

COMPETITIVE BIDDING “FAIRNESS” IN CONCESSION CONTRACT

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Local governments are customarily given a general power to contract, which is ordinarily interpreted to authorize all contracts necessary to accomplish the purposes, and objectives of the local governmental unit as expressed in the state constitution, state laws, or corporate charter. For example, Virginia state law authorizes local park authorities “to enter into any contracts. . . for or relating to the furnishing of park services or facilities.”

When the manner of entering into a public contract is not prescribed by statute or charter, including competitive bidding, the adoption of a method of contracting is left in the control of the governing body of the local unit. That being said, in most jurisdictions, the mode of contracting is oftentimes prescribed by statute or charter.

SEE: Statutes Dictate Public Contracting Requirements.

James C. Kozlowski. *Parks & Recreation* Oct 1982 v17 p28

<http://cehdclass.gmu.edu/jkozlows/lawarts/10OCT82.pdf>

SEE ALSO: Park Garbage Bag Competitive Bid Contract

James C. Kozlowski. *Parks & Recreation*. Feb.. 2010 Vol. 45, Iss. 2

<http://cehdclass.gmu.edu/jkozlows/lawarts/02FEB10.pdf>

As illustrated by the case described herein, in the absence of an applicable mandatory competitive bidding prescribed by law, local government officials are generally vested with significant discretion in choosing among competitive bids from qualified concessionaires. Under such circumstances, judicial review of the bidding process for a particular park concession contract may apply a deferential “fairness” standard. In so doing, the court will determine whether the decision to accept or reject a particular bid constituted a completely arbitrary abuse of discretion by local government officials.

PADDLE CONTRACT

In the case of *Kayak Centre v. Town of Narragansett*, 2015 R.I. LEXIS 83 (R.I. 6/15/2015), the Supreme Court of Rhode Island considered a challenge to a concession contract bidding process for operation of a paddle sports business on town owned land.

The reported opinion of the state supreme court provided the following description of the facts in the competitive bidding case. Plaintiff Kayak Centre is a Rhode Island limited liability company that operates paddle sports businesses at two locations, one in Charlestown and one in the village of Wickford in North Kingstown. Narrow River is also a Rhode Island limited liability company; it owns and operates a paddle sports business at 94 Middlebridge Road in Narragansett (the property).

In August 2012, the town acquired a 9.5-acre parcel of land that included the property on which Narrow River's business was located. Narrow River continued to operate its

business on the land after the town took ownership of the property. However, in August of 2013, the town invited competitive bidding for a five-year concession contract to operate a paddle sports business on the property. One rationale for the decision was described by Robert O'Neill, the Chairman of the town's Land Conservancy Trust, who said it was "good business sense to say 'We'll see what other proposals [for the paddle sports concession at the Property] people will bring forward.'" To begin the process, the town's purchasing agent, Susan Gallagher, and the Director of the town's Parks and Recreation Department, Steven Wright, prepared a package and advertised the invitation to bid on the concession award.

The invitation, specified a submission date of August 29, 2013, required that all bidders have a minimum of five years of experience operating a paddle sports business, and asked for references who could attest to prior experience. The invitation also stated, the Town "reserves the right to reject any/all bids, waive any informalities in the bids received and to accept and award the bid to the highest qualified bid deemed most favorable to the interest of the town."

Four bidders initially expressed an interest by attending an advertised pre-bid meeting, but, in the end, only Kayak Centre and Narrow River submitted bids to the town. Bidders were asked to state the amount of a proposed "annual payment" that they would be willing to make to the town. A minimum amount of \$15,000 annually was specified in the bid package. Kayak Centre proposed \$180,505 in total payments over the projected five-year period, while Narrow River's bid proposed \$100,500. In accordance with the invitation to bid, the bids were opened by the town's Parks and Recreation Department and were then examined in order to issue a report to the town council before it awarded the concession.

There was no dispute that Ms. Gallagher's report "concluded that the Kayak Centre was the best and most qualified bidder and recommended that the Town Council award the municipal contract to the Kayak Centre." The report stated, in part, "[t]he Parks and Recreation Department is recommending this award based on the Kayak Centre's 18-year experience in the paddle sports business, references, and total bid offering." Also, the town's contacts with Kayak Centre's references resulted in "all positive comments regarding the Kayak Centre operation."

