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Steven K. Metcalf

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THE OKLAHOMA PUBLIC COMPETITIVE BIDDING ACT OF 1974: INGENUITY IN SUBMITTING TO THE PROCESS

competition . . . the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms¹

I. INTRODUCTION

Competition, the primary driving force supporting the socioeconomic environment of our nation,² has been used in the procurement of federal government contracts since at least before the commencement of the Civil War.³ It has been consistently recognized as the purest⁴ and most efficient⁵ means of achieving the greatest value for the least cost. However, inherent in the concept of competition is the overriding focus on success. As Vince Lombardi has often been misquoted, “winning is not everything, it’s the only thing.”⁶

This perception of competition intensifies the natural human desire to succeed,⁷ often leading competitors to devise methods by which to achieve an “unfair advantage.”⁸ In Oklahoma, where public works have come to play a predominant role in supporting the construction industry

1. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 268 (1983) (syllable markings omitted).

2. *Webster's Ninth New Collegiate Dictionary* defines capitalism as “an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision rather than by state control, and by prices, production, and the distribution of goods that are determined mainly by competition in a free market.” *Id.* at 204.

3. W.N. KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 14.1 (1986).

4. *Id.* § 15.2 note 1. “The value of a good service, bargained out between buyer and seller in a free, competitive marketplace, will be the purest value.” *Id.*

5. *Id.* § 14.1.

6. G.L. FLYNN, VINCE LOMBARDI ON FOOTBALL 14 (1973). The actual quote was “[w]inning is not everything—but making the effort to win is.” *Id.*

7. See generally Williams, *Achievement and Success as Value Orientations*, *ACHIEVEMENT IN AMERICAN SOCIETY* 13 (1969).

8. One example is the use of steroids by athletes.

through an otherwise depressed economic period,⁹ the additional motivation of economic survival has enhanced the potential for such activity.¹⁰

It is against this backdrop that we consider the Oklahoma Public Competitive Bidding Act of 1974 (the Act)¹¹ and two methods of achieving contract awards in possible circumvention of the "free and open competition" contemplated by the statute.¹² Protest filings,¹³ under circumstances substantially similar to those considered here, have led to resolution of these difficult issues elsewhere.¹⁴ Undoubtedly, similar action will eventually result in Oklahoma.

II. THE PUBLIC COMPETITIVE BIDDING PROCESS

Generally all public contracts in Oklahoma¹⁵ are awarded through the process of competitive bidding.¹⁶ And though the value threshold¹⁷

9. The importance of public works projects to the construction industry in Oklahoma is likely to continue. Highway projects continue to be an ongoing source of publicly contracted work. Reports that a significant percentage of Oklahoma bridges do not meet applicable standards undoubtedly will lead to renewed life in that area. Similarly, prison facilities have been adjudged grossly inadequate, leading to the construction of a new facility in one major metropolitan area, with planning and fundraising begun in another. See *Tulsa World*, Oct. 25, 1989, at 13, col. 1; *Tulsa World*, Oct. 27, 1989, at 2, col. 1; *Tulsa World*, Nov. 2, 1989, at 13, col. 1. See also Alvey, *Jails & Prisons*, 57 CONSTRUCTION NEWS 6, 20 (1990).

10. P.J. COOK, *BIDDING FOR THE GENERAL CONTRACTOR* (1985). "Competition can be fierce. The intensity of competition depends upon three factors: (1) the number of competing bidders, (2) the number and type of construction projects currently available, and (3) the economic conditions, both current and prospective. Fluctuations in the economy and the resulting behavior of competitors constitute the *environment* of the bidder." *Id.* at iii (emphasis in original).

11. Public Competitive Bidding Act of 1974, OKLA. STAT. tit. 61, §§ 101-136 (1981 & Supp. 1989).

12. J.F. CANTERBURY, *TEXAS CONSTRUCTION LAW MANUAL* (1981). "Public contracting is the subject of unique legislative enactments and rules of law. Because public officials are trustees of public funds and public lands, special statutes define the permissible limits of authority and discretion given to officials in contracting for goods and services." *Id.* § 3.01.

13. Simmons & Dzialo, *Protests Against the Award of Government Contracts: Forums and Remedies*, 55 OKLA. B.J. 1917 (1984). For the text of the protest provisions of the Act, see *infra* note 48 and accompanying text.

14. *City of Lakeland v. Union Oil Co.*, 352 F. Supp. 758 (M.D. Fla. 1973) (post-bid, pre-award negotiations with lowest responsible bidder held not violative of competitive bidding requirements, absent a showing of fraud or favoritism); *Fred Brunoli and Sons, Inc. v. Town of Woodbury*, 4 Conn. App. 185, 493 A.2d 264 (1985) (post-bid, pre-award negotiation with the lowest responsible bidder regarding unilateral mistake did not undermine the objective and integrity of the competitive bidding process, absent fraud or corruption); *Browning-Ferris Indus. v. City of Oak Ridge*, 644 S.W.2d 400 (Tenn. Ct. App. 1982) (post-bid, pre-award negotiations were not inconsistent with policies underlying the bidding statutes where undertaken with the lowest competent bidder); *Thelander v. City of Cleveland*, 3 Ohio App. 3d 86, 444 N.E. 2d 414 (1981) (post-bid, pre-award solicitation of commitments materially different from those bid, where pursued with only one bidder, served to circumvent the orderly process of secret, competitive bidding).

15. Similar competitive bidding statutes exist in most states and in the federal government. See Note, *Responsibility* 47 GEO. WASH. L. REV. 1102, 1103-04 nn.6-8 (1979); and 41 U.S.C. § 251-260 (1982).

16. "Public construction contract" is defined by statute as "any contract, exceeding Seven

varies from jurisdiction to jurisdiction, the process employed is largely the same throughout the construction industry,¹⁸ both in public and private development.¹⁹

This process normally begins with the selection of a design team.²⁰ The team works in concert with the public agency to design the project and prepare the bidding documents.²¹ After the project has been properly advertised for bids,²² these documents are distributed to the prospective bidding contractors.²³ From the bidding documents and any

Thousand Five Hundred Dollars (\$7,500.00) in amount, awarded by any public agency for the purpose of making any public improvements or constructing any public building or making repairs to the same." OKLA. STAT. tit. 61, § 102(4) (1981).

