



# Legal Corner

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## “UCANE CHALLENGES ARBITRARY PREQUALIFICATION”

*The June issue of Construction Outlook Magazine’s Legal Corner article addressed the subject of local pre-qualification regarding the 2004 Construction Reform Statute which was mandated for certain building projects including those over \$10 million.*

Since local pre-qualification began almost two years ago, the pre-qualification record of the local awarding authorities has been “spotty”. There has been confusion as to how to conduct such evaluations which has created an inconsistency in the evaluation of contractors for different awarding authorities. Many of the awarding authorities must perform pre-qualification without any experience in doing so. Likewise, the regulations, which were issued by DCAM, provide little guidance as to how to do the evaluation.

While the statute provides the categories which must be considered and allocates the points within these categories, the awarding authority is given wide latitude as to how to evaluate and ultimately award the points for the sub-categories as permitted within the legislation.

This has created a situation where many of the decisions are quite arbitrary, resulting in very subjective evaluations. Thus, many experienced contractors have been informed that they are “not qualified” and, therefore, cannot bid on the project. The statute provides that the only appeal from a denial of pre-qualification by a contractor is for “fraud and collusion” which is virtually an impossible standard to meet.

Recently, in one local pre-qualification relating to a treatment plant in which numerous UCANE members participated, the subjectivity just went too far. When an experienced firm failed and did not pre-qualify, it requested copies of all of the documentation from all contractors, together with the evaluation records so it could better understand how this occurred.

What it found was that there were virtually no records from the awarding authority as to how they arrived at the scores which they did. There were no records of interviews with references or any type of analysis as to how experience, etc. was ever evaluated. It also appeared that there were very arbitrary standards which were used in evaluating certain categories.

It was brought to the attention of UCANE and several other construction associations whose members were impacted by this an evaluation process. The Associations agreed the contractor had no real remedy inasmuch as there was no documentation which could establish fraud or collusion. However, the underlying

process was clearly suspect. It clearly was arbitrary and way too subjective and just didn’t fulfill the statutory mandate of being “fair, consistent and sufficient”.

As a result, a request for investigation was filed with the Attorney General’s office by UCANE, CIM, and ABC to challenge the process used by the awarding authority and requesting that the Attorney General issue guidelines

UCANE, CIM, and ABC challenge arbitrary pre-qualification and ask the Attorney General’s office to issue guidelines to awarding authorities and public agencies on the pre-qualification process.

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and instructions to public agencies as to how to perform this pre-qualification process. It is vitally important that this process be performed with as little subjectivity as possible in order to ensure that contractors are rated and evaluated in a manner based on information without "arbitrary" or overly subjective standards by local awarding authorities...who just are not experienced or qualified to perform this type of evaluation.

During the hearing, on the request of the Associations involved, the awarding authority acknowledged that they would appreciate and welcome assistance from the Attorney General (or anyone else) who could provide guidance as to how to do it. They noted that their consultant had no experience doing it and that any type of assistance would be greatly appreciated.

The hearing lasted over two hours, evaluating all of the various factors. From the questions that were asked by the representatives of the Attorney General, who participated in the process, it was clear that they understood that this was a serious issue which needed to be addressed. The matter was taken under advisement, and the Associations were invited to submit proposed procedures or qualifications to the Attorney General for review. The procedures could be issued as

guidelines or instructions to awarding authorities to assist with this local pre-qualification practice.

We are hopeful that we will get a decision from the Attorney General's office in the near future, which will address this significant issue. This would provide the awarding authorities with clear direction as to how to perform this pre-qualification evaluation in a manner which will assure that contractors are treated fairly to promote competition between responsible contractors on public projects.

*The results of the decision will appear in a future Legal Corner article. ■*



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