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Supplement to Competitive Bidding and Award of Construction Contracts in Selected Studies in Highway Law

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs" for which The Transportation Research Board is the Agency conducting the Research. The report was prepared by Ross D. Netherton. Robert W. Cunliffe, TRB Council for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

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THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a section in Volume 3 of Selected Studies in Highway Law, dealing with the competitive bidding process used for transportation projects. An overview of federal and state legal requirements is provided, along with a discussion of the various steps in the process.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3 dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals

more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of \$90.00 per set.

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Supplement to Competitive Bidding and Award of Construction Contracts in Selected Studies in Highway Law*

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THE BASIS AND PURPOSE OF COMPETITIVE BIDDING (p. 1125)

The Purpose of Competitive Bidding on Public Contracts (p. 1125)

The temptation of legislators and administrators to use the public contracting process to help achieve policy and program goals whenever it appears capable of doing so directly or indirectly is both widespread and understandable. Examples are numerous, especially in connection with public social and economic and public safety. Where competitive bidding procedures are modified to accommodate extraneous public interests, awards sometimes have been challenged by disappointed bidders or others qualified as parties in interest.

This is illustrated where a transportation authority awarded a contract to paint subway stations to a not-for-profit corporation engaged in rehabilitating the work habits of persons with poor employment records resulting from alcoholism, drug addiction, imprisonment, or "social disability". The organization's "clients" came from governmental and quasipublic sources, and its program implemented the state's social service law.¹ The transportation authority's award was successfully challenged by the painter's union, however, in a case where the court held that neither the good intentions of the contracting agency nor the laudable work of the contractor could overcome the requirement for competitive bidding. It said:

The intent of the bidding statute is to prevent favoritism, improvidence, extravagance, fraud and corruption, and to promote economy in public administration and honesty, fidelity and good morality in administrative officers. This policy is so strong that a violation of [it] . . . makes a public works contract void. Thus the questions become whether . . . the [transportation authority] has the right to make an exception for contracts that clearly contemplate public works when the contractor is an organization that is itself performing a valuable service in the public interest . . . As well motivated as this may be, the statute does not support [the authority's action].²

*Supplementary material to the paper "Competitive Bidding and Award of Construction Contracts" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

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Effect of Failure to Follow Required Procedures (p. 1127)

Failure of a contracting agency to follow mandatory procedures in conducting bidding and award of contracts has been alleged in a variety of situations. Specifically, awards have been challenged where the awarding apparently did not compel the successful bidder on a highway construction contract to give assurance that he would pay prevailing wage rates as required by state law.³ Also, the contracting agency's award was protested where the agency accepted an apparently late bid upon the bidder's claim that the bid clock was fast, and thereafter failed to notify the apparently successful bidder of a bid protest.⁴

The necessity for competitive bidding also may be raised where an awarding authority rejects all bids for a service contract and executes an extension or renewal of a previous contract for those services. In holding that such an extension was invalid because it was awarded by negotiation rather than bidding, the court distinguished between a right to renew an existing contract and an authorization for the parties to enter into negotiations at the contract's expiration if the parties desire to do so.⁵

Similar issues are raised where a contracting agency rejects all bids on a project and negotiates separate contracts for the project's component parts or phases, or where the agency rejects bids on a series of separate contracts and negotiates with one of the bidders to perform all of the work under a single contract.⁶ Failure of an agency to follow procedural rules or construction specifications published in its bidding instructions may also be cause to challenge the validity of a contract subsequently awarded;⁷ also, where post-bidding negotiations with the apparent low bidder result in awarding a contract on specifications that have been altered from those originally advertised.⁸

Effect of Collusion in Bidding (p. 1128)

Although instances of unpermitted collusion in bidding customarily are thought of in terms of restricting competition by secret arrangements among bidders, the issue may arise through arrangements between contractors and public agencies. Collusive contracting was charged where a municipality leased a parking lot from an attorney who did work for the city, where it obtained insurance from a company in which the mayor owned stock and was employed, and where it deposited funds in banks where city officials served as director. Under these circumstances, it was held that the purchase of insurance from a company employing the mayor was the only act which violated the state's competitive bidding requirement. The other actions were held to not constitute prohibited forms of collusion in public bidding.⁹

Where the evidence is strong that there was conspiracy to subvert a statutory requirement for award to the lowest responsible bidder through competitive bidding, the criminal nature and consequences of the conspiracy cannot be avoided by reliance on the contracting authority's statutory right to reject any or all bids "if it is in the public interest to do so."¹⁰

COMPETITIVE BIDDING REQUIREMENTS FOR FEDERAL AND FEDERALLY AIDED HIGHWAY CONSTRUCTION CONTRACTS (p. 1131)

Pursuant to statutory requirements that federal and federally aided highway construction shall be performed under contracts awarded after advertisement and competitive bidding,¹¹ the Secretary of Transportation has promulgated regulations, guidelines, standards, policies and procedures applicable to state contracts on federal-aid highway construction projects.¹² State highway agencies may not issue invitations for bids on such projects until compliance with the provisions of applicable FHWA regulations and directives is approved by the FHWA division administrator. The administrator's review includes compliance with the Highway Relocation Assistance Program and the Equal Employment Opportunity Programs as well as FHWA regulations intended to assure that nondiscriminatory bidding procedures are afforded to all qualified bidders.¹³

Other aspects of competitive bidding are also subject to federal requirements. Minimum time for advertisement of bids is prescribed by federal regulations as three weeks prior to the date for opening bids, except where shorter periods may be justified by special circumstances and approved by the FHWA division administrator.¹⁴ Prior approval of the administrator must also be obtained if any addenda to the approved plans and specifications are issued during the advertising period, and the state highway agency may be required to give specific assurance that all bidders receive such addenda.¹⁵ Another requirement for FHWA approval is that the designated contractor must file an affidavit that it did not engage in any action in restraint of free competitive bidding in connection with the contract being awarded.¹⁶ Finally, in the interest of increasing small business participation in federal-aid highway construction, it is required that state highway agencies shall schedule contract lettings in "balanced programs" as to size and type of contracts so as to assure opportunities for all sizes of contracting business to compete in the federal-aid program.¹⁷

Federal regulations designed to increase participation of small business and minority and disadvantaged business enterprises have taken the form of "set asides" of specified numbers or amounts of contracts in a construction program, or of establishing "goals" in the utilization of minority or disadvantaged business enterprises as subcontractors. Objections to these methods have alleged that they may violate constitutional rights of equal protection and due process of law, or statutory rights under applicable contracting or civil rights laws. These measures are based on a legislative premise that the traditional government procurement practices, when applied to minority businesses, tend to perpetuate the effects of prior discrimination. Accordingly, in the Public Works Employment Act of 1977¹⁸ the public contract system was used to counter the effects of this prior discrimination by requiring state and local grantees of federal or federal-aid funds to assure minority and disadvantaged business enterprises that they would have access to public works contracts on competitive basis.

A series of cases followed in which the limits of state and local government authority to require minority or other participation in contract programs were tested. In *Wright Farms Construction, Inc. v. Kreps*,¹⁹ application of Minority Business Enterprise Program (MBE) requirements to a small construction contractor in Vermont was denied because the State had not made a legislative finding that discrimination existed in the State, and no evidence of present discrimination was before the court. There was, moreover, evidence that no MBE had been found in the State or adjacent State doing excavation and street paving work who was interested in doing the work advertised. A much more restrictive definition of the basis for imposing minority-sensitive requirements in contract awards was laid down in *Central Alabama Paving, Inc. v. James*.²⁰ Here the court held that the MBE program was not only inconsistent with the state law requiring award to the lowest responsible bidder, but it also lacked the necessary specific authority from Congress to promulgate MBE program regulations, and, beyond that, the state had not made any finding of past discrimination or a determination that the MBE program was responsive to the problem of discrimination identified.²¹

The decision in *Central Alabama Paving* purports to follow the constitutional interpretation of the United States Supreme Court in 1980 in *Fullilove v. Klutnick*.²² Other courts construing the same language, however, have upheld minority participation programs based on Presidential Executive Orders and departmental regulations.²³ Further, the requirement that an acceptable affirmative action plan must be supported by findings that the effects of prior discrimination are being perpetuated by existing practices, appears to be met by only minimal findings, sufficient to provide a rational basis for that conclusion.²⁴ Reliance on these bases for upholding minority participation programs may now be unnecessary in situations covered by the specific statutory authorization for expenditure of not less than 10 percent of federal-aid highway funds on small business concerns owned and controlled by socially and economically disadvantaged individuals, set forth in the Surface Transportation Assistance Act of 1983 (97 Stat. 2097, January 6, 1983, § 105(f)), as extended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (101 Stat. 132, April 2, 1987, § 106(c)).

As experience with affirmative action plans has increased, courts have recognized that certain aspects of local affirmative action plans must necessarily be based on local considerations as evaluated by state and local governmental authorities. Accordingly, determinations made by local public contracting agencies regarding compliance with federal-aid minority participation requirements are accepted unless there is evidence of arbitrariness indicating that the agency's administrative action defeats the intent of Congress in this matter. Acceptability of participation arrangements may, therefore, vary depending on circumstances. So, in one case, a flat 10 percent set-aside was found to have only a minor impact on nonminority contractors, and was acceptable. On the other hand, a 100 percent set-aside for one of several projects was judged unacceptable, while a 50 percent set-aside for the remaining projects in the program was acceptable because it had a more dispersed impact.²⁵

Minimum acceptable minority employment for various categories of constructions trades may be determined by reference to agreements between labor unions and industry associations, and may be accepted for compliance with federal-aid project contract procedures without violating constitutional limitations.²⁶

Where the qualifications of a contractor or subcontractor who is to be treated as a Minority Business Enterprise must be reviewed by the courts, legislative or administrative definitions usually are available, and the criteria of ownership, control and risk of loss which are applied in determining status generally are well understood. Accordingly, where a firm organized after the invitation to bid was advertised, and its inexperienced minority member acquired his stock with no cash paid and no payment due for 15 years, the court held there was no bona fide minority interest created.²⁷ Also, where the minority interest was acquired under a stock purchase agreement involving a small cash payment followed over a 10-year period by annual payments due and payable only out of employee bonuses, if any, the agreement called for the shares not paid for in 10 years to be surrendered to the seller without obligation. The court upheld an administrative finding that this arrangement did not qualify the company to be certified as an MBE.²⁸ In this instance, the contractor proposed to form and act as a joint venture, and found that when certifications for bidding in a sheltered market is determined, each member of the joint venture must be certified on its own merits.

SCOPE OF STATE COMPETITIVE BIDDING LAWS (p. 1134)

The Form of Competitive Bidding Rules (p. 1126)

Standard specifications for construction of highways, roads, and bridges on federal and federally aided projects are periodically reissued with revisions reflecting currently recommended engineering and administrative procedures and practices. The most recent revisions of this guide were published in 1974, 1979, and 1985.²⁹

Types of Contracts Subject to Competitive Bidding Requirements (p. 1134)

Cases interpreting the scope of statutory requirements that contracts of public agencies must be awarded through competitive bidding have held that replacement of heating and air conditioning systems in buildings were not within the scope of a statute requiring competitive bidding on "contracts for supplies, materials, equipments and contractual services."³⁰

Where construction contracts required competitive bidding, it was held that the purchase and installation of prefabricated, portable buildings were not subject to that requirement. The court felt that the work performed to assemble and attach the prefabricated pieces was incidental to delivery of the materials, all of which were easily relocatable at the option of the owner.³¹

Similarly, it was held that a contract for cartographic services to prepare tax maps for use in public works planning and land acquisition

did not have to be awarded through competitive bids, because the work did not involve actual physical construction activity on publicly owned land or structures.³² With this rationale, the same statute was construed to exclude contracts for repairing and resurfacing roofs of existing buildings.³³

Specifications for bidding on public works construction may require that, wherever available, only manufactured products of the United States shall be used in the work. These so-called "Buy American" laws have been challenged as unconstitutional interference with interstate and foreign commerce, violation of treaties and international trade agreements, and a general intrusion of the state into the field of foreign affairs which the Constitution reserves to Congress and the President. These issues were considered by the New Jersey Supreme Court in *K. S. B. Technical Sales Corp. v. New Jersey District Water Supply Commission*.³⁴

Although New Jersey's Buy American Act appeared to be in direct conflict with the General Agreement on Tariffs and Trade (GATT), to which the United States was a party by executive action based on Congressional legislation,³⁵ the court held that the contract of the Water Supply Commission was excluded from the agreement by an exception for products purchased by governmental agencies for governmental purposes and "not with a view to commercial resale or . . . use in the production of goods for commercial sale."³⁶ As to whether the Buy American Act injected the state into the conduct of the nation's foreign affairs, the court found no evidence to suggest that the policies of a foreign bidder's home government motivated inclusion of the Buy American proviso in the bidding instructions for public contracts, nor did this proviso have any direct or significant impact on the conduct of foreign affairs. Finally, after reviewing decisions on the effect of Article I, Section 8 of the Constitution—the Commerce Clause—in limiting state action which interferes with interstate commerce through burdensome regulation, the court held that nothing in the clause prevents a state from entering the market as a purchaser on its own behalf, as was the case of the Water Supply Commission.

The opposite circumstances, where a statute authorizing negotiation was held to conflict with a statutory mandate for use of advertisement and competitive bidding, occurred in *Glover Construction Company v. Andrus*.³⁷ Here the Federal Government's Bureau of Indian Affairs (BIA) selected three Indian-owned companies for negotiation leading to award of a contract for road construction on land administered by BIA. This action was taken under the so-called "Buy Indian Act" (BIA), which provided that "so far as may be practicable Indian labor shall be employed and purchase of the products of Indian industry may be made in the open market at the discretion of the Secretary of the Interior."³⁸

The BIA's action was challenged, however, as being contrary to the Federal Property and Administrative Services Act of 1949, which established the duty of Federal agencies to use advertising and competitive bidding in its contracts unless the project was listed in the statute's

enumerated exceptions. In this list of exceptions, road construction was not excepted from the competitive bidding rule.³⁹ Where, as here, neither the statutory language nor legislative history was ambiguous, the court concluded that the bidding requirements of the Federal Property and Administrative Services Act prevailed over the discretionary authority conferred in the Buy Indian Act. Accordingly, the BIA's contract award through negotiation was void.

In its arguments, the BIA contended that the competitive bidding requirement of the law was an admonition rather than a prohibition, and the administrative interpretation must be recognized as reflecting the legislative intent. The court denied this, however, and held to the rule that where statutory language was not in doubt there was no occasion for resorting to other sources of construction. A dissenting opinion criticized this as "rigidly adhering to formalistic rules of statutory construction" which threatened to thwart the remedial purpose of the Buy Indian Act, particularly in the important area of road construction programs.

A summary of State laws and regulations relating to requirements for competitive bidding and criteria for award of highway construction contracts is given in Table 1 (p. 7), *infra*. The updated information shown therein supplements Table 1 (p. 1138 *et seq.*) in *Selected Studies in Highway Law*.

