

## FEBRUARY 2010 LAW REVIEW

### PARK GARBAGE BAG COMPETITIVE BID CONTRACT

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Within the context of competitive bidding for government contracts, an accepted bid must substantially comply with the specifications and requirements in the call for bids. A bid which does not comply with specifications in the call for bids is effectively a new offer which can not be considered within the scope of the original call for bids. Any contract based on such a non-conforming bid would be void since it was not awarded in a manner consistent with a fair competitive bidding process required under applicable state law.

#### EASY TEAR BAGS

In the case of *Interboro Packaging Corporation v. City of Minneapolis* (Minn.App. 9/15/2009), the state appeals court considered a breach-of-contract claim arising from a competitive-bid process involving the purchase of garbage bags for use in public parks and recreation. In the fall of 2006, the City of Minneapolis issued a call for bids for garbage bags on behalf of Minneapolis Parks and Recreation Board. Pursuant to Minn. Stat. § 471.345 (2006), bidders were required to reply on a bid form that included a set of precise specifications.

In pertinent part, the call for bids specifically required the thickness of large polyethylene trash bags be within 5% of "4 full mil." (A "mil" is 1/1000 of an inch and is used to measure the thickness of a coating.) Specifications for small size bags required bids to be within 5% of "2 full mil." Further, the bid form required bidders to supply "the manufacturer's specifications guarantee on weight (mil) of the bags."

Bidders were also required to submit sample bags. According to the park board, "the only purpose of requiring a sample was to check the quality of the material." Accordingly, "[t]he bid form did not contain language indicating that the bid would be awarded based on the sample or that approval of the sample would supersede the bid form's specifications." On the contrary, the call for bids stated that the final product had to be "specifically manufactured due to the unique specifications."

Interboro Packaging Corporation submitted a bid and sent sample bags, inserting the language "as per sample" on its bid form. Despite the requirements of the bid form, Interboro did not supply "the manufacturer's specifications guarantee on weight (mil) of the bags" with its initial bid submission. Instead, Interboro attached a letter to its bid form acknowledging that the samples did not meet all specifications. The letter did, however, inform the park board that "the final product would match the sample in strength, and match the specifications in size and color."

Interboro's bid was the lowest. Because the price was so low, the city's purchasing agent, Nancy Pryzmus, was concerned that Interboro's product might not meet specifications. Pryzmus sent a memo, along with the bid and sample, to the park board's store keeper, Benny Rodriguez, stating, "I recommend Interboro Pack Co. as the low bid if they meet specs. Do they meet specs?"

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Rodriguez did not have a micrometer to measure the thickness of the sample. He did, however, notice that the sample bag was thinner than normal, but he pulled on the sample to test it and thought it was "pretty strong." Rodriguez claims that he called Interboro and spoke to an unidentified woman who informed him that Interboro's product would meet the park board's specifications but the bags' weight was not specifically discussed. Rodriguez subsequently informed Pryzmus that the sample bags met specifications for thickness and strength, and the park board accepted Interboro's bid.

Interboro then sent the city a manufacturer's specification sheet, identifying the weight of the large bags as "4 mil nominal" and the weight of the small bags as "2 mil nominal." Interboro also contacted Pryzmus to verify acceptance of Interboro's product. In addition, Interboro sent Pryzmus a document for the city and the park board to sign confirming that they had tested, evaluated, and approved a second set of samples that were sent along with the letter. Pryzmus did not sign or return the letter.

According to Interboro, Pryzmus told Interboro over the phone that she knew that Interboro's sample was 2.6 mil and not the required 4 mil. Interboro, however, alleged that Pryzmus told Interboro that the first sample was satisfactory to the city and Interboro "should have no problems" if it shipped this product.

The park board received its first order of bags from Interboro in March 2007. The park board claimed that the bags tore easily. Based on the allegation that Interboro's bags tore easily, a park board supervisor recalled the Interboro bags and did not allow them to be used. The park board then measured the bags' thickness and discovered that Interboro's large bags were only 2.6-2.8 mil thick and the small bags were only 1.0 mil thick.

A park board supervisor wrote to Interboro in March 2007 and informed them that its bags were being rejected because they were "of nonconforming thickness" and instructed Interboro to make arrangements to retrieve the bags. Interboro failed to do so.

In May 2007, the park board shipped the bags back to Interboro. Interboro refused to pay for the shipment or retrieve the bags from the carrier. The carrier then returned the bags to the park board. The park board maintains that it used another bidder to fulfill its order for trash bags and is not using Interboro's bags.

Interboro filed suit against the city and the park board alleging breach of contract. The district court denied Interboro's breach-of-contract claim and held the contract void. In the opinion of the district court, the contract was void because "Interboro's bid was nonconforming and acceptance of the bid violated the competitive-bidding law." Interboro appealed.