Section 103 provides that "[a]ll public construction contracts shall be let and awarded to the lowest responsible bidder, by free and open competitive bidding . . ." OKLA. STAT. tit. 61, § 103 (1981).

Section 131 of the Act prohibits splitting contracts in an effort to avoid competitive bidding: "No contract involving sums in excess of Seven Thousand Five Hundred Dollars (\$7,500.00) shall be split into partial contracts involving sums of below Seven Thousand Five Hundred Dollars (\$7,500.00) for the purpose of avoiding the requirements of this act." OKLA. STAT. tit. 61, § 131 (1981).

17. "Value threshold" in the context of this Comment means the statutorily prescribed amount beyond which a public construction contract must be submitted to the public competitive bidding process. *See supra* note 16.

18. For a general discussion of competitive bidding requirements, see 10 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 29.28-90 (3d ed. rev.); C. RHYNE, *MUNICIPAL LAW* 262-74 (1957); E.C. YOKLEY, 3 *MUNICIPAL CORPORATIONS* § 442 (1958 & Supp. 1980).

19. Because it is not restricted by statute, private competitive bidding often varies significantly from public competitive bidding in a technical perspective. However, the positive consequences of competition, *i.e.* "the best results at the lowest cost, the greatest value for the fewest dollars," *Flynn Constr. Co. v. Leininger*, 125 Okla. 197, 200, 257 P. 374, 378 (1927), motivate the continued use of competitive bidding in the private sphere.

20. Under the terms of OKLA. STAT. tit. 74, § 85.7(A)(2) (Supp. 1989), "[c]ontracts for . . . architectural, engineering, . . . or other professional services as such term is defined in Section 803 of Title 18 of the Oklahoma Statutes shall be exempt from competitive bidding procedures." *Id.*

21. Bidding documents include "the bid notice, plans and specifications, bidding form, bidding instructions, special provisions and all other written instruments prepared by or on behalf of an awarding public agency for use by prospective bidders on a public construction contract." OKLA. STAT. tit. 61, § 102(2) (1981). The "bidding form" is the form used by the bidder to transmit the bid, in its final form, to the public agency. *CONSTRUCTION DICTIONARY: CONSTRUCTION TERMS & TABLES AND AN ENCYCLOPEDIA OF CONSTRUCTION* 44 (1973). The bidding form will normally consist of an outline of the information requested in the bid documents, *i.e.*, total price, prices for alternates, unit prices, etc., all to be filled out by the bidder before submittal.

22. OKLA. STAT. tit. 61, § 104(1) (1981) provides that direct bid notice need only be sent to those "known prospective bidders, who have made known, in writing to the public agency their interest in bidding within the twelve (12) months immediately preceding the date of opening bids, [and] at least twenty (20) days prior to the time set for opening bids." *Id.* Further publication is required in local newspapers. OKLA. STAT. tit. 61, § 104(2) (1981).

23. OKLA. STAT. tit. 61, § 104 (1981) provides that "[a]ll proposals to award public construction contracts shall be made equally and uniformly known . . . to all prospective bidders and the public . . ." *Id.* The manner, method, and content of such notice is outlined in the remaining provisions of OKLA. STAT. tit. 61, §§ 104-105 (1981). Complete sets of the bidding documents shall be provided to any prospective bidder upon request. OKLA. STAT. tit. 61, § 106 (1981). The list of

subsequently issued addenda,²⁴ the respective bidders independently prepare²⁵ the estimated cost of the work. The cost estimated by each bidder is then submitted to the public agency at the time and place stipulated and on the form provided. All bids received in accordance with the bidding requirements are opened publicly and read aloud.²⁶ The bids, and any accompanying materials, are placed on file and remain available for public inspection.²⁷ Through consideration of the base bid²⁸ and any specified alternates,²⁹ the public agency will normally determine which bidder meets the criteria required of the "lowest responsible bidder" and will award the contract to the bidder selected.³⁰

The process of public competitive bidding, however, has sometimes fallen prey to the ingenuity of contractors, architects, and the public agencies involved. Through use of and familiarity with the process, various methods have been developed which would superficially appear to permit contravention of the purpose³¹ and policy of the Act. While the legitimacy of some of these methods have been addressed in other states,³² at least two such methods have yet to be considered by the

prospective bidders may be legitimately pared by the public agency through the use of prequalification statements. These statements are intended to identify in advance those bidders that qualify superficially as "responsible." OKLA. STAT. tit. 61, § 118 (1981). Prequalification as a responsible bidder does not, however, vest the bidder with a property right to the contract if he or she ultimately is the lowest bidder. The awarding agency remains empowered with the discretion to reject the prequalified bidder's status as "responsible" provided such discretion is exercised reasonably. *See Rollings Constr. Inc. v. Tulsa Metro. Water Auth.*, 745 P.2d 1176, 1179 (Okla. 1987).

24. It is often necessary to modify the bidding documents subsequent to their dissemination to the bidding contractors, but prior to submission of the bid. Such modification is commonly done through the issuance of addenda to the bidding contractors. Upon publication the addenda become a part of the bidding documents and will eventually become a part of the construction contract. CONSTRUCTION DICTIONARY: CONSTRUCTION TERMS & TABLES AND AN ENCYCLOPEDIA OF CONSTRUCTION 5 (1973).

25. OKLA. STAT. tit. 61, § 115 (1981) forbids "collusion among bidders or prospective bidders in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding, or otherwise . . ." *Id.* Bidders or prospective bidders guilty of collusion in violation of the statute shall be guilty of a felony and shall have their bids voided. *Id.*

26. OKLA. STAT. tit. 61, § 110 (1981).

27. OKLA. STAT. tit. 61, § 112 (1981).

28. Base bid means the "[a]mount of money stated in the bid as the sum for which the bidder offers to perform the work, not including that work for which alternate bids are also submitted." CONSTRUCTION DICTIONARY: CONSTRUCTION TERMS & TABLES AND AN ENCYCLOPEDIA OF CONSTRUCTION 35 (1973).

