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Time for a Re-evaluation: The "Lowest Responsible Bidder"

The Firehouse Lawyer does not shy away from controversy, but may a regional fire authority (RFA) or fire district comply with the competitive bidding laws for purchases not amounting to public works[1], without selecting the bidder offering the lowest price for its services or materials? This is a question of implied powers, and the answer to this question is probably yes: There is no specific statute mandating that fire districts or RFAs award contracts for goods to the "lowest responsible bidder" (LRB), as that term is currently understood to mean—lowest-priced, and responsible, bidder.

Under Washington law, fire districts have the authority "to enter into and to perform any and all necessary contracts" that are consistent with Title 52 RCW and the law. RCW 52.12.021. This power is limited, in some areas, by statute: "Insofar as practicable, purchases and any public works by the district shall be based on competitive bids." RCW 52.14.110.

Under Washington law, "[A] statute which requires that a contract shall be awarded to the

[1] "Public work" means "all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality." RCW 39.04.010 (4).

'lowest responsible bidder' is equivalent in meaning to a statute which requires 'competitive bidding'"—much like RCW 52.14.110, quoted above. *State v. Clausen*, 90 Wn. 450, 456-57 (1916); *See Also Great Northern Railway Co. v. Leavenworth*, 81 Wn. 511 (1914). But nothing within Title 52 RCW, or Title 39 RCW, outlining the general public bidding laws applicable to all public agencies, requires that a fire district or RFA award contracts to the LRB, for purchases that are not public works.

Under Title 52 RCW, a fire district may use the small works roster process for public works, to solicit competitive bids between $20,000 and $300,000. *See* RCW 52.14.110 (3). Under the small works roster process "[P]rocedures shall be established for securing telephone, written, or electronic quotations from contractors on the appropriate small works roster to assure that a competitive price is established and to award contracts to the lowest responsible bidder, as defined in RCW 39.04.010."[2] RCW 39.04.155 (2)(c). Furthermore, under the process for limited public works (for public works less than $35,000), "a state agency or authorized local government shall solicit electronic or written quotations from a minimum of three contractors from the appropriate small works roster and shall award the contract to the lowest responsible bidder as defined under RCW 39.04.010." RCW 39.04.155 (3). These statutes address public works projects, and are very clear: a contract for public works shall be awarded to the LRB.

Fire districts may also use the vendor-list procedure for goods costing between $10,000 and $50,000 in lieu of competitive bidding. RCW 52.14.110 (1). But the vendor-list procedure for the purchase of equipment, materials and supplies is the only bid law applicable to fire districts that references the LRB—in the context of purchasing goods (not public works). The statute currently reads as follows: "Municipalities shall by resolution establish a procedure…to assure that a competitive price is established and for awarding the contracts for the purchase of any materials, equipment, supplies, or services to the lowest responsible bidder as defined in RCW 43.19.1911." RCW 39.04.190 (2).

This is interesting because RCW 43.19.1911 was repealed in 2012. But the language of RCW 39.04.190 will change on July 24, 2015, after Senate Bill 5075 becomes effective. This Bill will replace "lowest responsible bidder as defined in RCW 43.19.1911" with "lowest responsible bidder as defined in **39.26 RCW**." Consequently, we have guidance to discern who the LRB is—in the context of the vendor-list procedure. It should be noted that RCW 39.26 applies to contracts for goods and services entered into by state agencies. *See* RCW 39.26.005.

But this statute actually bolsters our theory (that fire districts and RFAs need not award contracts for goods to the LRB). Under RCW 39.26, price is not the only factor in discerning who the LRB

[2] RCW 39.04.010 references RCW 39.04.350 only for the definition of "responsible bidder", not "lowest responsible bidder"

is: "[I]n determining the lowest responsive and responsible bidder, an agency may consider **best value criteria,** including but not limited to: (a) Whether the bid satisfies the needs of the state as specified in the solicitation documents; (b) Whether the bid encourages diverse contractor participation; (c) Whether the bid provides competitive pricing, economies, and efficiencies; (d) Whether the bid considers human health and environmental impacts; (e) Whether the bid appropriately weighs cost and noncost considerations; and (f) Life-cycle cost."

