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Local Government Procurement Laws - Who the Heck is a "Responsible Bidder"?

All state and local government public works construction projects must follow the public bidding and procurement laws, which seek to protect the public against the squandering of public funds and prevent abuses such as fraud, waste, and favoritism.

Local governments¹ are required to provide public notice and to competitively award public works construction contracts,² unless an exception applies, such as where the estimated cost of the project will be less than \$100,000.³ A contractor forfeits its right to payment if it performs work knowing that the local government did not follow the public procurement laws.

Local governments who take competitive sealed bids are not required to award the contract to any bidder.⁴ But if it decides to award the contract, the award must go to the "lowest responsible and responsive bidder."

In most cases the low bidder is awarded the contract; however, the local government must first determine that the bidder was responsible and the bid submitted was responsive based upon the requirements and criteria set forth in the invitation for bids before making the award. This article addresses what it means to be a "responsible bidder" in Georgia.⁵

A local government is not limited to looking at a bidder's financial ability to perform the public works contract. Rather, the term "responsible" looks to the bidder's ability to discharge the contractor's obligations in accordance with what is expected under the terms of the contract. Local governments may consider virtually any criteria reasonably or rationally related to the question of whether the contract, if awarded, could be completed by the bidder in accordance with its terms.

The determination of responsibility is a threshold issue qualifying the bidder for consideration of its bid, not an evaluation factor allowing an award to be made on the basis of the relative responsibility of the various bidders.⁶ Indeed, a bidder can be found "not responsible" only if the government body would reach the same conclusion if the bidder was the only bidder submitting a bid. Thus, a local government must award a contract to the lowest bidder meeting the criteria for being responsible, even if another bidder is substantially more responsible and its bid only slightly higher than the low bidder.

In Georgia, O.C.G.A. § 36-91-2(13) defines a "responsible bidder" or "responsible offeror" as "a person or entity that has the capability in all respects to perform **fully** and **reliably** the contract requirements." The terms "fully" and "reliably" authorize the public entity to consider two distinct categories of criteria: whether the bidder has the ability to perform, and whether the bidder is dependable to perform.

In determining whether a bidder is capable of "fully" performing the contract, a public entity generally considers objective criteria such as the bidder's financial resources; labor, facilities and equipment; skill, experience in terms of ability to perform⁷, and applicable licenses and permits.

Reliability, on the other hand, calls for a more subjective analysis as the public entity considers criteria such as the bidder's ethical integrity, reputation, experience for successfully performing and completing projects, claims history, and litigiousness.

The broad definition of what constitutes a responsible bidder, and the public entity's ability to establish its own criteria, some of which are very subjective, creates an environment ripe for a bid protest as to the public entity's selection and application of the criteria. Sometimes the apparent low bidder protests that its bid was not considered because the public entity determined it was not responsible.⁸ Other times the second lowest bidder protests that the public entity should not have considered the low bidder to be responsible.⁹ In either event, a court reviewing a bid protest will consider whether the public entity used a decision-making process rationally designed to evaluate a bidder's responsibility.¹⁰ If the process was fair, a court will usually enforce the public entity's decision, even if reasonable minds might differ about the decision. However, where the process is deemed "arbitrary and capricious" a court will set aside the public entity's decision.

In *Harmony Const., Inc. v. State Dept. of Transp.*¹¹, Delaware's DOT determined responsibility based solely upon whether the low bidder had assumed realistic startup dates on its proposed work schedule. Because this was the only factor considered by the DOT in its determination of responsibility, the Court found that the process was arbitrary and capricious and set aside the public entity's award to the second lowest bidder.

Under Georgia law, the local government is required to include the responsibility criteria in its invitation for bids. For example, Henry County recently identified the following criteria for determining the responsibility of bidders in a bid invitation:

Responsibility - The determination of the Bidder's responsibility will be made by the County based on whether the Bidder meets the following minimum standard requirements:

- Maintains a physical location presence and permanent place of business.
- Has the appropriate and adequate technical experience required.
- Has adequate personnel and equipment to perform the work expeditiously.
- Able to comply with the required or proposed delivery and installation schedule.
- Has a satisfactory record of performance.
- The ability of Bidder to provide future maintenance and service for the use of the contract under consideration.
- Has adequate financial means to meet obligations incidental to the work.
- Such other factors as appear to be pertinent to either the bid or the contract.

