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Bid protests in the United States

The primary goal of all sealed bid projects is to maximise competition in order to obtain the best possible price. In order to achieve that goal, government projects in the United States are typically highly regulated, from the manner in which an invitation for bids is issued to the way in which bidders resolve any problems arising from the bidding and award process. There are many pitfalls along the way, and special attention must be paid to the rules that govern the bidding process on particular projects.

Procurement regimes in the United States

As the US federal government constructs a great number of projects, an extensive body of common law has been developed in this area. In addition, many states base their rules and regulations on the federal rules or look to the federal rules and case law for guidance. Several procurement methods are used for awarding federal construction contracts: simplified acquisitions; negotiations between representatives of the government and potential contractors; and competitive sealed bidding. Each of these procurement regimes is embodied in the Federal Acquisition Regulations (FAR), set out in Title 48 of the United States Code of Federal Regulations. The preferred procurement method has generally been the competitive sealed bidding process, which is set out in 48 CFR Part 14.

The assumption held by the US federal government is that open, competitive procurement of fixed price construction contracts ensures fairness and maximises the return for US tax dollars. Accordingly, the US federal government has implemented an extensive statutory and regulatory scheme designed to establish competitive bidding procedures that will result in the award of contracts to the 'lowest responsible bidder'.

The bidding procedures utilised by the US federal government are set out in the FAR, which became effective on 1 April 1985. This body of regulatory law was developed in accordance with the Office of Federal Procurement Policy Act of 1974 (Pub L No 93-400). As such, it establishes procurement guidelines to be followed by all executive agencies. Some agencies have supplemented the FAR with their own regulations, including:

- Department of Defense (DFARS);
- Air Force (AFARS);
- Army (AFARS);
- Navy (NAPS);
- General Services Administration (GSAR);
- Department of Energy (DEAR); and
- National Aeronautics and Space Administration (NASA FAR).

The FAR was developed to ensure that the

party ultimately awarded a construction contract is the lowest responsive and responsible contractor answering the government's invitation to bid. Additionally, the fundamental charge of our federal procurement systems is to ensure full and free competition for all contracts whenever possible. However, this does not always result in an absolute requirement of competitive bidding for all construction endeavours by the US federal government. FAR 36.103 requires the federal government to award contracts by sealed bidding, unless such procedures are not appropriate. A specific exception noted by this regulation is overseas construction. FAR 6.302 sets out additional circumstances under which contracts may be negotiated without formal advertising, and provides guidance as to what is considered 'impractical' to obtain open competition.

The federal government has imposed additional restrictions on who can be awarded construction contracts by the federal government. One of the ways in which competition for bidding on projects is restricted is through the qualification process. Many states likewise require that potential bidders qualify to bid on state projects.

In addition, Congress has declared through a series of statutes that a 'fair proportion' of total contracts let by the federal government should be placed with small businesses. The criteria primarily deal with the contractor's number of employees and its average annual sales. In addition, the Small Business Act (15 USC §631 et seq) contains two sections (commonly known as §8(a) and §8(d)) that are designed to increase contract awards to qualified socially and economically disadvantaged persons or small business concerns, women-owned businesses and historically underutilised business zone businesses (HUBZone), to name a few. Like the federal government, many states also employ such programmes (commonly referred to as MBE, WBE or DBE programmes).

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Challenging the outcome of a procurement procedure and its effectiveness

A protester on federal projects has three possible avenues of relief:

1. the procuring agency;
2. the United States Government Accountability Office; and
3. the United States Court of Federal Claims.

In addition, certain issues relating to small businesses can only be heard by the Small Business Administration. Finally, suspension or debarments are handled by individual procuring agencies with a right to appeal to the US district courts.

Protests to the procuring agency

The FAR, discussed above, govern procurement by all executive agencies of the federal government. Each individual agency is authorised to promulgate regulations that supplement the FAR. The FAR provides the general principles; the agency regulations provide the details and the mechanics. The basic FAR procedures, as adopted and incorporated by the major procuring agencies, provide minimal guidance for protesters. They primarily set out the steps the contracting officer should take after receipt of a protest. If a protest is filed with an agency before award, the agency must notify all bidders who might become eligible for award. The regulations provide that the award shall not be made until the protest is resolved, unless the 'contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the government' (FAR 33.103 (f)(1)). When a protest is filed after award it must be received by the agency within ten days after contract award. When the protest is received by the agency, the contracting officer 'shall immediately suspend performance, pending resolution of the protest within the agency... unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government'.

