"THE WHY'S AND WHEREFORE'S OF MASSACHUSETTS PUBLIC CONTRACT BID PROTESTS IN 2013"
(Revised March, 2013)

by Attorney Jonathan Sauer

1. Introduction

The purpose of this article is to discuss how bid protests can be made administratively (in front of the Attorney General's Office) or in court, discussing generally how these protests are made and the advantages and disadvantages of each such process along with some reference as to typical issues bid protests are involved with.

2. The Bid Protest Process

The public contract procurement system is not for the weak-kneed or for the ill-informed. Issues of prequalification, prevailing wages, the filed subbid system (with variations for 'trade contractors' and prequalified subcontractors on certain kinds of jobs), bonding requirements and familiarity with obtuse and lengthy general conditions with the to-be-anticipated shortcomings in the bid documents make this type of work a minefield for its participants while still offering an opportunity for most contractors - particularly newer contractors - to participate therein. I have observed - both, for better and for worse - how the filed subbid system allows new subcontractors to go from having little volume to significant volume in a reasonably short period of time. In the Massachusetts competitive bid system for public buildings, the 'low number' is king and the system contemplates as a usual thing that general contractors will be working with subcontractors they may be unfamiliar with, often times with difficult results.

I have also seen a number of subcontractors and general contractors who aggressively use the bid protest process as a way of getting jobs. After all, if you are second or third low, you only have to have rejected one or two bidders ahead of you to get yourself the job and, this, at your higher number. I have also seen certain public bidders that aggressively protest a lot of jobs, filing very minimal bid protests which, if they are resisted, they subsequently may drop. There seems to be no penalty for this (other than perhaps getting yourself known at the AG's office that you are a 'player' and, possibly, a wise guy). Traditionally, many public owners think that they are better off to simply re-bid when there is a bid protest. As the bid protest process can take two to three months from the filing of the bid protest to the decision, many owners think they may as well re-bid the job and not lose all of this time (and, in many instances, the appropriate construction season for this particular job.) So, by filing nominal bid protests, this will give some a second bite at the apple, the next time around. And now *all* the bidders will know what the *right* price is for the job.

The purposes of the competitive bid statute as annunciated in Interstate Engineering Corp. v Fitchburg, 367 Mass. 751, 757-758 (1975):

" . . . First, the statute enables the public contracting authority to obtain the lowest price for its work that competition among responsible contractors can secure. . . Second, the statute establishes an honest and open procedure for competition for public contracts and, in so doing, places all general contractors and subbidders on an equal footing in the competition to gain the contract."

Thus, the fact that substantial work opportunities exist for a new business not having a substantial track record or established business relationships with general contractors and owners makes public work very attractive to many. Moreover, as compared with private owners, there is a greater expectation of getting paid when working for a public owner, particularly for subcontractors and material suppliers who have 100% protection for their claims under the C. 149, s. 29 general contractor payment bond. Claims under such bonds earn 12% interest and attorneys' fees to prevailing claimants. As a superior court civil trial takes three to five years to get reached for trial, a judgment could have an interest factor on it of between 36% and 60%. When one is suing for a million dollars, this is a *lot* of money. In 2013, with banks paying one-half percent interest or less on CD's, getting such an attractive rate of interest is a real bonanza and, some might say, not a bad investment. And, the attorneys' fee provision of the public payment bond statute is a distinct exception from Massachusetts' application of the 'American Rule', which provides that each side to a litigation bears its own legal fees and costs, unless a contract between the parties provides otherwise or suit is commenced (and is successful) with counts under statutes (such as the public payment bond statute) which provide for legal fees and costs.

The public bid system for contractors involving potential bid protests is largely contained within various sections of C. 149, s. 44A-H of the General Laws (for buildings), C. 149A of the general law (for the contractor-at-risk program) and C. 30, s. 39M of the General Laws (for public works, which generally means non-buildings: road work, bridges, sewer work, etc.)

Note that sometimes a public owner will try to bid a construction project through Chapter 30B of the General Laws, which is the state's procurement system for miscellaneous items, including materials and some services. Such procurements are problematic in that they are overseen by the Inspector General's Office, not by the AG. And, materials issued by the Inspector General's Office seem to require that any C. 30B procurement of a construction nature involving the performance of labor on site will require the payment of prevailing wages. Yet, it is to avoid the complexity of construction procurement that the awarding authority may take certain shortcuts in the procurement process, such as *not* providing for prevailing wages. (Typically, an awarding authority will obtain from the Department of Labor and Industries wage rates to be paid for a particular project, which rates are included in the bid document.) This leaves open the question as to subcontractor and general contractor potential liability for prevailing wages on C. 30B procurements, even when the procurement doesn't specifically provide for them. At minimum, if one were to bid on a C. 30B construction project where labor will be expended on site, seeking clarification of the prevailing wage issue from the Owner or Architect by way of requesting an addendum pre-bid seems sensible, if not necessary.

