

BEING READY TO BID ON PUBLIC JOBS: ARE YOU STIMULUS-READY?

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In light of the new federal stimulus package, Pennsylvania contractors should prepare themselves for what is projected to be a large-scale investment in public works. According to Governor Ed Rendell, Pennsylvania has hundreds of “shovel ready” road projects, not to mention school construction and other state and local projects. As a result, Pennsylvania contractors must brush up on their knowledge of the Commonwealth’s bid process, including contracts subject to bidding requirements, prequalification, the bid process, bid withdrawal and bid protests.

Bidding in Pennsylvania

As a general rule, most public contracts are subject to a sealed, competitive bidding process. The types of projects subject to bidding are diverse and include the construction of highways and roads, prisons, sewers, schools and other public improvements. In addition, bidding is often required for certain types of services and goods, such as printing services or office supplies. However, this article deals strictly with construction projects.

Competitive bidding begins with notice. Traditionally, the Commonwealth or local authority will publish notice that a particular project is going out to bid. Sufficient notice of an Invitation to Bid (ITB) is legally required under the Commonwealth Procurement Code (the Procurement Code), and other agencies have similar legal requirements. Interested contractors can often go to the agency’s or locality’s website to learn of jobs out for bid. For instance, the Pennsylvania Department of Transportation provides a running list of projects and general bid information on its website.

An interested bidder is required to obtain (sometimes purchase) the ITB from the contracting agency. The ITB is the gospel. The ITB is meant to insure that all bidders are treated equally and fairly, bidding on the same project with the same amount of knowledge. In addition to cost, the primary focus of competitive sealed biddings is to ensure an equal playing field for all bidders. In fact, on a number of occasions, the Pennsylvania Supreme Court stressed the importance of standard bidding requirements in “[guarding] against favoritism,” “fraud and corruption”¹ and to ensure a level playing field for all bidders.²

Prior to bidding, however, a contractor must determine if pre-qualification is necessary. Executive agencies like the

Department of General Services, the Department of Transportation and the Department of Education each require bidders to be pre-qualified. In addition, some local agencies such as the School District of Philadelphia require pre-qualification. The process for pre-qualification is an attempt to determine bidder responsibility in a prospective manner. In Pennsylvania, pre-qualification of bidders is legal. For example, the Procurement Code allows agencies and authorities to pre-qualify bidders.³ As with the ITB, however, pre-qualifying agencies must apply the rules of pre-qualification evenly to all potential bidders and avoid favoritism.⁴

The Bid and Contract Award Process

Bidders are required to submit their bid at the time and place provided in the ITB. The agency will open the bids and rank the bid from lowest to highest according to dollar amount. It is well established that public entities are required by law to award contracts to the lowest responsive and responsible bidder.

Responsibility is generally interpreted as a contractor’s ability to complete the job, including fiscal responsibility and experience, among other items. Agencies cannot, however, reject a bidder as unqualified without conducting an investigation into qualifications. As a result, many agencies have turned to pre-qualification (discussed above) of bidders.

Bidder responsiveness is based upon a bidder’s satisfaction of the required terms, conditions and instructions of the ITB. Prior to submitting a bid, therefore, contractors must be sure to pay particular attention to the requirements of the ITB. Areas where bidders do not comply with the ITB are called “bid defects.” Where there is a “bid defect,” a bid is non-responsive. Given the competitive nature of the bidding process, a non-responsive bid, particularly one that has the lowest price, will typically result in a bid protest from a frustrated bidder.

A bid defect may also result in bid disqualification, though this is not a certain outcome. A local agency can waive certain bid defects, but cannot waive what are deemed material bid defects. The determination as to materiality is guided by case law, particularly the Pennsylvania Supreme Court’s decision in *Gaeta v. Ridley School Dist.*, 788 A.2d 363, 367 (Pa. 2002), where the Court determined that a public agency cannot waive a defect where it would: (1)

deprive the agency of contract execution and performance per the ITB; and (2) where the bid defect places the bidder in a position of competitive advantage over other bidders. Some examples of immaterial defects include mathematical or clerical errors. Examples of material bid defects include the failure to include bid security, unsigned bids, failure to comply with certain minority contracting requirements, and deviations from specified means and methods.

Public entities do not, however, have to award a contract. They are, in fact, permitted to reject all bids and re-bid the job at another time. The rejection is proper, provided it is not arbitrary and is not done with bad faith, collusion or fraud.

Withdrawal of Bids

Bid withdrawals are allowed in certain, limited conditions. The first place to look is the bid documents, which may provide for circumstances where a bid can be withdrawn. Beyond the bid documents, a bidder may only withdraw a bid if there is an honest and good-faith mistake (which must be supported by evidence) in the calculation of the bid price. The law differentiates between a clerical mistake and a mistake in judgment. In addition, a bidder typically has two business days from bid opening to withdraw a bid.

A bidder who withdraws a bid is generally not permitted to bid on the project a second time or provide any work or materials to the project. In the case of a withdrawn bid, the contracting agency could re-bid the project and charge the withdrawing bidder the associated costs.

Bid Protests

It is likely that any contractor who has bid on a public job in the past has been through the bid protest process—in either defending an award or as a frustrated bidder. Bid protests are extraordinarily time sensitive, often requiring immediate action to preserve legal and administrative rights. Waiting too long to start the process, including the factual investigation, could waive the right to protest.

There are two methods of challenging a bid. It should be noted, however, that both options are not always available to contractors depending on the contracting agency. The first and oldest method is a taxpayer challenge. In a taxpayer bid challenge, a taxpayer has standing to insure that the contracting agency awards the contract to the lowest responsive and responsible bidder. A taxpayer lawsuit requires a party to request a temporary, then permanent injunction, or ask the court to award the contract to the proper bidder. Courts have directed the award of a contract. This does not, however, occur frequently. Usually, a court will go no further than to order a re-bid.

In some contexts, there is a second avenue to contest a bid—an administrative process. The Commonwealth Procurement

Code, which applies to certain state and state-related agencies, sets out the process for frustrated bidders to seek redress. The most important deadline involved in this process is the initial deadline, which allows a frustrated bidder only seven days after the party knew or should have known the facts giving rise to the protest. In no case may a protest be filed more than seven days after the contract has been awarded. Ultimately, if the parties pursue the matter long enough, the administrative process under the Procurement Code leads to court.

It should be noted that the Commonwealth Procurement Code has not been held to deprive taxpayers the right to seek an injunction. Further, the seven day rule of the Procurement Code does not apply to a taxpayer challenge.

The Construction Practices Group at White and Williams LLP can help you before, during and after a bid. We can help with the pre-qualification process, reviewing bids for conformity to avoid bid defects, bid protests and review of contracts and sub-contracts for all of your jobs. For further information, please contact one of our practice group chairs, Jerry Anders (215.864.7003; andersj@whiteandwilliams.com) or Bill Taylor (215.864.6305; taylorw@whiteandwilliams.com).

¹Yohe v. Lower Burrell, 208 A.2d 847 (Pa. 1965).

²See Ez Parks v. Larson, 454 A.2d 928 (Pa. 1990) (enjoining award by DOT where bid instructions were ambiguous and did not promote level playing field).

³62 Pa. C. S. § 532

⁴See Harris v. City of Philadelphia, 149 A. 722 (Pa. 1930) (holding prequalification permitted where standards are determined in advance and applied equally).

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