Exceptions to the Competitive Bidding Rule (p. 1136)

Where statutes provide that public agencies shall give preference to certain charitable or quasi-public entities in awarding contracts for public work, the limits of such exceptions generally must be defined by the courts. Thus, a decision to call for competitive bids to make identification photographs for drivers licenses was successfully challenged as contrary to a statute requiring state offices to obtain needed services from charitable non-profit agencies for handicapped persons whenever they were competent to provide the service at fair market value.⁴⁰

Where a preference or an exception to the competitive bidding statute is not specific, but is based on an implicit exception favoring organizations with programs that perform valuable services in the public interest, its limits are interpreted restrictively. In the case of a contract awarded for painting subway stations, the court rejected arguments that a law authorizing rehabilitation and development of job skills of persons with poor employment records due to alcoholism, drug addiction, imprisonment, or other socioeconomic disability had the effect of excluding contracts for this program from the competitive bidding rule. While this argument should not be taken lightly, the court said, "the countervailing policies embodied in the Public Authorities Law run too deeply to permit the contract at bar to wade through them by implication."⁴¹

In the customary categories of exceptions to competitive bidding, the definition of activities that must be recognized as contracts for specialized personal and professional services was at issue in cases involving the following types of activity: ambulance services, which were held to be

within the exception because they required special skill and training;⁴² feasibility studies of programs for environmental protection and rehabilitation of lakes, because the nature of the work desired made it impossible or impractical to draw specifications satisfactorily to permit competitive evaluation;⁴³ and installation of computer networks where the court characterized the contract in question involved "inextricable integration of a sophisticated computer system and services of such a technical and scientific nature" as to constitute a professional service within the statute.⁴⁴ The court also observed generally that this term is "no longer limited to the traditional professions such as law and medicine. If the law is to keep pace with scientific development in business and commerce, it must adapt statutory provisions . . . to the realities of the day."⁴⁵

Response to Emergencies (p. 1149)

Statutory provisions for award of contracts to deal with emergencies involving construction or repair of public works wisely avoid restrictive definitions of situations in which the procedures for competitive bidding may be bypassed in favor of speedier action. But as courts have supplied the definition of emergency situations in questionable cases, they generally have insisted that a strong and direct danger to public health or safety be present. Accordingly, in cases where sewer lines were threatened by falling rocks and where sewer lines beneath a river needed repair to seal a break, the circumstances did not justify avoidance of competitive bidding rules.⁴⁶ Similarly, the need to build a temporary floating bridge to replace a structure damaged by windstorm did not justify use of negotiation instead of bids, despite the fact that use of a major interregional highway was interrupted until the temporary bridge was in place.⁴⁷ Nor did the possible threat to public safety from prison riots justify avoidance of competitive bidding in the award of a contract for construction of prison facilities to relieve the overcrowded condition of the inmates. While the court here acknowledged that the state had effectively documented the potential danger to public safety if the overcrowded conditions were not relieved, it explained that to be within the intent of the exemption "an emergency must involve an accident or unforeseen occurrence requiring immediate action; it is unanticipated or fortuitous; it is a sudden or unexpected occasion for action and involves a pressing necessity."⁴⁸

Specialized Personal and Professional Services (p. 1147)

Procurement of personal or professional services without competitive bidding customarily is justified because it does not involve work that conforms to specifications that allow for contractors' performances to be evaluated by relatively objective standards. Accordingly, contracts calling for services that require personal or professional judgment, in which the contracting agency specifies an objective but not the methods of the desired work, have been exceptions to the competitive bidding mandate. There are indications that this rule now is being extended to

TABLE 1

SUMMARY OF STATE LAWS AND REGULATIONS RELATING TO REQUIREMENTS FOR COMPETITIVE BIDDING AND CRITERIA FOR AWARD OF HIGHWAY CONSTRUCTION CONTRACTS

STATE	CITATIONS	UPDATE INFORMATION	STATE	CITATIONS	UPDATE INFORMATION
ALABAMA	CODE (1986) §§ 23-1-92, 39-2-2, 39-2-6	<i>Classes of Contracts:</i> Any public works contract involving an amount in excess of \$2,000.			<i>Authority to Reject Bid:</i> Until contract award, Commissioner has right to reject any or all bids and to waive technicalities as he may deem best for the interests of the State.
ALASKA	STAT. (1985) §§ 19.10.170, 19.10.190, 19.10.210	<i>Classes of Contracts:</i> All highway construction with estimated cost exceeding \$100,000. For construction costing less than \$100,000 or where it appears to be in the State's best interest the Department may perform the work directly.	DELAWARE	CODE ANN. (1985) tit. 17, § 151; tit. 29, §§ 6903, 6907	<i>Classes of Contracts:</i> Contracts for work or materials costing more than \$10,000 may be awarded only after public advertising and sealed bidding. Contracts costing between \$5,000 and \$10,000 may be awarded in open market provided written competitive quotations are obtained from 5 sources or all available sources, whichever is less.
ARIZONA	STAT. (1985) § 28-1804		DISTRICT OF COLUMBIA	CODE (1986) §§ 7-132, 7-134, 7-136, 1-1183.3, 1-1183.6, 1-1183.7	<i>Classes of Contracts:</i> Contracts for street and highway construction and repair exceeding a cost of \$10,000, unless Director of Highways makes written determination that specifications for award on the basis of lowest bid price or lowest evaluated bid price cannot be prepared, or only one source is available, or emergency or other reasons make it in the best interest of the District to use other methods. <i>Criteria for Award:</i> Responsive and responsible bidder whose bid will be most advantageous to the District considering price and other factors.
ARKANSAS	STAT. (1983), 14-612 State Hwy. Comm'n Stand. Specs. (1978) 102-1				<i>Authority to Reject Bid:</i> All bids may be rejected if the Director determines in writing that such action is in the District's best interest. Such action must be reviewed by the Inspector General within 72 hours.
CALIFORNIA	PUB. CONTRACTS CODE (1986) §§ 10122, 10185 §§ 20391, 20394	<i>Classes of Contracts:</i> All public works contracts with estimated cost of \$350,000 or more, except Department may have work done by force account or on informal bids in cases of (1) failure or threat of failure of a facility; (2) damage by Act of God; (3) when Director deems it in best interest of State or when all bids are rejected. County highway work estimated to cost more than \$20,000.	FLORIDA	STAT. (1986) § 337.11 § 336.41(3)	<i>Authority to Reject Bid:</i> State projects: May reject all bids and readvertize the project or otherwise perform the work. <i>Criteria for Award:</i> County projects: Lowest competitive bidder.
COLORADO	REV. STAT. (1985) § 24-92-102, § 24-92-104 Code of Regulations 2 CCR 601-10	<i>Classes of Contracts:</i> All construction contracts expected to exceed \$50,000, except where Chief Engineer may approve contracts under emergency circumstances. <i>Criteria for Award:</i> Prequalified bidder determined to be responsible. <i>Authority to Reject Bid:</i> May reject any or all bids, waive technicalities, and readvertise for new proposals if best interest of State will be promoted by it, or if low bidder is determined to be not responsible.	GEORGIA	CODE OF 1981 (1986) §§ 32-2-64, 32-2-69, 32-4-64, 32-4-68	<i>Classes of Contracts:</i> Most DOT construction and maintenance work. County public roads. <i>Criteria for Award:</i> Lowest reliable bidder when at least two or more bids have been received from reliable bidders. <i>Authority to Reject Bid:</i> May reject any or all bids and readvertize, perform work directly, or abandon project.
CONNECTICUT	GEN. STAT. ANN. (1985) §§ 13a-95, 13a-95a Stand. Specs. (1985) 103.01	<i>Classes of Contracts:</i> Construction, alteration, improvement, reconstruction, relocation, widening or change in grade of State highways or bridges. Where specified by Commissioner of Transportation, bidding may be limited to "small business concerns owned and controlled by socially or economically disadvantaged individuals" for contracts under \$5 million. <i>Criteria for Award:</i> Lowest bidder deemed responsible.			

TABLE 1—Continued

STATE	CITATIONS	UPDATE INFORMATION
HAWAII	REV. STAT. (1984) § 103-22	<p><i>Classes of Contracts:</i> Performance of public work where amount to be spent is \$8,000 or more, except where public works or repairs and maintenance of buildings, roads and other site improvements costing between \$4,000 and \$15,000 are involved call for informal bids is permitted.</p> <p><i>Criteria for Award:</i> Lowest responsible bidder provided he qualifies by providing performance bond.</p> <p><i>Authority to Reject Bid:</i> If lowest bid is rejected or if successful bidder fails to enter into contract and furnish security Department may award to lowest remaining responsible bidder or readvertise the project, or, in its discretion, negotiate with lowest responsible bidder to reduce the scope of work or, if bid exceeds the funds available, reduce the price of the work and award a contract therefor.</p>
IDAHO	CODE (1984) §§ 40-617, 40-902, 40-906	
ILLINOIS	ILL. REV. STAT. 1985 ch. 127, § 132.6 ch. 127, § 5-403 ch. 121, § 7-203 ch. 24, § 4-5-11. 8-9-1	<p><i>Classes of Contracts:</i> Construction, repair, maintenance or remodeling of highways and structures, except (1) sole source materials and services; (2) professional or artistic services; (3) emergencies, (4) construction, repair, renovation or projects involving less than \$10,000 and no change or increase in existing facilities; (5) contracts of less than \$5,000; (6) maintenance or services by manufacturers of equipment when such work is best done by manufacturer.</p> <p><i>Municipal roads:</i> Public improvement where materials are valued at \$5,000 or more.</p>
INDIANA	STAT. ANN. (1986) § 8-13-5-6	<p><i>Classes of Contracts:</i> All contracts for construction or maintenance and improvement of highways.</p> <p><i>Authority to Reject Bid:</i> Highway Department Director may reject any or all bids if cause exists, and may spend up to 85% of lowest and best bid to perform work directly.</p>
IOWA	CODE ANN. (1986) §§ 23.18, 23.21	<p><i>Classes of Contracts:</i> Municipal projects: Construction, erection, demolition, alteration or repair of public works where estimated cost exceeds \$25,000.</p>
KANSAS	STAT. ANN. (1985) §§ 68-407, 68-410	<p><i>Criteria for Award:</i> Lowest responsible bidder. "Resident preference" allowed.</p>
KENTUCKY	REV. STAT. (1986) § 424.260	<p><i>Classes of Contracts:</i> Local road work: Road and bridge improvement by cities, counties, districts, or county/city boards costing more than \$7,500.</p>
LOUISIANA	STAT. ANN. (1986) §§ 48:205, 48:251, 48:252, 48:255	<p><i>Classes of Contracts:</i> All contracts for construction or improvement of State highway system. Purchase of supplies and equipment costing more than \$1,000.</p>
MAINE	REV. STAT. ANN. (1985) § 23-753	
MARYLAND	CODE ANN. (1985) State Finance and Procurement Act 13-202	<p><i>Classes of Contracts:</i> Procurements in excess of \$7,500.</p> <p><i>Criteria for Award:</i> Lowest responsible and responsive bidder.</p> <p><i>Authority to Reject Bid:</i> Bid may be rejected when it is determined to be fiscally advantageous or otherwise in the State's best interest.</p>
MASSACHUSETTS	GEN. LAWS ANN. (1986) ch. 149, §§ 44A, 44D, 44E	<p><i>Classes of Contracts:</i> Contracts for construction, reconstruction, alteration, remodeling, repair, or demolition of highways estimated to cost \$25,000 or more. In cases of extreme emergency due to natural catastrophe contracts for work necessary to preserve health or safety may be made on the basis of such competitive bids as can be obtained in the time permitted by the emergency.</p> <p><i>Authority to Reject Bid:</i> May reject any or all general bids if it is in the public interest to do so. Where subbids are involved, awarding authority may reject any subbid which it determines is not competent to perform the work, or where less than 3 subbids are received and the prices are not reasonable for acceptance without further competition.</p>
MICHIGAN	COMP. LAWS ANN. (1986) § 247.661c	<p><i>Classes of Contracts:</i> Highway, street, road and bridge construction or maintenance projects of Department of Transportation costing more than \$20,000, unless Department affirmatively finds that under the circumstances some other method is in the public interest.</p>

TABLE 1—Continued

STATE	CITATIONS	UPDATE INFORMATION	STATE	CITATIONS	UPDATE INFORMATION
	Std. Specs. (1984) §§ 103.01, 103.03	<i>Criteria for Award:</i> Lowest responsible bidder, subject to reservations in the bid proposal. <i>Authority to Reject Bid:</i> Right is reserved to reject any or all bids, waive specified irregularities, readvertise or do work otherwise if Department's best interests are promoted thereby.	NEW JERSEY	STAT. ANN. (1986) §§ 27:7-30, 40A:11-4	<i>Classes of Contracts:</i> State highways: All construction contracts. County roads: Contracts for road projects costing more than \$4,500. <i>Authority to Reject Bid:</i> May reject any and all bids.
MINNESOTA	STAT. (1986) §§ 16B.07, 16B.09	<i>Classes of Contracts:</i> All contracts for construction or repair and all purchases of supplies, materials, equipment rental and utility services where rates are not fixed by law. <i>Authority to Reject Bid:</i> Commissioner of Administration may reject any bid, including bids of bidders who have failed to perform previous contracts with the State.	NEW MEXICO	STAT. ANN. (1978) Procurement Code §§ 13-1-21 et seq., 13-1-99, 13-1-102, 13-1-108	<i>Classes of Contracts:</i> All procurements, including contracts for highway construction. <i>Criteria for Award:</i> Lowest responsible bidder. <i>Authority to Reject Bid:</i> May reject any and all bids when it is in the interest of the State.
MISSISSIPPI	CODE OF 1972, (1986) § 65-1-85	<i>Classes of Contracts:</i> All contracts for construction and repair of public roads or bridges, and purchase of materials, equipment or supplies costing more than \$1,500, except in cases of flood or other emergency in accordance with Highway Commission regulations.	NEW YORK	HIGHWAY LAW (McKinney Supp. 1986) §§ 38, 193, 194 GEN. MUNIC. LAW § 103 Std. Specs. (1984) 102-03	<i>Classes of Contracts:</i> Construction and improvement of State highways. County projects: Contracts for public work involving expenditure of more than \$7,000 or purchases costing more than \$5,000. Town projects: construction of new highways and bridges, permanent improvement or reconstruction of existing highways and bridges.
MISSOURI	ANN. STAT. (1984) §§ 34.040, 50.660		NORTH CAROLINA	GEN. STAT. (1981) § 136-28.1	<i>Classes of Contracts:</i> Construction or repair of state highways where cost is more than \$30,000. For projects of less than \$30,000, contracts may be awarded based on 3 informal bids.
MONTANA	CODE ANN. (1985) §§ 60-2-111, 60-2-112	<i>Classes of Contracts:</i> State and Federal-aid highways: All contracts where estimated cost of work exceeds \$10,000. Commission may make contracts with local governments for construction without competitive bidding if it finds the work can be done for lower cost.	NORTH DAKOTA	CENT. CODE (1985) §§ 24-02-17, 24-02-18, 24-02-23	<i>Classes of Contracts:</i> Construction or improvements costing more than \$5,000, providing discretion may be used where "preservation of state highways from deterioration" requires quick action.
NEBRASKA	REV. STAT. (1984) §§ 39-1349, 39-1407, 23-342	<i>Classes of Contracts:</i> State roads and bridges: All contracts for construction, improvement or maintenance.	OHIO	REV. CODE (1985) §§ 5517.02, 5525.01	<i>Classes of Contracts:</i> All construction, reconstruction, improvement, maintenance and repair of highways, except that construction or reconstruction projects on bridges and culverts or general maintenance costing less than \$20,000 may be carried out by the Department directly with force account. Equipment, material, labor, and supplies for maintenance or repair costing less than \$20,000 may be procured without competitive bids if emergency situations occur.
NEVADA	REV. STAT. (1985) §§ 408.232, 408.343		OKLAHOMA	STAT. ANN. (1985) §§ 61-103, 61-1101, 69-633	<i>Classes of Contracts:</i> All public construction contracts exceeding \$7,500. <i>Criteria for Award:</i> Lowest responsible bidder. If award is made to other than
NEW HAMPSHIRE	REV. STAT. ANN. (1985) §§ 228:4, 228:4-a	<i>Classes of Contracts:</i> State highway projects costing more than \$10,000, except (1) normal highway and bridge maintenance and improvements without Federal funds, including state-aided town road and bridge projects, and (2) emergency work done on force account basis. <i>Criteria for Award:</i> Lowest responsible bidder. <i>Authority to Reject Bid:</i> Right reserved to reject any and all bids. May negotiate with lowest responsible bidder.			

TABLE 1—Continued

STATE	CITATIONS	UPDATE INFORMATION
		lowest responsible bidder, the awarding agency must file a "publicized statement" of reasons therefor.
OREGON	REV. STAT. (1985) §§ 279.015, 279.029, 279.035	<i>Authority to Reject Bid:</i> May reject any or all bids for good cause upon finding by Department that it is in the public interest to do so.
PENNSYLVANIA	STAT. ANN. (1986) tit. 36, §§ 670.403, 670.404	
RHODE ISLAND	GEN. LAWS (1985) § 24-8-12	<i>Classes of Contracts:</i> All road construction or improvements made by Director of Transportation.
SOUTH CAROLINA	CODE OF 1976 (1985) §§ 57-5-1620, 57-17-650	<i>Classes of Contracts:</i> Highway Department construction contracts for \$10,000 or more, except where Department determines an emergency exists and provides public explanation.
SOUTH DAKOTA	COMP. LAWS (1986) §§ 31-5-10, 31-12-13	<i>Authority to Reject Bid:</i> State Highway Department reserves right to reject all bids.
TENNESSEE	CODE ANN. (1986) §§ 54-13-113, 54-5-114, 54-5-114, 54-5-116, 54-5-118, 54-9-124	<i>Classes of Contracts:</i> State projects: All contracts under which any highway funds are to be expended. County projects: Contracts for grading, macadamizing, concreting, bridge building, and other improvements.
TEXAS	CIVIL STAT. (1986) art. 6674i	
UTAH	CODE ANN. (1986) § 63-56-37	
VERMONT	STAT. ANN. (1986) tit. 19, § 4; tit. 3, ch. 55 Std. Specs. (1986) §§ 102.07, 103.01, 103.02	<i>Classes of Contracts:</i> State Transportation Board authorized to contract on such terms as it deems best for the State for construction, repair and maintenance of State highways, and for use of machinery and equipment for road work. Highway and bridge contracts exceeding \$40,000 must be advertised for bids. <i>Criteria for Award:</i> Lowest responsible bidder.
VIRGINIA	CODE (1986) §§ 33.1-185, 33.1-190; 11-35 et seq.	<i>Classes of Contracts:</i> Except in emergencies, all contracts exceeding \$200,000 must be let by State Highway and Transportation Board, and all contracts below \$200,000 may be let by competitive procurement.

