



Legal Corner

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LOCAL PREQUALIFICATION

An issue impacting general and subcontractors which concerns the prequalification provisions of the Construction Reform Legislation. As part of the reform package, the legislature enacted M.G.L. c. 144, §44D (1/2).

Last month, we focused on how a recent court decision resolved one of the issues created by the recent Construction Reform Legislation. The issue of who pays the premiums for prequalified subcontractors was determined in that the subcontractors must carry the cost of the bond premiums.

This month, we look at another issue impacting general and subcontractors which concerns the prequalification provisions of the Construction Reform Legislation. As part of the reform package, the legislature enacted M.G.L. c. 144, §44D (1/2).

This legislation allowed local awarding authorities to conduct their own prequalification of contractors and subcontractors on building projects which met the statutory requirements.

The statute set out a series of criteria to be used by the awarding authority in determining the "score" which would be earned by each prospective bidder in order to determine their "status" as a prequalified contractor. If a contractor was not prequalified through this process, it would not be allowed to submit a bid. The fact that a contractor may have a DCAM certification would not guarantee that such contractor would be determined to be "prequalified". The legislation also tasked DCAM to issue regulations to provide guidance to the local cities and towns as to how to conduct and implement this prequalification process.

In mid-2005, DCAM issued regulations which did not provide much guidance as to how to apply the criteria or to develop meaningful scores for prospective bidders. Some local municipalities and agencies have now utilized this process in attempts to prequalify contractors. From what has been observed, the lack of experience by numerous awarding authorities in conducting prequalifications has led to questions as to whether the statute is being applied as it was intended to be applied and as required by the mandate for competition in public construction.

...contractors are confronted with a statute which entrusts to a local awarding authority, the ability to determine whether they can be prequalified while giving up any right to appeal, though agencies that have vast more experience and expertise in prequalification provide such appeals.

A major shortcoming of the statute is that a prospective contractor denied prequalification has little recourse. The decision of the awarding authority can only be challenged on the basis of "fraud or collusion". The statute also puts the burden on the protestor to establish the fraud or collusion which, of course, is very difficult to establish.

Thus, even if a contractor learns that he was not treated fairly but was dealt with in an arbitrary and capricious manner, he has no ability to challenge the denial of prequalification. In other prequalifications by DCAM, MHD, or otherwise, there are appeals and challenges allowed to those who believed that the agency has acted in an arbitrary manner. Now, contractors are confronted with a statute which entrusts to a local awarding authority,

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the ability to determine whether they can be prequalified while giving up any right to appeal, though agencies that have more experience and expertise in prequalification provide such appeals.

Based on the limited or non-existent basis to challenge any arbitrary action by an awarding authority, it will not be long before there are court challenges as to whether the statute is constitutional because it really could deprive the contractor of a due process right to have its prequalification status determined in a fair and impartial manner. Due process would not permit arbitrary or capricious actions. It becomes a defacto debarment.

Due to the lack of the standards and any types of meaningful guidelines as to how to apply the criteria set forth in the legislation, there may also be challenges to the evaluation process conducted by an awarding authority as to whether it meets the basic standards for fairness. This process must comply with the overall goals of the competitive bidding statutes which are to promote and encourage competition with the maximum number of qualified participants.

We will continue to monitor these developments to see what transpires with respect to this statute, but it clearly is another little "hiccup" within the Construction Reform Legislation. ■



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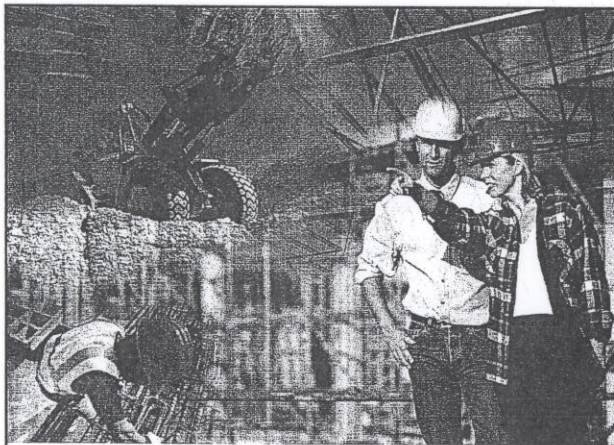
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