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# Navigating the Competitive Bid Process for Public Contracts

By Laura Colca, Esq.

The bid process for a public construction project can be daunting for even the most sophisticated and savvy owners. Failing to adhere to state and federal procurement guidelines can result in a myriad of legal woes for the unsuspecting owner. Therefore, prior to venturing into the public bidding arena to secure a contractor on a public project, owners are well advised to familiarize themselves with the relevant federal and state procurement statutes and regulatory guidelines to ensure as trouble-free a process as possible.

## THE BIDDING PROCESS

The selection of a contractor on a public construction project is governed by both state and federal procurement laws. While there are a number of methods for awarding federal construction contracts, the preferred method is the competitive sealed bidding process, codified in the Federal Acquisition Regulations (FAR), Title 48 of the United States Code of Federal Regulations. The rationale for utilizing the competitive sealed bidding process is not only to make sure that the public is getting the best financial deal possible but also to ensure that owners do not rely on improper factors such as favoritism in selecting a contractor.

As a preliminary matter, the owner soliciting bids on a public project issues an invitation for bids/request for proposals. The invitation for bids establishes the directives for the contractors who intend to bid on the project including a recitation of the details of the project, timing of the bidding, when and where bids are to be submitted and when they will be opened.

Bids not adhering to the specific requirements of the invitation for bids are considered non-responsive and a public entity is prohibited from awarding a contract to a non-responsive bidder.

A central tenant of the public bidding process is that the owner must award the project to the lowest responsive and responsible bidder. Obviously, the lowest bidder is the bid that is for the least dollar amount. However, the analysis does not stop there. Finding and retaining a "responsible" bidder is equally as important. If a project is awarded to a contractor who is the best economic value but cannot properly complete the work, this results in injury to the public. Owners determine whether a prospective bidder is "responsible" by evaluating a number of factors including financial stability, past performance on similar projects, and the contractor's overall reputation.

## CHALLENGING A FAILED BID

Contractors not awarded a contract on a public project may file a bid protest. The most frequently litigated issue in local and state bid protests is bid responsiveness followed by improper evaluation of contractor responsibility.

An aggrieved unsuccessful bidder on the state or local level typically has two forums at its disposal to pursue their claim. In some jurisdictions, there is a designated administrative agency specifically commissioned to resolve the bid protest. In the absence of a specifically identified administrative agency, an unsuccessful bidder has the option to file a claim in either state or federal court.

The success of a bid protest often depends on the jurisdiction where the claim is brought. In states where there are no administrative procedures established for bid protests and the unsuccessful bidder's recourse is state or federal court litigation, the challenge may be an uphill battle. Courts tend to be reluctant to second guess the public competitive bid process. However, relief is not unheard of and an injunction, declaratory relief or mandamus can be granted.

Recently in *DeSilva Gates Construction LP v. Department of Transportation*, 242 Cal. App. 4th 1409, 1412, 195 Cal. Rptr. 3d 891, 894 (2015), the California Court of Appeals, Third District upheld a trial court holding invalidating the award of a contract to a successful bidder on the grounds that the [rejected] low bidder's inclusion of information on a subcontractor within 24 hours of the submission of the bid did not render it unresponsive. Accordingly, the Court held that the actual lowest bidder's bid was improperly rejected by the owner.

## CONCLUSION

In order to be successful in the competitive bidding process for a public works project, both the owner and the prospective contractor must fully understand and comply with the requirements of the federal and state procurement guidelines. Appreciating and anticipating the possible pitfalls and difficulties that may arise throughout the process will make success in the process more likely. Ultimately, if the competitive bidding process goes awry, the aggrieved party may seek recourse through administrative channels, or court intervention. ■

## ABOUT THE AUTHOR

Laura Colca is a partner in the law firm Goldberg Segalla, where she is a member of the leadership committee of the Corporate Services and Commercial Litigation practice group. Laura is also a member of the National Association of Women in Construction as well as Professional Women in Construction. Laura has counseled countless clients on all types of business transactional matters including representing owners and contractors on both private sector and public construction projects. She can be reached at 716.710.5840 or lcolca@goldbergsegalla.com.