

# The Irresponsible Bidder on Public Works Contracts

BRUCE J. BERGMAN

Mr. Bergman is a Deputy County Attorney for Nassau County, New York, in charge of public works litigation, and counsel to D'Amato, Forchelli, Libert, Schwartz, Mineo & Weinstein, Mineola, New York. He is also an Adjunct Assistant Professor of Real Estate with the Real Estate Institute of New York University, a Director of the Nassau County Bar Association, past Chairman of its Real Property Law Committee, and a frequent lecturer to bar associations and other professional groups.

**W**HILE local statutes may vary, it is well recognized throughout the United States that most public contracts over a certain dollar amount must be let pursuant to competitive bidding. The purpose is to prevent corruption, favoritism, and reckless expenditure, while obtaining the best contract terms. Sometimes the object is viewed as the conservation of public welfare, or to foster honest competition and guard against imprudence or extravagance.

However, the beneficiary is the public entity, and that should be readily apparent. Also obvious is the mandatory character of bidding statutes. Non-observance will render the contract void.

Most bidding laws will require a letting to the lowest *responsible* (or best) bidder. For the few statutes that do not recite such qualifying language, case law has held nevertheless that words to that effect must be read into the requirements.

What is less apparent — and what is of overriding importance to all municipalities — is how they may determine whether a prospective contractor or vendor is the right party to engage, and what action can be taken.

By way of example, suppose a county must reconstruct a bridge. The work involves some dangerous conditions, thereby requiring considerable expertise. Moreover, during the reconstruction process a major detour will occur, seriously affecting the traveling public.

Assume further that of the ten bids received, company X was lowest at \$7 million with company Y next lowest at \$7.4 million. But company X was very slow in constructing a road for a nearby town and was found to have done some paving improperly. Company Y, however, has an exemplary record of past performance.

Must the county save the \$400,000, award to the lowest bidder, and risk the contract with a company whose ability is questionable? The answer is probably "no" and that it the vital subject to be explored.

## What Is Responsibility?

When a city council, county legislature, board of commissioners, or any other public body charged with the responsibility of awarding a contract has reservations about the contractor, the doubts could be based upon a myriad number of factors. Although these will ultimately be dependent upon the specific facts of each case, the courts have attempted to offer some guidelines.

These concepts have been stated in various ways and give a sense of where the municipality stands. One formulation was the mere fact that a contractor's proposal for public work as the lowest bid does not necessarily entitle him to the contract.

Stated another way was the view that the duty to award contracts to the lowest responsible formal bidder requires consideration not only of the price bid, but also of the bidder's qualifications to perform the work proposed.

More specific is the position that a responsible bidder is one who possesses sufficient capital resources, skill, judgment, integrity, and moral worth. Similar is the pronouncement that the term "responsibility" is not limited in meaning to financial responsibility, but also means ability to do the job. Still other synonyms include "accountable" and "reliable."

It is critical to recognize both the mechanics and technicalities of how municipal officials are to proceed when they have doubts about a bidder's responsibility. Once a decision is reached that a contract is not to be awarded to a bidder perceived as irresponsible — how that must be done will be reviewed — the aggrieved bidder will have certain paths of relief.

In some jurisdictions, there may be internal administrative appeals, with a later possibility to go to court. However, in most areas, the aggrieved bidder will have the right to go to court and ask the judiciary to overturn the municipal decision. Preliminarily, note that the municipality's decision cannot have been arbitrary or capricious. If it was, the court will

interfere. If on the other hand, the decision had some "reasonable" basis, the courts will be extremely reluctant to substitute their judgment for that of the officials representing the public.

A typical argument advanced by a rejected bidder is that it has been denied a "property right," thus entitling it in the first instance to a hearing by the municipal authorities. New Jersey appears to be the only state where court decisions would require a hearing. Although a few of the more obscure bidding statutes may by their own terms mandate a hearing, absent such statutory imposition, the majority view is that such a hearing is not required.

While a hearing can be said to be unnecessary, the decision to reject must have some solid foundation to resist judicial attack, which is one of the keys to this entire issue. A public contract award requires the exercise of judgment and discretion and where there is found to be a rational basis for the administrative determination, the judicial function is exhausted and the administrative agency, not the court, is the final arbiter. Thus, the courts may not interfere with the lawful exercise of discretion vested in the awarding body, and it is rare that a court will direct an administrative agency or official to award a contract to a particular bidder.

Sometimes the municipal decision to reject a bidder is honored if it has a "reasonable" or "rational" basis. Alternatively, the standard could be expressed in terms of "good faith" or "common sense" or "plausibility." The reverse is that the municipality cannot have been arbitrary, capricious, or unreasonable in making its decision. Absent capriciousness, therefore implying reasonableness, rationality, and common sense, as noted, the courts will not readily impose their own opinion. How the courts will be in a position to decide if the decision fits one of the categories of reasonableness or whether it is somehow arbitrary, will depend not only on the facts that have been the basis of the rejection, but the steps taken by the municipal officials to reach the decision.