On October 7, 2013, the report was presented at a meeting of the town council and a motion was made to award the contract to Kayak Centre. However, after some lengthy comments from the public and discussion among town councilors, the town council voted three to one to reject the motion to award the concession contract to plaintiff Kayak Centre.

Following this vote, the town solicitor, who was present at the meeting, then suggested that the next course of action would be to direct the staff to develop additional criteria and qualifications to be included in a new bid package for the town council's review before it goes back out to bid. The town council then "voted 3-1 to reject all bids and commence the bidding process again," following the solicitor's recommendation.

In the subsequent lawsuit, plaintiff Kayak Centre claimed the Town had violated state laws governing the award of municipal contracts. Further, Kayak Centre sought a court order preventing the Town from rebidding the concession contract.

#### MUNICIPAL CONTRACT LAW

As cited by the state supreme court, state law (G.L. 1956 § 45-55-5) entitled "Competitive sealed bidding" required that all contracts for "purchases" exceeding \$5000 be awarded by competitive bidding unless the contract involved professional engineering/architectural services or a construction contract less than \$10,000. Moreover, if the contract was to be awarded "on the basis of the lowest bid price or the lowest evaluated or responsive bid price," the invitation for bids was to state "the objective measurable criteria to be utilized."

In this particular instance, the trial court found the state "Competitive sealed bidding" statute inapplicable to the facts of this case. Moreover, the trial court did not apply the generally applicable judicial standard of "fairness" to review the Town's conduct in competitive bidding. This "fairness" standard of judicial review would have required the court to determine whether the government "acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion."

Having found no violation of an applicable competitive bidding law, the trial court entered judgment in favor of the Town. Kayak Centre appealed. On appeal, Kayak Centre claimed the trial court had erred in ruling "the requirements of § 45-55-5 were inapplicable to the case." In the alternative, Kayak Centre argued the Town had violated the applicable standards of fairness enunciated by the state supreme court for competitive bidding.

#### BIDDING LAW INAPPLICABLE

In reviewing "the interpretation of a statute," the state supreme court acknowledged that the "Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings" when the language of a statute is "clear and unambiguous."

As interpreted by the state supreme court, the language of § 45-55-9 was "clear and unambiguous" in that it required competitive bidding for contracts that exceeded "five thousand dollars (\$5,000) *for all other purchases*." Moreover, as cited by the court, the statute required that "the contract shall be awarded to the responsive and responsible bidder whose bid is either the lowest bid price, or lowest evaluated or responsive bid price." Section 45-55-5(e). In the opinion of the supreme court, this statute was enacted by the state legislature to "regulate contracts that require the expenditure of public funds." In so doing, the supreme court noted that the state legislature had not included "concession contracts" within the purview of § 45-55-5.

Moreover, in previous competitive bidding cases "where the awarding governmental

entity selected a more expensive bidder for specified reasons,” the court noted that § 45-55-5 "does not preclude an awarding authority from taking into account factors beyond price." In so doing, the court acknowledged that “choosing a seemingly higher initial bid from a more qualified party can lessen the risk of future unexpected expenses,” thus, fulfilling the purpose of the competitive bidding law in “safeguarding public funds."

The state supreme court acknowledged the concession contract bid submitted by Kayak Centre would have provided more “public funds” to the Town over a five year period than the next closest bid submitted by Narrow River.

The Kayak Centre submitted a bid for the concession contract at issue in this case that would have had Kayak paying the town the sum of \$180,505 in payments over the projected five-year period, while Narrow River's bid proposed \$100,500 in payments.

That being said, the state supreme court found the expressed language of “§ 45-55-9 explicitly provides that the contracts to which § 45-55-5 applies are ‘procurements’ and ‘purchases’”, with no mention of concession contracts.

In the opinion of the state supreme court, a contract involving expenditures does not involve “all of the same considerations” as a concession contract. Specifically, the higher payment bid for this particular concession contract was not similar to the lowest bid in a contract involving purchases for procurements. As a result, the state supreme court agreed with the trial court that the competitive bidding statute, as written, did not apply to the Town’s action in this case.