29. Alternate bid means the "[a]mount stated in the bid to be added to or deducted from the amount of the base bid if the corresponding change in project scope or alternate materials and/or methods of construction is accepted." CONSTRUCTION DICTIONARY: CONSTRUCTION TERMS & TABLES AND AN ENCYCLOPEDIA OF CONSTRUCTION 13 (1973).

30. *See infra* note 38.

31. For an evaluation and discussion of the purposes of the Act see *infra* notes 33-46 and accompanying text.

32. *See supra* note 14.

Oklahoma judiciary. However, given the reduction in private development within the state and a consequential rise to prominence of public work, coupled with an increase in the aggressiveness of contractors in the competitive bidding market, judicial consideration of these issues is inevitable. A judicial evaluation of the statutory validity of these approaches to the award of public contracts will almost certainly begin with consideration of the legislative intent in promulgating the Act and the stated or implied purpose of the Act.

III. MEANING AND PURPOSE OF THE ACT

In considering the validity of a public agency's approach to awarding public contracts under the Act, the judiciary must first determine the purpose of the legislature in enacting the competitive bidding statutes.³³ As defined, this purpose will serve as a guiding influence in the court's consideration of a particular approach and is, therefore, of significant importance in predicting the court's position regarding the approach's validity.

In the 1987 case of *Rollings Construction, Inc. v. Tulsa Metropolitan Water Authority*,³⁴ the Oklahoma Supreme Court relied on two different sources to support its interpretation of the legislative purpose of the Act. First, the court relied on language from a treatise on municipal corporations that indicated competitive bidding provisions "are enacted [solely] for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders"³⁵ Second, the court relied on a 1927 decision³⁶ which interpreted the language of a 1924 statute.³⁷ The court quoted the earlier decision, holding that the "sole purpose [of the competitive bidding process] is to obtain the best results at the lowest cost, the greatest value for the fewest dollars; in other words, it is a means for making the *best possible bargain*"³⁸

While the court appears to have reached a reasonable conclusion regarding one underlying purpose of the Act,³⁹ it did so without a stated

33. *United States v. Ray*, 488 F.2d 15, 18 (10th Cir. 1973); *Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 472 (W.D.Okla. 1976); *Humphrey v. Denney*, 757 P.2d 833, 835 (Okla. 1988).

34. 745 P.2d 1176 (Okla. 1987).

35. *Rollings*, 745 P.2d 1177-78 (quoting E. McQUILLIN, *supra* note 18, at § 29.29).

36. *Flynn Constr. Co. v. Leininger*, 125 Okla. 197, 257 P. 374 (1927).

37. State Highway Commission Act of 1924, ch. 48, §§ 2, 10, 12, 1923-1924 Okla. Sess. Laws 1924 Spec. Sess. 51 (codified as amended at OKLA. STAT. tit. 69, § 303, 304, 1101 (1981 & Supp. 1988) respectively).

38. *Rollings Constr. Inc. v. Tulsa Metro. Water Auth.*, 745 P.2d 1176, 1178 (Okla. 1987) (quoting *Flynn*, 125 Okla. at 200, 257 P. at 378) (emphasis added).

39. See *supra* notes 33 and 34.

consideration of the language of the Act itself⁴⁰ and apparently without a thorough consideration of other pertinent case law. These more traditional sources of statutory interpretation, when taken together with supplemental support from related federal statutes,⁴¹ might easily have led the court to identify an equally reasonable competing purpose.

This purpose is illustrated by the language of title 61, section 103 of the Oklahoma Statutes, which requires that public construction contracts be awarded to the lowest responsible bidder⁴² by "*free and open competitive bidding*."⁴³ Further support is found in the sections that follow section 103. There the statute establishes procedures by which the "free and open" nature of the competitive bidding process may be preserved.⁴⁴ These illustrations, along with earlier decisions by the Oklahoma Supreme Court,⁴⁵ clearly establish fairness in the bidding process as an underlying objective in promulgating the Act.⁴⁶

40. See *Brooks v. Brinegar*, 391 F. Supp. 710, 713 (W.D. Okla. 1974) ("the intention of the legislative body with regard to a particular statute is to be construed primarily from the language of the statute itself."); *Personal Loan & Fin. Co. v. Oklahoma Tax Comm'n*, 437 P.2d 1015, 1018 (Okla. 1968) ("In ascertaining legislative intent, the language of the entire act should be considered and that construction given which is reasonable and sensible.").

41. The existence of a competing purpose is further substantiated by a statement of Congressional Policy Decision with respect to Federal Procurement. 41 U.S.C. § 401 (Supp. V 1987).

42. OKLA. STAT. tit. 61, § 103 (1981) reads:

All public construction contracts shall be let and awarded to the lowest responsible bidder, by free and open competitive bidding after solicitation for sealed bids, in accordance with the provisions of this act. No work shall be commenced until a written contract is executed and all required bonds and insurance have been provided by the contractor to the awarding public agency.

Id.

43. *Id.*

44. OKLA. STAT. tit. 61, § 104 (1981) requires that notification to prospective bidders and the public on public construction projects be made "equally and uniformly known," and thereafter prescribes the appropriate methods and timing of such notice. *Id.* OKLA. STAT. tit. 61, § 105 (1981) prescribes the content of the bid notice. OKLA. STAT. tit. 61, § 115 (1981) expressly prohibits "[a]ny agreement or collusion among bidders or prospective bidders in restraint of freedom of competition . . ." OKLA. STAT. tit. 61, § 116 (1981) prohibits disclosure by an employee of the public agency of any term of a bid prior to the time set for opening of bids, and of any information which is to be contained in a public bid notice prior to the date of publication of said notice. Public employees are also prohibited from interfering with the distribution of said information after publication. Additionally, OKLA. STAT. tit. 61, § 122 (1981) provides a process by which any taxpayer of Oklahoma or any bona fide unsuccessful bidder may protest the award of a public construction contract on the grounds that such award was not the result of "free and open competitive bidding." *Id.*

45. See *State ex rel. Sanders v. Grisso*, 184 Okla. 348, 350, 87 P.2d 155, 157 (1939) ("competitive bidding requires only that all bidders be given an opportunity to bid on all plans and specifications upon the same terms and conditions . . ."). See also *Hannan v. Board of Educ.*, 25 Okla. 372, 376-94, 107 P. 646, 648-55 (1909).

