SCRIBBLES SQUIBS[1] #50 (September 29, 2016)

"THE WHY'S AND WHEREFORE'S OF MASSACHUSETTS PUBLIC CONTRACT BID PROTESTS IN 2016"

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1. Introduction

The purpose of this Squib is to discuss how bid protests can be made administratively (at the Attorney General's Office) or in court, discussing generally how these protests are made and the advantages and disadvantages of each such process.

2. The Bid Protest Process

The public contract procurement system is not for the weak-kneed or for the ill-informed. Issues of prequalification, prevailing wages, the filed subbid system, bonding requirements and familiarity with obtuse and lengthy general conditions make bidding and performing public projects a minefield for its participants, while still offering an opportunity for many contractors - particularly newer contractors - to get work of a size and kind that they might not otherwise be able to get.

The purposes of the competitive bid statutes as stated in Interstate Engineering Corp. v Fitchburg, 367 Mass. 751, 757-758 (1975) are:

" . . . First, the statute enables the public contracting authority to obtain the lowest price for its work that competition among responsible contractors can secure. . . Second, the statute establishes an honest and open procedure for competition for public contracts and, in so doing, places all general contractors and subbidders on an equal footing in the competition to gain the contract."

This, then, the inherent intrinsic tension in this process: (a) it is supposed to get the public owner the lowest possible prices, while (b) ensuring that those competing for public work have their rights determined through an honest, open and fair procedure which favors no one. Long experience in this field of the law, having handled well in excess of one hundred bid protests, has taught me that it can be difficult and challenging to have both purposes present in any given bid matter satisfied. Put another way, putting the two defined purposes in the same sentence can, unfortunately, too often result in an oxymoron!

Notwithstanding, the substantial work opportunities that exist in the public work arena for a new business not having a substantial track record or established business relationships with general contractors and owners makes public work very attractive to many, particularly with regard to subcontractors and their material suppliers. Moreover, as compared with private

work, there is a greater expectation of getting paid and security for that payment when working for a public owner for subcontractors and material suppliers who have 100% protection for their claims under the required C. 149, s. 29 general contractor payment bond. Claims under such bonds can earn 12% interest from the date of breach of contract and attorneys' fees to prevailing claimants.[2]

The public bid system for contractors is contained within various sections of the Massachusetts General Laws (MGL). These include MGL C. 149, s. 44A-H (for construction projects involving public buildings), MGL C. 149A (for contractor-at-risk projects) and MGL C. 30, s. 39M (for public works, which means construction work not involving buildings, such as road work, bridges, water and sewer work, etc.)

Generally speaking, for buildings there is a filed subbid system where eighteen enumerated subcontractor trades bid separately and directly to the public owner before the general contractors submit their bids for the entire job.[3] These bids are available to any general contractor bidding on the work except where a subcontractor restricts its bid away from certain designated generals (a statutory right) or where a subcontractor restricts its bid to a certain general bidder, which quite often describes the situation for 'captive' subcontractors or where a general contractor itself bids on a filed subbid trade to be included later in its own general bid. The latter situation only obtains where the general contractor can demonstrate that it routinely performs this work with its own forces.

The ordinary standard for the award to general contractors for public buildings and for public works is that the work is awarded to the lowest responsible, eligible and responsive general bidder, each of these three terms having a unique and specific meaning. The filed subbid system, however, does not require (or promise) that the lowest filed subbidder for any particular trade gets the award. True, there are market pressures to help ensure that result. Also true that an awarding authority has the statutory right to insist that the general contractor substitute down to the lowest filed subbidder against whom the general contractor has no objection as to competency. The foregoing notwithstanding, the fact that a filed subbidder is low in and of itself is not a guarantee of the job, as the law does not require this result.

What happens, though, when there is a claimed error in the bid procurement process? This could be a claimed error in the bid procurement process itself made by the owner. Or, there could be a claimed error on the part of one of the bidders. Sometimes, if a disappointed bidder can knock out one or two other bidders, that bidder becomes low and gets the work.[4] Sometimes, even though being successful with the bid protest with the AG finding a bid violation, the AG may simply throw out this round of bids, causing the matter to have to be bid again.

There are two ways of filing a bid protest: in court or through an administrative bid protest filed with the Massachusetts Attorney General's Office.

