

Chapter II

BIDS, BIDDERS, AND BID PROTESTS

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Introduction

In general, competitive bidding is the creation of public statutes and regulations intended to procure the services, materials or equipment needed by public agencies, at the lowest possible price. While competitive bidding is commonly used for procurement in the private sector, private sector competitive bidding is not governed under the statutes and procedures applicable to the public sector. Further, private sector competitive bidding frequently involves negotiating techniques which are not generally permissible in the public sector. Thus, private sector issues will not be considered by this article.

In order to fully appreciate the atmosphere under which most competitive, public sector, bids are submitted, it is worthy to note that industry observers have described the competitive bid process as a significant, contributing factor, towards the recent proliferation of construction industry disputes.

Mark E. Appel, Vice President of the American Arbitration Association stated recently:

"It is ironic that purposeful, deliberate decision making [by public owners] aimed at cost effectiveness may instead be fueling the contention process."¹

It has been further suggested that competitive bidding directly contributes to the following dispute generating circumstances:

1. Little pre-bid communication occurs among the parties regarding the project;
2. There is no exchange of expertise or information;
3. There is intense competition between bidders; everyone is looking for a competitive "angle;"
4. Members of the project "team" are segregated with different interests and objectives;
5. The contractor's right to rely upon and interpret the bid documents (based upon the owner's warranties and representations) yields often "stilted" interpretations and communications, as everyone in the process is attempting to protect their own interests and achieve their own objectives;
6. There is an abundance of mistrust concerning the use of project "tools" such as schedules, value engineering, etc.;
7. The atmosphere is predatory, self protecting and adversarial;
8. The weight of bureaucracy often conflicts with project timing and decision making, which is critical to design team and contractor efficiency, cost, profit and project value.

Having established the atmosphere in the market place, and with full recognition of the recent financial plight of the construction industry, the balance of this article will consider the relative rights of bidders and owners in public sector, competitive bidding.

PUBLIC PROJECTS

While it may seem obvious, a fundamental question when determining the rights of a bidder is whether or not the project is public or private. With recent creative project financing, it is not always easy to tell.

In general, and as indicated above, a bidder who has made a low bid on a privately funded project has no enforceable right to be awarded the contract. The contractor's bid is nothing more than an offer to perform the work and does not become enforceable until accepted by the owner. *See e.g., Commercial Industrial Construction, Inc. v. Anderson*, 683 P2d 378 (Colo App, 1984).

On the other hand, bids submitted on publicly funded projects should be considered fairly by the public authority awarding the contract. If the bid is not considered fairly, the disappointed bidder may have certain rights (depending upon the jurisdiction) to challenge or protest the award of the contract. *See e.g., Scanwell Lab, Inc v Shaffer*, 424 F2d 859 (DC Cir, 1970) (discussing a bidder's rights in federal procurement).

However, in Michigan "statutory and case law neither requires the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts." *United of Omaha Life Ins Co v. Solomon*, 960 F2d 31 (CA 6, 1992).

Public projects have been defined to include all projects undertaken in connection with public improvements, including projects owned by the federal government and, the state of Michigan and its political subdivisions, the payment for which is to be made by the public owner out of public money, including general funds, proceeds from bond sales, tax revenues and special assessments. Public improvements include all those properties which are properly the subject of municipal regulation, police powers and other powers conferred by the state or federal constitutions and the legislature, for the promotion of public convenience, health, safety and welfare.

While some projects are not necessarily "public," they will nonetheless, be subject to certain Michigan statutory bidding requirements. Hospitals and public utilities are examples. *City of Detroit v. Amalgamated Association of Street Electric Railway & Motor Coach Employees of America*, 332 Mich 237 (1952).

MICHIGAN BIDDING STATUTES

Michigan law generally requires that various public agencies conduct competitive bidding as a prerequisite to the award of a contract for a public project. The purpose of this requirement "is to prevent favoritism, corruption, extravagance, and improvidence in the awarding of municipal contracts". *Attorney General ex rel Allis-Chalmers Co v Public Lighting Commission of City of Detroit*, 155 Mich 207, 213 (1908).