STATE	CITATIONS	UPDATE INFORMATION
WASHINGTON	REV. CODE ANN. (1986) §§ 47.28.090, 47.28.100, 47.01.031	<i>Classes of Contracts:</i> All contracts let by State Transportation Department.
WEST VIRGINIA	CODE (1986) § 17-4-19 Std. Specs. (1986) § 103.2	
WISCONSIN	STAT. (1983-84) §§ 84.06, 84.075 Std. Specs. (1981) § 103.2	<i>Criteria for Award:</i> Lowest competent and responsible bidder, except the Department may award to minority business if it is qualified and its responsible bid is no more than 50 percent higher than the lowest bid. <i>Authority to Reject Bid:</i> Right is reserved to reject any and all bids if Department determines that State's best interest is served thereby.
WYOMING	STAT. (1986) § 24-2-108	

include services requiring aesthetic, business or technical knowledge and judgment, and professional or scientific skill and experience.⁴⁹

In line with this reasoning, contracts for architectural services are regularly put into this category.⁵⁰ In contrast, a contract to make a motion picture record of constructing a major highway bridge was held not to be one for "personal services";⁵¹ nor was a contract to manage the sale of advertising space and display facilities in an airport.⁵² The same result occurred where a public agency contracted for inspection and enforcement of an electrical code for building construction. Denying that it could be regarded either as "professional" or "extraordinary unspecifiable services" under the state's public contracts law,⁵³ the court reasoned that since inspection specifications had been issued for use in administration and enforcement of the law, the work may have required special skill but did not demand special knowledge or professional judgment.⁵⁴

The increasing use of construction managers has tested this distinction in a variety of circumstances. Where an arrangement called for a contractor to design a building and perform some of the functions of a construction manager—i.e., coordinating solicitation and acceptance of subcontracts, but not overseeing or performing any construction or supplying any materials—it was held that competitive bids were not needed.⁵⁵

The reverse of this situation is illustrated where a public agency contracted with an engineering consultant to advise it on the best way to proceed in arranging for the design, construction, and operation of facilities for management and recycling of solid waste. Award of the consultant's contract by negotiation rather than competitive bidding was challenged, alleging that the consultant did not come within the "scientific knowledge and professional skill" exception because it did not itself design the plant, but merely acted as a "broker" of the services of others. The court disagreed, and held that as long as the services contracted for involved scientific knowledge and professional skill it did not matter whether they were provided by an original source or through a broker.⁵⁶

Contracts of Special Nature (p. 1152)

Contracts for acquisition of real property have been regarded as unsuitable for award through competitive bids because differences in sites and conditions make each piece unique. This approach may be seen in another context where complex construction tasks are part of a larger integrated project in which engineering plans, design and construction phases must be coordinated within the framework of financing plans. Thus, the contract for construction of an underground parking garage for a retail shopping mall development project was held to be sufficiently special in its nature to warrant award of the contract through negotiation rather than competitive bid.⁵⁷

Model Legislation

Variations in state and local governmental organization, political constraints on contracting authority, and local or regional economic conditions have been responsible for lack of uniformity in statutory and administrative rules relating to contracting by public agencies. In 1979, the American Bar Association approved, and now recommends, a Model Procurement Code for state and local governments, offering it as a means introducing more uniformity into all types of public contracts and contracting procedure.⁵⁸ While it is recognized that differing local needs, magnitudes of construction requirements, and existing or longstanding practices may necessitate tailoring public contract laws to accommodate these factors, the premise of the model code is that in substantive matters it reflects basic policies and principles that are equally applicable to the contracting processes of all public bodies. In addition to the Model Procurement Code, the American Bar Association in 1980 prepared Recommended Regulations to implement the Code, and in 1982 it prepared a Model Procurement Ordinance for Local Governments, based on the Model Code but adapted to the special circumstances and needs of counties and municipalities. By 1986, eleven states had enacted legislation based on the Model Procurement Code.⁵⁹

Methods of Noncompetitive Award of Contracts

Where an exception to the requirement for competitive bidding already exists, a contracting agency has a choice of several methods of awarding

a contract. These range through a variety of (1) procedures for soliciting bids from a limited number of selected potential bidders who are pre-qualified, sometimes wherein negotiations with one or more bidders may result in modifications of specifications, work methods, performance criteria, or price; and (3) negotiations with a sole source.

The contracting agency is allowed substantial latitude in exercising judgment in selecting the method that best serves the public interest. Its judgment must, however, always be consistent with the policies requiring that negotiated awards must be made with the maximum competition that is practicable, and that the use of a noncompetitive award shall be limited to the minimum needs of the contracting agency.⁶⁰ Also, a sufficient justification for the exception must always exist before noncompetitive award is permitted. Accordingly, it is not proper for the method of award to be selected solely to obtain a desired level in the quality of performance beyond the contracting agency's minimum need, nor is it proper to base the award on the difficulty or inconvenience of advertising for competitive bids, or the complexity of the subject.

In addition, where negotiations with a sole source are undertaken, the contracting agency must be able to show that the source possesses a unique capability to furnish the property, services or performance required to meet the agency's minimum needs. The determination that a particular source is in fact the sole source available for specified products or services may not be based on the unsupported opinion of the agency's contracting officer. It must be based on showing that the appropriate effort was made to investigate potential sources without success in finding any others.

Noncompetitive (sole source) contract awards that are subject to United States Department of Transportation regulations⁶¹ must be supported by written justification which provides (1) a convincing rationale as to why it is not practicable to solicit competitive bids; (2) particulars and details as to how and in what manner the proposed sole source is uniquely qualified, or is the only contractor who can meet a needed delivery schedule; (3) a detailed explanation of why only one source can supply the agency's need, and why the agency cannot use similar items, materials, or processes which are available; and (5) a description of the market search that was conducted to identify sources capable of supplying the needed property or services.⁶² If it is claimed that time requirements dictate a noncompetitive award, the justification must also demonstrate that the performance schedule is critical to the contracting agency's needs, and state precisely what damages will be sustained if performance is postponed until competitive bids are solicited and evaluated. References to administratively established deadlines or implementation schedules is not by itself sufficient to justify foregoing competition.

ADVERTISEMENT FOR BIDS (p. 1152)

General Requirements for Advertisement (p. 1152)

Table 2 (p. 13), *infra*, presents a summary of State laws and regulations relating to publication of invitations to bid on highway construction contracts. The updated information shown therein supplements

Table 2 (p. 1155 *et seq.*) in *Selected Studies in Highway Law*.

Responsibility for Plans, Specifications, and Technical Information (p. 1169)

Where courts have reviewed contracting agencies' compliance with their duty to provide bidders with complete and accurate plans and specifications for the work to be performed, they have recognized the practical difficulties which those agencies have in dealing with construction projects that are both extensive and complex. This has been illustrated recently in cases where public agencies have installed automated data processing systems to aid in performing their functions, and in so doing have attempted to use very general descriptions of how their contractor shall do his work. In one recent case, the state agency requested bids for providing a "total data processing system" and did not specify any of the items of equipment desired, leaving it to the bidders to determine the components of the system which, in their judgment, would accomplish the desired end result. Commenting on this, the court stated:

The complex nature of the accouterments of the overall data processing, and its absorption into the state system involving hardware, software, conversion costs, maintenance, personnel training, etc., defied the preparation of specifications which would identify particular types of equipment to be furnished by the bidder.⁶³

Despite this, the court upheld the validity of the award because when viewed in its entirety, the agency's bidding and award procedure appeared to allow a sufficient comparison and evaluation of the competing proposals. In this instance, the bidders' proposals were reviewed and evaluated first by a committee which witnessed a 3-day demonstration of each system, during which each was rated on the basis of percentage points allocated to various performance requirements, and, second, in a written analysis of the performance point scores and cost proposals. This procedure, the court held, provided sufficient safeguards for the public interest so that failure to use the type of public advertising required for other and more usual purchases of materials and services was justified.

This insistence that, where a contracting agency does not use the customary advertising methods, it still must preserve the essential quality of competition and achieve the legislature's objective of preventing favoritism and unnecessary extravagance is emphasized where use of problem-oriented instructions was held not to comply with the state's bidding and award law.

Notwithstanding that the legislature had authorized development of a computerized data processing system, and stated that the contract for this work need not be awarded to the lowest responsible bidder, the court said:

To allow a bidder to furnish his own specifications for any material part of the contract in question would destroy genuine and fair competition. . . . The defendants are correct that . . . [the statute] does not expressly require the departments to use detailed specifications and does not contain a low bidder requirement. The regulations do, however, require a statement of the "quantity and quality of the item . . . to be furnished." . . . The

description need not label the item by a specific brand nor define it so rigidly that only one can comply. . . . However, the item purchased should be described with enough precision to permit fair comparison among the several bids. . . . The statute here in question required open competitive bidding upon a common footing after proper advertisement.

* * *

The point of the common footing is not to ensure such definite specifications that all bidders are bidding on exactly the same thing. The requirement is designed to ensure meaningful manageable comparison. . . . [T]he need for definiteness may even increase when criteria other than price come into play and awards based on favoritism are harder to detect.⁶⁴

Where contracts do not involve subject matter which is unusual or complex, and advertisements for bids omit pertinent features or descriptive information, courts tend to take a pragmatic approach and accept substantial compliance where the defective specification does not result in any practical disadvantage in preparing or evaluating bids.⁶⁵

The same applies where bidders charge that a contracting agency fails to furnish the latest and best technical information available. The limits of a contracting agency's duty in this regard are illustrated where a union which had members who would have been hired by a bidder complained that the agency did not notify bidders of a forthcoming change in the official wage determination so it could be reflected in bidding on a federally funded construction project. The court dismissed the complaint with the following observation:

The plaintiff would expand the [highway] administrator's duty . . . compelling him to keep one ear pressed on the walls of the Department of Labor's Wages and Hours Division, straining to hear of prevailing wage modifications . . . as yet unborn, but which might issue within days or hours of an opening of bids. No such burden is imposed by . . . [the law] as presently written and none shall be manufactured by this court.⁶⁶

Where the technical information in question is in the form of governmental actions, prospective bidders must, along with the rest of the public, monitor the official gazettes where such information is announced.

Alternate Bids (p. 1173)

Projects which permit or call for bidding in alternative terms may raise questions regarding practices that are prohibited because they adversely affect the quality of competition in the bidding process, even though there is no corruption or conspiracy in the bids, and no actual loss or unnecessary extravagance suffered by the public agency. Where such practices are found, contracts involving them are considered unlawful or may be set aside. Instances in which these results were considered to be present were where one submitted a high bid on one alternative and an excessively low bid on the other, with the intention of underbidding others on the total project and so securing contracts for all of the work.

Bidders who use this practice to advance their "all or none" strategy may reduce the risk of having only their excessively low bid by claiming

TABLE 2

SUMMARY OF STATE LAWS AND REGULATIONS RELATING TO PUBLICATION OF INVITATIONS TO BID ON HIGHWAY CONSTRUCTION

STATE	CITATIONS	UPDATE INFORMATION
ALABAMA	CODE (1986) §§ 39-2-2, 23-1-92	
ALASKA	Departmental Regulations	<i>Newspaper Notice:</i> Advertisement in 3 consecutive weekly issues in daily newspapers in Anchorage, Fairbanks, and Juneau and, when time permits, 3 times in local papers and papers with statewide circulation. Large projects should also be advertised in the northwest regional construction trade papers with publication for more than 21 days commensurate with size and complexity of project.
ARIZONA	REV. STAT. (1985) § 28-1804	
ARKANSAS	STAT. (1983) § 14-611	
CALIFORNIA	PUBLIC CONTRACT CODE (1986) § 10140 § 20392	<i>Newspaper Notice:</i> Projects over \$35,000: Once weekly for at least 2 consecutive weeks (or more if deemed necessary by Department) next preceding date set to receive bids in (1) newspaper of general circulation in county where project is located and (2) trade paper of general circulation published in San Francisco for projects in County Group One or in Los Angeles for projects in County Group Two. County projects: Ten times consecutively in newspaper of general circulation in county designated by the Board, or two times consecutively in a weekly published in a county designated by the Board.
COLORADO	REV. STAT. (1985) §§ 43-2-209 24-92-103(4) Code of Regs. 2CCR 601-10	<i>Newspaper Notice:</i> State projects: Notice in newspaper of general circulation at least 14 days prior to bid opening. <i>Public Posting:</i> County projects: If no newspaper of general circulation is published in county, post notice at county courthouse at least 10 days prior to bid opening date.
CONNECTICUT	GEN. STAT. ANN. (1986) § 13a-95	
DELAWARE	CODE ANN. (1985)	<i>Newspaper Notice:</i> Once a week for 2 consecutive weeks in a newspaper published or circulated in each county of the State.

STATE	CITATIONS	UPDATE INFORMATION
DISTRICT OF COLUMBIA	CODE (1986) § 1-1183.3	<i>Newspaper Notice:</i> Publication in a newspaper of general circulation and in trade journals considered appropriate by the Director of Highways which will give adequate public notice at a sufficient time (not less than 30 days) before the date for opening bids.
FLORIDA	STAT. (1986) §§ 337.11, 336.44	<i>Newspaper Notice:</i> State projects: Once a week for not less than 2 consecutive weeks in a newspaper of general circulation in the county where project is located. Last notice must be not less than 7 days before date of receiving bids.
GEORGIA	CODE OF GEORGIA ANN. (1985) §§ 32-2-65, 32-2-65(a)	<i>Newspaper Notice:</i> County projects: Once a week for at least 2 weeks in a newspaper in which Sheriff's Sale notices are published. <i>Public Posting:</i> Written notice on courthouse door is not required.
HAWAII	REV. STAT. (1984) §§ 103-22, 103-26	
IDAHO	CODE (1984) § 40-907	
ILLINOIS	REV. STAT. (1985) ch. 127, par. 132.4 44 ILL. ADMIN. CODE 675	<i>Newspaper Notice:</i> Notice and advertisement for bids must be published in "official newspaper" as selected by State Department of Central Management Services. Advertisement must appear 3 times, with first and last at least 10 days apart.
INDIANA	STAT. ANN. (1986) §§ 4-13.4-5-10, 8-20-1-64, 5-3-1-2	<i>Newspaper Notice:</i> Publication in a newspaper of general circulation in Marion County, at least once a week for 2 consecutive weeks. County projects: Publication in a newspaper or newspapers carrying legal notices two times, at least a week apart, with at least 10 days before date of receiving bids.
IOWA	CODE ANN. (1986) §§ 23.18, 23.21	<i>Newspaper Notice:</i> Municipal projects: Two publications in a newspaper circulating in the county where the work is to be done, with first publication at least 15 days prior to date for receiving bids.
KANSAS	STAT. ANN. (1985) § 68-408	<i>Newspaper Notice:</i> Publication at least once a week for 2 consecutive weeks in the Kansas Register, and such other notice as