A. Using Court Processes:

The first way - court - is comparatively (when compared with administrative bid protests) expensive, although sometimes this is the only available remedy or the most effective remedy.[5] That is to file a suit in court seeking a declaratory judgment and an injunction against a particular bidder's getting the award or against any award being made by a public owner with regard to a claimed defective procurement or to a particular bidder.

The three biggest problems with using court processes are: (a) they are generally more expensive than filing an administrative bid protest; (b) the Attorney General has greater familiarity with the public bid laws than do many superior court judges, many of whom are not well-versed on the intricacies of even construction law, let alone the public bid laws; (c) it is difficult legally to obtain a court injunction.

For what one seeks here is an injunction - which is a court order that someone do something or not do something pending further order of the court. Obtaining an injunction in any civil matter, including bid law cases, is difficult, because to obtain an injunction, one has to meet certain 'tests' (judicial requirements).

Four of these for the party seeking the injunction are: (a) being able to demonstrate a likelihood of success on the merits; and (b) no public interest will be adversely affected if an injunction issues; and (c) that there would be irreparable harm to the party seeking the injunction should an injunction not issue, which harm can't be compensated by a subsequent award of damages; (d) 'balancing the equities' giving an injunction is appropriate. These are discussed in greater detail below.

A big problem in bid cases is the fact that courts will not exercise injunctive powers if the parties have an adequate remedy at law, which means a right to be awarded damages. Since in bid matters a disappointed plaintiff has the possibility of obtaining either bid preparation costs or lost profits in an action at law, most courts refrain from issuing injunctive relief because this test can't be met. And, this being so even where the bid preparation costs, which is the form of damages issued in the vast majority of cases, will be, at best, nominal.

For, in the ordinary case where there is an "ordinary" bid error on the part of the awarding authority, the plaintiff can obtain its bid preparation costs. Paul Sardella Construction Co. v. Braintree Housing Authority, 3 Mass. App. Ct. 326 (1975). This is usually a fairly small amount of damages, which will be greatly exceeded by the cost of obtaining them. Thus, even for attorneys filing their bid protest in court, if they are unable to obtain a sought after injunction, they will usually abandon the case for reasons of economics.

Under very limited circumstances, with demonstrable bad faith on the part of a public owner, lost profit damages may be available. One such case was the case of Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass. App. Ct. 349 (1987). At issue was the bidding and award of a printing contract. Here an inspector for the Department of Labor and Industries essentially disqualified the bid of the low bidder by claiming that the low bidder did not pay the prevailing wage rates required for such contracts, although ultimately it was determined that the

inspector applied the wrong rates in that factual determination. (The inspector applied Boston rates, which were higher, rather than Essex County rates, which would have been applicable.) The state procurement officer decided to rebid the contract, claiming that Bradford & Bigelow did not qualify because of the prevailing rate issue and the other bidder's bid did not comply with the contract specifications. On the rebid, the previous second low bidder, Acme, was now low with Bradford & Bigelow now being higher. As stated on page 359 of the decision:

> "These most pertinent Massachusetts decisions leave undecided the issue whether failure of officers or agencies of the Commonwealth itself (and not merely a private general contractor or a local government or a public authority) to consider public contract bids fairly, in good faith, and in compliance with the applicable competitive bidding statutes, will subject the Commonwealth to liability for profits lost by the bidder to whom the contract should have been awarded in all fairness. The public objectives of public competitive bidding statutes, discussed by the Supreme Judicial Court in the Sardella case and by this court in that case and in the Roblin Hope cases, seem to us to be equally cogent, whether it is the Commonwealth which is soliciting bids or some political subdivision or authority doing so. Failure to give fair consideration in good faith to all bids in either situation will tend to discourage bidders and to destroy public confidence in the competitive bidding system. Upon adequate proof that agencies or officers of the Commonwealth have set aside in bad faith an award of a contract to a qualified low bidder, the cases already mentioned should be extended appropriately to permit recovery by the bidder of its lost profits."[6]

Thus, courts considering injunctions are loathe to restrain public procurements when there is not only one possible measure of damages (bid preparation costs) but a second one (lost profits), as well.

Another problem! Does the moving party - the party seeking the injunction - demonstrate a likelihood of success on the merits, meaning that a motion judge can pretty much tell that the plaintiff ultimately is going to win just by looking at the complaint, some affidavits and a legal brief? If this can't be done, no injunction will issue.

Also, a court considering an injunction request tries to "balance the equities". In other words, is the plaintiff more harmed by not getting the injunction than the defendant(s) will be harmed if the injunction issues?

