



LEGAL CORNER

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Court Reverses Attorney General's Findings Of Prequalification Fraud

Editor's Note: I would like to acknowledge the assistance of my colleague, Erin M. Boucher, who prepared this month's article. Erin is an Associate in Hinckley, Allen & Snyder's Construction and Public Contracts Group.

Contractors performing public work in Massachusetts should be aware of a recent decision on bidder prequalification by the Massachusetts Superior Court. The Superior Court reversed a decision by the Bid Protest Unit of the Attorney General concerning whether a contractor's failure to provide a full list of litigation matters pending against the contractor, or concluded adversely against the contractor within the past five years, in the context of a prequalification application, constituted fraud under the public bidding laws.



The case arose from the Attorney General's Bid Protest Decision that the Contractor violated the Commonwealth's public bidding laws by fraudulently omitting information in its prequalification application for a meaningful project. As part of the prequalification process for the Project, each contractor had to submit a Statement of Qualification ("SOQ"). In this case, the Town required all prospective contractors to disclose all legal proceedings currently pending against them, or adversely concluded in the previous five years, involving a construction contract. The Contractor submitted a SOQ and an Update Statement.

In response to the legal proceeding disclosure requirement, the Contractor stated as follows:

"being (sic) a construction firm that has built over a billion dollars in construction projects, as would be expected of a firm of our size to have involvement in a number of claims and/or litigation cases. The majority of these are insignificant cases into which the Contractor is brought by a subcontractor or other party.

In our judgment there are no current outstanding legal cases which have considerable potential to have any ample adverse impact on the Contractor's overall financial position, nor have there been within the past five years. The following cases exceed \$500,000 in exposure and are not covered by Insurance. Bankruptcy, Personal Injury and Workers Compensation Matters are excluded."

The Contractor then listed two specific civil actions and included a brief description of each. It maintained that it made a "strategic business decision" to "condense the company's disclosure" regarding legal proceedings in its SOQ submission, and that this form of disclosure was consistent with the practice of its competitors.

The Town's Prequalification Committee prequalified the Contractor to bid on the Project. Thereafter, the Town voted to redesign the Project, expanding the Project in scope and changing the start date. This necessitated a new prequalification process and

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The Court held that in the context of prequalification applications under public bidding laws, fraud occurs when a general contractor submits an application which includes an intentional misrepresentation, and the prequalification committee, in qualifying the contractor for bidding, relies on the misrepresentation to its detriment.

re-submission of contractor applications. The Town notified all prequalified contractors of these changes.

Prior to the prequalification process for the updated Project, the Union representatives provided the Town with a list of the Contractor's litigation. The Union representatives also submitted a Notice of Protest to the Attorney General. In response to the Notice of Protest, the Attorney General investigated the allegations that the Contractor's submission violated the public bidding laws and held a Bid Protest Hearing.

When the Town reopened the prequalification process for the updated Project, it wrote to the Contractor and informed it that given the allegations concerning omissions from the previous SOQ, it would be required to resubmit a complete prequalification package in order to be considered during the second prequalification process. The Contractor did not resubmit any materials, therefore, rendering it ineligible to bid on the Project. Despite the Contractor's ineligible status, the Attorney General concluded that it would be in the public interest to finish the investigation of the Contractor's original submission and present a decision.

The Attorney General issued a Bid Protest Decision which stated that the Contractor's prequalification was invalid and based on fraud. Specifically, the Attorney General found that the Contractor knowingly provided materially false statements of fact by intentionally failing to disclose all pending proceedings in its response to the Town's RFQ, and therefore, the Contractor's SOQ violated G.L. c. 149, §44D1/2.

The Contractor filed an action in Massachusetts Superior Court requesting that the Court vacate the Attorney General's Bid Protest Decision. The Attorney General filed a counterclaim seeking an order from the Court confirming its finding that the Contractor's submission violated the public bidding laws.

The Court concluded that the key issue was whether the Contractor's prequalification submission constituted fraud within the meaning of G.L. c. 149, §44D1/2. The Court held that in the context of prequal-

ification applications under public bidding laws, fraud occurs when a general contractor submits an application which includes an intentional misrepresentation, and the prequalification committee, in qualifying the contractor for bidding, relies on the misrepresentation to its detriment. In reaching its conclusion, the Court found that the Contractor's submission could not constitute fraud under the public bidding statute because the Prequalification Committee suffered no harm as a result of its abbreviated disclosure.

Although this decision highlights the high standard concerning whether a prequalification submission constitutes fraud within the meaning of G.L. c. 149, §44D1/2, a contractor who makes an intentional misrepresentation in a SOQ, with the aim of deceiving the Prequalification Committee, still risks decertification or denial of certification by DCAM or criminal charges. Contractors should continue to respond to SOQs fully and honestly, as failure to do so may result in loss of a project or worse.

(NOTE: DCAM had utilized the Attorney General's findings to then **debar** the Contractor for eighteen months, which now appears to have been unwarranted.) ■



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