

LEGAL CHALLENGES TO BIDDING PROCESS ON STATE CONSTRUCTION PROJECTS

The State of Wisconsin frequently issues solicitations for bids on state construction projects. Section 16.75 of the Wisconsin Statutes provides that with certain limited exceptions, contracts are to be awarded to the “lowest responsible bidder.” Bid solicitations generally contain instructions which the contractor must follow to be considered the “lowest responsible bidder.” Contractors often invest substantial time and effort participating in the bidding process. Occasionally, a contractor is disappointed to learn that its bid has been rejected as a result of failure to comply with bidding instructions which the contractor believes to be ambiguous or contradictory. The contractor may believe that the state has failed to follow its own procedures or bid instructions. Occasionally, a contractor may be the apparent low bidder when the bids are opened, but the state nonetheless rejects the bid for reasons which the contractor believes to be unfair. Under those circumstances, the contractor may have a remedy in court, but time will be of the essence in pursuing legal action.

The procedure which contractors must follow under such circumstances was laid out by the Wisconsin Supreme Court in Aqua-Tech, Inc. v. Como Lake Protection and Rehabilitation District, 71 Wis. 2d 541, 239 N.W.2d 25 (1976). Before the contract is awarded, the contesting contractor must file a complaint in circuit court seeking a temporary injunction, prohibiting the state from awarding the contract to any other bidder. The contractor must show that it has a reasonable probability of success on the merits of its claim of error by the state. If the contractor becomes aware that the contract is to be awarded imminently to another contractor, the contesting contractor should also seek a temporary restraining order preventing the state from awarding the contract until the motion for an injunction can be heard. If the contractor waits until the contract is awarded to a third party, it may be too late for the court to intervene because at that point the third party awarded the work will have a vested interest in the contract and the potential right to recover breach of contract damages. Such a result would be contrary to the state’s goal of performing construction work in the most cost-effective manner.

If the contractor is successful in obtaining the temporary injunction, that does not mean that the court will order the state to award the contract to the contractor. The court may enter an order prohibiting an award of the contract to another contractor. However, the courts generally do not intervene in the state’s exercise of discretion in determining the lowest responsible bidder. The state may reject all bids and rebid the project, although it is possible that the state will simply decide to award the contract to the contesting contractor. If the apparent low bidder is successful in obtaining a temporary injunction and the contract is not awarded to that contractor, the contractor may be entitled to recover its reasonable and necessary expenses in preparing its bid, plus the cost of obtaining any bonds required by the project specifications.

In 2009, the Wisconsin Supreme Court reiterated that the Aqua-Tech procedure remains the proper path to follow for an aggrieved bidder. In PRN Associates, LLC v. Department of Administration, 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559, a claim for lost profits by an apparent low bidder who failed to timely seek an injunction was denied. Citing Aqua-Tech, the Supreme Court noted that procuring statutes and regulations “are designed to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to ensure that the public receives the best work....at the most reasonable price practicable.” The

failure to timely request an injunction rendered the contractor's complaints moot, and left the contractor without a remedy.

The lesson to be learned is that when a contractor believes another contractor has erroneously been determined to be the apparent low bidder, or that the state has failed to follow its own bid instructions, or other mandated procedures, the contractor must request an injunction in court before the contract is awarded to another party. This procedure should be followed not only on state projects, but also for projects where a municipality or other branch of government is soliciting bids for materials or services. Contractors are encouraged to seek legal assistance when this situation arises to ensure that the proper procedure is followed.