



# LEGAL CORNER

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

## Maximizing Available Funding

**A** recent decision on a bid protest highlights the need for awarding authorities to carefully scrutinize their bidding requirements to maximize their shrinking capital budgets during this recession. The Boston Water & Sewer Commission (“BWSC”) has long been a provider of opportunities for UCANE members that attempt to diligently control its procedures including bid submissions. However, such efforts have resulted in bid disputes due to the strictness and processes insisted upon by the BWSC.

The latest was a project that involved lining of critical pipes under the Boston Garden. Due to the strict timeline by which this had to be completed, etc., the Commission imposed requirements which it believed would help to ensure that the project would be promptly awarded and ultimately completed.

The Commission required that bidders had to submit the qualifications and information of the subcontractor and the proposed method for performing the lining work in a separate envelope from its bid and other documentation. The separate envelope was to be opened before the bids would be opened. If the envelope was not submitted, then the Commission would not open the bid. This process had been used only once before about five years ago. Two of the four bidders failed to submit the separate envelope as required in the bid documents. Thus, the Commission refused to open either of the bids.



The Commission only opened the bids of the two remaining bidders who had submitted the “separate envelope”. The Commission did securely, however, retain the unopened bids of the two other bidders.

One of the two unopened bidders filed a protest with the Bid Protest Unit at the Attorney General’s office, inasmuch as it had submitted the requested information, but within its bid, as was the usual practice as contrasted to the “separate envelope”. The basis was that there was no harm to the Commission inasmuch as there is no evaluation of the subcontractor’s information before the other bid was opened. It was just so that the Commission knew it was there.

It was undisputed that the Commission could validate the presence of such information seconds after it opened the second envelopes so there was no savings of time. The Commission took the position that it had determined that this information was so critical and that it wanted to stress how important it was by making it a condition precedent of a bidder being able to have its bid considered. Other than stressing the importance of the needed information, there was no other apparent benefit or need for this information so as to make it a condition precedent to the opening of the bid.

The Attorney General subsequently held a hearing and issued a decision in which it directed that the

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Commission proceed to open the bids of the other two bidders. The Attorney General's reasoning was that projects that are bid under M.G.L. c. 30, §39M do not provide authorization for an awarding authority to require "prequalification". To the contrary, there is language within the bidding statutes which indicates that bids which are submitted are to be publicly opened.

Thus, the determination was that such a requirement or condition or in essence prequalification of a bidder by requiring the submission of such information was beyond the authority granted to an awarding authority. The decision found that under the building provisions specified under Chapter 149, there is a prequalification process required for most projects involving either a DCAM certification or a local prequalification. However, for the non-building projects, there were no similar requirements or ability to have such a requirement.

As a result, the remaining bids were opened and one of the bidders turned out to be the lowest bidder, saving the ratepayers over \$50,000. The bidder was a responsible contractor and the subcontractor that it proposed to use was acceptable. The Commission ended up getting what it needed and at a substantial savings.

There are two important messages in this case.

1. Awarding authorities must be diligent in constantly reviewing their bidding processes in order to make sure that they can make their capital budgets do as much work as possible. There are just no funds available to perform all of the work which should be done so that the goal of any agency must be to maximize the available funding, while still making sure that it deals with responsible contractors. Instances such as this in which awarding authorities adopt very restrictive bid procedures which result in the rejection of an otherwise qualified contractor merely for the late submission of certain information or rigid procedures which, in essence, have no inherent benefit or necessity, must be avoided in order to maximize the amount of work which can be completed for the available funding. Rigid procedures, of little or no benefit, serve no one's interest.
2. As awarding authorities retain the discretion whether to waive non-statutory omissions overlooked in a bid, it must carefully consider the necessity of being too rigid in their application of such discretion so as to maximize the potential without, in essence, wasting valuable resources or comprising the integrity of the bidding process. ■

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