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The New York State Legislature in 2008, allegedly “reformed” the State’s controversial Wicks Law governing public works contracts. The purpose of the reform was to ameliorate many of the problems historically associated with Wicks (depending upon one’s perspective). However, one aspect of the new statute, the establishment of the right to prequalification by almost all major government entities, has the potential to create a host of new complications for the unprepared contractor.

The Wicks Law, first enacted in 1921, requires government entities to issue four separate contracts for public construction projects instead of one contract with a single general contractor who then subcontracts out the work. The original purpose of the Wicks Law was to protect subcontractors, suppliers and laborers, and better ensure their payment on public works projects by removing the “middle-man” and allowing project trust funds to flow more directly to the subcontractors and, in turn, to tradesmen and materialmen. An added benefit is that the public owner “buys direct” for the services of the major trades without the general contractor’s markup.

NEW WICKS LAW “THRESHOLDS”

The new law increases the threshold amounts over which the Wicks Law still applies to \$3 million in New York City, \$1.5 million in downstate suburbs, and \$500,000 in upstate New York. In addition, the law now exempts contractors who use Project Labor Agreements (“PLA”), where a contractor and its subcontractors must use only union labor to perform the project work. These changes have been estimated to have exempted more than 70% of public works projects, providing the flexibility needed for small projects.

COMPENSATING “PROTECTIONS” FOR SUBCONTRACTORS IN NEW STATUTE

To compensate subcontractors for the loss of Wicks Law protection on many projects, the new law includes several additional protections for subcontractors on contracts where the Wicks Law does not apply. Under the new law, bidders are now required to submit a sealed list naming each of its

subcontractors and the amount to be paid to each. Once the sealed bid is opened, any changes to the list must be approved by the public owner. This process eliminates the potential for unfair “bid shopping” by the general contractor once the contract is awarded. In addition, the time in which contractors must pay subcontractors has been reduced from fifteen days to seven days from receipt of payment.

PREQUALIFICATION

The most significant “reform” under the new law is the authorization for almost all government entities (with populations exceeding 50,000 people) to establish contractor prequalification rules on a general or contract specific basis, whereby contractors may be pre-qualified based on certain criteria, such as

- Experience and record of performance in the particular type of work;
- Ability to undertake the type and complexity of work;
- Financial capability, responsibility and reliability of the bidder for the work;
- Record of compliance with labor standards;
- Maintenance of harmonious labor relations;
- Record of compliance with anti-discrimination and EEO laws;
- Demonstrated commitment to working with M/WBEs; and
- Safety record and workers compensation insurance EMR rate.

This reform of the Wicks Law marks an unheralded revolutionary change in the manner in which public works construction is conducted in New York. Prequalification allows an agency to evaluate the qualifications of a contractor before issuing a solicitation for a specific contract. Previously, prequalification was reserved under the New York

City Procurement Policy Board Rules ("PPB Rules") for only "special circumstances" such as in the case of emergencies.

While public owners have alleged that the use of pre-qualified lists ("PQL") will promote competition among contractors with a proven track record, and ensure that only companies truly able to handle the projects would be able to bid, it can actually have just the opposite effect.

Previously, under New York law there was no "gate-keeper" at the bid room door; anyone with a bid bond could enter and bid. This was a major tenet of public contracting law. Issues of responsibility (e.g. qualifications, character, capital, etc.) were addressed after a contractor was declared the "low bidder." Consequently, all contractors were entitled to bid in our free market economy. No public owner could control this. Under the "reformed" Wicks Law, public owners will now be able to determine who can bid in the first instance. This is "earth moving" in significance.

There was a reason why government entities were rarely allowed prequalification powers under New York law. The prequalification process has a very real potential for abuse as the opportunity for subjective and political influence in determining who can bid seeps into the system. The possibility of such inherent dangers, coupled with the damages suffered by a contractor unfairly denied prequalification, may actually discourage competition or lead to "cronyism," particularly among smaller public owners.

G&C COMMENTARY

It is too early to determine whether the Wicks Law "reform" will have the intended effect. In particular, there are an abundance of questions regarding how public agencies, which have, for years, procured and awarded contracts under "open" competitive sealed bid procedures, will implement new rules regarding prequalification.

Our experience has shown that navigating the prequalification procedures of the few agencies that have employed this "special case" method of contractor selection in the past, was problematic. Each agency developed its own requirements for obtaining and maintaining pre-qualified status. Consequently, knowing what the requirements were to be pre-qualified for a particular agency was often less than clear and objective.

With almost all government entities now empowered to pre-qualify contractors, traversing the mine field of conflicting agency-specific requirements for prequalification could become more difficult. In addition, being accused of failing to adhere to one agency's requirements could subjectively influence other owners. Furthermore, the opportunity to obtain protection from the courts could be limited because of the subjective and discretionary nature of such "qualification" determinations.

Whether you are an emerging or well established public works contractor, the blemish of a denial or later revocation of prequalification status can have a devastating "domino effect" on your company's status on other agencies' PQLs. Therefore, the careful contractor, must: (1) know and understand each agency's requirements; (2) provide full disclosure on all agency - developed questionnaires and NYC Vendex submissions, and (3) rigorously adhere to each agency's particular reporting obligations while included on that agency's PQL.

If you haven't previously filled out a prequalification questionnaire (as for example, with the NYC School Construction Authority, which was previously exempt from Wicks Law and had special prequalification authority) you need to be aware of the pitfalls associated with prequalification in New York under the new Wicks Law.

In filling out a prequalification application or NYC Vendex submissions caution is urged. These documents are submitted "under oath" and great care must be utilized to assure accurate, complete and consistent disclosure. Keep in mind that these agencies may be sharing this information in the future. NYC Vendex is already widely shared, even beyond NYC agencies.

Often the failure to disclose can have more serious consequences than the disclosure of the matter of concern. If in doubt, be sure to consult with experienced counsel.

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