Competitive bidding statutes were designed to protect the taxpaying public. Public officials considering competitive bids have a duty, which runs directly to the community they serve, to do so honestly. *Malan Construction Corporation v Board of County Road Commissioners of Wayne County*, 187 FSupp 937 (ED Mich, 1960). Public officials are presumed to have acted in good faith when considering public bids and awarding contracts. *Leavy v City of Jackson*, 247 Mich 447, 450 (1929).

If contracts are let in violation of the statutory competitive bidding requirement, the contract will be considered void. *Sault Ste Marie City Comm v Sault Ste Marie City Atty*, 313 Mich 644, 664 (1946).

Competitive bidding is required for projects (typically over a certain dollar value) under Michigan statutes, for the following kinds of public works:

1. Construction and improvement of county roads and bridges (MCL 224.19), for projects larger than \$20,000;
2. Drainage construction and improvement projects (MCL 280.221) larger than \$5,000;
3. Construction services for transportation authorities larger than \$25,000 under the Metropolitan Authorities Transportation Act (MCL 124.417)
4. Construction and improvement of hospitals and related facilities (MCL 331.158) under certain circumstances;
5. Projects involving construction, repair, and maintenance of pavements, sidewalks, and elevated structures on or along public roads and highways (MCL 41.278);
6. Certain city construction projects for which expenses exceed \$500.00 (MCL 108.5), but guidelines are only provided for the smallest class city (Class IV);
7. Construction of public schools (MCL 380.1267), however the statute does not apply to larger districts, specifically those of the first class;
8. Construction and improvement contracts by the State of Michigan (MCL 18.1241, and other statutory references); and
9. Michigan Department of Transportation (MDOT) construction and improvement projects (MCL 247.807).

BIDDING PROCEDURE

Generally, the competitive bid process is initiated by the owner, who invites bids by advertising the procurement. The advertisement is called an "invitation" or "solicitation," and is often referred to as a "request for proposal" (RFP).

The invitation generally identifies the project, its salient features, the owner, the design professional if any, and directs the bidder, if interested in bidding, to a location to obtain more specific project information, such as plans and specifications.

The owner's invitation is not considered an offer.

Under Michigan law, which is consistent with most other jurisdictions, it is the contractor's bid which constitutes the offer to perform the work set forth in the invitation. The contractor's offer (the bid) does not become a binding obligation until accepted by the owner. *Kleinman v Board of County Road Commissioners for Wayne County*, 336 Mich 602 (1953).

ACCEPTANCE OF THE BIDS

The public agency who is accepting bids in connection with a public project is generally obligated to award the bid to the lowest responsive, responsible bidder, subject to express provisions (by statute, ordinance, regulation, condition of procurement, etc.), which permit the agency to reject any and all bids, and/or waive any and all defects or irregularities in the bids.

A. Responsiveness. In the context of competitive public bidding, if a bid is responsive, it means that the bid conforms, in all material aspects, to the terms, conditions, specifications and requirements of the solicitation. Thus, when an agency rejects a bid because the bidder failed to fill in all of the blanks on the bid form, or offered an unsolicited voluntary alternate to the specifications, the bid has been rejected

because it was non-responsive. *See e.g.*, MCL 123.502 (public agency may reject bid proposal that fails to include statement of qualifications).

Similarly, where the bidder failed to submit a bid bond, the bid was determined to be non-responsive. *Hillside Township v Stenin*, 136 A2d 265, 25 NJ 317 (1957). In *Middlesex Corp v P.Gioioso & Sons, Inc*, 615 NE2d 937, 415 Mass 1002 (1993), the bid was determined to be non-responsive for its failure to strictly conform to the disadvantaged business enterprise participation requirement.

Other non-waivable irregularities have included: ambiguous bids; bidding on non-specified items; failing to bid on all items in the procurement; reserving the right to negotiate; attempts to limit liability; attempts to limit warranty requirements; quantity variations, and the like. (See, Cushman, *Construction Litigation*, (Practicing Law Institute, 1981) for a general discussion regarding the responsiveness of bids.)

