

**This chapter
was first
published by
IICLE Press.**



Book containing this chapter and any forms referenced herein is available
for purchase at www.iicle.com or by calling toll free 1.800.252.8062



1

Bidding the Construction Contract

HOWARD W. FELDMAN

Feldman, Wasser, Draper & Cox
Springfield

KENNETH M. ROBERTS

Schiff Hardin LLP

LORENCE H. SLUTZKY

Robbins, Schwartz, Nicholas, Lifton & Taylor Ltd.
Chicago

I. [1.1] Introduction**II. Procurement and Bidding in the Private Sector**

- A. [1.2] Introduction
- B. [1.3] Private Procurement Process Options
 - 1. [1.4] Benefits and Risks of Negotiated Procurement Process
 - a. Owner's Perspective
 - (1) [1.5] Advantages of negotiated procurement process
 - (a) [1.6] Minimizing construction schedule in a fast-track project
 - (b) [1.7] Specific or particularized knowledge
 - (c) [1.8] Previous relationship
 - (d) [1.9] Increased communication and knowledge of contract terms
 - (2) Disadvantages of negotiated procurement process
 - (a) [1.10] Emphasis on performance rather than price
 - (b) [1.11] Previous projects do not always predict future success
 - b. Contractor's Perspective
 - (1) Advantages of negotiated procurement process
 - (a) [1.12] Pricing
 - (b) [1.13] Reputation
 - (c) [1.14] Repeat work
 - (d) [1.15] Increased communication and knowledge of contract terms
 - (2) Disadvantages of negotiated procurement process
 - (a) [1.16] Duration of negotiations
 - (b) [1.17] Time investment
 - (c) [1.18] Potential financial risk
 - 2. [1.19] Benefits and Risks of Competitive Bid Process
 - a. Competitive Bid Procurement: General Considerations
 - (1) [1.20] Due diligence and internal cost control program
 - (2) [1.21] Formalized/documented process
 - b. [1.22] Competitive Bid Procurement: Open vs. Closed Bids
 - (1) Owner's considerations
 - (a) [1.23] Volume of responses
 - (b) [1.24] Cost incentives
 - (c) [1.25] Quality considerations
 - (2) [1.26] Contractor's considerations
 - 3. [1.27] Bidder Prequalification
 - 4. [1.28] Exceptions to Competitive Bid Process
 - 5. [1.29] Managing Fraud Risks

- C. [1.30] Bid Documents
 - 1. [1.31] Typical Bid Documents
 - a. [1.32] Bid Security
 - b. [1.33] Transmittal
 - 2. [1.34] Clarifications and Addenda
 - 3. [1.35] Disclaimers
- D. Submission and Acceptance of Responsive Bids
 - 1. Owner's Duties
 - a. [1.36] Duty To Fairly Consider
 - b. [1.37] Conformance of Submission to Bid Requirements
 - c. [1.38] Acceptance of Bid
 - 2. [1.39] Responsibility of Bidder
 - 3. [1.40] Bid Withdrawal
 - 4. [1.41] Timing and Bid Duration
- E. Bid Evaluation Considerations
 - 1. [1.42] Special Classes of Bidders
 - 2. [1.43] Evaluation Criteria
- F. Other Private Procurement Issues and Practice Tips
 - 1. [1.44] Contract Strategy Considerations and Ongoing Risk Management for Long-Term or Ongoing Projects
 - 2. [1.45] Bid Protests

III. Request for Qualifications

- A. [1.46] Introduction
- B. Initial Steps
 - 1. [1.47] Setting the Scope and Time Frame
 - 2. [1.48] Advertising for Submissions
 - 3. [1.49] Who Should Select?
- C. [1.50] Evaluating, Interviewing, and Selecting the Design Professional
- D. [1.51] Negotiating an Agreement with the Selected Firm

IV. [1.52] Professional Services Agreement

- A. [1.53] Services To Be Provided
- B. [1.54] Design Phase
- C. [1.55] Bidding and Negotiation Phase
- D. [1.56] Construction Phase
- E. [1.57] Qualifications-Based Selection

V. Publicly Bid Projects

- A. [1.58] Introduction
- B. [1.59] Prequalification
 - 1. [1.60] State of Illinois
 - 2. [1.61] Units of Local Government
- C. [1.62] Expediting the Process
- D. [1.63] The Bid Package
- E. [1.64] The Bidder's Representation — The Doctrine of Patent Ambiguity
- F. [1.65] Addenda to Bid Documents
- G. [1.66] Substitution of Materials, Products, or Equipment
- H. [1.67] Clarity of the Scope
- I. [1.68] Methodology of the Award
- J. [1.69] Bid Security
 - 1. [1.70] Invoking Forfeiture of the Bid Bond
 - 2. [1.71] Forfeiture of Bid Security
- K. [1.72] Sacrosanctity of Public Bid Submissions
- L. Modification or Withdrawal of Bids
 - 1. [1.73] Withdrawal of Bids — Before Opening
 - 2. [1.74] Modification of Bids — After Opening
- M. Award of the Contract
 - 1. [1.75] Lowest Bidder
 - 2. [1.76] Responsive Bidder
 - a. [1.77] Minor Variance
 - b. [1.78] Material Variance
 - 3. [1.79] Responsible Bidder
 - 4. [1.80] Articulating the Basis of the Award
- N. [1.81] Anticipating a Challenge to the Award

VI. Appendix

- A. [1.82] Bidder Prequalification Checklist
- B. [1.83] Bid Evaluation Matrix Template
- C. [1.84] Bid ADR Clause

I. [1.1] INTRODUCTION

Private consumers are free to buy goods and services from whomever they wish for any reason, including favoritism, religion, political viewpoint, or any other basis for permissible private action. The rules of the award of a construction contract in the private sector are purely contractual, unencumbered by constitutional restraints. To some degree, private contracts are impacted by statute.

Public entities are subject to the imposition of constitutional, statutory, and, in many instances, self-imposed regulatory restraints. The rules and the complexity of the rules are quite different in the public sector. A public (non-home rule) entity may act only based on the authority expressly given to it. “Municipalities are limited to only those powers which are given to them by constitution and statute, and a municipality cannot be bound by a contract that does not comply with the prescribed conditions for the exercise of its power.” *Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 565 N.E.2d 669, 673, 152 Ill.Dec. 136 (1st Dist. 1990).

Public entities have enabling legislation granting them express authority to purchase goods and services. Most public entities by statute require public bidding of goods and services. Compliance with the terms and conditions of the statutory requirements is critical to a successful project. Failure of those governmental entities that are statutorily required to make all purchases, contracts, and expenditures for goods and services by award pursuant to public bid to the lowest responsible bidder may result in a void contract. *Branigar v. Village of Riverdale*, 396 Ill. 534, 72 N.E.2d 201 (1947).

Many states have a solitary bidding law applicable to all public entities. The American Bar Association Section of Urban, State and Local Government promulgated The Model Procurement Code for State and Local Governments and Recommended Regulations (1979) in order to promote uniformity of procurement nationally. Illinois, on the other hand, has a discrete bidding statute applicable to virtually each distinct type of public entity, and Illinois has more public entities than any other state in the union. It is beyond the scope of this chapter to explicate the constitutional restrictions, statutory procedures, threshold requirements, and statutory exemptions applicable to each of the countless public entities in Illinois. The scope of this chapter is to suggest critical language in the bid instructions that will ensure the prompt award and issuance of a notice to proceed without interruption in the critical path.

II. PROCUREMENT AND BIDDING IN THE PRIVATE SECTOR

A. [1.2] Introduction

Sections 1.3 – 1.45 below describe strategies and legal principles related to the private procurement process with particular emphasis on bid procedures. The competitive bidding process, whether in private or public projects, seeks to maximize competition and obtain favorable pricing for goods and services. While private projects are not required to comply with the myriad statutory and regulatory requirements imposed on government projects, there are many business reasons that private owners may voluntarily adopt procedures that borrow from

concepts in federal and state procurement regulations. Furthermore, the vast number of projects constructed by the federal government has generated the majority of the common law in this area.

Unlike public entities, private construction owners have significant freedom in creating a procurement process. The most significant difference between public and private construction owners is that even when utilizing a competitive bid process, a private owner is not legally obligated to accept the lowest responsive bidder. A private construction owner has the flexibility to prioritize factors other than price and select a higher-priced option due to safety, quality, an existing relationship, technical or commercial terms, or other considerations used to evaluate the bids. Nevertheless, commercial or other corporate considerations may lead the private construction owner to voluntarily select an option that a public construction owner would be legally obligated to pursue. For example, the motivation to stay under a project-specific budget or meet corporate budget goals may prompt the private owner to choose the same bidder that a public owner would be required to select. These and other considerations are discussed in more detail below.

The following sections review private procurement process options, procurement documents, a private construction owner's considerations regarding the submission and acceptance of responsive bids, bid evaluation considerations, and other private procurement issues.

B. [1.3] Private Procurement Process Options

For private construction owners, there are two procurement process options: (1) negotiated procurement; or (2) a competitive bid process. As explained in §§1.4 – 1.26 below, there are advantages and disadvantages to either procurement process.

1. [1.4] Benefits and Risks of Negotiated Procurement Process

A “negotiated procurement process” means that a private construction owner selects a contractor for a project or scope of work based on its own independent criteria and begins to negotiate the cost and schedule for the related work as described in any design documents (*e.g.*, plans and specifications) that may be in existence at the time.

a. Owner's Perspective

(1) [1.5] Advantages of negotiated procurement process

For a private construction owner, the advantages of using a negotiated procurement process include expediting the construction schedule, capitalizing on specialized knowledge, continuing a previous relationship, and increasing understanding of the contract terms, which may avoid future disputes.

(a) [1.6] Minimizing construction schedule in a fast-track project

If a private owner is initiating a project on a fast-track basis, it may be a necessity to begin contract negotiations prior to the completion of the design documents. A “fast-tracked” project

means one in which construction begins before the engineering or design is completed. Typically, this would mean that the initial design focus would be on structures and foundations because these can often be designed and erected on the basis of knowing broad outlines of design elements such as the weight and size of the structure without fully completed, detailed design of the internals of the structure.

Typically, the design of a construction project is between 60 and 80 percent completed prior to the start of procurement. In a fast-track project, in order to expedite the construction process, engineering completion of various elements may track only slightly before construction of that element commences and the design may be as little as 20-percent complete at the time of procurement. In this situation, the private construction owner may adopt a commercial contracting strategy to minimize risk by engaging an existing contractor in negotiated procurement rather than take the time to competitively bid the project and potentially work with a new contractor. In this instance, the private construction owner would rely on the contractor's industry experience to determine a reasonable contract price based on its previous experience with other similar projects.

(b) [1.7] Specific or particularized knowledge

If a contractor is the only entity with the specific skills necessary or the work is highly technical or specialized, a private construction owner may elect to forego a competitive bid process. If competition is not available, even if the private construction owner engaged in competitive bidding, the bid process would not result in the main goal of competitive bidding — pricing competition. Similarly, schedule concerns may dictate that a specific type of work be executed with a high level of efficiency. For specialized work like certain types of welding, there may be a significant difference in productivity or efficiency factors and/or weld rejection rates for quality standards among various potential contractors. Appreciable productivity differences and quantity of rework for rejected welds or quality issues can translate to a significant cost impact to the owner. Accordingly, an owner may engage in negotiated procurement with a contractor who has demonstrated high efficiency and quality rather than accept the lowest-cost bidder in a competitive bid. In these types of specialized circumstances, a private construction owner may elect to engage in a negotiated procurement.

(c) [1.8] Previous relationship

If a private construction owner has a strong and positive existing relationship with a particular contractor or vendor, it may elect to add scope to its existing contract or enter into a subsequent contract through negotiated procurement with the same entity rather than engage in a competitive bid process for a new project. Additionally, to streamline transaction costs, an owner may enter into a master services or general services agreement (MSA or GSA) for a specific period of time to avoid repeated negotiations. The MSA or GSA would anticipate the execution of several purchase orders over the life of the agreement, which is typically between two and five years.

PRACTICE POINTER

- ✓ A private construction owner with a fleet, franchise, or other reoccurring construction need (whether materials, equipment, or services) may streamline its supply and obtain more favorable pricing and other commercial terms by procuring certain goods or services in bulk or in larger quantities to meet ongoing construction needs rather than engaging in serial competitive bidding for similar goods and services and/or ongoing needs.
-

(d) [1.9] Increased communication and knowledge of contract terms

Increased communication and knowledge of contract terms are potential benefits to both owners and contractors. Some private construction owners prefer the detailed discussions regarding the contract terms and documents that may result during a negotiated procurement process. The opportunity to negotiate the details of the contract documents and the terms of the engagement on the project may result in an increased level of certainty on both sides, which in turn may eliminate potential future disputes and reduce the contingency allowance that a contractor may otherwise include in its pricing. While a contractor does not have an incentive to streamline its pricing in a negotiated procurement (one of the potential disadvantages described in §1.10 below), a private construction owner may have the opportunity to sufficiently vet the scope of work and other contract requirements to permit the contractor to utilize real values rather than contingencies.

(2) Disadvantages of negotiated procurement process

(a) [1.10] Emphasis on performance rather than price

In the absence of a competitive bid process, the contractor/vendor lacks an incentive to limit the cost of its bid. Private construction owners should critically evaluate the estimated cost because it may be artificially inflated in some areas either with contingencies or other adders. In a negotiated procurement, a private owner lacks the benefit of evaluating the price breakdowns for the same work from other contractors/vendors. This disadvantage may be mitigated if the owner has extensive industry knowledge and experience to serve as a basis to evaluate the proposed price. Typically, in a negotiated procurement, the owner does not have the same factual basis it would have acquired by competitively bidding the work in order to push back on any hidden contingency fees or cost adders that the contractor may have included in its fee.