46. 41 U.S.C. § 401(1) and (2) provide:

It is the policy of the United States Government to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal Government by—

If this may fairly be considered an accurate reading of authority, then it is clear that the statute should be construed in light of both purposes with respect to any challenge to competitive bidding practices under the Act. However, because the “*best possible bargain*” is theoretically and most efficiently achieved through “*free and open competition*,” it would appear that fairness in the bidding process is a necessary prerequisite to procuring the best bargain. Therefore, in analyzing the validity of an agency’s approach to award of public construction contracts, a court must determine the extent to which fairness may be compromised while still achieving the “*best possible bargain*.”

IV. APPROACHES TO CIRCUMVENTION OF THE ACT

Several readily identifiable approaches are available for manipulation by the public agency intent on manufacturing a specific outcome.⁴⁷ These cases of unscrupulous, intentional, and collusive activity are the practices the statutes were intended most to prevent. And each, upon the proper exercise of the protest rights available in all public competitive bidding situations,⁴⁸ will be subject to judicial review and reversal upon a finding that the public agency has abused its discretion with respect to the award or where the award is the result of fraud or collusion.⁴⁹

But what of those cases where the intent of the agency comports with the intent and purpose of the statute and is in all things honorable, yet, by its very method arguably serves to contravene one of the purposes

(1) promoting full and open competition;

(2) establishing policies, procedures, and practices which will provide the Government with the property and services of the requisite quality, within the time needed, at the lowest reasonable cost;

.....
(6) eliminating fraud and waste in the procurement process;

Id.

47. For a general overview of pre-award fraud in formation of government contracts see ABA TASK FORCE, IDENTIFYING AND PROSECUTING FRAUD AND ABUSE IN STATE AND LOCAL CONTRACTING 3-5 (1984).

48. The protest provisions of the Oklahoma Act are embodied in OKLA. STAT. tit. 61, § 122 (1981):

Any taxpayer of the State of Oklahoma, or any bona fide unsuccessful bidder on a particular construction contract, within ten (10) days after any such contract has been executed, is empowered to bring suit in the district court of the county where the work, or the major part of it, is to be done to enjoin the performance of such contract if entered into in violation of the provisions of this act.

Id.

49. Rollings Constr., Inc. v. Tulsa Metro. Water Auth., 745 P.2d 1176, 1179 (Okla. 1987); Eckerle v. Ferris, 175 Okla. 107, 116, 51 P.2d 766, 776 (1935); Leininger v. Ward-Beekman & Brooks, Inc., 139 Okla. 292, 298, 282 P. 467, 472 (1929); City of Bartlesville v. Riggs, 114 Okla. 181, 183, 245 P. 603, 605 (1925).

of the Act? What of the situation where the means to award, though in keeping with the terms of the Act, results in promotion of one of the purposes at the expense of the other? Although the same remedies are available through protest procedures, there exists no dishonorable or contravening intent. Consequently, something more must serve as the basis for judicial decision.⁵⁰ The obvious focus of the court's evaluation must necessarily be the acts themselves and their effect, even absent improper intent, on the purposes of the competitive bidding process.

A. *Illicit Manipulation of the Bidding Process*

1. Manipulation of Alternates

In assembling a "bid package," public entities will often request the bidding contractors to submit bids in two forms. In the first, the bid reflects a contractor's estimate of cost for the entire body of the work defined by the bidding documents.⁵¹ In the second, the contractors are asked to submit prices for various changes to the base bid scope of work. This second type of bid is generally referred to as a bid alternate.⁵² These alternates may include additions to or deletions from the base bid scope of work, or may involve alternative means, methods, or materials for carrying out the work as bid in the base.⁵³ In either case, defining the scope of the bidding documents, and consequently the alternates, along with selection of those alternates to be incorporated into the construction contract, resides in the discretion of the contracting public agency.⁵⁴

a. *The Method of Manipulation*

While bid alternates serve a beneficial function in allowing the public agency an opportunity to evaluate a wide variety of scenarios with respect to the scope of the work,⁵⁵ they also provide an avenue for abuse

50. In many states and the federal government any post-bid, pre-award discussion with a single bidder for the purpose of materially modifying the content of a bid is condemned as contravening the purposes of competitive bidding, irrespective of the motivating intent. See ABA TASK FORCE, IDENTIFYING AND PROSECUTING FRAUD AND ABUSE IN STATE AND LOCAL CONTRACTING 1 (1984) ("award is made without further discussion."); and J.F. DONNELLY, A TREATISE ON THE LAW OF PUBLIC CONTRACTS, 193 (1922) ("nor may the public authorities who receive the bid permit a change in any material respect.").

51. See *supra* note 21 and accompanying text.

52. H.A. COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW 57 (1961). See also *supra* note 29 and accompanying text.

53. See *supra* note 29 and accompanying text.

54. The authority of a public agency to solicit and award public construction contracts is implied in the terms of the Act taken as a whole. See, e.g., OKLA. STAT. tit. 61, § 102(1)-(2) (1981).

55. See *Mayor of Baltimore v. Flack*, 104 Md. 107, 128-29, 64 A. 702, 710 (1906).

from two very different angles. First, favoritism may be expressed by defining the scope of one or more of the alternates in such a way as to give a favored contractor a decided advantage over the others.⁵⁶ A second means of favoritism, which could easily be combined with the first, is the solicitation for competitive pricing of a multitude of alternates followed by a post-bid, pre-award manipulation of those alternate prices to cause a favored bidder to be the low bidder. This is an available option because the basis for award may be defined by the public agency to include the base bid alone or the base bid plus any accepted alternates.⁵⁷

In some instances such practices could clearly be exposed as an arbitrary and capricious action by the awarding agency. However, more often than not, the acceptance and rejection of specific alternates could readily be justified as "in the best interest of the public." The very nature of the "alternate" process supports this justification. In order to award the project to the favored bidder whose "base bid"⁵⁸ is not the lowest submitted, it is necessary for the agency to accept an assortment of additive and deductive alternates that, when aggregated with the base bid, cause the favored bidder to have the low base bid plus accepted alternates.