The theory behind the responsiveness requirement is to place all of the bidders on "equal footing" so that all of the bids are based upon the same requirements. Thus, all the bidders are bidding by the same rules, and the agency can fairly compare the competing bids in making its determination for award. Further, since the bid is legally an offer, it must be definite and certain in all of its material terms, as a condition precedent to forming a binding contract, when the contract, based upon the bid, is awarded.

The most frequently used test, to determine whether or not a bid is responsive, compares the terms of the bid to the specifications. If the variation is material and gives the bidder a substantial advantage over other bidders, then the bid is non-responsive.

Another test sometimes used, is whether the variation may have affected the amount of the bid submitted, or may have caused potential bidders to refrain from submitting a bid.

A third test can be found in *Prestex Inc v United States*, 162 Ct Cl 620 (1963), where the court, in interpreting the Federal Acquisition Regulations, required that to be responsive, the bid as submitted, had to be an offer to perform the exact tasks specified in the bid invitation, and acceptance of the bid would bind the contractor to perform in strict conformity therewith.

The Michigan courts have shed some light on the issue of responsiveness. In *Pascoe v Barlum*, 247 Mich 343 (1929), the Michigan Supreme Court interpreted the City of Detroit's charter requirement to grant the contract to the "lowest responsible bidder" by stating:

"But not every variation from the specifications will destroy the competitive character of the bid. To have that effect, the variation must be substantial, it must affect the amount of the bid. It must give the bidder an advantage or benefit not allowed to other bidders. It must be an element considered in fixing the price."

In general, minor irregularities that do not affect the relative standing of the bidders, or are not otherwise prejudicial to them, may be waived. *See e.g.*, FAR 14.405.

B. Responsibility. Most bidding statutes and regulations require that the agency award the contract for the work to the bidder who has demonstrated the ability to properly perform the work. *See e.g.*, MCL 123.501 (public agency may require contractors to submit statement of qualifications prior to submitting bids). It is the desire of the public to prevent waste of tax dollars through the improper performance of construction contracts. Thus, public officials should examine the responsibility of the contractors bidding on public projects. This requirement is intended to reduce unqualified firms from bidding. *Alpine Construction Co v Gilliland*, 23 Mich App 275 (1970).

The concept of bidder responsibility focuses on the contractor's demonstrated judgment, skill, ability, capacity and integrity, requisite and necessary to perform a public contract according to its terms. *W Paynter Sharp & Sons, Inc v Heller*, 280 A2d 748 (Del Ch, 1971).

Officials are typically granted wide latitude and broad discretion in determining whether or not a bidder is responsible. Usually, only in cases of bad faith, fraud, collusion or arbitrary discrimination, will the agency's determination of bidder responsibility be overruled by the court. *J J Zayti Trucking, Inc v City of Detroit*, 137 Mich App 705; 359 NW2d 201 (1984).

Four principal criteria, used by the administrative offices of the Comptroller General when deciding bidder responsibility, are illustrative of the point (as they pertain to construction):

1. The bidder's status as a construction contractor;
2. The bidder's financial situation;
3. The bidder's skill and expertise; and
4. The bidder's conduct and performance on prior government contracts.

Bidder integrity is another factor considered when determining responsibility. Non-responsibility has been determined by the Comptroller General in situations where the bidder had been suspended from government contracting pending a criminal fraud investigation. *Shinwa Electronics*, B-290603 et al, September 3, 2002. Likewise, complaints against a low bidder alleging a fraudulent billing scheme resulted in a declaration of non-responsibility. *Consolidated Enterprises v Housing Authority of Newark*, 386 A2d 1364; 159 NJ Super 75 (1978). When the principals of the low bidder were determined to have been connected with other firms having an unsatisfactory work record on public contracts, the bidder was found to be non-responsible. *Aardvark Keith Moving*, B-290565, August 8, 2002.

The low bidder being a non-union contractor has been held not to be pertinent on the issue of bidder responsibility. *Wittie Electric Co, v State*, 139 NJSuper 529; 354 A2d 659 (1976). In *Long Island Signal Corp v County of Nassau*, 51 Misc2d 320; 273 NYS2d 188 (1966), the bid of the lowest responsible bidder could not be rejected because of threats by labor officials to call a strike on all public works projects if the contract was awarded to a non-union contractor.

