

Following Bid Instructions On Public Projects

In *R.D. Brown Contractors, Inc. v. Board of Education of Columbia County*, a Georgia case argued in 2006, a local school board solicited bids for the multi-million dollar construction of a new public school. The invitation explicitly stated the contractor must include a list of all its major subcontractors in its bid documents.

Significantly, the bid invitation did not make the list of subcontractors a material requirement. The losing bidder and plaintiff, R.D. Brown Contractors, Inc., submitted a bid of \$11,318,000. Although McKnight Construction Co. submitted the lowest bidding price in the amount of \$11,259,000, the firm did not include a list of its subcontractors.

As a result, the bid administrator rejected McKnight's bid presumably because of its failure to follow the invitation's instructions. The next day, McKnight gave the school board a list of its subcontractors. The school board then voted and approved McKnight's bid much to the consternation of Brown, the second lowest bidder.

Brown immediately sought a temporary restraining order and an order from the court to award the bid to Brown instead of McKnight.

Although Brown took the proper course of action, the court upheld the school board's decision to award the work to McKnight. Georgia's highest court loosely interpreted the state public bidding laws and did not see the need for every single invitation requirement to be satisfied. The court found the school board had the power to waive certain bidding requirements and to determine whether a bidder materially conformed its bid to public bidding laws and the invitation.

The court also found no state law required a public works contractor to provide a list of subcontractors, nor did state law prohibit the public agency from disre-



garding its own list requirement.

The Georgia court's decision was consistent with the public policy behind the bidding laws and could be considered in the public's best interest. Such policy ensures taxpayers pay the lowest possible price for the best quality work. McKnight's bid was \$59,000 less than Brown's bid. Furthermore, McKnight's bid otherwise conformed to the invitation in all material respects.

The Georgia court therefore considered it in the public's best interest to categorize the list of subcontractors as an immaterial technicality in hiring the most cost-effective bidder.

This decision is not consistent with many state laws and case law. If bid documents for public projects require bidders to submit certain information at the time of bid, such information can be for the protection of the agency contracting the work, or it also may be to prevent injustices in the construction industry.

For example, general contractors should not get pre-bid prices from subcontractors under the guise of a "lock in" price and then, after the bid, try to negotiate a better price with the subcontractor.

Public agencies also want to know at the time of bid what subcontractors the general contractor intends to use to ensure subcontractor integrity and quality. In a competitive public bidding scenario, it is usually unfair to exempt bidding contractors from listing their proposed subcontractors if the public agency so desires.

To protect integrity, every party should stand on a level playing field. The perception of fair play is as important as the act itself in the eyes of the law when it comes to public bidding.

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