



LEGAL CORNER

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

Revised Prequalification Guidelines

Approximately one year ago, UCANE, Associated Builders and Contractors (ABC) and Construction Industries of Massachusetts (CIM) filed a protest with the Bid Protest Unit of the Attorney General's Office challenging the manner in which a local awarding authority had conducted the prequalification of contractors for a Water Treatment Project. The challenge was the result of a growing concern that local authorities were not provided with adequate guidance as to how to conduct the prequalification process in an objective and fair manner. The purpose of the protest was not to undo the results of this particular process, but to convince the Attorney General that additional guidelines were needed for future procurements.

The August, 2007 issue of *Construction Outlook* magazine addressed the subject of local prequalification in an article entitled "UCANE Challenges Arbitrary Prequalification," and focused on this challenge. The Attorney General was convinced by the evidence presented at the hearing that additional guidelines were warranted. Draft guidelines were submitted by the Associations to the Attorney General, who then presented them to DCAM. After numerous reviews and public comment, DCAM issued the Guidelines in April, 2008.

The new guidelines reflect the policy goals of fair evaluation of contractors and promote interest in public construction projects to generate the greatest number of qualified bidders for a given public construction job. The revised guidelines also implemented practical prequalification procedures in addition to providing clarification of the prior guidelines. The revised guidelines suggest that if the contract documents are complete and available for review, it may be beneficial to allow contractors to review the drawings, specifications and other contract documents during the prequalification process "in order to increase interest in the project."

The guidelines note that standard form RFQ packages are generic so that each package must be customized with project specific information. As a result, the new guidelines state that "it is important that the project specific information be easily identified for review and response by interested contractors and subcontractors." In addition, if an awarding authority is also prequalifying all or some subcontractors, notice must be provided in the RFQ. If the project is subject to discretionary prequalification and the awarding authority is only prequalifying certain trades for the project, trades "should be clearly indicated in the RFQ."

As emphasized during the protest hearing, revised guidelines must also provide for a fair evaluation of contractors. The revised guidelines state that "the Prequalification Committee should ensure that the criteria and process they use is applied consistently and equally to all interested general contractors and

continued on page 11

subcontractors." To that end, the guidelines now include specific directions addressing "specific project experience"

The new guidelines advise an awarding authority to specify the type of similar experience sought for the project, and provides a list of examples illustrating when projects are "similar". For example, the new guidelines suggest that projects are similar when they are of similar size, budget or type. In addition, similar projects are those that employ similar specialized sub-trades, have similar scheduling requirements, site constraints or operating constraints.

Furthermore, similar projects include those that involve the renovation of an existing structure or involve historic preservation issues. These clarifications will not only assist awarding authorities in determining whether a proposed contractor is qualified to perform the work, but also assist contractors preparing statements of qualification.

The new guidelines also include practical assistance for evaluation of contractors and subcontractors. That is, the new guidelines include a five year time limitation for reporting management experience and Minority Business Enterprise and Women Business Enterprise compliance records. The new guidelines acknowledge that despite the absence of a statutory reporting time period, a limit of five years "should provide sufficient information to the awarding authority to reasonably evaluate" the experience of the proposed management team and the MBE/WBE compliance records of an interested contractor.

In addition, under the new guidelines, the Prequalification Committee must check all references before assigning points in connection with an interested contractor's project references. The guidelines state that the Prequalification Committee, "should endeavor to check all references provided and check the DCAM evaluation files for 'similar projects'" listed in the contractor's statement of qualifications.

The revised guidelines also shed light on an awarding authority's evaluation of a contractor's financial outlook. In evaluating a contractor's capacity to complete a project, an awarding authority ought to request contractors to submit revenue under contract for the next three years. The Prequalification Committee should be wary that an interested contractor having higher revenue under contract is not necessarily an indicator of greater financial capacity to perform the project.

The new guidelines acknowledge that despite the absence of a statutory reporting time period, a limit of five years "should provide sufficient information to the awarding authority to reasonably evaluate" the experience of the proposed management team and the MBE/WBE compliance records of an interested contractor.

Likewise, less revenue under contract is not necessarily an indication that an interested party does not have sufficient capacity to perform the project. To the extent it lacks sufficient expertise to make an objective financial determination regarding financial capacity, the prequalification guidelines encourage the Prequalification Committee to engage assistance in its review of information regarding revenue under the contract.

The guidelines also clarify that the awarding authority must request that interested contractors provide a commitment letter for payment and
continued on page 13



- Ready Mix Concrete
- Quick Set Flowable Fill
- Flowable Fill
- Washed Sand
- Washed Stone
- Compactable Gravel
- Loam, Mulch

A. GRAZIANO, INC.

71 Adams Street, Braintree, MA
Tel: 1-800-462-9901

E-Mail: www.grazianoconcrete.com



SATURDAY DELIVERIES

Legal Corner continued from page 11

performance bonds in an amount equal to 100% of the contract value which is the estimated construction cost of the project. The contract value for subcontractors is the estimated contract amount of the filed sub-bid trade work.

In order to achieve the greatest number of qualified bidders, additions were added in connection with notice and advertisement of an awarding authority's RFQ. Under the new guidelines, an awarding authority "may wish" to advertise the RFQ in other project notification services in order to maximize responses and ensure an adequate pool of interested parties that may lead to sufficient numbers of prequalified bidders.

Although the public notice must be given two weeks prior to the deadline for submitting responses to the RFQ, the revised guidelines suggest that "ideally", the public solicitation should be given as early as possible for the purpose of encouraging "the greatest response to the RFQ."

The revised guidelines also clarify the review and consideration of third-party information. An awarding authority "may, at its option" review and consider the third-party information but that "due process considerations require" a contractor impacted by third-party input to be afforded an opportunity to review the information and provide a response.

The revised guidelines also make clear that update statements, provided in follow-up to a statement of qualifications, are not public records. Although the previous version of the guidelines stated that an interested party's statement of qualifications was not open for public inspection, the previous DCAM guidelines did not address whether update statements are also confidential. The confidentiality of the update statement is now clear.

In conclusion, UCANE's efforts were rewarded with revised guidelines to ensure that contractors and subcontractors who are submitting proposal for prequalification will be evaluated with more standards and overall fairness.

Author's Note: I would like to acknowledge the assistance of Robert Ferguson, an Associate in the Construction and Procurement Practice at HAS, who reviewed and compared the old and new guidelines which is the cornerstone of this article. ■

AMERICAN MADE!

OIL AND GREASE TRAP

New and Improved!

- Comparatively lighter design.
- Easily removed for periodic flushing and cleaning of drain lines.
- Removable elbow for easy accessibility and visibility.
- No nuts or bolts.
- Unique design permits easy removal of grit and debris from catch basin sump.

Call for specification sheet which we will mail or fax to you.
Visit Our Web Site at: www.lebaronfoundry.com
or Email us at: sales@lebaronfoundry.com

 **LeBARON FOUNDRY, INC.**
AMERICAN MADE GRAY IRON CASTINGS
14 EAST UNION ST. • P.O. BOX 746 • BROCKTON, MA 02303
TEL (508) 586-3130 FAX (508) 580-2740



"It's a Matter of STRATEGY"

Serving The Construction Industry For More Than 30 Years



Reservoir Corporate Center • 144 Turnpike Road, Suite 110 • Southborough, MA 01772

P: 508.875.7431 • F: 508.626.1591 • www.e-pfg.com

Estate Planning
Business Succession Planning
Executive Benefits
Employee Benefits
Retirement Plans

