Scribbles Squibs# 10 *(May 17, 2013)* MASSACHUSETTS BID PROTESTS: THE AG SAYS THAT THERE IS NO SUBSTITUTE FOR EXPERIENCE

By Attorney Jonathan Sauer

1. The Problem: Over the last several years in the construction industry, one of the bright spots – or, perhaps, one of the *less* gray spots – has been public construction. There has been some ARRA money available, supplementing state and local money available for construction projects. And, with a public owner, there is presumably a better assurance of payment, although I've recently had a case against the Commonwealth where the Commonwealth asked for terms: spreading settlement payments over a period of two fiscal years. At all times, competition to get public work tends to be fierce, as the filed subbid system traditionally has offered both new and foreign contractors and subcontractors tremendous opportunities to break into the Massachusetts market and grow, such growth sometimes being quite dramatic and quick. In our present uncertain and difficult times - five and six years into it with seemingly no end in sight - even more so.

A major problem with fact patterns that may lead to bid protests is that Massachusetts bid law states that certain 'minor' errors with bids may be forgiven by the public awarding authority. So, for example, matters that are typically handled at the submittal stage – e.g. a requirement to submit schedules as indicated in the bid documents – along with many non-substantive bid errors (they don't violate a specific bid law statutory provision) can be forgiven, if the owner chooses to do so. One must keep in mind, however, two things. First, it is within the owner's exclusive purview whether or not such errors which *can* be forbidden *will* be forgiven. And, that discretion that an owner *might* exercise can't be forced by any particular bidder. As to major substantive bid law errors - not signing the bid, inadequate bid bond (typically, not covering the full possible value of the bid) - usually may *not* be forgiven by the owner, these being seen as significant violations of the bid process. A typical focus of many bid protests is which *is* the claimed error: minor or substantive?

Recently, the AG shed some light on specific experience requirements contained in bid documents, holding that very specific experience requirements contained in the bid documents for masonry filed subbidders could not be waived by the public owner, even though experience requirements *per se* are not public bid law requirements. The title of this protest is **IN RE:** Division of Capital Asset Management and Maintenance, Pittsfield Probate and Family Court Life Safety Improvements, Protest of Louis C. Allegrone, Inc., May 3, 2013.

DCAMM advertised for bids with regard to renovations to an historic public building, the Pittsfield Probate Court. A significant portion of this work involved masonry repair, which requirements were contained in six separate masonry specification sections. Several of the masonry bidders submitted filed subbids restricted to themselves as general bidders. Epic Masonry and Restoration, LLC (Epic), a Connecticut LLC organized three years ago and new to Massachusetts public bidding, submitted a bid for the filed subbid masonry work, which bid was the subject of this protest. If its bid was not rejected, the lowest general bidder (and presumptive contract awardee) would be Souliere and Zepka (SZ). If, on the other hand, its bid *were* rejected, SZ's taking the next available open (not restricted to someone) bid for masonry would cause SZ

to lose the job and Louis C. Allegrone, Inc. (Allegrone), a masonry filed subbidder which also bid as a general bidder, would get the job.

2. The Bid Protest: There's No Substitute for Experience: This is a tricky issue. Where an awarding authority has the discretion to evaluate a bidder's qualifications and eligibility and responsibility, that determination, considered to be a factual determination, will not be overturned by a court or by the AG unless the determination is arbitrary, capricious or illegal. A lot of experience has taught me that these are nearly impossible standards for a bid protester to meet, particularly without discovery (requests for production of documents, interrogatories, depositions.) Bid protests do not provide for any discovery before hearing. Such factual determinations would include - where there were no specific criteria in the bid documents indicating how a bidder's qualifications would be evaluated – whether any particular bidder is responsible and eligible, submitting a responsive bid.

For this project, for the masonry work there were six specific masonry specifications requiring successful bidders to have either three projects or five projects prior experience doing similar projects. One of the addenda removed this requirement as to the bidders as to one specification section. The protested party contended that this particular section was the 'master' masonry specification section. But, as to another five masonry specification sections, these requirements were not removed. The bidder in question, in business for only three years, had one similarly-sized job (around one million dollars) but the other two jobs it submitted as to its experience were in the $30,000 and $40,000 range. The architect for this project had specifically suggested to the low masonry bidder that it bid this project.

