



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

**GENERAL GUIDELINES REGARDING ATTORNEY GENERAL BID
PROTEST CASES**

Understanding The Role Of The Attorney General In The Competitive Bidding Arena

BACKGROUND

The Attorney General's Office (AGO) plays a unique role in the enforcement of the public bidding laws. Since 1993, with the transfer of enforcement of some of the public bidding laws from the former Department of Labor and Industries to the AGO, the AGO's Bid Unit has been investigating allegations of violations and rendering decisions regarding its findings.

The AGO's Bid Unit has the specific jurisdiction to enforce the following public bidding laws (the "Bid Laws"):

- M.G.L. c. 30, § 39M -- Public works construction (horizontal construction, such as, bridges, roads, sewer lines)
- M.G.L. c. 7, § 38A ½ et seq. – Designer selection (selection of the engineer or architect on a public building contract)
- M.G.L. c. 149, § 44A-H -- Public building construction (vertical construction, such as, schools, libraries)
- M.G.L. c. 149A – Alternative delivery methods (Construction manager at risk – vertical construction, design build – horizontal construction)
- M.G.L. c. 149, § 44D -- DCAM decertification and denial of certification by DCAM (appeals by contractors challenging decertification or denial of certification by DCAM)

Massachusetts courts have found that the purposes of the Bid Laws are to:

- obtain the lowest cost that fair competition can achieve to protect and preserve taxpayers dollars;
- protect the integrity of the bidding process;
- prevent favoritism; and
- maintain a level playing field for all bidders.

See, for instance, *Interstate Engineering Corp. v. City of Fitchburg*, 367 Mass. 751 (1975) and *Department of Labor and Industries v. Boston Water and Sewer Commission*, 18 Mass. App. Ct. 621 (1984).

NOTE: The AGO's Bid Unit does not have jurisdiction to resolve disputes regarding contract compliance. In addition, the Inspector General, not the AGO, enforces M.G.L. c. 30B, which concerns the procurement of goods and service by certain public awarding authorities.

THE BID PROTEST PROCESS¹

Nature Of A Bid Protest

A complaint or allegation that the Bid Laws have been violated is a “bid protest.” Bid protests generally arise from an allegation that the awarding authority has violated the state bidding laws during the prequalification or bid solicitation stage; or that a bidder has violated the bidding laws in its bid; or that an awarding authority has violated the bidding laws in the award of the contract.

Resolving An Alleged Bid Violation Prior To The Filing Of A Bid Protest

Because the bid protest process can be time consuming and costly to all parties, the Attorney General’s Office strongly encourages prospective bidders or interested parties to contact the awarding authority or the AGO prior to the submission of bids in an effort to clearly identify and resolve an alleged violation of the state’s Bid Laws. The AGO is ready and willing to assist in the resolution of potential bid protests by contacting awarding authorities during the bid solicitation process to call attention to possible bid law violations. In recent years, it has been the experience of the AGO that many potential bid protests have been successfully averted by communicating the concerns of potential bidders directly to the awarding authority or to the AGO’s Bid Unit.

Filing A Protest

To file a bid protest, a protestor should send a letter to the Bid Unit (with a copy sent to the awarding authority and the party against whom the protest is made, if different) that identifies:

- the awarding authority against whom the protest is being filed;
- the public works / public building construction project for which bids are solicited;
- the particular law violated, if known [M.G.L. c. 30, §39M, c. 7, §38A ½-O, c. 149, §44A-H, or c. 149A]; and
- a detailed description of the alleged violation.²

Bid protests should be sent to:

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

Bid protests must be accompanied by a check for \$100 made out to the Commonwealth of Massachusetts. Bid protests may be filed with the AGO’s Bid Unit by any “interested party” including unsuccessful bidders, citizens, watchdog groups, unions, trade associations and competitors.

Bid protests may also be submitted by facsimile or in PDF form via electronic mail (email), provided, however, that the \$100 filing fee be submitted shortly thereafter.

- Facsimiles should be addressed to the Bid Unit and sent to:
(617) 727-3066

¹ The following is a general description of the bid protest process and is strictly for informational purposes. **The Bid Unit retains the right to deviate from these general procedures in the fulfillment of its statutory obligations.**

² In a protest regarding a DCAM Certification/Decertification issue, the protest should include notification that the contractor is appealing either failure to be certified by DCAM or decertification by DCAM and the reason for the appeal.

- Emails should be sent to:
AGOBidUnit@state.ma.us

NOTE: Under the Bid Laws, bid protestors have the right to file a bid protest with the AGO's Bid Unit or to file a civil action in Superior Court to restrain an awarding authority from taking certain action, such as, awarding or rebidding a particular contract. Such civil actions are generally brought as preliminary injunction / declaratory judgment actions. **Only a court can issue a mandatory order under the Bid Laws or an award of monetary damages, such as, bid preparation costs or lost profits.**

SPECIAL INSTRUCTIONS REGARDING ARRA FUNDED PROJECTS:

If a bid protest involves a project funded, in part or in whole, by the American Recovery and Reinvestment Act (ARRA) or Federal Stimulus funds, please contact the Bid Unit at (617) 963-2330 prior to submitting the protest for special instructions on filing Stimulus-related bid protests.

What Happens After The Bid Unit Receives A Protest?

The Bid Unit processes the protest, and reviews the matter to determine whether a bid protest *hearing* is necessary to assist it in its investigation.

Generally, the Bid Unit may choose to *not* hold a hearing where:

- the bid protest fails to state a violation of the Bid Laws;
- the bid protest becomes moot; or
- there are no disputed, material facts and a decision can be rendered as a matter of law.