A big problem in this area also is that of "public interest". A public owner in resisting an injunction request usually argues that a job's not going forward will damage the public interest. The arguments go thusly: "If this school work can not be done this summer, we will not have a place for the kids in September, as this work can only be done with vacant buildings." Or, "If this sewer work does not get done presently, the Town will violate a consent order with the DEP." In such cases, the 'public interest' trumps a private party's search for personal justice. And, perhaps, this is appropriate for the 'public' - which includes you and me - assuming the claim of 'public interest' is genuine.

These types of arguments are tough for a court to deal with (or resist). Adding the possibility of damages to the fact that the judge may not fully understand the law combined with public interest questions and the fact that it is easier to say 'no' than to say 'yes', it is difficult - but not impossible - to enjoin public work.

Here is where court is preferable to the administrative alternative - the bid protest at the AG's Office. A big problem with bid protests is that ordinarily the Attorney General's Office, which hears the protests, will not go into court to enforce its own decisions, as it has the statutory right - but not obligation - to do. "Players" (those experienced with the bid protest process) know this. Many bidders and, occasionally, some state agencies believe that where they are co-equal to the Attorney General's Office on some organization chart, they are not required to follow these decisions. And, some towns find it hard to give up the cost savings that using a defective bid (or process) might gain them. Therefore, some protestors will go into court, either initially or after the bid protest decision. Unlike the bid protest decision, which is not appealable anywhere, once the matter is in court, appeals are possible.

Court really is attractive when time is of the essence, where there is no time for the bid protest procedure, which start to finish, typically takes at least a month. Court is also preferable when the dollars become larger and the five to ten thousand dollar investment to seek an injunction becomes less important. Court becomes mandatory when the Attorney General's Office finds against you or where it refuses to issue a decision on the issue or the public owner refuses to follow its decision. In court, bid protest decisions have some weight when a judge is in considering requests for injunctions. Even so, the judge has complete discretion and the ability to give the decision of the Attorney General as much weight - or as little weight - as he or she determines. Ultimately, a court consideration of a bid matter after administrative bid protest is a 'de novo' investigation, meaning that the Court has a full ability to decide the matter as it sees fit. This is because, among other reasons, an administrative bid protest is not an "adjudicatory" proceeding inasmuch as it does not have subpoena power, does not swear in witnesses, does not conduct an actual trial, etc.

Court is also a good idea where a bidder is looking for a judicial decision on a situation which arises often in its work. Also, the Attorney General's Office is only charged with interpreting the bid law within the confines of the existing bid law and does not have the authority to actually declare new law, which is a power that a court has. So, when individuals or organizations seek to influence, modify or make new law, court is the preferred procedure. And, it's important to underscore the fact that AG decisions are not binding authority in court, meaning that these are decisions that the court has to follow. Courts are not legally required to follow bid protest decisions.

Court may also be preferable for tactical reasons, particular when dealing with towns, where the fact that a court case is pending against the town will appear in the local paper, which may not be the case with an AG bid protest. My experience has been that local public officials care a great deal more what their constituency things of them, most of them having office only through an election. State officials, usually, are hired and do not get their positions as the result of an election process. So, they are far less concerned with what anyone might think of them because they don't have to be.

B. Administrative Bid Protests before the Attorney General's Office:

Most bid protests start and end here.

In a thumbnail sketch, here is the procedure.

3. The Bid Protest Letter

If one wishes to protest a bid or bid procurement, one writes to the Attorney General's Office. Presently, one would file a protest by writing to the following address:

Attn: Bid Unit
Office of the Attorney General
Commonwealth of Massachusetts
P.O. 6303
Boston, MA 02114

The AG will usually accept emailed bid protests, if they are quickly followed up with the protest on paper and with the filing fee. Protests are initiated by letter, which should include a check made payable to the "Commonwealth of Massachusetts" in the amount of one hundred dollars (the filing fee). There is no specific form which is required or any absolutely required content. The letter should identify the project, who is protesting, who is being protested, the Owner, the identity of any affected bidders and a detailed and documented description of what the claimed error is, which will almost always have some legal element to it.

