

Institute for Local Government Lawyers

Key Legal Issues in Competitive Bidding of Municipal Contracts

by
Frayda Bluestein
Professor
School of Government
University of North Carolina
Chapel Hill, North Carolina

Frayda S. Bluestein holds a B.A. from the University of California at Berkeley and a J.D. from the University of California at Davis. She is Professor of Public Law and Government at the School of Government, The University of North Carolina at Chapel Hill, where she specializes in teaching, researching, and writing about public contracts, and related areas such as conflicts of interest, privatization and general local government law. She is the author of *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*. Prior to joining the Institute faculty in 1991, she worked for four years in private law practice specializing in municipal and land use law, and for one year in the Legislative Drafting Division of the North Carolina General Assembly.

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Institute of Government
University of North Carolina at Chapel Hill

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Introductory Exercise:

The city you represent has solicited bids for a major construction project. In the process of evaluating the bids, it has become clear that some of the bids contain deviations from specifications. Your standard boiler plate instructions to bidders state that "the city reserves the right to waive minor irregularities." The apparent low bidder has failed to acknowledge receipt of the final addendum issued by the architect. When asked about whether he received it the bidder indicates that he has and that his bid incorporates the changes called for in the addendum. The incorporation of the addendum cannot independently be verified from the face of the bid. The city would like to waive this as a minor irregularity and award the contract to the low bidder. What is your advice?

I. Bidding statutes and ordinances

Competitive bidding requirements are common among public agencies at the federal, state and local level. Although competitive bidding is also used in the private sector, it is only in the public sector that the bidding of contracts is mandatory.

a. Purposes

Competitive bidding requirements are understood to meet two, sometimes competing purposes: 1) to obtain good prices and conserve tax dollars; and 2) to prevent favoritism and collusion in contracting in order to provide an equal opportunity for contractors to obtain public contracts. 10 McQuillan Mun. Corps. § 29.29. Competitive bidding has a reputation for increasing costs and creating delay in the contracting process. In some cases, the tension results from the need to maintain a fair process and the fact that the interest of fairness may take priority over the local government's need for cost saving or efficiency. *See, Acme Bus Corp. v. Board of Educ. Of Roosevelt Union Free School Dist.,* 689 N.E.2d 890 (N.Y. 1997) ("Favoritism or irregularity in the bidding process may ostensibly produce monetary savings. However, the use of such means to meet that singular end is still unsustainable because the complete public interest is ultimately promoted by fostering honest competition.")

b. Coverage/Exceptions

Competitive bidding laws typically delineate 1) particular types of contracts that are subject to bidding, and 2) dollar thresholds at which specific procedures must be undertaken. Contracts involving construction of buildings and utilities, as well as purchase of materials and equipment are usually covered by the bidding laws. Contracts for professional services are often exempted or excluded based on the notion that these services require individualized consideration and do not lend themselves to a bidding process that requires award based on low price meeting specifications. Other common exceptions include sole sources and purchases from other governments, including federal GSA contracts. Dollar thresholds generally apply to estimated contract amounts.

The typical bidding procedure calls for advertisement of an opportunity to submit bids, objective and brand neutral specifications, sealed bids, public bid opening at the advertised place and time, and award to the lowest responsible bidder. Informal bidding at lower dollar levels typically allows contracting based on written or verbal quotes. Procedures often require a minimum number of bids (usually three) and require readvertisement if the minimum number is not received after the first advertisement.

Some procedures allow the use of a "request for proposals" (RFP) process, in which proposal are developed by the bidders and are compared based on suitability for the intended purpose rather than based on the lowest lump sum bids in response to set specifications. This is commonly used for service contracts and information technology contracts.

A good resource on standard practices and trends in public purchasing is *State and Local Government Purchasing Principles and Practices,* published by the National Association of State Procurement Officials. For service contracting, a good practical resource is *Service Contracting: A Local Government Guide,* by Donald F. Harney, ICMA (1992).

c. Optional procedures

Local governments sometimes opt to conduct competitive bidding for certain contracts even though neither state nor local laws require it. The agency should assume that it is bound by the terms of the solicitation once it is initiated. If the agency wishes to accept a bid that does not meet the requirements of the optional solicitation, the agency should terminate the process and enter into the contract in its discretion. A contract that does not meet the requirements of the bidding procedures, even optional bidding procedures, may be subject to invalidation. *See*, 10 McQuillan Mun. Corps. § 29.38.