### SUBSTANTIAL COMPLIANCE?

On appeal, Interboro argued that its bid "substantially complied with the requirements set out in the call for bids." As characterized by Interboro, "the call for bids allowed bidders to submit substitute commodities" and the City "had the discretion to waive bid defects and accept Interboro's bid even if substitutes were not permitted." Moreover, under the circumstances of this case, Interboro contended further that "the park board accepted Interboro's substitute commodity

as an approved equal, resulting in a valid contract." As a result, Interboro maintained that the City was legally obligated to perform and make payment according to the terms of the contract.

As described by the appeals court, "[t]he purpose of competitive bidding is to give "all contractors an equal opportunity to bid and of assuring to the taxpayers the best bargain for the least money." Further, the court noted that "[a] fundamental purpose of competitive bidding is to deprive or limit the discretion of contract making officials in the areas which are susceptible to such abuses as fraud, favoritism, improvidence, and extravagance."

According to the appeals court, "competitive bidding is a condition precedent to the letting of public contracts." (A "condition precedent," is an event which must take place before something else can occur, i.e. competitive bidding before a government contract is awarded.) In this instance, applicable state law required "sealed bids on any contract entered into by a municipality for the purchase of supplies when the contract's amount may exceed \$50,000." Minn. Stat. § 471.345, subd. 3 (2006)

As cited by the appeals court, the Minnesota state supreme court had held that "a contract, let without competitive bidding where required by statute, is void as a matter of sound public policy," Further, the appeals court noted that a valid bid must "substantially comply with the requirements of law and the call for bids":

A bid constitutes a definite offer that a municipality may accept without further negotiations... A bid that does not comply with the issued call for bids is a new offer rather than a bid. A contract entered into based on a new offer is void because it was not arrived at by competitive bidding, as required by statute.

In this particular instance, the specific issue before the appeals court was, therefore, "whether Interboro's bid substantially complied with the call for bids." In addressing this issue, the court would consider "whether Interboro enjoyed a substantial advantage over other bidders" if their bid was accepted. According to the court, "[a] contract entered into with the lowest bidder containing substantial provisions beneficial to that bidder that were not included in the bid specifications is void." In this particular instance, the appeals court found "Interboro's bid did not propose to supply a product that met the mil requirements of the call for bids."

#### SUBSTITUTES PERMITTED?

On appeal, Interboro had claimed that its bid "complied with the bid requirements because the call for bids permitted substitute commodities." According to the appeals court, it would interpret the contract, applying "contract principles to determine whether the call for bids allowed a substitute product that did not meet mil requirements." In so doing, the court would determine whether any ambiguity existed in the language of the contract. In the opinion of the court, "[t]his language is clear and unambiguous." Specifically, the call for bids did "not allow for a substitute product that does not meet mil requirements":

On its bid form, the park board provided specific mil requirements. The bid form expressly equates mil with weight in its requirement that bidders supply the "manufacturer's specifications guarantee on weight (mil) of bags." Finally, the bid form clearly provided for "No substitute on size, color or weight."

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As a result, the appeals court found "the call for bids unambiguously expressed that no substitutions were allowed on the weight of the bags." Further, the court found it was "undisputed that Interboro's bid offered a product that did not comply with the weight, i.e., mil, specifications included in the call for bids." The appeals court, therefore, concluded that "Interboro's bid was nonconforming."

Because Interboro's bid offered a material that did not conform to the call for bids' clear and unambiguous mil requirements, the other bidders did not have an opportunity to compete with Interboro. Interboro's nonconforming bid circumvented the purpose of competitive bidding. Interboro had a substantial advantage over other bidders as a result, and respondents' acceptance of the nonconforming bid was in violation of law...

Minnesota Statute Section 471.345, subdivision 3, requires competitive bidding for the contract at issue. And the purpose of competitive bidding is to provide "all contractors an equal opportunity to bid," thus assuring that the taxpayers will receive the best value.

As a result, the appeals court concluded that the contract between Interboro and the City was void.

On appeal, Interboro had argued further that the city had the "discretion to waive bid defects... even if the call for bids did not allow substitutions." The appeals court rejected this argument. According to the court, "[a] fundamental purpose of competitive bidding is to limit the discretion of contracting officials." Pursuant to "municipal competitive bidding laws" (Minn. Stat. § 471.345), the appeals court found the City was "not permitted to accept Interboro's bid unless the bid offered a commodity that substantially complied with the call-for-bids specifications."

Because it had incurred expenses related to performance of the contract, Interboro had also argued that the court should not allow the City to claim that the contract is void. The appeals court disagreed. In the opinion of the court, "[t]he city and park board did not permit Interboro to continue for an extended period under the assumption that the contract was valid and that its final product conformed to the bid specifications." On the contrary, the court found "the contract was in an early stage of performance" because the park board had "notified Interboro that its bags were nonconforming within the same calendar month that it received the first shipment."

### CONCLUSION

The appeals court, therefore, concluded that the contract was void because "Interboro's bags were not of the thickness required by the bid specifications." Since "Interboro's bid did not substantially comply with the call for bids," the appeals court affirmed the summary judgment of the district court effectively dismissing Interboro's breach-of-contract claim.