(b) [1.11] Previous projects do not always predict future success

Private construction owners should take care to evaluate the similarities and differences among the projects when considering utilizing a specific contractor's services for a new project based on previous successful projects. Differences in the complexity and scope of work can significantly alter a contractor's ability to perform on a new project. For example, a contractor may have sufficient supervisory resources for the previous project, but if the next project would require double the craft labor, the contractor's supervisory staff resources may be inadequate.

Similarly, if the subsequent project is larger in scope, the contractor's financial resources may not support the project. Additionally, a contractor's finances may have changed in the intervening time. An owner should not assume that outdated financial information is still valid. In sum, private owners should carefully evaluate the contractor's core competencies and whether they are in alignment with the new project. The factors that made the previous project successful may no longer apply.

b. Contractor's Perspective

(1) Advantages of negotiated procurement process

(a) [1.12] Pricing

For contractors, keeping pricing as low as possible is not the main consideration in a negotiated procurement. As a result, the contractor may maintain a profit margin in its pricing for negotiated procurement that it would have reduced in a competitive bid. In negotiated procurement, an owner has already selected a contractor/vendor for negotiations without the benefit of pricing as a variable and typically based on the importance of factors other than cost. Performance, quality, schedule, safety, commercial or technical evaluations, and any other factors identified during the initial negotiations are more important to the owner.

(b) [1.13] Reputation

A contractor may benefit from developing a strong reputation in its industry, particularly if its services are a niche or specialty. A significant reputation in a specialized or niche industry may increase the circumstances in which private owners elect to engage in a negotiated procurement process rather than competitively bid with less-established contractors/vendors. Similarly, solid efficiency, quality, or productivity rates for certain specialized work may encourage private owners to seek out a specific contractor for emergent and time-sensitive work.

(c) [1.14] Repeat work

A good advertisement for future work is completing an existing project on time, on budget, and without commercial disputes. An owner may be more likely to engage a contractor in the future, and be comfortable utilizing a negotiated procurement process, if it had a positive experience with the quality of the work and the quality of the commercial relationship on a past project.

(d) [1.15] Increased communication and knowledge of contract terms

Both owners and contractors can benefit from a mutual knowledge of contract terms and efficient communications about them. Some contractors may prefer the relationship-building that occurs with the owner during detailed contract discussions. The opportunity to negotiate the details of the contract documents and the terms of the engagement on the project may result in an increased level of certainty on both sides, which may in turn eliminate potential future disputes and solidify pricing.

(2) Disadvantages of negotiated procurement process

(a) [1.16] Duration of negotiations

Unlike in a competitive bid process, the owner may not have assembled the same level of detailed information and documentation to initiate a negotiated procurement as it would have done to issue a request for proposal (RFP). As a result, the owner may request that the contractor participate in the development of such documentation (*e.g.*, the scope of work or schedule) prior to finalizing the contract. As a result, the duration of time for negotiating the commercial agreement may be longer than in a competitive bid process.

(b) [1.17] Time investment

If an owner initiates negotiations with two contractors simultaneously, the owner may request a written or an oral presentation or proposal, or both, to obtain additional information on which to base its final selection. The time and costs associated with such requests may be analogous to those necessary to respond to an RFP and require significant commitment of resources.

(c) [1.18] Potential financial risk

A contractor should not relax its standards in a negotiated procurement by relying on a handshake rather than a final, executed, written contract. If the contractor begins to provide construction services pursuant to negotiated procurement and prior to contract execution, it should be sure to obtain a notice to proceed or other documentation of its services and the agreed rates or pricing.

PRACTICE POINTER

- ✓ The negotiated procurement process may create a more informal and cooperative atmosphere between the owner and the contractor than a competitive bid process will produce. Nevertheless, both the owner and the contractor should maintain their commitments to industry best practices. If it is necessary or desirable to begin engineering or construction services prior to the execution of the contract, both the owner and the contractor should be sure to obtain a written document defining the payment terms and the scope of work prior to starting any services.
-

2. [1.19] Benefits and Risks of Competitive Bid Process

A competitive bid process is the most common procurement method used in the construction industry. At least part of the reason for this preference is the conventional wisdom that competition breeds innovation and efficiency. Additionally, a competitive bid process provides the owner with some security that it will obtain a fair price for the work consistent with the industry standard pricing at the time and the applicable geographic location.

a. Competitive Bid Procurement: General Considerations

(1) [1.20] Due diligence and internal cost control program

Cost controls are important to private construction owners. An owner may have to justify costs to many potential third parties as a part of its business operations: a partner or joint owner for a project; state or federal agencies; a board of directors; shareholders; a lender; or other stakeholders. Similarly, most private owners do not have unlimited funds and will utilize a budget and/or other cost control programs for the project. An owner is in a better position with respect to conforming to any applicable corporate, regulatory, or project-specific cost control governance system when competitively bidding construction work. For example, the due diligence associated with evaluating competitive bids provides an inherent justification for the associated procurement expenditures. Deviations or increases from the corporate or project budget for procurement cost increases will be easier to explain, whether internally or externally, based on the categories of costs included in the competitive bids (*e.g.*, labor, material, indirect, or other costs) that deviate from the assumptions or allocations in the procurement budget.

(2) [1.21] Formalized/documentated process

There are many reasons why a private construction owner should formalize and document its procurement process. As indicated in §1.20 above, the interested stakeholders may inquire about an owner and/or the project's cost control system, which may include a company's internal or external audit services, state or federal regulatory entities who may oversee the project, corporate boards, affiliates, or joint owners. Engaging in a competitive bid procurement process provides a private construction owner with a reasoned and documented justification for corporate and project procurement decision-making.

b. [1.22] Competitive Bid Procurement: Open vs. Closed Bids

When a private construction owner elects to engage in a competitive bid procurement process, it may utilize open or closed bids. Open bids are more commonly used by public construction owners; however, they may be used occasionally by private construction owners. "Open bidding" means that a private construction owner solicits bids from any legitimate construction company without restriction. Private construction owners using a competitive bid process most commonly engage in "closed bidding," in which the owner selects a certain number of bidders based on its qualification criteria.

(1) Owner's considerations

(a) [1.23] Volume of responses

Using open bids may result in significantly more responses that the owner has the resources and time to review and dispose of. Many owners' prequalification process includes developing a short list of potential bidders as a strategy to manage and limit the number of bids solicited and received to a manageable number. The prequalification considerations are discussed in more detail in §1.27 below.

(b) [1.24] Cost incentives

One of the core benefits of competitive bidding is the belief that the resulting competition breeds innovation and efficiency and, ultimately, lower cost. Private construction owners should bear in mind that a contractor may have made a business decision to cut corners to create the lowest bid. In the event that one fixed-price bid is substantially and inexplicably lower than the others, the owner should evaluate the potential long-range impact on the project of accepting such a bid. For example, the costs cut in the bid may reappear as change requests during the project as the contractor attempts to improve its profit margin or cash flow or otherwise recoup its costs that exceed its fixed price for the work. Similarly, the contractor may have an incentive to interpret the entire scope or certain scopes of the work in a narrow manner to serve as a basis for future change requests. This may increase the transaction costs of the project and result in subsequent and ongoing commercial negotiations during the construction phase of the project.

(c) [1.25] Quality considerations

If a private owner receives a bid that is substantially lower than others, the lowest bidder may have lower quality standards, which may include the quality of materials, labor or craftsmanship, volume of owner or engineering supervision, and other considerations that have a significant impact on both the execution of the construction and the end product.

(2) [1.26] Contractor's considerations

The contractor's considerations for competitive bidding include the fact that the owner is not required to accept the lowest bid. A private construction owner may consider a myriad of factors in its bid evaluation based on its experiences, corporate guidelines, and any other considerations. Contrary to the public construction owner, the private construction owner does not have a legal obligation to award the work to the lowest bidder. See 1 Samuel Williston, *A TREATISE ON THE LAW OF CONTRACTS* §4:12 (Richard Lord ed., 4th ed. 2007) (“[A]n ordinary advertisement for bids or tenders is not itself an offer, but the bid or tender is an offer which creates no rights until accepted.”).

3. [1.27] Bidder Prequalification

A private construction owner's prequalification process should include enough rigor to evaluate the three main prequalification criteria: a contractor's safety record; level of skill/experience in similar projects or the industry; and financial stability. A private owner should create and maintain prequalification documentation in order to harvest and evaluate information on these three criteria prior to requesting bids.

The first prequalification criterion is safety. There is a correlation between safety and costs on the project: the fewer the accidents or incidents, the less disruption to the progress of the work and the higher productivity. An owner may obtain information regarding a contractor's safety record from various sources, *e.g.*, a contractor's safety manual, safety statistics from other projects, and Occupational Safety and Health Administration (OSHA) information, as available.

The second main prequalification criterion is skill and experience. An owner may determine a contractor's prior experience by requesting a list of all similar projects for a specified number of prior years and analyzing the similarities and differences between the contractor's experience and the upcoming project.

The third prequalification criterion is financial stability. An owner typically bases its analysis of the financial stability of a contractor on a Dunn & Bradstreet report and financial information provided by the contractor for the previous three years. Additionally, an owner may require a performance bond. A "performance bond" is a surety bond issued by an insurance company or a bank to guarantee satisfactory completion of a construction project by a contractor. The benefit of requiring a performance bond is owner protection in the event of bankruptcy or default. If the contractor fails to construct the building according to the specifications laid out by the contract, the owner is guaranteed compensation for any monetary loss up to the amount of the performance bond.

The owner's prequalification considerations will vary based on the type of procurement. For example, an owner's primary concerns for a professional services contract will differ significantly from its concerns for a material procurement contract. The most significant concerns for professional services may include the experience level of the anticipated project team, experience level on similar projects, and the terms of the business deal, including incentive structure, insurance requirements, and limitations of liability. In a material supply contract, an owner would be more concerned with technical compliance with the specifications, the delivery schedule, and warranty terms. These differing concerns should be used as a guide in the development of both the prequalification process and the bid evaluation process. Section 1.82 below is a checklist of information and considerations that a private construction owner may use to create its bidder prequalification form or checklist.

4. [1.28] Exceptions to Competitive Bid Process

Even when a private construction owner has a policy of competitively bidding all procurements, there are some circumstances in which the benefits of the bidding process do not outweigh the administration costs. Some considerations when evaluating whether to engage in the competitive bid process include, but are not limited to, the following:

Sole source. In some instances, *e.g.*, highly specialized material, there may be only one contractor/vendor available to perform the work or provide the material or equipment.

PRACTICE POINTER

- ✓ A private construction owner should have a written policy, guidance document, or other procedure regarding the appropriate circumstances for a sole-source procurement. The policy should clearly articulate the internal documentation and steps required to approve the use of a sole-source procurement prior to entering into the contract.
-

Threshold dollar amount. A private construction owner may elect not to competitively bid low-cost work. The investment of time and the personnel cost to engage in a competitive bid for a

small work scope may exceed the value of the work itself. Additionally, for low-cost work, it is unlikely that there will be an appreciable price difference in the bids even if competitively requested.

Fleet considerations. If an owner's business includes a fleet, multiple locations, a series of projects, or other ongoing needs, a private construction owner may consider a long-term master or general services agreement contract that applies to future projects. The benefits of using the same contractor rather than a sequence of competitive bids include pricing benefits, streamlining potential warranty work or operations, and maintenance support.

Emergent work. During an active construction project, there may be circumstances in which competitively bidding a particular scope of work is not feasible. If a scope of work is discovered in the middle of the construction project, the construction schedule may not permit sufficient time to competitively bid the work without a delay and associated cost impacts. Similarly, the introduction of a new contractor to address the emergent work may create congestion in an area or other access issues.

A private construction owner may forgo competitively bidding work for a variety of other reasons. Other considerations that may warrant forgoing the competitive bid process include unique professional or highly technical services; development of minority or women-owned businesses; safety, insurance, or regulatory compliance; or additional work related to an existing job scope.

5. [1.29] Managing Fraud Risks

For large companies, a risk of revenue loss is employee fraud, including such loss during the procurement process. The largest risk of internal organizational fraud occurs in cash account transactions, including accounts payable and purchasing. Examples of procurement fraud include fictitious vendors, kickback schemes, rigged bidding, and side contracts or agreements. For many private construction owners, it is a good practice to include fraud protection considerations in the procurement process to reduce fraud in procurement and realize the related cost and revenue savings.

The Justice Department's National Procurement Fraud Task Force (NPFTF) is a source of additional information, including reports and findings on various fraud schemes such as bribery, bid rigging, embezzlement, money laundering, and false claims. For more information, visit www.justice.gov/criminal/npftf. For publicly traded companies, compliance with the requirements of the Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745, is a step in the right direction to managing fraud risks in procurement. Section 404 of Sarbanes-Oxley requires companies to test and document processes and procedures designed to prevent fraud and demonstrate corporate control of financial reporting, including procurement processes.

Private construction owners may reduce the risk of procurement fraud by establishing and maintaining procurement processes and procedures that involve a checks-and-balances system within multiple business units, defined approval authority, and written guidance for the procurement process. Some specific examples of how fraud risks can be eliminated include the

use of the prequalification process and a right-to-audit clause in the contract. First, the risk of fictitious bidders is effectively reduced by the use of the prequalification process described in §1.27 above and §1.82 below. By investigating the financial status, safety record, and experience of companies prior to the bid submissions, the private construction owner may be assured that a company is not a fictitious entity. Second, a right-to-audit clause, traditionally included in cost-plus and time and material work, contained in the contract documents helps to ensure the integrity of procurement and financial transactions.