II. Evaluating bids and awarding contracts

Bidding requirements usually contain a standard for awarding the contract that limits the discretion of the agency and promotes fairness in the contracting process. Typically the award must be made to the lowest responsive, responsible bidder. In the absence of a legally imposed standard of award, the agency may award in its discretion and may be challenged only if the decision is arbitrary or affected by demonstrable fraud or favoritism.

a. Responsive bids

To be eligible for award, a bid in a competitive bidding process must be responsive. Courts in most jurisdictions apply the following legal standard in determining responsiveness: A responsive bid is one that conforms substantially to the specifications and does not contain any *material* deviations. A material deviation is one that gives a bidder an advantage or benefit not enjoyed by the other bidders. *See,* 64 Am.Jur. 2d, Public Works and Contracts, §59. As stated in the Federal Acquisition Regulations, "a bid must comply in all material respects with the invitation to bids. Such compliance enables all bidders to stand on an equal footing and maintains the integrity of the sealed bidding system." 48 C.F.R. §14.301(a).

The most important thing to understand about this legal standard is that it focuses on and protects the bidders in the process over the needs and interests of the public agency. It is not sufficient for the waiver of a bid defect to be acceptable to the agency; it must also be fair to the bidders.

b. Responsible bidders

As noted above, the focus of the *responsiveness* inquiry is on the bid document and its compliance, or lack thereof, with the bid specifications. *Responsibility* relates to the qualifications of the bidder and his or her capacity adequately to perform the contract. The standard allows consideration or more than the prices offered, though the extent of discretion afforded varies as it is interpreted from state to state. Responsibility may include experience, financial resources, integrity, skill and any other factor relevant to the ability of the bidder successfully to fulfill the requirements of the contract. *See,* 10 McQuillan Mun. Corps. § 29.72, 73.

Documented evidence of poor performance or lack of experience or financial resources may provide a basis for rejecting a low bidder. In cases of ongoing or serious lack of responsibility, some jurisdiction may have authority to debar contractors, which prohibits them from bidding contracts to be awarded by a particular agency for a set period of time. Challenges by disappointed bidders to bid rejection or debarment decisions are addressed in the next section.

III. Disappointed bidder claims

Legal issues arise in the competitive bidding process largely through complaints and protests by bidders or potential bidders. Some jurisdictions have administrative protest procedures, which must be exhausted before a legal action may be filed. Protest procedures may also be required on contracts involving by federal funds. Protest procedures typically provide basic due process; notice, an opportunity to be heard, and a written decision. They also generally contain short deadlines for filing of and responding to protests in order to prevent undue delay in contract award and performance. If a disappointed bidder wishes to pursue a claim beyond a protest, or in cases where no protest procedure exists, the only avenue of redress is through the courts.

a. Standing

There are plenty of reported cases in state and federal court that have been brought by disappointed bidders. Whether by explicit state law or implicit recognition by the courts, it seems clear that most jurisdictions recognize the standing of a bidder to contest the validity of a bid process. Some jurisdictions, however, reject disappointed bidder claims either on standing or substantive ground on the theory that the bidding laws exist for the benefit of the units of government and its taxpayers, and not for the benefit of contractors. *See,* James L. Isham. J.D., *Public Contracts: Low Bidder's Monetary Relief Against State of Local Agency for Nonaward of Contract,* 65 A.L.R. 4th 93, section 2(a); 10 McQuillan Mun. Corps. §29.83.05; *Brunoli v. Town of Branford,* 722 A.2d 271 (1999). Lack of standing may be raised as a defense in a jurisdiction that has not directly addressed the issue, or in a case where the bidder asserting the claim is not directly affected by the alleged irregularity.

b. Causes of action under state law

Case law generally holds that failure to comply with applicable bidding requirements renders the resulting contract void. *See,*10 McQuillan Mun. Corps. §29.41. A claimant may seek relief in a cause of action to enforce the statutory or locally established bidding laws. A disappointed bidder may also assert several other types of claims, including negligence, breach of implied contract/promissory estoppel, or breach of contract. *See, Ritchie Paving, Inc. v. City of Deerfield, Kansas,* 67 P.3d 843 (Kan. 2003)(allowing cause of action for bid preparation costs under promissory estoppel theory). Not all of these claims are recognized by the courts. The most effective claim is for a declaratory judgment and injunctive relief in the form of a temporary injunction to prevent the contract from moving forward. *See, Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation. Auth.* 1 P.3d 63, 67, n.1 (Cal. 2000), *Sutter Brothers Construction Co., Inc v. City of Leavenworth,* 708 P.2d 190 (Kansas 1985). A claim under a mandamus action for an order mandating award to the lowest responsible bidder may be granted in appropriate case, although mandamus is not generally considered to be an appropriate remedy for a discretionary action. Such a claim might also be weakened if the bidding procedures reserve to the unit the right to reject all bids.

