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Bid Protests for Public
Works

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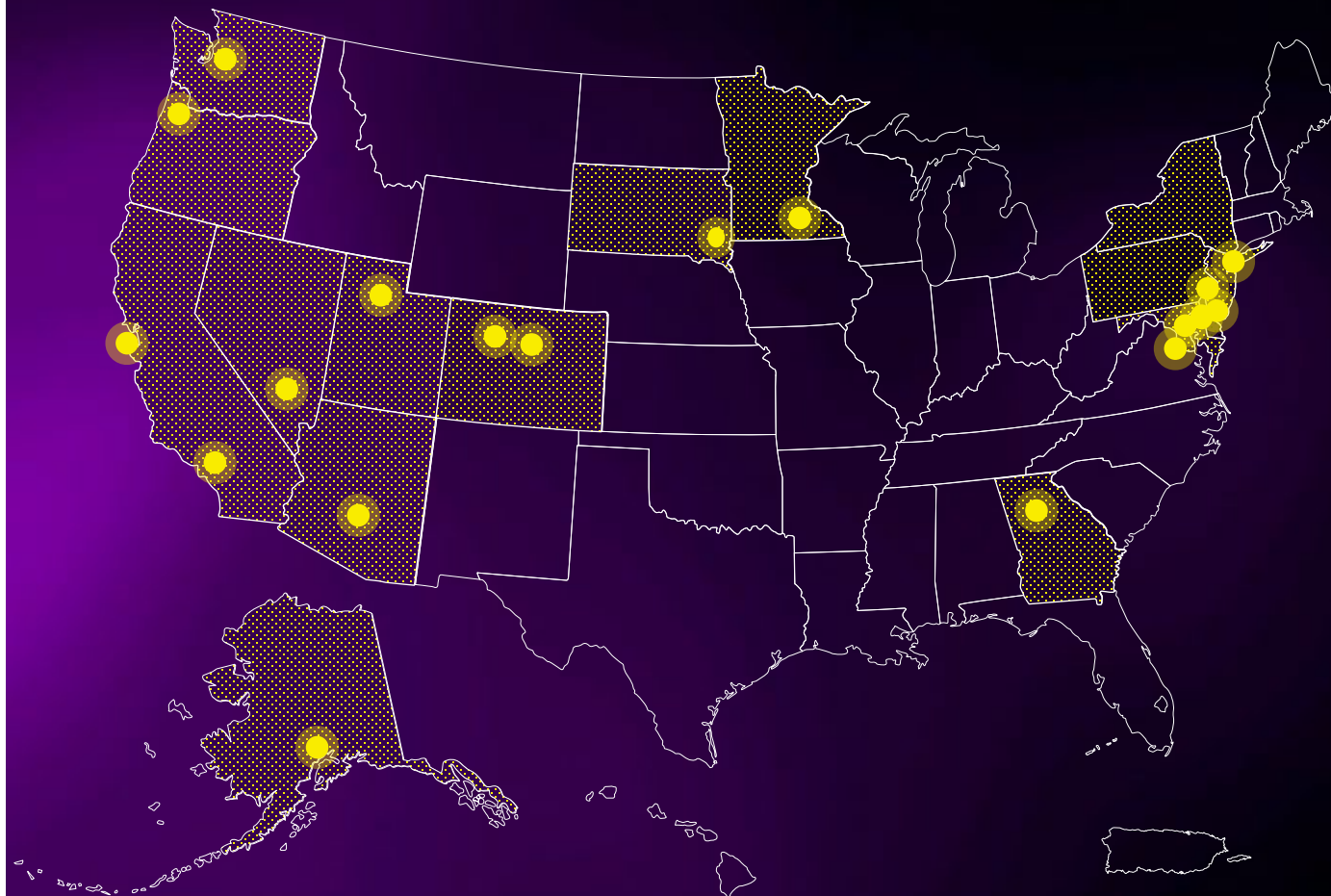
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TODAY'S AGENDA

- ✓ Purpose of competitive bidding laws
- ✓ When and to whom do the competitive bidding laws apply
- ✓ What is a responsive and responsible bidder
- ✓ Bid protest process
- ✓ Tips and examples on how to avoid protests

WHY USE FORMAL COMPETITIVE BIDDING?

The Main Purpose:

“...requiring public bidding on municipal contracts is **to prevent fraud, collusion, favoritism, and improvidence** in the administration of public business, as well as **to ensure that the municipality receives the best work ... at the most reasonable prices practicable.**”

“...the requirement of public bidding is **for the benefit of property holders and taxpayers**, and not for the benefit of the bidders; such that the requirements should be construed with the primary purpose of best advancing the public interest.”

