



CONSTRUCTION LAW E-UPDATE

A WINNABLE BID PROTEST

By **Henry L. Goldberg**

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Recently, our firm has seen an increase in the number of clients seeking to formally challenge bid results. This is no doubt a sign of lean economic times; there is clearly increased competition for public works construction. In addition, the migration from the private sector of companies less sophisticated in public contracting has also contributed.

In any bid protest, protesting bidders have often been frustrated by the fact that public owners have a fair amount of wiggle room to waive “minor irregularities” in a contractor’s bid. If the irregularity is not material, the owner’s discretionary decision to waive the irregularity will generally not be disturbed by a court. The problem is that materiality, like beauty, is in the eye of the beholder. What a losing bidder might see as material, the owner or a court might find to be minor and waivable.

Often, when there is an irregularity in a bid proposal, the owner will allow the low bidder to correct the irregularity after the bid opening, as opposed to outright rejecting the bid. To oppose this, a protestor must prove both that the irregularity was material and, therefore, not waivable and that it was disadvantaged by the post-bid-opening correction.

Bid protests in New York are pursued under Article 78 of the rules of court procedure. Therefore, another major issue confronting any bid protester is the Article 78 standard of review that a bid protestor must satisfy. In order to win in an

Article 78 “special proceeding,” the protestor must show that the public owner’s actions were “arbitrary and capricious”. Arbitrary and capricious essentially means that the agency had no rational basis upon which to make its decision to waive the irregularity or allow the winning bidder to correct the irregularity. Even if the court were to disagree with the ultimate decision of the agency, it is not difficult for an agency to show some rational, factual basis to justify what it did and prevail.

However, despite these hurdles, some bid protests are winnable. In a recent New York decision, the court upheld a bid protest by the second lowest bidder on two contracts bid together for storage tank removal and replacement at two maintenance depots. In both cases, the lowest bidder for the contract failed to provide evidence of participation in a state-approved apprenticeship training program. The owner claimed that the irregularities were waivable, and, in any event, allowed the non-conforming, winning contractors on each project to correct the irregularity by providing proof of apprenticeship program participation after bid opening. In fact, one winning contractor corrected its bid 24 days after the bid opening and the other winning contractor corrected its bid 51 days after the bid opening.

However, the court saw it differently and agreed with the protest. The court ordered that the bidding be “reopened” and that the lowest bids on each of the two projects be



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rejected as non-responsive with regard to the apprenticeship program requirement. In reaching this correct conclusion, the court made two essential findings. First, that proof of an apprenticeship program was a material aspect of the bid and, second, that allowing the lowest bidders to cure this irregularity was improper as it negatively affected the “competitive character of the bidding.” In so holding, the court applied a two-prong test for determining whether an irregularity is material. First, whether waiver would deprive the public owner of the assurance that the contract will be entered into according to the specified requirements and, second, whether waiver would adversely affect the fair competitive nature of the bidding by placing other bidders in a disadvantageous position.

As to the first prong, the court found that the applicable laws required that a contractor have an apprenticeship program in place prior to bidding, and, therefore, a waiver would deprive the owner of a necessary aspect of the contract. As to the second prong, the court found that the failure to provide proof of an apprenticeship program at the time of the bid did provide an unfair competitive advantage, because it gave the two low bidders extra time to comply with the requirement which was not afforded other bidders.

G&C Commentary

Given the large size of many public works projects, bid protests, at least from a cost perspective, are often “worth the shot.” However, we firmly believe that careful handicapping of the protest’s chances for success are necessary before a final determination can be made, especially in light of the hurdles that exist. Furthermore, courts give great deference to the discretionary decisions of public owners in waiving an irregularity or allowing an irregularity to be cured.

Despite these challenges, as the above mentioned cases clearly demonstrate and as I can attest to from personal experience, a successful bid protest is clearly possible under the appropriate circumstances.