LOCAL GOVERNMENT LAW

Number 102 May 2002 **David M. Lawrence, Editor**

UNDERSTANDING THE RESPONSIVENESS REQUIREMENT IN COMPETITIVE BIDDING

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Public contracts are subject to competitive bidding requirements for several reasons. One is to secure goods and services at competitive (low) prices. Another is to provide a contracting process that is open and visible to the public. Yet a third is to guarantee fairness in the contracting process, particularly to those who seek contracting opportunities: the bidders. These goals do not always work in harmony with each other. In some cases, for example, the best interest of the public agency might appear to favor accepting a bid despite a defect that it might contain. For some kinds of defects, however, the law limits the agency's discretion to take that action.

The legal concept at issue in this situation is the requirement of "responsiveness." This legal limitation, in effect, elevates the interest of fairness to the bidders over the agency's interest in expediency or in obtaining a low price. Because the process of determining when bids are responsive often presents a conflict between the agency's interest and that of the bidders, it is important for public officials to understand the limitations the law imposes on their discretion in this area.

This bulletin discusses the legal standard for determining when bids are responsive, and summarizes rulings in cases evaluating a variety of commonly encountered bid irregularities. The analysis presented draws substantially on cases from jurisdictions outside North Carolina. Though there is relatively little case law on this subject from the North Carolina courts, the legal standard on this issue is sufficiently consistent across the country that cases from other jurisdictions provide useful and reliable guidance.

Defining Responsiveness

In order for a bidder to be eligible for the award of a contract, his or her bid must be responsive. Put simply, a responsive bid is one that meets the requirements established in the specifications and under the applicable law governing the bidding procedure. As described in one case:

> The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified.[1]

Though it is simple to describe, the concept of responsiveness is often complicated to apply. Public agencies and courts have long recognized that neither bids nor specifications are perfect. Specifications may be purposefully broad in order to avoid limiting competition. Bids in response to these specifications will naturally contain variations in the products or services offered. In addition, bids are often prepared under extreme time pressure due to the bidders' practice of receiving pricing up to the last minute before the bid opening. These conditions result in mistakes, both in the form and in the substance of bids submitted.

In anticipation of this built-in lack of perfection, most bid specifications contain standard language reserving to the public body or its agents the right to "waive minor irregularities," or similar language. Although this statement is intended to provide the agency maximum discretion in evaluating bids, if that evaluation is challenged, a court will protect the interest of fairness in the bidding process and may override the public agency's judgment about what constitutes a "minor irregularity." Cases in this area focus on the question of whether a particular irregularity is so significant that its waiver creates a situation that is unfair to the other bidders. Stated another way, the question in responsiveness cases is: When does the law *require* the public agency to reject a bid and *prohibit* the agency from waiving a deviation from specifications as a minor irregularity?

Despite variation in statutory provisions governing the award of public contracts, the legal standard established by the courts for evaluating responsiveness is remarkably consistent. Although there is only one North Carolina case on this subject, it is consistent with case law elsewhere in the country. In *Professional Food Services Management v. North Carolina Department of Administration*[2] the North Carolina Court of Appeals ruled that a responsive bid is one that conforms substantially to the specifications, and does not contain a "material variance." The court went on to define a material variance as one that gives a bidder "an advantage or benefit not enjoyed by the other bidders."[3]

A similar standard is contained in the Federal Acquisition Regulations (FAR), which govern contracting by federal agencies. Those regulations provide that "to be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables all bidders to stand on an equal footing and maintains the integrity of the sealed bidding system."[4]

Before discussing the application of this standard to commonly-encountered bid defects, it is important to note several preliminary issues: (1) The difference between responsiveness and responsibility; (2) The standard of review courts use when a public agency's decision to waive a bid defect is challenged; and (3) The difference between defects that may be resolved as a matter of responsiveness, and defects that allow the bidder to withdraw his or her bid due to a mistake.

Distinguishing Between Responsiveness and Responsibility

As noted earlier, a public agency must determine that a bid is responsive before the bid may be eligible for award. As such, responsiveness is a threshold determination in the bid evaluation process that comes before a recommendation can be made on the award of the contract. As a legal matter, a bid that does not substantially meet specifications is not eligible to be the basis for the award of a contract. As one court has stated it, "[r]esponsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government…A responsive bid is one that, if accepted by the government as submitted will obligate the contractor to perform the exact thing called for in the solicitation..."[5] In contrast, responsibility relates to the issue of performance by the contractor in terms of the skill, experience, financial resources, and integrity necessary to complete the

1. Toyo Menka Kaisha, Ltd. v. U.S., 597 F.2d 1371, 1377 (1979)(citing R. Nash & J. Cibinic, Federal Procurement Law, 260 (3rd ed. 1977)).

2. 109 N.C. App. 265, 426 S.E.2d 447 (1993).

3. Professional Food Serv. Management, 109 N.C. App. at 269, 426 S.E.2d at 450 (citing 64 Am.Jur.2d , Public Works and Contracts, §59 (1972)).

4. 48 C.F.R. § 14.301(a)(1988).

5. Bean Dredging Corp. v. U.S., 22 Cl. Ct. 519, 522-23 (1991)(internal citations omitted).

requirements of the contract.[6] The difference between the two concepts is well stated in the following description by a court:

> In terms of identifying whether a particular requirement is related to responsiveness or responsibility, the distinction is *whether the bidder will conform* to the [invitation for bids], as opposed to *how the bidder will accomplish conformance*. Stated another way, the concept of responsibility specifically concerns the question of a bidder's performance capability, as opposed to its promise to perform the contract, which is a matter of responsiveness.[7]

Thus, while responsibility focuses on the qualifications and characteristics of the bidder, responsiveness is a determination that compares the bid to the specifications. In evaluating responsiveness, the qualifications of the bidder generally are not relevant.

