



Gray Areas in Public Bidding

Presented by: Steven E. Grubb, Esq.
Goldberg Katzman, P.C.
seg@goldbergkatzman.com

1. Electronic Things

- Local Government Unit Electronic Bidding Act
 - 62 Pa.C.S.A. Section 4601 et seq.
 - Electronic Bidding
 - Competitive Electronic Auction Bidding



Newspapers?!?

§5614(d) – The term “advertisement” or “public notice”, wherever used in this section, shall mean a notice published at least ten days before the award of a contract *in a newspaper of general circulation published in the municipality where the authority has its principal office* or, if no newspaper of general circulation, in the county where the authority has its principal office. . .

2. *Things I Would Miss If I Just Read the MAA*

- Part II of Commonwealth Procurement Code – “municipal authority” is a “government agency.” 62 Pa.C.S.A Section 3102.
 - Prevention of Environmental Pollution (Chapter 33)
 - Iran Free Procurement (Chapter 35) -Year Old!
 - Contract Clauses and preferences (Chapter 37)
 - Prohibiting Discrimination
 - North American Motor Vehicle Preference
 - Purchasing limits and requirements for mass transit authorities
 - Used oil preference
 - Guaranteed Energy Savings Contracts

- Public Works Contracts (Chapter 39)
 - Details:
 - Time of Award
 - Contract Execution
 - Release of Bidder
 - Retainage
 - Prompt Payments
 - Substantial/Final Payments
- Bidding Exception for Purchases from the United States (Chapter 41)
- Antibid-rigging (Chapter 45)

- *Funding Source Bidding Requirements*
 - Pennvest “or equal” Condition
 - List the Brand Name and insert “or equal” after it.
 - What are “equals?”
 - Pre-qualification
 - Look at this before you accept the funding.

- Professional Service Contracts
 - Where is it in the MAA?
 - Judge-made when it comes to authorities

- Performance and Payment Bonds
 - Performance
 - 5614(a)(3) No contract shall be entered into for construction or improvement or repair of a project or portion thereof unless the contractor gives an undertaking with a sufficient surety approved by the authority and in an amount fixed by the authority for the faithful *performance of the contract*.
 - 5614(a)(4) Payment
 - The contract must provide among other things that the person or corporation entering into the contract with the authority will *pay for all materials furnished and services rendered* for the performance of the contract and that any person or corporation furnishing materials or rendering services may maintain an action to recover for them against the obligor in the undertaking as though such person or corporation was named in the contract if the action is brought within one year after the time the cause of action accrued.
 - Public Works Contractors' Bond Law (8 P.S. Section 193.1)
 - “Any financial security, acceptable to and approved by the contracting body, including but not limited to, Federal or Commonwealth chartered lending institution irrevocable letters of credit and restrictive or escrow accounts in such lending institutions, equal to one hundred percent of the contract amount....”

Cooperative Purchasing

- Intergovernmental Relations, 62 Pa.C.S.A. Section 1901 et seq.
- Authority is a “Local public procurement unit”
- Fulfills Procurement Requirements (Section 1908)
- CoStars is the DGS Program



3. *Rejecting Bids*

5614(a)(1) (Services):

Except as set forth in paragraph (2), all construction, reconstruction, repair or work of any nature made by an authority if the entire cost, value or amount, . . . shall be done only under contract to be entered into by the authority with the *lowest responsible bidder* upon proper terms after public notice asking for competitive bids as provided in this section.

Section 5614(b) (Supplies and Materials):

All supplies and materials . . . shall be purchased only after advertisement as provided in this section. The authority shall accept the lowest bid, kind, quality and material being equal, *but the authority shall have the right to reject any or all bids or select a single item from any bid. . .*

- Not Responsive versus Not Responsible
- “Responsibility”
 - Financial Responsibility
 - Integrity
 - Efficiency
 - Experience in the Industry
 - Promptness
 - Performance Ability
 - Presumption you are Acting in Good Faith
- Challenge Can be Based Upon:
 - Bad Faith
 - Fraud
 - Capricious Action
 - Abuse of Power
- How does an Authority defend against a challenge?
- Who is Suing the Authority?

4. Emergencies

Section 5614(d) regarding “advertisement” or “public notice”:

Notice may be waived if the authority determines that an emergency exists which requires the authority to purchase the supplies and materials immediately.

- “Supplies and Materials”
 - Notice refers to “services”
 - 5614(a), (b) or both?
- What is an emergency?
 - Whatever the authority determines?
 - Commonwealth procurement guidance:
 - Threat to public health welfare or safety
 - “Circumstances outside the control of the Agency create an urgency of need that does not permit the delay involved in using more formal, competitive procedures.”
- Who makes the call?
 - Resolution?
 - Staff?
 - General Counsel?
- Defending the “emergency”

What is Gray to You?

Thank You for your attention.

Steven E. Grubb, Esquire
Goldberg Katzman, P.C.
4250 Crums Mill Road, Suite 301
P.O. Box 6991
Harrisburg, PA 17112
(717) 234-4161
(717) 234-6808 – fax
seg@goldbergkatzman.com