Generally speaking, for public building projects, there is a filed subbid system where certain enumerated trades bid separately to the public owner before the general contractors submit their bids. These bids are available to any general contractor bidding on the work *except* where a subcontractor restricts its bid away from certain designated generals (a statutory right) or where a subcontractor restricts its bid *to* a certain general bidder, which quite often describes the situation for 'captive' subcontractors or where a general contractor itself bids on a filed subbid trade to be included later in its own general bid. In addition, in recent years refinements have been made to where only certain prequalified subcontractors on certain kinds of projects can bid them. And, there is now, for certain construction, the concept of subcontractors as "trade contractors", which have certain rules applicable to them. The whole public procurement process is a system that is very complicated, even for legal practitioners working with it on a daily basis. That subcontractors and general contractors, whose business is something other than this complex system of rules, statutes and cases making up the competitive bid law, operate within it is something I find amazing. For example, note that a subcontractor working as a filed subbidder may have some different responsibilities working a similar job as a 'trade contractor'. For one thing, for a filed subbidder, the general contractor is required to pay the subcontractor's surety bond premium, if the general contractor requests one. (All filed subbidders, for this reason, have to be bondable.) 'Trade contractors', however, are required to provide payment and performance bonds and the law seems to indicate that they will have to pay their own bond premiums for such bonds. (A note to estimators!)

The ordinary standard for award for general contractors on public buildings and public works is that the work is awarded to the lowest responsible, eligible, responsive general bidder. 'Responsible' means, essentially, that there are no serious concerns that the contractor lacks the ability, whether technically or as regards character, to do the work. 'Eligible' means that the contractor meets whatever bid document requirements, trade requirements or license requirements that are necessary to accomplish the work. 'Responsive' means that the bid submitted by the subcontractor or general contractor exactly meets what the public owner is asking for. Generally speaking, not filling in parts of the bid form - leaving it incomplete - is grounds for rejection of that bid, as is providing additional information above that which is requested. (That becomes a 'counter-offer'.) *These two areas: leaving items out of the bid or giving more information or documentation than has been requested are among the most fertile grounds for bid protests.*

The filed subbid system, however, does not require (or promise) that the lowest filed subbidder for any particular trade get the award. There are market pressures to help ensure that result: most generals carry the lowest filed subbidder for each trade and doing otherwise is at one's peril. And, an awarding authority has the statutory right to insist that the apparent low general contractor substitute down to the lowest filed subbidder against whom the general contractor has no objection as to its competency. (In the cases I have been involved in, I have seen many situations where the awarding authority does not do this, for one reason or another.) Still, the fact that a filed subbidder is low in and of itself is not a guarantee of the job. Indeed, there has been at least one court case which has said that the low filed subbidder is not entitled to the job because of the fact that the subbidder is low. (Subbidder had no right to insist that his

subbid, however low, be accepted by general contractor. M.G.L.A. c. 149 §§ 44A-44L. Interstate Engineering Corp. v. City of Fitchburg, 329 N.E.2d 128 (Mass.),1975.)

What happens when there is a difficulty in the bid procurement process, where there is a particular error in the bid procurement process itself, where rebidding should occur? What happens when a particular bidder's bid is defective in some way?

There are two places one might go in order to try to knock out a bidder or a procurement: court or an administrative bid protest.

3. Using Court Processes

The major thrust of this article is to discuss administrative bid protests before the Attorney General's (AG) office. However, as Dirty Harry said in *Magnum Force:* "A good man knows his limitations". And, administrative bid protests have various shortcomings, which sometimes make them unworkable and not the first or final avenue of attack. Enter, court.

Let's be clear. Court is very expensive and for many matters not too practical. Sometimes, however, this may be the only available or effective remedy. That is to file a suit in court seeking a declaratory judgment as to the rights, responsibilities and options of the parties to the case and, usually, seeking a preliminary injunction (a court order issued by a judge) against a particular bidder's getting the award, proceeding with the job or against any award being made with regard to a claimed defective procurement process.

Here are some of the problems with court. First of all, it is expensive and any significant suit will involve an investment of several thousand dollars to get through the injunction stage. If an average bid protest costs somewhere between three and seven thousand dollars, seeking a preliminary injunction will cost between seventy-five hundred and ten thousand dollars – maybe more. The disappointed bidder has to become a plaintiff and commence a litigation by the filing of a verified complaint, which is more complicated in content than is a usual complaint. Then, one has to prepare a legal brief, various affidavit(s) to support the requested relief, one or more motions and proposed orders. One then files the complaint, requests a short order of notice and attempts to get a hearing as quickly as possible. The opposing parties file opposing papers and a superior court judge - most of whom are not well-versed on (or even interested in) the intricacies of the bid law - will decide the matter. (Judges do not particularly like construction cases because of how document-rich they are, because of their complexity and because they take much longer to try.)

What one seeks here at this early point in the process is an injunction - which is a court order - that someone do or *not do* something pending further order of the court. For various legal reasons, it is easier to get an injunction against someone's *not* doing something as compared with doing something. And getting an injunction, particularly in a bid matter, is difficult.