Judicial Review of Responsiveness Determinations

There are several common factual situations that are presented in legal challenges involving the responsiveness issue. One involves a bidder challenging the rejection of his or her bid, arguing that the public agency erroneously determined that the bid was nonresponsive. A second involves a challenge by one or more bidders who argue that the bid of another bidder *should* have been rejected as nonresponsive. Stated another way, the second scenario involves a situation where the public agency is alleged to have unlawfully waived a material deviation from specifications. A third type of challenge, alleging that the public agency was *obligated* to waive a deviation from specifications but failed to do so, is the most difficult to sustain, for reasons discussed below. The result of a successful claim under any of these theories would likely be a court order invalidating the award of the contract.[8]

It is notable that all of the potential plaintiffs discussed above would be bidders. It is beyond the scope of this bulletin to fully discuss the legal standing of a disappointed bidder to challenge decisions in a public bidding process.[9] In some jurisdictions, courts have denied standing to bidders on the rationale that bidding statutes are designed to benefit the public in general rather than individual bidders.[10] The majority of cases, however, recognize bidder standing because, among other reasons, they have a sufficient interest to bring the action and are thus more likely to ensure the integrity of the process than would reliance on citizen lawsuits.[11] This would seem particularly persuasive in cases involving the question of responsiveness, as opposed to decisions more directly related to the final award of the contract. Responsiveness issues are technical in nature and are rarely presented to or understood by the public at large. Furthermore, the legal issue in the responsiveness determination is based on the issue of fairness to the bidders, as opposed to the broader interests of the public at large. Although the North Carolina courts have not addressed this issue, it is reasonable to assume that bidders will be allowed to bring cases involving the responsiveness determination where they can demonstrate that they will be harmed by the action of the public agency at issue.

A significant factor in the outcome of cases involving responsiveness is the degree of deference the court gives to the agency in reviewing the challenged action. When evaluating responsiveness decisions, courts use a deferential standard of review, similar or identical to the standard used in reviewing the award of a contract. Under this standard, the court will not interfere with the agency's decision unless it is arbitrary, illegal, corrupt, or fraudulent.[12] This means that even

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6. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609, *disc. review denied,* 332 N.C. 345, 421 S.E.2d 149 (1992).

7. Okada Trucking Co. v. Board of Water Supply, 40 P.3d 946, 958-9 (Haw. Ct. App, 2001) (emphasis added), *vacated and remanded on other grounds,* 40 P.3d 73 (2002).

8. For a more detailed discussion of specific remedies that might be sought, *see* Frayda S. Bluestein, Disappointed Bidder Claims Against North Carolina Local Governments, Local Government Law Bulletin, No. 98, May 2001, Institute of Government, The University of North Carolina at Chapel Hill.

9. For such a discussion, *see* Bluestein, Disappointed Bidder Claims, *supra* note 8.

10. *See* H&W Contracting v. City of Watertown, 633 N.W.2d 167, 171-174 (S.D. 2001)(bidders do not have standing to challenge responsiveness determination except in cases of favoritism, improvidence, extravagance, fraud, or corruption).

11. H & W Contracting, 633 N.W.2d at 172 (citing cases).

12. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. App. at 384; 416 S.E. 2d at 608. *See also* Power Systems Analysis, Inc. v. City of Bloomer, 541 N.W.2d 214, 216 (Wis. Ct. App. 1995), Schindler Elevator Corp. v. Metro Development Comm'n, 641 N.E. 2d 653, 656-7 (Ind. App. 1994).

if there is support for more than one outcome, a court will defer to the discretion of the agency in interpreting the legal requirement and sustain its decision unless it was arbitrary or unreasonable.[13]

Similarly, courts have declined to *require* the agency to waive a defect in a bid, even upon a finding that the deviation lawfully could have been waived.[14] In these cases, the courts support the right of the agency to insist upon strict compliance with the specifications, and recognize that the determination of responsiveness is an action that involves discretion to which the courts must defer.[15]

An abuse of this discretion would occur, however, if the agency waives a defect that is material under the legal standard discussed in the rest of this article. There are also cases, including the only North Carolina decision on this issue, in which a court overrode the agency's decision to *reject* a bid. These cases are based on the court's conclusion either that the agency's determination that the bid was nonresponsive was erroneous as a factual matter,[16] or that the rejection of a bid that contained only technical defects constituted an abuse of discretion.[17]

The North Carolina case provides a good example of the fact-specific nature of some of these cases. That case involved a bidder on a food service contract with the State Department of Administration. The bidder completed the form, but instead of using the categories provided on the bid form for certain foods and beverages ("small, medium, and large"), the bidder listed the salad price "per ounce," and the beverages with a single price "all you can drink." The court held that the State's rejection of the bid as nonresponsive was not supported by the evidence, since the bid was clearly understandable on its face, and was in fact more specific than bids listed as "small, medium, and large" that did not identify the volume or weight.[18]

There are relatively few cases, however, setting aside the decision of the agency to insist on strict compliance. More often, courts must grapple with whether a deviation that the agency chose to waive is in fact a "material" deviation requiring the rejection of the bid as a matter of law. In these cases, especially where there are reasonable interpretations supporting both sides of the issue, a court's deference to the agency may make the difference in the outcome of litigation.