All of the factors provided in the *Henry County* bid invitation appear to be rationally designed to determine whether the bidder is capable or qualified to perform the work required by public contract. However, if the County included only one factor in its responsibility evaluation, such as "a physical location presence and permanent place of business," it is more likely that its decision could be overturned because that factor, standing alone, does not appear to have any bearing on whether the bidder is capable or qualified to perform the work.

In order to reject a low bid on a finding of not responsible, a public entity must present evidence that would cause reasonable persons to believe it was not in the best interest of the public entity to award the contract to the lowest bidder. Evidence of poor performance under a prior similar contract may constitute a rational basis for finding the actual lowest bidder irresponsible and rejecting its bid.

For example, in *Callanan Indust., Inc. v. Schenectady*,¹² a New York court held that an asphalt

contractor was not the lowest responsible bidder due to substantial evidence of poor performance under prior repaving contracts with the city. Specifically, on prior projects that the contractor performed for the city asphalt unraveled and potholes and contaminated surface mats appeared, and the city experienced difficulty resolving these problems with the contractor. Notwithstanding the holding in *Callanan*, a causal relationship demonstrating that the bidding contractor caused the performance issues must be established by the public entity. A contractor's late completion on prior projects is not sufficient for a finding of irresponsibility without showing the contractor actually caused the delays that lead to late completion.¹³

Generally speaking, a bidder is responsible if they are qualified to perform the work required by a contract and reliable. In Georgia and throughout the United States, public entities are afforded wide discretion in determining a bidder's responsibility, and their determinations will be overturned only if found by a reviewing court to be arbitrary, capricious, or not rationally supported.¹⁴ As a result of this high legal standard, courts are often reluctant to overrule decisions to disqualify a bidder as non-responsible.

Footnotes

1. O.C.G.A. §36-91-2 defines local government as any "county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission," other than "any authority, board, department, or commission of the state," and certain public transportation agencies."
2. O.C.G.A. §36-91-20.
3. O.C.G.A. §36-91-22.
4. *Letchas v. Sims Asphalt Co., Inc.*, 250 Ga.App. 179 (2001) (affirming city's right to reject all bids, and to accept revised bids based upon reduced scope).
5. The article does not address what it means to be a "responsive bidder," which is a separate and distinct issue that may be addressed in a future article.
6. See, e.g., *Georgia Branch, Associated General Contractors of America, Inc. v. City of Atlanta*, 253 Ga. 397, 321 S.E.2d 325 (1984).
7. A bidder on a state public works construction project cannot be disqualified based upon lack of previous experience with a job of the size for which the bid or proposal is being sought if: (1) the bid or proposal is not more than 30 percent greater in scope or cost from the bidder's previous experience in jobs; (2) the bidder has experience in performing the work for which bids or proposals are sought; and (3) the bidder is capable of being bonded by a surety which meets the qualifications of the bid documents. O.C.G.A. § 13-10-4
8. *Mark Smith Constr. Co., Inc. v. Fulton Co.*, 248 Ga. 694 (1982) (low bidder denied injunction preventing County from proceeding with second lowest bidder pending hearing on whether it was responsible based upon its history of performance and its officer's affiliation with another company)
9. *Hilton Constr. Co., Inc. v. Rockdale Co. Bd. Of Edu.*, 245 Ga. 533 (1980) (public entity not authorized to reject lowest bid on basis that bidder was "unknown")
10. *Credle v. East Bay Holding Co., Inc.*, 263 Ga. 907 (1994)
11. 668 A.2d 746 (1995).

12. 116 A.D.2d 883, 498 N.Y.S.2d 490 (1986)

13. See *Hilton v. Rockdale County*, 245 Ga. 533, 538, 266 S.E.2d 157, 161 (1980).

14. Public agency discretion is so broad that the Fifth Circuit has stated that a public agency “has the right to be wrong, dead wrong, but not unfairly, arbitrarily wrong.” *Housing Authority of City of Opelousas v. Pittman Constr. Co.*, 264 F.2d 695, 703 (5th Cir. 1959).

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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