Sole source construction procurement for Ohio statutory municipalities

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Background

Ohio Revised Code 735.05 requires a city's director of public service to make a written contract with the "lowest and best bidder" for all construction contracts that exceed $25,000. ORC 737.03 requires a city's director of public safety to competitively bid all contracts for the "erection . . . of station houses, police stations, fire department buildings" and other purchases of more than $25,000 for the police and fire departments.

For villages, under ORC 731.14 and 731.141, "when any expenditure . . . exceeds twenty-five thousand dollars, such contracts shall be in writing and made with the lowest and best bidder."

There are some statutory exceptions to competitive bidding, however. Under ORC 725.051, cities are exempt from competitive bidding when there is a "real and present emergency" and the contract is authorized by a two-thirds vote of city council.

There are other exceptions, including for purchasing goods and services under the State Term Contract program administered by the Ohio Department of Administrative Services (ORC 735.05); for purchasing used equipment or supplies at public auctions or sales (ORC 735.052); and for purchasing services, material, equipment or supplies from another Ohio political subdivision (ORC 735.053).

On some construction projects, especially ones that are complex and involve new technologies, a municipality may have a very good idea of exactly what equipment and systems it wants, such as a particular water treatment process. But the uniqueness of certain equipment and systems may mean that they are not readily available from more than one vendor, creating tension with statutory competitive bidding requirements.

Another problem arises when the desired equipment is not necessarily unique with respect to the rest of the world, but unique in that it is the only equipment that matches equipment or processes already used by the municipality, such as a particular HVAC system.

The doctrine of sole source procurement, when correctly applied, can help a municipality get the equipment and processes it wants without running afoul of Ohio's competitive bidding laws.

The Roots of Sole-Source Procurement

A public entity is not required to engage in competitive bidding in the absence of legislation requiring it. *Shafer v. Streicher* (1922), 105 Ohio St. 528, 534. Moreover, Ohio courts have recognized that not all procurements of services by public bodies are amenable to competitive bidding and, indeed, competitive bidding may be waived in some cases. This is roughly known as the

"sole-source doctrine," where courts have recognized that bids need not be solicited for certain specialized services.

The Supreme Court's expression of this principle comes from *State ex rel. Doria v. Ferguson* (1945) 145 Ohio St. 12, para. 2 of the syllabus:

> Although contracts relating to public projects, involving the expenditure of money, may not ordinarily be entered into by public officials without advertisement and competitive bidding as prescribed by law, an exception exists where the contract involves the performance of personal services of a specialized nature requiring the exercise of peculiar skill and aptitude.

In *Doria*, the services not subject to competitive bidding were preparing title abstracts. In *Heninger v. Akron* (1951) 112 N.E.2d 77, the Ohio Ninth District Court of Appeals cited *Doria* to excuse codifying city ordinances from competitive bidding.

The jurisprudence goes back further and includes construction. In *State ex rel. Scobie v. Cass* (1910), 13 Ohio C.C. (n.s.) 449, a courthouse construction commission was permitted to procure services for painting and decorating the interior walls and ceilings of a new courthouse without competitive bidding. The court held that the commission could award the interior decoration contract without bidding due in part to the rule announced in *State ex rel. v. Mackenzie* (1907), 9th Cir. Ct. Rep. (N.S.), 105:

> When the contemplated construction is essentially and absolutely non-competitive, because of its artistic nature; or is strictly monopolistic, because of the function to be performed thereby is necessarily dependent upon a single means which is the subject of an exclusive patent, or franchise, or sole source of supply then the principle of competition is, so far forth, inapplicable.

The common thread throughout the sole source case law is a rational, subjective belief that the chosen contractor delivers the best value for the work because it is uniquely qualified, or that it is physically impossible for the work to be performed by others.

The Importance of Competition

On the other side of the spectrum is the view favoring competitive procurement, under the theme that the purpose of competitive bidding is "to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms." *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21.

A good example is found in *State, ex rel. Schaefer v. Bd. of Commissioners of Montgomery County* (1967), 11 Ohio App.2d 132, where the court held that the county's specifications for incinerator equipment were so narrow that competitive bidding was stifled in violation of statutory requirements for competitive bidding.

See also *Fischer Auto & Service Co. v. Cincinnati* (Hamilton C.P. 1914), 26 Ohio Dec. 103, where a public owner was enjoined from publicly procuring an automobile when the specifications were too narrowly tailored to a certain make and model. The court used the terms "closed specification" and "open specification" to differentiate between an implied sole-source specification and a generic specification.