Errors That Justify Bid Withdrawal

Under North Carolina's competitive bidding statute, like many such statutes in other states, a bidder has a limited period of time following the bid opening within which to request that his or her bid be withdrawn without penalty due to an error in the bid.[19] In North Carolina, the statute allows withdrawal only if the bidder can document that the error is clerical in nature, as opposed to a judgment error, and that it was due to "an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, apparatus, supplies, materials, equipment, or services made directly in the compilation of the bid..."[20] If a bidder becomes aware of a defect in his or her bid that is clerical in nature and the bidder is not willing to enter into a contract based upon the bid as submitted, the bidder's only option is to request withdrawal. Under the statutory scheme, this decision is the bidder's to make. The determination of responsiveness, on the other hand, is made by the public entity or its agents. It is unlikely that an error that is substantial enough to justify withdrawal would be minor enough to be waived. It is possible, however, that in a particular circumstance, the bidder will need to know quickly whether the unit will waive a defect

13. Williams Brothers v. Kane County, 612 N.E.2d 890, 895 (Ill.App. Ct), *appeal denied,* 622 N.E.2d 1229 (1993).

14. Barriere Construction Co., LLC v. Terrebonne Parish Consolidated Govt., 754 So.2d 1123 (La. Ct. App. 2000)(agency not required to waive bidder's failure to note project name and number on bid envelope); Miami Valley Contractors. Oak Hill, 671 N.E.2d 646, 650 (Ohio Ct. App. 1996)(upholding rejection of bid for failure to submit data sheet form); Serenity Contracting Group, Inc. v. Borough of Fort Lee, 703 A.2d 352, 354 (N.J. Super. Ct. App. Div. 1997), *certification denied,* 708 A.2d 65 (N.J. 1998)(hand written changes on a bid could have been accepted, but unit's decision to reject was not arbitrary).

15. See Martel v. Montana State Board of Examiners, 668 P.2d 222 (Montana 1983), and State v. Bowers, 621 P. 2d 11, 13-14 (Alaska 1980), upholding agencies' decisions to reject bids for failure to acknowledge addenda.

16. Professional Food Serv. Management, 109 N.C. App. at 269, 426 S.E.2d at 450.

17. Chris Berg, Inc. v. State Dept. of Transp., 680 P.2d 93 (Alaska 1984).

18. Professional Food Serv. Management, 109 N.C. App. at 269-70, 426 S.E.2d at 450-51.

19. N.C. Gen. Stat. (hereinafter N.C.G.S.) §143-129.1 (1999). Requests to withdraw must in writing, and must be submitted within 72 hours after the bid opening (or a longer period as specified in the instructions to bidders). A bidder who does not meet the criteria for withdrawal forfeits the 5% bid bond, which must be submitted with the bid.

20. Id.

before the bidder can decide whether to seek withdrawal of the bid. An example of how this may occur is helpful in illustrating the potential overlap between these issues.

A bidder may discover, after bids are opened, that he or she has neglected to include in the bid the cost of the plumbing work. This might have been because a price supplied by a subcontractor was omitted erroneously from the bidder's lump sum bid. The error might not be obvious from the face of the bid, other than through the fact that the bid is significantly lower than the rest of the bids received. The public agency staff may notice the price difference, but if there is nothing on the face of the bid that would constitute a deviation from specifications, the agency must accept the bid as submitted. The most the agency could do is notify the bidder either directly or by means of a bid tabulation, which public agencies commonly prepare and make available to the bidders shortly after bids are opened. After becoming aware of his or her low bid, the bidder might recheck the documentation and discover the error. It would be up to the bidder, in this situation, to decide whether the error warrants withdrawal, and if so, to request withdrawal in writing.

A variation of this scenario might involve an error that is evident from the face of the bid. For example, a bid might be submitted containing a price for the wrong piece of equipment. In this case the unit would be in a position to reject the bid as nonresponsive, and the bidder might also be able to justify a request to withdraw. From a practical standpoint, it would be best for the agency expeditiously to make a decision about whether the bid will be rejected as nonresponsive so that the bidder will know whether he or she needs to request withdrawal. In this type of situation, it is simpler for the agency to reject the bid than it is to comply with the procedures for withdrawal.

It is important to recognize, that in no event may the bidder alter or correct the bid. The competitive bidding process requires that bids be evaluated as submitted. Errors in bids may be the basis for rejection or for withdrawal, but they may not be corrected, even when it would suit the agency to do so. Correction of a material error in a bid creates an unfair advantage and creates the potential for collusion and abuse of the competitive bidding process.[21] As noted below, courts have upheld an agency's discretion to *interpret* bids, where the intent of the bidder is clear, and when doing so does not give the bidder an unfair advantage.

Situations Requiring Rejection of Bids

When considering the application of the legal standard for responsiveness to specific situations, there are several obvious cases in which the agency's obligation to reject bids is clear. First, bids must be rejected when they do not meet statutory requirements.[22] In North Carolina, for bids that are subject to the formal bidding requirements,[23] these cases would include late bids,[24] bids that are not sealed, and bids that are not accompanied at the time of their filing by the requisite bid bond or deposit.[25] Each of these things is required in the formal bidding statute. An agency receiving bids under a bidding requirement that is mandated by state law simply has no authority to alter the statutory requirement by waiving it.[26]

A second clear case for rejection of bids is when the bidder simply fails to offer what the unit seeks to

21. Davis/HRGM Jt. Venture v. U.S., 50 Fed. Cl. Ct. 539, 542 (2001); Missouri v. Stricker, 858 S.W.2d 771, 776 (Mo. Ct. App. 1993); Rosetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039 (7th Cir. 1974).

