

NON-RESPONSIVE BID OR NON-RESPONSIBLE BIDDER?

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Contractors' expectations are often disappointed by rejections of their lowest bid in favor of a higher bid by a competitor where the public entity declares the lowest bid non-responsive or the bidder non-responsible. But there is an important distinction between the two, which affects the bidder's rights. In order to avoid a deprivation of due process and potentially a lucrative award of a public works project, it is important for contractors to understand their rights, and act quickly.

The law requires a public entity to afford a contractor a due process hearing when the public entity rejects the contractor's bid on the basis that the contractor is non-responsive; however, there is no right to a due process hearing where the public entity has merely found the contractor's bid to be non-responsive.

To avoid the due process hearing requirement, public entities have been known to notify bidders that their bids were non-responsive, when, in fact, the public entity had secretly determined the lowest bid contractor was non-responsive. However, in a recent case, the Court of Appeal in Great West Contractors v. Irvine Unified School District explained that an erroneous characterization of a bid as non-responsive when the bidder has, in fact, been found non-responsive, allows public entities to "circumvent public contracting statutes and do so without affording [the affected] bidder a hearing."

The Court rejected the non-responsive finding by the school district and sent the case back, requiring the school district to hold a due process hearing where the lowest contractor's bid was rejected by the district after it omitted details regarding other licenses held by its personnel. While the school district contended the omission made the lowest contractor's bid non-responsive, the Court held that the rejection was really due to non-responsibility, requiring a hearing before rejection.

So, what is the difference between a non-responsive bid and a non-responsible bidder, and how can you tell which reason is the true legal reason a bid was rejected?

According to the appellate court, a general rule of thumb is that responsiveness can usually be determined by solely looking at the bid and the bid request, without resort to any additional information, references, or past performance. If the bid offers to build exactly what the bid package requests, the bid is responsive. If the bid varies from the bid request, it is non-responsive. For example, if the bid package requests acquisition of a particular system by purchase only, and the bid offers to lease the system to the public entity, the bid is non-responsive and may be rejected without a due process hearing. If, however, the contractor's bid offers to build exactly what was requested, and the bid is nonetheless rejected as non-responsive, there is potentially an attempt by the public entity to circumvent the Public Contract Code and award the contract to a favored contractor for illegitimate reasons.

Responsibility generally requires a public entity to investigate facts and circumstances which are not apparent on the face of the bid, assessing the reputation of the bidder, among other factors. Public

Contract Code 1103 defines “responsible bidder” as “a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.” Because a finding of non-responsibility can adversely affect the contractor’s public image and cause detriment beyond rejection of its bid on the project at issue, due process requires the public entity to offer notice and an opportunity for the contractor to respond and rebut such a finding.

Thus, lowest bid contractors whose responsive bids are rejected as non-responsive should promptly seek legal advice where the rejection of their lowest bid is done without affording them a due process hearing. Lanak & Hanna regularly reviews bids to advise its clients regarding compliance with responsiveness and responsibility requirements both before bids are submitted, and after bids are opened to ensure due process and appropriate consideration of competitive bids.