RCW 39.26.160 (3) (emphasis added). Additionally, the same statute reads that after soliciting bids, "the awarding agency **may**… Award the purchase or contract to the lowest responsive and responsible bidder." RCW 39.26.160 (1)(a)(iii) (emphasis added). Furthermore, recall that RCW 39.04.190, the vendor-list procedure, only applies to purchases for goods between $10,000 and $50,000. Imagine that the goods needed cost more than $50,000, and therefore may not be procured under the vendor-list procedure. Yes, at this point, formal sealed bidding is required under RCW 52.14.110—in lieu of some other exception to the bid laws, such as sole source or purchases in the event of an emergency, under RCW 39.04.280. But we are even farther afield from the LRB requirement!!!

The word "lowest" has been consistently found by our courts to mean lowest price. But when Washington courts have done so, it has overwhelmingly been in the context of a statute requiring that a contract be awarded to the LRB.[3] There is simply no limitation imposed upon fire districts or RFAs that procurement contracts—for purchases of goods, such as apparatus and other materials or equipment—be awarded to the bidder offering goods for the lowest price. In fact, in the very narrow circumstances in which a contract for goods must be awarded to the LRB under the vendor-list procedure, the municipal corporation soliciting bids may consider more than price, but "best value criteria". *See* RCW 39.26.160 (3), quoted above.

The remaining statutes requiring that a contract be awarded to the LRB do not reference or impose any requirements upon fire districts or RFAs. The list of these statutes is long: (1) RCW 47.28.100 (public highways and transportation: contracts for construction of highways); (2) RCW 39.19.070 (contracts awarded to minority and women's business enterprises); (3) RCW 35.23.252 (public works for second-class cities); (4) RCW 87.03.435 (construction of canals for irrigations districts); (5) 85.24.070 (diking and drainage districts); (6) RCW 72.01.120 (state institutions); (7) RCW 70..44.140 (public hospital districts: contracts for material and work); (8) RCW 57.08.050 (water-sewer districts: contracts for materials and work); (9) RCW 54.04.080 (public utility districts); (10) RCW 53.08.130 (port districts: contracts for labor and material, small works

[3] *See Butler v. Fed Way School Dist.*, 17 Wn.App. 288, 294 (1977) (finding that "[T]he intent expressed by RCW 28A.58.135 is to foster bona fide bidders in the competitive bidding system, to protect their interests, and to enable school districts to acquire the best goods at the lowest price.")

roster); (11) RCW 47.28.170 (public highways and transportation: emergency protection and restoration of highways); (12) RCW 43.52.570 (state government: award of contracts for materials or equipment over $5,000 but less than $75,000); (13) RCW 39.26.271 (rules for reciprocity in competitive bidding between states); and finally, RCW 39.26.255 (director of the department of enterprise services shall develop rules for contracts for recycled materials by state agencies).

Because no Washington statute requires that fire districts or RFAs award a contract for goods to the bidder offering the lowest price, we are left with a question of whether these municipal corporations have the implied power not to grant such an award. It seems fire districts do: "Fire protection districts have full authority...to enter into and to perform any and all necessary contracts." RCW 52.12.021. Furthermore, all powers of a fire district participating in an RFA "shall be transferred to the regional fire protection service authority on its creation date," and if no fire districts are participating, the RFA may identify the powers set forth at RCW 52.12.021 in its plan, and subsequently exercise those powers. *See* RCW 52.26.100.

