

A Slow Private Economy Brings More Challenges to North Carolina Public Contracting

With private financing scarce, contractors are increasingly turning to publicly financed projects to help them weather the storm of economic downturn. Although the public sector certainly has not been immune to the challenges of the current economic crisis, public bond initiatives passed in better times have allowed the continued flow of public money for construction projects, at least in the near term.

As a result, more construction firms are competing for public dollars. As the number of firms bidding for public work increases, the number of challenges to their bids also increases. The growing popularity of the Construction Manager at Risk delivery method among public bodies in North Carolina also has resulted in competitive bidding among subcontractors previously inexperienced with formal competitive bidding rules. A relatively inexperienced bidding public is leading to more bidding mistakes, and thus more grounds to support bid challenges by aggrieved bidders and more bid rejections by public owners.

Convincing a local government authority or state agency to deviate from awarding a contract to the low bidder is no easy task. Similarly, obtaining judicial or administrative relief from a contract award is a significant challenge for a disappointed bidder. Legal counsel familiar with the bidding rules offers the best chance for an aggrieved bidder to maintain a successful bid challenge. Similarly, good counsel can mean the difference between a low bidder ultimately signing a contract and having its bid rejected by the awarding authority.

Bidding Basics

In North Carolina, contracts involving the expenditure of more than \$30,000 in public funds must be competitively bid. Contracts must be awarded to the lowest responsible, responsive bidder. The "responsible" portion of the award standard means simply that the contractor possesses the "skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." Bidders hoping to obtain public contracts must be "reputable and qualified contractors regularly engaged in their respective lines of endeavor."

Given the number of new players bidding for public dollars, questions of "responsibility" may become more commonplace. While the courts will allow a public body wide latitude to reject contractors it does not believe are responsible, this discretion is not unfettered. If a public body cannot articulate a legitimate reason for deeming a bidder not responsible, the aggrieved bidder may have grounds to challenge that determination.

A "responsive" bid is one that substantially meets the requirements of the specifications applicable to the contract. Low bidders who have made mistakes in their bid form must satisfy the awarding authority that any deviation is minor in order to keep the work. While an owner may waive minor deviations, it is prohibited from

waiving any material deviation. If a bid is not responsive, it must be rejected – the bidder does not have any opportunity to correct the mistake or supplement its bid. The result is that the owner must move on to the next lowest bidder.

Firms that come in second on bid day often will seek to convince the public owner to disqualify the low bidder on responsiveness grounds to secure the work for themselves. It is important for the low bidder as well as the challenger to seek legal counsel to present their best case to the awarding authority.

Bidding Considerations For Construction Manager at Risk Projects

In the last several years, many local authorities have begun awarding construction contracts using the Construction Manager at Risk delivery method. The increased popularity of this method has increased bid challenges by expanding competitive bidding to the subcontractor level.

Traditionally, contracts have been awarded to contractors based on the lowest responsible, responsive general contractor's bid. In contrast to this traditional type of "single prime" award, awards to construction managers at risk are to be made "without regard to fee." The public body selects a construction manager at risk based solely on qualifications rather than price. The awarding authority then negotiates with the selected construction manager at risk to establish a fee for pre-construction services as well as a percentage fee for the cost of the work. The construction manager at risk ultimately presents a "guaranteed maximum price" to the public owner, which consists of the cost of the work plus the construction manager's fee.

Although construction manager at risk contracts are not awarded through competitive bidding, construction managers at risk are required to competitively bid all of the work to subcontractors and to follow all bid requirements applicable to the awarding authority. Because the bid packages are divided into many smaller packages than in the traditional single prime scenario, many of the subcontractors bidding on a construction manager at risk project are inexperienced with public bidding requirements. Combined with the fact that many construction managers themselves are entering the public bidding process for the first time, this new layer of competitive bidding likely will result in more bid challenges.

Bid Challenges

A disappointed bidder should initially raise any alleged bid irregularity with the awarding authority. This challenge must be initiated quickly. A public body is far less likely to reverse a prior award once it has entered into a contract with the low bidder.

If the public body denies the aggrieved bidder's request, the bidder may maintain a formal challenge to the award. The method for initiating a formal bid challenge varies depending

upon whether the public body awarding the contract is a state agency or a local government.

A challenge to any contract awarded by a state agency must be made through the Office of Administrative Hearings ("OAH"). The rules for pursuing claims with the OAH must be strictly followed. Any such challenge must be initiated within sixty (60) days. The proceedings are governed by the rules promulgated by the OAH, and hearings are held before an administrative law judge.

Only if the OAH renders an unfavorable decision may the unsuccessful bidder pursue judicial review of the agency decision. Judicial review of an OAH decision is conducted before a Superior Court Judge without a jury, and is heard in either Wake County or in the county where the unsuccessful bidder resides.

For local government contracts, unless the particular locality has created an administrative procedure for reviewing bid challenges, there is no formal administrative procedure for review of local government action, and the aggrieved bidder may immediately pursue legal action through the courts. The avenues of relief available to a disappointed bidder in an action in state court are limited, however. Declaratory or injunctive relief are the only remedies available. Monetary damages are not available to an unsuccessful bidder based solely upon a public authority awarding a contract in violation of the North Carolina bid requirements.

The unsuccessful bidder seeking judicial intervention must move swiftly to seek a temporary restraining order to protect its interests. Because injunctive or declaratory relief are the only remedies available, the issue could quickly become moot if the successful bidder begins work.

Conclusion

Any bid challenge in North Carolina is an uphill fight. In the current economic climate where private work is scarce, however, securing public work can be critical to a firm's survival. To maximize chances of success before the awarding authority, OAH or the court, an aggrieved bidder should seek the assistance of legal counsel armed with the knowledge of what North Carolina's bid laws require to help it prepare a compelling argument if the bidder hopes to change the bid day result. Similarly, a low bidder facing a challenge from a disappointed bidder or rejection of its bid by a public owner should consult counsel to preserve the contract it worked hard to win.

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