22. Contracts that are subject to competitive bidding requirements are void if those requirements are not met. Styers v. Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960); Raynor v. Commissioners of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941); Phipps Prod. Corp. v. Massachusetts Bay Transp. Auth., 443 N.E. 2d 115 (Mass. 1982).

23. Bids on contracts for construction or repair work estimated to cost $300,000 or more, or for the purchase of apparatus, supplies, materials, or equipment estimated to cost $90,000 or more. N.C.G.S. 143-129.

24. In jurisdictions in which the time for filing bids is not governed by statute, courts have gone both ways in deciding whether lateness of bids is material or waivable. *Compare* Power Systems, Inc. v. City of Bloomer, 541 N.W.2d 214 (Wis. Ct. App. 1995)(where statute did not establish requirement for bid opening time, court deferred to discretion of agency in waiving a bid that was late due to a delivery truck breakdown) *with* Holly's Inc. v. County of Greensville, 458 S.E.2d 454 (1995)(lateness of bids material and not waivable). *See* Sandra M. Stevenson, Antieau on Local Government Law, 2d ed., § 34.04 [4](2001), *and* Robert M. Ey, J.D., Authority of State, Municipal, or Other Governmental Entity to Accept Late Bids for Public Works Contract, 49 A.L.R. 5th 747 (1997).

25. Bid bonds or deposits are mandatory for bids on construction or repair work estimated to cost more than $300,000 under G.S. 143-129(b).

26. *See* Neilsen & Co. v. Cassia and Twin Falls School Dist., 536 P.2d 1113, 1116 (Idaho 1975).

acquire in the contract. In some jurisdictions, this element forms the first part of a two-part test for determining when bids must be rejected. As stated in these cases, the test of materiality includes "first, whether the effect of a wavier would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements…"[27] (The second part of the test is whether the waiver gives the bidder an advantage over the other bidders.) The agency has the right to insist upon absolute compliance with specifications and clearly may reject a bid that fails to offer what the specifications require. More importantly, even if the agency is willing to accept the different materials or services offered in a particular bid, it would be unfair to the other bidders to accept an offer that does not meet the minimum specified requirement. It may even be unlawful to accept an offer that exceeds the minimum requirement, if the effect of doing so is to award a contract on which the other bidders were not given the opportunity to compete.[28] If the bid is simply beyond the scope of the solicitation, it must be rejected.

Understanding Materiality: What Types of Advantages Make Waiver Inappropriate

As noted earlier, courts evaluate materiality of defects in bids by reference to the principle of fairness. Specifically, agencies may not waive defects in bids when to do so would give the beneficiary of the waiver an unfair advantage in the competitive process. One could argue that the bidder gains an advantage simply by virtue of the fact that his or her bid has not been rejected. The courts do not approach the issue this way. The case law supports the idea that some defects are waivable, recognizing that substantial compliance with bid specifications, rather than perfection, is to be expected.

There are several types of advantage that courts identify when analyzing responsiveness cases. These interpretations of the basic legal standard are applied in a variety of recurrent scenarios, and provide useful guidance in resolving specific cases.

Types of advantages that make waiver of defects inappropriate include:

1) The bidder saves money. Since the competition in the bidding process centers substantially around money, the failure of a bidder to meet a specification that allows that bidder to reduce his or her cost and thus to submit a lower bid clearly creates an unfair advantage in a bidding process.
2) The bidder saves time. In many cases, bids are prepared in a hectic, time-sensitive environment. This is especially true in construction bids, where subcontractor prices are obtained up to the last minute before bids are submitted and the most competitive price offered before bids are due will be used. A bidder who fails to comply with a specification may gain an advantage by using the time saved to pursue better bids.
3) A defect in the bid gives the bidder the legal ability to back out. Some types of defects create an ambiguity about whether the bidder is actually bound by the bid. The best example of this is a bid that is not signed (see cases discussed below). Even if the bidder decides to honor the bid, the point here is that it is unfair for the bidder to be in a position to choose, after all the bids are exposed, whether or not to go forward with his or her bid. On the other hand, if the agency concludes that as a matter of contract law, the bidder would be bound by the bid even with the defect, the defect may be waivable since the bidder does not have the advantage of being able to back out.
4) A defect in the bid gives the bidder an opportunity to improve the bid. A variation on the previous example, this situation occurs when there is an ambiguity in a bid that must be resolved after bids are opened. It is not fair to the other bidders for the agency to allow a bidder to clarify or interpret the bid if this gives the bidder an opportunity to improve his or her standing in comparison to the other bids received.
5) The waiver creates the potential for collusion or abuse of the competitive bidding process. A court may require rejection of bids in cases where the action by either an owner (in waiving a defect or interpreting a bid) or a bidder (such as bid shopping, discussed below) may threaten the fairness or other

27. L. Pucillo & Sons, Inc. v. Township of Belleville, 592 A.2d 1218, 1225 (N. J. Super. Ct. App. 1991), *certification denied*, 606 A.2d 364 (1991).

28. *See* Owensboro Grain Co. v. Owensboro Riverport Auth., 818 S.W.2d 605 (Kentucky 1991)(acceptance of bidder's alternate proposals prevented fair evaluation of bids and was invalid).

purposes of the bidding process.[29] While this may not always constitute an advantage to the bidder, a court may invoke this rationale to invalidate the action in the context of applying the basic responsiveness standard.