Based on this language, and freedom-of-contract principles, perhaps it is possible that a fire district or RFA may award contracts for goods to the best, not the lowest, responsible bidder. Perhaps the intent of the legislature—to permit fire districts and RFAs to award contracts for goods to the best responsible bidder—arose from concerns for safety. If a fire department has the best—not the cheapest—equipment and apparatus, this promotes better safety. Consequently, the legislature gave fire departments some leeway.

Why Fire Districts Might Not Need to Pay B&O Taxes When Charging Fees for Governmental Functions

Doing business costs money: Under Washington law, "[T]here is levied and collected from every person that has a substantial nexus with this state a [B&O tax] for the act or privilege of engaging in business[4] activities." RCW 82.04.220. But what if a fire district is not performing a business function, but a governmental one? This is addressed by statute: The B&O tax shall not be imposed on any fire district activity unless the fire district (1) is engaged in an "enterprise" or "utility" activity and (2) the activity in question had previously been subjected to the B&O tax. *See* RCW 82.04.419. For purposes of this article, we will call this the "419 Exemption".

The Washington Administrative Code (WAC) provides guidance on the 419 Exemption. Under the WAC for excise tax rules, as promulgated by the Department of Revenue, an enterprise activity is "an activity financed and operated in a manner similar to a private business enterprise. The term includes those activities which are generally in competition with private business enterprises and which are over fifty percent funded by user fees." WAC 458-20-189 (2)(d). Because at least 90% of the funding of fire districts stems from property

[4] "'Business' includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140

taxes, it is difficult to discern whether a particular activity is over 50% funded by user fees. Under Washington law, user fees are not taxes. *See Lakewood v. Pierce County*, 106 Wn.App. 63 (1997).[5] Be sure to separate taxes from user fees when analyzing this 50% equation.

To illustrate the concept of "enterprise activities", let us consider some examples. First, consider billing for emergency medical services (EMS). Under Washington law, "[A]ny fire protection district which provides emergency medical services, may by resolution establish and collect reasonable charges for these services in order to reimburse the district *for its costs* of providing emergency medical services." RCW 52.12.131 (emphasis added). Typically, a fire district imposes additional charges for providing EMS because (1) it has the legal authority to do so (provided it does so by resolution) and (2) it intends, by imposing such a charge, to recoup its costs. Additionally, the provision of EMS is primarily funded by property taxes, not user fees. Thus, bills collected for the provision of EMS—for the purposes of recovering costs, not for commercial gain—are more than likely not intended to compete with private entities, and are exempt from B&O tax under the 419 Exemption.

Second, assume that a fire district enters into a contract with a county to perform illegal burn investigations in unincorporated areas of the county, and charges a (user) fee for such investigations. Under Washington law, "[A]ny two or more public agencies may enter into agreements with one another for joint or cooperative action." RCW 39.34.030 (2). Furthermore, RCW 19.27.110 states that "each county government shall administer and enforce the International Fire Code in the unincorporated areas of the county," but further states that counties may contract with fire districts under RCW 39.34 to assume all or a portion of such responsibilities. Consequently, fire burn investigations by fire districts are an extension of the police power of counties. Such investigations are clearly not meant to be in competition with private business, but an extension of the police power. And again, user fees are not taxes. A fire department official conducting a burn investigation is more than likely doing so on the clock of his or her employer—a fire district, whose funds are derived primarily from property taxes. Furthermore, the DOR may be hard-pressed to locate a private business with the police power to conduct illegal burn investigations and subsequently fine those who do not comply with the law. As such, these investigations are most likely not enterprise activities—unless they are funded by over 50% in user fees—because these investigations are not conducted in competition with some other private business. Therefore, fees received from a county for illegal burn investigations are most likely exempt because of the 419 Exemption.

