

LEGAL PERSPECTIVE

BID PROTESTS ON PUBLIC PROJECTS WHERE PRICE IS NOT THE DECIDING FACTOR ARE AN UPHILL BATTLE

BY EDGAR ALDEN DUNHAM IV, ESQ.

Traditionally, public construction projects typically followed a set path. The public owner hired an architect or engineer who prepared plans and specifications, and then released those plans and specifications out for bidding. The project was then awarded to the qualified bidder who provided the lowest responsive bid.

A contractor protesting a bid in those cases had to show that the lowest bid was either from a non-qualified bidder or was not responsive in some fashion. While that can be difficult in a specific case, conceptually, it is relatively simple.

Over the past 20 years or so, public entities have increasingly strayed from the traditional model. Fast-track projects, which are not based on complete plans and specifications, public-private partnerships, and projects in which the price is simply one of the factors to be considered have become increasingly popular.

Public projects where price is simply one of the factors tend to be projects where time is an issue. The public entity will typically set broad parameters for the design, a tight schedule for completion, and other particulars it wants in the project.

Because the award of public projects is not supposed to be done on the basis of favoritism, and because the bidding of such projects is supposed to be open to all, the public entity will establish ostensibly objective criteria for determining the winning proposal. This typically takes the form of a number of categories of different criteria in which each bidder is ranked. To determine the winning bid, the public entity compiles the total scores of each bidder based on the rankings in each category. The proposal with the best score receives the award. While the mathematics of determining the winning bidder by compiling the various proposals' rankings in each category is objective and presumably fair, the assigning of rank to each bidder is frequently much more subjective.

Accordingly, attacks on awards in such cases usually center on attacking the individual rankings in each category, arguing that the various rankings by the public entity were incorrect or arbitrary. Unfortunately, for those protesting bidders, however, courts rarely substitute their knowledge and expertise for that of the publicly entity and generally defer to the entity's ranking choices.

A recent example is the 2018 Court of Claims case of Kiewit Infrastructure Ins. Co. v. United States. There the Army Corps of Engineers awarded a contract for a dam repair project to the second-lowest bidder,

Flatiron/Dragados/Sukut joint venture (FDS). Kiewit Infrastructure West Co. (Kiewit), the lowest bidder, challenged the award. The bid proposals were to be evaluated on the basis of the "best-value tradeoff process" set forth in section 15.101-1 of the Federal Acquisition Regulations. That process permits a tradeoff between price and non-price factors and allows awards other than the lowest-priced one.

The Corps had a number of non-price factors that were more important than the price for the project. Ratings for each factor ranged from unacceptable to outstanding.

Ultimately, the two highest-ranked bidders were FDS and Kiewit. FDS had a higher technical ranking, and Kiewit had a lower price. Kiewit's technical ranking was "good," the second-highest ranking.

The justification for FDS's higher ranking was subjective. The Corps said that FDS "demonstrated a better understanding of the existing site conditions and project requirements," and that "FDS's exceptional approach . . . resulted in a lower risk of unsuccessful performance." The Corps also noted that FDS had "a superior understanding of the geologic and hydrogeological site conditions."

The court, in ruling on Kiewit's protest, found that the award was not arbitrary, largely because the Corps followed the process set forth in the solicitation for making the award. Regarding Kiewit's detailed arguments on the rankings, the Court said that while there must be more than conclusory statements in the record to support a selection under the Federal Acquisition Regulations, "technical rating decisions are the minutiae of the procurement process . . . which involve discretionary determinations of procurement officials that a Court will not second-guess."

Not surprisingly, Kiewit did not prevail.

Cases like the Kiewit case are not anomalies. As Kiewit illustrates, it is difficult for a disappointed bidder on these projects to protest the award. Generally, the only argument disappointed bidders will have is that the public entity made a mistake in its technical review. But the courts will generally not engage in the type of detailed technical analysis necessary for those arguments, under the theory that to do so would be to second-guess the determination of procurement officials.