The party filing the protest argued that: (a) where the bid documents have specific bid requirements which have to be met as to experience, the awarding authority did not reserve to itself a determination of eligibility and responsibility to be made solely by the exercise of its judgment; (b) that parties submitting public bids have the right to have the awarding authority make determinations as to bidders only in accordance with the specific requirements the bid documents contain; (c) bid law suggests that since favoritism on the part of an owner cannot be easily proved after the fact, making an award under these circumstances to a bidder whose qualifications were not met could be some evidence of favoritism, although no contention in that regard was made as to this protest.

3. The Decision: In allowing the protest, the AG stated:

> "While it is true that an awarding authority has discretion to waive certain non-statutory bidding requirements, this discretion does not extend to waiving requirements that substantively change the fundamental requirements which govern the process. . . . Even though experience requirements are not statutorily-mandated but rather are requirements imposed by the bidding specifications, the principles of "equal footing" and "fair and open competition" would prohibit non-compliance with such experience specifications. Although this Office has often upheld the discretion of awarding authorities to waive their own imposed non-statutory bidding requirements, such a waiver cannot fairly include abandoning significant experience qualifications which influence which bidders choose to submit a bid and the bidders' assessment of the costs and conditions of

> performing the contract. It is assumed that prospective bidders review such qualification requirements and make appropriate determinations as to whether they are eligible to submit a bid. For Epic to submit a bid, with its experience deficiencies, and expect or seek a waiver from the awarding authority after the fact raises issues of fairness to the pool of potential bidders, some of whom may have opted not to bid on account of their own experience deficiencies similar to those of Epic. Nor is it fair to those bidders who submitted bids in compliance with the experience requirements of the bid solicitation. In addition, the waiver of significant experience requirements could result in the appearance of favoritism by the awarding authority. Although here, there was no evidence of favoritism towards Epic on DCAMM's part, post-bid waiver of important experience requirements could create opportunity to exercise favoritism in awarding contracts and thus, must be prevented."

(For other information on Massachusetts bid protests, including a fairly comprehensive explanation of the bid protest process from beginning to end along with some practice tips, strategies and an identification of some typical bid protest issues, see our article "The Why's and Wherefore's of Massachusetts Public Contract Bid Protests in 2013" found at www.sauerconstructionlaw.com.)

4. Conclusion: In considering the filing of a bid protest (or an opposition to another party's bid protest) the two things that can not be changed are what the bid documents require and what (and how) you and/or the other guy bid. Very seldom are there material factual issues with a bid protest. Rather, bid protests are almost exclusively *legal* in nature. And, although the communications you may receive from the AG indicate that the AG will conduct an 'investigation', as a practical matter, what this means is that the protesting and opposing parties and the owner must supply the facts, bid documents and make their factual and legal arguments before the hearing officer. If one sends a letter to the AG based solely on the facts and specifications, it is unlikely that that person would prevail. Electrical guys don't do plumbing work. HVAC guys don't do waterproofing. Stick to what you know! And, that knowledge in the vast majority of cases will not include a detailed knowledge of the bid laws sufficient to successfully participate in a bid protest.

This was one of our victories. Victories are gratifying. But, in the court business and, especially, in the bid protest business, keeping track of one's wins and losses is counter-productive. You win some. You lose some. So, as Big Willy says ending each episode of Restaurant Stakeout: "America, onto the next one." A lawyer helping a party through a bid protest is a lot like a quarterback. And, I have heard frequently that quarterbacks often try to forget which side won the last game. A victory for this game or that game? What does that have to do with how one will perform in the *next* game. Losses? Shake it off! A loss is a lot like injuries. Rub some dirt on it and let's take care of business.

