

Contractors May Bring Suit to Challenge Award of Contract on Public Project

Indiana's Competitive Bidding Statute safeguards the public against fraud and undue influence by insuring that each bidder is on equal footing. If a local municipality violates the provisions of Indiana's Competitive Bidding Statute, the contractor may bring a lawsuit to force the board to comply with the statute.

Indiana's Competitive Bidding Statute, I.C. §36-1-12-1 *et seq.*, applies to all public works performed for, or contracted for, by political subdivisions and their agencies, regardless of whether it is performed on property owned or leased by the political subdivision or agency. A public work is the construction, reconstruction, alteration or renovation of a public building, airport facility, or other structure that is paid for out of a public fund or out of a special assessment. I.C. §36-1-12-2.

I.C. §36-1-12-1 *et seq.*, provides certain procedures for the bidding and awarding of contracts for public works which apply to the projects of at least \$50,000 in a county containing a third-class city or town with a population of more than 5,000. On such projects, the governmental unit must comply with the following procedures:

(1) The board shall prepare general plans and specifications describing the kind of public work required;

(2) The board shall file plans and specifications in a place reasonably accessible to the public;

(3) The board shall publish notice calling for sealed proposals for the public work needed and referencing the location of the plans and specifications and the date for receiving bids;

(4) If the cost of the project is \$100,000 or more, the board shall require the bidder to submit a financial statement, a statement of experience, a proposed plan or plans for performing the public work, and the equipment that the bidder has available to perform the work;

(5) The board must hold a public meeting to receive and open the bids, which bids shall be read aloud;

(6) The board shall award the contract to the lowest responsible and responsive bidder or reject all bids submitted.

I.C. §36-1-12-4(b). The board shall award the contract and provide the successful bidder with written notice to proceed within 60 days after the date on which bids are opened, unless general obligation bonds are sold to finance the construction, in which event the board has 90 days to notify the successful bidder. I.C. §36-1-12-6(a) & (b). If the board fails to award and execute the contract and to issue notice within the time required, the successful bidder may (1) reject the contract and withdraw his bid without prejudice, or (2) extend the time to award the contract and provide notice to proceed at an agreed date. I.C. §36-1-12-6(d). If the successful bidder elects to reject the contract and withdraw his bid, the successful bidder must give the board written notice of such election within 15 days of the applicable expiration date. *Id.* A contract for public work by a political subdivision or agency is void if it is not let in accordance with I.C. §36-1-12-1 *et seq.*

Indiana case law provides that the purpose of Indiana's competitive bidding statute, I.C. §36-1-12-1 *et seq.*, is to place each bidder on the same footing and safeguard the public against fraud, favoritism, extravagance and improvidence and to ensure honest competition for the best work or supplies at the lowest reasonable cost. *Christiani v. Clark County, Indiana Solid Waste Management District*, 675 N.E.2d 715, 719 (Ind. Ct. App. 1996). The thrust of the statute is therefore protecting the public. Consequently, contractors have brought suits challenging the award of a contract that was substantially modified after its award, but before its execution, and challenging a resolution of a school board providing that all bids from a certain contractor would be returned unopened. *See Christiansi*, 675 N.E.2d at 719; *Brooks v. Gariup Construction Company, Inc.*, 722 N.E.2d 834, 839 (Ind. Ct. App. 2000). Such suits seek, in part, to prevent the public from being deprived of competition. Similarly, contractors have brought suits challenging the award of a contract claiming that the awarded bidder was not the lowest responsible and responsive bidder. *Schindler Elevator Corporation v. Metropolitan Development Commission*, 641 N.E.2d 653 (Ind. Ct. App. 1994) (finding that bid which substantially conformed to bidding requirements was lowest responsible and responsive bidder); *Bowen Engineering Corporation v. WPM, Inc.*, 557 N.E.2d 1358 (Ind. Ct. App. 1990) (finding that board must award contract to lowest responsible and responsive bidder, not most responsible bidder).

I.C. §34-13-5-1 *et seq.*, permits citizens and taxpayers of a municipality to bring an action questioning the validity or construction of any public improvement by the municipality. *See*

Christiani, 675 N.E.2d at 719. A public lawsuit is defined as “any action in which the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement by a municipal corporation is questioned directly or indirectly, including but not limited to suits for declaratory judgments or injunctions to declare invalid or to enjoin the construction, financing, or leasing.” I.C. §34-6-2-124.

I.C. §34-13-5-11 generally requires a plaintiff to exhaust all administrative remedies before bringing a public lawsuit. However, Indiana’s Bidding Statute does not create any administrative remedy as a prerequisite to a public lawsuit. *See Christiiani*, 675 N.E.2d at 720 (finding that Indiana’s bidding statute does not require an administrative remedy prior to filing a public lawsuit). Nonetheless, if a municipal corporation is required to hold a public hearing preceded by public notice and in fact holds such a meeting, a plaintiff must raise any issue at such hearing or be barred from raising the issue in a public lawsuit. I.C. §34-13-5-12.