TABLE 2—Continued

STATE	CITATIONS	UPDATE INFORMATION
		the Secretary of Transportation may deem necessary and proper.
KENTUCKY	REV. STAT. (1986) §§ 176.050, 176.070, 178.050, 178.260, 184.110, 424.260	
LOUISIANA	STAT. ANN. (1986) § 48:252	
MAINE	REV. STAT. ANN. (1985) § 23-753	
MARYLAND	ANN. CODE (1985) State Finance and Procurement Act 13-202	<i>Newspaper Notice:</i> Publication in a newspaper of general circulation in the State. <i>Public Posting:</i> Reasonable public notice at least 10 days prior to bid opening. <i>Other Requirements:</i> Publication in the Maryland Register at least 30 days prior to bid opening where the bid amount is reasonably expected to exceed \$25,000.
MASSACHUSETTS	GEN. LAWS ANN. (1986) ch. 149, § 44J	<i>Newspaper Notice:</i> Publication in a newspaper of general circulation in the locality of the project at least 2 weeks prior to time for receipt of bids, and at such other times and in such other newspapers or local trade journals, as may be required, having regard to the locality of the work involved. <i>Public Posting:</i> Posting not less than one week prior to time for receipt of bids in a conspicuous place in or near the office of the awarding authority. <i>Other Requirements:</i> Publication in the State Secretary's Central Register at least once not less than 2 weeks prior to time for receipt of bids.
MICHIGAN	COMP. LAWS ANN. (1986) §§ 247.661, 224.19	<i>Newspaper Notice:</i> State law does not require Department of Transportation to advertize for bids on highway projects. Publication of invitations for bids is left to administrative discretion. 10 Op. Atty. Gen. 1937-1958, No. 2952. Current administrative practice relies on notice mailed to prequalified bidders who express interest in a project.
MINNESOTA	STAT. (1986) §§ 161.32, 16B.08	<i>Newspaper Notice:</i> Projects other than State trunk system: If amount of contract exceeds \$5,000, notice for sealed bids must be published in a newspaper or trade journal at least once not less than 7 days prior

STATE	CITATIONS	UPDATE INFORMATION
		to date for receipt of bids. Commission shall designate newspaper or trade journal to be used in each case. <i>Other Requirements:</i> Commission shall also send notice by mail to all prospective bidders known to him.
MISSISSIPPI	CODE OF 1972 (1986) § 65-1-85	
MISSOURI	ANN. STAT. (1984) §§ 227.100, 229.50	
MONTANA	CODE ANN. (1985) § 60-2-112	<i>Newspaper Notice:</i> State Highway Commission is authorized to prescribe rules for notice. By Commission regulation notices for bid proposals follow rules in 23 Code of Fed. Regs. (1986) 635.107.
NEBRASKA	REV. STAT. (1984) §§ 39-1348, 39-1406, 39-1407	
NEVADA	REV. STAT. (1985) § 408.327	
NEW HAMPSHIRE	REV. STAT. ANN. (1985) § 228:4	
NEW JERSEY	STAT. ANN. (1986) § 27:7-29 § 40A:11-23	<i>Newspaper Notice:</i> State highway projects: Once a week for 3 weeks prior to receipt of bids in each of two newspapers printed in county or counties where project is located, and in one newspaper published in Trenton. County road projects: At least once 10 days prior to date for receipt of bids in newspapers circulating in the county. <i>Other Requirements:</i> State highway projects: May publish notice in one or more American engineering journals. Notice of addenda or revisions shall be published in a legal newspaper and sent to bidders in writing by certified mail at least 5 days prior to acceptance of bids.
NEW MEXICO	STAT. ANN. (1986) § 67-3-43	<i>Newspaper Notice:</i> Publication at least once not less than 10 days prior to letting in a newspaper of general circulation in the area in which the central purchasing office of the Highway Department is located. <i>Other Requirements:</i> Invitations for Bids shall be sent to all interested parties provided project will exceed \$5,000 and recipient has paid requisite fees.

TABLE 2—Continued

STATE	CITATIONS	UPDATE INFORMATION
NEW YORK	HIGHWAY LAW (McKinney Supp. 1984) § 37	
NORTH CAROLINA	Board of Transp. Rules and Regs.	
NORTH DAKOTA	CENT. CODE (1985) § 24-02-19, § 24-05-04	<i>Newspaper Notice:</i> State highway projects: Once a week for 3 successive weeks in the official newspaper of the county where the project is located. County road projects: Once a week for 2 successive weeks in the official newspaper of the county, and in others deemed advisable. First publication must be at least 30 days prior to date of bid opening.
OHIO	REV. CODE (1985) § 5525.01	
OKLAHOMA	STAT. ANN. (1985) § 61-104	<i>Newspaper Notice:</i> Publication in a newspaper of general circulation published in the county where all or a major part of the work is to be done, two consecutive weekly issues with first publication at least 20 days prior to date of bid opening. Whenever a project cost exceeds \$50,000 notice may also be sent to trade or construction publications. <i>Other Requirements:</i> At least 20 days prior to date for bid opening, written notice must be sent by first class mail to all known prospective bidders who have indicated in writing an interest in bidding. Contents of bid notice are specified by statute.
OREGON	REV. STAT. (1984) § 279.025	
PENNSYLVANIA	STAT. ANN. (1986) tit. 36, § 670.405	<i>Newspaper Notice:</i> Twice in one or more newspapers of general circulation in county where project is located. If more than one county is involved, notice must be given in at least two newspapers in at least two of the counties involved. Notices must be given at least 3 weeks before contract award. Notices also may be published in other newspapers or engineering publications.
RHODE ISLAND	GEN. LAWS (1985) § 24-8-12	
SOUTH CAROLINA	CODE OF 1976 (1985) §§ 57-5-1620; 57-17-640	<i>Other Requirements:</i> When circumstances warrant, the Department may advertise for longer periods of time and in publications other than newspapers.

STATE	CITATIONS	UPDATE INFORMATION
SOUTH DAKOTA	COMP. LAWS (1986) §§ 31-5-10, 31-12-14	<i>Newspaper Notice:</i> State trunk system: Publication of a minimum of two notices over a period of 3 weeks prior to date of bid opening in a manner determined by the State Highway Commission. County road projects: Once a week for 2 successive weeks in the official newspaper of the county.
TENNESSEE	CODE ANN. (1986) §§ 54-4-114, 54-4-106, 54-9-124	<i>Newspaper Notice:</i> Publication at least two weeks prior to date for receiving bids in a newspaper in the county where the money is to be spent, and also in one widely circulated newspaper in that grand division of the State where the work is to be done. If no newspaper is published in the county where the work is to be done, notice may be published in an adjacent county.
TEXAS	CIVIL STAT. (1986) §§ 6674h, 2368a	
UTAH	CODE ANN. (1986) 63-57-37	
VERMONT	STAT. ANN. (1986) tit. 19, § 4 Std. Specs. (1986) § 102.01	
VIRGINIA	CODE (1985) §§ 11-37, 33.1-185	<i>Newspaper Notice:</i> All construction contracts, except emergency contracts, must have invitation to bid advertised at least 10 days prior to letting the contract. <i>Public Posting:</i> Notice must be posted in public area designated by State Transportation and Highway Board. <i>Other Requirements:</i> Invitations to bid may be solicited directly and, if done, shall include Disadvantaged Business Enterprises (DBEs).
WASHINGTON	REV. CODE ANN. (1986) § 47.28.050	<i>Newspaper Notice:</i> State highway projects: Once a week for two consecutive weeks next preceding the date for receipt of bids in one newspaper and one trade journal, both having general circulation in the State. Projects of less than \$50,000: Publication may be in one newspaper of general circulation in the county where the major part of the work will be done.

TABLE 2—Continued

STATE	CITATIONS	UPDATE INFORMATION
WEST VIRGINIA	CODE (1986) §§ 17-4-19, 59-3-1 et seq.	
WISCONSIN	STAT. (1983-84) § 84.06	<i>Other Requirements:</i> Advertisement in a manner determined by the State Department of Transportation.
WYOMING	STAT. (1986) § 24-2-108	

it was made by mistake and must be rejected. The prospect that a "high-low" bidder may be able to manipulate the award, while other bidders do not have this same advantage, has led courts to condemn the practice even though it was not illegal.⁶⁷

Circumstances may alter results, however, and were held to do so in *Sempre Construction Co. v. Township of Mount Laurel*.⁶⁸ Here a contracting agency asked for bids on excavation work, reserving the right to award its contract or contracts on "base bids" or "base plus alternates." One construction company, making no secret that it wanted all of the work or none of it, submitted a high base bid and an extremely low bid for the alternates. When this action was challenged by a competing bidder, it was upheld by the court, and distinguished from the prohibited type of practice.

Citing the fact that the high-low bids here were free from any technical defects by which the bidder might be relieved from his duty to accept an undesired contract, the court observed:

Here the high base-low alternates bid strategy grants the bidder only an inchoate opportunity to seek to be relieved from its bid from third persons (the governing body or court) not under its control. Such a strategy is a calculated gamble fraught with attendant risk that relief from the bid, a purely discretionary decision, would not be granted.

If the low bidder decides to renege after reviewing the bids, he must go through the costly and risky process of arguing that he made a blunder. Review of case law indicates that, while such arguments have been successfully made, they are not at all common.⁶⁹

PREPARATION OF BIDS (p. 1175)

Eligibility of Bidders (p. 1175)

Once granted, a contractor's eligibility to bid on public contracts may be lost permanently through revocation of his contractor's license or lost temporarily through debarment for cause or suspension of prequalifi-

cation. The basis and consequences of these actions have been considered in recent court decisions.

The law does not recognize that a contractor has a legally protected right to bid and be awarded a public contract merely because his qualifications as a potential bidder have been certified. The law does, however, treat revocation of a certificate of qualification as being in the nature of a license revocation and is subject to procedural requirements that constitute due process.⁷⁰ Thus, a licensee or certificate holder is entitled to notice and hearing at which he may explain or rebut the evidence giving rise to the agency's action. Informal exchange of letters and meetings with agency officials carried out under policies and practices followed by the agency do not meet due process standards. Formalized proceedings under applicable state administrative procedure laws are required.⁷¹ Administrative proceedings leading to suspension or debarment must compile a record of evidence which is sufficient to rebut any charge that the agency's decision was arbitrary.⁷²

Because the bidding and award process is based entirely on statutory authority, departmental administrative proceedings leading to suspension or debarment must adhere strictly to statutory requirements. Thus, statutes have been construed to require that contractors be disqualified for unintentional violations of the law as well as intentional actions.⁷³ Also, jurisdiction and authority for debarment by a contracting agency has had to be specifically authorized in applicable statutes.⁷⁴ Administrative proceedings must keep records showing that all jurisdictional elements of the case were dealt with and sustained by factual findings developed in accordance with its own rules as well as those of the legislature.⁷⁵

Form of Bid (p. 1177)

Single or Separate Contracts (p. 1177)

Where a Department of Transportation advertised for bids on a single lump sum contract to construct a series of 35 roadside rest areas, a local mechanical contractors association sought to enjoin the advertisement, claiming that the state bidding law required separate contracts for each mechanical trade involved in the project. In this case, each rest area involved construction of public facilities and storage buildings with janitors' and storage rooms, and a complete waste water treatment system installed.⁷⁶ Examining the Department of Transportation's statutory authority to enter into contracts, the court concluded that although the legislature had not authorized construction of roadside rest areas in specific terms, ample authority could be inferred from other legislation making the agency responsible for highway and roadside conditions. The more difficult question was whether the Department of Transportation was subject to a statutory requirement that state contracts involving plumbing, gas fitting, steam heat and power, and electrical equipment must be awarded in separate contracts for each mechanical trade in-

volved.⁷⁷ Construing the applicable statutes, the court held that they required the Department to advertise and award separate contracts for each mechanical trade involved in the desired work.⁷⁸

Lump Sum versus United Price Bids (p. 1178)

When unit price bidding is authorized, discrepancies may occur between the total unit price shown in the bid and the same price as calculated by multiplying the unit price by the number of units to be furnished. If bidding instructions anticipate such situations and specify what figure will be accepted, the parties to the contract are held to resolving discrepancies by that means, and the contracting agency may not reject the bid as being ambiguous, uncertain and inconsistent for that reason.⁷⁹

Balanced and Unbalanced Bids (p. 1181)

The distinction between genuine and apparently unbalanced bids was made in *Department of Labor and Industries v. Boston Water and Sewer Commission*,⁸⁰ in which the complainant protested a bid made to the defendant Commission for construction of underground sewer lines. The Commission's specification for the work called for the contractor to install temporary sheeting, on which item the apparent low bidder listed a unit price of a penny per square foot. Although it was determined that this bid was in no way unbalanced, "front-end loaded" or otherwise inflated, and was made in good faith, and did not violate any of the State's public contract laws, the complainant instructed the defendant Commission to reject the bid as unresponsive and contrary to the complainant's policy.⁸¹

On appeal, however, the Massachusetts Appellate Court reversed this ruling. It held that the complainant lacked authority to promulgate rules or regulations which controlled the bidding process, and its announced policy could not be permitted to have the practical effect of law.⁸² The court also distinguished the practice of penny bidding from the case where the "equal footing" of bidders was destroyed by artificially low bids that conferred special advantages on one of the bidders.⁸³

Bidding on Alternatives (p. 1183)

Bidding on alternatives may take the form of instructions to prepare bids on alternative methods or specifications for accomplishing the contracting agency's objective. In such cases the bids are evaluated for returning the greatest value for the money spent. Success in using this type of bidding requires clear and complete specifications and instructions, and proposals that are carefully prepared and responsive.⁸⁴

Cases in which bids contain minor irregularities or technical failures to comply with instructions that do not materially affect the bid generally may be waived by the contracting agency. Cases in which bidders fail to submit any bid on some of the alternatives cause more serious problems, as illustrated in *Baxter Asphalt & Concrete, Inc. v. Liberty County*.⁸⁵ Here the contracting agency asked for bids for resurfacing roads with two alternative methods, differing mainly in the grade of asphalt used.

At the bid opening it was found that the lowest bidder had failed to bid on one of the alternatives because, it turned out, the contracting agency had inadvertently failed to send the bidding form needed for that purpose. Exercising its discretionary authority to waive irregularities and technical violations, the agency awarded the contract to the lowest bidder. When the second lowest bidder sought to enjoin the award, the Florida Supreme Court upheld the county's action, noting that its action here had not exposed the public to any of the dangers of fraud, collusion, or favoritism which the competitive bidding procedure was intended to prevent. The fact that the low bidder's failure to comply with instructions was a material omission rather than a minor technicality did not preclude its waiver where, as here, it did not confer any special competitive advantage on the lowest bidder.

Bid Security Deposits (p. 1188)

Compliance with bidding procedure is an administrative function, and courts do not substitute their judgment for that of the contracting agency in this matter in the absence of fraud or conspiracy. So, where a bid was rejected because the bidder's security deposit check was not properly certified, the agency's action was upheld over arguments that the defective certification complied with the intent of the law.⁸⁶

A summary of State laws and regulations relating to security for bids on highway construction contracts is presented in Table 3 (p. 18), *infra*. The updated information shown therein supplements Table 3 (p. 1191 *et seq.*) in *Selected Studies in Highway Law*.

Mandatory Provisions (p. 1185)

Requirements that bids must include assurances that bidders will comply with the terms of Federal or State laws favoring minority and disadvantaged business enterprises are frequently included in bidding instructions for public works construction projects. Under the laws establishing these requirements, contracting agencies' authority for determining compliance may extend to substantive as well as formal aspects of a bidder's proposal. For example, where a municipality's advertisement for bids to install street signs and traffic signals also required bidders to submit an Affirmative Action Program for achieving minority participation goals, the municipal contracting officer rejected the lowest bid because of an unacceptable plan. On appeal, the court upheld the municipality's authority to determine the acceptability of the bidder's plan as part of the responsiveness of his bid.⁸⁷

Similarly, where the low bidder on a public construction contract was disqualified because one of his designated subcontractors was not on the Department of Transportation's list of certified minority business enterprises, the action of the contracting agency was upheld as proper.⁸⁸

In both cases refusal of the contracting agency to waive the irregularity and permit it to be corrected later was upheld based upon the argument that to do otherwise would give the bidders in question an advantage over others who would not be allowed to change their bids after they had been opened.