We cannot rewrite the statute by essentially exchanging the word lowest for the word highest, as plaintiff would have us do, because we will not insert words into an unambiguous statute. We simply apply the words as written and the words of § 45-55-5 make it clear the statute is inapplicable to these facts.

Accordingly, the state supreme court concluded “§ 45-55-5 does not apply to competitive bidding processes involving concession contracts, which are contracts that produce revenue and not purchases.” As a result, the state supreme court found the trial court had correctly ruled that § 45-55-5, the competitive sealed bidding state statute, did not apply to the facts of this case.

#### GOOD FAITH STANDARD

As noted by the state supreme court, prior to the competitive bidding statute being enacted into law, “there was already a standard that was used by this Court when it reviewed bid disputes.”

[I]n the absence of any legislative requirement pertaining to competitive bidding, it is the duty of the appropriate public officials to act honestly and

in good faith as they determine which bidder would best serve the public interest.

According to the court, this judicial standard of review for competitive bidding afforded “a certain amount of deference to government officials.” Specifically, in applying this deferential standard of judicial review, a court should “not interfere with an award absent a showing that the board acted corruptly or in bad faith, or so unreasonably or arbitrarily as to be guilty of a palpable abuse of discretion.”

Since the Town “never completed the bidding process and never awarded the concession to any bidder,” the Town had argued there was nothing for the court to review. The state supreme court disagreed.

According to the court, the standard of judicial review to be applied to “the process of awarding, or not awarding, a competitive bid” required good faith on the part of government officials. In this particular instance, the state supreme court found the trial court had erred in not determining whether the town had acted in good faith in not awarding the concession contract to any bidder. Specifically, the trial court should have considered “whether the town acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion” under the circumstances.

The state supreme court, therefore, remanded (i.e., sent back) this case to the trial court for further proceedings to consider whether the Town had “acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion” in not awarding a concession contract. In light of judicial deference in favor such decisions by government officials, the state supreme court recognized that Kayak Centre faced a difficult task of proving the Town had violated the applicable good faith standard for competitive bidding.

In remanding this case we remain cognizant of our earlier holdings that the bar for a potential challenger is extremely high. Corruption, bad faith, and a palpable abuse of discretion are difficult to prove, particularly in the light of our antipathy for “government by injunction.” [In other words, courts are appropriately reticent to effectively dictate governmental operations through court orders prohibiting implementation of decisions by government officials.]

#### ABUSE OF DISCRETION?

As described above, the Town Council rejected the report of its own purchasing agent as well as the recommendation of the Parks and Recreation Department. Regardless, absent proof of “a palpable abuse of discretion,” the court would still defer to the judgment of local officials. Accordingly, any doubts would be resolved in favor of upholding the Town Council’s decision to reject all bids and recommence the bidding process. Moreover, the reasonableness of this decision can be inferred from the expressed language in the bid invitation reserving the Town’s right to “reject any/all bids.”

## SEPTEMBER 2015 LAW REVIEW

Further, the decision of the Town Council to reject the report and recommendation of its own municipal officials could also be viewed as a reasonable political response to “lengthy comments from the public” in deciding whether or not to award the concession contract to Kayak Centre. A perceived lack of public support for a prospective concession contract would certainly provide a rational basis for local politicians to reject the recommendation of local administrators. Perhaps, one could speculate that comments from members of the public favored preserving the status quo wherein Kayak Centre’s competitor, Narrow River, would continue to operate its existing paddle sports business on the property acquired by the Town.

The opinion of the state supreme court described above did not provide a description of these public comments and subsequent discussion by the Town Council. On remand, the trial court would presumably conduct further proceedings to consider whether such public commentary might indeed have provided a reasonable basis for the decision to “reject all bids and commence the bidding process again.” Moreover, one could certainly argue that the Town’s action was a reasonable decision to follow the legal advice of the town solicitor.

While the decision to remand preserved Kayak Centre’s lawsuit, as noted by the state supreme court, Kayak Centre faced a very difficult burden in trying to prove corruption, bad faith, and a palpable abuse of discretion on the part of the Town Council in deciding to reject all bids and recommence the bidding process with additional criteria and qualifications to be included in a new bid package.

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