There are four basic problems in seeking an injunction, and these are in meeting the various “tests” that the court will apply to the matter in front of it. These issues are: (a) likelihood of success on the merits; (b) balancing of the equities; (c) adequate remedy at law, and; (d) the public interest.

For a party to get an injunction, it has to demonstrate that it has a reasonable likelihood of success on the merits. Meaning simply that the court looking at the paperwork in front of it comes to the conclusion that, more likely than not, the plaintiff is entitled to win. That the papers demonstrate this rather clearly and convincingly.

Then, the court will consider a ‘balancing of the equities’ test. Namely, assuming that the plaintiff has demonstrated that there is a reasonable likelihood of success on the merits, as to which party – plaintiff or defendant - is it more damaging for the requested relief to be allowed or not allowed?

Now, a court will not generally order an injunction - which can have almost the same power as a judgment, which is only entered after lengthy litigation, a trial and decision - where there is an adequate remedy at law. That simply means that if there is some theory under which the plaintiff could recover money damages for the harm alleged, a court will not ordinarily issue an injunction. This ‘test’ is problematic in bid litigation, as a plaintiff suing for a bid error has an opportunity to get bid preparation costs (fairly nominal) or, in very limited and egregious cases, lost profits. Since those possibilities are there for getting money damages, this makes getting an injunction difficult.

In the ordinary case, where there is an “ordinary” bid error on the part of the awarding authority, the plaintiff can obtain its bid preparation costs. Paul Sardella Construction Co. v. Braintree Housing Authority, 3 Mass. App. Ct. 326 (1975). A bid error of this type essentially means that the awarding authority made a mistake but that it was a good faith mistake or a more-or-less innocent error, not something intended to damage any specific bidder. This amount of damages is not likely ever going to be enough to even pay for the legal fees and expenses required to prosecute the case to recover them. There is some limited case law where judges have opined that ‘bid preparation costs’ are *not* an adequate remedy at law, just for these reasons. One always has to remember that human beings, as fallible as we all are, may see things differently. Thus, one judge might deny the request for a preliminary injunction and another might allow it. Justice may be blind. But, sometimes, it often is also just plain dumb.

Under very limited circumstances with demonstrable bad faith on the part of a public owner, lost profit damages may be available. In Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass. App. Ct. 349 (1987), at issue was the bidding and award of a printing contract. Here an inspector for the Department of Labor and Industries essentially disqualified the bid of the low bidder by claiming that the low bidder did not pay the prevailing wage rates required for such contracts, although ultimately it was determined that the inspector applied the wrong rates in that factual determination. (The inspector applied Boston rates, which were higher, rather than Essex County rates, which would have been applicable.) The state procurement officer decided to rebid the contract, claiming that Bradford & Bigelow did not qualify because of the prevailing

rate issue and the other bidder's bid did not comply with the contract specifications. On the rebid, the previous second low bidder, Acme, was now low with Bradford & Bigelow now being higher. As stated on page 359 of the decision:

"These most pertinent Massachusetts decisions leave undecided the issue whether failure of officers or agencies of the Commonwealth itself (and not merely a private general contractor or a local government or a public authority) to consider public contract bids fairly, in good faith, and in compliance with the applicable competitive bidding statutes, will subject the Commonwealth to liability for profits lost by the bidder to whom the contract should have been awarded in all fairness. The public objectives of public competitive bidding statutes, discussed by the Supreme Judicial Court in the *Sardella* case and by this court in that case and in the *Roblin Hope* cases, seem to us to be equally cogent, whether it is the Commonwealth which is soliciting bids or some political subdivision or authority doing so. Failure to give fair consideration in good faith to all bids in either situation will tend to discourage bidders and to destroy public confidence in the competitive bidding system. Upon adequate proof that agencies or officers of the Commonwealth have set aside in bad faith an award of a contract to a qualified low bidder, the cases already mentioned should be extended appropriately to permit recovery by the bidder of its lost profits."

An award of these types of damages is *extremely* rare. My general sense of any form of bad faith litigation is that this type of litigation doesn't make any economic sense pursuing unless there are other less extreme (and available) remedies also being sought, such as, typically, claims for contract balances where there is also a claim for unfair and deceptive trade practices. The usual course of a bid protest litigation is that a plaintiff will file the case, most often in the superior court, in an effort to get the injunction. If that effort is unsuccessful, frequently the case is dismissed at this point by the plaintiff, as the economics are very much against its continuance. In some cases, there may be some grounds for having the judge's decision reviewed by an appellate court. Such reviews are not often granted and, even when granted, are not successful. That is because of the fact that where one judge has 'discretion' to take a certain action, it is rare for another judge to substitute his or her discretion for that of the original judge.

The fourth test is that of "public interest". A public owner in resisting an injunction request usually argues that a job's not going forward will damage the public interest. The arguments go thusly: "If this school work cannot be done this summer, we will not have a place for the kids in September." "If this sewer work does not get done presently, the Town will violate a consent order with the DEP or lose a federal grant." These types of arguments are tough for a court to resist.

