



Legal Corner

Charles E. Schaub, Jr. Esq.
Hinckley, Allen & Snyder LLP



Court Confirms Discretion of Awarding Authority to Determine "Responsibility"

The United States Circuit Court of Appeals (1st Circuit) recently confirmed the broad discretion of an awarding authority to reject a low bidder on a public construction project based on independent investigations and outside information. That is to say, a DCAM Certified contractor may nevertheless face rejection when bidding on a public project, because an awarding authority may conduct its own investigation and make a determination based on information not contained in the contractor's certification files or update statement.

The case involved a contract for the expansion and renovation of a public library. Although the plaintiff contractor submitted the lowest bid on the project, the town rejected the bid after determining the plaintiff was not the lowest "responsible" bidder for the project under the Massachusetts public bidding statutes. The town based its decision on information it received about the contractor's performance in connection with eight other construction projects. Based on this information, which was not favorable to the contractor, the town awarded the contract to the next lowest bidder. The rejected bidder brought suit in federal court seeking a preliminary injunction.

When the United States District Court rejected the contractor's request for an injunction, the contractor appealed to the First Circuit. On appeal, the court summarized the Massachusetts public bidding statutes, by acknowledging that M.G.L. c. 149, § 44A, requires a contractor to produce a DCAM certificate of eligibility and an update statement to ensure that all information is current. The court noted that under the statutory scheme, an awarding authority must accept the lowest "responsible and eligible" bidder but that an awarding authority can consider other information. The plaintiff contractor claimed that the town, in making its decision, must be limited to information contained in the

certificate of eligibility and the update statement.

In support of its argument, the contractor noted that the outside information was "inaccurate and unfairly negative" and that the public bidding statutes were designed, in part, to limit the discretion of an awarding authority by establishing a centralized bidding process. However, the First Circuit disagreed and upheld the lower court's denial of an injunction. The Court of Appeals stated that if it accepted the contractor's argument, any awarding authority would be prevented from considering other relevant information in making decisions to accept or reject bids.

The court also noted that the Massachusetts Inspector General has required awarding authorities to make sepa-

...an awarding authority has broad discretion to accept or reject bids regardless of DCAM certification. DCAM certification alone is not sufficient to render a contractor "responsible"

rate determinations regarding a bidder's qualifications. Further, the bid protest decisions by the Massachusetts Attorney General, interpreted the public bidding statute as empowering awarding authorities with broad discretion to

continued on page 17

Legal Corner

continued from page 15

conduct independent investigations and consider outside information in making decisions on the issue as to whether the bidder was responsible. Finally, the court noted that the update statement requires a listing of contact information, including telephone numbers, which allows awarding authorities to contact previous awarding authorities to discuss the qualifications of the bidder. In the court's view, these conversations could not conceivably be limited to confirming that the bidder had worked on the projects listed. The more likely interpretation, according to the court, was that the statute permits awarding authorities to have substantive discussions with other awarding authorities to exchange and consider information beyond the certification file and update statement. As a result, the Court upheld the lower court's decision.

This decision really confirms what has long been recognized, that an awarding authority has broad discretion to accept or reject bids regardless of DCAM certification. DCAM certification alone is not sufficient to render a contractor "responsible" under the public bidding statute: it is up to the awarding authority to decide whether a contractor is "responsible". Although DCAM certification and the update statement provide an awarding authority with information relevant to the decision-making process, this information will not be considered in a vacuum. In making decisions, awarding authorities can consider additional information such as a contractor's performance on previous projects. Past conduct can clearly have a significant effect on its future prospects. Therefore, it is important for a contractor to understand that its performance under each and every contract will be considered by an awarding authority in making decisions as to whether a contractor is responsible. ■

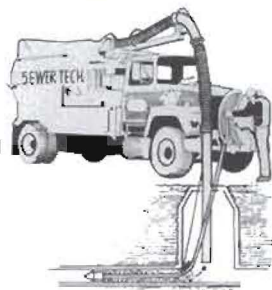
SEWER TECH, INC.

Sewer Tech, Inc.

VACTA-TECH A DIVISION OF STI

SERVICES

- **Vactor Services**
 - Manhole and Catch Basin
 - Pipe Cleaning
- **Video Inspection**
 - 3" to 30"
- **Pipeline and Manhole Testing**
- **Leak Detection**



672 UNION STREET—ROCKLAND, MA 02170
TEL: 781-878-0636 FAX: 781-878-5298

People You Trust

When It Matters

Vibra-Tech and GeoSonics provide a combination 80+ years of experience, services, instrumentation and 25 office locations which are unbeatable in the industry.

For further information, call Vibra-Tech or GeoSonics.

What does that mean to you?

Greater efficiency, better protection, more convenience, lower costs, fewer headaches and continued innovation.

The services we provide include:

- Monitoring Programs
- Geophysical Surveys
- Vibration Prediction Studies
- Blast Design Services
- Training Seminars
- Seismograph Manufacturing
- Pre/post inspections
- Damage Claim Investigations
- Expert Testimony



New!! Innovative SSU 5500 with Compact Flash™ memory card

VIBRA-TECH

GeoSonics

MA 978-692-9633 / CT 203-271-2504
Vibra-Tech 800-233-6181 GeoSonics 800-992-9395
www.vibra-tech-inc.com and www.geosonics.com