The Firehouse Lawyer

Volume 20, Number 9

September 2022

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue:

LAST CALL: 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 facilitators 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 under RCW 39.04.280—which we wrote about last month. 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

If you are less tech savvy and need access to the MR by different means, please contact us.

THE GROWTH MANAGEMENT ACT AND "SUFFICIENT CAPACITY"

There has been a change[1] in the Growth Management Act (GMA), effective June 9, 2022, relating to limited areas of intensive rural development (LAMIRDs) that should be of interest to a variety of rural service providers in Washington. We begin by quoting the change:

> Any development or redevelopment [in a LAMIRD] in terms of building size, scale, use, or intensity may be permitted subject to confirmation[2] from all existing providers of public facilities and public services of **sufficient capacity** of existing public facilities and public services to serve any new or additional demand from the new development or redevelopment.

RCW 36.70A.070 (5)(d)(C) (emphasis added).

For purposes of this article, we focus on how this change impacts *fire departments*. Many of our clients are highly urbanized and the entirety of their service area is within the UGA, and therefore this law will not affect them because there will be no LAMIRDs within their boundaries. However, we represent quite a few agencies in what have been traditionally considered "rural" areas. To determine whether this GMA change impacts your agency, a series of questions need to be answered:

What is a LAMIRD?

To define a LAMIRD, we must look to other definitions in the GMA, because the term LAMIRD is not explicitly defined in the GMA.

Definitions under RCW 36.70A.030. An UGA is an area designated by a county in which "urban growth" should occur. "Urban growth" means "growth that makes intensive use of land" that is not suitable for "rural development." "Rural development" means development outside of the UGA that *must* be consistent with the "rural character" of the area. "Rural character" means a lot of things, but of great importance is that "rural character" refers to land uses that "generally do not require the *extension* of urban governmental services." (emphasis added). And "urban governmental services," in the context of this article, refers to fire protection that "is typically provided in *cities*." (emphasis added).

Exclusion of LAMIRD from typical rural areas. Based on the above, a LAMIRD is an area of land outside of the UGA that generally does not require fire protection provided at the level in cities. However, in a LAMIRD, contrary to other rural areas not designated as LAMIRDs, (1) the development need not be visually compatible with the surrounding rural area and (2) the development may result in "*sprawling*, low-density development[3] in the rural area." RCW 36.70A.070 (5)(d) (emphasis added).

We therefore colloquially refer to land use in a LAMIRD as "Rural Plus" or "RP." When facing RP land uses, under the new law, your department or public agency must be able to certify whether it does or does not have "sufficient capacity" to meet those RP uses, on a case-by-case basis. And again,

[1] https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5275-S.SL.pdf?q=20220606085717

[2] As a matter of practical reality, it is the applicable *county*, not the particular developer, that will be securing this "confirmation."

[3] Low-density development is generally understood as "residential areas occupied primarily by single-family homes or buildings with a small number of units." https://www.century21.com/glossary/definition/low-density#:~:text=Low%20density%20housing%20typically%20refers,a%20large%20number%20of%20units.

although your rural department need not provide levels of service compatible with those provided in cities, if LAMIRDs exist within your boundaries, this may result in RP "sprawl."

What is "Sufficient Capacity"?

To determine whether your agency has "sufficient capacity" to meet this RP "sprawl," typically, the county will send the service provider a form in which the provider must certify that it either does or does not have "sufficient capacity" to serve RP developments. See the attached form as an example. In said form, the county defines what may be "sufficient capacity" as follows:

> For the fire district, _____ County wants to verify the fire district has the capacity to serve the proposed development, or will have the capacity at the time it is developed. Adequate facilities mean: For residential or commercial buildings with a height of 35 feet and below, two stories or less, and 50,000 square feet or less, the local fire district has the equipment and personnel to serve the new facility without a change in the current level of service for similar facilities existing in the district. For industrial or commercial over *35 feet in height*, the district has the equipment and personnel to serve the new facility consistent with the adopted standards of the district, including local fire codes. Fire Districts can provide or secure adequate emergency services to this location for the proposed project.