Disappointed bidders are likely to seek injunctive relief, monetary damages, or both. Courts are divided about whether bidders are entitled to monetary damages for bid preparation costs, but most deny recover for lost profits. *See,* 10 McQuillan Mun. Corps. §29.86, §29.83.05.; *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation.*

Auth., 1 P.3d 63, 67, n.1 (Cal. 2000). Claims seeking monetary damages or other relief for alleged violations of constitutional rights are addressed below.

As noted earlier, claims that seek a re-award or re-bidding of the contract must be brought in a timely fashion. If not, they are subject to rejection on grounds of mootness or laches. *See, e.g., Masonry Arts, Inc. v. Mobile County Comm'n,* 628 So.2d 334 (Ala. 1993); There is little relief a court can grant if a dispute contract is substantially under way or has already been performed. This is especially true if monetary damages are not available. Where the claimant seeks monetary damages, delay in filing the claim creates a double burden on the taxpayers who must pay for the contract and the damages. *See, Urban Electrical Services, Inc. V. Brownwood Ind. School Dist.,* 852 S.W.2d 676 (Texas App. 1993). Depending upon the law of the jurisdiction, claims may also be barred by governmental immunity. Case law often holds that a unit of government waives immunity when it enters into a contract, but prior to making a contract, immunity from claims seeking damages may still exist.

IV. Constitutional issues

As is the case in other contexts, disappointed bidders are inclined to assert constitutional claims in order to obtain damages and attorney's fees under the federal civil rights statutes. Several constitutional grounds exist in the contracting context, as summarized below.

a. Procedural Due process

Procedural due process rights may be implicated in one of two ways by a competitive bidding process undertaken by a public agency. First, a bidder may claim to have a property interest in the award of a contract, such that the rejection of a bid or denial of the contract gives rise to procedural due process protections. Second, the determination that a bidder is not responsible either broadly in a debarment action, or as part of the bidding process for a particular contract, may affect the liberty interest of the bidder to pursue his or her chosen trade. *See, Omaha Life v. Solomon*, 960 F.2d 31,33 (6th Cir. 1992).

In analyzing whether a bidder has a *property interest* in the award of a contract, a key issue is the extent to which the discretion of the awarding authority is limited by statute or ordinance. If the standard of award provides discretion, the bidder cannot successfully argue an entitlement to the contract upon submitting the low dollar bid and meeting specifications. Arguably, the determination of responsibility involves some degree of discretion, though cases have gone both ways on this issue. *Compare, Scott v. Buhl Joint School District No. 412,* 852 P.2d 1376, 1381 (Idaho 1993)(lowest responsible bidder has a property interest); *with, Grand Canyon Pipelines, Inc. v. City of Tempe,* 816 P.2d 247, 250-51 (Ariz. App. 1991)(mere expectation of award does not create property interest, citing cases in accord).

The constitutionally recognized *liberty interest* gives rise to procedural due process claims when the local government determines that a bidder is not responsible and rejects his or her bid. *See, RJB Properties, Inc. v. Board of Educ. Of City of Chicago,* 2006 WL 224101 (N.D. Ill, 2006). Liberty interests are even more likely to be invoked by the debarment of a bidder. *See, Southern Cal. Underground Contractors, Inc. v. City of San Diego,* 108 Cal. Rptr. 2d 527 (Cal. App. 2003)([B]ecause debarment implicates a liberty interest, a contractor has a due process right to a fair hearing when a government entity seeks to debar it from contract eligibility.").

In a jurisdiction recognizing procedural due process rights in these situations, the law does not, of course, prohibit the action. It simply requires notice, an opportunity for the bidder to hear and present evidence, notice of the decision and its basis, and possible the right of appeal, unless the court recognize recourse to the courts as sufficient. It is prudent to provide notice and opportunity to respond even if the constitution does not require it. There may be facts that are unknown to the agency or its staff and it is always better to learn of them before the decision is made than during litigation, which may delay the contract.

b. Equal protection

Most claims of equal protection in the context of a bidding process will amount to an allegation of unfair treatment, will be subject to review under minimal judicial scrutiny, and will be unsuccessful. A successful equal protection claim is most likely to arise in a challenge involving a contracting program that promotes the use of minority- or women-owned businesses. The law in this area has not undergone significant change since the 1989 decision in *Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). Local governments that establish race-based programs (which should be understood to include even outreach or good faith efforts programs that do not establish quotas or set-asides) must justify the programs in order to meet the strict scrutiny standard. The subsequent case of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) made clear that this standard applies even if federal funds are involved, including local government contracts that are federally funded.

