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LEGAL BRIEF: PROTESTING BIDS ON PUBLIC CONSTRUCTION PROJECTS

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Competition for public projects remains as intense as ever. The transition to the public sector by contractors who previously worked primarily in the private sector has only added to the competition. With private work almost nonexistent, winning a bid on a large public project can make or break a company. Consequently, bidders are closely scrutinizing other contractors' bids to make sure the low bidder has complied with all bidding requirements. Contractors whose bids were rejected due to a mistake or omission may wish to try and compel the owner to accept their bid. Contractors that believe the low bidder may not have followed the requirements have the right to challenge the bid process and the outcome. These challenges are often

referred to as bid protests. A successful protest prevents the owner from entering into the contract with the winning bidder. The owner that is forced to reject a bid can award it to the next lowest bidder or re-bid the project.

Contractors wishing to protest a bid must act promptly. The rules for bid protests vary depending upon the identity of the owner. For example, the requirements for filing bid protests on projects administered by the State System of Higher Education, DGS and PennDOT are highly-regulated and governed by detailed regulations which must be strictly followed. Federal government projects are also subject to detailed rules and regulations pertaining to bid protests. Due to space limitations, protests on federal projects are not discussed in this article.

Projects involving school districts, townships and other municipalities are not governed by administrative regulations. However, courts have developed rules regarding bid protests that a contractor must understand.

On State System, DGS and PennDOT projects, a disappointed bidder can protest a contract award to another contractor, but it must file the protest in writing with the agency within seven days of the date that the bidder discovered, or should have discovered, the basis for the protest. In no event can the protest be filed later than seven days after award of the contract regardless of when the basis was discovered.

If the project is not a State System, DGS or PennDOT project, the contractor cannot file a protest in its own name. Courts have ruled that the disappointed contractor itself does not have standing to challenge the award. Rather, courts have ruled that since the purpose of competitive bidding is the protection of taxpayers, only a taxpayer in the jurisdiction where the project is located has standing to protest an award. Therefore, a disappointed bidder wishing to protest a contract award must first locate a taxpayer at the place where the project is located to file the protest since only a taxpayer has standing to bring suit to set aside an award. But before going to that trouble, many companies want to know the likelihood that a protest will succeed. The fact is that some bid protests are winnable.



A party wishing to challenge a bid award must act quickly, otherwise the protest will be deemed waived.

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Most bid requirements provide that the owner can waive mistakes in the bid. Usually, these mistakes are referred to as defects or irregularities in the bid. On its face, this provision would appear to allow the public owner to waive mistakes or other defects in a bid. However, courts have ruled that the owner cannot waive just any mistake or defect. Rather, the owner can only waive it if the bidder did not obtain a competitive advantage by virtue of the defect. Second, if waiving the defect would deprive the owner of its assurance that the contract would be signed, performed and guaranteed by the bidder, the defect cannot be waived. Whether a defect is waivable is a very fact-specific inquiry in which the nature of the bid defect and its effect on the bid process and competition will be closely analyzed by the court.

In one case, the low-bidder included a list of clarifications with its bid on a wastewater treatment plant project. In the list of clarifications, the contractor indicated that the work after hours would be overtime, that any rock excavation would be an extra charge, that the bid was valid for 30 days (rather than 60 as required by the bid specifications), that payment would be due in 30 days and that the contractor could bill for stored materials. The court ruled that these clarifications gave the bidder an unfair advantage because they limited its risk. By reducing the risk, the contractor was able to reduce its bid price. The court ruled that the bid had to be rejected. In another case, all bidders were required to furnish a bid bond with a rating of A minus or better. The low bidder furnished a bond with a B rating. A taxpayer protested and the court rejected the protest, ruling that it did not give the bidder a competitive advantage over other bidders and did not create a risk that the bidder would not enter into and complete the contract. There are many more court cases involving bid protests and the outcome is very fact-specific. If your company is considering a bid protest, it should consult with legal counsel that is experienced in this area to evaluate the specific mistakes, omissions or errors contained in the bid in question and decide whether the protest should be pursued.

A related issue that arises in this context involves a contractor’s ability to compel an owner to waive a defect. In other words, some contractors have had bids rejected as non-responsive for minor mistakes, omissions or technicalities that did not give them a competitive advantage over other bidders. An owner’s decision not to waive a defect or mistake will not be set aside by a court unless the owner’s decision not to waive the defect was arbitrary or capricious, which basically means that the owner had an improper purpose and was deliberately trying to steer the bid to the next bidder. Thus, low bidders whose bids are rejected as non-compliant face an uphill battle in convincing a court to require a public owner to waive a defect. While bid instructions often give the owner the right to waive defects, it is not required to waive them. Although State System, DGS or PennDOT have regulations laying out specific procedures for protesting bids, the legal analysis is the same.

In summary, a party wishing to challenge an award must act quickly, otherwise the protest will be deemed waived. Locating a taxpayer to pursue the challenge in his or her name is required on many government projects. Courts have placed limits on types of errors or mistakes that government owners are permitted to waive, and if you can show that the mistake or omission helped the low bidder get the job, it may be worth challenging. Finally, unlike some other court matters, bid protests do not take long and are usually resolved in a matter of weeks.

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