Here is where court is preferable to the administrative alternative - the bid protest. A big problem with bid protests is that ordinarily the Attorney General's Office, who hears the protests, will not go into court to enforce its own decisions as it has the statutory right - but not obligation - to do. "Players" (those experienced) in the bid protest process know this. For all practical purposes, the Attorney General's Office, if only by default, leaves the parties to a bid protest the option of seeking an enforcement of its orders in court. Some state agencies believe that where they are co-equal to the Attorney General's Office on some organizational chart they are not

required to follow these decisions. Some towns find it hard to give up the cost savings that using a defective bid (or process) might gain them. Therefore, some protestors will go into court either initially or after the bid protest decision is issued in any event. On top of these considerations, since 'the Great Recession', over these last several years, the hearing officers at the Attorney General's Office have shown a distinct tendency to side with the public owner, unless a substantial provable error with regard to scope or price or the bid process has been made. Rebidding costs money and it is my sense that in former years principles of law were more important than they are today in terms of deciding to order rebidding or not. I have learned from my experience that unless there is a provable violation of a substantive bid law provision, having the public owner on your side (or not) can frequently be a determinative factor in who will win a bid protest. In fact, one of the most effective strategies with regard to a bid protest under some circumstances is to hold off filing one for a bit. Then, spend some time working on the architect and the owner as to the potential grounds of the protest, which might cause a change in their opinion as to who gets the job. I have seen this many times. Once, however, a matter goes to the AG or to court, the parties seem to be a lot less flexible. In the law business, I have frequently found that the threat of a future action exceeds the value of actually taking the action. So, advising the owner and architect that you are likely to file a protest may achieve more in some circumstances than filing the protests, particularly when you have the ability to continue the conversation with them before a final decision to award or reject has been made.

Court really is attractive when time is of the essence: there is no time for the bid protest mechanism, which start to finish typically takes somewhere between two and three months. Court is also preferable when the dollars become larger and the larger dollar investment to seek an injunction as compared with filing a bid protest becomes less important. Court becomes mandatory when the Attorney General's Office finds against you or when the awarding authority refuses to follow the Attorney General's decision. In court, bid protest decisions have some weight (by case authority) when considering requests for injunctions, although the judge has complete discretion and the ability to give the decision of the Attorney General as much weight - or as little weight - as he or she determines to be appropriate. Ultimately, a court consideration of a bid matter after an administrative bid protest is *de novo*, meaning that the Court has a full ability to decide the matter as it sees fit, even to the point of completely disregarding the prior administrative bid protest process and decision. This is because an administrative bid protest is not an "adjudicatory" administrative proceeding inasmuch as it does not have subpoena power, does not swear witnesses, does not conduct an actual trial, does not follow the rules of evidence, does not allow for any discovery prior to hearing, etc. Quite simply, an administrative bid protest hearing isn't a real court procedure: it's something significantly less than this, especially procedurally.

Court is also a good idea where a bidder is looking for a judicial decision on a situation which arises often in its work. An example might be where a bidder has its bid rejected by a major awarding authority based on being found to be not 'responsible' and other awarding authorities are beginning to reject its bids for the same reason. Or, the bidder is afraid that this might prove to be the case. While attempting to get a judicial decision under these circumstances makes sense to me in certain limited cases, my experience has been that virtually

no one does it. Whether or not a particular bidder is known to have aggressively pursued its rights in a bid evaluation, particularly as to a determination of responsibility as to a particular bidder, might be something that a subsequent owner and architect might consider in doing its 'due diligence' as to whether any particular bidder's bid should be accepted or rejected. In some regards, a particular bidder might be seen as a 'bully' in terms of actively seeking to protect its rights, which is not necessarily a bad thing. As architects and owners don't want to be part of bid litigations, a prior tendency to show aggressive action in event of a rejection might have some value in the making of a decision as to responsibility of a bidder, if the decision is a close call and could go either way.

Also, the Attorney General's Office is only charged with interpreting the bid law within the confines of the *existing* bid law and does not have the authority to actually declare new law, which is a power that a court has, particularly an appellate court (or a federal district court). So, when individuals or organizations seek to influence, modify or make new law, court is the preferred procedure.

4. Filing Bid Protests at the Attorney General's Office

Many, perhaps most, bid protests start and end here. One must keep in mind that a court will consider a bid law issue after there is a bid protest at the AG's office but the AG's policy is to not allow for administrative bid protests after there has been court action. So, if one wishes for two potential bites at the apple, starting first in an administrative bid protest is the way to get it. In a thumbnail sketch, here is the procedure.

