

History, the Law and Politics:

Openness in Public Construction Contracting

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As an avid reader of American history, the Commonwealth Court's recent decisions in *Associated Builders and Contractors Inc. v. Commonwealth Department of General Services* and *Worth & Company v. Commonwealth Department of General Services, et al.*, reminded me of a famous line once uttered by George Washington. He wisely observed, "Few men have virtue to withstand the highest bidder."

While his statement was uttered in a different context, it aptly relays the undercurrents of the challenges made by ABC and Worth to the recent policy changes of Gov. Edward Rendell's administration in its application of the Commonwealth Procurement Code to construction projects. The court's decision rested on sound legal analysis, but larger public policy

issues and political maneuvering are linked to the decision.

The controversy started April 7, 2005, when the Pennsylvania Department of General Services announced that it would change its policy for bidding on public construction projects. In a marked change from the traditional competitive sealed bidding process, the DGS opted to begin utilizing a "best value" approach. By doing so, the DGS was changing the framework in which public construction contracts would be awarded from one focused only on the lowest bid to one that emphasized a combination of the lowest price and the best qualifications.

Since this approach is already being used by nine other states, including New Jersey and Delaware, and over 70 percent of federal agencies awarding public contracts, it is not without precedent. However, as these two cases illustrate, the procedure by which the bids are evaluated is as important as the factors being analyzed.

The new policy utilized by the DGS relied on Section 513 of the Commonwealth Procurement Code to allow bidding on certain public construction projects using a request for proposal process. As required by law, the secretary of the DGS issued a written opinion authorizing the commonwealth to use a request for proposal process on certain "complex projects" and on projects with allocations exceeding \$5,000,000 in order

to ensure "timely delivery and quality work." The new process required contractors to submit written proposals to DGS. These proposals would then be evaluated by an unidentified committee that would award the contract based on a weighted scale that included the cost (60 percent), a technical score on competency of the contractor to perform the work (30 percent), and a disadvantaged business score (10 percent). In an odd twist, the DGS also declared that those submitting unsuccessful proposals were to be "notified and debriefed" as to their own proposal and its relative rank in the scoring process, but that the DGS would not permit contractors to review the bidding information provided by any other contractor.

Unlike the new policy, DGS previously received sealed competitive bids for public construction projects. The only factor evaluated prior to April 7, 2005, was the bid price, and no differentiation was made regarding the complexity of the project or the overall cost of the work to be performed. Contracts were awarded to the "lowest responsible bidder," and all the bids were made public record after the contract was awarded. Accordingly, contractors could compare their bids to any other bid submitted and prepare a bid protest if desired.

The differences in these two policies created an immediate fault line, as many quickly became concerned about the decision to take the bidding process behind closed doors. Speculation of manipulated

and fraudulent results abounded in particular because the records would no longer be made available for public scrutiny by unsuccessful bidding contractors. In addition, it was alleged that the newly proposed scoring would be susceptible to some level of subjectivity. In juxtaposition to these opinions, those in favor of the new process argued it saved public funds in the long run because it allowed for the use of more competent contractors that would ensure the work was done on time and in a more professional manner. They also argued that it streamlined the process by limiting change orders and construction claims.

On May 18, 2006, the Commonwealth Court of Pennsylvania issued dual opinions analyzing the challenges made by ABC and Worth. The facts and procedural history of each case differs, but the substantive arguments made by the parties in their respective challenges were largely identical. Since the court acknowledged this fact and incorporated the analysis of ABC's challenge into the Worth opinion, only a discussion of the ABC case is merited here.

On cross motions for summary judgment in *Associated Builders and Contractors Inc. v. Commonwealth Department of General Services*, the court was asked to decide whether the DGS' use of the request for proposal process violated the Pennsylvania Constitution, the Commonwealth Procurement Code, the Separations Act, the Commonwealth Documents Law, and DGS' own regulations. The court resolved the case as a matter of statutory interpretation, so it never reached the constitutional or administrative issues. Inevitably, the decision was largely dependent on the



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court's interpretation of Section 513 of the Commonwealth Procurement Code.