The ease of justification lies in mathematical logic. In order for the accepted total of the favored bidder's adjusted bid to be lower than the adjusted bids of the other competing bidders, the differential between the favored bidder's alternate prices and the other bidders' alternate prices must be, as an aggregate, sufficient to overcome the difference in the base bids.⁵⁹ Therefore, as an aggregate, the favored bidder's additive alternates must be less than the additive alternates of the other bidders; and the favored bidder's deductive alternates must be greater than the deductive alternates of the other bidders. In both cases it may be explained that the public is receiving the benefit of the bargain by accepting the favored contractor's bid because it will be paying less for the work included in the additive alternates and receiving a greater credit for the

56. S.M. SIEGFRIED, INTRODUCTION TO CONSTRUCTION LAW 1.03(d) (1987); see also *State ex rel. Sanders v. Grisso*, 184 Okla. 348, 350, 87 P.2d 155, 157-58 (1939).

57. See *Mayor of Baltimore v. Flack*, 104 Md. 107, 64 A. 702 (1906); H.A. COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW 58-59 (1961).

58. See *supra* note 28.

59. For example:

	Base bid "A" = \$100,000.00	Base bid "B" = \$96,000.00
Accepted alt. 1	+\$ 1,500.00	+\$ 2,800.00
Accepted alt. 2	+\$ 4,000.00	+\$ 6,100.00
Accepted alt. 3	-\$ 4,000.00	-\$ 2,000.00
	<u>\$101,500.00</u>	<u>\$102,900.00</u>

work deleted by the deductive alternates.⁶⁰

Therefore, in this scenario, the public agency benefits from the logic inherent in the process to justify almost any decision. By defining a sufficient number of additive and deductive alternates from which to choose, a public entity need only discover the correct combination of base bid and alternates to cause the favored bidder to be awarded the contract on the basis of the "low bid."⁶¹

b. *One Proposed Statutory Resolution*

Although "alternates" are not discussed in the provisions of the Act, a simple addition to these provisions could, at worst, minimize the potential effects of this sort of illicit practice. The suggested method is one used by the Federal Procurement Act⁶² and clearly supports the idea of free and open competitive bidding. The addition would incorporate language that requires the public authority to prioritize internally the alternates by rank according to likelihood of acceptance or necessity.⁶³ This prioritized list would then be available to all the bidders, giving each the opportunity to stand on equal footing. The alternates would bear a relation to one another that would prevent the acceptance of one without acceptance of those preceding it in importance.⁶⁴

60. In the example illustrated in note 59, the aggregate cost represented by the accepted alternates of bidder *A* would result in an additional cost to the public of \$1,500.00, whereas an aggregate cost of the same alternates of bidder *B* would result in additional cost to the public of \$6,900.00. Therefore, acceptance of the selected alternates may be justified on the theory that the public is paying a smaller amount than would have resulted had the low base bid, plus accepted alternates, been taken.

61. Low bid in this scenario is determined by considering the aggregated amount of the base bid and all accepted alternates.

62. 41 U.S.C. § 253(a) (1984) states:

(b) In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include—

(1) a statement of—

(A) all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

(B) the relative importance assigned to each of those factors;

Id. See also D.P. ARNAVAS & W.J. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK 4-5 (1986).

63. Though the federal statute does not expressly refer to alternate bids, the inclusion of alternate bids in the purview of "all significant factors" is a reasonable reading of the statutory intent.

64. To illustrate this process, suppose the public agency has identified three changes to the base bid scope of work that, if sufficient funds are available beyond the low base bid, the agency would like to incorporate into the contract award. The agency would describe in textual and/or graphic form the three separate changes. These changes would then be internally prioritized in order of preference and numbered as alternates Number 1, Number 2, and Number 3. The alternates would then be published to each of the bidding contractors, along with notification that the alternates will be accepted in their order of priority. The contractors in turn, would include estimated costs for the three alternates as part of the bid submitted. Upon evaluating the bids, and assuming that the funds

B. *Post-Bid, Pre-Award Negotiation*

This form of potential circumvention might take two distinct forms. First, the public entity, after opening the bids but prior to award, requests the apparent low responsible bidder⁶⁵ to provide additional pricing with respect to a deferred purchase program.⁶⁶ Second, again after opening the bids but prior to award, the public entity directs the apparent low responsible bidder to develop a shopping list of “value engineering”⁶⁷ items. From this list the agency chooses those items which are in the best interest of the public. These items, and their associated costs, whether additive or deductive, are included in the award. The value engineering process may be used to upgrade the “as-bid” project,⁶⁸ ordinarily at an increase to the bid amount, or downgrade the project, thereby reducing the overall cost of the project and permitting it to come within available funding.⁶⁹

available to the public agency are in excess of the low base bid, the agency may accept in order, alternate Number 1, Number 2, and Number 3 to the extent of the available funds. The agency, however, could not select alternate Number 2 without having accepted alternate Number 1, nor could it accept alternate Number 3 without having accepted alternates Number 1 and Number 2.

65. The public agency, by implication, is empowered with the discretion to reject the bid of any contractor if the contractor does not meet the broadly defined criteria of a responsible bidder. *See* OKLA. STAT. tit. 61, § 111 (1981) which states: “The awarding of a contract to the *lowest responsible bidder*.” *Id.* (emphasis added); and OKLA. STAT. tit. 61, § 117 (1981), which provides:

If an award is made to other than the *lowest bidder*, the awarding public agency shall accompany its action with a publicized statement setting forth the reason for its action. Such statement shall be placed on file, open to public inspection and be a matter of public record.

Id. (emphasis added). *See also* OKLA. STAT. tit. 61, § 118 (1981), which provides:

In order to determine the responsibility of bidders, the awarding public agency may require prospective bidders to prequalify as responsible bidders prior to submitting bids on a public construction contract. Notice of any such prequalification requirement shall be made equally and uniformly known by the awarding public agency to all prospective bidders and the public in the same manner as proposals to award public construction contracts as set forth in Section 4 hereof.