C. [1.30] Bid Documents

A private owner may issue different types of requests to potential bidders on a construction project (*i.e.*, request for information, request for quote, or request for proposal). The owner should select the appropriate type of request based on the type of information that the owner is seeking and the stage of procurement. From a contractor's perspective, the type of request determines the amount of time and cost investment required to prepare a response and in some instances whether the contractor submits a response at all.

A request for information (RFI) is a business process, the purpose of which is to collect written information regarding the capabilities of various contractors or suppliers. An RFI is primarily used to gather enough preliminary information to permit an owner to determine what steps to take next. As a result, this type of request is usually utilized early in project development. In addition to gathering basic information, an RFI is often used as a solicitation to a broad base of potential contractors or suppliers for the purpose of conditioning suppliers' minds, developing strategy, building a database, or preparing for a subsequent RFP or RFQ. From a contractor's perspective, responding to an RFI requires the least cost and time investment.

A request for quote (RFQ) is a standard business process, the purpose of which is to invite contractors or suppliers into a bidding process to bid on specific products or services. To receive accurate quotes, RFQs often include the specifications of the material, equipment, and/or services to make sure all the contractors or suppliers are bidding on the same item or service. Logically, the more detailed the specifications, the more accurate the quote will be from each responder, enabling a more detailed comparison among contractors/vendors. RFQs are best suited to gather information regarding standard products and services or commodities.

A request for proposal (RFP) is an invitation for contractors or suppliers, often through a competitive bidding process, to submit a proposal on a specific commodity or service. A bidding process is one of the best methods for leveraging a private owner's negotiating ability and purchasing power with contractors or suppliers. The RFP process brings structure to the owner's procurement decision and allows the risks and benefits to be identified clearly up front in the project. The RFP may dictate to varying degrees the exact structure, format, and content of the contractor or supplier's response. The creativity and innovation that responders choose to build into their proposals may be used to evaluate and compare supplier proposals against each other. Owners should note that the higher the level of creativity permitted in RFP responses may increase the risk that the RFP fails to capture consistent information among bidders and thus may hamper the owner's ability to compare and contrast the responses in an effective decision-making

process. Effective RFPs provide sufficient information to the potential bidders to enable them to tailor their response in a manner that reflects the owner's project strategy and short- and long-term business objectives and provide the owner detailed insight on which suppliers will be able to meet the owner's needs.

1. [1.31] Typical Bid Documents

The bid documents typically include the invitation to bid or the request for proposal, the instructions to bidders, the bid form, the commercial terms, the technical specifications, and drawings. The American Institute of Architects (AIA) document forms are often utilized by private owners because they represent standard bidding and contract documents for a wide variety of owners and contractors and construction projects. Other professional organizations also offer versions of standard form construction documents, including the Associated General Contractors of America (AGC) and the Engineering Joint Contract Documents Committee (EJCDC). Depending on the size and complexity of the project, a private construction owner may modify standard industry documents to fully address the project needs or independently create project-specific bid and contract documents.

a. [1.32] Bid Security

Some private construction owners in large or complex projects require bid security. Some private owners who utilize prequalification procedures such as those described in §1.27 above may waive a requirement of bid security. If required, bid security is usually five percent of the bid.

b. [1.33] Transmittal

Private construction owners should adopt internal procedures to govern the security and transmittal of the bid documents. These procedures should govern all communications between procurement personnel and the representatives of the potential bidding companies as well as maintain the security and reliability of the contract documents. For example, password protecting the documents will prevent unauthorized alteration of the bid documents. The security settings may ensure that all changes are marked using the track-changes feature of Microsoft Word. This can streamline the review and negotiation process. A best practice is to date the document and memorialize the details of the transmittal. For example, the original bid documents should include a description of the project and the date as either a header or a footer.

Typically, bidders submit bids in hard copy by either facsimile or e-mail. Upon receipt of bids, the owner should track the internal distribution of both priced and unpriced copies of the bid documents. Industry best practice is to limit the distribution of priced copies of bids in order to separate the technical and commercial review of the bids. An alternative that may be used by large, sophisticated owners is "online reverse auction bidding." The process of online reverse auction bidding has been described as "a real-time dynamic process between a buyer and a group of prequalified, invited sellers who compete online to provide goods or services pursuant to clearly defined scope, specifications, related terms, and conditions." See Carina Y. Enhada and Bassam Naja, *Bechtel Corporation: Online Bidding and Reverse Auction Program* (ABA Forum

on the Construction Industry, Washington, DC, Oct. 3, 2003). At a predetermined date and time, the prequalified bidders log on to the system and have the opportunity to progressively bid the price of the procurement down. The program maintains the confidentiality of the bid value between the bidders and does not allow the bidders to see what others are bidding. Instead, bidders receive immediate rank feedback regarding the competitiveness of their last bid related to the other bidders and have the opportunity to lower their last bid in response to the feedback. This process requires highly elaborate rules.

2. [1.34] Clarifications and Addenda

An issue that frequently arises during the bid period is whether contractors may rely on the accuracy of the information contained in the bid documents when assembling the pricing for their bids. Under traditional common law, statements of material fact can be relied on by the party to whom they are made. A bidder is not required to make inquiries and examinations into the representations in bid documents in the absence of any knowledge or facts that would arouse doubt or suspicion. *Simon J. Carlson & Son, Inc. v. Fricke*, 45 Ill.App.2d 88, 195 N.E.2d 17 (2d Dist. 1963). It is common that the instructions to bidders in an RFP require a potential bidder to seek a clarification to the bid documents if it identifies an ambiguity or possesses knowledge or facts that should raise doubt or suspicion. See, e.g., AIA Document A701, *Instructions to Bidders* §3.2.1 (1997). Including this provision in the bid documents puts the burden on the contractor if, as a result of its experience or knowledge, it recognizes or should recognize that an ambiguity, inconsistency, or mistake is contained in the bid documents and creates a duty to investigate before the contractor is permitted to reasonably rely on the representations.

“Addenda” include additional documentation or information that the owner provides to the bidders after the initial issuance of the RFP but prior to the response deadline. The addenda may include responses to questions or clarifications received from bidders or information independently prepared by the owner.

PRACTICE POINTER

- ✓ An owner should strive to include all relevant documentation in the initial RFP. While additional information may be issued to bidders in an addendum, any documentation or terms that materially alter the original documentation are likely to result in a request for an extension of time to respond.
-

3. [1.35] Disclaimers

An owner is responsible for ensuring that the bid and contract documents are accurate and free from defects. Some bid documents include a general disclaimer statement for the purpose of limiting liability for inaccuracies in the bid documents. Caselaw has held that this provision does not achieve its intended purpose. The Seventh Circuit and the Illinois appellate courts have held that in private construction contracts, an owner impliedly warrants to the contractor that the plans and specifications provided are free from defect and sufficient for the intended purpose. *Trustees of Indiana University v. Aetna Casualty & Surety Co.*, 920 F.2d 429, 436 (7th Cir. 1990) (court

upheld *United States v. Spearin*, 248 U.S. 132, 63 L.Ed. 166, 39 S.Ct. 59 (1918), and held that contractor could not be held liable for warranty damages when it used product specified by owner); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335, 1350 (7th Cir. 1983) (Illinois law recognizes implied warranty by owner in private construction contracts that plans and specifications are free from defects); *W.H. Lyman Construction Co. v. Village of Gurnee*, 84 Ill.App.3d 28, 403 N.E.2d 1325, 1332, 38 Ill.Dec. 721 (2d Dist. 1980). See also 8 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS §19:66 (Richard Lord ed., 4th ed. 1998).

The seminal court decisions for this doctrine, and the basis for the decisions interpreting Illinois law, are federal cases regarding government contracts that held that an owner warrants the accuracy and adequacy of its detailed plans and specifications. See *Spearin*, *supra*; *Hollerbach v. United States*, 233 U.S. 165, 58 L.Ed. 898, 34 S.Ct. 553 (1914).

In *Hollerbach*, the Court held a general disclaimer inapplicable as to site conditions when the specifications were clear but false. 34 S.Ct. at 555 – 556. The government had stated in the specifications that the dam to be repaired was backed by a stone compound; however, when the contractor began work, it discovered that the backing was instead a mixture of soft, slushy material and crib work. The specifications also contained a general requirement for the contractor to investigate the site. The contractor claimed that it should be compensated for the additional work arising from the inaccurate specification. The court stated that “it would be going quite too far to interpret the general language of other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt.” 34 S.Ct. at 556. Accordingly, the court held the contractor was entitled to additional compensation because the specific statements regarding work conditions override general language requiring contractor pre-bid site investigations.

In *Spearin*, *supra*, the owner provided the contractor with detailed plans and specifications for the construction of a dry dock. The plans and specifications required the diversion and relocation of a section of sewer prior to the construction of the dry dock. The Court stated: “[T]he insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate.” 39 S.Ct. at 61. In *Spearin*, the contractor had to perform additional work because the plans and specifications did not indicate that the work would require the connection to another dam in another sewer. Additionally, heavy rain caused unforeseen pressure on the dam, which resulted in flooding of the dry dock area. The Court held that “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.” *Id.*

These two decisions create the principle in government contracts that the owner provides an implied warranty that the plans and specifications are adequate to complete the project. This doctrine has been adopted by the Seventh Circuit interpreting Illinois law. *Chicago College of Osteopathic Medicine*, *supra*, 719 F.2d at 1350. Accordingly, in Illinois it is not likely that a private construction owner’s general disclaimer of the sufficiency of the plans and specifications would eliminate its potential liability.

D. Submission and Acceptance of Responsive Bids

1. Owner's Duties

a. [1.36] Duty To Fairly Consider

Unlike public contracting, private construction owners do not have a duty to fairly consider the bids. A private owner may, in its sole discretion, reject all bids. As a practical matter, an owner who demonstrates favoritism and other biases in its construction bid process is unlikely to obtain future bids from disgruntled companies who received what they perceive to be unfair treatment after investing the time to prepare a responsive bid. As a good practice, the private construction owner should communicate its priority of bid evaluation factors to the potential bidders and emphasizing its intention, if applicable, to exercise its discretion to reject some or all bids for any reason. Private construction owners should consider the potential negative reputation in the industry that may develop and the corresponding decrease in the volume of potential future bid responses that may result if it is perceived that they failed to reasonably evaluate each bid and reach a principled selection.

b. [1.37] Conformance of Submission to Bid Requirements

How well a bid conforms to the material terms contained in the invitation for bids is referred to as the “responsiveness of the bid.” As a threshold matter, private construction owners are not required to automatically eliminate a nonresponsive bidder from consideration. While responsiveness is a statutory requirement in public contracts, in private construction contracts, the owner has the discretion to award the contract to any bidder, regardless of the responsiveness of that bid submission absent an election to adopt a similar requirement. (In the public sector, a bid must be rejected if it is substantially and materially nonconforming to the bid documents. See 44 Ill.Admin. Code §910.120(m).) If a private construction owner has adopted such a policy, it should perform an initial review of all bid responses and eliminate or reject any bids that do not conform to a material term of the bid documents. Some examples of nonconformances to frequently requested bid terms include a bidder’s failure to submit exceptions to the commercial terms, failure to provide a sample performance bond or letter of credit, or omission of all pricing options included in the technical specifications. Any deviation from the material terms of the RFP, including a bidder’s failure to respond within the allotted time, technically makes a bid nonresponsive. It is common that an owner maintains its discretion and reserves the right to reject all or some of the bids for any reason.

c. [1.38] Acceptance of Bid

Unlike in a public project, a private construction owner is not legally obligated to accept the lowest responsive bidder. A private construction owner has the flexibility to prioritize factors other than the lowest price and select a higher-priced bidder based on its evaluation of benefits due to safety, quality, a strong existing relationship, or other considerations. In some instances, the low bidders on private projects have challenged a private owner’s discretion to select a bidder other than the lowest and asserted that circumstances or language in the bid documents created a legal obligation to select the lowest bidder. As explained below, courts have not recognized an obligation to select the lowest bidder absent a statutory requirement to do so.

For example, the type of project and the type of owner may lead a contractor to believe that the owner was a public entity and that the competitive bid process was governed by the applicable state procurement laws. *North Central Utilities, Inc. v. Walker Community Water System, Inc.*, 437 So.2d 922 (1983), *appeal after remand*, 506 So.2d 1325 (La.App. 1987). Nevertheless, a contractor's belief regarding the nature of an owner's project (public vs. private) does not trigger the application of the public procurement laws and regulations. In *North Central Utilities*, the owner, a nonprofit corporation, advertised for bids to construct a water distribution system. The contractor/plaintiff's submission was the lowest bid, complied with the specifications and requirements, and included a bond. 437 So.2d at 923. The owner did not award the contract to the lowest bidder but instead selected another contractor whose price was \$5,000 higher. The owner did not give the plaintiff notice of the disqualification of its bid or written reasons for the rejection. *Id.* The contractor's complaint alleged that either by the nature of the owner's business or by the manner in which the owner advertised the work and held itself out to the public it should be required to comply with the public bid laws. 506 So.2d at 1326. In the alternative, the contractor asserted a cause of action under the doctrine of detrimental reliance or equitable estoppel. 506 So.2d at 1326 – 1327. The court reasoned that the mere fact that a company's business provides a benefit to the public is insufficient to trigger the requirements of the public bid law. 506 So.2d at 1327. The court held that a nonprofit organization is not a "public entity" subject to public bid laws and rejected the theories of detrimental reliance and equitable estoppel.

