

Best-Value Procurements in Virginia Following The Virginia Supreme Court's Decision in Professional Bldg. Maintenance Corp.

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On April 20, 2012, the Virginia Supreme Court, in *Professional Bldg. Maintenance Corp. v. School Board of The County of Spotsylvania*,¹ found an award using "best value" criteria to other than the low, responsive, responsible bidder, improper. What impact will the decision in Professional Bldg. Maintenance Corp. have on future best-value procurements in Virginia? The short answer is that it possibly may cause some initial confusion, but likely will have no lasting impact other than to encourage public bodies to ensure that they better understand the basic procurement process and that they then follow its requirements. "Best value," with its flexibility to award to other than the lowest-priced offer from a responsible offeror in appropriate circumstances when a higher-priced offer more optimally meets the public body's needs, should remain alive and well in Virginia following *Professional Bldg. – if done properly*. The trick is for the public body to take the proper steps required to use this process. This includes limiting use of "best value" to procurements done using competitive negotiation for other than professional services.

I. Best-Value Procurement Under Virginia Public Procurement Act

Under the Virginia Public Procurement Act, Va. Code § 2.2-4300, *et seq.*, a best-value procurement is one where award is made to an offeror whose proposal best or most optimally meets the soliciting public body's needs, as measured by applying predetermined evaluation criteria stated in the solicitation to factors reflective of the public body's needs, such as quality, price, and various other elements of the public body's requirements.² The Procurement Act's definition of "best value" procurement and its procedures for competitive negotiation allow award to other than the lowest-priced offeror, even if the lowest-priced offeror is fully qualified. The rationale for allowing this approach is that factors other than price, such as relatively higher quality, may be important to certain types of procurement. As the joke goes, who wants to be the astronaut on the lowest-priced rocket ship? A "best value" approach, where award is to other than the lowest-priced offeror who is qualified, is fundamentally different from traditional

"competitive sealed bidding," where award is required to be made to the lowest-priced responsive bid from a responsible bidder.³ Under the Procurement Act, award using best-value criteria other than lowest price must be done using competitive negotiation. Competitive negotiation requires special justification. Specifically, the Procurement Act requires a prior written determination by the public body "that competitive sealed bidding is either not practicable or not fiscally advantageous to the public" in order to allow procurement by competitive negotiation. Va. Code § 2.2-4303C.

Unfortunately, the location of an amendment made to the Virginia Public Procurement Act in 2000 apparently has created confusion for some Virginia public bodies about when they may use "best value" award criteria and award to other than the lowest-price offer from a responsible offeror. This amendment added several provisions on "best value" to the Virginia Public Procurement Act, which did not expressly use the term before then.⁴ Although the term "best value" was not expressly used, the concept had long been engrained in the definition of competitive negotiation of other than professional services, which allowed award to the "best proposal" even if its price was higher than another acceptable proposal. See Va. Code § 2.2-4301 "Competitive negotiation." The more appropriate location for any further discussion of best value would have been the Procurement Act's section 2.2-4301 provision on competitive negotiation because "best value" makes no sense at all in the context of "competitive sealed bidding." Indeed, it essentially is its antithesis. Unfortunately, however, the General Assembly chose to insert a provision on best value in what is now section 2.2-4300C, creating the potential for confusion for those who do not read the Procurement Act carefully.

II. The Professional Bldg. Case

The genesis for the *Professional Bldg.* case was a procurement for custodial services by a Virginia School Board. The School Board initiated the procurement by publishing a "Best Value Invitation for Bid." By definition, under the Virginia Public Procurement Act, an "Invitation for Bid" is the method to initiate "competitive sealed bidding." Va. Code § 2.2-4301 "Competitive sealed bidding." By definition, "competitive sealed bidding" requires award to the lowest responsive and responsible bidder. *Id.* Accordingly, even the title of the document initiating the procurement was problematic because use of a "best value" approach and "competitive sealed bidding" are fundamentally incompatible. Unfortunately, the contradiction and the incompatible approach were not just ones of mistaken terminology. Rather, the solicitation document itself carried the

fundamental contradiction forward, apparently because of confusion caused by the amendments to the Procurement Act made in 2000.

The Invitation for Bid stated that the School Board would utilize the "Best Value procurement method" to consider factors in addition to price "to select the most advantageous offer." The specific evaluation criteria listed in the Invitation were: expertise and experience relative to the scope of services (50 points); experience of personnel assigned to the project (5 points); supplies/equipment proposed for general cleaning (5 points); quality control program (10 points); and price (30 points). Although Professional Building Management ("PBM") submitted the lowest bid price among all the bidders, the School Board issued a notice of intent to award the contract to the bidder who had the highest score according to the points given for each of the specific criteria, even though its bid price was higher. PBM sent a letter to the School Board expressing its concern that the bid review process was not carried out in a fair and objective manner, in light of its experience and the fact that it submitted the lowest bid. Representatives from PBM and the School Board met to discuss PBM's bid. During the meeting, the School Board provided PBM with a summary of the points awarded to each bidder for the criteria set forth in the Invitation. Subsequently, PBM submitted a formal protest, and the parties met again to discuss PBM's bid. Thereafter, the School Board confirmed, in writing, that PBM would not be awarded the contract. Following the School Board's decision, PBM filed suit. *Professional Bldg.*, Slip. Op. at 1.

