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Inside this Issue: New Bid Law Column and On-Call Pay Issues

TAKE WARNING: OUR NEXT MUNICIPAL ROUNDTABLE IS ON THE WAY!

To all of our friends in the public service, we are hosting yet another Municipal Roundtable (MR). The MR is akin to a "town hall" for those in government, from those in administration to elected officials. The MR is a place for public servants to develop a collective understanding of the legal/politically perilous issues. The MR is not a lecture: Participants share their experiences and discuss them, and share policies they have used to address issues in a uniform manner, rather than "playing it by ear." And we, the attorneys, are the mediators that articulate the legal concepts underlying the discussion.

Please join us for a *virtual* MR, in which we will be discussing the exceptions to the bid laws set forth under RCW 39.04.280. **We are outlining and discussing the RCW 39.04.280 bid-law exceptions in this issue**. But we will be expanding on those exceptions at the MR. We welcome our readers, and any of your friends in government, to this free discussion forum. This *virtual* MR will take place on **Friday, September 30,** from 9 AM to 11 AM.

Join our Municipal Roundtable, via Zoom, here:

https://us06web.zoom.us/j/81295328206?pwd=cWRVUUF5RGlCQXNyZS80c0E4aVU1Zz09

NEW COLUMN: THE RESPONSIBLE BIDDER

For the remainder of 2022, we will be writing an additional column each month on the bid laws and contract-performance issues, entitled "The Responsible Bidder." We are drafting this additional column because we have seen some agencies interpreting bid exemptions far too broadly, or otherwise failing to understand certain aspects of the bid/contract-performance laws.

For purposes of these columns, we will not recite the monetary bid thresholds for each specific agency, but instead will only be discussing the laws that permit the waiver or non-use of competitive bidding, or other laws impacted by public contracting, such as the prevailing wage laws. We will not be discussing what constitutes the "lowest responsible bidder." We have already done that.[1]

Today, we begin with the bid exemptions that are applicable to any public agency. The exemptions—or the bid laws—cannot be understood by simple reference to a diagram, but instead need to be considered based upon the facts at hand. Some bidding exemptions are set forth at RCW 39.04.280. Under that law, a governing body of a public agency may waive competitive bidding for a variety of reasons, each of which we will discuss here—with the exception of purchases of insurance or bonds:

[1] https://www.firehouselawyer.com/Newsletters/August_2015.pdf

Sole-Source Purchases

RCW 39.04.280(1)(a) provides that competitive bidding may be waived, by resolution or other written policies established by the agency, when a purchase is "clearly and legitimately limited to a single source of supply." This is known as the "sole source" exception. It sounds like it is very restrictive or limited in application, but in reality it can often be used to waive competitive bidding.

The exception found its beginnings in the idea that an agency should be able to specify a patented item, when it appeared that only a patented product would do the job. *See Seattle v. Smith,* 192 Wash. 64, 72 P.2d 588 (1937). In later years, the exception was expanded, due to Washington State Attorney General opinions, to allow sole source procurement when an agency – for good reasons grounded in economic realities—decided to specify a particular brand name that would best fulfill its procurement needs. *See* AGO 61-62, No. 24. The AG pointed out that this is the majority view in the United States. They noted that the underlying purpose of the bid laws would be defeated, if such limited specifications were forbidden, when it would clearly be in the public interest to allow it. Of course, the drafting of the limited specifications must not be arbitrary and capricious and must be done in good faith. AGLO 1971, No.128.

Our office has written sole source legal opinions scores of times in recent years; it is always a good idea to have a legal opinion on this exception rather than rely on a vendor's assurance that they are the only legitimate source of a product.

Purchases or Public Works in the Event of an Emergency

A related statute—RCW 39.04.280 (1)(c) exempts from competitive bidding "purchases in the event of an emergency." For purposes of this statute, the word "emergency" means unforeseen circumstances beyond the control of the municipality that either: (a) Present a real, immediate threat to the proper performance of essential functions; or (b) will likely result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken.

Over the years, we have sanctioned use of the emergency exception several times, such as a health emergency created by a broken sewer pipe, or a risk of freezing pipes due to the only heat source (a furnace) going out during an extreme cold spell during winter.

Another example: a truck drove through a wall in a fire station, rendering the building insecure, so an emergency was declared to repair the wall and secure the station. This exception is used less often than the sole source exception, based on our experience.

"Special Facilities or Market Conditions"

Under Washington law, competitive bidding may be waived for "purchases involving special facilities or market conditions." RCW 39.04.280 (1)(b). Neither the Washington Courts nor the Washington State Attorney General (AGO) have issued opinions that define the meaning of the "market conditions" bid exemption.

Indeed, a couple of years ago, we searched nationwide for law on this subject and found only three states had statutes with this "market conditions" exception to their bid laws (Connecticut, Oregon and Washington). Also, there was little or no case law in any of these states, interpreting these unusual statutes.

Some have argued that a past supplier's unreliability is a "market condition" that necessitates/permits the waiver of competitive bidding. For example, let us pretend that a public agency previously used state bid under RCW 39.26.060, but the State has been less than forthright in communication or has otherwise not been renewing master contracts that the agency may "piggyback" on. We disagree that the state's unreliability alone is a "market condition."

