



## CONSTRUCTION LAW E-UPDATE

### LIMITATIONS ON AN OWNER'S RIGHT TO REJECT ALL BIDS

By Henry L Goldberg

MARCH 2011

It is a fundamental principle of public contract law that a contract shall be awarded “to the lowest responsible bidder.” However, this mandate is not absolute. Aside from the responsiveness of the bid and the responsibility of the bidder, both of which can affect the acceptability of an individual bid, public bidding statutes authorize the rejection of all bids only when it is in the “public interest.” Exactly what are the boundaries of the “public interest” in this context is a matter for case by case analysis.

Many in the industry believe that a public owner's right to throw out all bids, in effect to declare a “do over,” is virtually unlimited. However, New York's highest court has set out limits on the right to reject all bids. The Court has held that owners cannot exercise their right to reject all bids “arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive bidding process.” The “public benefit” contemplated by the competitive bidding laws is to obtain the best possible work at the best possible price. In order to allege that the public benefit test has been violated, a protesting contractor needs to show “actual impropriety or unfair dealing,” such as found in the oft-cited bad acts categories of “favoritism, improvidence, extravagance, fraud or corruption.” Such a showing would allow a court to overturn a public owner's decision to reject all bids.

This is not to suggest that this would be easy. In one reported case, the contractor was one of three bidders on an MTA project. It was determined that he was the lowest responsible bidder, with a bid that fell in the original estimated cost range of \$120 to \$140 million. However, after the bidding, the MTA entered into separate negotiations with each bidder with the goal of seeking cost concessions. When the cost concessions were not to the MTA's liking, the MTA opted to reject all the bids, and re-advertise the project with a revised estimated cost range of \$100 to \$120 million. The contractor commenced a proceeding to annul the decision of the MTA to reject all bids.

The Court held that, at worst, there was only a mere appearance of impropriety by the MTA and that the contractor had failed to show any actual impropriety. Accordingly, the Court, held that the MTA acted reasonably in deciding to reject all bids in order to seek a lower price. Significant to the Court was that the rationale offered by the MTA—it could save money in a new round of bidding—was itself consistent with the public bidding laws. This made it clearly in the “public interest” to reject all the bids and seek a lower price.

Intermediate appellate court cases also demonstrate the challenge to be met in seeking to overturn a public owner's decision to reject all bids. In one such case, the State was



## CONSTRUCTION LAW E-UPDATE

### LIMITATIONS ON AN OWNER'S RIGHT TO REJECT ALL BIDS

By Henry L Goldberg

MARCH 2011

seeking bids on a contract to supply dry ice to various locations throughout the State. The low bidder won all of the sites in the Buffalo and Syracuse area. However, the State determined that the low bidder did not have the requisite facilities in the areas to meet the service requirements of the contract. Accordingly, the State rejected all bids and re-advertised for new bids, this time including a requirement that the bidder have a local site within 75 miles of the state facility to be serviced. The Court upheld the State's right to reject all bids due to the initial low bidder's inability to perform the contract, and the desire to insert the local facilities requirement to prevent such a situation from occurring the second time around.

In another case, the contractor was the low bidder on a project to perform computer-related electrical work for the New York State Department of Social Services (DOSS). After the bidding, the DOSS asked the contractor for certain extra information. Shortly thereafter, the DOSS rejected all bids, claiming that the post-bid requests for extra information from the contractor were improper under the bidding laws. The contractor alleged that the real reason for the rejection of all bids was improper union pressure. However, the Court held that this "conclusory allegation," alone, was insufficient for the Court to overturn the decision of the state agency.

#### G&C Commentary

Despite the prevailing belief of many in the industry, an owner does not have carte blanche authority to reject all bids and restart the bidding process. When confronted with actual proof of governmental "favoritism, improvidence, extravagance or corruption," a contractor that is a low bidder should promptly consider whether to lodge a bid protest to preserve its rights and obtain the project.

A contractor must also provide actual evidence of impropriety. Simply alleging fraud or favoritism is not enough. However, where a contractor has clear proof that an agency's decision was influenced by improper motives or has the consequence of thwarting the benefits of the competitive bidding laws, a contractor can successfully challenge a public owner's decision to throw out all bids.