TABLE 3

SUMMARY OF STATE LAWS AND REGULATIONS RELATING TO SECURITY FOR BIDS ON HIGHWAY CONSTRUCTION CONTRACTS

STATE	CITATIONS	UPDATE INFORMATION
ALABAMA	CODE (1986) §§ 39-2-4, 39-2-5	
ALASKA	Std. Specs. (1981) § 102-1.08, 103-1.04	<i>Amount of Security:</i> Not less than amount prescribed in bid invitation. <i>Form of Security:</i> Cashier's check or surety bond. If surety bond is used, the surety must be corporation or partnership authorized to do business in Alaska as an insurer under Alaska Statutes, 21.09.
ARIZONA	REV. STAT. (1985) § 34-201	<i>Form of Security:</i> Certified check, cashier's check, surety bond. <i>Terms for Return of Security:</i> Security deposits are returned to unsuccessful bidders after selection of successful bidder, and to successful bidder upon execution of contract and performance bond.
ARKANSAS	STAT. (1985) § 14-612	
CALIFORNIA	PUBLIC CONTRACT CODE (1986) §§ 10167, 10184	
COLORADO	REV. STAT. (1985) § 24-92-110 Code of Regs. 2 CCR 601-10	<i>Amount of Security:</i> Five percent of contractor's bid. <i>Terms for Return of Security:</i> Returned to unsuccessful bidders "promptly" following opening and verification of bids. Bid bonds for three lowest bids are held until award of contract
CONNECTICUT	GEN. STAT. ANN. (1986), 13a-95 Std. Specs. (1985) § 103.04	
DELAWARE	CODE ANN. (1985) § 29-6906	<i>Form of Security:</i> Surety bond or "security assigned to the agency." Bid bond need not be for a specific amount, but may be for a sum equal to at least 10 percent of the bid.
DISTRICT OF COLUMBIA	CODE (1986) § 1-1185.2	<i>Amount and Form of Security:</i> Bid bond equal to 5 percent of the amount bid is required for all construction contracts exceeding \$100,000, and may be required for contracts under \$100,000 when circumstances warrant. Bond must be issued by a surety company authorized to do business in the District.

STATE	CITATIONS	UPDATE INFORMATION
FLORIDA	STAT. (1986) § 337.17 Std. Specs. (1986) §§ 3-2, 3-4	<i>Amount of Security:</i> Statute allows up to 10 percent of preliminary estimate of cost to be required for all contracts exceeding \$150,000. Standard Specifications require bid bond of 5 percent of bid. <i>Terms for Return of Security:</i> All bid guaranties, except those of two lowest bidders, are returned immediately after opening and checking bids. Guaranties of two lowest bidders are returned immediately after contract is executed and performance bond is issued, but in no event will guaranty be retained more than 50 days without contract award unless there is a bid protest.
GEORGIA	CODE OF 1981 (1986) §§ 32-2-68, 32-4-67	
HAWAII	REV. STAT. (1984) §§ 103.28, 103-30; 103.31	<i>Form of Security:</i> "Legal tender," certificate of deposit, certified check on bank insured by FDIC or savings institution insured by FSLIC. Bid deposits exceeding \$100,000 must be in legal tender or surety bond meeting requirements of H.R.S. 103-31. <i>Terms for Return of Security:</i> Returned to unsuccessful bidders after contract is executed or, if contract is not awarded, when determination is made to readvertise.
IDAHO	CODE (1984) § 40-902	
ILLINOIS	44 ILL. ADMIN. CODE 675.20 Std. Specs. (1983) § 102.09	<i>Amount of Security:</i> Five percent of bid amount according to chart on Standard Specifications, ranging from \$150 (for bids under \$5,000) to \$1,000,000 (for bids up to \$35,000,000). <i>Form of Security:</i> Bid bond, cashier's check, or certified check. <i>Terms for Return of Security:</i> Guaranty checks, except for two lowest bidders, are returned after bids are evaluated. Checks for two lowest bidders are returned after contract and performance bonds are executed and approved. Bid bonds are not returned.
INDIANA	STAT. ANN. (1986)	<i>Amount of Security:</i> Bidders must submit with proposal a 5 percent bid guar-

TABLE 3—Continued

STATE	CITATIONS	UPDATE INFORMATION
		anty and a performance bond payable to State, except that performance bond may be waived for certain designated contracts of less than \$100,000.
IOWA	CODE ANN. (1986) §§ 23.18, 23.21	<i>Amount of Security:</i> Municipal projects: At least 5 percent but not more than 10 percent of estimated total cost of the work.
	Std. Specs. (1986) §§ 1102.12, 1103.03, 1103.05	<i>Form of Security:</i> Cash, certified check, bank draft, credit union certified share draft, cashier's check, or surety bond. <i>Terms for Return of Security:</i> Municipal projects: Returned to unsuccessful bidders as soon as successful bidder is determined. Returned to successful bidder upon execution of contract documents.
KANSAS	Std. Specs. (1985): § 102.11	<i>Terms for Return of Security:</i> Bid bonds of two lowest responsible bidders remain in force until execution of a contract, and other bonds and insurance requirements to Secretary's satisfaction, at which time they become void. Security of unsuccessful bidders is returned or becomes void when contract award is determined.
KENTUCKY	REV. STAT. (1986) § 176.080	
LOUISIANA	REV. STAT. (1986) § 48:253	<i>Amount of Security:</i> Amount is fixed by Department as approximately 5 percent of departmental engineer's estimate of project cost.
	Std. Specs. (1977) § 3.02	<i>Form of Security:</i> Certified check, cashier's check, postal money order, bank money order, surety bond. <i>Terms for Return of Security:</i> Security of unsuccessful bidder is returned within 15 days after receipt of bids.
MAINE	REV. STAT. ANN. (1985) § 23-753	<i>Form of Security:</i> Official bank check, cashier's check, certificate of deposit, postal money order, or surety bond.
	Std. Specs. (1981) § 102.10	
MARYLAND	ANN. CODE (1985) State Finance and Procurement Act 13- 504	<i>Amount of Security:</i> Five percent of amount bid. <i>Form of Security:</i> Surety bond, bank certified check, bank treasurer's check, cash, trust account, or securities backed by full faith and credit of U.S. government, or bonds insured by State of Maryland.

STATE	CITATIONS	UPDATE INFORMATION
		<i>Terms for Return of Security:</i> Returned to unsuccessful bidders immediately after opening and review of proposals, except second and third lowest bidders' security is returned within 30 days following contract award date.
MASSACHUSETTS	GEN. LAWS ANN. (1986) ch. 484, § 45	
	Std. Specs. (1973) §§ 2.06, 3.03	
MICHIGAN	Std. Specs. (1985) § 1.02.07	<i>Amount of Security:</i> Determined by administrative discretion and indicated in the proposal form. <i>Form of Security:</i> Determined by administrative discretion and indicated in the proposal form. <i>Terms for Return of Security:</i> Returned to unsuccessful bidders "promptly." Department will hold security of determined lowest bidder until a Detailed Progress Schedule and required insurance is received and contract and required bonds are issued.
MINNESOTA	Std. Specs. (1986) §§ 1208, 1304	
MISSISSIPPI	CODE OF 1972 (1986) § 61-1-85	
MISSOURI	Std. Specs. (1984) § 102.8	
MONTANA	CODE ANN. (1985) §§ 18-1-202, 18-1- 203	<i>Amount of Security:</i> Highway Commission may specify amount of security, but not less than 10 percent of bid price. <i>Form of Security:</i> Cash, certified check, bank money order or draft on a national bank located in Montana or a bank incorporated in Montana, or surety bond.
NEBRASKA	Std. Specs. (1985) §§ 102.11, 103.04	
NEVADA	REV. STAT. (1985) § 408.337	
NEW HAMPSHIRE	Std. Specs. (1983) § 102.08	
NEW JERSEY	STAT. ANN. (1986) § 27:7-31	<i>Amount of Security:</i> Fifty percent of bid amount. <i>Form of Security:</i> "Proposal bond."

TABLE 3—Continued

STATE	CITATIONS	UPDATE INFORMATION
		<i>Terms for Return of Security:</i> Returned to unsuccessful bidders within 3 working days after bids are opened, except proposal bonds of two lowest bidders are returned when contract is executed.
NEW MEXICO	STAT. ANN. (1986) § 67-3-43 Std. Specs. (1984) § 102.09, 103.04	<i>Amount of Security:</i> Amount designated in proposal form as determined by Highway Department. <i>Form of Security:</i> Surety bond, certified check, cashier's check, postal money order, bank money order. <i>Terms for Return of Security:</i> All proposal guaranties in the form of checks, except those of the two lowest bidders, are returned immediately following opening and checking of proposals. Proposal guaranties of two lowest bidders, in the form of checks must be returned within 10 days following contract award. Proposal guaranty of the successful bidder, in the form of a check will be returned after a contract is executed and satisfactory performance bonds are furnished. Proposal guaranties in the form of surety bonds are returned only on request of the unsuccessful bidder.
NEW YORK	HIGHWAY LAW (McKinney Supp. 1986), 38 Std. Specs. (1973) § 102.07	<i>Form of Security:</i> Certified check, cashier's check. <i>Terms for Return of Security:</i> Returned to unsuccessful bidder promptly after determination of two lowest bidders. Checks of two lowest bidders are retained until contract is executed and bonds for performance and other requirements are issued.
NORTH CAROLINA	GEN. STAT. (1981) § 136-28.1 Std. Specs. (1984) §§ 102-9, 103-4	<i>Form of Security:</i> Bond issued by surety licensed under North Carolina law, certified check or cashier's check on a bank or trust company insured by Federal Deposit Insurance Corporation.
NORTH DAKOTA	CENT. CODE (1985) 24-02-09 Std. Specs. (1976) §§ 102-9, 103-4	
OHIO	REV. CODE (1985), 5525.01 Std. Specs. (1981) § 102.08	

STATE	CITATIONS	UPDATE INFORMATION
OKLAHOMA	STAT. ANN. (1985) § 61-107	<i>Amount of Security:</i> Five percent of amount bid. <i>Form of Security:</i> Certified check, cashier's check, surety bond. <i>Terms for Return of Security:</i> Security deposit of successful bidder is returned upon execution of a contract and required bonds and insurance. Checks of unsuccessful bidders are returned in accordance with the terms of the proposal.
OREGON	REV. STAT. (1985) §§ 279.027, 279.031	
PENNSYLVANIA	STAT. (1986) tit. 36, § 670-405.1 Std. Specs. (1983) §§ 102.08, 103.04	<i>Terms for Return of Security:</i> Bid security returned to unsuccessful bidders within 3 days after bids are opened. Security of successful bidder is held until contract is signed and approved by Departmental Counsel or Attorney General or their designee.
RHODE ISLAND	Std. Specs. (1981) §§ 102.08, 103.4	<i>Amount of Security:</i> Not less than amount indicated in bid proposal form. <i>Form of Security:</i> Character of security is indicated in the bid proposal form. <i>Terms for Return of Security:</i> Bid security of unsuccessful bidders is returned following opening and checking of bids. Security of two lowest bidders is retained, and that of the unsuccessful of these two must be returned within 10 days following the contract award. The successful bidder's security is retained until a contract is executed and satisfactory bonds are issued.
SOUTH CAROLINA	Std. Specs. (1973) §§ 102.10, 103.01	<i>Amount and Form of Security:</i> Proposals must be accompanied by a proposal guaranty of the specified character, in amount not less than indicated in the proposal form, and made payable to the State Highway Commission. <i>Terms for Return of Security:</i> All proposal guaranties are retained until the contract is executed by the successful bidder, after which all proposal guaranties will be destroyed unless the guaranty form contains a written request that it be returned to the bidder or surety.
SOUTH DAKOTA	COMP. LAWS (1986) §§ 5-18-6, 5-19-7 Std. Specs. (1985) § 2.18	

TABLE 3—Continued

STATE	CITATIONS	UPDATE INFORMATION
TENNESSEE	CODE (1986) § 54-5-115 Std. Specs. (1981) §§ 102.02, 102.05, 103.02	<i>Amount and Form of Security:</i> Amount and form of security to be submitted with bid is indicated in the proposal form. <i>Terms for Return of Security:</i> As soon as bids have been opened and prices compared, Department returns security for proposals it deems not likely to be involved in the contract award. Security for other proposals is returned after a satisfactory contract and performance bonds have been executed and accepted.
TEXAS	Std. Specs. (1982) §§ 2.7, 3.3	
UTAH	CODE ANN. (1986) § 63-56-37	<i>Amount of Security:</i> Equal to at least 5 percent of the amount of the bid. <i>Form of Security:</i> Bond of surety company authorized to do business in Utah; cash or "any other form satisfactory to the state."
VERMONT	Std. Specs. (1976) §§ 102.08, 103.03	<i>Amount of Security:</i> Five percent of the amount bid, not to exceed \$150,000, or as indicated in proposal form. <i>Form of Security:</i> Form of security is indicated on proposal form. If surety bond is used, it must be on form furnished by the State. <i>Terms for Return of Security:</i> Security of two lowest bidders is retained until a contract and performance bonds are fully executed. Security of other bidders is returned "as soon as possible." If contract is not awarded within 30 days, all proposals are rejected and all security is returned.
VIRGINIA	CODE (1985), § 11-57 Std. Specs. (1982) §§ 102.07, 103.04	
WASHINGTON	REV. CODE ANN. (1986) § 47.28.090 Std. Specs. (1980) § 1-02.7	<i>Amount of Security:</i> Five percent of total amount bid. <i>Form of Security:</i> Cash deposit, certified check, cashier's check, surety bond. <i>Terms for Return of Security:</i> As soon as bids are compared, security is returned to bidders who, in the judgment of the Secretary, will not be considered in the award. All other security is held until a contract and required bonds are executed, after which all security deposits and bonds are returned.

STATE	CITATIONS	UPDATE INFORMATION
WEST VIRGINIA	CODE (1986) § 17-4-19 Std. Specs. (1986) §§ 102.8, 103.4	<i>Amount of Security:</i> Amount specified in the bid invitation, but not less than \$500 nor more than 5 percent of the amount of the bid.
WISCONSIN	Std. Specs. (1981) §§ 102.7, 103.4	<i>Terms for Return of Security:</i> Returned to unsuccessful bidders promptly after bids are checked, except security of the lowest bidder is retained until a contract is executed.
WYOMING	Std. Specs. (1980) §§ 102.08, 103.04	

SUBMISSION OF BIDS AND AWARD OF CONTRACTS (p. 1190)

Authority of Contracting Agencies (p. 1190)

Although broad latitude is given to states in prescribing how lowest responsible bidders are determined and contracts are awarded, such rules always are subject to constitutional limitations on legislative and administrative actions. This has been an issue where state laws give preference to local contractors or local labor in public construction projects, as in the case of the Illinois Preference to Citizens on Public Works Projects Act,⁸⁹ requiring employment of only Illinois residents unless none were available or able to perform the work desired.

This statute was challenged as violating the constitutional provisions that Congress shall regulate commerce among the states and that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states—the Commerce Clause and the Privileges and Immunities Clause. Both issues were discussed in *W.C.M. Window Co., Inc. v. Bernardi*.⁹⁰

As to whether the Illinois Preference Act established a prohibited tariff against labor imported from another state, the court started with consideration of *White v. Massachusetts Council of Construction Employers, Inc.*,⁹¹ in which the mayor of Boston, by executive order, required that Boston residents must make up at least half the workers on a construction project, financed, all or in part, by the City of Boston. This action was upheld by the United States Supreme Court, which explained its holding as follows:

If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.⁹²

As the 7th Circuit interprets the Illinois law, however, it went far beyond the scope of *White* when it required the preference to be used in projects for all the State's political subdivisions, municipal corporations and other governmental units. As applied only to a municipal school board's contract for replacement of windows in its buildings, the court made the following distinction:

... according to the ... uncontradicted affidavit in this case, the window replacement project is not even partially financed by the state; neither is it being administered by the state. The "market participant" is the school board, just as the market participant in *White* was the City of Boston. The state is a regulator, telling thousands of local government units that they must not give construction contracts to employers of non-residents. It is particularly important to insist on the distinction because *White* prevents any consideration of the impact on interstate commerce until the state is found to be a regulator rather than a participant in the market.⁹³

It is true, of course, that states may lawfully regulate activities that threaten the health, safety, or welfare of their residents when such a threat is demonstrated. No such danger was demonstrated by the State of Illinois in this case, however, in order to justify its preference law under the police power.

Arguments that preference laws violate the Privileges and Immunities Clause are closely related to the Commerce Clause issue. Ultimately both involve the validity of a rationale for classifying employees for preference. This problem was considered by the Illinois Supreme Court in *People ex rel. Bernardi v. Leary Construction Co.*⁹⁴ Here the court applied the United States Supreme Court's disapproval of the so-called "Alaska Hire" statute, which gave preference to Alaska residents for employment arising out of any gas or oil lease in which the state was the lessor.⁹⁵ The United States Supreme Court used a two-part test to determine when state actions violated rights protected by the Privileges and Immunities Clause. First, the state must identify nonresidents as being a "peculiar source of evil" at which the statute is directed. Second, the discrimination must bear a substantial relationship to the evil that nonresidents present.