If the Bid Unit determines that a particular protest warrants a hearing, the hearing is usually held within 10 days of receiving the protest. A number of circumstances may necessitate a delay in the scheduling of a protest, including a request by parties for time to review a particular matter or a request by an awarding authority for further time to investigate allegations in order to provide a complete response to the protest.

Prior to the bid protest hearing, the Bid Unit sends the protestor and the awarding authority a notice of the date and time of the hearing. The notice informs the parties that they are required to submit any written materials by no later than two days prior to the hearing and that they must send a copy of any such materials to the other named parties to the bid protest hearing. In most circumstances, the notice will request that the awarding authority refrain from performing work prior to resolution of the bid protest.

The awarding authority is required to forward the notice of hearing and a copy of the protest to the apparent low bidder, if any, whose actual or potential award is the subject of the protest, as well as to any other bidder whose bid is being challenged. Where a bid protest challenges specific provisions in the bid documents or the process, the awarding authority should forward the notice of hearing to all potential bidders or awardees directly affected by the subject of the protest. The awarding authority must thereafter provide written confirmation to the Bid Unit that it has provided notice to the above referenced parties of the hearing.

Timeliness Of Filing Protests

Delays in the bidding process can result in a significant increase in costs for an awarding authority. All interested parties should file protests as soon as they become aware of the issues to protect the integrity of the bidding process and safeguard against needless waste. The Bid Unit will scrutinize all protests to determine whether a delay in filing a protest, particularly when the work has already begun, should result in the denial of the protest as untimely. Complaints regarding contractor prequalification issues, such as undisclosed litigation, should be made to an awarding authority within 14 days after the prequalification process is closed and the awarding authority has released prequalification information. Contractors should not wait until after the contract has been awarded to contest prequalification issues. **The Bid Unit retains the discretion to hear and decide a protest regardless of the timeliness of filing if it determines that such a decision is warranted.**

The Bid Protest Hearing – What To Expect

Bid protests are held at the Attorney General's Offices in Boston, New Bedford or Springfield. The hearings are open to the public. All interested parties may attend, and may participate and present testimony and evidence at hearing, subject to the discretion of the Assistant Attorney General overseeing the hearing. Parties may be represented by counsel, but are not required to be.

Because bid protest hearings are part of the Bid Unit's investigation as to whether a violation of Bid Law has occurred, the Bid Unit requests that parties present any information that may assist it in its investigation. Such information may come in the form of testimony from witnesses or through the presentation of documentary evidence, if relevant, such as: bid specifications; lists of past projects performed; and evaluations from past projects.

Since the bid protest hearings are part of the Bid Unit's investigation, as opposed to court proceedings or administrative hearings, neither the rules of evidence nor administrative procedures apply. After the parties have had an opportunity to present evidence, and have answered follow-up questions posed by the Assistant Attorney General overseeing the hearing, the record will generally be closed and parties will not be allowed to submit additional information. Only under compelling circumstances, subject to the discretion of the Assistant Attorney General overseeing the hearing, will parties be allowed to submit supplemental information after a hearing.

Bid Unit Decisions

In reviewing a bid protest, the Bid Unit usually evaluates and answers one of the following questions:

- Did the awarding authority violate the Bid Laws by failing to adhere to certain statutory requirements in awarding the public construction contract?
- Did the awarding authority violate the Bid Laws by awarding the public construction contract to a contractor who had violated the statutory provisions of the Bid Laws?
- Did the awarding authority violate the Bid Laws by making arbitrary decisions regarding bidder eligibility or qualifications?
- Did the awarding authority violate the Bid Laws by improperly or unfairly restricting competition for the project?
- Was DCAM's decision to decertify the contractor arbitrary or capricious?

Unless circumstances warrant otherwise, a Bid Protest Decision should issue within three weeks of the hearing. Depending on the complexity of the legal or factual issues involved in a particular case, a Decision may issue after the three week period. In order to expedite decisions, the Bid Protest Unit may issue an abbreviated decision to be followed later by a formal decision. Parties are advised to inform the Assistant Attorney General overseeing the hearing of any extraordinary circumstances that would warrant an expedited decision.

Bid Decisions that find that an awarding authority violated the Bid Laws may:

- 1) instruct the awarding authority to rebid a project;
- 2) remand the matter to the awarding authority to complete the review it must undertake under the Bid Laws;
- 3) require the awarding authority to reject a particular bidder (for failing to meet the requirements set forth by either the awarding authority or the relevant Bid Law);
- 4) suggest that the awarding authority rewrite an unclear provision in its bid specifications; and/or
- 5) suggest that an awarding authority add or delete language from the bid specifications to conform to the goals and objectives of the Bid Laws. In the case of 4) or 5), the revisions may require a re-bid.

Monetary Damages Are Not Available Through The AGO Bid Protest Process

The AGO's Bid Unit is not authorized to award money damages of any kind. As such, monetary damages, such as bid preparation costs (if the appeal is filed after the Notice of Award is issued) or lost profits, in the cases of intentional violations of the bid laws, can not be redressed by a Bid decision of the AGO.

Appeal From An AGO Bid Decision

Since AGO Bid Decisions are findings, as opposed to administrative decisions under M.G.L. c. 30A, (the Administrative Procedure Act), they are not subject to a formal appeal or review process. Parties who wish to challenge the findings made by the Bid Unit can bring a declaratory judgment action / preliminary injunction in Superior Court to attempt to enjoin the awarding authority from proceeding with a contract if, for example, a protest challenging the award of a contract is denied by the AGO.

For further information about AGO Bid Protests, please contact the Bid Unit at: (617) 963-2330 or email us at: AGOBidUnit@state.ma.us.