

November 8, 2005



VIA OVERNIGHT MAIL

Mr. Patrick S. Hosty
Executive Director
LECET
999 McClintock Drive, Suite 300
Burr Ridge, IL 60527

Re: Responsible Bidder Ordinance

Dear Mr. Hosty:

This correspondence is written in response to your request for our opinion regarding the legal status of LECET's Responsible Bidder Ordinance, hereto attached. For the reasons set forth below, we believe that such an Ordinance is not only legal for governmental purchasing of construction goods and services, but also advisable for governmental entities in the exercise of their purchasing responsibilities.

OVERVIEW

Illinois state courts have not established set standards by which the term "responsible bidder" can necessarily be defined, and federal courts construing Illinois law have likewise refrained from providing a clearly delineated, all-encompassing set of factors that define the term. In fact, in summarizing the relevant case law, one Illinois state court opined, "the term 'responsible bidder' is incapable of any exact definition." *Oscar George Elec. Co. v. Metropolitan Fair & Expo. Auth.*, 104 Ill. App. 3d 957, 963 (1st. Dist. 1982).

The courts have consistently held, however, that statutes requiring the award of contracts to the lowest responsible bidder do not require the award of such contracts to the lowest bidder. Instead, the courts have empowered municipalities and purchasing agents to consider various factors in determining the financial responsibility and practical ability of the Contractors who have bid on a given contract.

To that end, the courts have consistently afforded municipalities and purchasing agents great deference in the award of contracts, and will only disturb a contract award if arbitrary conduct on the part of the municipalities and purchasing agents, such as fraud, lack of authority,

unfair dealing, or favoritism, can be proven. Therefore, in the event that a municipality adopts a "responsible bidder" ordinance, we believe that the courts would defer to the municipality's definition of "responsible", assuming the reasonableness of the ordinance's definition.

BACKGROUND

The Illinois Supreme Court has historically held that statutes requiring the award of contracts to the lowest responsible bidder do not require that such contracts be awarded to the Contractor offering the lowest bid. *People ex rel. Assyrian Asphalt Co. v. Kent*, 160 Ill. 655, 660-62 (1896); *Hallett v. City of Elgin*, 254 Ill. 343, 346-47 (1912); *People ex rel. Peterson v. Omen*, 290 Ill. 59, 67 (1919); *S.N. Nielsen v. Public Building Comm'n of Chicago, et. al.*, 81 Ill. 2d 290, 299 (1980); *Court Street Steak House Inc. v. County of Tazewell*, 163 Ill 2d 159, 165 (1994). Moreover, the Court has repeatedly noted that the term responsible refers to more than just the pecuniary ability and financial responsibility of a bidder. *Assyrian Asphalt*, 160 Ill. at 661-62; *Hallett v. City of Elgin*, 254 Ill. at 346-47; *Peterson*, 290 Ill. at 67; *S.N. Nielsen*, 81 Ill. 2d at 299; *Court Street Steak House*, 163 Ill 2d at 165. To that end, the Court has consistently recognized that, when determining whether given contracts have been properly awarded to the "lowest responsible bidder", the word "responsible" should mean "financially responsible and able to discharge one's obligations 'in accordance with what may be expected or demanded under the terms of the contract.'" *S.N. Nielsen*, 81 Ill. 2d at 299 quoting *People ex rel. Peterson v. Omen*, 290 Ill. 59, 67 (1919), citing *Hallett v. City of Elgin*, 254 Ill. 343, 346-47 (1912), *People ex rel. Assyrian Asphalt Co. v. Kent*, 160 Ill. 655, 661-62 (1896).