One must keep in mind that while the Attorney General's Office is charged with interpreting and enforcing the bid laws, there is no absolute right to get a hearing. Put another way, the investigation that the Attorney General's Office performs does not of necessity guarantee you a hearing. Therefore, when you describe the bid problem, do so in detail and with whatever resort to authority (the law) available to you to facilitate the chances of getting a bid protest hearing. Moreover, as in any adversarial procedure, where you have the first "say", make it count. Obviously, you want to try to get the hearing officer seeing the matter your way from the beginning. A good initial presentation probably works towards that goal and quite often will minimize your costs by either not requiring any further later legal briefing or, if necessary, minimizing what that further legal briefing might have to be.[7]

The following are sources of the law that are considered by the Attorney General's Office. Initially, the General Laws are of paramount important. These can be found in virtually every public library. Of specific importance are MGL C. 30, s. 39M (for public works), MGL C. 149, s. 44A-H (for public buildings) and the recent addition of MGL C. 149A (for projects with contractors-at-risk). If possible, find an annotated set of the General Laws, which list court case summaries interpreting specific sections of the bid law.

The decisions of the Appeals Court and of the Supreme Judicial Court are of great importance. These may only be available in law libraries.

Of particular importance are previous decisions of the Attorney General's Office and of its predecessor, the Department of Labor and Industries. Decisions by the Attorney General's Office are indexed and can be found at http://www.bpd.ago.state.ma.us. However, these are not well-indexed from a practitioner's point of view.

An example. There are a great many bid protests dealing with the issue of 'Paragraph E' subcontractors with regard to filed subbidders' bids. Paragraph E refers to Paragraph E of the bid form for filed subbidders as provided for under MGL C. 149, s. 44F. Under the filed subbidder statute, eighteen specific trades bid their work directly to the owner, not to the general contractor. Filed subbidders are supposed to perform all of the work of their filed subbid trade and are not allowed to subcontract out any of their work unless the public owner says in the bid document that they are allowed to. So, for example, for a plumber, owners often allow plumbers to subcontract out various pipe insulation work. Where applicable, the name of the 'Paragraph E' subcontractor along with its price must be included in Paragraph E of the form for filed subbidders.

The problem with the Attorney General's index to its own decisions is that it is exceptionally basic and rudimentary. There are a whole host of different Paragraph E legal issues. But, if one wants to try to look up a specific Paragraph E issue, the only search term one can use is 'Paragraph E', which brings up the names of several dozen cases discussing Paragraph E cases without breaking down the Paragraph E cases into the variety of sub-categories of legal issues involved with Paragraph E. This means that you or your lawyer has to go through all of these cases to see if you can find a Paragraph E case dealing with your specific issue. This can be very time-consuming. And, with time comes, unfortunately, expense.

And, where bid protests used to be heard by the Department of Labor and Industries, which decisions the AG still uses as binding precedent, I am unaware of any generally available current index to them available on the internet. Frequent practitioners in this area may maintain these earlier decisions in their own offices, which has the further advantage of saving time, as bid protests are frequently an eleventh hour matter. The author, as an example, has copies of various bid protest decisions of the Attorney General's Office and of the Department of Labor and Industries going back to January of 1987. Citing to the Attorney General's Office its own previous decisions is a plus, as these decisions may influence the ultimate decision of that office.

4. The Two Kinds of Bid Protests

The subject matter of bid protests contains two broad areas of inquiry (or, attack).

A. Problems with the Procurement

The first is that there is something wrong with the procurement - not with any specific bidder's bid. The owner did not comply in some way with the bid laws. The following are examples only and not in any particular order of importance. The owner received bids after the deadline for bids stated in the bid documents. The bid documents were defective in some way, not containing, for example, statutorily-required language or forms (e.g. affidavits of non-collusion). A public building job was advertised under the laws pertaining to public works,

which could mean that the filed subbidders are prejudiced in that they would not be required. Filed subbids were not required for the appropriate trades which should have had them. The procurement specifically calls for a proprietary item which can not be supported under the facts as being required or necessary. (Most materials contained in public bid documents should be capable of being supplied by at least three vendors.)

Protesting the procurement - rather than a specific bid - is one of those 'good news, bad news' situations. The good news is that if you are correct, the job will be rebid. The bad news is that if you are correct and you were (or should have been) low, the job will have to be rebid. Meaning, that the error in the process does not allow the protesting party to actually get the job. It only provides another opportunity to bid the job again.

B. Protesting Another Bidder's Bid

Protesting another bidder is the meat and potatoes of the bid protest practice. Here is an opportunity to knock out a competitor and possibly get a public job.

