

The Firehouse Lawyer

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UPCOMING MUNICIPAL ROUNDTABLE

As many of our clients are aware, we put on a quarterly Municipal Roundtable (MR) in which we discuss issues that are relevant to the fire service and municipal corporations, such as counties, cities, and other special purpose districts. The next MR will occur on Friday, June 29, 9-11 AM, and will be located at West Pierce Fire and Rescue, Station 31 (headquarters), 3631 Drexler Drive, University Place, WA 98466. Our topic for this MR is employment law matters, specifically the implications of the forthcoming *Janus* decision of the United States Supreme Court and the 2020 implementation of the paid leave provisions of the Washington Family Leave Act, and the implications this may have on labor and employees in general. Furthermore, we are considering a brief training session on disclosures of medical records to local law enforcement. Such disclosures are highly limited under *Washington law* while these disclosures may be permitted under *HIPAA*.¹ We don't anticipate devoting any more than 30 minutes to this topic.

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<https://www.firehouselawyer.com/Newsletters/September2017FINAL.pdf>

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AG ISSUES SIGNIFICANT OPINION RE: FIRE DISTRICT BID LAW

Early this month, the Attorney General issued a very significant opinion concerning how RCW 52.14.110—the main fire district bid law—should be interpreted when applied to purchase of materials, equipment, services and supplies worth at least \$50,000.00.

As many of our readers know, the State Auditor will sometimes question, or even enter audit findings, when such a bid is not awarded to the lowest bidder. In other words, it has seemed historically that, to the office of the State Auditor, lowest price is the most important criterion. This opinion states that this is not necessarily true at all.

First, let us frame the issues on which the AG was asked to opine. The two questions were paraphrased by the AG as follows:

- 1. Does the competitive, formal bid procedure only consider the "lowest responsible bidder," or may "best value" be considered?**
- 2. Under what circumstances may a fire protection district "piggyback" off a previously established public contract?**

In this article, we discuss the first issue at length and the second issue only briefly, as the answer to the second question is what we have said for years.² Initially, let us remember that

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<https://www.firehouselawyer.com/Newsletters/v06n05may2006.pdf>

the questions and the opinion only relate to non-public works contracts. Nonetheless, we think the opinion is very significant and should be closely followed by the *State Auditor's Office*.

The brief answer to question one was as follows: "A fire protection district may use best value criteria when contracting for non-public works purchases of materials, supplies, services, and equipment which exceed \$50,000." Before going further into the reasoning of the AG, we have to point out that "you read it here first." Please see the *Firehouse Lawyer* article on this subject published in August 2015 (see footnote 3). (As I re-read that article, I find striking similarities in the reasoning of the author of our newsletter article and the reasoning of the AG.) The same point was hammered home in a thorough paper on the same subject by Eric Quinn at the WFLA Legal Committee in October of 2015. Readers are welcome to Eric's Power Point presentation on that subject.

So let us explore what is meant by "best value criteria." Interestingly, the AG looked to state law applicable to state agencies and departments to ascertain what "best value criteria" might mean. See, e.g., RCW 39.26.160. The AG noted that this reforming state law on bidding allows the concept of best value criteria to shed light on who is a "responsive and responsible" bidder.

The following are some of the best value criteria, the AG said: Whether the bid (1) satisfies the needs of the state as specified in the solicitation documents, (2) encourages diverse contractor participation, (3) provides competitive pricing, economies,

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and efficiencies, (4) considers human health and environmental impacts, (5) appropriately weighs cost and non-cost considerations; and (6) Life-cycle cost.³

As you can see, price is only one of many considerations in making a list of best value criteria. This seems to be pre-eminent common sense also: It may be a cliché, but can we not all agree that sometimes the lowest price may mean that quality is sacrificed?

In the Analysis section of the opinion, the AG first noted that RCW 52.14.110 does not expressly state (like some other bidding statutes do) that the contract must be awarded to the lowest responsive bidder (or lowest responsible bidder). Then the AG turned to the most vital question: May a fire district incorporate into its procurement process best value criteria and then use those to select the successful or best bidder? The answer is a resounding yes, but there is one caveat: the fire district must state in its specifications (put it in the invitation to bid, in the interest of full transparency and fairness) that best value criteria will be used, and state what they are in the procurement. Indeed, we would recommend that all fire districts and RFA's (we would argue that this opinion applies to RFA's as their powers are aligned closely with fire districts) have their procurement policies reviewed immediately to ensure the principles of this AGO are embodied in their policies for all procurements of this type.