Contractors have been similarly unsuccessful using the contents of bid documents to challenge private construction owners' discretion in bid selection. An owner's representation in the bid documents that it will select the lowest-priced bidder does not create enforceable contract rights as to a bidder against the owner. *See, e.g., Hoon v. Pate Construction Co.*, 607 So.2d 423 (Fla.App. 1992). In *Hoon*, the owner included (1) a statement in the invitation to bid that the owner intended to award the contract to the lowest responsible bidder, and (2) a reservation of rights to reject any bid for any reason. 607 So.2d at 424. The bidder asserted a breach of contract claim against the owner based on a breach of express warranties and implied guarantees to select the lowest bidder. 607 So.2d at 425. The court held that there was no contract between the parties and that the statements in the bid documents did not create a duty for the owner to select the lowest responsible bidder. 607 So.2d at 426.

A similar issue arises when the owner does not include language in the bid documents affirmatively stating that it reserves its rights to reject any or all of the bids. The absence of a reservation of rights does not create a legal obligation of a private owner to select the highest or lowest bidder. *Eames v. James*, 452 So.2d 384 (La.App. 1984) (failure to specifically state that owner reserves right to accept or reject any bid for any reason does not create implied obligation to accept highest or lowest bid/offer). Similarly, an owner's implied reservation of rights to do what is in its interest preserves its discretion to reject all bids even if the bid documents do not explicitly and affirmatively state that the owner reserves the right to reject any or all bids. *William A. Berbusse, Jr., Inc. v. North Broward Hospital District*, 117 So.2d 550, 551 (Fla.App. 1960) (owner's discretion in selecting bidder was not restricted when instructions stated "[a]ward will be made to the lowest responsible bidder, *provided it is to the Owner's interest to accept the bid*" [emphasis added by court]). Courts have held that it is not a breach of contract to accept a bid other than the lowest responsive bid when an advertisement for bid specifically reserves the right to reject any or all bids. *Olson v. Beacham*, 102 N.W.2d 125 (N.D. 1960).

2. [1.39] Responsibility of Bidder

The “responsibility” of the bidder refers to the bidder’s ability to perform the work in a prompt and workmanlike manner. For private construction owners, there are very few rules regarding the responsibility of the bidder. Generally, the owner is free to enter into a contract with a party of its choosing.

3. [1.40] Bid Withdrawal

A bidder’s ability to withdraw its bid is limited by the “firm bid” period contained in the terms of the request for bid. In the event that the RFP states that all bids must be open for a specified period of time (typically 60 or 90 days), the bid may not be withdrawn except on equitable grounds such as mistake or fraud.

The public purpose of limiting a bidder’s right to withdraw its bid is to prevent fraud. Illinois applies the common-law doctrine of unilateral mistake with respect to the right to withdraw a bid. A bidder may correct its bid if it can show by clear and positive evidence that (a) the bidder’s mistake was related to a material term, (b) it occurred despite the exercise of reasonable care, (c) it would be unconscionable to enforce the bid containing the mistake, and (d) the owner can be placed in status quo after the bid revision or correction. *See Wil-Fred’s Inc. v. Metropolitan Sanitary District of Greater Chicago*, 57 Ill.App.3d 16, 372 N.E.2d 946, 951, 14 Ill.Dec. 667 (1st Dist. 1978). Generally, bid relief is refused for errors in judgment and allowed for clerical or mathematical mistakes. Yet, “the facts surrounding the error, not the label, i. e. ‘mistake of fact’ or ‘mistake of judgment,’ [will] determine whether relief is granted.” 372 N.E.2d at 953 (prime contract bidder who followed its bid review procedures could rescind awarded contract and require bid security returned for error in subcontractor’s understanding of specifications).

4. [1.41] Timing and Bid Duration

The timing of the issuance of bids will depend on the project schedule, including the lead times associated with the material and equipment. Private construction owners should have a detailed procurement schedule for the project that takes into account the pinch points that may impact the construction schedule. Adequate notice and sufficient response time will maximize the number of submitted bids. Consideration in the procurement schedule should be provided for both the duration of time for the responses to be prepared by the bidders and the owner’s review. If the owner is going to issue an RFP with a very tight deadline, care should be taken to identify holidays and other impediments to a contractor’s ability to complete the request in a timely manner. Failure to provide a realistic deadline or adequate time to provide the requested information may decrease the number of bidders overall and/or result in requests for an extension of the response deadline. Additionally, if the owner provides inadequate time for the bidders to prepare their bids, it may prevent the bidders from performing sufficient site investigation or resolving ambiguities and clarifications, which may increase disputes or give rise to additional costs during the project.

E. Bid Evaluation Considerations

1. [1.42] Special Classes of Bidders

Many private owners maintain an outreach program to encourage bid participation and opportunity by special classes of bidders. Private construction owners may adopt corporate goals regarding their procurement activities with respect to these special classes. These may include local businesses, women-owned businesses, or minority-owned businesses. Depending on a private owner's corporate goals, special classes of bidders may be a part of the bid evaluation process.

2. [1.43] Evaluation Criteria

Generally, a private construction owner has unlimited discretion in evaluating the bid submissions. As discussed in §1.38 above, a private construction owner may reject all bids. Similarly, it may choose to waive any irregularity in the bid. The discretion afforded private owners permits the bid evaluation to proceed based on any combination and priority of hard and soft criteria. "Hard criteria" include pricing, technical compliance, and financial stability. "Soft criteria" include such considerations as previous relationship, reputation in the industry, and other intangibles. A template bid evaluation checklist is included in §1.83 below. This is a general guideline that should be expanded and modified based on the type of procurement, the owner's corporate policies, project goals, etc., in order to adequately assess the bid responses based on the owner's considerations.

PRACTICE POINTER

- ✓ It is a best practice to move toward contract award with two bidders remaining. The owner would initiate negotiations with the top bid, while preserving the validity of the second bid in the event that an impasse is reached. Maintaining competition between the two top bidders until the negotiations are complete and the contract is executed benefits the owner and maintains the owner's bargaining strength.
-

F. Other Private Procurement Issues and Practice Tips

1. [1.44] Contract Strategy Considerations and Ongoing Risk Management for Long-Term or Ongoing Projects

Large and complex construction projects pose unique procurement considerations. The private construction owner should not only consider the strategy and procedure for individual procurements, but also evaluate its overall contracting strategy for the project and the likelihood that a contractor may bid — and be awarded — multiple scopes of work on the project. Because work scopes vary in price ranges, risk, and other commercial concerns, the appropriate contract terms for one specific scope may not be appropriate if a single contractor is the successful bidder on multiple work scopes. To address this potential issue, the private construction owner should consider not only establishing procedures to bid and award each individual work scope, but also

creating a mechanism to internally audit and review the commercial terms in the event that the work scope of a particular contractor significantly evolves during the life cycle of the project.

For example, a contractor initially awarded only the site preparation contract may subsequently be awarded foundations and other miscellaneous civil scope. As a result, the total value of the contractor's work may exponentially increase from the initial contract, which makes the original terms and conditions included in the bid documents insufficient or inappropriate for the total scope ultimately awarded at the completion of the project's procurement. The original contract may have been a short form agreement or other type that does not adequately address the commercial considerations for additional scopes subsequently awarded. For example, some significant commercial terms, including limitation of liability, the amount of a performance bond or letter of credit, and payment schedule, including release of retention, should be reviewed and revised in the event of a material change in the contractor's work scope. Educating the procurement personnel regarding these issues may assist the private construction owner in obtaining appropriate contractual safeguards for what may have evolved into one of the largest contracts on the project.

Similarly, owners that have ongoing procurement needs for certain equipment, material, or services should evaluate the benefits of a master or general services agreement for the entire fleet or company's needs for a specified period of time. The benefits of engaging a contractor for more than a single project include streamlined maintenance for multiple projects or locations and commercial negotiating leverage for pricing or operational assistance.

PRACTICE POINTER

- ✓ A master services agreement may not be appropriate for all projects. MSAs and GSAs usually are generic. The terms may or may not be appropriate for each construction project. Additional terms may need to be added for highly specialized projects or scopes of work. Practitioners should review the terms of the MSA or GSA with particular attention to the needs of the client and the project and identify commercial and legal risks and provisions that should be incorporated into the change order or purchase order, as applicable.
-

2. [1.45] Bid Protests

In private construction projects, a contractor does not have the same bases for filing a bid protest that exist in public construction projects. As discussed in §1.1 above, the basis for a contractor's bid protest in public procurement is either state or federal statutes or regulations. The processes and procedures for bid protest in the public sector are not applicable to private construction owners. A private owner is more likely to receive a request from an unsuccessful bidder to review its bid submission and explain the reasons it was not selected for the project. The purpose of such a request is for the contractor to obtain feedback on its bid and learn more about the owner's considerations with the hope of submitting a more competitive bid for future work.

III. REQUEST FOR QUALIFICATIONS

A. [1.46] Introduction

Governmental bodies engaging in construction projects that are of a size that require the use of contractual design consultants engage in a process that has been named “qualifications-based selection” (QBS). The qualifications-based selection process originally stemmed from the establishment of the Brooks Architect-Engineers Act of 1972, 40 U.S.C. §541, *et seq.* The State of Illinois has also enacted the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act, 30 ILCS 535/1, *et seq.* Local governmental subdivisions that are non-home rule units and units of government with more than three million inhabitants must comply with the Local Government Professional Services Selection Act, 50 ILCS 510/0.01, *et seq.* Governmental bodies’ application of the principles of qualifications-based selection will result in design professionals’ being hired based on their professional qualifications, the history of the work they have performed, and the specialties in which they are engaged.

B. Initial Steps

1. [1.47] Setting the Scope and Time Frame

Professional selection is based on a series of steps to arrive at either a single design professional or a small number of them, who will then negotiate with the governmental body with regard to the services to be provided and the reimbursement.

The governmental body must first establish a scope of work and a project time frame. The general scope of work can be broad or detailed depending on the sophistication of the governmental body and the nature of the project. The projected time frame should be based on the expectation of the governmental body of the need for the project to be completed. Sometimes, time frames are dictated by immediate needs or compliance with statutory mandates, such as clean water or sewage treatment plants. Other times, projects have a much longer lead time because there is no immediate need.

The governmental body can assist itself by thinking through the program statement or general scope of work so as to provide to those design professionals the qualifications that are being sought due to the nature of the work to be performed.

2. [1.48] Advertising for Submissions

The public entity, in order to have qualified design professionals submit their expertise, advertises for submissions. 30 ILCS 535/25.

The public notice should include the nature of the services being sought, any specific expertise that is required, and the number of firms that ultimately will be selected for purposes of negotiation. The notice should be carried in appropriate publications as required by law and should be advertised at least 14 days before submissions if a state project is involved. *Id.*; 50 ILCS 510/4.

3. [1.49] Who Should Select?

A committee should be created that will evaluate the qualifications, review submittals, and interview candidates. The most sophisticated systems will use defined criteria, assign numerical values to the criteria, and rank the firms. It is critical that the end user participate in the selection process, that an individual or group that administers the contract be involved in the process, and that an objective appraisal be done. The Capital Development Board (CDB) of the State of Illinois' prequalification formula is often a base qualification for public projects. The Architectural, Engineering, and Land Surveying Qualifications Based Selection Act specifically provides for prequalification. 30 ILCS 535/20. The prequalification form can be found on the CDB website at www.cdb.state.il.us/cdbweb.nsf/forms.

The CDB prequalification form requests information concerning the number of individuals in the firm, designation of consultants of the firm, relevant project experience, and the names of the specific persons who will be involved with the project.

More sophisticated public owners may request detailed proposals, which can be evaluated by design professionals. These detailed proposals typically are utilized on larger projects.

A basic necessity for the design professionals to compete for projects fairly is that the information provided to any one professional be the same as the information provided to any other. There should be limited contact with design professionals during the selection process, and answers to any questions posed by a design professional should be disseminated to all that have shown interest in the project.

C. [1.50] Evaluating, Interviewing, and Selecting the Design Professional

Qualifications-based selection requires evaluating the submittals of design professionals and, should there be a substantial number of submittals, limiting the interview process to a reasonable number. In order to fairly evaluate the proposals, there needs to be a specific design set of criteria. A model guide with procedures and forms for the interview process can be found at www.aiaail.org/pages.aspx?pageid=23.

After the initial evaluation has ranked the proposals, it is common, although not required, that an interview process take place. The interview process should be relevant and material to the project. Each of the parties being interviewed should be evaluated on the same criteria and scored as objectively as possible. The selected number of design firms should then be ranked.

It is common when a significant number of design firms are competing and the project is significant and sophisticated that an owner will select a group of design professionals (frequently the top three according to a ranking system) and then attempt to negotiate the terms of an agreement with one of them. After selection, all of the parties submitting proposals should be informed of the selected parties in as objective a manner as possible. See 30 ILCS 535/30; 50 ILCS 510/6.

The Second District Appellate Court in *Board of Trustees of Community College District No. 502, County of DuPage v. Department of Professional Regulation*, 363 Ill.App.3d 190, 842 N.E.2d 1255, 1268, 299 Ill.Dec. 903 (2d Dist. 2006), stated:

We stress that, although a political subdivision is not prohibited from requesting fee information before selecting a firm for negotiation, the selection ultimately must be based on qualifications. The lack of an express prohibition against considering fee information before selecting the most qualified firms should not detract from the overall purpose and requirements of the Local Government Selection Act. For example, although the College has requested fee information, its selection criteria are strictly based on qualifications. Although one might wonder why the College has asked for fee information if it is not relevant to the selection of the most qualified firm, it appropriately has refrained from formally injecting any elements of competitive bidding into the selection process. We simply hold that the College's requests for proposals do not violate the Local Government Selection Act.