Initially, it is a good idea to examine your competitors' bids on bid day. This may be your only opportunity to do so and is certainly the easiest way to see the actual bids and check them for errors. As an example, if they are incomplete or contain blank spots, they may have to be summarily rejected by the public owner. While the bids are "public records" and are probably later available under the 'freedom of information' law, that law does not specifically require producing such records within the short timetable that a bid protest may require. Also, once the public owner has decided on a course of action, access to these bids may be practically limited or slowed down. By that public owner.

What are the grounds (opportunities) for bid protests? I respond by asking how many stars are there in the sky! The following are common areas of protest, although this list is far from comprehensive.

First, is the bid form completely filled out? Is it signed? Is there bid security for 5% of the total possible value of the bid, including alternates? Is the bid bond conditional (in that it has a rider reducing potential coverage)? Is the bid 'obscure' in that some important element of the bid relating to scope or price is not unequivocally provided or filled out? Are all the subsidiary forms - non-collusion affidavit, for example - filled out completely? Has a filed subbidder indicated subcontractors when they were not asked for or allowed? Is the bid in any way conditional, incomplete, containing items not asked for or a counter-offer? Are all of the addenda affecting in any significant manner scope or price acknowledged? Has the bidder included any required prequalification statements and updates required by the bid document? Have the various MBE and WBE letters of intent - when required - been included? Is there any contradiction between the written numbers and the actual numbers? Is there any confusion as to the scope of the work or the price of the work? Is the bidder debarred from submitting a bid for any reason? Was the bid delivered in time for the bid opening? If the general contractor has carried himself/herself as a filed subbidder for a particular trade, does he/she have a demonstrated track record in this trade? Is there 'penny bidding' involved on any significant unit price item? Does the bidder have all required licenses to perform the work (e.g. for an

electrician, does the corporation have in its own name a master's license)? Is any specific bid sufficiently labor intensive that under no set of circumstances could the bidder meet the prevailing wages for the job in question? (This could be most glaring in the case of a pure maintenance project.) Does a particular competitor have an overwhelmingly bad record for this type of work to necessarily prevent an owner from finding him/her to be a 'responsible' bidder? Does the bidder meet the experience requirements for submitting a bid? Is a bidder attempting to meet the experience requirements called for in the bid document by using for that experience that of a predecessor/sister/affiliated company?

A public owner has the authority to waive certain minor bid errors not substantially affecting scope or price and not involving a violation of a core element of the public bid laws. If there is a bid error substantially affecting scope or price or involving a violation of a core element of the public bid laws - prevailing wages, for example - then it is less likely that the public owner has a right to waive a bid error.

5. The Bid Protest Process, Hearing and Decision

After the protest is filed, ordinarily, the Attorney General's Office will send an emailed letter or note to the owner and to obviously involved parties advising of the bid protest and asking the owner to not make any ultimate decision with the procurement until the investigation has been conducted and a decision issued.

In due course, usually within two weeks, the matter is set down for hearing.

At the hearing, ordinarily the protesting party will present the basis of the protest. Reference may be made to the bid documents, the various bid forms, letters, etc. No witnesses are sworn and there is no subpoena power available. Usually, though, individuals involved with the procurement, particularly parties, are permitted to speak their mind, if they are so inclined to do so.

After the protestor has spoken, the awarding authority gets to speak its piece and, lastly, any other affected parties - including opposing contractors - have an opportunity to speak.

Then there is typically a rebuttal round where everyone gets to comment on the claimed mistakes and improper legal applications made by the other parties during the first round.

The hearing officer may question the witnesses although the usual procedure is for the various parties to speak for themselves. There is no specific mechanism for the parties to call opposing or other witnesses or to cross-examine each other. The hearing usually takes about an hour and a written decision is issued within two or three weeks after the hearing.

As stated elsewhere in this Squib, bid protest decisions are not appealable. Not to get too technical, the reason such is the case is that a bid protest hearing and decision are not achieved through an 'administrative adjudicatory procedure', through which there would be witnesses, sworn testimony and a variety of the other normal incidences of a court trial.

At this point, a disappointed party can consider what further action, if any, might be warranted or available. Quite often, if the matter has not been to court yet, resort to court is available when one is unhappy with the bid protest result.[8] When a bid protest already decided by the AG goes to court, this is not an appeal of what the AG said (or didn't say). It's a 'de novo' proceeding, meaning the court looks at the issue in its entirety, completely as a new matter, not being bound at all by what the AG said (or didn't say).