Application of Legal Standard to Specific Bid Defects

Failure to sign bids or related bid documents

The main issue regarding signatures on bids or bid documents is whether, taken as whole, the bid submission would constitute a binding offer by the bidder as a matter of contract law.[30] If the bidder would not be bound by the documents submitted due to the lack of signature, it would be unfair to waive this defect even if the bidder has agreed to be bound by his or her bid. The fact that the bidder, who may have had the opportunity to review all the bids submitted, chooses to stand by his or her bid, does not cure the unfair advantage the bidder gains by leaving open the option of refusing to do so based on his or her incomplete bid. The question of whether a bidder would be bound by a particular bid that lacks signatures depends entirely upon the documents involved, and is governed by case law within the jurisdiction. As such, cases that seem to have similar facts may have different outcomes. Examples of cases are discussed below.[31]

Some cases involve situations in which the bidder has signed one or more bid documents, but has not signed all the documents in the proper places.[32] In these cases, courts rely on general contract law to determine whether the documents are sufficient to indicate an intention by the bidder to make an offer to contract. If the bidder would be bound by the bid as submitted, he or she gains no competitive advantage from the waiver of the defect. For example, in a case from Ohio in which the bidder did not sign the cover page of the bid, but did sign an addendum, the court looked at the entire package of documents and concluded that they were sufficient to constitute a binding offer.[33] Based on this conclusion, the court held that the failure to sign the cover page was not material and could be waived. A similar result was reached in a case involving an unsigned bid accompanied by a signed bid bond,[34] and in another involving a signed bid containing an unsigned affirmative action form.[35]

Cases in which the court concluded that the bidder would not be bound by the bid as submitted have held that the defect is not waivable.[36] A case in which the bid was not signed anywhere resulted in a ruling that the bid must be rejected.[37] The bidder argued that the bid bond would protect the agency, but the court correctly noted that the surety would be entitled to any defense the bidder had, and would not be liable on the bid bond if the bidder were not bound by the bid.[38] Similar results have been reached in cases where the bid was signed, but the signature was invalid. An example is a bid signed by someone without legal authority to bind the bidding entity.[39]

Finally, several cases have held that the agency must reject an unsigned bid if the signature requirement is a matter of statute or regulation.[40] This is

29. *See,* San Jose Const. Group v. Loudoun County School Board, 47 Va. Cir. 487 (Va. Cir. Ct.1998)(interpretation and use of alternate bids creates opportunity for favoritism).

30. As noted in a later section, the lack of a signature on a document that is statutorily mandated, such as a bid bond or performance bond, may be a separate basis for rejection of a bid.

31. There is no reported North Carolina case directly addressing this issue in the public bidding context.

32. *See, e.g.,* Spawglass v. Houston, 974 S.W.2d 876, 881-87 (Texas App. 1998)(summarizing cases).

33. Leaseway Distribution Centers v. Dept. of Administrative Services, 550 N.E. 2d 955 (Ohio Ct. App. 1988). *See also,* Menefee v. County of Fresno, 210 Cal. Rptr. 99 (Cal. App. 1985).

34. Eastside Disposal Co. v. Mercer Island, 513 P.2d 1047 (Wash. Ct. App. 1973). *See also,* Farmer Construction Ltd. V. State, 656 P.2d 1086 (Wa. 1983).

35. Kokosky v. Dixon, 594 N.E.2d 675 (Ohio Ct. App. 1991).

36. Kennedy Contruction v. Chicago, 481 N.E. 2d 913 (Ill.Ct. App. 1985) *vacated on other grounds,* 491N.E.2d 1160 (1986).

37. A.A.B. Elec., Inc. v. Stevenson Public School Dist., 491 P.2d 684 (Wash. Ct. App. 1971).

38. A.A.B. Elec., 491 P.2d at 687. Note that under the Uniform Commercial Code, a bidder on a contract for the sale of goods may be bound by a bid that does not contain a signature as long as there is other evidence of an intent to authenticate the contract, such as a letterhead or other symbol representing the party to be charged. *See* N.C.G.S. 25-1-201(39).

39. Intercontinetal Properties, Inc. v. State, 606 So. 2d (Fla. Ct. App. 1992); Davis/HRGM Joint Venture.v. U.S., 50 Fed. Cl. 539 (Fed. Cl. 2001).

40. See, Whitmarsh Township Auth. v. Finelli Brothers, Inc., 184 A.2d 512 (Pa. 1962); Thigpen Const. Co., Inc. v. Parish of Jefferson, 560 So.2d 947 (La. Ct. App. Cir. 1990).

consistent with the rule, discussed above, that the agency has no authority to waive statutory requirements.

Failure to use proper bid form

Many bid specifications require that bids be submitted on the form supplied by the agency. There are several important reasons for this requirement. First, it is designed to encourage prospective bidders to obtain complete bid specifications directly from the agency (rather than submitting a bid using specifications borrowed from another bidder). The agency encourages this in order to maintain a list of bidders who may intend to submit bids so they can be notified of changes in specifications or other important information about the bid process. In addition, complications in interpreting bids can arise if the bids are not submitted in the common format set out in the bid form supplied by the agency. Ideally, the bid form, if properly completed, will minimize confusion in interpreting alternate bids, unit price extensions, and other aspects of the pricing requested in the solicitation. Despite the best efforts of the agency, however, bidders sometimes fail to obtain or to properly complete bid forms.