Protests to the United States Government Accountability Office

The second possible forum for the resolution of bid protests is the United States Government Accountability Office (GAO), which is a branch of the legislature. The GAO's historical function has been to

Bid protest procedures for construction contracting among the states vary greatly from jurisdiction to jurisdiction

settle the accounts of the executive agencies. The Competition in Contracting Act of 1984 (CICA) specifically authorised the GAO to decide bid protests on executive agency procurements (31 USC §3551–3556).

CICA also requires agencies that have received notice from the GAO of a pending protest filed before award to refrain from making the award until the matter is resolved, unless the head of the procuring activity responsible for the award makes a written finding of urgent and compelling circumstances that will not permit waiting for a decision more than 30 days and advises the Comptroller General. The stay is lifted when the Comptroller General renders a decision. The GAO will not review all procurement actions, such as the size standards for small businesses, negative determinations of responsibility of a small business, affirmative determinations of responsibility by the contracting agency (unless there is a showing that it was made fraudulently or in bad faith) and matters relating to contract administration.

After the procuring agency has received notice that a protest prior to award has been filed with the GAO, the procuring agency may be required to withhold award of the contract. The head of the procuring activity, however, may authorise the award of a contract, notwithstanding a protest to the GAO, under certain circumstances. For instance, the head of the contracting agency may authorise award upon making a written finding that there are 'urgent and compelling circumstances which significantly affect interests of the United States' that require prompt award.

If the agency receives notice of a protest after the contract has been awarded, but within ten days of that award, then the procuring agency must immediately direct the contractor who has been awarded the contract to suspend performance. In addition, the procuring agency must cease any other activities related to contract performance that would result in additional obligations being incurred by the United States.

The GAO bid protest regulations permit the agency, the protester or certain interested parties to request a hearing to be held, at the sole discretion of the GAO, on the merits of the protest. If the GAO agrees to hold a hearing, it will be scheduled as soon as practicable after receipt of the agency report by the protester and the interested parties. There are no set procedures to be followed during such a hearing and the formality or informality of the hearing depends upon the participants.

The GAO is required to issue a decision within 100 days from the date the protest is filed, or unless the 'express option' is invoked. In the latter case, decisions will be issued within 65 days from the date of the receipt of the protest by the GAO. The agency is required to submit its report within 20 days from the date it is notified that the GAO has determined that the case is suitable for an accelerated decision.

Pursuant to CICA and its bid protest regulations, the GAO can recommend the following corrective actions to the procuring agency:

1. refrain from exercising options under the contract;
2. re-compete the contract;
3. issue a new solicitation;
4. terminate the contract;
5. award a contract consistent with the requirements of the appropriate statutes and regulations;
6. implement any combination of recommendations under 1–5; or
7. implement such other recommendations as the GAO determines necessary to promote compliance with procurement statutes and regulations.

The procuring agency responsible for the solicitation is required to implement the Comptroller General's recommendations fully within 60 days of receipt of the GAO's decision.

CICA specifically authorises the GAO to award a protester, or any other appropriate interested party, its costs of filing and prosecuting a protest, including attorneys' fees and consultant and expert witness fees and its bid and proposal preparation costs, where an actual or proposed contract award did not comply with a statute or regulation. In some instances, a prevailing party can also recover costs on behalf of a prospective subcontractor, where the subcontractor, acting 'in concert' with and on behalf of the party, incurred costs.

Protests to the United States Court of Federal Claims

The most recent addition to the forums available for the resolution of bid protests is the United States Court of Federal Claims. Its decisions are subject to review by the Court of Appeals for the Federal Circuit.

Although there is no rule providing for a specific time period within which a bid protest must be filed with the Court of Federal Claims, a protest should ideally be filed as soon as possible after the basis of the protest is known. In cases involving a patent error or ambiguity, the Court of Federal Claims has said that it is appropriate to apply the GAO timeliness rule (ie, the protester must file prior to bid opening or time for receipt of proposals).

An action in the Court of Federal Claims is commenced by filing a complaint. A bid protest is typically begun by filing a motion for a temporary restraining order (TRO) and/or a motion for a preliminary injunction in connection with the complaint (Rules of the Court of Federal Claims, Rule 65).

In order to obtain a preliminary injunction or other equitable relief, the bidder must establish four elements, no single one of which is dispositive:


1. that it will suffer irreparable injury if defendant is not enjoined, including, but not limited to, absence of an adequate remedy at law;
2. a likelihood of success on the merits;
3. the harm to the plaintiff outweighs the harm to the defendant; and
4. that it would be in the public interest to enjoin the defendant.