However, the courts in both cases, although striking down the challenged procurements, did implicitly acknowledge that there is a place for sole-source procurement. In *Fischer*, the court recognized that an open specification was workable only when "there was at least one other engaged in the same business." In *Schaefer*, in citing to *Doria*, supra, the court recognized the sole-source procurement doctrine when it stated "[i]t may be evidence would show that these matters should be excepted from competitive

bidding." But the court did not have enough evidence in front of it to make a determination that competitive bidding could be bypassed. The court held:

> It is argued in the reply brief that the respondent board 'with expert advice, has determined that the incinerator and complementary equipment sought, with the requisite expertise for installation, are available from only one source * * *'.
>
> Whether the board's determination in this regard is based on actual facts concerning the state of the art or industry of manufacture and installation of incinerator equipment is a matter which the respondent board must plead and prove—we cannot take judicial notice of such facts.

In *The Gamewell Co. v. Phoenix* (C.A. 9, 1954) 216 F.2d 928, (cited by the Schaefer court) the court recognized that a certain product may be specified as sole source when it is patented and the sole source is technically justified.

Modern Practice: Implied Statutory Recognition of Sole Source for Equipment and Systems Based on Owner's Discretion

In modern construction procurement, the question of sole source most often involves equipment and systems to be furnished and installed by one or more of the bidding contractors, instead of sole sourcing an entire contract to a particular contractor.[1] HVAC equipment, roofing systems and water/wastewater treatment equipment are common examples. The modern practice, whose origins quite possibly lie within requirements set out by those entities funding the work, is to oftentimes require that three or more manufacturers be listed as acceptable in the technical specifications.

But there are times when the equipment or systems are sufficiently unique that a particular system or piece of equipment must be used to ensure the project's success, at least in the mind of the owner. On a water or wastewater project, a particular tertiary filter, membrane process or filter press may have been pilot tested and the entire project may have been designed around it. On a building project, the owner may strongly desire a certain brand of HVAC equipment or controls, because that is what was installed in the owner's other numerous buildings, making operations and maintenance more efficient.

One way for an owner to obtain the equipment or system that it desires without running afoul of competitive bidding laws is to include the equipment or system as one of several choices in the base bid and then specify the exact equipment desired as an alternate, thereby allowing a bidder to specify its price if certain equipment or systems are selected as an alternate. If the owner decides that the price for the equipment it prefers (the alternate bid) is acceptable it may select the alternate and evaluate bids taking into account the alternate selected. This approach has been accepted by the courts throughout Ohio.

If the owner is convinced of the necessity of sole source, and there are no other comparable equipment or systems available, this is when the owner must make a strong technical justification and proceed under the great discretion afforded to public construction owners under Ohio law.

Ohio statutory municipalities, counties and regional water and sewer districts (organized under ORC Chapter 6119) award construction contracts under the "lowest and best" bidder standard. The inclusion of the term "best" gives the municipality considerable discretion to consider and compare the qualifications of the bidders and equipment suppliers for a contract. See *Cedar Bay Const., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21. "[C]ourts in this state should be reluctant to substitute their judgment for that of [public] officials in determining which party is the single 'lowest and best bidder.'" *Id.*

So, the municipal owner must be prepared to demonstrate that the decision to specify certain equipment as sole source is rational. Transparency of the selection process and technical justification are the owner's best friends for demonstrating rationality. Such a documented justification of the sole-source determination is what the owner was missing in the *Schaeffer* case.

In a water or wastewater treatment setting the technical justification could be in the form of pilot or bench-scale testing of certain equipment, or hands-on evaluation of the equipment in other installations. For cases involving HVAC controls and equipment, or emergency power generators, an evaluation of the cost savings from system-wide uniformity would be helpful.

Practical Considerations

Once the decision is made to procure by way of sole source a piece of equipment or system, there are ways that the public owner can still help ensure competitive pricing. Requiring bids for alternate systems and equipment (as official bid alternates/substitutions) could convince the owner that the price difference for the preferred system or equipment is or is not worth it. The discretion of Ohio public owners in determining the lowest and best or lowest responsive and responsible bid extends to an owner's discretion in accepting bid alternates, after bid opening. See *Metzger-Gleisinger v. Mansfield City School District*, 2005-Ohio-2727.

Another practice is to have the design professional, as part of its work to prepare a published estimate of construction cost (another statutory requirement), get firm pricing from manufacturers as early as possible, before any sole-source designation is made.

Footnotes

1. Even so, there are certain processes, such as for in situ repair of underground pipe, which may be used by only one particular contractor, or which may even be patented and licensed to very few contractors within a geographical region.

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