Perhaps what the Legislature contemplated by RP development is that our state's population is growing substantially and therefore additional homes and development need to occur outside of UGAs to serve present and growing populations in rural areas. But with the addition of homes and development comes additional demand.

The question becomes whether your department must adjust to this additional demand by hiring career firefighters or updating existing apparatus to meet RP uses. But when the county gets to define what constitutes "sufficient capacity," that could create problems. You are the service provider. You should be able to define what "sufficient capacity" is.

Perhaps, for a fire district, "sufficient capacity" means not only whether your agency has enough equipment and personnel to meet new demand, but whether additional training will be required depending on the type of development at issue. For example, if a sewage treatment plant is set to be developed, perhaps your staff will need training on hazardous materials incidents and major fires requiring additional personnel. And if such disasters are possible, perhaps you will need to hire additional *career* personnel that will be able to respond in such circumstances—do you have the funding available for that? As an additional example, what if an assisted-living facility is set to be developed? Will your fire district have sufficient training and personnel to respond to patient-assists that do not necessarily constitute emergencies but which may occur at all hours of the night—which is a common problem?

In the context of considering whether your agency has "sufficient capacity," there are some important limiting provisions for developments in LAMIRDs, as set forth in RCW 36.70A.070 (5)(d), that bear mentioning:

1. Any commercial development or redevelopment generally must be designed to serve the existing and *projected* rural population.

2. The area of any retail or food service may not exceed 5,000 square feet for the same, previous use. This presumably encompasses height and width.

3. The area of any retail or food service may not exceed 2,500 square feet for a *new* use.

4. **"Major industrial developments" (MIDs) or master planned resorts are not permitted unless otherwise specifically authorized under RCW 36.70A.360 (as to resorts) or RCW 36.70A.365 (as to MIDs).**

An MID is a master planned location for a specific "manufacturing, industrial, or commercial business" that: (a) Requires a parcel of land so large that no suitable parcels are available within an UGA; **or** (b) is a natural resource-based industry requiring a location near agricultural land, forestland, or mineral resource land upon which it is dependent. RCW 36.70A.365 (1). Importantly, MIDs may not be authorized until "[N]ew infrastructure is *provided* for and/or applicable *impact fees* are *paid*." RCW 36.70A.365 (2)(a) (emphasis added). Furthermore, the MID "shall not be for the purpose of *retail* commercial development or multitenant office parks." RCW 36.70A.365 (1).

We are of the opinion that it may behoove a rural fire department to indicate "no" on the attached form when faced with the construction of a MID. We say this because a rural department within a county-designated LAMIRD is not providing the level of service expected in an UGA and the MID is too large to be placed in the UGA. Logically, this creates "new or additional demand" that the department may not have sufficient capacity to meet.

Consequently, the department should consider taking the position that it would not have "sufficient capacity" until new infrastructure is provided or impact fees are paid, as is required under RCW 36.70A.365. Well, hey there, wait a minute…maybe this presents your department with the opportunity to lobby your county to adopt impact fees for fire departments in their comprehensive plan!

Take note as well that a residential development is not a MID because it is not manufacturing, industrial or commercial. However, the residential development may constitute *high-density* residential development that may not "fly" in a LAMIRD. Single-family residential units, along with small apartment complexes, are likely going to be considered "low density" and therefore be a permissible RP use in a LAMIRD. But your agency will still need to consider whether it has sufficient capacity to serve those new units. The answer to this question will always depend on the facts—and the law.

Again, the above change in the GMA is *not applicable* in UGAs, so our larger clients will likely not be extended the same ability to confirm their capacity in the event of substantial development. Hopefully, our larger clients are within a county or city that imposes impact fees[4] for fire protection facilities.

THE RESPONSIBLE BIDDER: BID PROTESTS AND APPEALS

[4] See this link for a discussion of impact fees: https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Impact+Fees

As promised, we are continuing our Responsible Bidder column that discusses issues relevant to the bid laws and public contracting/public works. We have written on this subject for many years[5] but felt this subject needed revisiting.

Today we consider the laws surrounding bid protests and appeals, which in many respects requires consideration of the laws of contracts in general.