## What the Municipality Must Do

Somehow, the quality of the municipality's decision must have a basis for a court to honor. Obviously, in

those rare circumstances where an actual hearing is required, it must be granted. If a hearing is held, it must be fairly conducted and the contractor must be given sufficient latitude to present its case. Even where a hearing is not necessary, the municipality may choose nevertheless to give one. If it does, however, the hearing cannot be a charade lest the municipality open itself to a finding of arbitrariness.

But the usual case is that the municipality evaluates its information and reaches its conclusion. Here is where it must be careful. Essentially the concept is simple. There must be some independent decision made by the officers charged with the responsibility coupled with the honest exercise of discretion.

Where a town board accepted without question the report of its engineer without exercising its own judgement, the court overturned the rejection. Similarly, where there was neither hearing nor investigation conducted, the decision was deemed arbitrary. Where, however, in addition to an architect's recommendation, a school board proceeded with its own investigation and gathered "other evidence," its decision to reject was upheld.

### **Some Factual Examples**

It cannot be emphasized too strongly that the ultimate disposition of any irresponsible bidder case must depend upon the local statute involved and the precise facts of the particular situation. Usually, though, the municipality will be upheld unless its basis for rejection was blatantly trivial, against public policy, or just devoid of foundation. But an analysis of some categories that supported rejection should be enlightening.

**Broad Discretion.** Since municipal decisions are presumed to be exercised for the benefit of taxpayers, we begin with the idea that the courts generally give wide latitude to conclusions reached. Thus, even where the municipalities' direction to reject a bidder did not prove that the contractor was incapable of performing the contract, where the evidence gave rise to legitimate doubt, the discretion would not be interfered with.

Similarly, where two bidders were unknown to the municipality, each was asked to submit recommendations of past performance. Inquiry concerning the low bidder elicited one response from an architectural firm that the bidder had satisfactorily done a job for the firm ten years previously. Another response was that the low bidder could not be favorably recommended because of difficulties in recent years and inability

to obtain approval from underwriting laboratories. Recommendations for the second low bidder were uniformly positive. The municipality's rejection was concurred in by the court.

**Lack of Financial Worth.** A contractor's financial ability to perform, sometimes determinable by a review of financial data required by bid documents, is a significant factor that courts weigh in considering responsibility. For example, after the initial contractor was defaulted for failure to perform, the job was rebid and let to the second low bidder. Understandably concerned with a new contractor's ability to complete, the board sought financial information. Reports from financial rating services were unsatisfactory and the low bidder itself refused to furnish any financial statement, relying upon borrowed funds to proceed with the work. The board's rejection of the low bidder was found under these circumstances to be reasonable and in good faith.

In another case the low bidder was awarded a paint supply contract upon condition that it furnish a performance bond within a set period of time. Upon failure to comply, even after an extension of time, the town rescinded the contract award for irresponsibility, which was ruled not to be arbitrary or capricious.

**Lack of Experience or Technical Ability.** Can the contractor do the job is another valid inquiry a municipality will make. One actual case involved a complex electrical job requiring the contractor to have a "first class" engineering organization. But the low bidder did not have the engineering personnel or the ability to perform an intricate installation. Despite the low bidder's claim at a hearing that it was in a position to hire an engineer, it was held insufficient to negate its lack of expertise at the time of the bid, and thus the holding of irresponsibility withstood attack.

An even tougher ruling resulted on a project for construction and installation of incinerator equipment. Although the low bidder had in the past constructed and installed incinerator equipment, it had never previously constructed a mechanical stoker or installed incinerator equipment involving a mechanical stoker. The bidder chosen over the low bidder had not only installed many, but even patented one. In upholding the town, the court said the issue was not the town's wisdom, but the reasonableness and plausibility of its decision.

In another case, a court concurred in a finding of irresponsibility based upon facts about the low bidder that it was a corporation with no employees, no experience in building construction, and insufficient financial re-

sponsibility. Apparently petitioner had bid with the intention of assigning the contract to another corporation for performance, in violation of local statute.

**Past History Unsatisfactory.** Although a contractor's past performance is not necessarily dispositive of his prospective work on a project to be started, an unfavorable prior record can be the reasonable and rational basis to reject. In one case, "poor service" in the past coupled with unacceptable "delivery and billing practices" was sufficient to disqualify a bidder on a fuel oil delivery and service contract.

A village refuse removal contract was the subject in another case where the second low bidder had been satisfactorily serving the community for three years when its contract expired. The low bidder's price was only slightly lower than that of the second bidder. After investigation, the board received reports that the low bidder had rendered unsatisfactory service on a refuse removal contract with a neighboring town.

The low bidder argued that these reports were simply unsubstantiated rumor initiated by its competitor. Once again, the finding of irresponsibility as the exercise of reasonable discretion was upheld.