Besides making it difficult for disappointed bidders, it is easy for public officials to make subjective determinations in these cases that can result in

conscious or unconscious favoritism—something our bidding laws are designed to prevent.

None of this means that contractors should avoid these types of projects. It simply means that when bidding on a project like this, a bidder should fully explain what it is proposing and what it intends to do, and realize that if it is not awarded the project, any attempt to protest the bid will be an uphill battle.

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A PRIMER ON TRADEMARKS FOR THE CONSTRUCTION INDUSTRY

BY CANDACE LYNN BELL

Construction companies, engineering firms, and contractors of all types often work with different types of intellectual property assets in their day to day business—the copyright in a set of blueprints or plans or a patented piece of equipment, tool or process. But what about trademarks and service marks? What about a construction company's, engineering firm's, or contractor's own marks or brands?

What is and is not a trademark?

A trademark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of a good, while a service mark is a word, phrase, symbol, and/

or design that identifies and distinguishes the source of a service. For the rest of this article, trademark or mark will mean both. The name on your company's certificate of incorporation or certificate of formation, for example, ABC, Inc. or ABC LLC, may not necessarily be your company's mark. A company's assumed name, d/b/a, or trade name also may not necessarily be the company's mark. Nor is a company's domain name its trademark; it is just the web address for the company's website. But all of these can include your company's mark. It is important to understand this difference, because if your company's legal name or domain name infringes on another company's mark, despite a state's approval of the company's formation or the registration of a particular domain name, you may have to change your name or give up your domain name.

So what makes a mark? Use of the mark on or in association with the company's goods and services—for example, ABC hammers when ABC appears stamped on the hammer's handle or ABC commercial construction services when ABC appears in a brochure advertising the commercial construction services.

Why is a trademark valuable?

At its core, a mark is a symbol of the goodwill associated with a company's goods and/or services. As a construction firm or a contractor, each and every day and on each and every project, you work on building your company's reputation. You know how hard it is to build a good solid reputation, and you know how easy



it is to lose it. Your mark is the symbol of your company's reputation and goodwill. As a result, your mark may be one of the most valuable assets of your company. If you are just starting out on a new venture, you want to choose a mark that does not infringe on someone else's mark, so the goodwill that accrues as a result of your hard work stays with your company. If your mark is already established, you also want to be able to stop someone else who tries to use your mark or another mark that is so close to yours that your customers are likely to be confused about whether it represents your company or a competitor.

How do you protect your valuable trademark?

One of the best ways to protect your mark is to apply for and obtain a trademark registration. In the United States, rights in your mark are based on and created by using your mark in commerce, "common law" rights, but such rights exist only in the specific areas of the country where you used your mark. A state trademark registration only provides rights in that particular state. By obtaining a U.S. federal trademark registration on the Principal Register, you can obtain nationwide rights for your mark. A U.S. federal trademark registration has a number of other advantages and benefits over common law rights and state trademark registration. Your federal registration will be listed in the United States Patent and Trademark Office (USPTO) database, and your registration can be cited by the USPTO as

a basis for refusing registration of someone else's pending application if the USPTO determines the mark of the pending application is likely to cause confusion with your registered mark.

The test for whether or not there is a likelihood of confusion looks at a number of factors, but the two factors often given the most weight are how similar the marks are and how closely related are the goods and services. Sometimes a refusal to register is enough to cause the other party to abandon the applied-for mark. Recent studies have also shown a positive link between various company economic performance indicators, such as revenue growth, and the registration of a company's trademarks. A U.S. registration can also provide a basis for obtaining trademark registrations in foreign countries. If you perform work or sell product in countries outside the United States, you may or may not have created rights in your mark. Many foreign countries only recognize trademark rights if you have a trademark registration in that particular country.

Taking the proper steps to choose and use your mark, combined with seeking trademark registrations for your mark, will enable your company to "build" on one of its most valuable assets. And after all, isn't that what construction is all about? **BC**

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