The DGS took the position that the new policy was properly authorized under Section 513. Although the request for proposal process outlined there does not explicitly mention construction contracts, the DGS suggested it could be used in the construction industry because Section 103 of the code included construction contracts in its definition of the term "contract." While this argument was logical so far as it went, it failed to address the conflict between the new policy and Section 322(6) of the Separations Act. This provision requires competitive bidding and separate awards of public construction contracts for plumbing, heating, ventilation and electrical work to the lowest responsible bidder.

The DGS argued that the two statutes had to be read and reconciled within the context of the overall legislative intent of the statutes and the body of law governing public construction contracts. When this is done, DGS intimated, it is clear that Section 513 was intended to allow for the use of a request for proposal process when a sealed competitive bidding process was not "practical" or "advantageous" for the Commonwealth.

ABC also argued the legislative intent of Section 513. However, it stated that the Legislature did not intend for Section 513 to cover construction contracts. ABC conceded the Section 103 definition of "contract," but it pointed to a number of other

things to support its position. It said that the Legislature specifically differentiated construction contracts from others in certain sections of the code, and thus signaled that construction contracts were to receive special treatment.

ABC also relied heavily on the Separations Act because its requirement of competitive sealed bidding and an award to the lowest responsible bidder directly conflicted with the DGS' position. In reality, it more closely mirrored the DGS' previous bidding policy under the Commonwealth Procurement Code.

Finally, ABC relied heavily on the legislative history of the Commonwealth Procurement Code, in particular Section 513. It referred to specific language in the original draft of Section 513 that permitted requests for proposals for construction contracts, and pointed out that this language was removed from the version that passed into law. Accordingly, it was evident that the Legislature did not intend for Section 513 to be used for public construction contract bidding.

The court sided with ABC, ruled in its favor, and issued an injunction ordering the DGS not to utilize the request for proposal process any further. It largely adopted the arguments put forth by ABC and agreed that the Commonwealth Procurement Code did not contemplate the use of the request for proposal process for construction projects. The legislative history of Section 513, the passage of the Separations Act and the "special" treatment given to construction contracts in the Commonwealth Procurement Code indicated that the Legislature did not intend for the commonwealth to use a

request for proposal process on construction projects. To the contrary, the dissent sided with the DGS and adopted all of its arguments.

The almost immediate decision of the DGS to petition for allocatur to the Supreme Court reflects both the far-reaching implications and explosive nature of this decision. From a policy standpoint, the implementation of a request for a proposal process might lead to higher overhead costs for contractors, as additional information and forms will be necessary to participate in the public bidding process. Such increases in cost could have a disproportionate impact on businesses ill-equipped to deal with such changes, thus decreasing the number of businesses bidding on public construction work. This begs the question of whether the DGS would truly be getting the "best value" for the money spent.

The new policy also adds additional subjectivity to the selection process by including "qualifications" as an element in the decision making process. The problem lies in who defines "qualification." When one adds the volatile effect of taking the decision behind closed doors and leaving it to a largely unaccountable committee, public confidence in the process begins to waver.

Finally, consideration of the impact of these cases cannot pass without a discussion of its role in election year politics. Rendell is running for re-election this fall, and large numbers of those who oppose this change in policy have suggested that it was intended as political patronage. They fear that the secrecy imbedded in the process was designed to allow the award of

contracts to favored union contractors who traditionally support Democrat candidates such as Rendell. They say that since the new policy does not require that unsuccessful bidders be given an explanation as to why the contract was awarded the DGS would be largely free of big protests and could arbitrarily evaluate "qualifications" in the best value process.

Supporters of the new policy defend it largely on the concept that it saves the commonwealth money because it allows it to obtain the "best value" for the funds it expends on public construction projects.

The legal arguments in these cases veil a larger issue that pervades government today — whether it is run by Republicans or Democrats — secrecy. George Washington's words ring true because the public largely distrusts governmental action done in secret for fear that politicians do not have the necessary "virtue to withstand the highest bidder." As a result, the winners become the politicians and the political insiders, not the public.

This fundamentally contradicts the American system and almost universally perturbs all voters on some level. In this regard, perhaps this controversy would have been avoided if the DGS had adhered to the philosophy of former U.S. Supreme Court Justice Louis Brandeis that sunlight is the best disinfectant.

Given the recent fallout from the pay raise scandal, the Supreme Court may not consider this issue before this fall's election. In the event it does, it is difficult to predict the outcome given the split in the Commonwealth Court's decision and the political differences on the Supreme Court. Only time will tell. •