In this case, the plaintiff was seeking fee information, and the court made clear that the decision on selection was not to be based solely on price but on a myriad of factors.

D. [1.51] Negotiating an Agreement with the Selected Firm

The size of the unit of government that is involved in the project will often dictate the type of professional service agreement that will be utilized. The American Institute of Architects has sophisticated and well-vetted professional service agreements, as does the Engineers Joint Contract Documents Committee. Both the Illinois Department of Transportation and the Capital Development Board have very detailed agreements. These agreements often make reference to standard procedures utilized during the various design phases of a project. Any agreement should provide a detailed and specific scope of the services that are being requested. This statement may be the result of meetings with the end user and the selected design professional. It is during this phase that there will be further refinement of what other design consultants will be used and the coordination of the parties' various roles in the construction phase.

Typically, discussions or negotiations concerning a design firm's fees occur simultaneously with the contract language. These fees will include work for the basic design, consultants' fees, additional costs and fees, observation expenses, and, for all practical purposes, a project budget. The nature of the fees that a design professional will receive can be based on hourly charges with a "not to exceed" amount, a flat fee, or, which is very common, a fee based on percentage of construction costs with some minimums. 50 ILCS 510/7; 30 ILCS 535/40.

The State of Illinois, through its Capital Development Board, has published a fee structure based on the complexity of the project, the **CENTRALIZED FEE NEGOTIATION PROFESSIONAL SERVICES AND FEES HANDBOOK** (2006); it can be found on the Board's website at www.cdb.state.il.us/forms/download/cfn2006.pdf.

Also, excellent resources for QBS information and forms can be found on the websites of the American Council of Engineering Companies of Illinois, www.acec-il.org/howto.cfm, and, for members, the Illinois Society of Professional Engineers, www.ilspe.com.

IV. [1.52] PROFESSIONAL SERVICES AGREEMENT

After the selection of a design professional, the public owner must enter into a written professional services agreement. The professional services agreement should be comprehensive given the nature of the project. The agreement should include a clear statement of the services that are being sought, time frames that are required, and compensation that will be paid.

The public owner is not left to paying thousands of dollars of legal fees to create, from scratch, such professional services agreements. Several organizations and public contracting agencies that do hundreds of projects have existing professional services agreements that can be tailored to use in almost all instances. The American Institute of Architects publishes on its website, www.aia.org, professional services agreements that can be utilized by a governmental agency. These agreements are familiar to design professionals, who are comfortable in their use. In addition to these professional organizations, the Illinois Department of Transportation and the Illinois Capital Development Board have standard form professional services agreements that can be reviewed and the terms modified for use by other municipal agencies.

Home-rule municipalities, such as the City of Chicago, will usually have their own professional services agreements that have been tailored to their specific needs and requirements.

The most critical item for anyone reviewing a professional services agreement is to ensure that the agreement addresses the project to be undertaken and the specific services to be provided as well as provides guidance to the design professional of the standards to be implemented. The critical matters that need to be included in a professional services agreement are set forth in §§1.53 – 1.57 below.

A. [1.53] Services To Be Provided

The agreement should state very specifically what services are being requested of the design professional. Is the design professional limited to providing engineering services for the project, or is the professional services provider going to provide all of the services under the umbrella, including architectural, mechanical, electrical, and civil engineering services? The more detailed the services section, the more help it will be to all parties to the process.

There should be a summary of discussions that have taken place during the selection process and the negotiations. The signing of the agreement is not a time to expand the services beyond what was requested in the selection process, and to do so would be inappropriate.

B. [1.54] Design Phase

The design professional is hired, first and foremost, to prepare specifications and drawings that will permit a contractor to construct a project. This is true whether the project is a wastewater treatment plant, a new city hall, a gymnasium, a new school, or a civic center.

The level of complexity of the project and the size and capacity of the public entity will often determine the number of steps that a design professional will take in getting to that point where

the drawings can be used for the construction of the project and the specifications have been completed. Public owners often will want to comment on the development of these documents.

The design phases used in a construction project are outlined in AIA Document B101, *Standard Form of Agreement Between Owner and Architect* (2007). For any significant construction project, these milestones of design are important to keep the project within budget and within the expectation of the owner and to further refine a construction schedule.

C. [1.55] Bidding and Negotiation Phase

The professional services agreement should include a delineation of the responsibility of the design professional during the bidding and negotiation phases.

Although not exclusively, the predominant means by which public entities enter into construction contracts is a public bidding process. The public policy behind public competitive bidding for the lowest responsible bid is the subject of numerous articles. It is intended to remove any favoritism or politics, to the greatest extent possible, from the award of construction contracts.

The role of a design professional is to assist in evaluating the submittals to provide that a given bid that is received is responsive to the request and that the contractor is, in fact, a “responsible” contractor. Design professionals have an expectation of being involved in this phase of the contracting process, and their role should be specifically set forth.

D. [1.56] Construction Phase

The detailed duties that a design professional will have during the construction phase can be found at length in any of the standard form agreements. It is important that the contract be reviewed carefully, that the services that are being requested are specified, and that the expectations of the public body and the design professional are the same with respect to duties and responsibilities.

Nothing is more critical than the public owner’s specification of the amount of construction observation that a design professional will do. This typically is a reimbursable expense in addition to the basic design fee. The nature and expectation of a construction observer need to be clear to the public owner. In addition, the compensation of any construction observer must be understood, *i.e.*, if it is going to be an extra, that it is a cost in addition to the basic fee.

If a public owner desires to create its own professional services agreement, an appropriate starting point is the most recent version of AIA Document B102, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect’s Services* (2007), or the Illinois Capital Development Board’s professional services agreement found on its website, www.cdb.state.il.us/cdbweb.nsf/forms. These are the two professional services agreements that the author of this section is most familiar with. The professional services agreements of the Engineers Joint Contract Documents Committee, the Illinois Department of Transportation, and other organizations may also be reviewed and compared to develop an appropriate professional services agreement for a specific situation.

E. [1.57] Qualifications-Based Selection

A public body that is going to engage a design professional for a construction project must understand the statutory requirements of the qualifications-based selection process, whether that statutory provision is the Local Government Professional Services Selection Act, 50 ILCS 510/0.01, *et seq.*, the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act, 30 ILCS 535/1, *et seq.*, the Brooks Architect-Engineers Act of 1972, 40 U.S.C. §1102, *et seq.*, or an ordinance of a home-rule governmental body. It is that understanding that will allow the appropriate selection of a design professional based on qualifications and experience criteria. The selection of a qualified design professional will lead to a project that meets the government body's objectives and, hopefully, will also lead to a project in which the least amount of problems will arise. These goals are furthered by selecting appropriate contractual provisions and ensuring that the decision makers for the public body understand what is contained within the contractual agreement.

V. PUBLICLY BID PROJECTS

A. [1.58] Introduction

The private consumer is free to purchase design and construction services from whomever it wishes for any reason, including favoritism, religion, political viewpoint, or any other basis for permissible private contractual action. The relationship between the parties is based on the law of contract.

The public sector must overcome the electorate's skepticism over expenditures from the public purse. Notwithstanding dedicated and honorable procurement officers, self-dealing and real and perceived political abuse have resulted in a public demand for transparency, which mandates a procurement process beyond reproach, *i.e.*, a fundamentally fair bidding process. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill.App.3d 163, 773 N.E.2d 1155, 266 Ill.Dec. 85 (1st Dist. 2002). The oft-stated purposes of competitive bidding are to enhance competition; prevent corruption and undue influence; guard against favoritism, improvidence, extravagance, fraud, and corruption; prevent waste of public funds; obtain the best economic result for the public; stimulate advantageous marketplace conditions; and obtain the most advantageous contract for government. All are desirable goals; whether in practice the goals of best economic result or prevention of public waste are achieved is subject to the reality of the influences of the political process and the quality of the chosen construction delivery system, contractors, and designer.

This chapter does not provide a detailed analysis of the statutorily imposed principles and requirements of each and every public entity in Illinois. What is important is an understanding that an Illinois public (non-home rule) entity may act only based on the authority expressly given to it. "Municipalities are limited to only those powers which are given to them by constitution and statute, and a municipality cannot be bound by a contract that does not comply with the prescribed conditions for the exercise of its power." *Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 565 N.E.2d 669, 673, 152 Ill.Dec. 136 (1st Dist. 1990).

Public entities have enabling legislation granting them express authority to purchase goods and services. Most public entities by statute are required to publicly bid goods and services. Compliance with the terms and conditions of the statutory requirements is critical to successful contract practices. Many states have a single bidding law applicable to all public entities. The American Bar Association Section of Urban, State and Local Government promulgated the MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS (1979) and the MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS: RECOMMENDED REGULATIONS (1980) to create procurement uniformity nationally. Illinois, on the other hand, has a discrete bidding statute for virtually each and every distinct type of public entity, and Illinois has more public entities than any other state in the union. Most statutes require award to the lowest responsible, responsive bidder. A few authorize award to the lowest and best bid.

All public purchases, contracts, and expenditures for goods and services that (1) exceed the statutory threshold monetary limit, and (2) are not exempt are to be awarded pursuant to public bid to the lowest responsible, responsive bidder. Failure of a public entity that is statutorily required to make all purchases, contracts, and expenditures for goods and services by award pursuant to public bid to the lowest responsible bidder may result in a void contract. *Branigar v. Village of Riverdale*, 396 Ill. 534, 72 N.E.2d 201 (1947).

The purpose of this discussion is not to provide an exegesis of each of the arcane, idiosyncratic rules and principles applicable to each public entity. Indeed, it has been noted that the public bidding process is laden with arcane principles. *M.J. Paquet, Inc. v. New Jersey Department of Transportation*, 335 N.J.Super. 130, 761 A.2d 122 (2000). The purpose of this discussion is to highlight commercial concerns and to anticipate and avoid disruption of the public bidding process so that an award can be issued, a contract can be executed, and a notice to proceed can be authorized without the intervention of the judicial process due to a challenge by either a citizen/taxpayer or a disgruntled bidder. Any judicial intervention may result in significant delay claims. As noted in *Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago*, 389 Ill.App.3d 138, 904 N.E.2d 1158, 1174, 328 Ill.Dec. 648 (1st Dist. 2009), in rejecting a challenge to the award of a contract to the next-lowest bidder and upholding the public entity's characterization of the low bidder's material deviation from the bid specifications as nonresponsive, "[t]o hold otherwise could, with all due certainty, negatively affect the competitive bidding process by resulting in protracted litigation about issues such as good faith, intent and inadvertence. Our legislature armed public bodies such as the District here with discretionary authority to award public contracts. Judicial interference with this, to any extent beyond that here, is unwarranted."

B. [1.59] Prequalification

Prequalification of bidders is a technique to generate interest in bidders while contemporaneously prequalifying those interested bidders. The energy and expense involved in prequalification must be questioned. In many instances, a prequalification program is a marketing technique for construction managers to justify billing during the pre-construction phase and a lure to potential trade contractors to assist in generating cost estimation data. If the goal is marketing the project, mere notice of the project to the construction manager's stable of preferred trades

should be sufficient. In lieu of the time and expense of prequalification, energy should be devoted to marketing to the trades the scope of the project and encouraging bidding; accurate, detailed cost estimation to enhance the likelihood that the project will come within budget; and detailed “constructability reviews” of the design documents, *i.e.*, whether the design is complete and provides the information necessary to construct the project and whether conflicts between trades have been anticipated and avoided or minimized. A true, detailed exercise of due diligence and determination of the lowest responsible and responsive bidder does not and cannot occur until the low bidder is identified. Only at the time the low bidder is identified can a focused assessment be made of current financial data, bonding ability, rating of insurers, and surety as well as of the most recent relevant anecdotal project experience.

Prequalification, of course, does not preclude subsequent reevaluation of the qualifications of the low bidder and subsequent disqualification prior to award. *Crest Construction Corp. v. Shelby County Board of Education*, 612 So.2d 425 (Ala. 1992); *Bucko Construction Co. v. Indiana Department of Transportation*, 850 N.E.2d 1008 (Ind.App. 2006). See also ABA, MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS §3-402, Commentary (2007).

1. [1.60] State of Illinois

The chief purchasing officers of state agencies have express discretionary authority under the Illinois Procurement Code and regulations to prequalify vendors of supplies and services when doing so is in their best interest. 30 ILCS 500/20-45; 44 Ill.Admin. Code §1.2045. Award may be denied to a vendor because it did not prequalify. 44 Ill.Admin. Code §1.2045(5).

The Illinois Procurement Code provides for the development of a prequalified supplier list for certain professional services and periodic updating of those lists. 30 ILCS 500/35-15.

2. [1.61] Units of Local Government

Presumptively, units of local government, if following the general procurement requirements imposed by statute, have the right to prequalify bidders.

CAUTION: In *Engineering Contractors Association of South Florida, Inc. v. Broward County, Florida*, 789 So.2d 445 (Fla.App. 2001), the county’s practice of short-listing potential bidders violated the state’s competitive bidding law because (a) contractors who were admittedly responsible and satisfied all the criteria used in awarding the contract were not placed on the prequalified bidders list and permitted to submit a bid, and (b) the bid was awarded to the lowest bidder among those preferred by the selection committee. The court concluded that the short-listing procedure circumvented the purposes of competitive bidding.

C. [1.62] Expediting the Process

The political exuberance to promise the electorate the completed project in a truncated and perhaps unrealistic time frame is the cause of incomplete drawings and specifications with multiple addenda issued before the bids are to be received, creating confusion, multiple claims for

extras, and potential delay. The higher the quality and detail of the plans and specifications, the more accurate the bid and the less likely the demand for change orders, extras, and delay. Realistic design and construction schedules should be established consistent with complexity of the project and the reality of the construction season in the geographical local.