Platt Elec. Supply, Inc. v. City of Seattle, Div. of Purchasing, 16 Wn. Ap. 265, 555 P.2d 421 (1976) (citations omitted)

WHY USE FORMAL COMPETITIVE BIDDING? (CONT'D)

The Secondary Purpose:

“Although the primary purpose for the requirement of public bidding is for the protection of the general public, it is also recognized that another purpose is **to provide a fair forum for those interested in undertaking public projects.**”

Platt Elec., 16 Wn. App. at 269 (citing *Gostovich v. West Richland*, 75 Wn.2d 583, 454 P.2d 737 (1969))

WHEN DO COMPETITIVE BIDDING REQUIREMENTS APPLY?

Per Chapter 39.04 RCW, competitive bidding requirements apply to:

- **Public Works:** “All work, construction, alteration, repair, or improvement *other than ordinary maintenance*, executed at the cost of the state or any municipality...” RCW 39.04.010(5).
- **By a Municipality:** broadly defined to include “every city, town, port district, district, or other public agency authorized by law to require the execution of public work...” RCW 39.04.010(4).



EXCEPTIONS TO COMPETITIVE BIDDING REQUIREMENT

Ordinary maintenance: “Maintenance work performed by the regular employees of the state or any county, municipality, or political subdivision created by its laws...” NOT “executed by contract, purchase order, or any other legal agreement...” WAC 296-127-010(7)(a)(i); (7)(b)(i), (ii).

Common sense distinction...



vs.



EXCEPTIONS TO COMPETITIVE BIDDING REQUIREMENT (CONT'D)

- **Exemptions under RCW 39.04.280**

- Emergency Works (landslide, windstorm, etc.) – 39.04.280(e)
- Sole Source procurements (unique technology) – 39.04.280(a)
- Purchases of insurance and bonds (relevant for builder's risk) – 39.04.280(d)



CONTRACT GOES TO THE LOWEST RESPONSIVE AND RESPONSIBLE BIDDER

“Bidding statutes require ... that the qualified, responsible bidder with the lowest bid (sometimes ‘lowest and best’ or other similar term) be awarded the contract.”

Savage v. State, 75 Wn.2d 618, 622, 453 P.2d 613 (1969)).

“Award” means “the formal decision ... notifying a **responsible bidder with the lowest responsive bid** of ... acceptance of the bid and intent to enter into a contract with the bidder.” RCW 39.04.010(2).

WHAT IS A RESPONSIVE BIDDER?

- Bid contains all required documentation and information
- Hourly rates, unit prices, proof of insurance, project schedule, etc.
- Federal funding?
 - Additional requirements are incorporated into bid documents



Practice Pointer

- ✓ Pre-bid Q&A allows for clarification of unclear requirements and minimizes the chances of a protest

WHAT IS A RESPONSIVE BIDDER? (CONT'D)

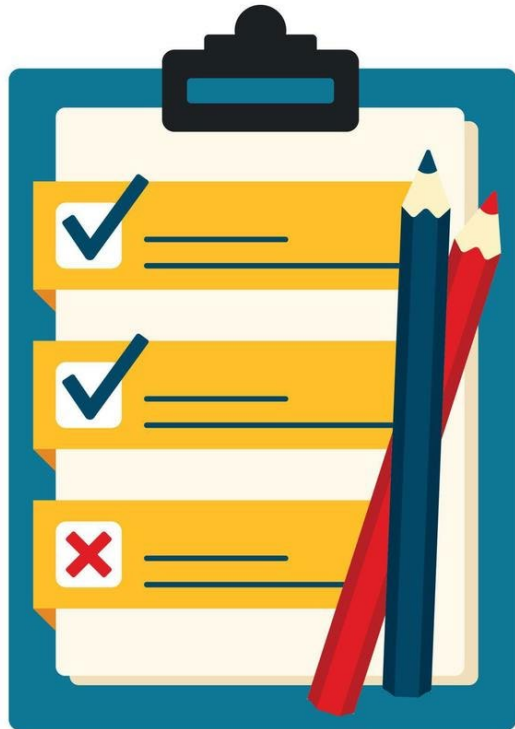
- Subcontractor listing statute – **RCW 39.30.060**
 - Requires bidder to list names of licensed subcontractors who will perform HVAC, plumbing, electrical, structural steel installation, and rebar installation
- Failure to list subcontractor means the bid is nonresponsive and “void”
- Common source of bid protests

Washington State Department of Transportation							B
Agency Name						Federal Aid Number	
Prime Contractor Name						Contract Number	
Contract Name							
Firm/ Subcontractor Name	Address (incl. Zipcode)	DBE Status	Race	Gender	NAICS Codes	Scope of Work	

Practice Pointer

✓ Minimize protests by working with the project team to clearly delineate all required scopes of work

WHAT IS A RESPONSIBLE BIDDER?