The Illinois Supreme Court has always afforded municipalities and purchasing agents substantial deference in making such determinations. *Court Street Steak House*, 163 Ill 2d at 165 citing *Hallett v. City of Elgin*, 254 Ill. 343. Accordingly, courts interpreting Illinois law at the state and federal level have refused to interfere with the exercise of such discretion so long as it is "judicial in nature" and devoid of fraud. *Callaghan Paving Inc. v. City of Chicago*, 1992 WL 159313, *5-6 (N.D. Ill. 1992) citing *Stanley Magic-Door, Inc. v. City of Chicago*, 74 Ill. App. 3d 595, 598-99 (1st. Dist. 1979), *Oscar George*, 104 Ill. App. 3d at 962-63; see also *Best Bus Joint Venture v. Bd. of Ed. of the City of Chicago*, 288 Ill. App. 3d 770, 777-79 (1997).

Therefore, not only are municipalities entitled to pass ordinances or resolutions that establish a comprehensive set of objective factors by which they will make their subjective, "judicial" determination of which Contractor constitutes the "lowest responsible bidder" on a contract, municipalities are better off taking such measures, as such actions will enable a prospective court of review to justify the substantial deference it is required to give those determinations. A municipality's use of an ordinance or resolution, such as the draft ordinance hereto attached, would not only incorporate factors municipalities are permitted to consider when selecting the lowest responsible bidder, it would enable a municipality to later defend itself against any claim of wrongdoing in its award of a contract.

PERMISSIBLE FACTORS FOR CONSIDERATION

In *S.N. Nielsen*, the court noted that while Contractors' financial responsibility and ability to perform are the two important factors in determining the lowest responsible bidder, social

responsibility should also be a concern in awarding public contracts. *S.N. Nielsen*, 81 Ill. 2d at 299. In support of this proposition, the *S.N. Nielsen* court stated:

In proper circumstances a contract may be awarded to one who is not the lowest bidder, where this is done in the public interest, in the exercise of discretionary power granted under the law, without fraud, unfair dealing, or favoritism, and where there is a sound and reasonable basis for the award as made.

(*Id.*, quoting 10 E. McQuillin, Municipal Corporations § 29.73.10, 429-30 (3d ed. 1966).)

In *S.N. Nielsen*, the plaintiff Contractor sought declaratory and injunctive relief and a writ of mandamus against the Public Building Commission for the award of a building contract. *S.N. Nielsen*, 81 Ill. 2d at 295. The plaintiff Contractor asked the court for a determination that it was entitled to the building contract in question under the Public Building Commission Act, which provided that building contracts were to be awarded to the lowest responsible bidder. *Id.* The court ruled in favor of the Building Commission, holding that it had properly considered the affirmative action efforts of the respective bidders in determining which one was the lowest responsible bidder. *S.N. Nielsen*, 81 Ill. 2d at 299.

Social responsibility and, specifically, “[m]aintaining the public’s confidence” in a project funded by public money, were also deemed to be legitimate considerations in the award of a contract by the court in *Joseph J. Henderson & Son, Inc. v. City of Crystal Lake*, 318 Ill.App.3d 880, 885 (2nd Dist. 2001). The *Henderson* court held that the appearance of impropriety was an appropriate factor for a municipality to consider when determining which bidding Contractor was the lowest responsible bidder. *Id.* at 884-85.

Moreover, the broad discretion of a purchasing agent to determine whether a bidder is “responsible” under the Illinois Municipal Purchasing Act was examined by the U.S. District Court for the Northern District of Illinois in *Callaghan Paving*, 1992 WL 159313 (N.D. Ill. 1992). In discussing the agent’s ability to reject the bid of any bidder not deemed “responsible,” *Callaghan* court relied on section 8-10-12, which provides:

Any and all bids received in response to an advertisement may be rejected by the purchasing agent if the bidder is not deemed responsible, or the character or quality of the services, supplies, materials, equipment or labor does to conform to the requirements or if the public interest may otherwise be served thereby.