A reliable rule of interpretation in cases involved a bidder's failure to use the proper form, is that if the bid amount and other terms of the offer are clear from the face of the document as submitted, the failure to use the form is a waivable defect.[41] Where all of the information necessary to understand and evaluate the bid is contained on the document, the failure to complete the proper form is purely a technicality and does not provide any benefit or advantage to the bidder. It is important to note, however, that if the failure to use the proper form results in a need to clarify the bid, this may give the bidder an opportunity to improve his or her position after bids are opened. Such clarification should be avoided and the bid, in these circumstances, must be rejected.[42]

Numerical Errors

Certainly the most important aspect of most bids is the price offered. Errors in bid amounts are common, and may, as noted earlier, cause a bidder to seek withdrawal of a bid. In other cases, however, the agency may be tempted to interpret the prices offered in a way that preserves its ability to award the contract. A general rule in cases involving unclear or ambiguous bid amounts is that unless the bid amount can be determined by reference to the face of the bid document, or by applying objective rules for interpretation of bids, the bid must be rejected.

A common rule of interpretation, for example, is that in the case of a discrepancy between a unit price and the extension (the unit price multiplied by the number of units), the unit price governs. Another common rule is that where numerical bids are stated both in numbers and in words, the words govern. While these rules of interpretation are widely used and generally accepted, it is unclear whether they may be used if they are not contained in the specifications or in laws governing the solicitation. Public agencies should include these rules of interpretation in their standard specifications for bids, or in local regulations, so that they will have stronger authority to rely on them to resolve ambiguous bids. Without such authority, it could be argued that the unit must reject bids that contain these types of ambiguities.

Some numerical errors can be resolved from the face of the bid document, without reference to a rule of interpretation. For example, consider a bid specification that requests a base bid, and an additive alternate. The bid document requires the alternate to be stated as the base bid amount plus the alternate. One bidder offers a base bid of $250,000 and an alternate bid of $35,000. Obviously, the bidder has stated the alternate as a separate amount, rather than adding it to the base bid amount. The intent of the bidder is obvious and can be resolved without consultation with, or other advantage to the bidder.

Even when a rule of interpretation, like the ones described above, would dictate a different outcome, courts have allowed agencies to make practical interpretations of bids when the intent of the bidder is clear from the face of the bid.[43] In a case, for example, where the numbers clearly indicated that a bidder put

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There is no specific signature requirement in the North Carolina bidding statutes.

41. State ex rel. KNC, Inc. v. New Mexico Dept. of Finance and Adm., 704 P.2d 79 (N.M. Ct. App. 1985) *cert. denied,* 702 P.2d 1007(failure to acknowledge addenda); McCloskey v. Independence Cablevision Corp, 460 A.2d 1205 (Pa. Commw. Ct. 1983); Bryan Construction Co. v. Montclair, 106 A.2d 303 (N.J. Super. Ct. App. Div.1954).

42. *See,* Fratello Construction Corp., v. Tuxedo Union Free School Dist., 726 N.Y.S.2d 705, 706 (N.Y. App. Div. 2001).

43. *See,* H&W Contracting, LLC v. City of Watertown, 633 N.W.2d 167 (S.D. 2001); Spina Asphalt Paving Excavating Contractors, Inc. v. Fairview, 701 A.2d 441 (N.J. Super. Ct. App. Div. 1997); Sciaba Construction Corp. v. City of Boston, 617 N.E.2d 1023 (Mass. App.Ct. 1993), *review denied,* 621 N.E.2d 685 (Mass. 1983).

the extended price in the unit price line on the bid form, a court approved the agency's evaluation based on division of the lump sum bid by the number of units, which resulted in a unit price in line with those of the other bidders.[44] In this type of case, courts have upheld an agency's decision *not* to use a standard rule of interpretation where the intent of the bidder was clear from the bid, and the application of the rule would be inconsistent with that intent.[45]

A more difficult case, however, is presented by a bidder's failure to include a price for a listed item or portion of work. This may be interpreted two ways: One is that the bidder intended to provide the item or work at no additional cost, and the other is that the bidder made an error and failed to complete the bid. (Note that a bid of zero does not present this ambiguous scenario.) Asking the bidder to clarify his or her intent after bids are opened is not an option, since this would clearly give the bidder an advantage by allowing him or her to decide, after seeing the competitors' bids, which interpretation was more advantageous to use.[46] The agency could quickly notify the bidder that the agency will interpret the incomplete bid as an offer to do the work at no cost and give the bidder an opportunity to withdraw the bid if this was an error. Otherwise, it is probably best, and may be legally necessary, to reject the bid.[47]

Failure to acknowledge receipt of addenda

Bidders are not the only ones in the bidding process who make mistakes. It is common to discover errors or changes in specifications that require correction or modification prior to the receipt of bids. These changes are made by "addenda," which are simply changes in or additions to the specifications that are added after the initial release of specifications to the bidders. Addenda are distributed to each bidder who has received specifications, or who the agency is otherwise aware intends to submit a bid. A standard practice is to require the bidders to acknowledge receipt of addenda in order to assure that the bids reflect the changes they contain.