6. What is this going to cost

Often, one contemplating filing a bid protest wants to know up front what this is going to cost. In this regard, law work is like the labor element of the construction business. The more time that goes into something, the higher the cost. Also, using an experienced construction lawyer who does bid protests should reduce the time necessary for the legal work required.

One has to keep in mind that bid protests are much more about the law than they are about the facts. In a certain sense, the preparation and presentation of a bid protest is similar to the preparation and presentation (less discovery) of a matter for a trial.

The bid laws are extensive and quite technical. And, while using a construction attorney well-versed with Massachusetts bid law should be less expensive, no lawyer is able to know everything about everything and a good deal of legal research will probably be required.

The following is a rough estimate of the cost for an experienced construction law attorney to handle a bid protest before the AG with a bid issue of average legal difficulty.

In preparing a bid protest, a lawyer will most likely incur about six to ten hours reviewing a client's materials and the bid documents, performing legal research and preparing the actual bid protest letter. The more complicated the matter legally, the more research that may be required. There is, of course, the filing fee to the state of one hundred dollars. After the bid protest has been filed, each party to the protest has the right to supplement its materials and arguments to the AG within two days of the actual bid protest hearing. Depending on how thorough the bid protest was as was initially filed, this could take another six to ten hours of legal work. The attorney will need to review the briefs filed by the other side and perform legal research looking for legal authorities to rebut the other side's arguments. (One need keep in mind that there could be multiple briefs to review, including briefs filed by the awarding authority and briefs filed by opposing parties.) This could be another six to ten hours of work. The attorney will need several hours to organize his/her thoughts and prepare arguments to be made at the actual hearing. Say, three to four hours for that. Then, there is the actual hearing. While the bid protest hearing may only take an hour or so, there may be one or more meetings between contractor and the lawyer before the hearing to prepare or fine-tune the presentation. Say three or four hours for that.

Under certain circumstances, the AG will allow the parties to file supplemental briefs after the hearing. This does not generally occur and no time for this activity will be included in the estimate. And, as most bid protesters do not go to court after receiving an adverse decision from the AG, no time will be included in the estimate for any post decision matters.

A rough estimate of the cost will be in the range of about twenty-four hours to thirty eight hours of lawyer work. Assuming an attorneys' fee of two hundred fifty dollars an hour and including the filing fee, the rough cost of preparing and presenting a bid protest with a bid issue of average legal difficulty would be between six thousand one hundred dollars and nine thousand six hundred dollars. So, this is not an activity that will make much economic sense if the contractor's bid for the job was seventy-five thousand dollars and he/she anticipated making ten to fifteen thousand dollars for the job. As is also the case with many civil matters prepared for trial, the legal work is neither reduced or appreciably increased wherever the decimal point may fall. Thus, the cost of six and seven figure jobs and protests is not much higher than the cost of preparing a five figure bid protest.

Those not familiar with the kind of work lawyers actually do may not realize that a good percentage of the work that goes into preparing and successfully prosecuting a legal matter is done in libraries, virtual or otherwise. And, particularly with something as complex as the bid laws, it is seldom that one feels after legally researching a legal issue that he/she has absolutely found all of the cases that might lead to a successful result. Like most things in life, the harder one works at something, the greater the chances for success. The more time a contractor allows his/her attorney to research the legal precedents, the better the chances for a favorable result.

Can a contractor file a bid protest itself? Certainly, there is nothing in the law that I am aware of which precludes this opportunity. It is hard to contemplate, however, a contractor's successfully doing this, just as it would be hard to contemplate an attorney's being able to successfully set up forms and pour a concrete foundation for a house.

As stated above, the AG does very little ostensible investigation into bid matters other than sometimes discussing them with the public owner and very briefly discussing them with a party contemplating a bid protest. The AG depends on the parties to bring to her attention the salient factual and legal elements of the dispute.

If the error is so obvious or so glaring or so basic or so egregious that anyone doing bid work can easily see it, then the contractor has some chance of success but not, most likely, the same chance of success as using an experienced construction attorney. For a complex bid issue or one with an experienced construction attorney on the other side, there is a very good chance that the contractor will not be successful with the bid protest.

At Sauer & Sauer, for certain types of bid protests, we are able to quote a flat fee.