Third, consider an example of an enterprise activity, directly from WAC 458-20-189, quoted above: "For example, a city operating an athletic and recreational facility determines that the facility generated two hundred fifty thousand dollars in user fees for the fiscal year. The total costs for operating the facility were four hundred thousand dollars. This figure includes direct operating costs and direct and indirect overhead, including asset depreciation and interest

[5] Additionally, "[A]n enterprise activity which is operated as a part of a governmental or nonenterprise activity is subject to the B&O tax." WAC 458-20-189 (3)(d)(ii). Consequently, if an enterprise activity is enmeshed in a governmental function, such that the activity is funded over 50% by user fees—which are not taxes—the activity is subject to the B&O tax.

payments for the retirement of bonds issued to fund the facility's construction. The principal payments for the retirement of the bonds are not included because these costs are a part of the asset depreciation costs. The facility's operation is an enterprise activity because it is more than fifty percent funded by user fees." WAC 458-20-189 (3)(d)(i). What distinguishes this type of activity is that the city is running an athletic and recreational facility, that could easily be provided by a private business, such as a private gym; and the project is clearly funded by over 50% in user fees. Whenever you are presented with this "enterprise activity" question, always do the math. No activity is the same, so do not assume too much, or risk an audit finding.

One final example: a contract with a county in which the fire district forms a HAZMAT response team and charges a fee for such responses in the county. Under Washington law, **"[**F]ire protection districts may cooperate and participate with counties, cities, or towns in providing hazardous materials response teams under the county, city, or town emergency management plan provided for in RCW 38.52.070. The participation and cooperation shall be pursuant to an agreement or contract entered into under chapter 39.34 RCW." RCW 52.12.140. As already indicated, any fire district activity is exempt from the B&O tax unless the activity is a utility or enterprise activity. Surely, cooperation between two public agencies to provide hazardous materials response teams is not meant to be in competition with private business: name the private business providing HAZMAT response. Therefore, moneys earned because of this agreement are not subject to the B&O tax. But still investigate whether the activity is over 50% funded by user fees, even if the activity does not appear to be in competition with private business. Always do the math.

For the above reasons, a fire district should consider four issues prior to claiming that fees charged for a particular activity are exempt from the B&O tax: Whether the activity (1) is authorized by law (otherwise the activity is not a "fire district activity")[6]; (2) is intended to compete with private business; (3) is over 50% funded by user fees; and (4) had been previously subjected to the B&O tax. As far as that second issue, consider whether there is even a private business to compete with in the first place. Unfortunately, as the statute is currently written, the 419 Exemption does not apply to RFAs. This shall require a legislative change.

Speaking of Enterprise Activities…

Fire departments should properly apportion benefit charges—if they utilize this financing mechanism—to the properties owned or operated by religious organizations that are within their boundaries. Recall that the benefit charge may be applied to "personal property and improvements to real property owned or used by any recognized religious denomination or religious organization for business operations, profit-making enterprises, or activities not

[6] Consider the reasons for which fire districts may exercise their broad powers: "Fire protection districts for the provision of fire prevention services, fire suppression services, emergency medical services, and for the protection of life and property are authorized to be established as provided in this title." RCW 52.02.020 (1).

including use of a sanctuary or related to kindergarten, primary, or secondary educational purposes or for institutions of higher education." RCW 52.18.010. Perhaps the time has come to re-examine whether certain property owned or operated by religious organizations—in whole or in part—is being used for enterprise activities. That way, these properties may be subject to the benefit charge, and these charges may be reasonably apportioned, pursuant to RCW 52.18.010.

Case Note: Anonymous Speakers and Defamation Claims

Recently, the Washington Court of Appeals, Division One, reminded us that the First Amendment to the United States Constitution protects the right of persons to speak anonymously. *See Thomson v. Jane Doe*, 72321-9-I (2015). And this right applies equally to constitutionally protected speech made online. *In re Anonymous Online Speakers*. 661 F.3d1168, 1173 (9th Cir. 2011). However, the *Thomson* court further reminded us that when a plaintiff brings a defamation claim against an anonymous speaker, in order to ascertain the identity of that speaker, the plaintiff must have a "prima facie"[7] defamation claim. This requires different standards of proof, depending on the plaintiff.