D. [1.63] The Bid Package

The bid package should include instructions to bidders, supplemental instructions to bidders, a bid submittal form, the owner-contractor agreement, general conditions, supplementary conditions, drawings, specifications, and addenda issued.

E. [1.64] The Bidder's Representation — The Doctrine of Patent Ambiguity

A contractor's bid on a project implies that he understands the plans and specifications. A contractor must exercise a high degree of care to assure a complete understanding of the plans and specifications. *Clark v. Pope*, 70 Ill.128 (1873). If a patent ambiguity exists in the plans and specifications, it is the duty of the contractor to seek clarification of the inconsistency that appears in the bid document.

The contractor must give the owner notice of patent ambiguities prior to submittal of a bid or acceptance of the contract. Failure to give the owner such notice may impose an obligation to perform work that was reasonably necessary to complete the project. Typical language dealing with this issue provides as follows:

Instruction to bidders:

Should discrepancies appear among the contract documents, the contractor shall request in writing an interpretation from the architect before proceeding with the work. If the contractor fails to make such request, the architect shall determine which of the conflicting requirements shall govern, and the contractor shall perform the work at no additional cost to the owner in accordance with the architect's determination.

General conditions (see 48 C.F.R. §252.236-7001):

Omissions from the drawings and specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications or that are customarily performed shall not relieve contractor from performing such omitted or misdescribed details of the work, but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

A clause that imposes on the contractor the duty to perform “[a]ll work which is necessary to carry out the intent of the drawings and specifications or which is customarily performed for such work” has been interpreted as (1) imposing on the contractors responsibility for what they knew or reasonably should have known to be erroneous specifications, but (2) absolving them of responsibility for contract errors that are not obvious. *Appeal of Phelps Construction Company of Wyoming*, 65-1 B.C.A. ¶4761, 1965 WL 352 (Armed Services B.C.A. 1965).

AIA Document A701, *Instructions to Bidders* §2.1.1 (1997), provides that by submitting a bid, the “Bidder [represents that it] has read and understands the Bidding Documents or Contract Documents, to the extent that such documentation relates to the Work for which the Bid is submitted, and for other portions of the Project, if any, being bid concurrently or presently under construction.”

Bidders must be encouraged to bring to the attention of the owner or its representative ambiguities or inconsistencies in the bid documents. Any ambiguity should be clarified through the addenda process. Failure to clarify by addenda will result in bidders submitting proposals based on their definitions of the scope of the work. The owner is effectively and unknowingly evaluating nonresponsive bids.

A bidder who does not seek clarification of a patent ambiguity from the owner may not take advantage of any apparent error or omission in the plans and specifications. *J.H. Berra Construction Co. v. Missouri Highway & Transportation Commission*, 14 S.W.3d 276 (Mo.App. 2000). The bidder has a duty to examine the specifications, judge the efficiencies, detect reasonably discoverable or patent defects or ambiguities, make appropriate inquiries, and give the owner notice of such defects and ambiguities. The bidder must be held to some degree of accountability. *W.H. Lyman Construction Co. v. Village of Gurnee*, 131 Ill.App.3d 87, 475 N.E.2d 273, 86 Ill.Dec. 276 (2d Dist. 1985); *United States v. Spearin*, 248 U.S. 132, 63 L.Ed. 166, 39 S.Ct. 59 (1918); *Fortec Constructors v. United States*, 760 F.2d 1288 (1985); *Blue Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed.Cir. 2007)(“[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.”).

In *Beacon Construction Company of Massachusetts v. United States*, 314 F.2d 501, 504 (Ct.Cl. 1963), the court stated:

The bidder who is on notice of an incipient problem, but neglects to solve it as he is directed to do by this form of contractual preventative-hygiene, cannot rely on the principle that ambiguities in contracts written by the Government are held against the drafter . . . Even more, the bidder in such a case is under an affirmative obligation. He “should call attention to an obvious omission in the specification, and make certain that the omission was deliberate, if he intends to take advantage of it.” . . . If the bidder fails to resort to the remedy proffered by the Government, a patent and glaring discrepancy (like that which existed here) should be taken against him in interpreting the contract. We do not mean to rule that, under such contract provisions, the contractor must at his peril remove any possible ambiguity prior to bidding; what we do hold is that, when he is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government’s representatives if he intends to bridge the crevasse in his own favor. Having failed to take that route, plaintiff is now barred from recovering on his demand. [Citations omitted.]

A contractor has a duty to read the entire contract and a duty to inform itself as to contract representations concerning the parts of the contract describing significant portions of the work. Such an inquiry should lead the contractor to discover obvious or potential discrepancies between sections in the specifications, *e.g.*, narrative and technical sections. Discovery of a patent discrepancy triggers a duty on the contractor to inquire. *See Gardner-Zemke Co. v. State of New Mexico*, 109 N.M. 729, 790 P.2d 1010 (1990); *Chris Berg, Inc.*, 1964 B.C.A. (CCH) ¶4199 (Armed Services B.C.A. 1964).

Most industry-recognized contract documents require the contractor to apply to the architect for clarification and direction. For example:

Should discrepancies or ambiguities appear among the Contract Documents or between the Contract Documents and existing conditions, the Contractor shall request an interpretation or explanation from the Architect before bidding. If the Contractor fails to make such request, it is presumed that both provisions were included in the bid and the Architect shall interpret the ambiguity and/or determine which of the conflicting requirements shall govern. The contractor shall perform the work at no additional cost to the owner in accordance with the Architect's determination. Where conflicts exist between or within the contract documents or between the contract documents and applicable standards, codes, ordinances or manufacturer's recommendations and clarification has not been requested from the architect prior to bidding as provided for herein, the more stringent or higher quality standard shall prevail.

If the contractor chooses to rely on its own skill and judgment and this results in a mistake, the contractor must bear the consequences. When the contractor fails to raise questions regarding the plans and specifications, the contractor is bound by the architect's interpretation of the contract. *Acme Builders, Inc. v. Facilities Development Corp.*, 51 N.Y.2d 833, 413 N.E.2d 1164, 433 N.Y.S.2d 749 (1980). Patent ambiguities require the contractor to identify the ambiguity and afford the design professional an opportunity to issue an addendum to all bidders clarifying the ambiguity.

Another source of dispute is a "typical" drawing detail. A detail may be identified as "typical," which would apply in all comparable situations. The "typical" detail may not be repeated in other drawings, hence, the following recommended language:

The contractor shall provide all work and material that any section or part of the Drawings, Specifications, or conditions require him to provide regardless of whether such requirement is or is not faithfully repeated in other parts of documents thereof to which the provision might be appropriate.

F. [1.65] Addenda to Bid Documents

"Addenda" are modifications, interpretations, additions, deletions, clarifications, or corrections to the bid documents prior to the award of the contract. The particular importance of written addenda to all bidders is to clarify obvious ambiguities during the bidding process. A contractor should not be allowed to rely on oral interpretations of the contract that were not

disseminated in writing to all other bidders. To do so is to give one bidder a competitive advantage over other bidders. *SMC Corp. v. New Jersey Water Supply Authority*, 334 N.J. Super. 429, 759 A.2d 1223 (2000).

It is usually not until the last-minute time crunch of putting the bid together that a patent ambiguity that needs clarification via addenda is identified. However, virtually all bid instructions impose a cutoff date for requests for clarifications several days before the bid opening. The ambiguity disclosed to the design professional goes unanswered. In a perfect world, the time and date for the bid opening should be extended to afford all bidders the opportunity to benefit from the clarification of the ambiguity via addenda. However, construction projects are time- and season-driven, and addenda are typically not issued within the cutoff period. It is recommended that the contractor, without conditioning its bid and creating the potential of being declared nonresponsive, merely indicate its attempt to seek clarification of the ambiguity through the architect and declare its assumption in submitting its bid. This may preserve the contractor's claim, leaving room for argument that the ambiguity was patent, that it was recognized, and that clarification was requested and left unanswered. If the bidder's assumption is determined to be wrong, the bidder may attempt to seek an extra if awarded the contract.

G. [1.66] Substitution of Materials, Products, or Equipment

A bid should be based on the materials, equipment, and component systems specified by the contract documents, without exception. Selection of materials, products, and equipment is a complex process. Presumptively, the owner hired the design professional based on the designer's experience in similar projects of the same nature, magnitude, and complexity and the designer's familiarity with materials, products, and components suitable for the project. Presumptively, once materials, products, and components of the project are identified, the relational compatibility of adjacent materials, products, and components (*e.g.*, structural compatibility, chemical compatibility, and compatibility based on the coefficient of thermal expansion and contraction) will be verified before inclusion in the specifications.

Contractors, too, have significant experience with materials, products, and components that may be suitable for the project but are not specified. However, unilateral or unapproved substitutions should be unauthorized. Strict compliance with a well-defined substitution approval process should be required to assure compatibility. If timely, any approved substitute materials, product, or equipment should be issued as an addendum to all bidders.

H. [1.67] Clarity of the Scope

Objectively, does the bid submittal form clearly define the scope of the work, alternates, and unit price work with some reasonable estimate of volume in order to determine the lowest responsible bidder? The bid submittal form must clearly identify what is within the base contract and what is an extra. Too often confusion reigns due to different details that use the same definition. *E.g.*, the "upper" gable detail is within scope, and the "lower" gable detail is outside scope and subject to unit pricing; neither of the gable details in the bid submittal form or the project manual is identified or defined as either "upper" or "lower."

I. [1.68] Methodology of the Award

A public entity is given due deference in the exercise of its discretion in awarding the contract. *Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago*, 389 Ill.App.3d 138, 904 N.E.2d 1158, 328 Ill.Dec. 648 (1st Dist. 2009). Instructions to bidders typically afford the owner the discretion to accept alternates in any order or combination to determine the low bidder, calculated by adding the base bid plus the approved alternates. However, the award is subject to impermissible manipulation; *e.g.*, alternates can be chosen as a basis for awarding the contract to the local bidder or for some other impermissible purpose. To avoid challenges to the award, the authors have two suggestions:

1. Articulate at the immediate time of the bid opening the preferred alternates to be awarded based on the financial ability of the public entity to elect the alternates.

2. All good business decisions should be memorialized. It is recommended that the procurement officer prepare a recommendation of award memorandum articulating the rationale for the award of the contract based on the base bid and alternatives selected.

J. [1.69] Bid Security

Bid security in the form of a bid bond is generally not statutorily mandated. However, every state public works project in excess of \$50,000 and every public works project by a political subdivision of the state in excess of \$5,000 requires a performance and payment bond. 30 ILCS 550/1.

Why a bid bond in lieu of a certified cashier's check made payable to the owner as security for execution of the contract upon award? A bid bond serves two functions. First, it provides the owner with security that if, upon award of the contract, the contractor refuses to execute the contract, its surety is responsible for paying the penal sum of the bond. Second, and more important, it gives the owner confidence that the contractor is capable of securing a performance and payment bond for the value of the contract promptly upon award. If a bid bond is not required and if the contractor has not previously secured a performance and payment bond, it could take months for a bond to be secured. An audited financial statement is required by all sureties. An investigation must be performed by the surety as to the financial, technical, and management capabilities of the contractor.

Hence, from the date of the award the project could be halted in its tracks due to the lack of a performance bond and payment bond. It is in the owner's best interest to require a bid bond on construction projects and verify the bonding capacity of the contractor.

1. [1.70] Invoking Forfeiture of the Bid Bond

Recovery on a bid bond requires that all conditions have ripened to impose a duty on the contractor to enter into the contract. The owner must award the contract in a timely manner and promptly submit the contract documents for execution by the successful bidder within the time identified in the specifications. The owner's failure to follow the specifications may bar recovery.

For example, In *Hennepin Public Water District v. Petersen Construction Co.*, 54 Ill.2d 327, 297 N.E.2d 131 (1973), the contractor submitted low bids for two public projects. The successful bidder was to execute the contract documents within 60 days of the closing of the bids. The owner submitted the contracts 67 days after the closing of the bids. The court found that the contractor was under no obligation to execute the contracts after the expiration of the 60-day period. Recovery on the bid bond was denied. Similarly, in *Hanover Area School District v. Sarkisian Brothers, Inc.*, 514 F.Supp. 697 (M.D.Pa. 1981), the specifications provided that the contract would be awarded within 60 days, requiring bidders to hold their bids for the same period. The owner requested the successful bidder to extend its bid for an additional 15 days, *i.e.*, a total of 75 days. The contractor refused. The owner rebid and awarded the contract to another bidder. The owner sought damages from the original low bidder. The court denied recovery, finding that since the owner deviated from its own instructions to bidders, there was no default by the low bidder, and the owner could not recover on the bid bond. *See also Western Sand & Gravel Co. v. Town of Cornwall*, 2 Ill.2d 560, 119 N.E.2d 261 (1954) (owner's forfeiture of bid bond was inappropriate because public owner did not accept low bid and refused to execute contract; owner's conduct constituted counterproposal that was not accepted by contractor; owner had no right to proceeds of forfeited bid security because no award had been made).

2. [1.71] Forfeiture of Bid Security

Under standard form instructions to bidders, a bidder's refusal to enter into a contract or failure to furnish performance and payment bonds as required results in a forfeiture of the bid security as liquidated damages. AIA Document A701, *Instructions to Bidders* §4.2.1 (1997). However, modification of this clause could impose an entitlement to the actual damage sustained by the failure of the contractor to enter into the contract, *i.e.*, the difference between the bids of the lowest bidder and the second-lowest bidder who is awarded and enters into the contract.