(Ill. Rev. Stat., ch. 24, § 8-10-12.) The court also noted that a purchasing agent may consider broad range of factors when determining a bidder’s responsibility, citing section 8-10-11, which states:

In determining the responsibility of any bidder the purchasing agent may take into account other factors in addition to financial responsibility, such as records of transactions with the bidder,

experience, adequacy of equipment, ability to complete performance within a specified time limit and other pertinent considerations.

(Ill. Rev. Stat., ch. 24, § 8-10-11.)

The *Callaghan* court reiterated the fact that, “[c]ourts have consistently held that statutes requiring the award of contracts to the lowest responsible bidder do not require the award of such contracts to the lowest bidder.” *Callaghan*, 1992 WL 159313, *5 (N.D. Ill. 1992) citing *Oscar George*, 104 Ill. App. 3d at 963. The court noted that, while such discretion must be “judicial in nature,” in the absence of fraud, courts will not interfere with the exercise of such discretion. *Callaghan*, 1992 WL 159313, *5-6 (N.D. Ill. 1992) citing *Stanley Magic-Door, Inc. v. City of Chicago*, 74 Ill. App. 3d 595, 598-99 (1st. Dist. 1979), *Oscar George*, 104 Ill. App. 3d at 962-63.

The defendants in *Callaghan*, the city, its Department of Purchases, Contracts and Supplies, and the purchasing agent, required the plaintiff-bidder, a joint venture of two companies, to submit various documents as proof of compliance with the project’s bid requirements. *Callaghan*, 1992 WL 159313, *1-3 (N.D. Ill. 1992). The project bid requirements mandated that bidders, if requested, had to present within a reasonable time, as determined by the purchasing agent, evidence satisfactory to the purchasing agent, of the bidder’s “performance ability and possession of necessary facilities, pecuniary resources and adequate insurance to comply with the terms of these specifications and contract documents.” *Id.* at *5. The project bid specifications also required bidders to fully comply at all times “with all laws, ordinances, regulations and codes of the Federal, State, City and other government agencies, which may in any manner affect the . . . performance of the contract.” *Id.* at *6. Despite repeated requests by the purchasing agent, the plaintiff-bidder did not supply the defendants with a copy of the joint venture agreement or written documentation of the joint venture’s structure, which the defendants deemed necessary to determine the respective roles, responsibilities, and financial obligations of the respective companies in the joint venture, and whether each of them was capable of fulfilling their respective obligations under their agreement. *Id.* at *1-2. The purchasing agent rejected the bid of the joint venture because of its nonresponsiveness to these documentation requests as well as the fact that there was litigation pending against one of the joint venture’s corporate members regarding environmental and public nuisance allegations. *Id.* at *6.

The court held that, despite the fact that that the two joint venture corporate members were jointly and severally liable and one corporate member by itself had sufficient financial capacity to either complete the project or compensate the city should the other corporate member fail to fulfill its responsibilities, “whether the existence of a guarantor converts a potentially irresponsible bidder into a responsible one is a discretionary determination to be made by the purchasing agent.” *Id.*

The notions that a public body exercises a great deal of discretion in determining the lowest responsible bidder, and that the phrase “lowest responsible bidder” does not require the public body to award a contract to the lowest bidder, were the bases for the court’s decision in *Court Street Steak House. Court Street Steak House Inc. v. County of Tazewell*, 163 Ill 2d 159, 165 (1994) citing *S.N. Nielsen*, 81 Ill. 2d at 299; *Hallett*, 254 Ill. at 346-47 (1912). The *Court Street Steak House* court decided the case under the Competitive Bidding Statute of Section 5-

1022 of the Counties Code, which mandated that any purchase of services, materials, equipment, or supplies in excess of \$10,000 by a county with fewer than 2,000,000 inhabitants be awarded to the lowest responsible bidder. *Court Street Steak House*, 163 Ill. 2d at 162-63.

