

Bid Protests for Local Projects

By Jeff Chapman

Local governmental projects, and the process for competitive bidding, are governed by chapter 2269 of the government code, as well as chapters 252, 262, and 271 of the local government code. Interestingly, those statutes have almost no language explaining how to enforce the procurement laws or file a protest action. This column will address bid protests and provide three examples of protest situations as instructive guides for evaluating protest situations.

The statutes that address enforcement of the procurement law generally only say that a “violation” of the procurement laws can be enforced by a bidding party or a taxpaying citizen of the jurisdiction that bid a project. In each statute authorizing the enforcement, the party challenging the improper award of a contract can seek to stop the performance of the project and compel the winning contractor to return any funds received in that performance. Additionally, one statute states that a contract awarded in violation of the act is void, but that the enforcement action must be filed within 10 days of the award of the contract.

Other than the above, the statutes are silent as to the means and methods of enforcement. Also, there are almost no published court cases that address bid protests. In fact, since chapter 2269 of the government code was enacted in 2011, there have been no court opinions addressing any aspect of procurement issued under that omnibus chapter.

Typically, contractors in Texas do not take formal action to challenge a procurement. The perception among both owners

and contractors that I have worked with over the years is that a protesting bidder has a higher chance of getting itself black-listed rather than successfully challenging an award and winning a project.

The process for protesting a bid for a local governmental project is not uniform or well defined. At times, some owners will publish an accepted method of challenging or protesting a bid in the Request for Proposals, others may have processes published on their website. Frequently, however, the local ordinances, procedures, and preferences are silent as to protests.

If a contractor finds itself wanting to protest a bid process, it should first evaluate the language in the RFP for a process to address concerns. Contractors should also evaluate language in the RFP that describes the rights, discretion, and evaluative process the owner has reserved for itself in scoring the bidders. For example, three scenarios brought to my attention recently are instructive in this respect.

First, a contractor provided a bid for a publicly owned office building. The RFP sought the best value bid and required acknowledgment of the addenda issued during the bid process as well as a 10 percent bid security. The low bidder failed to acknowledge the addenda and provided only a 5 percent bid bond. After being made aware of the errors, the contractor verbally acknowledged receiving the addenda and confirmed its price was unchanged and increased the bid bond value as required.

At the public meeting to award the contract, these changes were acknowledged and announced to the attendees. The second low bidder was in attendance and

voiced its dissatisfaction with the process and expressed the opinion that the low bidder’s deviations from the RFP requirements were material and should have resulted in a rejection of the bid. Because there was no protest procedure, nor any rights reserved in the RFP that would allow the owner sole discretion to determine materiality, the protesting bidder was able to secure a rejection of all bids, thereby allowing an opportunity to rebid.

Second, a contractor provided a bid for services based on a Request for Proposal. The RFP included the proposed contract documents. This particular project was bid as a best value bid under chapter 252 of the local government code. That statute allows discussions with bidders post-submission, but it also requires that all bidders be afforded equal opportunity to engage in discussions and offer any clarifications sought by the owner. After the bids were opened, the owner sought to modify the terms of the contract governing payments. The low bidder protested the change. Claiming the proposed revision was an improper negotiation not presented to all bidders, the low bidder sought a return to the originally published terms. In response, the owner evaluated its right to negotiate. Because the RFP was issued under 252, which does not allow negotiations like chapter 2269 does, the negotiation was improper. Reverting to the original bid terms was proper for a fair and open process.

Third, a bidder submitted a price proposal in response to an RFP for competitive sealed proposals pursuant to chapter 2269. As alluded to above, that chapter allows for post-evaluation negotiations with bidders to adjust the contract scope or time and any associated price changes. In this RFP, the owner reserved the right to determine materiality of omissions or irregularities. It also advised bidders of the process whereby negotiations may be conducted post-ranking but prior to the award. At the meeting to award the contract, the winning bidder and its final price was announced. The second lowest bidder realized the low bidder’s number was different that initially proposed, although it was still low. In response, the second lowest bidder issued a protest letter challenging the award. The owner’s response pointed to its authority to negotiate, it contained an explanation of the post-ranking negotiation, and it addressed the discretion reserved in the RFP. The protesting contractor, once advised of the legal basis for the negotiation and the fac-



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tual nature of that scope change, chose not to pursue a protest. In this situation, the perception of an impropriety existed, but the actual error associated with that impropriety did not exist.

These three examples are instructive for contractors bidding projects. In each example errors were either present or perceived and the protests were resolved without litigation. When bidding a project and determining whether a basis for a protest exists, keep in mind that the overall purpose of the procurement code is to ensure open competition for public dollars and that the process is fair and equal to the bidding public. If the process seems to violate these tenets, bidders may want to consider a protest.