The Court of Federal Claims may also award bid preparation costs where the government's conduct towards the bidder was arbitrary and capricious. In *Keco Indus v United States*, the Court of Claims established four general criteria for determining whether the government's conduct was arbitrary and capricious. Successful protesters have also been allowed to recover attorneys' fees in addition to their bid preparation costs, unless the United States can show its position was 'substantially justified'.

The Court of Federal Claims will not award lost profits in bid protests.

State and local bid protests

Bid protest procedures for construction contracting among the states vary greatly from jurisdiction to jurisdiction. Sources



for determining the procedures include statutes, departmental regulations, internal bid documents, case law and general policies of the public authority. Distinctions are often drawn in the statutes between state and municipal or county contracts, and between construction and purchase-type contracts. Often, procedures for bid protests are established for purchase-type contracts, where price is the prime consideration, and not for construction contracts, where bidder responsibility is also considered.

Many jurisdictions at the state level handle bid protests very informally. In these jurisdictions, Illinois, Michigan, New York and Texas, for example, there are no formal bid protest procedures because there are very few bid protests. State officials, therefore, see little purpose in establishing formal administrative procedures. It is, indeed, questionable whether bid protests can be effectively litigated in these and like jurisdictions.

There are two types of forum generally available to a disappointed bidder wishing to file a bid protest on a state or local construction project. First, there may be an administrative agency specifically designated by regulation or statute to hear bid protests. Secondly, where there is no administrative tribunal established to hear bid protests, a disappointed bidder may be able to sue in state or federal court for mandamus, injunction or declaratory relief.

If a jurisdiction has established no administrative procedures for bid protests, a disappointed bidder may be able to bring an action in federal or state court. Although courts, in general, are not often willing to interfere with the public competitive bidding process through injunction, mandamus or declaratory judgment, relief is sometimes available. Suits should be filed at the first-level trial courts in the jurisdiction and the first hurdle to be overcome is standing to sue. Courts in some jurisdictions hold that competitive bidding statutes were enacted for the benefit of the taxpaying public and not for the benefit of bidders, and therefore only a taxpayer can challenge a contract award. In other jurisdictions, the courts hold that the bidding statutes, in addition to benefiting the public, directly benefit and protect the bidders themselves by making treatment of all bidders on public contracts fair and equal or finding that a particular

statute gives bidders a cause of action. In these states, an unsuccessful bidder, generally only the lowest unsuccessful bidder, has standing to sue.

Other than damages, a court can generally order one of three remedies to a disappointed bidder: injunction, declaratory relief or mandamus.

Injunctions are an effective remedy where an unsuccessful bidder is alleging violation of the competitive bidding statutes, mis-award of contract or is attempting to halt payments for work already performed under an illegal, and therefore, void contract. Injunctions are also effective if an unsuccessful bidder is attempting to get a public authority to reject all bids and force a re-bid. Preliminary injunctions can be used to preserve the status quo until the merits of the bid protest are formally adjudicated.

Declaratory relief may be available to a disappointed bidder seeking a judgment declaring that a contract award was invalid and, therefore, voidable. It is used effectively in jurisdictions that allow disappointed bidders, who successfully prove mis-award of a public contract or recovery of bid preparation costs.

A successful mandamus action will allow a court to order award of a contract to a particular bidder. It is a way of compelling a public officer to perform an official act (eg, to award a contract where it is under a clear legal duty to do so). The official act must not be discretionary, but ministerial, and the bidder must have a clear legal right to the award. In fact, mandamus rarely lies in a public bidding context because bidding statutes generally allow a public authority to reject all bids. Therefore, a disappointed bidder cannot usually show a clear legal duty on the part of the public authority to award the contract to it. Courts are hesitant to interfere so directly with the public bidding process.

An unsuccessful bidder on a state or local public construction contract cannot recover lost profits, as a measure of damages in a successful suit, in the absence of fraud or other extraordinary circumstances. A bidder may, however, be able to recover bid preparation costs or damages for civil rights violations or for malicious interference with the right to secure a contract.

Common grounds for bid challenges

Federal bid protests

Disappointed bidders on a federal government projects can have two general bases for protest:

1. a defect in the bidding procedures or documents; or
2. an irregularity in the evaluation of a bid or award of a contract.