Applied to the case of a municipal painting contract, the Illinois Supreme Court found that there was nothing in the record of complaint that established a relationship between nonresident employment on public works projects and resident unemployment. Accordingly, nonresident laborers could not be considered a "peculiar source" of the evil of unemployment, and so be sufficient reason to interfere with the right of a citizen to cross state lines to work.⁹⁶

Following the United States Supreme Court's decision in *Hicklin*, other instances occurred in which public contracting agencies failed to demonstrate that nonresident labor constituted a "peculiar source" of evil sufficient to sustain a preference law. These include the following:

United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208, 104 S.Ct. 1020 (1984), requirement

of statewide affirmative action program that at least 40 percent of employees of contractors and subcontractors on city construction projects must be city residents may be challenged by out-of-state resident under Privileges and Immunities Clause.

Neshaminy Constructors, Inc. v. Krause, 437 A.2d 793 (N.J. Super., 1981), requirement relating to construction contracts of state and other public agencies that employment preference be given to citizens of New Jersey who have lived in the State for at least one year, and that non-New Jersey citizens may be employed only when local citizens are not available violates Privileges and Immunities Clause since the construction industry depression was not shown to have been caused by employment of nonresidents.

Sala v. County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909 (1979), requirement that in public works construction contracts the State and its contractors must give preference in employment to New York citizens who have been residents of the State for at least one year violates the Equal Protection Clause.

Laborers Local Union No. 374 v. Felton Construction Co., 98 Wash.2d 121, 654 P.2d 67 (1982), requirement that in construction contracts of state, counties, and cities the contractors and subcontractors must employ 90 to 95 percent residents of Washington violates the Privileges and Immunities Clause.

One instance in which a bidding preference classification statute was applied successfully occurred in *Equitable Shipyards, Inc. v. State Department of Transportation*,⁹⁷ where the contracting agency added 6 percent "penalty" to the bids of out-of-state shipbuilding companies when determining the lowest responsible bidder. When this action was challenged as being arbitrary and capricious, and thus unconstitutional, the court found that a reasonable basis existed for the preference and was sufficient to withstand the constitutional attack. The court's inquiry involved a three-part test: (1) Does the classification apply equally to all of the designated class? (2) Does some basis in reality exist for reasonably distinguishing between those within and those not within the designated class? (3) Does the classification have a rational relation to the purpose of the challenged statute? Summarizing its analysis of the case, the court said:

The plain object of the act is the procurement of ferries. . . . An identifiable underlying policy is that of granting a preference to those who contribute to the economy through construction activities within the state. R.C.W. 47.60.670, as we interpret it, grants a preference for constructing vessels within the state.

Ferry construction activities are exempt from state sales and use tax. Lost revenues from the tax exemption are partially offset if the shipbuilding activities occur within the state thereby generating secondary economic activity. The lower price preference partially compensates for the revenue lost if the vessels are constructed elsewhere. Finally, construction of ferries within the state strengthens state and local economies. Out-of-state construction results in increased inspection costs and greater potential of delay.

... [I]n our view, the preference classification is valid. ... [T]he preference statute relates to particular bidders as a class and not particular bidders of of class.⁹⁸

Establishment of a rationale for preference of resident contractors by reference to the taxes paid by that class appears in the justification of Arizona's bidding preference law. Within the class of contractors favored by the preference, however, the comparative contributions of the members is not considered. Thus, where two contractors, both resident businesses, bid on a municipal airport construction project, the court held it was wrong of the contracting agency to grant the statutory 5 percent preference to the contractor who had the larger investment in plant and equipment, and who had paid more taxes than the other.⁹⁹ The preference applied only between resident and nonresident contractors, and not between two resident bidders.

State laws providing for preferential treatment of local contractors in bidding or preferential hiring of local labor or material men in performance of a public construction contract may be applied to state or locally funded projects, but not to federally funded work. Under statutory authority to approve methods of bidding used in federally funded contracts, 23 U.S.C. 112(a), the Secretary of Transportation and Federal Highway Administrator have promulgated regulations requiring bidding procedure to be nondiscriminatory, 23 C.F.R. 635.107(e), and that selection of labor to be employed by a contractor shall be of his own choosing, 23 C.F.R. 635.124(b); FHWA Labor Compliance Manual, §§ 208-2, 508-3, App. C-9. Prohibition of discriminatory hiring practices is provided in the Required Contract Provisions for Federal-Aid Contracts, set forth in 23 C.F.R. pt. 633. These laws and regulations were relied on by a United States District Court in Arizona, holding that Arizona's Preference Statute, A.R.S. 34-241(B), was inapplicable to the bidding and award of federal-aid highway contracts.¹⁰⁰

Throughout the process of awarding contracts through competitive bidding, public contracting agencies must also act in accordance with due process of law. Accordingly, rejection of the lowest bid received may be challenged as taking or injuring the bidder's right to the contract award. Where it appears that a contractor has a legitimate property right or interest which is entitled to protection, due process doctrine requires that the contracting agency grant a hearing on the matter in which the rejected bidder is told the reasons for the action and has an opportunity to answer or explain the agency's reasons. Due process protections are required only where property rights of interests are involved, however, and neither courts nor statutes have been inclined to recognize that every unsuccessful bidder has lost the right to pursue a livelihood or earn a living when he fails to be awarded a contract in a properly conducted competition.¹⁰¹

If, on the other hand, an unsuccessful bidder can show that the process of evaluating the bids received for a project was prejudiced, or that the contracting agency did not follow its own rules, the agency's action may be subject to challenge. So, where an agency conducted post-bid nego-

tiations with the lowest bidder, resulting in cost concessions and modification of certain specifications, it was argued that the agency, in effect, had engaged in action violations both the spirit and letter of the competitive bidding law.¹⁰² In this instance the court found that the contracting agency had acted properly, but it clearly affirmed the rule that any derogation of the statutory duty to award contracts through competitive bidding would make the resulting contract void.¹⁰³

Abuse of discretion by a contracting agency may take the form of failing to furnish enough or the right sort of guidelines and instructions for bidders, which, if true, would prejudice the entire bidding process. Such questions must be decided by reference to the entire body of data available to bidders. Thus, where bidders' proposed affirmative action plans for participation of minority subcontractors were factors in the evaluation of their bids, the court held that the state and city had issued guidelines on such programs, which could assist bidders preparing their proposals, and also serve to prevent the bidding requirement from being a delegation of uncontrolled discretion to the contracting agency without proper standards or criteria.¹⁰⁴

Submission, Opening, and Acceptance of Bids (p. 1197)

Consistent with the rule that there must be strict adherence to formal specifications and procedures in the submission, opening, and acceptance of bids, courts have upheld the rejection of bids that are irregular when submitted. For example:

Ardmare Construction Co. v. Freedman, 191 Conn. 497, 467 A.2d 674 (1983), use of rubber stamp rather than handwritten signature on bid.

Colombo Construction Co., Inc. v. Panama Union School District, 136 Cal. App. 3d 868, 186 Cal. Rptr. 463 (1982), bidder who made a mistake in original bid is prohibited from further bidding on same project.

E. M. Watkins & Co. v. Board of Regents, 414 So.2d 583 (Fla. App., 1982), failure to list subcontractors in bid.

Gibbs Construction Co., Inc. v. Board of Supervisors, Louisiana State Univ., 441 So.2d 90 (La. App., 1984), failure of bidder to attend pre-bid conference.

Monoco Oil Co. v. Collins, 409 N.Y.S.2d 498 (1978), failure of bidder to show formula for determining contract price changes due to future price level fluctuations.

Williams v. Board of Supervisors, Louisiana State University Agricultural and Mechanical College, 388 So.2d 438 (La. App., 1980), failure to describe equipment according to instructions.

Grau Construction Co. v. St. Charles Parish, 467 So.2d 1371 (Fla. App. 1985), failure of bidder to acknowledge receipt of addendum to project specifications.

George W. Kennedy Construction Co., Inc. v. City of Chicago, 135 Ill. App.3d 306, 481 N.E.2d 913 (1985), omission of bidder's president's signature on corporate signature and acceptance pages.

George & Lynch, Inc. v. Division of Parks and Recreation, Department of Natural Resources and Environmental Control, 465 A.2d 345 (Del., 1983), failure to list all subcontractors to be used.

Matter of Bayonne Park, Lincoln Park and James J. Braddock-North Hudson Park Bikeway System, Hudson County, 168 N.J. Super. 33, 401 A.2d 705 (1979), successful low bidder delayed return of executed contract beyond period permitted in bid instructions.

Where, on the other hand, an irregularity is determined to be minor and has no adverse effect on the competition among bidders, contracting agencies have been upheld in their waiver of the defect. For example: *Lovisa Construction Co., Inc. v. New York State Department of Transportation*, 435 N.Y.S.2d 123 (1980), low bidder did not list mobilization costs separately for particular facilities, but inserted one gross figure for all mobilization costs.

Whether irregularities in bidding and acceptance may be waived by the contracting agency generally has been determined by consideration of their practical effect on the basic purpose of the competitive bidding system. Thus, the question of waiving a bidder's failure to file certain forms with his bid is evaluated in terms of the risk that an unfair advantage may be gained by allowing this oversight to be corrected after bid opening.¹⁰⁵ Similarly, waiver of oversights in the formalities of opening bids requires consideration of whether the action will result in giving any bidder an advantage which the others do not have.¹⁰⁶

Determination of when a bid is accepted must be made by reference to the contracting agency's rules of procedure. So, where bids for a construction contract were the subject of several motions at the same meeting of the agency's governing body, it was held that the last action in the continuous session of the Commission's meeting was controlling, and earlier motions to accept a particular bid did not give rise to a bidding contract at that time and by that act. Also, where a contracting agency's rules of procedure require that acceptance is not completed until the bidder is formally notified, the time of notification is controlling, even though the successful bidder was represented at the meeting.¹⁰⁷

Among the consequences of acceptance of a bid is the general rule that the bidder may not thereafter make changes in the list of subcontractors which he has submitted without the approval of the contracting agency. Some states have specific legislation to discourage bid shopping or bid peddling in connection with construction contract awards, and to promote the dual purposes of maintaining fairness in dealings between prime and subcontractors as well as protect public works projects from excessive costs.¹⁰⁸

Change of Specifications Following Advertisement (p. 1200)

If a contracting agency decides to make additions or modifications in the specifications of bidding instructions after they have been advertised but before the bids are opened, it must make those changes in such a manner as to assure that all bidders receive notice of them. If statutory procedure is silent on the method to be used for such notification, the

contracting agency's own bidding instructions may provide the necessary guidance. In the absence of any such guidance, the agency still is responsible for notifying all prospective bidders in a manner which ensures the integrity of the competitive bidding process. Accordingly, where an addendum page was disseminated by simply inserting it into the packets of bidding documents remaining to be picked up by prospective bidders, it was held that the agency had not fulfilled its duty of notification. The court stated:

When, as here, an alternative procedure for giving notice of an addendum to the plans and specifications is utilized after the statutory notice has been published . . . the alternative procedure so utilized, as a matter of law, must, as a minimum, establish *actual knowledge* on the part of the prospective bidder of the fact of the addendum. Thus, as a matter of law, where a challenge to that alternative procedure is promptly entered by an actual bidder who presents a prima facie case that he was unaware of the addendum to his prejudice the bidding procedure employed . . . fails and the trial court is required to order the board to reject all bids.¹⁰⁹

Cases arise where conversations, sometimes of such a nature as to resemble negotiations, occur between bidders and representatives of the contracting agency after projects have been advertised. Most frequently these cases have involved engineering personnel who have a certain amount of authority to deal with technical or design aspects of a project, but are not authorized to award contracts or commit the contracting agency to substantial changes in the specifications of the project.¹¹⁰ Post-bidding conversations may not be permitted to change the basis on which the original bidding was done.¹¹¹

Determination of Lowest Responsible Bidder (p. 1201)

Acknowledging that the determination of the lowest responsible bidder is an "exercise of bona fide judgment, based upon facts tending reasonably to the support of such determination,"¹¹² contracting agencies may be challenged for arbitrary and capricious action where circumstances suggest that this may have been the case.¹¹³ This aspect of the contract award process was discussed in *Berryhill v. Dugan*, as follows:

[T]he courts have uniformly held that the question of who is the lowest responsible bidder is one for the sound discretion of the proper municipal authority, and does not necessarily mean the one whose bid on its face is the lowest in dollars. . . . At the same time, it is held that to award the contract to a higher bidder capriciously without a full and careful investigation is an abuse of discretion which equity will restrain. . . . Where a *full investigation* discloses a *substantial reason* which appeals to the *sound discretion* of the municipal authorities, they may award a contract to one not in dollars the lowest bidder. The *sound discretion*, which is upheld, *must be based upon a knowledge of the real situation gained by a careful investigation*.

The *discretion*, however, is in the determination of who is the lowest responsible bidder; when that is settled, discretion ends and the contract must be awarded, if at all, to him . . . regardless of the differences in the bids, whether it is more or less.¹¹⁴

In this instance, the award to the second lowest bidder was held to be arbitrary since the contracting agency acted contrary to the preponderance of the evidence in the bids, and appeared to be persuaded by the fact that the second lowest bidder had had similar contracts for the agency in the past.¹¹⁵ In other instances, however, judicial review has upheld the contracting agency's action in rejecting low dollar bids for reasons bearing on the bidder's responsibility. For example:

Turnkey Construction Corp. v. City of Peekskill, 379 N.Y.S.2d 133 (1976), lack of experience in building construction, insufficient financial resources, and reason to believe that if awarded the contract bidder intended to assign it to another for performance.

L&H Sanitation, Inc. v. Lake City Sanitation, Inc., 585 F. Supp. 120 (D. Ark. 1984), bidder only recently organized and not incorporated at time of bid, lacked any experience in proposed construction, submitted a contingent bid.

John Carlo, Inc. v. Corps of Engineers, 539 F. Supp. 1075 (D. Tex. 1982), lack of integrity of bidder's present officers and association with contractors having unsatisfactory records of integrity and performance.

International Telecommunications Systems v. State, 359 So.2d 364 Ala. 1978), low bidder's samples failed tests for specifications.

Keyes Martin & Co. v. Director, Division of Purchase and Property, 99 N.J. 244, 491 A.2d 1236 (1985), recent publicity on possible conflict of interest deemed sufficient to conclude that award to lowest bidder would undermine public confidence.

E. M. Watkins & Co. v. Board of Regents, 414 So.2d 583 (Fla. App. 1982), low bidder's material variance with bidding instructions determined to give it advantage over other bidders.

Conduit and Foundation Corp. v. City of Philadelphia, 401 A.2d 376 (Pa. Cmwlth. 1979), low bidder's material variance with bidding instructions determined to adversely affect other bidders.

Automatic Merchandising Corp. v. Nusbaum, 60 Wis.2d 362, 210 N.W.2d 745 (1973), second lowest bidder offered greater amount of new equipment than lowest bidder.

The extent of a contracting agency's discretion in basing contract awards on factors other than dollar cost is limited by the terms of the advertised specifications and bidding instructions, and may not utilize extraneous factors. So, where the specifications for a construction project did not give any date for completion of the desired work, or state that the length of construction time would be a determining factor in the award, it was held that the contracting agency acted arbitrarily in using that factor to reject the lowest bid in favor of a higher one which called for an earlier completion date.¹¹⁶

On the other hand, where matters are clearly stated in the specifications or bidding instructions as being necessary for the performance of the contract or pertinent to the selection of a contractor, courts generally uphold rejection of bids based on such grounds. For example:

William v. Board of Supervisors, Louisiana State University Ag-

ricultural and Mechanical College, 388 So.2d 438 (La. App., 1980), irregular and incomplete bid.

Cave-of-the-Winds Scenic Tours, Inc. v. Niagara Frontier State Park and Recreation Commission, 407 N.Y.S. 2d 301 (1978), previous experience and reputation.

Gibbs Construction Co. v. Board of Supervisors of Louisiana State University, 447 So.2d 90 (La. App., 1984), attendance at pre-bid conference.

Monoco Oil Co. v. Collins, 409 N.Y.S. 2d 498 (1978), failure to describe pricing formula.

Land Construction Co. v. Snohomish County, 40 Wash. App. 480, 698 P.2d 1120 (1985), failure to list certified women's business enterprise as subcontractor in violation of bidding instructions.