PBM asserted, among other things, that the School Board violated the Virginia Public Procurement Act because it did not award the contract to PBM, which was the lowest responsive and responsible bidder. The School Board filed a demurrer to PBM's complaint, asserting, among other things, that the contract was to be awarded to the best-value bidder, not the lowest responsible bidder. The circuit court sustained the School Board's demurrer, finding that "Best Value" is a method permitted for public bodies and the Invitation "sufficiently meets the requirements of law for a 'Best Value' procurement solicitation." *Id.*, Slip. Op. at 1-2.

In reversing the circuit court, the Virginia Supreme Court correctly noted in part as follows:

Pursuant to Code § 2.2-4303, which identifies the "[m]ethods of procurement" to be used in awarding public contracts, the contract was to be awarded after competitive sealed bidding. Competitive sealed bidding "is a method of contractor selection, other than for professional services" Code § 2.2-4301.4 Code § 2.2-4303(A) states that "[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the

purchase of services, insurance, or construction, *shall be awarded after competitive sealed bidding*, or competitive negotiation as provided in this section, unless otherwise authorized by law." (Emphasis added.) This section enumerated certain contracts that may be awarded and purchases that may be made using competitive negotiation or other methods of procurement. Code § 2.2-4303(B)-(J) The School Board's contract does not fall within any of these subsections providing for a procurement method other than competitive sealed bidding.

The process to be followed by the public body in procuring a contract under the competitive sealed bidding process is set forth in the Act and consists of the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the public body has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. . . .
2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by posting on the Department of General Services' central electronic procurement website or other appropriate websites. . . .
3. Public opening and announcement of all bids received.
4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.
5. *Award to the lowest responsive and responsible bidder.* . . . Code § 2.2-4301 (emphasis added). Therefore, under the plain language of the Act, the School Board was required to award the contract to the lowest responsive and responsible bidder.

We reject the School Board's position that its utilization of best value concepts permitted it to award the contract to the best value bidder instead of the lowest responsive and responsible bidder. Although the Act permits public bodies to "consider best value

concepts when procuring goods and nonprofessional services," Code § 2.2-4300, it does not provide the School Board with a method of procurement in lieu of competitive sealed bidding. See Code § 2.2-4303C. To accept the School Board's position, we would have to add language to the fifth element of competitive sealed bidding set forth in Code § 2.2-4301 by providing for an award to the best value bidder as an alternative to the lowest responsive and responsible bidder. We cannot change or amend legislative enactments in this manner.

Id. at 2 (citation omitted).

III. What's A Public Body To Do?

Ironically, a public body can conduct a proper best-value procurement for custodial services by following requirements of the Virginia Public Procurement Act. The correct way for a Virginia public body to conduct a best-value procurement is to use competitive negotiation for other than professional services. To use competitive negotiation, a public body would only have to (1) make the prior written determination required by Va. Code § 2.2-4303C; (2) issue a Request for Proposal, the method to initiate procurement using competitive negotiation; and (3) ensure its solicitation and procedures followed the requirements for competitive negotiation for other than professional services. When competitive negotiation for other than professional services is used, the Virginia Public Procurement Act expressly allows award to the "best proposal" based upon evaluation factors stated in the RFP, of which price may be a factor to be considered but "need not be the sole determining factor." Va. Code § 2.2-4301, "Competitive Negotiation." In other words, the School Board should have first made the written determination required by Va. Code § 2.2-4303C and issued an RFP using competitive negotiation. Had it done so, it properly could have taken the basic award strategy that it tried.

IV. Conclusion

Despite *Profession Bldg.*, "best value" procurements should remain alive and well in Virginia. Public bodies must bear in mind, however, that in Virginia, true "best value" procurements can only properly be conducted by use of competitive negotiation for other than professional services. In all cases, that requires the prior written determination mandated by Va. Code § 2.2-4303C "that competitive sealed bidding is either not practicable or not fiscally advantageous to the public." Also, (1) the public body must issue a "Request for Proposal," not an "Invitation to

Bid"; and (2) the terms of the solicitation must be carefully reviewed to ensure that all inappropriate references to competitive sealed bidding or award to the lowest responsive and responsible bidder are eliminated. Finally, the public body must conduct the procurement consistently with all the requirements for a competitive negotiation for other than professional services. Following these basic rules, Virginia public bodies should continue to be able to have "best value" procurements available as tools to meet their procurement needs in appropriate circumstances.

¹ *Record No. 110410 (Va. Sup. Ct. decided Apr. 20, 2012), 283 Va. ____ (2012)*2. *Goldacre (Offices) Limited v Nortel Networks UK Limited* [2009] EWHC 3389

² See Va. Code § 2.2-4301, "Best value." "The clear purpose of 'best value' considerations is to allow a governmental unit in a *competitive negotiation process* to consider factors other than price related to the goods or services being solicited." 2006 Va. AG 5 (06-034) March 21, 2006 (emphasis added). Definitions of "best value" in public procurement can vary. For example, the Federal Acquisition Regulation ("FAR") has an extremely broad definition. 48 C.F.R. § 2.101 (2011).

³ See, e.g., Va. Code § 2.2-4301 "Competitive sealed bidding."

⁴ 2000 Va. Acts ch. 644. See 2002 Va. AG 13 (02-1077) (Dec. 10, 2002).

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