If it is clear from the face of a bid that the bid incorporates the changes called for in an addendum, the failure to acknowledge receipt of the addendum is a waivable defect.[48] The rationale for this interpretation is the same as in the cases discussed above regarding failure to use the proper bid form, that is, that the failure is of a technical nature and does create an advantage for the bidder. Waiver has also been approved in situations where the bidder provided an oral acknowledgement of receipt *prior* to the opening of bids, or where the substance of the addendum at issue has negligible or no effect on the essential terms or prices in the bid.[49]

The more difficult case is one in which it cannot be determined from the face of the bid whether the bid amount incorporates a change made by addendum. In this situation, the bidder gains an advantage from having the ability after bids are exposed to provide an interpretation of his or her bid. In the second situation, the bid must be rejected.[50]

Failure to list subcontractors

In some jurisdictions and for some types of contracts, the failure to list subcontractors is a violation of state law and must, as noted earlier, be rejected.[51] In North Carolina, for example, when bids on building projects are received using the single-prime or dual-bidding methods, the law requires the single prime bids to identify the subcontractors that will be used in

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44. H&W Contracting, LLC, 633 N.W.2d at 175.

45. *See also,* Jensen & Reynolds Construction Co., v. Dept. of Transportation, 717 P.2d 844 (Alaska 1986)(rule providing that written bid governs over numerical bid rejected where the intent of the bidder was clearly the opposite).

46. *See,* Fratello Construction Corporation v. Tuxedo Union Free School Dist., 726 N.Y.S. 2d 705 (N.Y. App. 2001), *and* Lovering-Johnson v. Prior Lake, 558 N.W.2d 499 (Minn. Ct. App. 1997).

47. *Compare,* Turner Construction Co. v. New Jersey Transit, 687 A.2d 323 (N.J.Super. Ct. App. 1997)(zero bid acceptable) *with* Hall Construction v. New Jersey Sports Authority, 685 A.2d 983 (N.J. Super.Ct. App.Div. 1996)(bid must be rejected where alternate was left blank).

48. Martel v. Montana State Board of Examiners, 668 P.2d 222 (Mont. 1983); State ex rel. KNC, Inc. v. New Mexico, 704 P.2d 79 (N.M. Ct. App. 1985), *cert. denied,* 702 P.2d 1007.

49. *See*, Charles N. White Construction v. Dept. of Labor, 476 F. Supp. 862, 866 (D.C. Miss. 1972).

50. *See,* Charles N. White Construction v. Dept. of Labor, 476 F. Supp. 862 (D.C. Miss. 1972); Lovering-Johnson v. Prior Lake, 558 N.W.2d 499 (Minn. Ct. App. 1997).

51. Ray Bell Construction Co., Inc. v. School Dist. Of Greenville County, 501 S.E. 2d 725 (S.C. 1998); George & Lynch, Inc. v. Division of Parks and Recreation, 465 A.2d 345 (Del. 1983).

specified categories of work.[52] The purpose of a subcontractor listing requirement is the prevent "bid shopping." Once a bidder is the apparent low bidder or has received a contract, he or she may attempt to improve profits or favor particular subcontractors by soliciting new bids from subcontractors and substituting those who are willing to underbid the subcontractors whose bids were used in the original bid. Preventing bid shopping is a sufficiently important goal that courts have been hesitant to allow waiver of a failure to list subcontractors, even when the listing is not required by statute.[53] Indeed, even when not required by statute, the failure to list subcontractors probably gives the bidder an advantage not enjoyed by other bidders and may be sufficient to constitute a material deviation under the legal standard for responsiveness.

Failure to provide minority utilization information

Responsiveness issues also arise with public contracting requirements that are designed to promote the use of minority contractors. In some jurisdictions contractors are required by statute or regulation to list or otherwise document the efforts they have made to solicit bids from minority contractors, or to list minority contractors that will be used on the project. These things are required in North Carolina for most building construction or repair projects.[54] As noted earlier, the general rule is that the failure to comply with a statutory requirement cannot be waived. Courts in other jurisdictions have also held the failure to provide minority contracting documentation to be a material defect in bids.[55]

A question of interpretation sometimes arises when a bidder who has failed to submit documentation of good faith efforts indicates that he or she in fact made the required effort to recruit and use minority businesses, but simply failed to enclose the form or affidavit, and the bidder offers to provide it immediately or shortly after the bids are opened. Cases are unclear on whether this type of defect is material. If a bidder can demonstrate that the efforts were made prior to the bid opening, perhaps it could be argued that the failure to include the form does not provide an advantage.[56]

The better approach, however, is probably to reject bids in this circumstance. It is difficult to establish what efforts were made prior to the bid, and to verify the accuracy of material provided after the bid opening. Furthermore, even a small amount of time gained by failing to prepare the affidavit or documentation of good faith efforts may be a material advantage in the bid preparation process. Refusal to accept late submission may also promote better compliance with the minority outreach program.[57] Finally, if state law requires affidavits to be submitted with the bid, as is the case for some contracts under North Carolina law,[58] a bid that fails to meet that requirement must be rejected.

Failure to submit technical materials or other documentation

It is impossible to catalogue the various types of documentation that an agency might require bidders to submit as part of a bid. Examples include technical material describing the performance capability or characteristics of material to be purchased, schedules for performance, and information about the bidder's experience or financial resources. There is no clear rule of interpretation for cases involving the failure to include this type of material, other than the general rule of determining whether the failure to include the material gives the bidder with a competitive advantage. In most cases, the failure to include documentation does not create an advantage and may therefore be waived and cured by the later submission of the information.

The fact specific nature of these types of situations, however, is illustrated by comparing two cases. In one case, a bidder failed to supply a graphic representation of a construction progress schedule that was

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52. N.C.G.S. 143-128(d), (d1).

53. *See* Conduit and Foundation Corp. v. City of Philadelphia, 401 A.2d 376 (Pa. Commw. Ct. 1979).

54. *See* N.C.G.S. 143-128.2(c); 143-131(b).