If one wishes to protest a bid or bid procurement, one writes to the Attorney General's Office. Presently, one would file a protest by writing a letter to the following address:

Attn: Bid Unit
Office of Attorney General
Commonwealth of Massachusetts
P.O. 6303
Boston, MA 02114

Protests are initiated by letter, which should include a check made payable to the "Commonwealth of Massachusetts" in the amount of one hundred dollars (the filing fee). There is no specific form which is required or any absolutely required content. The letter should identify the project, who is protesting, the general grounds of the protests, the owner and any affected bidders, including the party being protested. The stronger your protest, copy more people from the owner. Also, if you have people friendly to you at the owner, copy that individual, as he or she might speak up for you. So, for example, if you are protesting a decision of the director of public works, you might copy the mayor and the chairman of the board of selectmen, even, on occasion, the town counsel. If you are 'guy two' (second low) and you are protesting 'guy one' (first low), I would probably only copy the low bidder and not the other bidders. I would almost always copy the architect. Your letter should indicate that everyone

indicated has been copied on the letter with all enclosures. The better the detailed and documented description of what the claimed error is, the better the bid protest.

There are two ways I have seen bid protests filed. The following would seem to be the more traditional way. In the letter, you describe the bid problem, doing so in detail and with a complete description of the applicable law. A good initial presentation may ultimately minimize your costs in that a further later briefing may not be required or, at least, may not have to be as extensive as might otherwise be required. For all intents and purposes, this would be your legal brief for the hearing or most of it.

I have seen a second approach, which seems to play to the fact that the standard order issued from the Attorney General's Office when a protest is filed directs the parties to file all materials with that Office, copies to the other side, by a certain date and time, which is usually not later than two days of the date of the scheduled hearing. Some bid protest filers, then, try to work that date to their advantage. They do so by filing only the most minimum of protests with as little reference to authority and substantive bid law issues as they feel that they can get away with. Then, right at the deadline for filing materials, as ordered by the Attorney General's Office, they file their reasons in support of the protest, with all references to the various sources of bid law. This seems to present to them several advantages. For one thing, Attorney General opinions on bid protests are not widely available. They are only generally available in paper form at the Attorney General's Office. In the past, they may also have been available at certain law libraries. Having said this, the AG *does* have case decisions on line, but only back to 2003. And such decisions - what we in the law business refer to as 'precedents' – go back *way* before this. As there are myriad potential legal issues involved with bid protests, some of the most important cases may have been decided in the 1990's. And, we still cite as authority cases from the Department of Labor and Industries, which agency handled bid protests before the AG took over some years back. So, if one indicates a dependence on a certain prior Attorney General case as the basis for the protest two days before the hearing, it becomes difficult to actually get a copy of that decision within that time period, unless one can get into Boston to look at that decision at the AG's office. (Perhaps, if you call and ask someone to send it to you, they might. But, can you depend on that?) Also, with the opposing party to the protest not really knowing what the full arguments are going to be before such time as its own briefing materials are due, this increases the chance that the opposing party may not completely brief the issue because it is not aware of what these arguments are until its own brief is due. So, if the decision in "Case A" is what the protest is based on, the opposing party may not even be aware of that when it files its own brief, as the two briefs are filed and exchanged simultaneously.

Does this seem fair, oriented towards a full exploration of the legal arguments or even, as is said across the Pond, 'Cricket'? Some would say 'no', although these types of tactics are not uncommon in the legal process, which seems more orientated towards winning than towards anything else. While one would think that the orientation of the justice system should be towards justice, all too often it seems more concerned with 'process' and not 'substance'. Coach Vince Lombardi, widely-regarded as a football visionary, said that "Winning isn't everything, it's the only thing."

Ultimately, there are some ways to deal with the 'sneak attack' approach. I personally feel that there are some elements of intellectual dishonesty with it. And, such tactics, particularly used in front of judges might backfire, possibly quite dramatically. Speaking as a practitioner, it's never a good idea to go out of one's way to irritate any judge or hearing officer. And, even with an administrative bid protest, if the real grounds of the protest are not in the original papers, this makes it more likely that the hearing officer will be receptive to the opposing party's request to submit a supplementary memorandum after the hearing, which might then allow the protested party an opportunity to brief issues that arose during the hearing and/or other issues which were left out of the original opposition materials. So, the 'sneak attack' approach might be counter-productive in any particular case. Also, when you are trying to 'woo' the architect, owner or both in terms of getting them to take your position in the protest, their being presented with your legal arguments and materials as soon as possible may actually help them come around to your point of view. Where bid law is a kind of specialty, it may be that their counsel simply won't see all of the available bid law issues. And, by filing a response brief before it is actually do with appropriate authorities has caused, in some instances, the protesting party to actually withdraw their protest. But, for my readers, I want you to be aware of both possible approaches and the advantages and disadvantages of each.

What are the sources of law involved with a bid protest?

Initially, the General Laws are of paramount important. These are Massachusetts' statutes, laws of general application. These can be found in virtually every public library. Of specific importance are Chapter 30, s. 39M (for public works) and C. 149, s. 44A-H (for public buildings) and C. 149A (for the 'contractor-at-risk' program). If possible, find an *annotated* set of the General Laws. In your library, these will typically have all green covers or all black covers and I have found that many libraries will have one or the other. An annotated law lists after each section of the law various court case summaries interpreting that law. Quite often, the interpretation of the law by the court will have greater significance than the actual statutory law itself.