7. Some Hints:

1. Bid protests can be very technical and very 'legal'. Usually, there isn't a great deal of controversy over what the facts are. The real dispute is what is the law that should be applied to those facts. If you are serious about winning your protest or about opposing someone else's protest, you should really have the legal work done by an attorney who does a lot of this type of work.[9]

2. Don't overuse the process. These matters at any given time are only heard by one or two individuals and, human nature being what it is, if you file a number of 'light' (approaching frivolous) bid protests, this could prejudice you down the road when you have a really good one. This could be a case for the application of 'the boy who cried wolf'!

3. Don't misrepresent the facts or the law to the Attorney General's Office.

4. Try to get other affected parties who could support your protest to attend the protest, particularly when you are protesting the procurement rather than the bid of a specific bidder. For example, if an incorrect procurement is unfair to both subcontractors and general contractors, try to get representatives of each to attend. And, where your bid protest could be supported by your subcontractors or material suppliers, try to get them to voluntarily attend.[10]

5. If there is no clear violation of the law or the matter is really a judgment call for the owner, there appears, through my own experience, to be some tendency on the part of the Attorney General's Office to defer to the public owner. Therefore, getting the owner on your side in the protest can be helpful, sometimes extremely helpful and this especially applies to the matter before a bid protest is filed and the parties' positions solidified.

6. Don't expect the Attorney General's Office to do your work for you. In other words, it is incumbent on you as the protestor to develop the facts, the law, produce the documents and the witnesses. Because of time and business pressures, the Attorney General's investigation is not going to be very active in many cases but will rely on the parties to develop the subject matter. And, although you might receive in various emails from the AG references to 'its investigation', my own experience has been that the investigation will principally be listening to the parties and reviewing the various briefs, documents and statements made by the parties as part of the hearing process. As a matter of law, the protestor has the burden of proof to demonstrate a violation of the bid law. As a protester, be prepared to do so!

7. The Attorney General's Office generally will not take jurisdiction over a bid protest if the same matter has already been to court. However, the fact that a matter has already had a bid protest hearing does not prevent the matter from being later presented to court. Therefore, if time and circumstances permit and you wish to preserve the opportunity of two possible bites at the apple, typically one will file a bid protest administratively first and then proceed with court second, if necessary.

8. Don't bring politicians into the arena! Many times clients have told me that they know the governor or a senator or a representative and that person is going to make some calls to the Attorney General's Office on that person's behalf. To the best of my (increasingly) long recollection, I have never seen this work. Moreover, it presents various possibilities of backfiring and/or annoying the hearing officer and/or raising issues of influence peddling, which might have some unintended and even criminal results.[11]

9. On a close case that could go either way with no glaring violation of the substantive elements of the bid law, there seems to be a tendency on the part of the AG to side with the awarding authority.

10. My own subjective experience and observation is that the AG seems less willing to order new rounds of bids than was the case in times past.

11. Make it a practice of getting 'love me' letters from those you have contracted with and who were appreciative of your work.[12] When you need them, you need them, and it's unlikely you will be able to get them in the matter of days you have to get your protest or opposition in. The fact that those you have contracted with are several projects or months or even years down the road make it less likely that they will be willing to spend the time to prepare them. For some bid protests, I think they can be useful, particularly on close calls that could go either way.

8. Conclusion

Bid protests are an important potential remedy for the public bidder which when properly utilized can produce jobs for its lucky, knowledgeable and experienced practitioners.

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1. A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

2. One doesn't want to get too excited about this, however. Recent statistics say that only one percent of all superior court civil cases go through an actual complete trial and, generally speaking, a 'judgment' has to be first obtained before one gets the attorneys' fees and, for that matter, the interest. This is another way of saying that the entitlement to attorneys' fees as per the statute requires first a trial and then prevailing at that trial. Under certain circumstances, attorneys' fees can be obtained when a party is successful, as an example, with a motion for summary judgment, something determined before a trial occurs. Also, if the surety has sat on a payment bond case for a couple of years taking little or no action, courts are more amenable to granting attorneys' fees even with resolution of a dispute through a settlement.

3. Filed subbids are sometimes used for public works projects, although this is relatively infrequent. While they are required for 'public building' projects for the eighteen enumerated trades, they are not required for 'public works' projects as a matter of law.

4. While most public bidders seem to shy away from filing bid protests - possibly, because they don't understand the process and since better bid protests should be prepared by lawyers - some bidders play the process as if it were a Stradivarius violin. Checking the 'Paragraph E' bid protest decisions, one will see that certain names of bid protesters come up frequently.

