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## **Government Takes a Shine to Alternative Bids**

Washington public entities have used the standard sealed bidding process for nearly a century, but current legislation and court decisions regarding alternative procurement methods are significantly changing the way these entities do business.

Beginning in 1992, with the state Legislature's enabling legislation authorizing regional transit authorities to use negotiated procurements and, more recently, with similar legislation related to the monorail, alternative procurement methods are becoming increasingly common.

### Federal and state law

Since at least World War II, the federal government has allowed alternative methods of public procurement, recognizing that the standard competitive bidding process is unsatisfactory for more complex projects where the technical expertise and experience of a contractor is considered just as, if not more, important than price.

The "best value" procurement is one such method.

Under a best value procurement, award of the contract is based upon a combination of price and qualitative considerations such as technical design, technical approach, past performance, quality of proposed personnel, and/or management plan. Federal courts have afforded broad discretion to federal agencies using a best value procurement, particularly in the area of technical expertise and experience.

Under Washington's standard competitive bidding laws (RCW 39.04), public entities receive sealed price proposals from bidders in response to an invitation for bids (IFB). The public entity is required to award the contract to the bidder who submits the lowest responsible bid with little, if any, concern for the actual technical expertise and experience of the successful bidder.

With its enactment of RCW 39.10 in 1994, the state Legislature expressly recognized that, under certain circumstances, the public interest may be better served by alternative contracting

procedures based on "objective and equitable criteria" rather than simply awarding contracts to the lowest responsible bidder.

In 1992, the state Legislature specifically authorized regional transit authorities, such as Sound Transit, to use an alternative method such as the best value procurement (RCW 81.112.070).

The best value procurement is also authorized by the Federal Transit Administration (FTA), which is providing partial funding on Sound Transit projects. Under its own Resolution 78-1, Sound Transit recognized the broad discretion granted to it by the Legislature and authorized the use of best value procurements.

The use of a best value procurement allows Sound Transit to consider factors related to the qualifications of the proposal team, past performance, technical components, and work approach for purposes of selecting the proposal that represents the best value to Sound Transit and to the taxpayers.

#### Best value procurement

Under a best value procurement, a public entity may first seek to pre-qualify contractors with its issuance of a request for qualifications (RFQ). Based upon the proposals submitted in response to the RFQ, the public entity will deem certain contractors qualified to submit proposals in response to a request for proposals (RFP). Following pre-qualification of the proposers, the public entity will issue an RFP.

The primary difference between an RFP and an IFB issued in a standard competitive bidding process is that the RFP contains factors other than price upon which the submitted proposals will be evaluated. The RFP may also require that the price proposal be submitted separate from the technical proposal so that each can be independently evaluated.

Because a best value procurement involves a relatively subjective evaluation process compared to sealed bidding, the RFP may also describe the proposal evaluation process in detail to lessen concerns of the public and disappointed proposers.

Once proposals are received, the public entity will evaluate them and determine which proposal, in light of price and other factors, is most advantageous and of greatest value. The actual evaluation process will vary depending on the public agency.

An agency may simply award the contract based upon the proposals submitted. Prior to awarding the contract, the agency may communicate with one or more proposers solely for purposes of clarifying or verifying their proposals. An agency may also choose to request from the proposers a best and final offer (BAFO), which may involve additional discussions with all of the proposers. At the conclusion of such discussions, each proposer may submit its BAFO for consideration by the public entity.

## Recent litigation

A disappointed proposer recently attempted to attack Sound Transit's contract award for a segment of the Central Link Light Rail Project under a best value procurement process. The disappointed proposer argued that Sound Transit's award of the contract did not abide by Washington's longstanding competitive bidding laws.

The King County Superior Court and Division I of the Washington State Court of Appeals recognized Sound Transit's discretionary authority to use a best value procurement and denied the disappointed proposer's request to enjoin Sound Transit's award of the contract to the contractor that had submitted the proposal determined to present the best value.

According to the disappointed proposer, the mandatory project labor agreement (PLA) requirement provided for in the RFP was removed after Sound Transit received proposals in response to the RFP. The disappointed proposer, relying solely on case law related to Washington's standard competitive bidding laws, argued that removal of the PLA requirement resulted in a material change in the contract which gave the successful proposer an unfair advantage over other proposers.

Although the RFP required the use of a PLA, the RFP also incorporated by reference certain FTA-mandated terms, including compliance with Executive Orders 13202 and 13208 executed by President Bush in 2001 that prohibited requiring a contractor on a federally-funded project to execute a PLA without an exemption from the FTA. The executive orders also allow a contractor to voluntarily enter into a PLA.

Sound Transit applied for an exemption from the FTA after it made its best value determination and before it awarded the contract. The FTA denied the request.

The trial court specifically held that the best value procurement used by Sound Transit was a relatively new legislative creature and that sealed bidding case law was generally not applicable.

Both the trial court and the Court of Appeals disagreed with the disappointed proposer and concluded that removal of the mandated PLA did not result in a material change in the contract.

Both courts reviewed Sound Transit's decision under an abuse of discretion standard and concluded that the cost to the taxpayers that would result from a possible six- to eight-month delay in the project related to the bid protest far outweighed the additional costs allegedly associated with the PLA.

Significantly, both courts recognized Sound Transit's authority to use a best value procurement that allows evaluation of the submitted proposals in categories other than price.

Based on these recent decisions in support of alternative procurement methods already authorized by the state Legislature, it is anticipated that such methods will be used more and more by public entities to obtain the overall best value for the taxpayers.