Where the agency is required to award the contract to the lowest responsible bidder, the lowest responsible bidder must be awarded the contract if it is responsible, even if the bidder is not the "most" responsible bidder. *Standard Highway Co v Police Jury of Tangipahoa Parish*, 103 So 819; 158 La 294 (1925).

C. Late Bids. Consistent with the other bidding criteria, the bidder must submit its bid in strict conformity with the requirements of the procurement. The requirement that contractors submit their bids no later than the exact time set forth in the invitation is strictly adhered to by most governmental agencies, in order to assure equal treatment to all bidders; to prevent the appearance of favoritism; and, to preserve the integrity of the competitive bidding system.

It is presumed that the acceptance of a late bid will provide the late bidder with a material advantage over the other bidders. Most blatantly, this advantage could be created if the late bidder was able to learn the prices submitted by competing bidders, prior to submitting the late bid. *Duffy v Village of Princeton*, 60 NW2d 27; 240 Minn 9 (1953). There are other multiple possibilities for abuse, created by the acceptance of late bids.

Under some circumstances, late bids have been accepted, so long as there is no fraud or collusion, or unfair advantage gained by the late bidder. For example, in a case involving poor weather conditions, the court ruled that the agency did not abuse its discretion by accepting a bid, two minutes late, where the bidder had been delayed in traffic by bad weather, and had called the agency to inform them. No fraud or collusion was shown. *Wiltom Coach v Central High School District No 3*, 36 Misc2d 637; 232 NYS2d 876 (1962).

In an interesting Michigan case, *Great Lakes Heating, Cooling, Refrigeration and Sheet Metal Corp v Troy School District*, 197 Mich App 312 (1992), the school district refused to accept a bid that was five minutes late. The trial court ordered the school district to accept the bid, open it, and consider it in the award of the contract. The Court of Appeals reversed the trial court's order, and determined that the trial court had improperly infringed upon the school district's discretion. The Court of Appeals held:

"The exercise of discretion to accept or reject bids will be controlled by the courts only when necessary to prevent fraud, injustice, or the violation of a trust. The courts will indulge the presumption that the authorities acted in good faith. *JJ Zayti Trucking, Inc v Detroit*, 137 Mich App 705 (1984)."

However, where the delay was caused by the carelessness or neglect of the bidder, a late bid will not be excused, no matter what its value is to the public. The bid is non-responsive and must be rejected.

D. Bid Errors and Mistakes. The nature of the competitive bidding process, complete with its time urgency, often results in bids being submitted containing errors and mistakes.

Whether the bidder will be liable for a bid containing an error will depend upon the nature of the mistake and whether the contracting officer had notice of the error, actual or constructive, before awarding the contract.

In public contracting, if the bid error is discovered before the award of the contract, the bid can probably be withdrawn. Bid errors can be corrected in only a few, limited situations. If the error is discovered after award, it is possible that the contract could be rescinded or reformed under certain circumstances. The contractor is liable for errors in judgment attendant to the making of the bid.

In Michigan, the courts have addressed bid errors on a number of occasions. In *Clinton County Department of Public Works v American Bank & Trust Co*, 83 Mich App 259, 266 (1978), *rev'd on other grounds*, 406 Mich 85 (1979), the court established a five part test for granting the bidder equitable relief from a bid containing a mistake:

"[E]quity will relieve against forfeiture of a bid bond (a) if the bidder acted in good faith, and (b) without gross negligence, (c) if he was reasonably prompt in giving notice of the error in the bid to the other party, (d) if the bidder will suffer substantial detriment by forfeiture, and (e) if the other party's status has not greatly changed, and relief from forfeiture will work no substantial hardship on him."

In the case *Kutche v Ford*, 222 Mich 442; 192 NW 714 (1923) the Michigan Supreme Court considered whether or not the parties had reached a meeting of the minds, necessary to form a contract, where the contractor's bid contained a clerical error. The court stated:

"Where a mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff [bidder], either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed in status quo, equity will interfere in its discretion to prevent intolerable injustice."