55. *See* Carl Bolander & Sons v. Minneapolis, 451 N.W.2d 204 (Minn. 1990); Leo Michuda & Sons v. Metro Sanitation Dist., 422 N.E.2d 1078, 1083 (Ill. App. 1981); Rossetti Contracting Co. v. Brennan, 508 F.2d 1039 (7th Cir. 1975). *But see*, James Luterback Const. Co. Inc. v. Adamkus, 577 F. Supp. 869 (D.C. Wisc. 1984), *vacated for mootness,* 781 F.2d 599 (7th Cir. 1986).

56. *See,* Schindler Elevator Corp. v. Metro Dev. Comm'n, 641 N.E.2d 653 (Ind. Ct. App. 1994); Kokosing Construction Co. v. Dixon, 594 N.E.2d 675, 680 (Ohio Ct. App. 1991).

57. *See,* Rossetti Contracting, 508 F.2d at 1082-3.

58. N.C.G.S. 143-128.2(c)(applies to building construction and repair projects costing $300,000 or more).

required in the bidding documents.[59] The court held that this was a waivable defect since it did not alter the bidder's obligation to finish the work by a certain date and because the schedule was not required by statute.[60] In contrast, another case held that the failure to include appropriate data, sketches, drawings, sales specifications, and other information to be used for complete evaluation of the bids required rejection.[61] Similarly, the failure to specify a time for completion of the project was a material deviation requiring rejection of the bid.[62] Resolution of these cases will necessarily depend entirely upon the nature of the documentation at issue, its importance in the bid evaluation process, and the advantage, if any, gained by a delay in submission.

Errors in bid bonds

Public agencies often require each bidder to submit a bid bond, which secures the obligation of the bidder to enter into a contract if he or she is the successful bidder. When a bond is submitted, errors in the form or content of the bid bond raise issues of responsiveness. A defect in a bid bond that renders the bond invalid constitutes a failure to supply a bond. Where a bond is required by statute, this type of defect requires rejection of the bid. In North Carolina, bid bonds are required for construction or repair contracts in the formal bidding range.[63] The statute prohibits the consideration of a bid in this category unless it is accompanied "at the time of its filing" by a bid bond or deposit in an amount equal to not less than five percent of the total bid amount.[64] This requirement is sufficiently specific that many questions about improper bid bonds are easily resolved. A bid that is accompanied by a bond that is not valid due to improper signatures or amount must be rejected. A bid that is not accompanied by a bond at all must be rejected, even if the bidder can supply it shortly after the bid opening, since the statute requires the bid bond to accompany the bid *at the time of its filing.*

Another question that sometimes arises in this area is whether an alternate form of security, such as a letter of credit, is acceptable. The North Carolina statute allows three specific alternatives to a bid bond: cash, cashier's check, or a certified check on a federally insured bank or trust company.[65] Though there is no North Carolina case or other interpretation of the statute on this question, since the statute is so specific as to the forms of security permitted, it appears that alternatives other than those specifically listed are not acceptable.[66]

Another common issue involving bid bonds is whether a bid accompanied by a faxed bid bond is acceptable. The legal issue is whether the faxed document as submitted is valid, that is, whether the surety is bound by the document as submitted by the bidder. Although there does not appear to be case law directly on this subject, the law increasingly recognizes the validity of contractual obligations evidenced by electronic documents.[67] A court would likely uphold the obligation of the surety under a faxed bid, assuming that the document is otherwise valid. Public agencies may choose to insist upon original bid bonds, however, in order to reduce the chances of receiving a falsified document or to otherwise insure authenticity. The ability to use a faxed document makes a big difference to contractors when submitting bids, since it takes more time to obtain and submit an original document from the surety. Public agencies should specify in their bid documents whether they will accept faxed bid bonds so that the bidders are in an equal position with regard to the submission of bid bonds. If there is nothing in the specifications indicating that faxed bid bonds will be accepted, bidders may assume they are not acceptable. In this circumstance, acceptance of a faxed bid bond would be unfair to those who took the time to obtain original documents.

Conclusion

The bid preparation and submission process is fraught with opportunities for error. Public agencies are often inclined to waive errors in order to avoid additional expense and delay in the contracting

59. Gil-Bern Constr. Corp. v. Brockton, 233 N.E.2d 197 (Mass. 1968).

60. Gil-Bern, 233 N.E. at 199-200.

61. National Engineering & Contracting Co. v. City of Cleveland, 146 N.E.2d 340 (Ohio 1957).

62. Bale Contracting, Inc. v. City of Westerville, 455 N.E.2d 517 (Ohio Ct. App. 1982).

63. N.C.G.S. 143-129(b). Formal bidding is required when the estimated amount is $300,000 or more.

64. Id.

65. Id.

66. *See*, Kennedy Temporaries v. Comptroller, 468 A.2d 1026, 1033-34 (Md. Ct. Spec. App. 1984).

67. *See, e.g.,* N.C.G.S. 66-317, a key provision of the North Carolina Uniform Electronic Transactions Act, which recognizes the validity of electronic contracts and electronic signatures.

process. Courts play a unique role in promoting fairness on behalf of all of the participants in the process, especially the bidders, in cases challenging a public agency's exercise of discretion to waive defects in bids. Cases decided around the country provide guidance to public officials in determining when defects in bids lawfully may be waived. Adherence to the general rules articulated in these cases, supported by the generally deferential standard of review applied in most cases, should promote consistency and legally enforceable results for pubic agencies in North Carolina when they analyze the responsiveness of the public bids they receive.

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