Defects in the first type include unduly restrictive specifications, ambiguous bidding documents and improper procurement procedures. Any protest involving alleged defects or improprieties in bidding documents should be submitted prior to the bid opening or proposal submittal date. If there is an irregularity in the bidding documents, it can frequently be corrected by the contracting agency by amendment of the invitation for bids (IFB). If there is a more complicated problem than a mere discrepancy in the bidding documents (eg, an unduly restrictive specification), it is most likely that the contracting agency will either cancel the solicitation or forward the protest to the GAO.

The second ground for protest, irregularities in the evaluation or award of a contract, can be divided into two sub-categories: irregularities that result in the improper rejection of the protester's bid; and irregularities that result in the improper acceptance of another bid. These irregularities include such items as failure to sign the bidding documents properly, bids that do not conform to the IFB, and evaluation on grounds other than those described in the IFB.

A disappointed bidder may challenge a proposed award of a contract by 'objecting to a solicitation by a Federal agency for bids or proposals for a proposed contractor or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement' (28 USC §1491 (b)(1)). Typically this involves alleging improprieties in the procurement process on the part of the procurement officials.

The government's conduct is reviewed using the same standard in the Administrative Procedures Act. This standard is generally stated as the government's conduct or decision will be upheld 'unless it is arbitrary and capricious or otherwise not in accordance with law' (*California Marine Cleaning, Inc v United States*, 42 Fed Cl 281, 291 (1998)). This is a deferential standard by

which an agency is entitled to a 'presumption of regularity', and the court is limited to the role of 'ensuring that the agency has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made' (*WinStar Communications, Inc v United States*, 41 Fed Cl 748, 757 (1998)). There are four factors – called the *Keco* factors, criteria or test – that are used to determine whether the government's conduct or a decision was arbitrary and capricious:

- subjective bad faith by the government;
- absence of a reasonable basis for the administrative decision;
- the amount of discretion afforded to the procurement officials by applicable statutes and regulation; and
- proven violations of pertinent statutes or regulations (*Southfork Syst, Inc v United States*, 141 F 3d 1124, 1132 (Fed Cir 1998)).

The disappointed bidder has the burden to establish the four *Keco* factors above, but it need not satisfy all four of the factors in order to establish that the government's conduct was arbitrary and capricious.

State and local bid protests

Typically, state competitive bidding statutes require a public authority to award public contracts to the 'lowest responsible bidder' or the 'lowest and best bidder'. This means a successful bidder must be a responsible bidder under the conditions set by the authority, submit the lowest bid and submit a bid that is responsive to the plans, specifications, and procedures established by statute, regulation and the bidding documents.

Bid responsiveness is the most frequently litigated issue in state and local bid protests, as a finding of non-responsiveness disqualifies the bid from any consideration. Bid responsiveness is a measure of whether the bid meets the terms of the public authority's invitation to bid in all material or substantial respects when judged on its face.

Other major issues in public construction bidding include allegations of an invalid or vague plan or specifications, and improper evaluation of contractor responsibility. State competitive bidding statutes generally provide that public officers must prepare reasonably definite plans and specifications, particularly for construction contracts, so all bidders can be fairly assured that their bids will be

Table 1: Protest activity statistics				
Year	Cases filed	Merit (sustain + deny) decisions	Sustain rate (percentage)	Effectiveness rate (percentage reported)
2001	1,146	311	21	33
2002	1,204	256	16	33
2003	1,352	290	17	33
2004	1,485	365	21	34
2005	1,356	306	23	37
2006	1,327	249	29	39
2007	1,411	335	27	38
2008	1,652	291	21	42
2009	1,989	315	18	45
2010	2,299	441	19	42
2011	2,353	417	16	42
2012	2,475	570	18.6	42

Source: www.gao.gov/legal/bids/bidproan.htm

comparable. If the plans and specifications are too vague, or if errors are made in drawing them, a protest may be lodged.

Developments in procurement issues and scale of bid challenges

A big change in recent years is the rate at which unsuccessful bidders are challenging their failed procurement. Since 2001, the GAO has reported to the United States Congress its fiscal year bid protest activity statistics. As shown in Table 1, the number of bid protests filed with the GAO has doubled over the last decade. While the rate of bid

protests sustained has varied from year to year, the effectiveness rate of the bid protest (that is, the protester obtains some form of relief from the agency, as reported to the GAO) has increased approximately ten per cent.

Conclusions

The highly regulated federal and frequently litigated state procurement laws provide guidance for counsel confronted with a protest by a contractor of the bidding process in the United States. However, close attention to the stringent requirements is essential to obtain relief.

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