**Ethics, Morality, and Criminal Activity.** Avoiding contractual relationships with individuals of firms convicted or charged with criminal activity or who are of questionable ethics is another basis for a declaration of irresponsibility.

Recalling that moral worth is one of the standards to be adjudged in awarding public works contracts, note these facts on a sewer project. An investigation of the low bidder demonstrated that the firm was a front for a particular individual and his corporations whose activities in connection with public construction contracts over a number of years had brought them into frequent conflict with the criminal law and its enforcement agencies. That was enough to confirm a finding of irresponsibility.

In another matter, a local city charter prohibited acceptance by its officers or employees of any gift, loan, or thing of value from persons or corporations doing business with the city, empowering the comptroller to void contracts with such parties. In furtherance of this policy, executive memorandums were issued, listing firms that had given things of value to city employees or officials.

The low bidder appeared on one such list, but contended that its gifts cost between \$17.50 to \$30.00 each, were not "things of value" as con-

*(Continued on page 123)*

## New Safety Standards

New standards for the solid waste management industry have been approved in revisions to ANSI Standard Z245.1-1984, *Safety Requirements for Mobile and Stationary Compaction Equipment*. Changes include a ban on steps across the rear of rear-loading compactors and requirements to identify lift points for heavy equipment components which must be raised for servicing, to add supports for lift bodies, for identification of changes when equipment is modified, and for operator training by end users.

## Road Maintenance Conference

The Fifth Annual National Road and Street Maintenance Conference and Product/Equipment Display will be held in Fort Worth, Texas, May 1 to 4, 1984. The conference will address both materials and procedures that are related to road and street maintenance. The program is designed to be of particular benefit to those involved in the management, design, or supervision of maintenance programs. The vendor display area will provide an opportunity for participants to review these exhibits and become further

aware of new equipment, techniques, products, and services which are useful to their operations. Registration and session topics information can be obtained by contacting the conference sponsor: The Center for Local Government Technology, 505 EN, Oklahoma State University, Stillwater, OK 74074 (405/624-6049).

## The Irresponsible Bidder

(Continued from page 76)

templated by the charter provision, were given merely as gestures at Christmas, and totaled but \$500. Such facts were found to warrant rejection as irresponsibility.

Still more harsh was the rejection of a bidder in the public interest based solely upon an indictment charging the bidder with first degree grand larceny and conspiracy involving its taking of topsoil from a state highway in the course of a construction job. the mere indictment—which is only a charge and not a conviction — was held a sufficient basis to decide irresponsibility.

## Conclusion

By virtue of all the statutory and case law, municipalities have the right to reject a low bidder or bidders if there is a reasonable, rational, com-

mon sense, good faith belief that the bidder is not responsible, as various cases have defined the term. To be considered reasonable, or to be within one of the other standards, the finding of irresponsibility may not be predicated upon advice without the independent judgement of the officials constituted with the authority to make the decision. This means that the decision must be based upon some good faith investigation or exploration of the facts.

While this investigation need not rise to the level of a hearing, it may, and frequently does. If a hearing is given, the municipality helps insulate its findings from attack, provided the hearing is as fair as possible.

The aggrieved bidder has legal recourse available to it to challenge the finding of irresponsibility, but if the municipality has met the cited tests, the courts most often will decline to substitute their judgement. However, as in any area, the particular facts of the case will ultimately be controlling.

What can never be neglected when examining the facts at hand is the idea that the bidding statutes have been developed for the benefit of the public—not the bidder. A good faith attempt by a municipality to protect its taxpayers is vital, and rarely interfered with by the courts. □□□

## RACINE HYDRAULIC BREAKER FOR TRACTOR BACKHOES

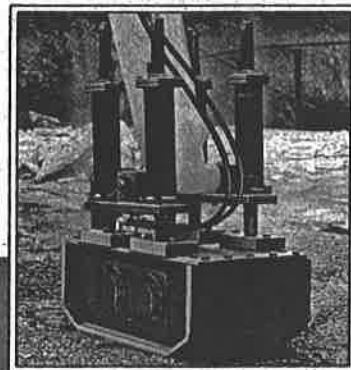
### The one for all.

When the job calls for more than manpower, mount Racine's MB-600 demolition tool on your backhoe to quickly break concrete, rock and frozen ground.

Patented hydraulic cushioning system protects the backhoe from the counter-blow... provides unmatched protection for backhoe and tractor. Versatile breaker hits 500 ft. lb. blows, 600 times per minute. Needs just 20 gpm at 1750 psig. Comes with standard roundmoil point, mounting plates and control valves.

### HYDRAULIC COMPACTOR FOR BACKHOES

Compacts granular and clay material, drives sheet piling and posts. Single pin connection provides better contact and compaction. Patented isolators virtually eliminate vibration to dipper stick and boom, and permit fast change to digging bucket.



**racine** HYDRAULIC TOOL DIV.  
2200 South Street • Racine, WI 53404 • 414/639-8770  
Division of Racine Federated, Inc.

For details circle No. A-79 on card