Apart from the statutes, the decisions of the Appeals Court and of the Supreme Judicial Court are of great importance. These may only be available in law libraries but are generally available and are indexed in a variety of ways. For example, under the Westlaw system, specific points of law have assigned to them 'key numbers'. So, once the lawyer has identified the specific point of law governing the matter – harder to determine than you might imagine! - by checking that key number through various 'digests', one can either find every case that has ever been decided on that point or, at least, the most recent ones.

Of particular importance are previous decisions of the Attorney General's Office and of its predecessor, the Department of Labor and Industries. These are not generally available and are not well-indexed. The last index the author is aware of only covers decisions through 2004 and is summary (brief) at best. Namely, all that this index will do would be to list a certain bid law subject and then list the various cases which have discussed that subject. That is the complete extent of the indexing, such as it is. The Attorney General's Office maintains these decisions at its office. Some practitioners in this area may maintain these decisions in their own

offices, which has the further advantage of saving time, as bid protests are frequently an eleventh hour matter. I have several years of the bid protest decisions of the Attorney General's Office and of the Department of Labor and Industries going back to January of 1987, although not a complete set for all of the years. The decisions on-line at the AG's website only give, as description, the date of the decision, the name of the awarding authority and the protesting party *but nothing else.* So, for example, if I were researching a 'Paragraph E' case, I would have no way of knowing which of these decisions – if any - going back to 2003 deals with that issue. The index that I referenced *does* list the general subject matter of, for example, 'Paragraph E' cases but then just gives you perfunctory information on the date of the decision, the awarding authority and the name of the protesting party *but nothing else.* So, if I wanted to find out what the specific issue and decision was in any particular 'Paragraph E' case, I would have to look at *all of them.* Since the last several years are not indexed – at least, as far as I know - trying to find relevant recent cases is challenging, to say the least.

Citing to the Attorney General's Office its own previous decisions is a plus, as these decisions will influence the ultimate decision of that office. There is a concept in the law with a Latin name: '*Stare Decisis'*. This means: 'let the decision stand'. It's a legal concept that says, everything else being equal, a court should continue applying previous established decisions to current fact patterns and the issues in front of it.

5. The Bid Protest Process, Hearing and Decision

After the protest is filed, the Attorney General's Office will send a letter to the Owner and obviously involved parties advising of the filing of the bid protest and asking the Owner not to make any ultimate decision on the procurement until the investigation has been conducted. By my experience, most owners will comply with that initial request. (In a situation where an owner won't comply with that request, this would be a factor supporting going into court for an injunction.) I have had a number of situations in the past where other state agencies were less inclined to defer action pending the hearing process.

In due course, usually in a month or less, the AG will send out a letter (or email) setting down the date and time of the hearing. Usually, this letter will advise the parties that all materials that they wish the AG to consider must be filed at least two days prior to the hearing. If you do not receive a notice for a hearing in the first month, it is acceptable practice to call up and specifically ask that the matter be set down for hearing. My sense is that the hearings are scheduled a bit quicker than they used to, quite often in two or three weeks from the date of this particular notice.

Now, the letter from the Attorney General will refer to the hearing in the context of the Attorney General's 'investigation' into the matter. Being brutally honest, the Attorney General's Office is not likely to do *any* investigation of its own into the protest, unless there is a 'hot button' issue involved, such as an allegation of failure to pay prevailing wages. The Attorney General's Office will be willing to listen to your arguments, consider your documentary submissions and legal authorities but is not likely to actually conduct an investigation itself. My experience has been that the Attorney General's role in this process is fairly passive, at least with

regard to the bid protesting party and the party being protested. As a practical matter, it is really up to both sides to bring all factual and legal issues to the AG's attention.

A hearing typically takes about one hour. At the hearing, ordinarily the protesting party will present the basis of the protest. Reference may be made to the bid documents, the bid forms, various writings and documents of one kind or another and, of course, to the legal arguments and authorities supporting the protest. No witnesses are sworn and, for that matter, there isn't actually any examination of witnesses. Individuals from the principals are given an opportunity to speak but usually only very briefly and to make a point they are particularly interested in. I have had any number of protests where all of the talking was done by lawyers. Some clients prefer this, as bid law is complicated and can be quite technical and some people may be a little intimidated by the process. There is no subpoena power available, which means that anyone you wish to come to the hearing has to agree to attend on his or her own. Similarly, unlike court, records themselves cannot be subpoenaed for production at the hearing. Simple frontier justice, in some regards.

After the protestor has spoken, the awarding authority gets to speak its piece and, lastly, any other affected parties - including the protested party - have an opportunity to speak. Then there is typically a rebuttal round where everyone gets to comment on what was said by the other parties during the first round.

A decision in writing is issued generally in not less than two or three weeks after the hearing, sometimes longer. Thereafter, the parties are then in a position to consider what further action, if any, might be warranted or available. As indicated above, if the matter has not been to court yet, resort to court is available when one is unhappy with the bid protest decision.

6. The Two Kinds of Bid Protests

The subject matter of bid protests contains two broad areas of inquiry (or attack).

