

**Competitive Bidding vs. Social Policy:  
A Look at Council of City of New York v. Bloomberg**

By Michaelbrent Collings

There are more than 100 competitive bidding statutes in California. These are statutes designed to protect the public's money by ensuring that many public works projects will go to the lowest bidder. As one construction law authority puts it, competitive bidding is "a vehicle to protect the public from public officials and to assure that the bidders are treated fairly and honestly when they bid on public works projects." (Bernard S. Kamine, Public Works Construction Manual: A Legal Guide for California (1991 BNI Publications, Inc.) p.20.)

These statutes are authoritative: most public agencies (cities, state entities, counties) must follow them. However, those same public agencies often have other interests that they wish to advance, and may try to advance them by attempting to ferret out undesirable contractors.

An example of this kind of maneuvering was seen recently in New York, and described in the case of Council of City of New York v. Bloomberg (N.Y.,2006) --- N.E.2d ----, 2006 WL 346293. In 2004, the New York City Council enacted what it called The Equal Benefits Law ("EBL"). The EBL stated that no city agency could enter into contracts with a value of \$10,000 or more annually with any person or firm that did not provide domestic partner benefits to its employees that were equal to those provided to employees' spouses.

The Mayor of New York City opposed this law. He vetoed it, but the City Council overrode his veto pursuant to local law and enacted the ELB anyway. After it was enacted, the Mayor began a declaratory judgment action against the Council. In this lawsuit, he asked the New York trial court to determine whether the EBL was inconsistent with other local provisions and with the federal law, and that the EBL was invalid for those reasons. The Mayor tried to temporarily restrain enforcement of the law, but the lower court ruled against him, stating essentially that the law could go forward until the entire question was decided by the court.

The City Council also began a competing lawsuit, seeking to have the Court order the Mayor (and the city) to implement and enforce the law. The lower court granted the City Council's request, stating that the law was entitled to a presumption of validity, and that the Mayor and the city were required to implement it.

After several appeals, the Court of Appeals of New York (the state of New York's highest court, similar to the Supreme Court of California) agreed with the Mayor's position. Of particular interest was their finding that the proposed New York City law would conflict with laws against New York's state competitive bidding statutes. Section 103 of New York's General Municipal Law states:

[A]ll contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded by the appropriate officer, board or agency of a

political subdivision... to the lowest responsible bidder  
furnishing the required security after advertisement for sealed  
bids in the manner provided by this section. [emphasis added]

The Court of Appeals agreed with the Mayor's argument that The EBL  
"violates this requirement by excluding from public contracting any  
'responsible bidder' that does not provide equal benefits to domestic partners  
and spouses." It stated that the competitive bidding statutes were primarily  
designed to protect public moneys and to "prevent favoritism, fraud and  
corruption in the awarding of public contracts." The EBL would undermine  
these interests because, as the Court of Appeals pointed out:

If municipalities are free to contract only with firms that provide  
certain benefits to their employees, the door is open at least to  
favoritism, for the municipality could design its requirements to  
match the benefit structure of the bidder it favored... [T]he  
competitive bidding statute reflects a judgment by the State  
Legislature that, to avoid among other things the risk of  
favoritism, municipalities must give business to the lowest  
responsible bidder, whether the bidder's benefit plans meet the  
municipality's idea of fairness or not.

The Court of Appeals did agree that there were certain situations in  
which public entities were permitted to adopt measures requiring contractors  
to procure pre-negotiated labor agreements as a prerequisite to bidding on a  
public contract. However, the Court also pointed out that these exceptions  
actually supported the efficiency that the competitive bidding laws were  
designed to protect, ensuring that jobs would continue without labor  
problems that would result in inefficiency (and thereby lost money).

Of course, the above case occurred in New York. It therefore is not binding on California municipalities or California courts. However, the competitive bidding laws there are very similar to those in California. For example, Public Code Section 20162 states:

When the expenditure required for a public project exceeds five thousand dollars... it shall be contracted for and let to the lowest responsible bidder...

Therefore, the Bloomberg case does provide a framework for looking at similar challenges likely to appear in California's own construction environment. As municipalities seek to improve not only their infrastructure and other building projects but to advance social policies, they too must be wary of stepping on the toes of California's competitive bidding statutes. Otherwise, they may find that, similar to the city of New York, they have exceeded their authority.

Contractors, of course, are often the innocent parties caught in the middle of this tug-of-war. It is critical that contractors wishing to become (or remain) successful in their fields be aware of this kind of legal development. This will enable them to plan, not only for today's job, but for tomorrow's business and legal environment.

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