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ALERT

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Best Practices in Pennsylvania Public Construction Preparation of the "Front-End" Bidding Requirements

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Public construction in Pennsylvania and elsewhere continues to present substantial challenges to local governmental entities. While some projects have been deferred in the current health and economic climate, at some point, and we hope sooner rather than later, the normal course of public construction programs will resume. Local governments, and their architects, engineers and other design professionals can take advantage of what observations and experience have taught us about better ways to undertake and complete public construction projects. From these observations, we have developed what we call best practices in public construction. In this article, we will discuss one of these – preparation of "front-end" bidding documents in a form extensively revised from standard AIA documents.

Pennsylvania public construction continues to present substantial challenges to public entities.[1] Given current economic circumstances, many public entities have curtailed their construction programs.[2] While some projects have been deferred, at some point, and we hope sooner rather than later, the normal course of public construction programs will resume.[3] Most public projects in Pennsylvania proceed with design and bid project delivery and traditional financing through grants and the issuance of bonds, repaid with tax revenues.[4]

Experience being a great teacher, the question is what has experience taught us about the way to undertake and complete public construction projects using the traditional design and bid approach? Over the years, we have observed strategies that always work, those that work only some of the time, and those that rarely ever work. From these observations, we have developed what we call best practices in public construction.[5] In this article, we will discuss one of these – preparation of "front-end" bidding documents in a form extensively revised from standard AIA documents.

Architects create bidding and contracting documents in two parts. The part of the documentation that reflects the core design abilities of the design professional are of course the drawing and specifications. The other part is the "legal" section or "front-end." For example, the specifications for a project might be arranged in divisions, while the front-end, legal section is often called "division zero."

Architects and the design professional community generally are trained to think primarily in terms of the finished project. This is both natural and proper. We know from reviewing front-end legal sections drafted for Pennsylvania public projects that the legal requirements for bidding and construction are all too often not given the desired level of legal review and revision. The availability of AIA and other forms drafted with commercial projects in mind only exacerbates this problem. From our viewpoint, the front-ends are sometimes unchanged from project-to-project, and do not often reflect project-specific consideration of particular risks that are likely to be encountered during construction.[6]

There are many ways in which the bidding and construction processes can be made to work better. First, more effort needs to be made to attract bidders – architects and project and construction managers should be asked to make

special efforts at recruiting bidders for the construction contracts, and not merely rely on publicly required advertising. Second, the provisions of the bidding and construction documents should be made more reasonable. Often the design and construction managers, and lawyers as well, believe their job to be that of shifting every conceivable risk to the contractors, even when such shifting adds unnecessarily to prices and excessive contingencies on bid day, creates disputes during construction and is received with resistance and hostility by arbitration panels and courts (and therefore on occasion not enforced). Finally, and most pertinently in connection with this article, bidding documents should be revamped to use the latest in legal techniques to secure more reliable bids and to save the low bids from technical disqualification.[7]

Generally, the requirements set forth in a bidding document are mandatory and must be strictly adhered to in order for a bid to be valid. However, the Pennsylvania Supreme Court in Gaeta v. Ridley School District, 567 Pa. 500, 788 A.2d 363 (2002), decided 18 years ago, and as usually interpreted by the Commonwealth Court, provides a roadmap for how to save low bids from technical disqualification. In Gaeta a contract was awarded to a low bidder whose surety on the bid bond had a B+ rating, notwithstanding that the legal front-ends required an A-. Because a particular rating for the surety on a bid bond was not a matter of statutory mandate, and because the Court concluded that no competitive disadvantage to other bidders existed on the facts there, the Court held that the award was appropriate, notwithstanding this obvious technical defect. As stated by the Court, "where the requirements in a bidding document are not required by statute, and the bidding document reserves the right to waive defects, a non-compliant bid for public work may be accepted or cured if: (1) the effect of a waiver will not deprive a municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and (2) a waiver will not adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders." *But see* Dragani v. Borough of Ambler, 37 A.3d 27, 30 (Pa. Commw. 2012) (reservation of right to "waive any informality" inadequate to avoid disqualification for failure to provide a consent of surety in a sufficient amount).