Under Washington law, as it pertains to fire districts[6] a "low bidder claiming error" who fails to enter into a contract with the agency soliciting bids cannot bid on the same project if a second or subsequent call for bids is made on the same *public works project* by the same agency. *See* RCW 52.14.130. Furthermore, a public agency, after a competitive bidding process, and after being provided notice that a bidder is protesting a bid award on a *public works* project, cannot enter into a contract with another bidder unless it provides two business days' written notice of its intent to enter into a contract with another vendor—if the protesting bidder follows other procedural steps. *See* RCW 39.04.105.[7]

What the heck do these laws stand for? To us, the laws mean that during the pendency of a protest of an *award* of a contract, an unsuccessful bidder could not submit another bid on the same public works contract even if a fire district did not enter into a contract with the successful bidder. Furthermore, RCW 39.04.105 means that even if the agency receives a bid protest, the agency can enter into a contract with the successful bidder after two days from providing notice to a protesting bidder, absent the unsuccessful bidder obtaining an *injunction*.

Does the protesting bidder have any recourse? As intimated above, the primary relief of the unsuccessful bidder is for an injunction[8] preventing contract formation. *See Dick Enterprises v. King County*, 83 Wn.App. 566 (1996). Furthermore, "an unsuccessful bidder in a competitive bidding context lacks 'standing' to bring claims other than alleged violations of the competitive bidding statute, and *then only before the contract is signed*," arguably meaning that the unsuccessful bidder cannot bring *monetary* claims against the agency and may only force the agency to start over in the competitive bid process, by way of injunction, *if* the agency did not previously enter into a contract with the successful bidder. *SEATTLE-TAC. Inter. Taxi v. Pt. of Seattle*, 156 Wn. App. 1025, n.7 (Wash. Ct. App. 2010), unpublished, citing *Dick Enterprises*. previously cited (emphasis added). And as stated above, in the context of fire districts soliciting bids for public works, the unsuccessful bidder could not bid on that project when the process starts over.

So, the law does not *require* a fire district—or really any public agency—to start over merely because a bidder claims that errors were made in the bidding process. Instead, agencies should be

[5] https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Public+Bid+Laws+

[6] When we refer to "fire districts" herein, we refer to fire protection districts and regional fire authorities that have adopted the powers of fire districts.

[7] We have written about this law before: https://www.firehouselawyer.com/Newsletters/MarchApril2019.pdf

[8] An injunction is an order by a court that requires a party to stop doing something, such as entering into a contract with another party.

aware that a court may *order* them to not enter into a contract if they violated the bid process. Of course, under RCW 39.04.105, unsuccessful bidders have *two business* days to obtain such an injunction. Put another way, unsuccessful bidders have minimal recourse against an agency that awards a contract in the public-works context.

To what extent does your agency have to provide notice to bidders of their ability to appeal a bid award? In the public works context, such notice is only required if your agency adopts supplemental responsibility criteria beyond the general "responsibility" requirements, which include but are not limited to simply having a uniform business identifier. See RCW 39.04.350 (3). Put another way, if your agency does not require additional proof of responsibility beyond that set forth in RCW 39.04.350 (1), you are under no obligation to inform bidders of their right to protest a bid award or any other aspect of the bid process.

And again, there is no legal guidance in the context of purchase contracts.[9] Consequently, there is no requirement that your agency provide notice of the ability of a bidder to protest an award of a contract for supplies, equipment or materials (goods).

Additionally, your agency does not have a "contract" with a bidder merely because they submit a bid—the solicitation of bids is an invitation for the *submission* of offers, not an offer itself. Nor does your agency generally have a contract with a *successful* bidder if you have not entered into a written contract with that bidder, *if* your bid documents specify that a bid award itself does not constitute a contract.

However, if your agency does *not* specify as such in the bid documents, you may have a problem. That is because if your agency has made a bid award—for example, by adopting a motion awarding a contract in an open meeting—despite not having finalized that contract, you have essentially "accepted" the offer of the bidder. *See Peerless Food Prods., Inc. v. State,* 119 Wn.2d 584, 592, 835 P.2d 1012 (1992) (acceptance of the bid for public work constitutes a contract on a public works project). "Mutual contractual responsibilities begin when the contract is awarded, even though it is contemplated that contract forms will be executed" after that award. *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 289 P.3d 690, 695 (Wash. Ct. App. 2012), quoting *J.J. Welcome,* 6 Wash.App. at 988–89, 497 P.2d 953.