Seeing oneself as a quarterback in a bid protest, whether consciously or not, you compare yourself against other quarterbacks. Take Tom Brady, for example, a guy who works in the very next town over. I feel that I might compare surprisingly well with him in at least **three out of four** categories**.** ***First***, as a lawyer, I make a whole heck of a lot more money. After all, the guy only really works in a visible way 16 days a year, although his employer would prefer he

work at least 19 to 20 days per year. *I*, on the other hand, work at least 19 to 20 hours *per day!* At least, that's what the timesheets seem to indicate. ***Secondly***, he's talking about playing to age forty. His childhood hero, Joe Montana, played to age thirty-eight. He was kicked out of San Fran his last coupla' years, as the team wanted to go Younger. Number 12 will be thirty-six on August 3. Those of you who estimate jobs can do the math. Based on the helpful actions of our friendly sub-prime mortgage banker friends on Wall Street, cheerfully and non-invasively overseen at all times by an astoundingly myopic Mr. Alan Magoo, our stationery, at some point, will likely have the following slogan: "Over 100 years of continuous legal service". (I got tired just *writing* that!) ***Thirdly,*** although I am a righty, I can throw a perfect spiral accurately at least ten yards farther than the Big Guy. That, with my *left* hand. With my eyes *closed*. Come on Randy, go deep! *What?* He's no longer here? Why am I always the last to know? Next thing you know someone's gonna' tell me that the Patriots traded Wes Welker. Yeah, *right*! Mr. K is *way* too smart for that. After all, what's a million dollars among friends? Some of my senior domestic help make close to that! ***Lastly***, TB *does* have Gisele. In the interests of fair and balanced reporting, a ***Scribbles*** hallmark, I had my paralegal scour the internet for some pictures of this lady. After a couple of kids? Let's face it! Some gals as they age tend to get a bit *dowdy*.

I just got handed a bunch of pictures. Looking. Looking. Looking. Two hours later, still looking. . . . . *Uh*, after reviewing all of the evidence, this would be one for the Tomster.

*(These materials are intended as general information only, not specific legal advice. When confronted with a legal problem you don't understand, seek the assistance of legal counsel. Construction law is something that most 'general' lawyers don't do a lot of and not all construction lawyers do a lot of bid law. At Sauer & Sauer, we **only** practice construction law and we have handled more than one hundred bid protests over a period of more than thirty-five years. And, incidentally, if Tom ever wanted to go mano a mano? Yo?! This homey is **down** with that! Uh, just four little things, though. Just like in the games, we get to bring our own footballs. Some say that with some advance attention, footballs can be 'specially-prepared'. Just like a lotta' pitchers in The Bigs know how to really treat a baseball right. Footballs and baseballs, just like women, have gotta' be treated right. Or, suffer the consequences! Secondly, no whistle-twirlers within five kilometers of the field of contest. This, a distance I run competitively during the season generally twice each weekend. Thirdly, if I can get him to come back from the Mile High Club, I get to throw to Wes exclusively. A Peytonly better receiver I've never seen. Yo?! Someone needs to go back to things that they understand! Like, paper products. Understanding paper cuts is easier than understanding a small receiver with a lion's heart who makes his cuts perfect almost always time after time irrespective of the big hits he often takes. Lastly, please leave The Missus at home. Gillette Stadium has enough distractions of its own. Hot! Really hot! I mean, uh, let's not do this thing when it's really hot. This thing of ours. Yo!)*

SIX QUICK THINGS ABOUT OUR FIRM:

1. We guarantee our billing rate for five years in writing for all new clients after the date of this article, being May 17, 2013. And we will give a 25% discount as to the legal fees on the first file for such new clients mentioning this offer before services are provided.
2. No charge to non-clients for quick answers to *general* Massachusetts construction law questions.

   3. As trials are quite expensive, often with a result that can not be predicted, anticipated, we make our best efforts towards seeing whether something short of a trial – such as mediation – might be possible for resolving the matter. If a trial is necessary, we are well-experienced in trying cases.
4. We endeavor to maintain, wherever possible, future business relationships with your contracting party by emphasizing a fair and reasonable approach to disputes, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'. And, while you might say now 'I'd never work for that guy again', a lot of experience over the years suggests otherwise. Given the right job, he'd be given another chance!
5. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first. We recently obtained a 1.5 million dollar settlement for a subcontractor against a bankrupt general contractor's payment bond surety on three projects without a single deposition ever being taken and without our client's even having to answer interrogatories.
6. Being a smaller firm, our attention is focused *solely* on our clients and their problems, not on feeding the overhead of a fancy office and many partners, associates and support staff. We only have to feed our five dogs, most of which, however, are *quite large!* (If you ever meet the Worm, be respectful and, perhaps, a bit wary. After all, Rotties *can* be difficult.)

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