Basic Criteria – RCW 39.04.350:

- **DO:**
 - Be licensed / registered with Department of L&I;
 - Have a unified business identifier number;
 - Maintain industrial insurance coverage;
 - Receive training on public works and prevailing wage requirements.
- **DON'T:**
 - Be disqualified from bidding on public works contracts;
 - Have a track record of non-compliance with apprenticeship requirements; or
 - Have a track record of violating prevailing wage laws, minimum wage laws, or fair labor laws.

WHAT IS A RESPONSIBLE BIDDER? (CONT'D)

Supplemental Criteria – RCW 39.04.350(3):

“The state or municipality may adopt relevant supplemental criteria for determining bidder responsibility applicable to a particular project which the bidder must meet...”

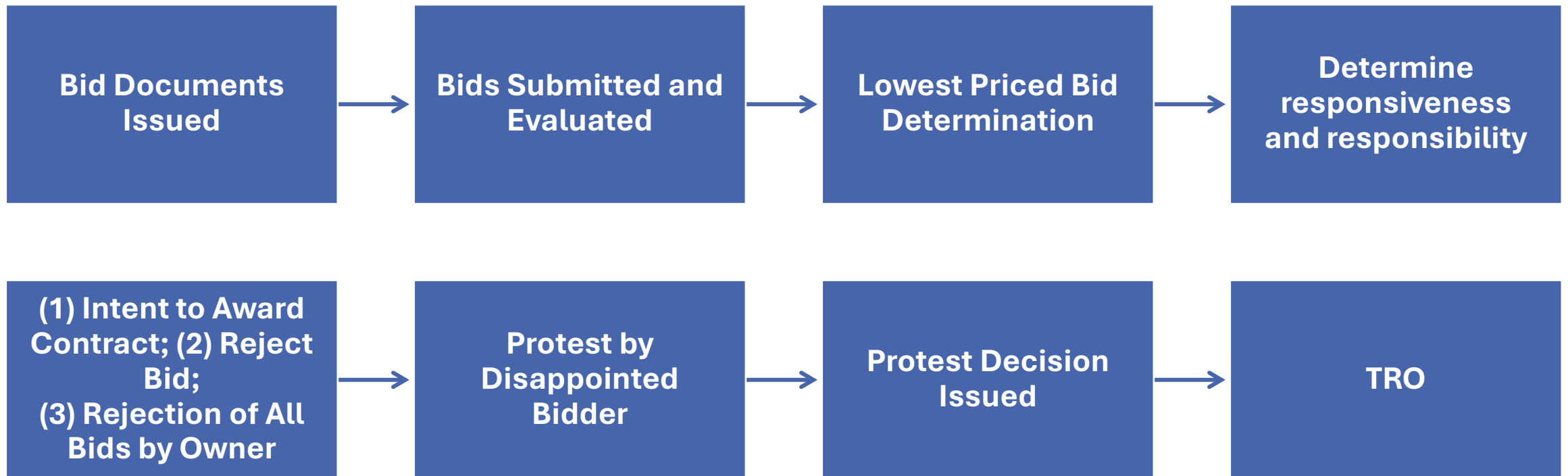
Common Examples:

- Past experience on similar projects;
- Qualified key personnel;
- Financial resources of bidder;
- Past history of lawsuits/claims/terminations.

Practice Pointer:

- ✓ WSDOT LAG puts limits on supplemental criteria

BID PROTEST PROCESS



BID PROTEST TIMING

- Controlled by statute - **RCW 39.04.105**:
 - If requested, provide copies of all bids **within 2 days of bid opening**;
 - **Wait 2 business days** after providing copies to execute the contract;
 - In the event of protest, do not execute a contract with anyone other than the protester without first giving **2 business days advance notice of intent to execute the contract**.
- Advance notice only required if:
 1. the protest is submitted within 2 days of bid opening; or
 2. the protest is submitted within 2 days of the municipality providing copies of the bids.
- Protests received outside these time periods can still be considered but do not require the municipality to give advance notice of intent to execute.