Id. *But see* Rollings Constr. Inc. v. Tulsa Metro. Water Auth., 745 P.2d 1176 (Okla. 1987), wherein the Oklahoma Supreme Court rejected the argument that prequalification as a “responsible bidder” deprives the public agency of the discretion to find otherwise; and ABA TASK FORCE, IDENTIFYING AND PROSECUTING FRAUD AND ABUSE IN STATE AND LOCAL CONTRACTING 3 (1984) (“Courts in a majority of jurisdictions defer to the awarding body’s judgment.”).

66. For a discussion of the deferred purchase concept see *infra* note 70 and accompanying text.

67. Value engineering is “[a] branch of engineering whose objective is to effect economy in the cost of constructing a project. Evaluating any object’s function and bettering the object in terms of dollars and functional objectives.” CONSTRUCTION DICTIONARY: CONSTRUCTION TERMS & TABLES AND AN ENCYCLOPEDIA OF CONSTRUCTION 462 (1973).

68. When the amount of the lowest responsible bid is less than the aggregate amount of available funds the agency may choose to upgrade portions of the project with the excess funds.

69. A common example of this predicament is that of an agency or institution that relies on donations or federal funding for all or part of the funds necessary to develop a particular project. At the time the project is bid, a certain amount of funds, thought to be sufficient, is available for the agency’s use in developing the project. However, when the bids are opened and tabulated, taking

Each of these methods arguably contravenes the purposes of the Act. However, it may also be effectively argued that the integrity of the process remains intact and the purpose of competitive bidding is not circumvented.

1. Deferred Purchase

The deferred purchase concept operates to defer the purchase of designated portions of the work until some later date, usually within the duration of the project.⁷⁰ The deferral of "as-bid" costs permits the initial project cost commitment to be reduced to an amount that more closely aligns with the funds allocated and available for the project at the time of award. In this way the contract may be awarded without committing to costs beyond those initially available. By allowing the project to go forward at a reduced scope and cost, this approach benefits the public agency by (1) allowing the construction process to begin on what is often a badly needed facility,⁷¹ and (2) avoiding the significant additional cost associated with rejecting all the bids, revising the contract documents to reflect a reduced scope, and readvertising the project for rebidding.

But does selecting one contractor, ordinarily the apparent low responsible bidder on the originally advertised project, with whom to develop and reprice a deferred purchase program, defeat the competitive bidding objectives of the Act? While arguments may be reasonably made in support of both positions, the issue has not been judicially considered at the district court or appellate court level in Oklahoma.

a. *The Argument for Strict Statutory Construction*

The closest resemblance to official consideration of the matter in Oklahoma is represented by the 1977 opinion of the Attorney General of Oklahoma.⁷² In responding to a question presented by state Senator Bob

into account all possible alternate combinations, the lowest amount bid is greater than the available funds. Generally unable to contract for an amount in excess of the available funds, the public agency is faced with a dilemma. See J.F. CANTERBURY, TEXAS CONSTRUCTION LAW MANUAL § 3.10 (1981). Rather than commit funds currently unavailable, the agency may: (1) reject all bids, revise the bidding documents to eliminate a sufficient scope of work to bring the cost within budget, and republish the documents for bidding; or (2) decrease the existing scope through discussions with and pricing by the lowest responsible bidder.

70. The portion of work deferred most often will be a component that is not critical to completion of the project until near the end of the scheduled duration. Likely examples are sitework, *i.e.*, landscaping and paving, and any expensive equipment.

71. State *ex rel.* Tuxhorn v. District Court, 464 P.2d 758, 759 (Okla. 1969).

72. 76 Op. Okla. Att'y Gen. 413 (1977). Additionally, the procurement statutes of the federal

Funston, the Attorney General wrote, "no provision is found which authorizes a governing body to negotiate with a low bidder In order to be able to enter into a construction contract, [the governing body] must either reject the bids and solicit new bids or properly declare an emergency pursuant to Section 130."⁷³

Though the response was fact specific, being directed to situations where all the bids submitted exceed the engineer's estimate,⁷⁴ it appears relatively clear that the Attorney General's position is appropriate regardless of the status of the bids received relative to the available funds. Therefore, whether the purpose of instituting a deferred purchase plan was to reduce the scope and cost of the contract award because the bids were in excess of the funds available, or because the governing body experienced a change of position regarding the inclusion of certain portions of the work, it appears to contravene the competitive bidding objectives of the Act to select, prior to award, one contractor from a group of bidding contractors with whom to alter the scope and cost of the bid submitted.⁷⁵

The purpose of the Act is to promote "free and open competition" in an effort to prevent fraud and favoritism⁷⁶ in the award of public works contracts and to provide a fair forum in which contractors might freely compete for their livelihood. It may be argued that by limiting post-bid, pre-award discussions regarding scope and price to one contractor, whether the initial low responsible bidder or not, the benefits and safeguards inherent in competitive bidding can never be fulfilled. Unless the "competition" remains "free and open" until award, the purposes and provisions of the Act are improperly contravened and any award resulting from such irregular acts should be found absolutely void. Any other result would be clearly unfair to the other competing contractors and would not fully achieve the benefits and provide the safeguards intended by the Act.

government have been interpreted to require that any post-bid discussions regarding any offer be conducted not only with the successful offeror (lowest responsible bidder), but also with those bidders found to be within the competitive range. See 56 Op. Comptr. Gen. 768,780 (1977).

73. 76 Op. Okla. Att'y Gen. 413-14 (1977).

74. Under the terms of OKLA. STAT. tit. 11, § 673 (1971) competitively bid projects were previously required to have been first subjected to review and pricing by an engineer. The statute requiring this review was repealed in 1972. However, informal pricing by the design architect/engineer is still done to determine whether the project, as designed, will "fit" within the "budget."

