

CONSTRUCTION AND THE LAW IN TEXAS

Bid Protests – When and Why?

In June 2015, the Austin-American Statesman reported that a losing bidder on a central Texas design-build highway project was protesting the award of a project to a competing contractor. Engineering News-Record republished the article for wider distribution within the industry.

The protesting bidder submitted a proposal with a significantly lower price than the winning bidder. However, the winning bidder's proposed construction schedule was six-months shorter. Further, the Project's owner and awarding authority scored the protesting bidder significantly lower on technical competency than the winning bidder. From the article in the newspaper, it appeared that this score was the difference maker in the outcome.

At the end of the article, the paper identifies a perceived conflict of interest involving a public-relations firm and its owner's relationship with the awarding authority. From the article it appears that the perceived conflict of interest and the subjective nature of the points awarded for technical competency drove the protesting bidder to challenge the award.

This story made news because of the size of the project and the relative rarity of bid protests in Texas. The fact that a bid protest has been filed and that it received this level of publicity makes this topic worth further exploration and discussion.

Bid protests in Texas procurement are not common. Until relatively recently, most public projects have been awarded based on best value low dollar bids. Under a best-value method, the selection of a winning bidder is fairly objective. With an objective system, the bidders can ascer-

tain whether the procurement process, the scoring and the award were conducted properly. In the last decade, many public owners have chosen to increasingly use alternative delivery methods such as competitive sealed proposals, design-build, and construction manager at-risk. These methods introduce a level of subjective evaluation that can cloud transparency. Bidders who may not win a project have more difficulty understanding and evaluating whether the owner properly complied with the procurement process.

Additionally, the subjectivity used in evaluating and scoring bidders can be abused and owners can manipulate the procurement process when selecting and awarding contracts. While most owners strive to award projects fairly and in compliance with both the procurement statutes and the requests for proposals that are published, there should be no doubt that certain owners have recognized the opacity of these more selective methods and have used them to cherry pick or narrow the playing field of contractors that might have an opportunity to win a project.

The "when" to file a bid protest is a tough question. In a situation as described immediately above – when an owner is abusing the procurement process or making serious mistakes in fairly evaluating bidders on a specific project – a bid protest may be warranted. But just because filing a protest may be appropriate does not necessarily mean that a contractor should protest an award. The "when" question is difficult to answer.

I often discuss bid awards with clients. One consideration when there is a perceived abuse of the process is whether the use of a protest will result in a better result the

next time. Whether the next time is a rebid of the contested project or future work bid by the same owner is also a consideration. When choosing whether to file a protest for a particular project, the number of bidders, the proximity of the scoring, the sophistication of the owner, and the relationship of the contractor with the owner should be considered by the contractor.

Rarely will an owner who is forced to rebid a project due to a protest turn around and award the project to a protesting contractor. Quite simply, most owners feel that rescoreing the project and awarding it to the protesting bidder would start the project off on the wrong foot. Owners generally seek a cooperative contractor who will be a partner on a project. An owner that has had to overcome a bid protest may have trouble seeing the protestor as a partner on that project once it starts.

However, protests do serve a valuable and legitimate purpose. If the protesting contractor is seeking to win future work from that owner, then a protest lodged in a professional manner may alert the owner to perceived irregularities and act as an impetus for better compliance efforts from the owner on future projects. An alternative to filing a protest for the same purpose, especially if the contractor has a relationship with the owner, would be to request a debriefing and informally lodge a protest in a meeting. This type of protestation would remove the complaints from the public sphere, protect the relationship, and preserve the integrity of the process.

In the case of the road project addressed at the outset of this article, there were three bidders. The lowest bidder was over \$100MM less in price than the selected



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bidder but, the selected bidder promised to complete the work 6 months ahead of the lowest bidder. The third bidder was, apparently not close to the others. In that situation, the protesting bidder probably believes that the protest may result in it winning the job because the competition was narrow and spread out on initial.

Regardless of that bidder's motivation for this project, the use of bid protests can help police the industry and ensure better compliance with procurement standards in future bidding. Essentially, that statement and goal answers the "why" question. Using a protest may not win a contractor a lost project, but bid protests can send a message to competing contractors and owners that there are sophisticated contractors watching the process to ensure it is fair. Owners traditionally do not want to compromise a project due to a challenge. If the owners know someone is watching and that strict compliance with the code will be required, there will likely be better and less manipulated selection processes on future projects.

