

Breaking Ground

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Legal Perspective

DGS (And Contractors) Struggle With Best Value Procurement

By David Raves, Esq.

Since the enactment of the Commonwealth Procurement Code in 1998, Commonwealth Agencies, which includes the Department of General Services, have been, under certain circumstances, statutorily authorized to procure goods and services by way of competitive sealed proposals in lieu of competitive sealed bidding. Since being authorized to do so, state agencies have been involved in a myriad of court cases litigating the issues surrounding attempts to procure goods and services through the proposal process rather than sealed bidding. The Department of General Services has been brought into the litigation foray as a result of its initiation of Best Value Request for Proposals.

In 2005, DGS issued its "Best Value Policy" which authorized the use of RFP's to accomplish DGS' goals of improving upon timely delivery of quality multiple prime construction projects by qualified contractors. The RFP process was to be considered for complex projects with allocations exceeding \$5,000,000. The policy statement also required that DGS' Deputy Secretary make a written determination that competitive sealed proposal process was either not practicable or not advantageous to the Commonwealth.

Best Value was designed to give the Commonwealth flexibility in contracting larger, more complex projects, but was also believed to give Best Value projects a better chance of avoiding the high level of claims that were common on DGS projects prior to the previous DGS administration. Architects and contractors favored Best Value because it offered an opportunity for selection based upon technical qualifications in concert with price. And the projects that have gone through the Best Value process have, for the most part, attracted contractors who had previously refrained from bidding DGS work.

The method also had its detractors, particularly from prime mechanical and electrical contractors with extensive DGS resumes, and from contractors who felt the standards were not consistently applied. From the earliest Best Value projects, lawsuits have followed.

Two recent Commonwealth Court cases have weighed in on DGS' methods of procurement involving Slippery Rock and Cheyney Universities. Of the two, Cheyney, decided in May of this year, came first and has persuasive weight – this means others potential litigants can reference it as decided

law. While first initiated in 2005 because of appeals to the Supreme Court, it took nearly five years to run its course. The Slippery Rock case, decided in November of this year, was not reported and only applies to the parties involved. From a legal perspective, the Cheyney case is the Court's decision on the issues surrounding DGS' use of RFP's rather than bidding.

In both the Cheyney and Slippery Rock cases, the final decision focused on DGS' initial decision to use the RFP process and did not focus on the selection process. Both of these cases found that DGS did not sufficiently conclude that the normal bidding process was either not practical or not advantageous to the Commonwealth under the Procurement Code. Section 513(a) of the Procurement Code requires, "When the contracting officer determines in writing that the use of competitive sealed bidding is either not practicable or advantageous to the Commonwealth, a contract may be entered into by competitive sealed proposals."

The Court's looked at what level of particularity is needed when the contracting officer determines, in writing, that the competitive sealed bidding is either not practicable or advantageous. DGS, in its written determination to use the RFP process for the Cheyney project, stated:

The use of the standard competitive sealed bid process for the renovation of Foster Union would not be advantageous to the Commonwealth. Competitive sealed proposals are a more practical method of procurement since this will allow Proposers flexibility in developing their proposals to address their experience with this type of work and the ability to complete coordinated construction in a timely manner. In addition to expediting the process, this method will be more advantageous by allowing the Commonwealth the ability to consider criteria other than cost in the award process. The prime contracts to be awarded, if any, will be agreed-upon lump sum awards reflecting the costs submitted in the proposals.

Finding that the proposed construction was not unique and that any contractor was always obligated to coordinate its work with other contractors and timely complete its work, the Court found that DGS did not provide enough specificity for finding impracticability or disadvantageous. On the Slippery Rock project, DGS' determination stated:

The complexity of the project, the difficulties of the site, the tightness of the construction schedule, and the requirement to have the building LEED certified make the cooperation

and coordination of the prime contractors essential to the success of the project.

I certify that the use of competitive sealed bidding for this construction project is either not practicable or advantageous to the University.

The Slippery Rock Court, heavily relying on the reasoning in the Cheyney again found that DGS' underlying reasoning that competitive sealed bidding was not practicable and not advantageous contained no basis for the Court to review the complexity or difficulties of the site. While the Court did grasp on the LEED nature of the project, it concluded that there was no reasoning why seeking LEED certification would preclude competitive sealed bidding.

While the above cases do reveal that in order for DGS to utilize the RFP process on construction projects the written determination must be specific and state with particularity the reasons that bidding is not "practical" or is not "advantageous" they provide little more guidance on the issue other than this general proclamation. What can be determined is that such impracticability and/or disadvantage will need to be more than just general project conditions that make construction difficult. Based on DGS' posted Best Value documents on its web-site, they have developed a determination matrix listing various job conditions to consider when making the decision to utilize the RFP process rather than bidding. From this writers experience, none of the considerations listed are considerations that have not otherwise been addressed on a previously bid project. This begs the question, that if the conditions have been successfully dealt with on a bid project, would a repeat of those conditions justify utilization of the RFP process? For example one of the considerations is a prison project. Has DGS previously bid and successfully completed a prison project? Why would this now be a basis for determining that bidding a prison is impractical? It will be more likely that an agency will conclude that the bidding process is not advantageous rather than not practical. "Advantageous" appears to be a subjective criteria that will allow the agency great latitude in its determination, rather than an objective standard with established criteria.

Although this article focuses on DGS, as a result of the recent cases, it would equally apply to other Commonwealth Agencies that have the ability to invoke section 513 of the Procurement Code. Additionally, while some may try and raise the issue of the Separations Act, the requirement of entering into separate contracts for general, mechanical, electrical and plumbing contracts, that issue has been resolved by

the Cheyney case. On appeal of the initial decision of the Commonwealth Court, the Supreme Court did decide that if the RFP process is properly utilized, the Separations Act is not applicable to the RFP process. It is interesting to note that the Court's decision was accompanied by two dissenting opinions that reached different conclusions.

While there are no clear answers on DGS' use of the Best Value RFP process in construction, there will be more litigation on a case by case basis to ferret out the details on when bidding a construction project is not practical or not advantageous to DGS.

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