A. Problems with the Procurement

The first is that there is something wrong with the procurement - not with any specific bidder's bid. The owner did not comply in some way with the bid laws. The following are examples only and not in any particular order of importance. The owner received bids after the deadline for bids stated in the bid documents. The bid documents were defective in some way, not containing, for example, statutorily-required language or forms (e.g. affidavits of non-collusion). A public building job was advertised under the laws pertaining to public works (which would mean, ordinarily, that the filed subbidders are prejudiced in that they would not be required in a public works procurement.) Filed subbids were not required for the appropriate trades which should have had them. The procurement specifically calls for a proprietary item which cannot be supported under the facts as being required or necessary. (Usually, any three materials or manufacturers should be indicated in the bid document as being acceptable to the owner.) I have found that a public owner has a fairly light burden in convincing the hearing officer as to the need for a proprietary specification.

Protesting the procurement - rather than a specific bid from a specific bidder - is one of those 'good news, bad news' situations. The good news is that if you are correct, the job will be rebid. The bad news is that if you are correct, the job will be rebid! Meaning, that the error in the process does not allow the protesting party to actually get the job: only another opportunity to bid the job again. From my own experiences with bid protests, it seems that the Attorney General's Office is less interested in ordering rebidding than it was in earlier years. My own experience suggests that the current hearing officers seem more inclined than some earlier ones to go along with what the awarding authority wishes to do, particularly on close cases.

B. Protesting Another Bidder's Bid

Protesting another bidder is the meat and potatoes of the bid protest practice. Here is an opportunity to knock out a competitor and get a public job.

Initially, it is a good idea to examine your competitors' bids on bid day. This may be your only opportunity to do so and is certainly the easiest way to see the actual bids and check them for errors. While the bids are probably "public records" and are probably later available under the various 'freedom of information' laws, those laws do not specifically provide for the production of this evidence during the short timetable that the bid protest process may require. (Massachusetts FOIA law seems to give a public body at least ten days to produce records.) Also, once the public owner has decided on a course of action, access to these bids may be practically limited or slowed down, possibly to minimize the filing of bid protests.

What are the grounds (opportunities) for bid protests? I would respond by asking how many stars are there in the sky?! The following are common areas of protest.

First, is the bid form completely filled out? Is it signed? Is there bid security for 5% of the total *possible* value of the bid, including alternates? Is the bid bond conditional (in that it has a rider reducing potential coverage), which sometimes happens with hazardous waste abatement? Is the bid 'obscure' in that some important element of the bid relating to scope or price is not unequivocally provided or filled out? Are all the subsidiary forms - non-collusion affidavit, for example - filled out completely? Has a filed subbidder indicated his subcontractors when not asked to do so? (Filed subbidders are generally required to perform all of the work of their trade as a matter of law, unless given specific permission in the bid document to have subcontractors. The AG has a number of decisions against 'brokers'.) So, it's not uncommon for a plumbing filed subbidder to be allowed an insulation subcontractor or an HVAC filed subbidder to have an automatic temperature controls subcontractor. Is the bid in any way conditional, incomplete, containing items not asked for or a counter-offer? Are all of the addenda affecting in any significant manner scope or price acknowledged? Has the bidder included any required prequalification statements and updates required by the bid document? Have the various MBE and WBE letters of intent - when required - been included? Is there any contradiction between the written numbers and the actual numbers, particularly such that calls into question what the actual amount of the bid is? (By case law, 'post-bid' modifications (and even explanations) of bids already submitted are not allowed.) Has a bidder 'penny bid' a

significant bid item? Is there any confusion as to the scope of the work or the price of the work? Is the bidder debarred from submitting a bid for any reason? Should the bid be rejected for some or any reason? Was the bid delivered in time for the bid opening? If the general contractor has carried himself/herself as a filed subbidder for a particular trade, does he/she have a demonstrated track and experience record in this trade? Does the bidder have all required licenses to perform the work (e.g. for an electrician, does the corporation have *in its own name* a master's license)? Is any specific bid sufficiently labor-intensive that under no set of circumstances could the bidder meet the prevailing wages for the job in question? Does a particular competitor have an overwhelmingly bad record for this type of work to necessarily keep an owner from finding him/her/it to be a 'responsible' bidder? Does the bidder meet the experience requirements for submitting a bid? Is a bidder attempting to meet the experience requirements called for in the bid document by using for that experience that of a predecessor/sister/affiliated company?

7. Some Hints and Tips

Don't overly abuse the process. While certain companies seem to file an inordinate number of protests, at some point, this may become counter-productive. These matters are currently heard generally by only two individuals and, human nature being what it is, if one files a number of 'light' bid protests, this could prejudice a bidder down the road when it has a really good one. (Remember what they said about the boy who cried 'wolf'?!) Don't misrepresent the facts or the law to the Attorney General's Office. Try to get other affected parties to attend the protest, particularly when you are protesting the procurement rather than a specific bidder. For example, if an incorrect procurement is unfair to both subcontractors and general contractors, try to get representatives of each to attend.