K. [1.72] Sacrosanctity of Public Bid Submissions

A public official's ability to communicate with a potential bidder is strictly limited to (1) disclosure of the name of any person who has submitted a bid in response to or requested plans or specifications regarding an invitation to bid, and (2) conveying information concerning acceptable alternatives or substitutes to plans or specifications if such information is also made generally available to the public and mailed to any person who has submitted a bid in response to or requested plans or specifications regarding an invitation to bid on a public contract. Of course, once an award of the contract has been made, the public official may disclose the award. 720 ILCS 5/33E-12.

There is an evidentiary presumption that all persons who submit bids in response to an invitation to bid by any unit of state or local government submit their bids independently of all other bidders, without information obtained from the governmental entity outside the invitation to bid. There is an evidentiary presumption that a bid submittal is a good-faith effort to obtain the contract. 720 ILCS 5/33E-10. Criminal penalties are severe for violation of these evidentiary presumptions, *e.g.*, bid rigging (720 ILCS 5/33E-3), bid rotating (720 ILCS 5/33E-4), acquisition or disclosure of bidding information by a public official (720 ILCS 5/33E-5), interference with

the bidding process by a public official (720 ILCS 5/33E-6), offers of kickbacks to public officials (720 ILCS 5/33E-7), participation by a public official in the profit from the award of any contract (720 ILCS 5/33E-17), and stringing of contracts to avoid the public bidding process (720 ILCS 5/33E-18).

L. Modification or Withdrawal of Bids

1. [1.73] Withdrawal of Bids — Before Opening

A bid once submitted in response to an advertisement for public bids constitutes an irrevocable offer and cannot be withdrawn, usually for the period stated in the bid solicitation. *Elsinore Union Elementary School District of Riverside County v. Kastoff*, 54 Cal.2d 380, 353 P.2d 713, 6 Cal.Rptr. 1 (1960). However, bid instructions may allow a bid to be withdrawn prior to bid opening. A bidder may be allowed to submit a new bid upon withdrawal of a previous bid.

2. [1.74] Modification of Bids — After Opening

A competitive bid that contains a material variance is an unresponsive bid and may not be corrected after the bids are opened in order to make it responsive. *Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill.App.3d 340, 422 N.E.2d 1078, 52 Ill.Dec. 869 (1st Dist. 1981). To authorize the change of a bid in any material respect after the bids are open is a clear violation of the purpose, intent, and spirit of the law and opens the door for preferences and favoritism as between the different bidders, if not the grossest frauds. *City of Chicago v. Mohr*, 216 Ill. 320, 74 N.E. 1056 (1905). A bid containing a material variance must be rejected. The contract may be awarded to the next-lowest bidder. A public owner may not negotiate with the lowest responsible bidder over the terms of the contract. A public owner may negotiate only a reduction in the price of the bid. 720 ILCS 5/33E-12.

M. Award of the Contract

1. [1.75] Lowest Bidder

The lowest bid is a simple concept. Application of the concept in a competitive bid setting with multiple discretionary alternates, unit prices, and a base bid can be complex. Standard form documents grant an owner authority to accept alternates in any order or combination and to determine the low bidder on the basis of the sum of the base bid and alternates accepted. *E.g.*, AIA Document A701, *Instructions to Bidders* §5.3.2 (1997). When unit prices may be significant, an assumed or anticipated volume of units for each unit category should be included in the matrix of determining the lowest bidder. The bid form should clearly indicate the various categories of work to be included in determining the basis of calculating the low bid.

2. [1.76] Responsive Bidder

A “responsive bidder” means a person who has submitted a bid that conforms in all material respects to the invitation for bids. 30 ILCS 500/1-15.85. Every standard form instruction to

bidders grants the owner the right to reject any or all bids and to waive informalities and irregularities, reserving to the owner the right to award the contract based on its own best interests.

a. [1.77] *Minor Variance*

A variation from the bid specifications that neither deprives the public entity of its guarantee that the contract will be performed nor grants the successful bidder an advantage over competitors constitutes merely a technical irregularity that can be waived. *Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill.App.3d 340, 422 N.E.2d 1078, 52 Ill.Dec. 869 (1st Dist. 1981). Courts have recognized that competitive bidding should be administered in a manner so as not to thwart the primary purpose of achieving economy, fairness, and transparency. Public entities should be afforded due deference in their decision-making processes in the absence of abuse of discretion or manifest injustice. *Williams Brothers Construction, Inc. v. Public Building Commission of Kane County*, 243 Ill.App.3d 949, 612 N.E.2d 890, 184 Ill.Dec. 14 (2d Dist. 1993).

For example, failure of a contractor to hold a current license is waivable. *Thompson Electronics Co. v. Easter Owners/Integrated Systems, Inc.*, 301 Ill.App.3d 203, 702 N.E.2d 1016, 234 Ill.Dec. 362 (3d Dist. 1998) (when bid specifications do not require current license and contractor is capable of securing license before commencement of project, deficiency is waivable.) See also *Quality Fixtures, Inc. v. Multi-Purpose Facilities Board for Pulaski County, Arkansas*, 337 Ark. 115, 986 S.W.2d 865 (1999). However, when the public entity establishes a licensing requirement, it may enforce the requirement, disqualifying an unlicensed bidder. *M & B Construction v. Yuba County Water Agency*, 68 Cal.App.4th 1353, 81 Cal.Rptr.2d 231 (1999). From a practical standpoint, the need for a contractor to achieve licensure before its construction responsibilities are on the critical path should give a public entity justifiable pause before awarding a contract to a contractor that is not licensed as required by the state.

Failure to list subcontractors as required by the specifications did not provide the lowest bidder with an unfair cost advantage. *Williams Brothers, supra*.

In *Arcon Construction & Management Services, Inc. v. Saratoga County Office of General Services*, 15 Misc.3d 1147, 841 N.Y.S.2d 818 (2007), a bidder's completion of a preprinted bid form included a preestablished contingency of \$300,000. The form required the bidder to add up all of the lines, including the contingency, for a total bid. The total amount of the bid in question was the sum of the first seven lines and did not include the contingency amount. The county's consulting engineer recognized the "mistake" made by the bidder and adjusted the total by \$300,000, making the bidder the second lowest bidder. The bidder informed the engineer that its bid was "not mistaken" and that it intended its original bid submittal to include the contingency, thus making it the lowest bidder. The county awarded the contract to the "low bidder." Arcon challenged the award based on the after-the-fact explanation of the exclusion of the \$300,000 from the bid, noting that the estimator's worksheet did not support the explanation. The court concluded that Arcon did not provide any evidence that the successful low bidder gained any

unfair advantage or evidence that the discussions regarding the bid mistake were post-bid, pre-award negotiations that tainted the bidding process. The county possessed the right to waive nonmaterial deviations that occurred in the bidding process, and the rationale provided was sufficient.

In *Tec Electric, Inc. v. Franklin Lakes Board of Education*, 284 N.J. Super 480, 665 A.2d 803, 805 (1995), the court suggested that “where the irregularity is not substantial, it may be the duty as well as the right of the municipality to waive it,” quoting *Township of River Vale v. R.J. Longo Construction Co.*, 127 N.J. Super. 207, 316 A.2d 737, 744 (1974). In *Tec Electric*, Tec’s bid documents omitted a one-page “Prequalification Affidavit” that was part of the state’s statutory qualification scheme. The affidavit required the bidder to state that there had been no material adverse change in the qualification information. The prequalification affidavit was to be sent to the Department of the Treasury for a determination of whether a change in status had occurred. The ten-item bidder checklist prepared by the board of education, however, did not list the prequalification affidavit. The checklist specified inclusion of a form indicating a determination by the New Jersey Division of Building and Construction that the bidder was qualified as required by New Jersey law. Tec Electric submitted all of the ten specified items but did not include the prequalification affidavit. The contract was awarded to another company. Here, the court found that Tec Electric and its surety were financially and contractually committed to the project, the omission did not influence the amount of any other contractor’s bid, and there was no evidence of manipulation of the bidding process for competitive advantage. The court held that refusal to waive the defect was an abuse of discretion.

Compare *Tec Electric* with *George W. Kennedy Construction Co. v. City of Chicago*, 135 Ill. App.3d 306, 481 N.E.2d 913, 90 Ill. Dec. 113 (1st Dist. 1985), *vacated on other grounds*, 112 Ill.2d 70 (1986), in which the failure of the president to include his signature on all bid submittals was considered a material deviation. The author of this section believes the decision to be wrong. The company and its surety evinced an intent to be bound by the contract. The omission of one signature among scores of signatures and a bid bond was a minor variance that could have been waived. If the purported purpose of public bidding is to produce economy, in the absence of manipulation of the bidding process for competitive advantage, it may constitute an abuse of discretion to refuse to waive a variance. However, current law grants a public entity’s exercise of discretion in denying the bidder the opportunity to cure the defect due deference in its decision-making process and would be upheld. See *Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago*, 389 Ill. App.3d 138, 904 N.E.2d 1158, 328 Ill. Dec. 648 (1st Dist. 2009) (failure of low bidder to execute “utilization plan” that was clearly and unequivocally mandated as articulated at pre-bid conference and denoted in bid instructions found by both trial and appellate courts to be material variance in that lack of signature on utilization page gave apparent low bidder advantage of being able to negotiate (and/or bid shop) with minority subcontractors after it was awarded contract; further, purchasing agent testified that MWRD uniformly rejected all bids in which utilization plan was missing signature or otherwise incomplete).

b. [1.78] Material Variance

Bid submittals must be in strict compliance with the bid specifications and instructions to bidders. A two-pronged test determines whether a noncompliant bid constitutes a material and

non-waivable irregularity: whether the deviation would have the effect of depriving the public entity of its assurance that the contract will be entered into, performed, and guaranteed according to its specified requirements; and whether the deviation is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. Eugene McQuillin, 10 THE LAW OF MUNICIPAL CORPORATIONS §29.65, pp. 584 – 586 (3d ed. rev. 2009).

A public entity confronted with a material deviation in an otherwise low bid submittal has two choices: (1) award the contract to the next lowest responsible bidder; or (2) reject all bids and readvertise.

In *Bodine Electric of Champaign v. City of Champaign*, 305 Ill.App.3d 431, 711 N.E.2d 471, 238 Ill.Dec. 368 (4th Dist. 1999), submission of a five-percent bid bond by the low bidder in lieu of the specified ten-percent bid bond was a material variance notwithstanding the bidder's submission of a ten-percent bid bond within 5 days of the bid opening. The city council concluded that the variance was material and awarded the contract to the next-lowest bidder. The low bidder challenged, arguing that the variance was minor and could be waived. The court concluded that the low bidder was not in compliance with the bid instructions and could refuse to execute the contract with significantly smaller risk of forfeiture of its bond. This constituted a substantial advantage or benefit not enjoyed by other bidders. The court concluded that the city did not abuse its discretion in declining to award the contract to the low bidder.

A bidder's failure to list minority and small business subcontractors with the bid submittal as required by the specifications was a material deviation requiring rejection of the bid. *Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill.App.3d 340, 422 N.E.2d 1078, 52 Ill.Dec. 869 (1st Dist. 1981). Failure to comply with affirmative action requirements was cause to reject a contract. *John N. Brunfeldt & Sons, Inc. v. Board of Education of City of Chicago*, 54 Ill.App.3d 119, 369 N.E.2d 283, 11 Ill.Dec. 829 (1st Dist. 1977). *See also Rossetti Contracting Co. v. Brennan*, 508 F.2d 1039 (7th Cir. 1974) (failure to submit required commitment to hire minority workers on federally assisted construction project was nonresponsive bid requiring rejection).

In *Court Street Steak House, Inc. v. County of Tazewell*, 163 Ill.2d 159, 643 N.E.2d 781, 205 Ill.Dec. 490 (1994), the court upheld the exercise of discretion of weighting the bid for jail food service based on the use of disabled employees, a noble and honorable consideration. However, from a competitive bid perspective, the use of disabled employees was not identified as a consideration or the basis of the award of the contract. Indeed, if the county wanted to encourage the use of disabled employees, it should have been indicated in the bid specifications that use of disabled employees would be given a weight in the decision to award to the lowest bidder. In this case, a nonresponsive bidder received considerable economic advantage by submitting a second-lowest bid coupled with a factor that did not place it on the same playing field as all other bidders. It is the opinion of the author of this section that all bids should have been rejected and that use of disabled employees should have been disclosed as a weighted consideration in the next round of bids. A similar example arises when a bidder unilaterally submits a two-percent deduction of the

bid based on payment within 30 days of invoice. This offer materially alters the terms and gives the bidder an economic advantage that potentially elevates it above the plane of the other bidders. If discount for prompt payment is an important term of the contract, it should be applied to all bidders to be fair.

Failure of the president to include his signature on all submittals was considered a material deviation. *George W. Kennedy Construction Co. v. City of Chicago*, 135 Ill.App.3d 306, 481 N.E.2d 913, 90 Ill.Dec. 113 (1st Dist. 1985), *vacated on other grounds*, 112 Ill.2d 70 (1986). As indicated in §1.77 above, the author believes that this was an immaterial defect that could and should have been waived.

3. [1.79] Responsible Bidder

A “responsible bidder” means a person who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good-faith performance. 30 ILCS 500/1-15.80.

What does the word “responsible” connote? In the bidding context, “responsible” is not necessarily employed to mean a trustworthy bidder. However, a finding of non-responsibility does not therefore connote untrustworthiness. Rather, while “responsible” includes the attribute of trustworthiness, it also has reference to the quality, fitness, and capacity of the low bidder to satisfactorily perform the proposed work. *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, 7 Cal.3d 861, 500 P.2d 601, 103 Cal.Rptr. 689 (1972).