75. See *supra* note 72 and accompanying text.

76. See *supra* notes 33-46 and accompanying text.

b. *The Argument for a Practical Reading of the Statutory Requirements*

A reasonable argument may also be made that post-bid, pre-award deferred purchase activity does not contravene the purposes of the Act. This argument, however, is necessarily founded on two presumptions: first, the deferred purchase activity is pursued with the lowest responsible bidder;⁷⁷ and second, the competitive bidding process, to the point of deferred purchase discussions, has been conducted without irregularity. Absent these essential criteria, any post-bid, pre-award deferred purchase activity would serve only as a secondary source of dispute.⁷⁸

Assuming *arguendo* that the competitive bidding process has concluded without irregularity and that any deferred purchase activity is pursued with the lowest responsible bidder, it may be argued that the bidder selected for further discussion reached the position of lowest responsible bidder through full compliance with the statutory provisions of the Act and that all competing contractors were given a similar opportunity to achieve that status. This reasoning leads to the logical conclusion that the purpose enunciated by the Act, namely that publicly contracted work should result from "free and open" competitive bidding, was adequately and fairly fulfilled. Therefore, any post-bid, pre-award deferred purchase activity pursued with the lowest responsible bidder is within the provisions and purposes of the Act and should be left to the discretion of the public agency acting in the best interest of the public.

c. *A Practical Resolution of the Dilemma*

While it is clear that taken to a logical extreme the provisions of the Act require the "competition" of bidding to remain "free and open" until contract award, the statute also vests the public entity with substantial discretion throughout the process.⁷⁹ Again assuming *arguendo* that the competitive bidding process has reached the point of post-bid, pre-award

77. See *supra* notes 42 and 65.

78. The Act prescribes various forms of conduct required by the public agency in competitively bidding work. Violation of any of these criteria is cause for challenge. Likewise, though the agency is afforded significant discretion in selecting the lowest responsible bidder, the exercise of that discretion may also be challenged within the terms of the Act. See *supra* note 48 and accompanying text.

79. A public agency is implicitly and expressly empowered throughout the Act with a broad range of discretion in soliciting and awarding public construction contracts. See generally OKLA. STAT. tit. 61, § 111 (1981) (implicit discretion to reject the bid of any contractor found not to be a responsible bidder); OKLA. STAT. tit. 61, § 117 (1981) (implicit discretion to award to a bidder other than the lowest bidder); OKLA. STAT. tit. 61, § 118 (1981) (discretion to require prequalification of bidders); OKLA. STAT. tit. 61, § 119 (1981) (discretion to reject "any or all bids" and resolicit). The Oklahoma Supreme Court has also recognized the broad discretion vested in the awarding public

consideration without irregularity, it appears logical that the purposes of the Act have been fulfilled. First, the "fair and open competition" requirement has been satisfied because it is through the proper execution of the process that the lowest responsible bidder was identified. Second, the "best bargain" objective may be satisfied by allowing the public agency to exercise its discretion in subsequent discussions with the lowest responsible bidder.

This position may be supported by two rationales. First, if any of the bids submitted represent an amount below that of the available funds, the public agency would be within its rights to award the contract to the lowest responsible bidder and negotiate revisions to the bid amount in the context of a change order adjustment to the contract.⁸⁰ The subtle difference between this sort of clearly legitimate practice and the somewhat questionable practice of negotiating with the lowest responsible bidder prior to award is in the definition of the project scope. Because the amounts of the bids are a function of the design as defined in the bidding documents, the agency's failure to assess properly the cost of the project at the design phase would necessarily result in the additional cost to the public of redesign and rebid. It seems untenable to suggest that the legislature intended to limit the exercise of agency discretion to only those instances where it was able to assess properly the fluctuating cost of a project while still in the design phase. Second, it is equally untenable to suggest that the legislature would promote the exercise of agency discretion in negotiating with the lowest responsible bidder after contract award, while limiting similar discussions with the same bidder when held prior to award. This is especially true where the discussions are pursued in an effort to define properly the scope of the project in relation to the available cost and thus avoid the additional cost of redesign and rebid.

Use of the post-bid, pre-award approach is compelling for two additional reasons. First, in the pre-award approach, because award of the project has not yet been made, the selected bidder is not under contract. Consequently the public agency has a carrot to dangle during the deferred purchase discussions. Strengthening the bargaining position of the public agency relative to the selected bidder ensures that the bidder will

agency. See *Rollings Constr. v. Tulsa Metro. Water Auth.*, 745 P.2d 1176, 1178 (Okla. 1987); *State ex rel. Sanders v. Grisso*, 184 Okla. 348, 350, 87 P.2d 155, 158 (1939).

80. The term "change order" refers to the document or documents that amend the terms of the public construction contract after award. Change orders are issued periodically during the construction process to modify the original scope of work, and normally also modify the contract amount and/or project duration. CONSTRUCTION DICTIONARY: CONSTRUCTION TERMS & TABLES AND AN ENCYCLOPEDIA OF CONSTRUCTION 84 (1973).

bargain in good faith during the deferred purchase discussions. Moreover, by equalizing the bargaining power, the public agency enjoys the additional assurance that the public will receive the best bargain available. Second, the post-bid, pre-award approach permits budgetary scope revisions prior to contract award, thereby preventing infringement of the post-award change-order percentage limitations imposed by the statute.⁸¹ Because changes in excess of this stipulated percentage must be advertised and competitively bid, as if an entirely new project,⁸² infringement of the percentage prior to award would, quite obviously, negate the agency's efforts to avoid the expense of readvertising and rebidding the same project. In addition, coordination related problems could arise should a contractor other than the original contractor be successful in the subsequent letting.

A second rationale supports the position that the public agency should be vested with the discretion to pursue pre-award discussions with the lowest responsible bidder without being found to contravene the Act. Simply stated, absent any fraudulent activity by the public agency during the deferred purchase discussions, the general public will receive the benefit of those discussions, and this benefit will only be enhanced by the increased bargaining power of the public agency, resulting from the character of pre-award deferred purchase activity.