If there is no clear violation of the law or the matter is really a judgment call for the owner, there is a distinct tendency on the part of the Attorney General's Office to defer to the public owner. Therefore, getting the owner on your side in the protest can be helpful, sometimes extremely helpful, maybe even necessary. Quite often, the owner's involvement will be where it wishes to retain the protested bidder. Getting the owner interested as early in the process as possible may be very useful. Don't underestimate the importance of the architect, particularly in the time period right around bid time and for the next week or so. At this point, the process is as fluid as possible and the public owner will more likely be asking the architect, rather than a lawyer, its questions as to what is right and appropriate to do. Whether any particular architect is well-versed or not at all in the bid law, usually the architect has a lot more familiarity with the process than does the typical smaller municipal owner and there is some tendency for the smaller owners to look for advice first from the architect (just as most often happens during the actual performance of the job.) Owners seem somewhat more inclined to accept the low bidder these days, even when errors are alleged.

Don't expect the Attorney General's Office to do your work for you. In other words, it is incumbent on you, as the protestor, to try to develop the facts, the law, the documents and the witnesses. Because of time and business pressures, the Attorney General's investigation is not going to be very active in many cases but will rely on the parties to develop the subject matter.

As a matter of law, the protestor has the burden of persuasion to demonstrate a violation of the bid law. In that way, a bid protester's obligation is similar to a plaintiff's obligation in civil litigation: it has to establish, even prove, that a violation has occurred.

Don't bring politicians into the arena! Many times clients have told me that they know the governor or a senator or a representative and that person is going to make some calls to the Attorney General's Office on that person's behalf. To the best of my long recollection, I have never, *ever* seen this work. Moreover, it presents various possibilities of backfiring and/or annoying the hearing officer and, given the state of political play in this state, might even constitute influence peddling.

Keep in mind that not all bid errors require rejection of a bid. According to legal authorities, *de minimus* (minor) bid errors not affecting a specific, clear violation of a substantive bid law principle might *allow* for a public owner to reject the bid but does not *require* the public owner to reject the bid. This becomes a matter of discretion for the owner. A clear violation of a substantive bid law principle should require a rejection of a particular bidder's bid. But, since gray seems more prevalent a color than black or white, this doesn't necessarily always happen. An example. A bidder should acknowledge all in-effect issued addenda at the time of the bid. Generally, a failure to acknowledge an addendum would be grounds for mandatory rejection, as many prior legal decisions have held. There is case law, however, which says that if the addendum only has a *minor* impact on price, mandatory rejection is not required. What is *minor?*

Here's a final point. While a public owner might have the discretion to decide whether or not it will reject any particular bid for a claimed defect in the bid, no bidder has the right to insist that the public owner exercise that discretion. Put another way, if the public owner could go in two different directions with something, there is simply no way or mechanism for a bidder to force either choice. This is one of the many reasons why trying to get the architect and owner on your side as early as possible in the process – even, before a formal bid protest is filed – has its distinct advantages. And, in deciding a factual matter - i.e. is a particular bidder 'responsible' for the purposes of submitting a bid - the court cases hold that a public owner's factual determination is not supposed to be capable of being second-guessed by either the Attorney General's Office or by a judge unless such a decision is 'arbitrary, capricious or illegal'. This is nearly an impossible standard to establish, speaking from long experience.

****

This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and informational purposes only. Questions of your rights and obligations under the bid law are best addressed to legal professionals of your own choosing. Other materials on bid law issues and a variety of other Massachusetts construction law issues can be found at www.sauerconstructionlaw.com.

Boston Office: Sauer & Sauer, Suite 500
75 Arlington Street, Boston, MA 02116; Phone: 617-848-4538
Email: jonsauer@sauerconstructionlaw.com; sallysauer@sauerconstructionlaw.com

Main Office: Sauer & Sauer, 15 Adrienne Road, East Walpole, MA 02032
Phone: 508-668-6020; jonsauer@verizon.net ; sallysauer@verizon.net

Worcester Office: Sauer & Sauer, Suite 1000, 255 Park Avenue, Worcester, MA 01609 Phone: 508-797-3066

HERE ARE FIVE THINGS TO KNOW ABOUT OUR FIRM:

1. We guarantee our billing rate for five years in writing and give a 25% discount as to the fees on the first file for new clients.

2. We endeavor to maintain wherever possible future business relationships with your contracting party by emphasizing a fair and reasonable approach, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'.

3. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first and, where possible, mediation. (We recently obtained 1.5 million dollars for a subcontractor against a bankrupt general contractor's payment bonds (three projects) without a single deposition ever being taken and without having to even answer interrogatories!)

4. No charge for quick answers to *general* Massachusetts construction law questions.

5. Being a smaller firm, our attention is *solely* on our clients, not on feeding the overhead of a fancy office and many partners and associates. We only have to feed our five dogs, most of which are *quite large!* (The Rottie , by the way, says '*hey*!') Our experience has been that when a Rottie speaks, it's often a good idea to listen!

"Knowledge is money in your pocket!"