Therefore, if you wish to have flexibility post-award, your bid documents should state that your final acceptance of the contract shall be contingent upon the successful negotiation of a mutually agreeable contract, not merely by awarding a contract to a successful bidder. If your bid documents so state, the successful bidder is less likely to have a colorable claim in a court of law. And again, the unsuccessful bidder has even less recourse. We also recommend that an acceptable performance bond, with sufficient surety, be submitted and approved after Notice of Award and before Notice to Proceed.

Thank you for reading another installment of the Responsible Bidder column.

[9] To be clear, we are not discussing what a state auditor might say in these circumstances, we are only discussing what a *bidder* might do when they are not awarded a contract.

DISCLAIMER. The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Eric T. Quinn, P.S. and the reader.

[redacted] County Community Development

[redacted]

ADEQUATE PUBLIC FACILITIES FORM

Date: 09/06/2022 Permit Number: [redacted]

To whom may concern,

[redacted] has a land use application for:

[redacted]

The proposal is located at [redacted], which lies within your district. Please respond below to indicate whether or not your district has the capacity to serve the proposal or will have the capacity at the time of development. If no response is provided, it will be assumed you do not have the capacity to serve the proposed development. When completed, please return to: [redacted]

Email: [redacted] Phone number: [redacted]

Return by: September 20, 2022

Authorized official for:

(Select one): ☐ **School District** ☐ **Law Enforcement Agency** ☐ **Fire District** ☐ **Refuse Disposal Company**

☐ Yes, I certify that I have read the definition of adequate facility (attached). We have the capacity to serve only the proposed development as described above on this form, or will have the capacity at the time this project is developed.

☐ No, we do not have the capacity to serve the proposed development.

Comments:

Name: _____ Position: _____

Email: _____ Phone number: _____

Signature: _____ Date: _____

Attached: Adequate Public Facilities Definitions

[redacted] County Community Development

[redacted]

ADEQUATE PUBLIC FACILITIES DEFINITIONS

Rural Governmental Services:

Those governmental services historically and typically delivered at an intensity usually found in rural areas. A complete definition is provided within the Growth Management Act (RCW 36.70A.030(17)) and the [redacted] County Comprehensive Plan.

School District:

For the school district, [redacted] County wants to verify the school district has the capacity to serve the proposed development, or will have the capacity at the time it is developed and the proposed project does not interfere with reasonable school operations or safety. Adequate facilities mean: For residential uses, the school can reasonably accommodate the school population anticipated from the new development within existing facilities, together with state or federal funds expected as a result of growth or changes within the district. For commercial or industrial uses, the traffic or other impact to the school does not interfere with reasonable school operations or safety.

Fire District:

For the fire district, [redacted] County wants to verify the fire district has the capacity to serve the proposed development, or will have the capacity at the time it is developed. Adequate facilities mean: For residential or commercial buildings with a height of 35 feet and below, two stories or less, and 50,000 square feet or less, the local fire district has the equipment and personnel to serve the new facility without a change in the current level of service for similar facilities existing in the district. For industrial or commercial over 35 feet in height, the district has the equipment and personnel to serve the new facility consistent with the adopted standards of the district, including local fire codes. Fire Districts can provide or secure adequate emergency services to this location for the proposed project.

Law Enforcement Agency:

For law enforcement, [redacted] County wants to verify the law enforcement agency has the capacity to serve the proposed development, or will have the capacity at the time it is developed. Adequate facilities mean: The law enforcement agency can provide adequate emergency services to the location of the proposed development.

Refuse Disposal Company:

For the disposal company, [redacted] County wants to verify the disposal company has the capacity to serve the proposed development, or will have the capacity at the time it is developed. Adequate facilities means: facilities are available where the project does not adversely affect the ability of the local and/or regional solid waste authorities from accomplishing the goals and objectives of the adopted county solid waste comprehensive plan. Adequacy includes pick up, transport, disposal, or transfer of solid waste.