Of course, the First Amendment does not protect defamatory speech. But when defamation involves a public figure, the courts generally require a showing of "actual malice", as held in the famous defamation case, *New York Times Co. v. Sullivan*. Consequently, a public figure—for purposes of this article, a fire district[8]—when suing another anonymous party for defamation, must show that the party made defamatory statements with "actual malice" to establish a prima facie case. Otherwise, the public figure would not have a prima facie defamation claim, and therefore could not ascertain the identity of the anonymous speaker, under *Thomson*. As a side note, the "actual malice" standard exists because the courts view the free exchange of ideas more important in the context of public service. We agree.

We stress here that the *Thomson* court did not explicitly hold that a public figure must demonstrate "actual malice" to determine the identity of an anonymous speaker.[9] Nonetheless, *Thomson* is relevant because it sheds light on what a plaintiff in a defamation action must demonstrate prior to "unmasking" the anonymous speaker. Under *Thomson*, the plaintiff must have a prima facie defamation claim; the public figure must show "actual malice" to have a prima facie defamation claim.

But with that, we come to a second question, admittedly in a circuitous manner: May a fire district, or any other municipal corporation, sue

[7] For purposes of this article, "prima facie" means that all of the requirements for a particular claim (be it negligence, defamation etc…) have been demonstrated by the plaintiff.

[8] Individuals, or "natural persons", of course, have been found able to sue for defamation; we shall address whether a fire district may sue for defamation shortly.

[9] The plaintiff in *Thomson*, an attorney and private party, served Avvo.com, an attorney-review site, with a subpoena to discern the identity of an anonymous speaker ("Jane Doe"). Consequently, the standard to determine whether the speaker's identity should be disclosed was different.

another person for defamation in the first place? Under Washington law, "[T]he term 'person' may be construed to include the United States, this state, or any state or territory, or **any public or private corporation** or limited liability company, as well as an individual." RCW 1.16.080 (emphasis added). Consequently, a corporation may be deemed a legal "person" in Washington. But this statute does not end the inquiry: No Washington court has held that a municipal corporation may or may not sue for defamation.[10]

In fact, many courts across the country have found that municipal corporations may not. In *Village of Grafton v. American Broadcasting Co.,* 70 OhioApp.2d 205, 212 (1980), an Ohio court found that that "a municipal corporation is not a person, has no reputation which may be defamed, and, therefore, has no standing to maintain an action for defamation." This seems absurd, as a municipal corporation relies very heavily on its reputation.

An Illinois court found that a defamation claim by a municipal corporation "is out of tune with the American spirit, and has no place in American jurisprudence." *Chicago v. Tribune Co.,* 307 Ill. 595, 610 (1972). And a Tennessee court found that a municipal corporation was not a "person" and therefore could not sue for defamation, because it had no reputation to protect. *See Johnson City v. Cowles Communications, Inc*., 477 S.W.2d 750, 753 (Tenn. 1972). Of course, *Johnson City* was decided by reference to a Tennessee statute that read that "a libel is the malicious defamation of a person." Under Washington law, and federal precedent, a corporation is, technically, a person. *See* RCW 1.16.080; *See Also Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Furthermore, a corporation is recognized as a citizen in the state in which it was incorporated. *See* 28 U.S.C. § 1332 (c)(1).

If a private corporation may be deemed a "person" or a "citizen", for purposes of having the power to sue another for defamation, why may a municipal corporation not be? The Firehouse Lawyer, at this time, does not take the position that a fire district—or regional fire authority—may or may not sue another person for defamation. We only note that this is an open question under Washington law. But this is a question worthy of asking.

DISCLAIMER

[10] This may become relevant, as the Washington ANTI-SLAPP statute, RCW 4.24.525, a statute essentially forbidding "strategic lawsuits against public participation", was recently declared unconstitutional by the Washington Supreme Court in *Davis v. Cox,* NO. 90233-0 (Wash. 2015).