The position of a public entity will be substantially better if the front-ends are modified to provide specific rules in specific contexts, thereby avoiding litigating over the Gaeta meaning and its application. By providing explicit rules in applying Gaeta principles in a number of different contexts, bidders and the public entity will know exactly how to treat various kinds of deficiencies. Under the principle in Gaeta, some defects can in fact be corrected, while others cannot, as evidenced by comparing Gaeta with Dragani. Unless changes are made to the bidding documents issued, the public entity will be vulnerable to a dispute.

The basic concept in clauses drafted to take advantage of Gaeta, is to set forth specific rules applicable to specific deficiencies. At all times, the operative legal principle in Gaeta must be preserved. Whatever the deficiency, the correction cannot be allowed where the revision to the bidding submission would affect the integrity of the bids and bidding processes, in order to invite competition and to guard against favoritism, improvidence, extravagance, fraud and corruption in the award of contracts. For example, a bidder cannot be permitted to change its bid amount or submit a bid that is unsigned. Both of these requirements are critical to the integrity of the process.[8]

Examples of circumstances that can be addressed in the bidding rules include:

- Failure to submit a non-collusion affidavit in the bidding package
- Inadequate or incomplete qualification questionnaire responses
- Failure to submit necessary or desired certifications with the bid
- Failure to submit a financial statement

None of these requirements, if allowed to be corrected post-bid, would affect the integrity of the bidding process, meaning the price offered and the binding nature of the commitment. We have used a number of clauses to address these and similar issues for nearly two decades and have not had a protest lodged on the front ends we've prepared.

We must confess that there are some "gray areas" where some judgment, very specific legal advice, and some measure of tolerance for risk are required. With proper drafting, even these types of deficiencies can be guarded against in advance without affecting the integrity of the bids.

In conclusion, once specific rules have been adopted in anticipation of the inevitable deficiencies, experience teaches that bid protests can largely be eliminated. Proper application of these techniques does not require a determination as to whether a deficiency is somehow "technical" or not, does not require the public entity to make difficult determinations on what is called bidder "responsiveness," and does not require litigation in court. Best of all, the lowest bid received is more often than not the basis of an award.

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1. Public entities in Pennsylvania are generally categorized as state agencies, counties, cities, towns, townships, boroughs, authorities and school districts. Most laws thought of as public bidding laws will apply to each of these entities. But there are numerous other entities that may be bound by some of the public bidding laws. Each law must be examined to determine if the law applies in a specific circumstance.
2. COVID-19 presents special challenges to operating a construction project, and of course the virus's economic impact has had and will continue to have a negative effect on public construction programs in the near term.
3. We might even anticipate a surge of infrastructure projects of all kinds. Public buildings may need major modifications. There's been lots of talk about traditional infrastructure projects, and that talk may turn to action as a way of increasing economic activity and reducing unemployment.
4. When projects resume, we may see increasing use of public-private collaborations by public entities as an alternative to traditional bond financing. See https://www.saul.com/publications/articles/warren-co-authors-article-american-infrastructure for a discussion of strategies that help make private sector investment in public infrastructure projects succeed.
5. Although written from the perspective of projects in Pennsylvania, the concepts discussed here can readily be adapted for other jurisdictions. The laws in the various states have much more in common than not. The real variation is between construction contracting at the state and local level and that engaged in by the federal government.
6. Our two-part article on risk analysis and why public and non-profit entities should pay more attention to mitigating and eliminating potential risks on projects can be found at https://www.saul.com/publications/alerts/construction-newsletter-january-2007 (pages 1-5) and https://www.saul.com/publications/alerts/construction-newsletter-november-2007 (pages 4-6).
7. The method that is almost always used, adding a provision that allows the public entities to "waive technicalities" or "waive informalities," has never worked consistently to avoid bid protests. If a low bid is received with a technical defect, and the bidding documents say that the bid shall be rejected, the failure to actually reject the bid because of the technical deficiency can easily be challenged and protested. Even if the bidding documents are permissive, and say in effect that the public entity may disqualify on the grounds of the technical defect, the public entity either might face a challenge because it failed to exercise the authority or because it did!
8. Ironically, we would argue that a defect in a bid bond ordinarily cannot be corrected for complex reasons. In any event, the front ends should consider and create a specific rule for a defect in a bid bond.

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