

PROPRIETARY MEETINGS

Are they legal in Washington?

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Purpose of Procurement Laws

- Protection of general public
 - “prevent fraud, collusion, favoritism, and improvidence in the administration of public business as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable.” *Platt Electric Supply, Inc. v. City of Seattle*, 16 Wn.App. 265 (1976)

Purpose of Procurement Laws

- Fair forum for those participating in the process
 - One bidder cannot have a “substantial advantage” over another
 - Test: “Whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.” *Gostovich v. West Richland*, 75 Wn.2d 583 (1969)

Competitive Bidding

- Requires award to the lowest, responsive, responsible bidder.
- Does NOT allow negotiation. *Hanson Excavating Company, Inc. v. Cowlitz County, 28 Wn.App. 123 (1981).*

Design-Build Procurement

- RFQ/RFP/Negotiation
- “The finalists' proposals shall be evaluated and scored based on the factors, weighting, and process identified in the initial request for qualifications and in any addenda published by the public body. Public bodies may request best and final proposals from finalists. The public body shall initiate negotiations with the firm submitting the highest scored proposal. If the public body is unable to execute a contract with the firm submitting the highest scored proposal, negotiations with that firm may be suspended or terminated and the public body may proceed to negotiate with the next highest scored firm. Public bodies shall continue in accordance with this procedure until a contract agreement is reached or the selection process is terminated.”
RCW 39.10.330

How Do We Reconcile?

- Tacoma Narrows Bridge: *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226 (2004)
- Where the statute requires negotiation after selection, competitive bidding statutes are not applicable.
- Neither is the prohibition against negotiation.

Still Require a Fair Forum

- Cannot give one proposer an advantage
- Must comply with procedures established in RFQ
- Must give all proposers the same information

Sayer v. MnDOT (2009)

- I-35W Bridge procurement
 - Flatiron-Manson's proposal had 95.3 points, with next highest at 71.4
 - Highest price and longest delivery time overcome by high technical scores
- Unsuccessful argument that proposal was non-responsive
 - ROW outside of that identified in RFP
 - Specification was limited to specific area, not project-wide
 - RFP allowed further ROW with justification
 - 2 web concrete girder box vs. RFP requirement for 3
 - 3 webs per direction of traffic vs. per girder
 - Flatiron exceeded this requirement

Sayer v. MnDOT (2009) (cont'd)

“[The] design-build statute does not allow the TRC to exercise unfettered discretion in determining whether a proposal is responsive. Generally, agency decisions enjoy a presumption of correctness, and judicial deference is owed to an agency’s expertise and special knowledge *** But reversal of an agency decision is appropriate when the decision constitutes an error of law, when findings are arbitrary and capricious, or when the findings are unsupported by substantial evidence.”

Coffman Specialties, Inc.

- Design-build of aircraft processing ramp
- Limitations in RFP
 - 3 projects for design projects
 - 5 pages for management approach
- CSI had lowest price, but ranked 5th out of 6 on technical merit
- Proposal format not per RFP
- CSI lost protest
- Key lesson: agencies have great discretion in running their procurements

Emerald Correctional Management v. Bay County Board (2007)

- RFQ/RFP Process
- County issued “Request for Clarifications” with different questions to the proposers.
- County awarded based on new numbers, a result of the different information provided to proposers.
- Court:
 - County cannot request modifications from one party and not another.
 - County cannot alter material provisions in RFP for one party.

Proprietary Meetings

- Establish meetings in RFQ
- Purpose: to make sure procurement works
- Schedule early enough to allow for addenda
- Provide sufficient time to allow for thoughtful process
- Do not have to disclose proprietary information
- HOWEVER, If Basis of Design Documents changes, issue addenda

Robynne Thaxton Parkinson

Robynne Thaxton Parkinson is a Seattle based lawyer who provides legal services to a full range of clients performing construction work, including Owners, Contractors, Design Builders, Engineers and Architects. Robynne is one of the leading experts in construction law and alternative procurement both in Washington State and on a national basis. She serves on the National Design Build Institute of America Board of Directors and the American Arbitration Association National Construction Dispute Resolution Committee. In addition, she leads the DBIA National Contracts Task Force and was instrumental in revising the DBIA form Design-Build contracts and subcontracts. She is on the DBIA National Policies and Standards Committee, which is the “knowledge center” for the DBIA, and is one of DBIA’s highest rated speakers. She served as the President of the Northwest Region for DBIA from 2008 to 2010 and continues on its Board of Directors. She participates on the legislative subcommittees of the Washington Capital Projects Advisory Review Board, which reviews all legislation involving capital projects in Washington State. Robynne was named as a Washington Super Lawyer in 2010 and 2011 and is one of the few lawyers who are Designated Design-Build Professionals.

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