To us, a "market condition" is applicable to the particular *market*, not a particular *vendor*. For example, we believe the Municipal Research Services Center has opined that the exception can be applied well to the purchase of used equipment. This makes sense, as there is little or no market for certain types of used equipment,[2] and also the available equipment might not be comparable as between vendors anyway. But we also believe the MRSC has not opined further on this exception—perhaps for good reason, because there is sparse legal guidance on the subject.

Another way to express the "market conditions" exception is to say: "Competitive bidding may be waived in the event that conditions in the applicable market have rendered competitive bidding impractical."

[2] https://mrsc.org/Home/Explore-Topics/Public-Works/Purchasing-and-Bidding/Purchasing-and-Bidding-for-Washington-State-Local/Competitive-Bidding-Exemptions.aspx#specialfacilities

Some examples that might support a "market conditions" waiver are these: (1) Suppose the main suppliers of SCBAs are affected by a new NFPA standard that renders current models obsolete or non-compliant but the new standard does not go into effect until September 1st. It is now almost August. One of the best-known vendors offers to sell some of its remaining inventory at 2022 prices, when the market is dictating (and the two main suppliers have announced) that prices will rise about 20% on September 1 due to the new NFPA standard. Given the fact that there is not enough time to go out to bid, and that only one seller is willing to do this, it is fair to say that "market conditions" justify waiving competitive bidding. The market for SCBAs is about to change drastically, and the agency is just adjusting to market conditions.

(2) Suppose you are in a period of escalating inflation (sounds like July of 2022 right?). All vendors in a certain market (for example, wildland fire vehicles) announce that rampant inflation and supply chain problems related to steel for manufacturing such rigs, means that prices will increase 20% on October 1, 2022. Market conditions dictate that you buy now, even if you planned to buy that brush rig next year.

In other words, we look at "market conditions" as referring to the laws of *supply and demand* that cause markets to rise and fall, not factors such as unreliability of any particular vendor. In reality, we have not found this particular exception to the bid laws to be widely used, probably because agencies are not really familiar with the exception.

As to the "special facilities" portion of that statute, we find virtually no helpful legal guidance on what that means. The procurement policies we have on file *also* just list that exception without substantial elaboration.

So what might "special facilities" mean? While we may be speculating, it could refer to the type of public works "facilities" or projects being proposed. For example, suppose a fire department wants to have a training tower built for live fire evolutions, on its training campus. I would argue that these are special facilities that might be so unique with respect to the special needs of the owner that going out to bid might be a waste of time. Not every licensed general contractor would have the experience or expertise to build one of these types of "special facilities." Perhaps our readers, or other attorneys, might have different suggestions for what "special facilities" could justify a waiver of competitive bidding.

We will be discussing the above exceptions in much greater depth at our September 30 Municipal Roundtable—link above. Be there!

Our next Responsible Bidder article in August will likely relate to **purchasing cooperatives.**

WHEN IS "ON CALL" TIME COMPENSABLE UNDER THE FLSA?

In the last 36 years or more of working with fire departments, and addressing their legal problems, there have been several occasions when this lawyer has been asked about "on call" pay. Recently, we have been asked whether on call time for mechanics is compensable "work time". The restrictions on their freedom of movement were these: they had to be able to respond to the district's facilities within two hours and they were required to refrain from consuming alcohol. The assignment to the "on call" duty was

voluntary or negotiated, and not made mandatory unilaterally.

In general, such on-call time is compensated as work time if done on the employer's premises. If required to remain on call at home, or required to leave a message where the employee may be reached, then compensability depends on the breadth of the restrictions. While not generally considered work time, there are some limitations that so restrict the employee's freedom of movement, that they have been deemed to be work time.

If the restrictions completely preclude personal pursuits, then the time is compensable. See 29 C.F.R. Section 553.221 (d). The question in every case is whether the employee can effectively engage in their personal pursuits.

In a Wage and Hour Division letter written in January 2009, the Department of Labor found the following provisions did **not** subject the employer to a duty to pay "on call" pay as work time:

- Employees served in one week-long on-call period about every 8 weeks, but could switch schedules with others;
- There were only two to five emergency calls per month;
- There was rarely more than one emergency in any one night;
- The on-call employees were expected to respond in 45 to 60 minutes;
- A physical response was required (not just by telephone or electronically);
- Employees were provided with a vehicle, tools and telephone;
- Employees were not restricted to a particular location while on call.

The Wage and Hour Division ruled there was no entitlement to on call pay. FLSA 2009-17 (January 16, 2009).

We conclude that the situation referenced above, even with the prohibition on alcohol consumption, is not so limiting of personal freedom that necessarily the employer must pay "on call" pay for the hours the employee is on call. It is also relevant that the assignment referenced above was done in a rotation, with each employee participating in the program pulling a 48-hour "on call" assignment every three weeks or so.

Of course, it matters that the situation is bargainable and in that sense, voluntary. The union and the employer would be free to negotiate some compensation for including that in an MOU or a new collective bargaining agreement. The employees presumably entered into the arrangement, through their union, with their eyes open.