³ The *Firehouse Lawyer* discussed “best value” criteria in August 2015:
[https://www.firehouselawyer.com/Newsletters/August 2015.pdf](https://www.firehouselawyer.com/Newsletters/August%202015.pdf)

We also found it interesting that the AG pointed out in a footnote that *Butler v. Federal Way School District*, 17 Wn. App. 288, 562 P.2d 271 (1977) is easily distinguished because in that case the statute *expressly required* award to the lowest responsible bidder, which RCW 52.14.110 does not so state. This is notable because *Butler* is often relied upon as the seminal case supporting the proposition that bid laws mean you should ordinarily award to the low bidder.

The AG then stated that the state statute (Chapter 39.26 RCW) does not apply to fire districts so it was necessary to ask what the rules should be when the statute does not specify expressly what criteria are to be used to pick the best bidder. Our statute neither permits nor prohibits the use of best value criteria.

Because the statute—RCW 52.14.110—is silent on the subject but certainly does not require award to the lowest bidder, the AG concluded that a fire district can incorporate other considerations into its bidding process as long as these considerations are consistent with common law procurement principles. A note of caution was added by the AG: Price is still important in all public purchasing, as the main purpose of bid laws is to get the best deal for the public.

The bottom line or important upshot of this opinion is that (at least with purchase of materials, supplies, and equipment) now a fire district or an RFA can safely award such a bid on a *non-public works project* to a vendor who is not the lowest bidder under the following circumstances: First, the procurement documents must spell out that best value

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criteria are being used and specifically what those are for the procurement in question; second, price cannot be ignored but must be given considerable weight; and third, an agency must be sure to follow its own policies and rules for procurement, so we recommend that those be put in place carefully before using this method of procurement.

Now we briefly turn to the second part of the opinion as to whether a fire district may lawfully "piggyback" upon a previously authorized and awarded purchase contract for such non-public works purchasing. The AG opined that such cooperative purchasing is allowed, *inter alia*, by the Interlocal Cooperation Act, which is codified at RCW 39.34. As we have often noted in these pages, however, that depends on whether certain concepts are followed. First, the applicable laws must have been followed in the original procurement. Second, in that original purchasing process, the specifications must have provided that piggybacking by others is allowed. As we have previously said, after all, it is only fair to tell those original bidders that they are agreeing to later piggybacking, because prices are again very relevant, and are affected. The AG did not mention it, but RCW 39.34.030 also requires that the original procurement must have been advertised on that agency's web site or a web portal.

Interestingly, the AG did deal briefly with some issues that we have previously discussed. Among those, the AG noted that variations from the original procurement should be reasonable and not excessive. Also, the time lapse between the first procurement and the piggyback may be important. The AG said a court would examine common law principles

and aim to avoid fraud or collusion. A large change in scope would be, and should be, a red flag for any court or auditor. We have previously opined that the scope issue is reminiscent of change orders. To this writer, a change in scope of 50% from contract #1 to contract #2 (the piggybacker) would be a significant red flag to a court or auditor. Piggybacking on a contract awarded three years ago might also be very questionable. Obviously, there are no hard and fast rules but we certainly agree with the principles in this second part of the opinion.

Some unanswered (or "unasked") questions remain. For example, could best value criteria be applied to *public works contracts* entered into by fire districts and/or RFA's? Using the same method of analysis used by the AG in this opinion, we would note that the exact same statute—RCW 52.14.110—applies to public works. While the analogy used in the opinion to the state purchasing laws would not apply to public works, we do think the general concepts of the opinion are equally applicable. We think that, at long as the procurement documents transparently disclose that best value criteria are being used, and as long as that is consistent with well-considered, modern procurement regulations adopted by the agency, this could be done. Of course, the procuring agency has to follow the common law concepts of public procurement including the avoidance of fraud and collusion, fairness, notice to bidders, equal opportunity, and price must be of paramount importance, but not solely determinative.

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SAFETY BILL

Wildland fire season is here. Just a reminder that “wildland firefighters engaged in direct fire attack shall work in teams of two or more unless they are in visual or voice contact with an officer.” WAC 296-305-07002 (3).

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