Local governments have conducted disparity studies and undertaken other efforts to demonstrate the need for minority contracting programs based on 1) underutilization by the local unit of available minority firms; and 2) documented discrimination in the relevant private marketplace. Numerous cases illustrate how difficult it is to win a case under these theories, largely due to the difficulty of developing data that is statistically reliable. *See, e.g., Webster v. Fulton County,* 51 F.Supp. 2d (1999). Several recent cases, however, suggest the possibility of success provided that sufficient documentation of discrimination is shown, and that the program is narrowly tailored. *See, Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950 (10th Cir. 2003); *and, Builders Association of Greater Chicago v. City of Chicago,* 298 F.Supp.2d 725 (N.D. Ill. 2003)(finding sufficient evidence to support a compelling interest but rejecting the program based on lack of narrow tailoring). It is clear that much effort and expense is necessary to provide the necessary basis to survive a legal challenge under race-based program. Some jurisdictions use disadvantaged- or small-business categories in order to create a race neutral basis for the program.

c. First Amendment

Local government contracting, even under mandated bidding procedures, usually affords some degree of discretion to the awarding authority. It is clear, however, that this discretion can not be exercised in a way that blatantly punishes a contractor or bidder for statements or political allegiances that are protected by the First Amendment. *See, O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712 (1996); *Board of County Comm'rs, Wabaunsee County v. Umbehr,* 518 U.S. 668 (1996).

Conclusion

The focus of this material has been on legal issues that arise in the context of mandated competitive bidding requirements. Some of these considerations may also apply to contracts that are not subject to mandatory procedures, though certainly there is greater discretion in the award of these contracts. In addition, federal and state laws governing conflicts of interest and bid tampering should be consulted when allegations involving these issues arise.

Contracting by any organization is a basic and essential administrative and financial process. In the public sector, however, it is an area that is made by more complex by the presence of mandatory bidding procedures and by constant public scrutiny and the potential for negative publicity. Legal issues must be resolved through consideration of the technical legal requirements, balancing the sometimes competing interests of efficiency and cost savings on the one hand, and fairness and openness on the other. Decisions sometimes must be made in order to preserve the public's trust in the process, even though they cost more of the public's time and money.

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Frayda S. Bluestein
UNC Chapel Hill
School of Government
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Purposes of Competitive Bidding

- Low price
  - Not necessarily low quality
- Fair process
  - Prevent fraud, collusion
  - Process open and rules consistently applied to all bidders
- Tension: Process takes time, sometimes requires rejection of low bid.

Bidding Requirements

- Coverage
  - Types of contracts
  - Dollar thresholds
  - Exceptions; professional services, sole sources
- Sealed bid process
  - Advertisement
  - Specifications
  - Public Bid Opening
  - Award to lowest responsible bidder

Requests for Proposal (RFPs)

- Flexible alternative to sealed bids
- Often used for service or technology contracts
- Proposals offer various solutions to stated requirements
- Award not necessarily tied to price

Responsive Bids

- Bids must conform substantially to the specifications
- Minor deviations may be waived
- Bids containing material deviations must be rejected
- Material deviation is one that gives a bidder an advantage or benefit not enjoyed by other bidders

Responsible Bidders

- Responsibility relates to the bidders capacity to perform the contract
  - Experience, skill, staffing
  - Financial resources and capacity
  - Integrity
- Requires documentation to reject low bidder

Disappointed Bidder Claims

- Failure to comply with applicable bidding requirements renders contract void
- Standing/Cause of action under state law usually but not universally be recognized
- Other theories: negligence, breach of contract, breach of implied contract/promissory estoppel
- Administrative protest procedures may apply as prerequisite to lawsuit

Remedies

- Injunction prior to contract award – best chances of success if timely sought
- Bid Preparation Costs – sometimes allowed
- Lost Profits – not usually allowed
- Mandamus to award contract - not appropriate for discretionary actions, but sometimes granted

Constitutional Claims

- Procedural Due Process
  - Property interest in award of contracts; must show entitlement; award standard involves discretion
  - Liberty interest affected by rejection of bid or debarment
  - Procedural protections should be provided even when not required to provide support for decision

Constitutional Claims

- Equal Protection
  - Race-based programs require documentation of compelling interest and narrow tailoring
  - Strict scrutiny applies to federal programs
- First Amendment
  - Contract decisions can not be based solely on contractor or bidder's expressive conduct or political affiliation