



Appeals Court Decision Raises Questions Regarding an Awarding Authority's Ability to Waive Substantive Non-Statutory Bid Requirements

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A decision of the Massachusetts Appeals Court has raised important questions regarding an awarding authority's ability to waive its own substantive bid requirements for a public construction project. It is well established in Massachusetts that an awarding authority is required to reject bids that fail to comply with a substantive requirement (versus a procedural requirement) of the public bidding statutes. What happens, however, when an awarding authority accepts a bid that fails to comply with a substantive requirement included in the bidding documents, not by statute, but by the awarding authority itself? Although the Appeals Court did not answer this question, its decision acknowledges the importance of this issue. The case is notable, not so much for the majority opinion, but for its concurring opinion, which may be read to suggest that an awarding authority may not waive non-statutory bid requirements "in any manner [it] wishes."

The case arose out of the solicitation of bids for a local road paving project. The bid documents required bidders to submit documentation demonstrating prequalification by the former Massachusetts Highway Department for recent past projects of similar nature and of equal or greater contract value. This provision was not required by statute; rather, this prequalification requirement was imposed by the town. Ultimately, the town awarded the project to the lowest bidder. To do so, however, the town had to waive the prequalification requirement it had written into its own bid documents.

When the town indicated that it would award the contract to the low-bidder, the second-low bidder brought suit to prevent the contract award. Although the Superior Court allowed an injunction staying the contract award process,

a single justice of the Appeals Court dissolved the injunction. In support of this decision, the single justice relied upon Massachusetts caselaw permitting an awarding authority to waive noncompliance with a non-statutory bid requirement. Accordingly, the town awarded the contract to the low bidder and work on the project commenced. The second-low bidder appealed to the full panel of the Appeals Court, contending that the town improperly waived a substantive (albeit non-statutory) requirement of the bid documents.

By the time the case reached oral argument in the Appeals Court, most of the project had been completed. As a result, and in light of the fact that the second-low bidder no longer had interest in reinstatement of the injunction, the Appeals Court concluded that the appeal of the injunction decision was moot and should be dismissed. Justice Trainor, however, (although he agreed that the appeal was moot) wrote a separate opinion stating his disagreement with the decision of the single justice with respect to the underlying issue in the case: whether an awarding authority can waive noncompliance with a substantive, non-statutory requirement of its bid documents.

According to Justice Trainor, the Massachusetts cases allowing an awarding authority to waive non-statutory requirements had involved non-substantive and ministerial bid requirements (such as a non-statutory requirement to file an equal opportunity certificate). Any failure to comply with such ministerial requirements could be cured before contract execution. In Justice Trainor's view, these types of requirements differed from the substantive prequalification requirement at issue in this case, which was "mandatory" and "essential" to a bidders' ability to submit bids in accordance with the town's bid

requirements. Justice Trainor further noted that the prequalification requirement (unlike certain procedural requirements) was not one that could be cured prior to a contract award. As a result, the justice observed that “[i]t would not be unreasonable to assume that other firms chose not to respond to the town’s request for bids because of their inability to comply with this mandatory prequalification requirement.” In other words, it is possible that some companies might have decided not to submit a bid because of this requirement.

Justice Trainor cautioned against the “arbitrary exercise of municipal discretion,” which violates the public bidding scheme. In the justice’s view, Massachusetts cases do not authorize an awarding authority to waive non-statutory bid requirements in any manner it wishes. Without guidance from the court as to whether a municipality may waive substantive, non-statutory bid requirements, businesses would be “incapable of knowing which mandatory bid requirements may be waived to their detriment, either for having bid or for not having bid.” In addition, without an answer from the courts, awarding authorities could engage in “foul play” in exercising their discretion to waive (or not waive) certain non-statutory requirements to favor one bidder over another. The Appeals Court agreed with Justice Trainor that these issues are “important ones that merit judicial examination.” Ultimately, because the project was essentially completed, Justice Trainor did not wish to undo the contract that had already been performed.

Justice Trainor’s opinion may be read to suggest that an awarding authority should not, as a general matter, have unfettered discretion to waive substantive, non-statutory bid requirements. Such discretion could undermine the public bidding process and allow for favoritism and unfairness detrimental to the public interest. Although the Appeals Court did not resolve this issue, the court’s decision may invite challenges to an awarding authority’s decision to disregard its own substantive bidding requirements in awarding a public contract. Awarding authorities should exercise caution in waiving non-statutory bid requirements and contractors should be wary when awarding authorities do so. As Justice

Trainor observed, while an awarding authority is free to impose its own bidding requirements prior to issuing a request for bids, it is “far from clear” whether an awarding authority “may change the basic and mandatory bid requirements after issuing such requests.”