Oklahoma courts have clearly identified the interests of the public as the primary interest to be preserved by competitive bidding.⁸³ In so doing, the courts have vested the public agency with the discretion to administer the Act in a manner that most suitably achieves that end.⁸⁴ The public agency functions neither autonomously nor without established guidelines.⁸⁵ Its conduct remains subject to judicial review through the filing of a statutorily prescribed protest⁸⁶ by any taxpayer or competing

81. The Act imposes limitations on the aggregated amount of change orders that may be appended to a public works construction contract. Generally, OKLA. STAT. tit. 61, § 121 (1981) provides that the total amount of change orders is limited to the following percentages of the original contract amount: (1) If the original contract amount is less than or equal to \$1,000,000.00, the maximum aggregated change order amount may not exceed fifteen percent of the original contract; (2) If the original contract amount is greater than \$1,000,000.00, the maximum aggregated change order amount may not exceed ten percent.

82. Changes to the scope of work requiring additive change orders in excess of these statutorily stipulated percentages must be readvertised for bids. OKLA. STAT. tit. 61, § 121 (1981).

83. The primary interest to be served by competitive bidding is that of the public. *Supra* notes 33-46 and accompanying text.

84. *See supra* note 79 and accompanying text.

85. *See supra* note 78 and accompanying text.

86. *See supra* note 48 and accompanying text.

contractor,⁸⁷ and it must operate within the statutorily prescribed guidelines of the Act. The utilization of these safeguards should adequately protect both the interests of the public and the competing contractors in the event of fraudulent, collusive, or biased acts by the public agency.

2. Value Engineering

Value engineering operates in much the same manner as the deferred purchase concept. It involves the attempt to amend the bid of the lowest responsible bidder by negotiating with the bidder after the competitive bidding process has concluded. Like the deferred purchase concept, value engineering attempts to change the scope of the as-bid project⁸⁸ and reap the cost benefits associated with a decreased scope.

This process differs from the deferred purchase concept primarily in its structure. Whereas the deferred purchase concept relies largely on the public agency's input in defining the scope of the discussion and pricing, the value engineering concept relies almost exclusively on the ingenuity and imagination of the bidder to propose changes to the scope of the work and provide the concomitant pricing. It is then within the agency's discretion to accept or reject the changes proposed.

Because of the similar character of post-bid, pre-award value engineering negotiation and post-bid, pre-award deferred purchase negotiation, the arguments in support and derogation of the validity of each are likewise very similar. Each must also necessarily be founded on the same basic presumptions: (1) that the competitive bidding process to the point of post-bid, pre-award has been conducted without irregularity; (2) that the selection of the lowest responsible bidder was accomplished without fraud, collusion, or favoritism; and (3) that the post-bid, pre-award negotiations are pursued with the lowest responsible bidder.

a. *The Argument For Strict Statutory Construction*

Again it may be argued that the full benefit of competitive bidding, and therefore the full purpose of the Act, is not fulfilled unless the competitive process remains "free and open" until award. In the case of post-bid, pre-award value engineering, this means the competitive process must necessarily be available to all competing contractors throughout

87. See *supra* note 48 and accompanying text.

88. See *supra* note 67 and accompanying text.

any value engineering discussions that occur after the bid opening. Absent the opportunity for participation by all interested bidders,⁸⁹ the purposes of the Act are not fulfilled and any award that results from value engineering should be invalidated upon the proper filing of a protest pursuant to section 122 of the Act.⁹⁰

b. *The Argument for a Practical Reading of the Statutory Requirements*

In support of the post-bid, pre-award pursuit of value engineering negotiations with *only* the lowest responsible bidder, it may be argued that the legislature vested the public agency with substantial discretion in administering the Act in the best interests of the public and in fairness to the competitive bidders as a whole. It may be argued further that the value engineering negotiation with the lowest responsible bidder does not contravene the competitive process mandated by the Act because it is through the competitive process that the lowest responsible bidder is established. In addition, by negotiating through the value engineering process prior to awarding the contract, the public agency is in a superior bargaining position, thereby better achieving the best interests of the public and fulfilling the judicially recognized purpose of the Act. Finally, continuing to bargain after the bids have been received permits the public agency to avoid the costly and time consuming process of revising the contract documents, re-advertising, and rebidding the project only to run the risk that the bids will again be of such a nature as to make awarding the contract impossible.

c. *A Practical Resolution to the Dilemma*

As with the deferred purchase concept, either argument has significant merit, and a judicial resolution of the dispute could readily be supported either way. However, as with deferred purchase, the broad discretion assigned the public agency in administering the competitive bidding process⁹¹ carries with it the necessary implication that the agency will, at all times, act in pursuit of the defined purposes of the Act. Any deviation from this obligation may be contested through protest filings and is thereby subject to judicial review. Moreover, it clearly places

89. Some of the original bidders may not be interested in further pursuing the project for a variety of reasons: conflicting bid schedules, position relative to the low bidders, error in the original bid submitted, or unwillingness to expend additional funds.

90. See *supra* note 48 and accompanying text.

91. See *supra* notes 54, 65 and 79 and accompanying text.

the agency in a position of superior bargaining power to avoid a contractual commitment until all the terms of that commitment have been resolved to the best interest of the general public.

V. CONCLUSION

The Oklahoma Public Competitive Bidding Act of 1974 clearly prescribes the process by which impropriety in the award of public contracts may be challenged. The real question is, what constitutes an improper award? Cases involving improper motives serve as the prototypical example because the impropriety of a motive is defined in terms of the purposes of the Act; *i.e.*, securing for the public the "best bargain" available through "free and open competition."

Less clear, however, are those cases in which motive is not at issue but rather the process employed. The result in such cases is necessarily dependent upon the relative importance assigned to the competing purposes. Absent clear legislative intent as to the proper assignment of this relative importance, the judiciary is placed in the position of balancing these purposes.

Should the judiciary determine that maintaining the integrity of the process is of greater value, it will likely employ a strict statutory interpretation to maximize the "free and open competition" feature of the Act. However, should it be determined that the purposes are of relatively equal value or that the "best bargain" purpose is superior, a practical reading of the statutory language is likely to be considered more appropriate. In any event, with the reliance of the construction industry in Oklahoma shifting to public works projects, it is inevitable that such difficult policy issues will demand resolution.

Steven K. Metcalf

