



# New York State's Highest Court Reaffirms Important Bid Protest Principles

## LEGAL LOG

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Public owners clearly do not have the same freedom as private owners in awarding contracts. They are required to award the contract only to the lowest responsive and responsible bidder. Increasingly, however, this basic rule is under attack, and public owners, through RFP's and other devices, are seeking to exercise more discretion and "control" over the bidding process. Simply put, public owners are attempting to "privatize" the competitive bidding process to facilitate their ability to control with whom they deal. Fortunately, the Court of Appeals, New York's highest court, recently reaffirmed the basic legal principles of public bidding.

In a recent case, a township in New York had solicited bids from qualified contractors to provide refuse removal services. The bid proposal listed the town's requirements for prospective contractors, such as timely, quality service, safety training for employees, and easy access to back-up equipment. The town received three bids: Contractor A for \$1.2 million/year, Contractor B for \$1.5 million/year, and Contractor C (the incumbent) for \$1.7 million/year.

The town then conducted its post-bid due diligence. Already familiar with Contractor C, representatives of the town visited the facilities of both Contractor A and Contractor B. The town concluded that Contractor A, the low bidder by \$300,000.00, was a "responsible" bidder. The town's investigation, however, also concluded that Contractor B's "operations, cleanliness, professionalism, and process" exceeded that of Contractor A.

At the decisive Town Board meeting, the Town Supervisor correctly proposed a resolution to award the contract to Contractor A, the admittedly lowest responsive and responsible bidder. However, the Town Board defeated this resolution. One councilmember then proposed a resolution awarding the contract to Contractor B, which passed. Explaining his reasoning, the councilmember stated that Contractor B was the "lowest responsible bidder, when . . . consider[ing] all the . . . qualitative factors."

After Contractor A formally protested the award in Court, another councilmember attempted to defend the Board's decision by stating that: "[We] chose a contractor that is more qualified, more 'responsible and responsive,' and who will provide a higher level of service. . . ." The councilmember also attempted to justify the award by referring to the allegedly compelling safety measures Contractor B routinely employed. However, though none of these measures were set forth as requirements of the bid specifications.

The dispute ultimately reached the Court of Appeals. The Court reaffirmed the important, fundamental principle that public works contracts must be awarded to the lowest responsible and responsive bidder, not the "more" responsible bidder. As the Court of Appeals stated "[a]bsent a finding of lack of responsibility, there [was] no authority to support the Town Board's rejection of [Contractor A's] bid for one that is considered more responsible." The Court also noted that assessing a bidder's responsibility

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properly includes considering their skill, judgment, and integrity. However, the Court found no good reason for rejecting the bid of Contractor A, which was found responsible, as the denial was based on qualitative factors not part of the bid specifications.

### G&C Commentary

For contractors who believe they are the lowest responsible bidder, but aren't awarded the contract, all hope is not lost. However, time is of the essence in the context of the bid protest. It is important to stop the project from proceeding to award or mobilization. Such contractors would be best served by urgently seeking counsel who can help them assess their situation, and mobilize a formal protest quickly and competently. Protests are winnable.

Public officials, for their part, can best avoid the problems described above by ensuring that their "Information for Bidders" packages are both accurate and complete. Inclusion in a municipality's bid specifications is a legal prerequisite to the use of a particular qualification in determining the "responsibility" of a contractor.

As indicated, we are concerned by recent trends regarding public bidding practices. New York's very clear bidding rules may be clouded, or even

undermined, as more and more "creative" product delivery and project financing alternatives are tossed about in these difficult financial times. Where a particular procurement is organized as a PPP (public private partnership) or other RFP-type procurement, which varies from the foregoing well established rules of public bidding, the public will never be assured of the absence of "favoritism, corruption, political influence or improvidence." It was from these very dangers that the tried and true rules of public bidding were originally designed to protect the taxpayers of New York State. Increased public owner "flexibility" will also deprive the contracting community of the valuable right to a fair and objective bidding process. With jobs increasingly dear in these critical times, we believe these rules designed to protect the "level playing field" for the contracting community, and the public from waste and fraud, are all the more essential, not less.

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