In *Fraser Public School District v Kolon*, 35 Mich App 441 (1971), the school board proceeded to award a contract to the bidder, despite the bidder's notice that its bid contained an \$80,464.00 error. The court cited *Clinton County Department of Public Works, supra*, and allowed the contractor to recover the value of the omitted costs. When considering the contractor's conduct, the court determined that the contractor had been somewhat "negligent," however, the contractor's negligence did not amount to gross negligence sufficient to prevent the intervention of equity.

It would appear, that based upon the Michigan case law on point, the following factors should be considered when determining whether a bidder should be allowed to amend or withdraw its mistaken bid:

- a. The mistake is so material in character that the minds of the parties have never met;
- b. An unconscionable advantage would be gained by one party as a result of the mere mistake by the other party; to wit: one party would receive a windfall as the result of the other's mistake;
- c. The bidder must not be guilty of gross negligence in making the error or asking for redress [relief] from the error. The error must be honest and not just a ruse to avoid a low bid.
- d. The parties must be capable of returning to the status quo. This means, primarily, that the owner must not have detrimentally relied upon the erroneous bid.

The law allowing correction of bid mistakes is less clear. In one case, where the bid was the low bid both before and after correction of the error, the bid was permitted to be corrected because the bidder could present clear and convincing evidence of the mistake and of the actual intended bid. *CN Monroe Mfg Co v United States*, 143 FSupp 449 (ED Mich, 1956).

In general, bid reformation is only permitted where both the existence of the error and the intended bid can be ascertained, and the reformed bid will not displace another bidder. This notion generally limits bid corrections to clerical mistakes, such as the incorrect addition of a column of figures presented in the bid, or the correction of an obviously displaced decimal point.

While it is true that equity may intervene to free a contractor from liability for clerical errors in the bid, the contractor will continue to be responsible for errors in judgment. The contractor will not be entitled to relief where the bid errors result from poor judgment or the lack of adequate diligence in calculating the estimated cost. *Balaban-Gordon Co, Inc v Brighton Sewer District*, 342 NYS2d 435 (App Div, 1973).

The summary below fairly illustrates the results of bid errors in federal contracting, under the various circumstances (*See*, "Mistakes in Bids: Contractor's Rights and Remedies," National Association of Surety Bond Producers, 1982). The points addressed are thought to be applicable to similar situations under Michigan law:

- a. Mistakes in judgment rarely afford the contractor a basis for the withdrawal of the bid, and never provide any basis for reformation;
- b. An essential element in allowing reformation is the basic premise that the government should not be penalized by the mistake and should have the benefit of the lowest price;
- c. No reformation or withdrawal of a bid will be allowed if it taints or adversely affects the integrity of the competitive bidding system;
- d. The closer that the bid, as reformed, is to the bid of the bidder who otherwise would receive the award, the less likely that the reformation will be allowed;
- e. A non-responsive bid can never become responsive by a claim of mistake;

- f. Bidders normally will not be required to perform work and go forward on a contract where there is a mistake, if enforcement would be unconscionable; and
- g. Once the owner has made its determination as to whether a bid will be allowed to be reformed or withdrawn, an appellate review will generally adopt the contracting agency's decision if there is any rational basis for the decision.

Bid errors discovered after the award of the contract may result in the reformation of the contract if the mistake is clearly established; if the mistake was not a mutual mistake, in which case there would be no contract because there was no meeting of the minds; the mistake is attributable solely to the contractor; and, the mistake is sufficiently apparent that the contracting officer or owner would be deemed to have had constructive notice of its existence. *Bromley Contracting Co v United States*, 596 F2d 448 (Ct Cl, 1974).

PROTESTING THE AWARD OF PUBLIC CONTRACTS -- "THE DISAPPOINTED BIDDER CASE"

A. Federal Law. Under federal law, protesting the award of public contracts is governed by statute and the Federal Acquisition Regulations. It is a broad topic, beyond the scope of this article. Disappointed bidders on federal projects, should be cautioned that the times and procedures set forth for bid protests are strictly construed. If the appeal is not timely, or is perfected improperly, the appeal will not be considered. Further, there are significant limitations imposed on the recovery of successful appeals. For example, lost anticipated profits are not recoverable. *Excavation Construction Inc v United States*, 494 F2d 1289 (Ct Cl, 1974). Typically, only the direct cost of bid preparation is recoverable, which is often a rather nominal amount. The disappointed bidder has difficulty in obtaining enjoining the award, because "irreparable harm" must be demonstrated -- an almost impossible task. Further, potential liability may result if the designated bidder's ability to proceed with the work is delayed by the protest. The protester may be sued for delay and resulting damages, under the theory of tortious interference with a contract expectancy.