5. Using court processes rather than administrative bid protests will make the most sense in a variety of circumstances. One must keep in mind that although the Attorney General has the authority to go into court to enforce its decisions, it rarely does so. So, the fact that one wins an administrative bid protest doesn't mean that some of the parties to the protest, including the owner, might not simply ignore the decision. Such decisions do not have the 'force of law', while court decisions do. Court is especially more attractive on larger jobs and on jobs where you really want the job because, for example, the job is especially profitable. Also, the use of court processes makes sense where time is truly of the essence. While it is my experience that the AG will hear bid protests after the work has started, the earlier the bid protest is filed, the better. Among other problems, for a later bid protest, a party or the AG itself may raise the issue of 'laches', which is unreasonable delay which causes harm. This could cause your protest to fail.

6. While it is certainly possible to obtain lost profit damages, they are awarded extremely infrequently. Much as in prosecuting a claim for unfair and deceptive trade practices under MGL C. 93A, s. 11, it is the exceptionally rare case that warrants going to trial seeking this type of damages because of the relatively small chance of success in either case, as compared with the economics of fully prosecuting such a case through a trial.

7. I would be remiss if I didn't point out that there are two schools of thought as to the timing of the substantive arguments with a bid protest. One view is to put as little information and, especially, legal arguments as possible in the initial bid protest. Since the parties are allowed to file supplementary documents up to two days before the hearing, this school of thought has filing the real protest with references to legal authority at that time. This leaves the other side with only two days - frequently less - to actually read your cited authorities and find others to rebut them. Of course, there is the possibility that the AG may not give you a hearing on such abbreviated initial arguments if they fail to truly identify a bid error. There are some problems with this approach. By filing a more substantial bid protest with all of your major arguments and citations to authority with the initial bid protest, this means that the party opposing your bid will have to cite all the authorities he/she can think of to rebut them, which then gives you two days to find those authorities rebutting their defense. Some might, in addition, be uncomfortable with the first approach as representing a sharp practice. The AG might be more likely to allow a second round of briefing if the protester's supplemental materials and brief filed two days before the hearing look like an ambush. Still, there are proponents of this bid protest philosophy.

8. While a court will consider a bid protest in court that has already been heard by the AG, the AG will not involve itself with any bid matter that has already been to court. If one wishes to have two potential bites of the apple, go the AG bid protest route first, and the court route second.

9. You wouldn't hire an attorney to wire an electrical panel. Don't hire 'yourself' to do something you are simply not trained to do. Even having gone to college for nine years and entitled to list the word 'Doctor' before my name, I would not feel competent to perform an appendectomy on myself. Then again, after looking at the irregularly wide and meandering scar some doctor gave me when I was ten years old after the doctor's possibly spending a good part of that Sunday of my operation relaxing in possibly a comfortable and liquid way, perhaps he wasn't, either!

10. There are no subpoenas to compel attendance at a bid protest. This coupled with the fact that there is no 'discovery' of witnesses and documents before a hearing, make such hearings frequently difficult to prepare for and to prepare a rebuttal to, particularly where another party has the facts, witnesses and documents that might support your position.

11. Following this advice is unimportant if you don't mind: (a) eating chicken fried steak every Thursday, prepared with no interest of building layers of flavor; (b) sleeping in truly small bedrooms with an exceptionally hard mattress and with roommates of questionable and limited personal hygiene; (c) finding new and possibly unique ways of socially interacting with new friends; (d) a distinct lack of opportunities for exercise and/or conjugal visits (which, for some on the outside, might represent both); (e) following to the letter suggestions made by the institution's employees, especially those with the big sticks and the pepper spray; (f) living in circumstances that might prove difficult for those afflicted with claustrophobia; (g) lifting very heavy weights for two to three hours every day; (h) visiting with your loved ones principally on weekends and holidays. An hour or two here. An hour or two there. Knowing how to bribe the screws can also be a definite plus! Fortunately, it's not important for you to be good with all of these things on your first day. Some people, in fact, take years and years to get good at them. But, as MJ sang some fifty years ago, 'Time Is On Your Side.' Yes, it is.

12. For a discussion of 'love me' letters, see Squib number 12, available at our website.

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This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational purposes only. Questions of your rights and obligations under the bid laws are best addressed to legal professionals. Sauer & Sauer sees as a large part of its mission providing information and education to the contractors, subcontractors, material suppliers, sureties and owners it daily serves. Articles are available on a number of construction

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