The *Court Street Steak House* court acknowledged that, “competitive bidding statutes are enacted ‘for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud corruption and to secure the best work or supplies at the lowest price practicable.’” *Id.* at 165 quoting 10 E. McQuillin, Municipal Corporations § 29.29, at 375 citing *Compass Health Care Plans v. Bd. of Ed.* 246 Ill. App. 3d 746, 751; *O’Hare Express, Inc. v. City of Chicago*, 235 Ill. App. 3d 202, 208 (1992). Therefore, the purchasing agent of the public body exceeds the permissible scope of its discretion, and mandamus will subsequently issue if a plaintiff alleges and proves fraud, lack of authority, unfair dealing, favoritism, or similarly arbitrary conduct by a county. *Court Street Steak House*, 163 Ill. 2d at 165 citing *S. N. Nielsen*, 81 Ill. 2d at 299; *Hallett*, 254 Ill. at 348-50.

IMPERMISSIBLE FACTORS FOR CONSIDERATION

The court, in *Court Street Steak House*, examined the criteria in the Counties Code’s Competitive Bidding Statute, which included: the quality of the articles to be supplied, conformity with bid specifications, suitability to the requirements of the county, and delivery terms. *Court Street Steak House*, 163 Ill. 2d at 166 citing Ill. Rev. Stat. 191, ch. 34, Par. 5-1022. The court recognized that, “a county solicits bids on many different types of contracts with many different factors affecting each purchasing decision,” and therefore, “under this criterion, the County can take into account reasonable benefits to the County arising from each bid.” *Court Street Steak House*, 163 Ill. 2d at 166. The *Court Street Steak House* court ruled that the additional food service training for the mentally handicapped, which would cost the defendant county an additional \$1,400 per year and was a component of the successful bid but not that of the plaintiff, was a reasonable basis on which the county awarded a food service contract to a bidder other than the plaintiff. *Id.* at 166-68. Support for a mentally handicapped for service training program is the type of county welfare concern upon which a municipality can properly base its decision regarding to whom it will award a public contract, as it does not indicate an arbitrary preference for one bidder over another. *Id.* at 168.

The *Court Street Steak House* court distinguished the consideration of a food service program for the mentally handicapped, as a proper concern for the welfare of the County, from an impermissible situation in which the sole basis of to whom a public contract is awarded is the county board’s desire to keep money in the community. *Id.* citing *Cardinal Glass Co. v. Bd. of Ed. of Mendota Community Consolidated School District No. 289*, 113 Ill. App. 3d 442 (1983). In *Cardinal Glass*, the plaintiff brought a mandamus action against the board of education to compel the board to award it the contract in question, claiming that the defendant school board violated the School Code, which required that public contracts be awarded to the lowest responsible bidder. *Cardinal Glass*, 113 Ill. App. 3d at 443-44. The *Cardinal Glass* court remanded the case, finding that the facts alleged in the complaint, taken as true, indicated that the sole reason the board did not award the contract to the plaintiff was because the board wished to keep the money in the community. *Court Street Steak House*, 163 Ill. 2d at 168. The *Cardinal Glass* court found that such conduct constituted clear favoritism, and therefore violated the

“lowest responsible bidder” requirement. *Id.* In *Court Street Steak House*, the Illinois Supreme Court clarified the rationale it used in *Cardinal Glass* stating, “A desire to keep money in the community indicates prejudice, not reasoned decisionmaking.” *Id.* The *Court Street Steak House* court also stated that such favoritism might be suggested if a board relies *solely* on the past performance of a bidder. *Id.*

The inclusion of *any* local preference factor when determining who is the lowest responsible bidder, in the context of contracts created under the Illinois School Code, was examined in *Best Bus Joint Venture v. Bd. of Ed. of the City of Chicago*, 288 Ill. App. 3d 770, 779 (1997). In *Best Bus*, the defendant board used a 2% local preference in the determination of the lowest responsible bidder.