B. Michigan Law. Under Michigan law, there is little relief for the disappointed bidder.

In general, Michigan law does not require that the contract be awarded to the lowest bidder, nor does the law create a property interest in favor of a disappointed bidder. *United Omaha Life Insurance Co v Solomon*, 960 F2d 31 (6th Cir, 1992). This is particularly true, where the bid documents reserve the right to accept or reject any or all bids (which is a typical owner reservation in most construction contracts). The losing bidder has no right of action at law in Michigan. *Talbot Paving Co v City of Detroit*, 109 Mich 657 (1896).

The Michigan Supreme Court has also rejected disappointed bidder actions in the context of taxpayer's injunctive relief proceedings, which seek to enjoin an award of a contract to another bidder and to compel the acceptance of the disputed bid. In *Leavy v City of Jackson*, 247 Mich 447 (1929), the Supreme Court explained its decision by stating:

"Reservation of [the] right to reject any and all bids, where the authorities have the power to make such a reservation, gives the right to let the contract to any bidder and reject the others, although the one securing the contract is not the lowest bidder."

See also, Berhage v City of Grand Rapids, 261 Mich 176 (1933) and *Bolt v Muskegon Board of Road Commissioners*, 277 Mich 75 (1936) for similar results under similar reasoning.

In *Rayford v City of Detroit*, 132 Mich App 248 (1984), the court relied upon the general rule of Michigan law that disappointed bidders may not maintain an action either to enjoin the award of a contract or to obtain damages because of the City's refusal to accept the plaintiff's bid.

Federal courts interpreting Michigan law have arrived at consistent conclusions. For example, in *Malan Construction Corp v Board of County Commissioners*, 187 FSupp 37 (ED Mich, 1960), the court concluded that the incidental benefit received by bidders from competitive bidding did not allow an unsuccessful bidder to bring a private cause of action against a governmental agency. In *Shaw-Henderson, Inc v Schneider*, 335 FSupp 1203 (WD Mich, 1971), the court dismissed the complaint of disgruntled bidders on a waste water treatment plant. See also *North Construction Company v Mayo*, 437 FSupp 725 (WD Mich, 1975) for a similar result on a secondary sewage treatment plant.

In *City Communications v City of Detroit*, 650 FSupp 570 (ED Mich, 1987), and *Kasom v City of Sterling Heights*, 600 FSupp 1555 (ED Mich, 1985), the court rejected a disgruntled bidder's claim that it possessed a Section 1983 property interest protected by the Fourteenth Amendment, and dismissed the claims.

It is noted, however, that an Illinois court has agreed with the disappointed bidder's position. In *Northwestern Disposal Co v Village of Fox Lake*, 456 NE2d 691 (1983), the court found that there was a protected property interest where there was:

"(1) a regulated bidding procedure, (2) material compliance with the procedure by the unsuccessful bidder, and (3) material and significant non-compliance with the procedure by the successful bidder."

C. Summary. In summary, Michigan courts have routinely rejected the complaint of losing bidders bringing suits to enforce state statutes or local ordinances requiring public authorities to accept the lowest responsible bid. Michigan courts have long rejected such disappointed bidder claims for lack of standing, recognizing that losers in the competitive bidding process are not within the class of persons intended to be benefited by the legislation requiring the competitive bidding. See, *Rayford v City of Detroit, supra*; *Talbot Paving v City of Detroit, supra*; and *Detroit v. Wayne Circuit Judge*, 128 Mich 438 (1901).

Thus, it would seem that so long as there was no fraud or corruption involved in the award of the contract, the governmental agency is free to exercise its discretion on which bidder it will award the contract to, assuming, of course, that the agency has the right to accept or reject any and all bids.

Endnotes

1. Mark E. Appel, "Partnering: New Dimensions in Dispute Prevention and Resolution," *Arbitration Journal*, June, 1993.