Kuhn Construction Co. v. State, 366 A.2d 1209 (C. Cl., Del. 1976), failure to list specialty subcontractors held to be material to statutory requirement for bidding, and omission cannot be waived without encouraging bid shopping.

LeCesse Bros. Contracting, Inc. v. Town Board of Town of Williamson, 403 N.Y.S. 2d 950 (1980), failure to give names of manufacturers of equipment as required in bid instructions.

L. Pucillo & Sons, Inc. v. Mayor and Council of Borough of New Milford, 73 N.J. 349, 375 A.2d 602 (1977), failure to bid on five-year contract as asked for in bid instructions; required that project should be rebid.

Marchionna v. New York State Department of Transportation, 450 N.Y.S. 2d 529 (1982), failure of bidder to follow statutory form in providing security for bid.

Stano v. Soldo Construction Co., 187 N.Y. Super. 524, 455 A.2d 541 (1981), failure of bidder to provide list of qualified contractors as required by statute.

A similar approach is seen where contracting agencies reject all bids and readvertise the project for a new round of bids. If, as may happen, all bids received exceed the contracting agency's estimate of the construction costs, the agency is within its authority to reject all bids.¹¹⁷

The frequently seen statutory provision that "any and all bids may be rejected for good cause" entitles contracting agencies to exercise discretion in rejecting the lowest bidder in favor of the second lowest bid, but it obligates the agency to base its action on reasons which are reasonably related to the substance of the bargain or the bidding process. Bids which propose to produce results that are inferior or different from what is called for by the specifications, or are conditional in form, illustrate cases which most obviously fit this rule. Evaluation of bids must be done by reference to their own merits, however, and not through comparison with other bids. Accordingly, where a contracting agency rejected the lowest bidder and awarded the contract to the second lowest bidder because he employed a higher proportion of minorities than the lowest, the court held that this fact did not constitute "good cause" for rejecting the low bid.¹¹⁸

Selection of the lowest responsible bidder may be challenged for actions taken subsequent to the opening of bids which amount to changing substantially the original specifications and, in effect, rewriting them to describe a new contract, different from the one on which bids are submitted.¹¹⁹ Excessive delay in awarding and executing contracts may also be cited as a cause of action against the contracting agency for damages, but has not prevailed against the axiom that the competitive bidding system is established for the protection of the public rather than the bidders. The rights which bidders have or share with the public are those pertaining to freedom from fraud and avoidance of arbitrary and capricious action.¹²⁰ State administrative procedure laws may be of more practical benefit to unsuccessful bidders by assuring them of hearings at the contracting agency level where the reasons for rejection are disclosed and an opportunity is provided to explain or rebut the basis of the rejection.

THE EFFECT OF BID MISTAKES IN CONTRACT AWARDS (p. 1205)

Withdrawal of Erroneous Bids Prior to Opening (p. 1205)

Generally, when a bidder discovers his error prior to the opening of bids, he seeks to withdraw from the bidding entirely or else substitutes a correct bid at or prior to the opening. Since the bids have not been opened at that time, there is no occasion to inquire into the materiality, causes, or consequences of the error. If, however, requests to withdraw or substitute are denied, these aspects of the bid mistake may become matters of inquiry, and may affect the contracting agency's determination to accept the bid. In these circumstances, a bidder may elect to sue for equitable relief to cancel the erroneous bid and release the bid security. This action was successful in *Arcon Construction Co. v. State ex rel. Department of Transportation*,¹²¹ where the bidder failed to include an applicable gross receipts tax in his bid, and prior to opening notified the contracting agency of this omission and requested cancellation of the bid.

Whether an erroneous bid may be withdrawn after the opening of bids but prior to the contracting agency's formal acceptance of it was considered by the Oregon court in *R. J. Taggart, Inc. v. Douglas County*.¹²² In this instance the bidding instructions and specifications did not require bids to remain irrevocable until accepted, although, the court noted, this could easily have been required in the bidding instructions. No "firm offer" rule was provided for by statute, and the court noted that the contracting agency was not in a position to claim that it had relied upon the bid until it had accepted it. A dissent in this case argued for at least a forfeiture of the bid security if the bidder was permitted to withdraw his bid, and observed that federal courts have held that, as a matter of common law, bids are irrevocable where contracts with the United States Government are involved.

Correction of Bid Mistakes After Opening of Bids (p. 1206)

Because discrepancy between words and numbers is a frequent type of error in bidding, statutory rules are sometimes established for resolution of such differences. Such statutes are strictly construed and are held to be exclusive remedies.¹²³ Also, when a contracting agency has adopted rules or policies as to what types of irregularities may be waived, it is expected to comply with them and not negotiate with a bidder over which of the differing figures he will accept.¹²⁴

Although the contracting agency's authority over the bidding process is broad enough to allow it to waive irregularities that are of a minor and inconsequential nature, and do not destroy the competitive character of the bidding process, it is difficult to justify waiver of a bidder's failure to include in his bid papers some specific statements or certifications that are required by statute.¹²⁵

In some circumstances, correction of discrepancies or omissions have been permitted because they were viewed as part of the verification procedure, or as updating information required in the bid.¹²⁶ No such opportunity for correction or withdrawal of a bid is provided, however, where a mistake is determined to be due to an error of judgment or lack of diligence by the bidder in preparing his bid. Thus, where a contractor sought to withdraw his bid after it had been opened because he discovered that he would have to pay higher labor costs and taxes than originally estimated, he was not allowed to withdraw the bid.¹²⁷ Also, where, after opening, the bidder discovered he had not included the cost of several elements of a sewer system, he was refused permission to withdraw his bid because his error resulted from failure to exercise ordinary care in preparing the bid.¹²⁸

Equitable Relief for Bid Mistakes (p. 1207)

Recourse to courts for rescission of a bid because of a mistake requires the bidder to show that there is a serious and substantial error in the bid, that it is an honest mistake, and not intentional or due to willful neglect or gross negligence, that others will not be adversely affected by the relief requested, and that action to deal with the mistake was taken promptly upon its discovery. In such cases, courts have said, equity will interfere, in its discretion, to prevent unconscionable injustice from being done by enforcement of the erroneous bid.¹²⁹ What constitutes "unconscionable consequences" depends on the circumstances in each case, and no general criteria have been laid down by the courts. Most courts would agree that enforcement need not go so far as to render the bidder insolvent or bankrupt in order to be considered unconscionable.¹³⁰

Rescission of a contract may be granted where it appears that the terms of the contract that was awarded lack a reasonable similarity to the specifications used in bidding. Thus, where bids were solicited for furnishing commuter bus service, and made no reference to operating a park-and-ride facility and other matters relating to such facilities required by statute, all of which were covered in the contract that was awarded, a taxpayer's suit succeeded in having the contract rescinded.¹³¹

Where substantial mistakes are discovered after a contract has been awarded, and the contractor desires to adjust the contract's terms to compensate for the mistake, the Federal courts have, in several instances, considered requests for reformation of the contract. Historically, equity has allowed reformation in instances of mutual mistake in order to conform the terms of a contract to those the parties actually intended, as indicated by previous expressions of their agreement. More recently, however, this traditional basis for the remedy—mutual mistake—has been extended to cases where the government knew or should have known of a bid mistake which would be excessively costly to the bidder.¹³² This is especially true where there is evidence of the practice of “overreaching the contractor” by the government.¹³³

The resulting use of equity to deal with such bid mistakes is illustrated in *Bromley Contracting Co., Inc. v. United States*, where plaintiff bid on a contract to repaint the exterior of one of the military academy's buildings at West Point.¹³⁴ In the bid which he submitted, two steps in calculating total costs from unit prices were inadvertently omitted, so the final tabulation was substantially less than the next lowest bidder. Despite the fact that the bidder reported his mistake to the contracting officer promptly and before the contract award, correction of the bid was not allowed, and the bidder accepted the award under threat of default if further delay occurred.

After performing an administrative review of the bid, the Comptroller General was convinced that a mistake had occurred, probably in the manner alleged, but denied relief because the evidence submitted did not establish “the exact proof of the intended bid.” On appeal, however, the court held that because of the overreaching on the part of the government, and because rescission was no longer possible, the contractor was entitled to reformation of the contract price to the amount that he would have bid if the mistake had not been made. In similar circumstances, other Federal courts have ordered reformation to cure a remediable unilateral mistake when necessary to prevent an evident injustice.¹³⁵

Disposition of Bid Security (p. 1212)

Where the validity of the bidder's tender of security is challenged because of irregularities in form or procedure, evaluation of the effects of such irregularities presents essentially the same problems that arise where other parts of the bid are involved. If the irregularity is minor and capable of being waived, courts generally uphold that action by the contracting agency.¹³⁶

Determination that an irregularity or bidding mistake is substantial, so that the bidder refuses to enter into a contract on the basis of his bid, leads to forfeiture of his bid bond or other form of bid security. Equity frequently is asked to intercede in the forfeiture procedure, but the record of success in preventing forfeiture by this means has been misused, as illustrated by the following:

P. J. Spillane Co., Inc. v. City of New Bedford, 15 Mass. App. 708, 448 N.E.2d 78 (1983). In contract for removal of a building to a new

location, bidder unsuccessfully sought to recover a bid deposit forfeited when a subcontractor could not obtain performance and payment bonding. Bidder's claim to be the victim of “unforeseen circumstances” was denied since the circumstances in question existed when the bid was submitted.

Peter Kiewit Sons Co. v. Washington State Department of Transportation, 635 P.2d 740 (Wash. App., 1981). Where the low bidder on a highway construction project notified the contracting agency of a bid mistake eight days after the bid opening, and requested equitable relief from performance, it was held that he had waited too long to request relief, and his action resulted in added delay and cost in readvertising for a second round of bids.

A&A Electric, Inc. v. City of King, 54 Cal. App.3d 462, 126 Cal. Rptr. 585 (1976). At opening of bids for airport construction contract, the bidder discovered an error for which he requested rescission of his bid due to mutual mistake. The court referred to existing statutory procedure for relief from bid mistake,¹³⁷ noting that it was an exclusive remedy, and held that bidder had not complied with the procedure which would entitle him to release from his security.

Contractors have been relieved from the results of unilateral mistake where they show use of reasonable care in preparation of bids and where enforcement of the mistaken bid would be unconscionable. Thus, in *City of Devil's Lake v. St. Paul Fire & Marine Insurance Co.*, 497 F.Supp. 595 (D., N.D., 1980), suit seeking forfeiture of a bid bond was dismissed when evidence showed that the state highway department's specification for installation of drainage pipe could be interpreted as allowing a choice of construction methods, and that the contractor's bid was based on an interpretation that was reasonable but later turned out to differ from the contracting agency's view.

Liability under a bid bond arises for failure or refusal of the bidder to execute a contract when offered by the contracting agency. Until the contracting agency has formally accepted a bid and offered a contract for execution the bidder has no opportunity to either perform or default his obligation under the bond. So, where a municipality decided not to offer the lowest bidder a contract because of an error in the bid, it could not treat the bid bond as forfeited; nor could it refuse to use the statutory provision for correction of bidding errors.¹³⁸

Rejection of All Bids and Readvertisement

In all states the contracting agency for highway construction projects is authorized by statute or by standard specifications incorporated into bidding instructions, to reject any or all bids if it appears to be in the public interest. In some cases, this public interest is defined in terms of specific causes.¹³⁹ But in the great majority of states, highway contracting authorities are subject either to no statutory standards or limitations, or to only very general conditions, such as “for good cause,” “for the state's best interest,” or promotion of the “best interest of the department.” Within this context, courts have recognized a broad area of

discretion to deal with irregularities and other perceived threats to the competitive bidding process by rejecting all bids and re-advertising the project for a new round of bids. As with other instances where discretionary action is involved, the contracting agency may be challenged for being arbitrary. No special standards apply to these cases, and they are decided individually on their circumstances.

The following cases illustrate situations in which rejection of all bids was upheld as reasonable and proper:

State ex rel. KNC, Inc. v. New Mexico Department of Finance and Administration, 704 P.2d 79 (N.M., 1985), rejection justified because of modification of specifications following original advertisement.

Oonaar Corp. v. Metropolitan Atlanta Rapid Transit Authority, 441 F. Supp. 1168 (D. Ga., 1977), rejection based on bid irregularities and lack of bidder experience.

Longo Puerto Rico, Inc. v. U.S. Environmental Protection Agency, 575 F. Supp. 990 (D., P.R., 1983), rejection and re-advertisement after a two-year delay in awarding contract and changes in specifications following original bidding.

Angelo DiPonio Equipment Co. v. State Department of Highways and Transportation, 107 Mich. App. 756, 309 N.W.2d 566 (1981), low bid exceeded estimated cost.

American Asphalt Distributors, Inc. v. County of Otsego, 334 N.Y.S. 2d 465 (1972), rejection based on one bidder receiving prior information not given to other bidders.

Modern Continental Construction Co., Inc. v. Massachusetts Port Authority, 343 N.E.2d 362 (Mass., 1976), rejection authorized where it appeared that acceptance of low bid would lead to labor dispute.

Cubic Western Data, Inc. v. New Jersey Turnpike Authority, 468 F. Supp. 59 (D. N.J., 1978), where it was held that low bidder was properly rejected, contracting agency was ordered to reject all bids and re-advertise the project.

Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago, 97 Ill. App. 3d 340, 422 N.E.2d 1078 (1981), rejection of all bids justified where lowest bidder had a material variance between the bid and invitation, and second lowest bid was 42 percent above cost estimate.

Instances in which rejection of all bids was held to be improper include the following:

Couch Construction Co., Inc. v. Department of Transportation, 361 So.2d 172 (Fla. App., 1978), where contracting agency rejected a highway construction project bid, but failed to give bidder a hearing on cause of rejection, it was held the agency could not thereafter reject all bids and re-advertise. Rejection of all bids may not be used to avoid agency's administrative law duty to rejected bidder.

Solar Energy Control, Inc. v. State of Florida Department of Health and Rehabilitative Services, 377 So.2d 746 (Fla. App., 1980), rejection of all bids and re-advertising of the project was stopped on evidence of possible conflict of interest in contracting agency.

¹ N.Y. SOCIAL SERVICE LAW, § 164-a (McKinney, 1980).

² District Council 9, Int'l Bhd. of Painters & Allied Trades v. Metropolitan Transp. Auth., 454 N.Y.S.2d 663, 667 (1982).

³ Lynch v. Devine, 45 Ill. App. 3d 743, 359 N.E.2d 1137 (1977).

⁴ Washington Mechanical Contractors, Inc. v. U.S. Dept. of the Navy, 612 F. Supp. 1243 (D. Cal. 1984).

⁵ Browning-Ferris Industries of Tennessee, Inc. v. City of Oak Ridge, 644 S.W.2d 400 (Tenn. App., 1982).

⁶ Modern Continental Constr. Co., Inc. v. City of Lowell, 391 Mass. 829, 465 N.E.2d 1172 (1984); Elview Constr. Co., Inc. v. North Scott Community School Dist., 373 N.W.2d 138 (Ia., 1985).

⁷ Spiniello Constr. Co. v. Town of Manchester, 189 Conn. 539, 456 A.2d 1199 (1983); Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 341 A.2d 327 (1975).

⁸ Thelander v. City of Cleveland, 3 Ohio App. 3d 86, 444 N.E.2d 414 (Ohio App., 1981).

⁹ McCloud v. City of Cadiz, 548 S.W.2d 158 (Ky. App., 1977).

¹⁰ Commonwealth v. Gill, 5 Mass. App. 337, 363 N.E.2d 267 (1977).

¹¹ 23 U.S.C. § 112(a) (1986).

¹² 23 C.F.R. part 635, subpart A, "Contract Procedure" (4-1-86 ed.); *Federal-Aid Highway Program Manual*, v. 6, c. 4, § 1 (May 1983).

¹³ 23 C.F.R. §§ 635.107, 635.309(c) (1986).

¹⁴ 23 C.F.R. § 635.107(c) (1986).

¹⁵ 23 C.F.R. § 635.107(d) (1986).

¹⁶ 23 C.F.R. § 635.107(i), and 51 Fed. Reg. 27, 533 (August 1, 1986).

¹⁷ 23 C.F.R. § 635.106 (1986).

¹⁸ 42 U.S.C. § 6706 (1986 Supp. II).

¹⁹ 444 F. Supp. 1023 (D. Vt., 1977).

²⁰ 499 F. Supp. 629 (D. Ala., 1980).