The *Best Bus* court reiterated that the purposes for requiring public bodies to engage in competitive bidding are to invite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption and to secure the best work or supplies at the lowest price practicable. *Id.* at 776-77 citing *Compass Health Care Plans v. Bd. of Ed.*, 246 Ill. App. 3d 746, 751 (1992); *O’Hare Express Inc. v. City of Chicago*, 235 Ill. App. 3d 202, 208 (1992). The court cited *S.N. Nielsen* and *Court Street Steak House* in its acknowledgement that, while the contracts must be awarded to the “lowest responsible bidder” after due advertisement, the statute did not automatically compel the Board to award a contract solely on the basis of lowest cost. *Id.* at 778. The *Best Bus* court also noted that the public body is entitled to specify the terms of the contract for which it solicits bids and the criteria that bidders must meet in order to be considered a responsible bidder. *Best Bus*, 288 Ill. App. 3d at 778 citing *Compass Health*, 246 Ill. App. 3d at 751. Therefore, the court recognized, “the law is clear that a public body possesses great discretion in determining the lowest responsible bidder,” and that, “[f]inancial responsibility and ability to perform are not the only relevant factors.” *Best Bus*, 288 Ill. App. 3d at 778.

However, the *Best Bus* court held that a local business preference has no proper legislative authority and is an arbitrary and capricious delegation of power to a municipal unit and is therefore unconstitutional. *Id.* at 779. The court reasoned that the board’s broad range of powers to implement policies relating to education was limited to those powers expressly granted by law. *Id.* at 778. Including a local business preference was not a question of whether it was *prohibited* by the School Code, but rather, whether the ability to use such a criterion was *granted* by the School Code.

However, Sections 8-10-11 and 8-10-12 of the Illinois Municipal Purchasing Act may negate the application of such rationale to the use of a local preference factor as a consideration in the award of a contract under its authority in at least two ways. Moreover, with respect to the discretion of the purchasing agent allowed for by the Section 8-10-11, a local business preference factor is arguably something through which “the public interest may otherwise be served thereby.” Section 8-10-12 allowance for “other pertinent considerations” may further justify the use of such a factor. It can be argued that such statutory provisions give the purchasing agency and agent, under the Illinois Municipal Purchasing Act, legal authority to use a local business preference as one of the factors to consider when determining who is the “lowest responsible bidder.” Therefore, so long as the purchasing agent of the public body does not exceed the permissible scope of its discretion, and fraud, lack of authority, unfair dealing,

favoritism, or similarly arbitrary conduct are not present, mandamus will not be issued by a court.

CONCLUSION

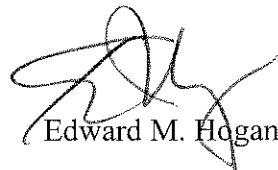
Courts' deference to the broad discretion of the purchasing agent is a strong factor creating an inability to exactly define "responsible bidder." While the *Best Bus* court asserted that a local preference factor was unconstitutional because the ability to use such a consideration was not granted by the School Code, such a consideration limitation is the exception to the jurisprudential norm.

The Illinois Supreme Court has consistently allowed for the inclusion of many factors into a consideration of which bidder is the "lowest responsible bidder." In addition to financial responsibility and ability to perform, the court has also allowed agents and agencies to include social responsibility and reasonable benefits to the given municipality. Most importantly, the court adheres to the deference of the purchasing agent and the factors of responsibility as delineated by the statute in question. Therefore, in the absence of arbitrariness and fraud, any factor used in an ordinance and subsequent bid requirements that is based upon authority granted by the Illinois Purchasing Act would not conflict with jurisprudential precedent regarding "responsible bidders."

Therefore, municipalities requesting bids under that Act, would be wise to adopt a "responsible bidder" ordinance containing a reasonable definition of "responsible", such as that which is hereto attached, as we believe that the courts would defer to a given municipality's definition and its discretion to award a contract thereunder.

If you have any questions regarding this matter, please do not hesitate to contact our office.

Sincerely,



Edward M. Hogan