Under the Illinois Procurement Code, to be considered a responsible bidder on a State of Illinois construction contract, a bidder must meet all of the following requirements and must present satisfactory evidence of compliance to the appropriate construction agency:

(1) The bidder must comply with all applicable laws concerning the bidder’s entitlement to conduct business in Illinois.

(2) The bidder must comply with all applicable provisions of the Prevailing Wage Act.

(3) The bidder must comply with Subchapter VI (“Equal Employment Opportunities”) of Chapter 21 of Title 42 of the United States Code (42 U.S.C. 2000e and following) and with Federal Executive Order No. 11246 as amended by Executive Order No. 11375.

(4) The bidder must have a valid Federal Employer Identification Number or, if an individual, a valid Social Security Number.

(5) The bidder must have valid certificate of insurance showing the following coverages: general liability, professional liability, product liability, workers’ compensation, completed operations, hazardous occupation, and automobile.

(6) The bidder and all bidder's subcontractors must participate in applicable apprenticeship and training programs approved by and registered with the United States Department of Labor's Bureau of Apprenticeship and Training. 30 ILCS 500/30-22.

The exercise of due diligence upon identification of the low bidder and actively pursuing current information from key project owner personnel, construction management, or design personnel on comparable projects can provide a public owner with the anecdotal information necessary to reject a low bidder or feel comfortable in the ability of the apparent low bidder to perform the work.

4. [1.80] Articulating the Basis of the Award

To avoid a perception that the bid process is politicized, before the actual award of the contract the procurement officer should carefully articulate the basis of the recommendation of the award to the governing board or the chief procurement officer with authority to award the contract. Post-award justification of the action is always suspect and has significantly less weight of persuasion than a pre-award articulation of the basis of the award.

N. [1.81] Anticipating a Challenge to the Award

For the contractor submitting a bid, understanding the methodology available to challenge an award is of critical concern. Truncated time restraints and esoteric bid challenge procedures may exist. A decision to challenge an award may come too late or be procedurally barred.

For the public entity, it is of paramount importance to award the contract in a timely fashion in order to achieve completion as established by the contract documents. Any delay, particularly a judicial challenge to the award, can significantly impact the timely completion of the project. In an era of fast-track, multiple-prime, multiple-bid package projects, it is very likely that contractors are mobilized and engaged in the construction process when a second or third bid package is issued, awards are made, and the work in the bid package is on the critical path. A judicial challenge to the award of the trade on the critical path has the potential not only to delay the project but also to subject the owner to delay damages from the contractors thwarted from proceeding due to an interruption of the critical path caused by judicial intervention. From a pure economics perspective, it is of paramount importance to swiftly and economically resolve the bid dispute and avoid disruption of the critical path.

In *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192 (Tex.App. 1999), architects engaged by the school district did not recommend a low bidder for a San Antonio high school renovation project. The architectural firm, but not the school district, was sued under theories of tortious interference with business reputation, defamation per se, business disparagement, and negligence. The architect defended based on two clauses included in the instruction to bidders:

By submitting a bid, each bidder agrees to waive any claim it has or [may] have against the Owner, the Architect/Engineer, and their respective employees, arising

out of or in connection with the administration, evaluation, or recommendation of any bid; waiver of any requirements under the Bid Documents; or the Contract Document; acceptance or rejection of any bids; and award of the Contract.

* * *

Representations: By execution and submission of this Bid, the Bidder hereby represents and warrants to Owner as follows:

(B) the Bidder has read and understands the Bid Documents and the Contract Documents and this Bid is made in accordance with the Bid Documents. 995 S.W.2d at 194 – 195.

The bidder was afforded statutory notice of the school district's intent to award the contract to a bidder who was not the lowest bidder and an opportunity to appear before the board.

On a motion for summary judgment, the architect successfully argued that the waiver included in the bid specifications was an affirmative defense barring recovery. As a matter of public policy, courts have recognized limitations placed on a rejected bidder's claim for damages. The bidder sought damages against the architect and not the school district. The court held that participation in the bidding process effectively served as the bidder's consent to an investigation of its work history and other information, opening the door to the possibility of a negative assessment and recommendation.

It is suggested that, as a matter of public policy, instructions to bidders and a bid submittal form under an Illinois project with similar broad language restricting judicial review could be successfully challenged for want of transparency. However, if a forum is established to challenge an award that meets minimal due process, such a process should be capable of promptly and economically resolving a dispute over the propriety of an award of a contract. See §1.84 below.

VI. APPENDIX

A. [1.82] Bidder Prequalification Checklist

A private construction owner's bidder prequalification process may include an analysis of the following information:

- 1. General business information**
 - a. Full legal name**
 - b. Trade name or DBA**
 - c. Address**

- d. Telephone, fax, website
 - e. Legal name and address of parent company (if applicable)
 - f. Legal name and address of subsidiaries (if applicable)
 - g. Other offices, representatives, agents, or contacts
2. Organization information
 - a. Federal tax identification number
 - b. D-U-N-S number
 - c. Minority certification number (if applicable)
 - d. E-mail address
 - e. Organizational form (corporation, partnership, joint venture, proprietorship, or other)
 - f. Date founded and state of state of formation
 - g. Organization type (manufacturer, distributor, wholesaler, retailer, manufacturer's representative, general contractor, specialty contractor, professional service, other)
 - h. Business size and ownership classification with applicable documentation (small business, minority-owned, women-owned, certified 8(a), other)
3. Organization personnel (officers' names, titles, and lengths of service)
4. Union affiliation
 - a. Union contracts and/or registration with the National Maintenance Agreements Policy Committee
 - b. Involvement in previous strikes, walkouts, lockouts, or slowdowns
5. Financial information
 - a. Previous annual reports, certified financial statements, or balance sheets for previous three years
 - b. Annual sales for previous three years
 - c. Dun & Bradstreet rating

- d. **Bonding capacity and rate**
- e. **Banking reference**
6. **Insurance data (insurance company contact and policy limits)**
7. **Construction experience**
 - a. **Completed projects (project name and location, contract amount, contact information, completion date)**
 - b. **Current projects in process (project name and location, contract amount, contact information, start date, and expected completion date)**
 - c. **Previous projects with owner**
8. **Performance**
 - a. **Explanation of any previous projects that were not completed**
 - b. **List of pending or outstanding claims, suits, or judgments against or brought against organization**
 - c. **Previous projects, including liquidated damages**
9. **Company safety information**
 - a. **Copy of corporate safety program**
 - b. **Copy of training program**
 - c. **Contact information and qualifications/certifications/training for safety and health representative**
 - d. **Frequency of on-site inspections and safety meetings**
 - e. **New employee orientation**
 - f. **Explanation of procedures/training included in the safety program**
 - g. **Substance abuse policy**
 - h. **Annual safety goals and incentive program**
 - i. **Standard Industry Classification (SIC) number(s) or corresponding North American Industry Classification System (NAICS) number(s)**

- j. Number of OSHA citations**
 - k. Experience modification rate**
 - l. Summary of work-related injuries and illnesses from OSHA Form 300A**
- 10. References (major clients from the past five years)**
- 11. Type of work interested in bidding (electrical, mechanical, piping, instrumentation, other)**

B. [1.83] Bid Evaluation Matrix Template

Owner considerations in the bid evaluation process may include the following concepts. The criteria should be revised based on the procurement type and other project considerations. To utilize this type of evaluation, each reviewer would rank each bid on a numerical scale, *e.g.*, 1 – 5 when 1 = negative; 2= slightly negative; 3 = average; 4 = slightly positive; 5= positive.

- 1. Market Awareness, Contracting Strategy, and Experience**
 - a. How extensive is the bidder’s experience on similar projects?**
 - b. How extensive is the bidder’s awareness of market conditions and ability to accurately assess future market conditions to the owner’s advantage?**
 - c. Has the owner previously contracted with the bidder? If so, how successful was the bidder’s previous work?**
 - d. How well did the bidder describe its project experiences as related to the scope of the RFP?**
 - e. How closely does the bidder agree with owner’s chosen contracting strategy?**
- 2. Cost and Schedule Considerations**
 - a. How desirable is the (*e.g.*, rate schedule, unit price, fixed price) provided by the bidder?**
 - b. Does the bidder demonstrate the ability to comply with the project schedule/milestone dates/delivery dates, etc.?**
 - c. How open is the bidder to allowing the owner to view internal project-related metrics and/or audit records?**
 - d. How high is the perceived quality of the bidder’s scheduling procedures?**

e. How effectively does the owner believe the bidder can track and report internal costs as required?

3. Staffing

a. Does the bidder understand the proposed scope of work (i.e., extent and complexity)? The evaluator may consider experience with specific technology or equipment identified for the project.

b. How qualified is the proposed project team or staff?

c. Does the bidder present a realistic staffing plan for obtaining and staffing the project in support of the work scope and schedule?

4. Business Relationships

a. How effective is the bidder's use of women-owned businesses?

b. How effective is the bidder's use of minority-owned businesses?

c. How effective is the bidder's use of local businesses?

[Comment: Favoritism is a prohibited basis for award in the public sector. *Best Bus Joint Venture v. Board of Education of City of Chicago*, 288 Ill.App.3d 770, 681 N.E.2d 570, 576, 224 Ill.Dec. 255 (1st Dist. 1997) (although specifications afforded local business 2-percent preference when compared to nonlocal bidders, without express statutory authority, such conduct constitutes favoritism; award of contract on this basis is invalid arbitrary and capricious action).]

5. Contract Terms

a. Did the bidder take exception to important contract terms?

b. How receptive is the bidder toward key terms (e.g., warranty, insurance coverage)?

c. How difficult will it be to reach final commercial agreement regarding the terms and conditions?

d. Does the bidder propose commercial or technical alternatives that may decrease cost, scope, or schedule? If so, are the alternatives acceptable in lieu of the original terms?

6. Technical Evaluation

a. Did the bidder take significant exceptions to the specifications? If so, are any of the exceptions unacceptable to the owner?

b. Does the bidder demonstrate its understanding of the scope of work and performance requirements?

c. Does the bidder communicate that it will comply with all applicable industry standards and codes?

7. Standards and Quality Control

a. Does the bidder possess a rigorous, effective quality control process?

b. How receptive does the bidder seem to be with respect to adhering to established owner processes?

8. Other Issues the Owner Wants To Consider (*e.g.*, information sharing, ownership of work product, use of subcontractors)

C. [1.84] Bid ADR Clause

Use as addendum or insert into instructions to bidders:

1. Withdrawal of Bid — Bid Mistake

1.1 *After Expiration of 60 Days.* A bidder may not withdraw his bid before the expiration of 60 days after the date of the opening of bids; thereafter, a bidder may withdraw his bid only in writing and in advance of (before) an actual award.

1.2 *Error in Bid.* When a bidder claims to have made a mistake, the mistake must be called to the attention of the Owner within 24 hours after the opening of bids. Within 48 hours of the bid opening, a bidder shall submit original documentary evidence to the Owner's designated contracting officer with a detailed explanation of how the mistake was made. Failure to conform to this requirement precludes the bidder from withdrawing its bid based on a bid mistake. If such notice, proof, and explanations have been tendered and the contracting officer is convinced that a bona fide mistake has been made, the contracting officer may recommend to the governing board that the bidder be allowed to withdraw its bid and recommend that the bid be awarded to the next lowest responsible, responsive bidder. If the governing board determines by majority vote that the bidder has made a bona fide error, no award will be made on that bid, and the bid security will be returned.

2. Bid Disputes

2.1 *Final and Binding Arbitration.* By submitting a bid and by executing the bid submittal form, each bidder agrees to submit to final and binding arbitration any claim it has or may have against the Owner, the Architect/Engineer, the Construction Manager, and their respective employees arising out of or in connection with the administration, evaluation, recommendation to award or reject any bid, or award or rejection of any bid.

2.2 Demand for Arbitration within 48 Hours. An unsuccessful or successful bidder must serve on the Owner a written demand for arbitration within 48 hours of the award of the contract or waive any challenge to the award or rejection of the award. The demand for arbitration shall set forth with specificity the factual and legal bases of the challenge to the rejection or award of the bid. Within 48 hours of receipt of the demand for arbitration, the Owner shall respond in writing, answering the factual and legal bases for the award. Either party may request and receive documentation from the other party pertaining to the bases of the award or rejection of the bid.

2.3 Selection of Arbitrator. The parties shall promptly select an arbitrator from the membership of the Society of Illinois Construction Attorneys (www.soica.org) or such other arbitrator as the parties expressly agree and set a date for hearing on the challenge to the bid award or rejection. If the parties are unable to agree on an arbitrator, either party may initiate a claim before the American Arbitration Association. An arbitrator shall be selected by a case manager of the American Arbitration Association on a fast-track procedure basis. Proceedings shall be had in accordance with the American Arbitration Association Construction Industry Arbitration Rules then in effect to the extent consistent with the provisions herein.

2.4 Expedited Process. A hearing shall be set as expeditiously as appropriate to allow a fair hearing and prompt disposition of the dispute without delay in issuance of a notice to proceed and the commencement of the Project.

2.5 Expenses of Arbitration. All expenses pertaining to the arbitration of the award or rejection of the bid shall be shared equally between the participants to the arbitration.

2.6 Final and Binding. The decision of the arbitrator shall be final, binding, and enforceable, and judgment may be entered on it in accordance with the applicable law in any court having jurisdiction thereof.

Add to the bid submittal form:

Bidder, by executing and submitting this bid submittal form, expressly agrees to the expedited dispute resolution process contained in the Instructions to Bidders.

NOTE: Without this adding this language, submittal to final and binding arbitration may not be enforceable.