Practice Pointer:

✓ Statute sets a floor, bid documents often grant additional time for bidders to submit protests

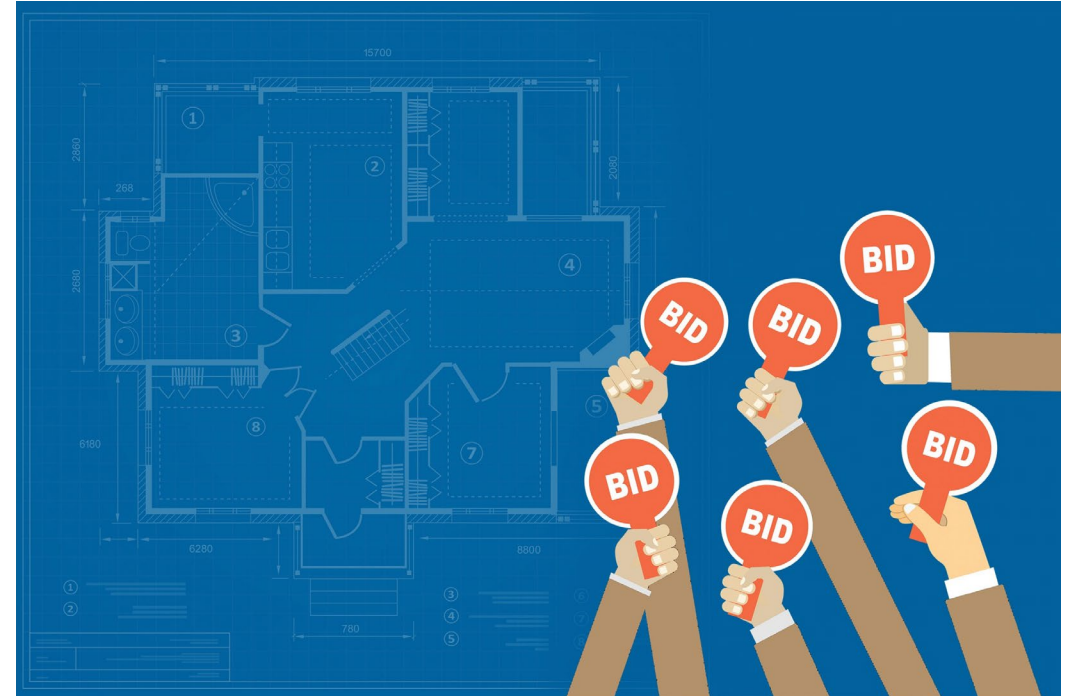
PROTEST STANDARD; BID IRREGULARITIES

If there are “**material irregularities**” in the bidding process, the public owner should not accept the bid.

Gostovich v. City of West Richland, 75 Wn.2d 583, 452 P.2d 737 (1969)

An owner may waive an irregularity as an informality if the irregularity is not material.

Test = whether or not the irregularity gives a bidder a **substantial advantage or benefit** not enjoyed by the other bidders.



MATERIAL IRREGULARITY? OR IMMATERIAL & WAIVABLE?

Examples from case law:

Material:

- **Bid not signed**
 - *A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist.*, No. 303, 5 Wn. App. 887, 491 P.2d 684 (1971)
- **WBE contractor not certified**
 - *Land Constr. Co., Inc. v. Snohomish Cnty.*, 40 Wn. App. 480, 698 P.2d 1120 (1985)

Not Material:

- **Late Bid**
 - *Gostovich v. City of West Richland*, 75 Wn.2d 452 P.2d 737 (1969)

Examples from practice:

Material:

- Error in calculation of successful bidders' labor rates when determining lowest priced bidder
 - Lesson: check the math!
- Bidder failed to list plumbing subcontractor
 - Lesson: check your subcontractor requirements
- Bidder failed to list required MBE subcontractor

COMMON GROUNDS FOR PROTEST

- Failure to list required subcontractor (Subcontractor listing statute, RCW 39.30.060)
- Bidder or subcontractor is unregistered or unlicensed
- Failure to respond to all items in the RFP
- Bidder lacks required past experience with projects of a similar size or nature (Supplemental Responsibility Criteria!)
- Excessively unbalanced bid items



LIMITED REMEDY IF PROTEST IS UNSUCCESSFUL



A disappointed bidder cannot recover damages; the only option is to immediately file for a TRO. Injunctive relief can only be given before a contract is executed. **Once the contract is signed, a bidder has no remedy.**



Competitive bidding laws are for the protection of the general public, not the protection of individual bidders. Courts have repeatedly denied damages claims for disappointed bidders.

Peerless Food Products, Inc. v. State, 119 Wn.2d 584, 835 P.2d 1012 (1992)

KEY TAKEAWAYS; HOW TO CONTROL THE PROCESS

- ✓ Crafting the bid documents and RFP
 - Specific and strategic supplemental bidder responsibility criteria;
- ✓ Discretion to waive minor irregularities
- ✓ Municipality can reject all bids and start the process over
 - Be sure to include language in the bid documents retaining this discretion
- ✓ Timing of notice of intent to award
 - Once a contract is executed, a disappointed bidder has no remedy