²¹ See also, Arrington v. Associated Gen. Contractors, 403 S.2d 893 (Ala., 1981), where legislative preamble alone was held insufficient.

²² 448 U.S. 448 (1980).

²³ M. C. West, Inc. v. Lewis, 522 F. Supp. 338 (D. Tenn., 1981).

²⁴ Southwest Washington Chapter, Nat. Electrical Contractors Assn. v. Pierce County, 100 Wash.2d 109, 667 P.2d 1092 (1983).

²⁵ See, Fullilove v. Klutnick, 338 U.S. 448 (1980); South Florida Chapter of Associated Gen. Contractors v. Metropolitan

Dade County, 723 F.2d 486 (11th Cir., 1984); Southwest Washington Chapter, Nat. Electrical Contractors Assn. v. Pierce County, 100 Wash. 2d 109, 667 P.2d 1092 (1983).

²⁶ Otis Elevator Co. v. Washington Metropolitan Area Transit Auth., 432 F. Supp. 1089, (D., D.C., 1976), where a government-issued plan for affirmative action in construction projects (i.e., the "Washington Plan") was held to be superceded by a national affirmative action plan negotiated by the trade association and union for the elevator construction industry, and approved by the U.S. Department of Labor as a substitute for the official affirmative action plan.

²⁷ Shore Air-Conditioning Co., Inc. v. New York City Health and Hospitals Comm'n, 401 N.Y.S. 2d 948 (1977).

²⁸ American Combustion, Inc. v. Minority Business Opportunity Corp., 441 A.2d 660 (D.C. App., 1982).

²⁹ Federal Highway Administration, *Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects*, FP85 (Washington: GPO, 1985).

³⁰ Anderson v. Peterson, 221 Neb. 149, 375 N.W. 2d 901 (1985).

³¹ Steelgard, Inc. v. Janssen, 171 Cal. App. 3d 79, 217 Cal. Rptr. 152 (1985).

³² Andover Consultants, Inc. v. City of Lawrence, 10 Mass. App. 156, 406 N.E. 2d 711 (1980).

³³ Commonwealth v. Brown, 391 Mass. 157, 460 N.E. 2d 606 (1984).

³⁴ 75 N.J. 272, 381 A.2d 774 (1977).

³⁵ Reciprocal Trade Agreements Act of 1934, as amended, 48 Stat. 943 (1934), 19 U.S.C. § 1351-1366 (1983). (Hereafter cited as GATT.)

³⁶ GATT, part 6, art. 3, par. 8(b), 62 Stat. 3681 (v. 3) (1948).

³⁷ 591 F.2d 554 (10th Cir., 1979).

³⁸ 25 U.S.C.A. 47 (1986).

³⁹ 41 U.S.C.A. 252, 253 (1986).

⁴⁰ Pa. Stat., tit. 71, § 639.1(c) (1986 supp.). Pennsylvania Industries for Blind and Handicapped v. Larson, 496 Pa. 1, 436 A.2d 122 (1981).

⁴¹ District Council No. 9, Int'l Bhd. of Painters & Allied Trades v. Metropolitan Transp. Auth., 454 N.Y.S. 2d 663, 669 (1982).

⁴² Amherst Columbia Ambulance Service Ltd. v. Gross, 437 N.Y.S.2d 137 (1981).

⁴³ Aqua-Tech, Inc. v. Como Lake Protection and Rehabilitation Dist., 71 Wis. 2d 541, 239 N.W. 2d 25 (1976).

⁴² N.J., STAT. ANN., 5:10-21 (1986 supp.).

⁴³ *Autolite Limited v. New Jersey Sports and Exposition Auth.*, 85 N.J. 363, 427 A.2d 55, 59 (1981).

⁴⁴ *Northern Improvement Co. v. State*, 213 N.W. 2d 885 (N. Dak., 1973); *Martin Excavating, Inc. v. Tyrollean Terrace Water & Sanitation Dist.*, 671 P.2d 1329 (Colo. App., 1983).

⁴⁷ *Manson Constr. & Eng'g. Co. v. State*, 24 Wash. App. 185, 600 P.2d 643 (1979).

⁴⁸ *General Bldg. Contractors of New York State, Inc. v. State*, 391 N.Y.S. 2d 319, 321 (1977).

⁴⁹ *Atlin Constr., Inc. v. Muncie Community Schools*, 413 N.E. 2d 281, 287 (Ind. App., 1980).

⁵⁰ *State v. Brown*, 422 N.E.2d 1254 (Ind. App., 1981).

⁵¹ *Photo-Art Commercial Studies, Inc. v. Hunter*, 42 Ore. App. 207, 600 P.2d 471 (1979).

⁵² *Transportation Displays, Inc. v. City of New Orleans*, 346 So.2d 359 (La. App., 1977).

⁵³ N.J. STAT. ANN., 40A:11-6.1 (1986 supp.).

⁵⁴ *Township of Burlington v. Middle Dept. Inspection Agency*, 175 N.J. Super. 624, 421 A.2d 616 (1980). *But see*: *SCA Services of Georgia, Inc. v. Fulton County*, 238 Ga. 154, 231 S.E. 2d 774 (1977) and *Trane Co. v. County of Broome*, 429 N.Y.S. 2d 487 (1980), where contracts to provide garbage disposal service and air conditioning repair service were held to involve use of specialized skill and expertise and so were exempt from competitive bidding.

⁵⁵ *Mongiovi v. Doerner*, 546 P.2d 1110 (Ore. App. 1976); *Atlin Constr., Inc. v. Muncie Community Schools*, 413 N.E.2d 281 (Ind. App., 1980).

⁵⁶ *Waste Management Inc. v. Wisconsin Solid Waste Recycling Auth.*, 84 Wis. 2d 462, 267 N.W. 2d 659 (1978).

⁵⁷ *Graydon v. Pasadena Redevelopment Agency*, 104 Cal.App. 3d 631, 164 Cal. Rptr. 56 (1980).

⁵⁸ Falvey, Birnkrant and Friedman, *ABA Proposes Legislative Adoption of a Model Procurement Code for State and Local Governments*, 11 URBAN LAWYER 481 (1979). *See also*: DelDuca, Falvey and Adler, *State and Local Government Procurement: Developments in Legislation and Litigation*, 18 URBAN LAWYER 301 (1986).

⁵⁹ Arizona, Jan. 1, 1985: ARIZ. REV. STAT. ANN. §§ 41-2501 to 41-2652 (1985); Arkansas, July 1, 1979: ARK. STAT. ANN. §§ 14-113 to 14-1115 (1985 supp.); Colorado, Jan. 1, 1982: COLO. REV. STAT. §§ 24-91-101 to 24-112-101 (1985 supp.); Indiana, Jan. 1, 1982: IND. CODE ANN. §§ 4-13.4-1-1 to 4-13.4-9-3 (Burns 1985 supp.); Kentucky, Jan. 1, 1979: KY. REV. STAT. ANN. §§ 45A.005 to 45A.990 (1985 supp.); Louisiana, July 1, 1980: LA. REV. STAT. ANN. §§ 39.1755 (1985 supp.); Maryland, July 1, 1981: MD. STATE FIN. & PROCURE. CODE ANN. §§ 11-101 to 21-504 (1985); New Mexico, Nov. 1, 1984: N.M. STAT. ANN. §§ 13-1-21 to 13-1-199 (1985); South Carolina, July 30, 1981: S.C. CODE ANN. §§ 11-35-10 to 11-35-5270 (1984); Utah, July 1, 1980: UTAH CODE ANN. §§ 63-56-1 to 63-56-73 (1985 supp.); Virginia, Jan. 1, 1983: VA. CODE §§ 11-35 to 11-80 (1985).

⁶⁰ Gallagher, *The Law of Federal Negotiated Contract Formation* (1981), pp. 94-98.

⁶¹ U.S. Dept. of Transp. Order 4200.10A, June 16, 1982.

⁶² Descriptions of market searches customarily include use of notices in professional publications and contract notices, industry surveys, and notices and queries to trade associations or industry councils.

⁶³ *Matter of Honeywell Information Systems, Inc.*, 145 N. J. Super. 187, 367 A.2d 432, 436 (1976).

⁶⁴ *Datrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 400 N.E.2d 1218 (1980).

⁶⁵ *Plantation on the Green, Inc. v. Gamble*, 441 So.2d 299 (La. App., 1983), description of land by address and location within a larger public facility approved; *Platt Electr. Supply Inc. v. City of Seattle*, Div. of Purchasing, 16 Wash. App. 265, 555 P.2d 421 (1976), failure to describe warranty or method of implementing warranty.

⁶⁶ *Operating Engrs. Local Union No. 3, Int'l Union of Operating Engrs. v. Hurley*, 546 F. Supp. 387 (D., Ut., 1982).

⁶⁷ *See*: *Waste Disposal, Inc. v. Mayor and Council of Borough of Roselle Park*, 145 N.J. Super. 217, 367 A.2d 449 (1976); *George Harms Const. Co. v. Borough of Lincoln Park*, 161 N.J. Super. 367, 391 A.2d 960 (1978); *Cubic Western Data v. New Jersey Turnpike Auth.*, 468 F. Supp. 59 (D., N.J., 1978).

⁶⁸ 196 N.J. Super. 204, 482 A.2d 36 (1984).

⁶⁹ *Ibid.*, pp. 38, 40.

⁷⁰ *Capeletti Bros., Inc. v. State Dept. of Transp.*, 362 So.2d 346 (Fla. App., 1978), delinquency on prior state contract; *North Central Util. v. Walker Community Water Systems, Inc.*, 437 So.2d 922 (La. App., 1983), failure to comply with public bid law; *Seacoast Constr. Corp. v. Lockport Urban Renewal Agency*, 339 N.Y.S.2d 188 (1972), lack of qualification and experience record; *Couch Constr. Co., Inc. v. Dept. of Transp.*, 361 So.2d 172 (Fla. App., 1978), failure to attend pre-bid conference.

⁷¹ Departmental procedures for settlement of disputed administrative actions, contested claims, and the like have been described as "free form proceedings." Levinson, *Elements of the Administrative Process*, 26 AMER. U. L. REV. 872 (1977). In *Capeletti* the court commented: "Free form proceedings are nothing more than the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business. Without summary letters or telephone calls, and other convenient communication the wheels of government would surely grind to a halt. The vast majority of an agency's free-form decisions become conclusive because they are not challenged. . . . Yet an agency must clearly signal when the agency free-form decisional process is completed or at a point when it is appropriate for an affected party to request formal proceedings. . . . In other words, an agency must grant affected parties a clear point of entry . . . to formal or informal proceedings . . ." under statutory administrative procedures. *Capeletti Bros., Inc. v. State Dept. of Transp.*, 362 So.2d 346, 348 (Fla. App., 1978).

⁷² *E. Smalis Painting Co., Inc. v. Commonwealth Dept. of Transp.*, 452 A.2d 601 (Pa. Cmwlth. 1982), felony conviction of corporate officer; *Polyvend, Inc. v. Pucorius*, 88 Ill. App.3d 778, 411 N.E.2d 316 (1980), felony conviction of corporate stockholder; *Coken Co., Inc. v. Dept. of Public Safety*, 9 Mass. App. 586, 402 N.E.2d 1110 (1980), unreported change in corporate name; *Dept. of Labor v. Berlanti*, 196 N.J. Super. 122, 481 A.2d 830 (1984), failure to pay prevailing wage rate; *Dickerson v. Rose*, 398 So.2d 922 (Fla. App., 1981), Sherman Act Violation.

⁷³ *Dept. of Labor and Indus., Div. of Workplace Standards v. Union Paving and Const. Co., Inc.*, 168 N.J. Super. 19, 401 A.2d 698 (1979), repeated violations of prevailing wage laws.

⁷⁴ *Dept. of Labor v. Berlanti*, 196 N.J. Super. 122, 481 A.2d 830 (1984).

⁷⁵ *Dept. of Labor v. Berlanti*, 196 N.J. Super. 122, 481 A.2d 830 (1984); *Seacoast Constr. Corp. v. Lockport Urban Renewal Agency*, 339 N.Y.S.2d 188 (1972); *Dept. of Labor and Indus., Div. of Workplace Standards v. Union Paving and Const. Co., Inc.*, 168 N.J. Super. 19, 401 A.2d 698 (1979); *Capeletti Bros., Inc. v. State Dept. of Transp.*, 362 So.2d 346 (Fla. App., 1978).

⁷⁶ *Mechanical Contractors Assn. of Cincinnati v. State*, 64 Ohio St.2d 192, 414 N.E.2d 418 (1980).

⁷⁷ PAGE'S OHIO REV. CODE ANN., §§ 153.02, 153.03 (1985 supp.).

⁷⁸ A dissent argued, however, that the Director of Transportation could act under special highway enabling legislation, and award contracts for highway and bridge work in any manner deemed advantageous to the public. 414 N.E.2d 418, 442, citing OHIO REV. CODE, § 5529.05 (1985 supp.).

⁷⁹ *Pozar v. Dept. of Transp.*, 145 Cal. App. 3d 269, 193 Cal. Rptr. 202 (1983).

⁸⁰ 18 Mass. App. 621, 469 N.E.2d 64 (1984).

⁸¹ The trial court explained that the Department of Labor and Industries had taken the position that penny bidding of certain items of the contract is unlawful even where the bid is not facially unbalanced. This position is taken as a result of the department's interpretation of the law and a longstanding publicly known policy against any form of penny bidding. The basis of this policy was a conclusion that "because of the potential bid manipulation and the possible resulting harm to the awarding authority and the general public . . . unrealistic bids must be rejected as unresponsive to the bid requirements." *Ibid.*, 66.

⁸² *See*: *Interstate Engr'g Corp. v. Fitchburg*, 367 Mass. 751, 329 N.E.2d 128 (1975).

⁸³ The court noted that in the instant case at least five other contractors had listed bids of one penny per square foot for temporary sheeting. 469 N.E.2d 64, 66 (1984).

⁸⁴ *V. C. Vitanza Sons v. Murray*, 396 N.Y.S.2d 305 (1977).

⁸⁵ 406 So.2d 461 (Fla. App., 1982).

⁸⁶ *Menke v. Bd. of Educ., Independent School Dist. of West Burlington*, 211 N.W.2d 601 (Iowa, 1972), bank used rubber stamp to certify check instead of officer's handwritten signature.

⁸⁷ *Appeal of Associated Sign & Post, Inc.*, 485 N.E.2d 917 (Ind. App., 1985).

⁸⁸ *Land Constr. Co. v. Snohomish County*, 40 Wash. App. 480, 698 P.2d 1120 (1985).

⁸⁹ ILL. REV. STAT., c. 48, pars. 269-274 (1986 supp.), provides (par. 271) that a contractor on "any public works project or improvement for the state of Illinois or any political subdivision, municipal corporation, or other governmental unit thereof shall employ only Illinois laborers on such project or improvement, unless the contractor certifies and the contracting officer finds, that Illinois laborers either are not available, or are incapable of performing the particular type of work involved."

⁹⁰ 730 F.2d 486 (7 Cir., 1984).

Constitutional issues of equal protection and privileges and immunities raised by state resident contractor preference laws are discussed in Sands and Libonati, *Local Government Law*, § 22.0 (1986 supp.); Note, *Constitutional Analysis of Iowa's Bid Preference Law*, 70 IOWA L. REV. 1252 (1985); Varat, *State Citizenship and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576 (1973).

⁹¹ 460 U.S. 204 (1983).

⁹² *Id.* at 210.

⁹³ 730 F.2d at 495.

⁹⁴ *People ex rel. Bernardi v. Leary Constr. Co.*, 102 Ill.2d 295, 464 N.E.2d 1019 (1984), municipal painting contract.

⁹⁵ *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

⁹⁶ *See: W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7 Cir., 1984).

⁹⁷ 93 Wash.2d 465, 611 P.2d 396 (1980).

⁹⁸ *Id.* at 404.

⁹⁹ *Maridan Constr. Co. v. Superior Court*, 113 Ariz. 489, 557 P.2d 526 (1976) interpreting ARIZ. REV. STAT. 34-241 (1986 supp.). *See also: The Tanner Companies v. Superior Court*, 144 Ariz. 141, 696 P.2d 693 (1985), legislative intent; *Swengel-Robbins, Inc. v. Gagle Contracting, Inc.*, 134 Ariz. 83, 654 P.2d 17 (App. 1982), qualification for preference; *D.C. Speer Constr. Co. v. Arizona Dept. of Transp.*, 124 Ariz. 208, 603 P.2d 100 (App. 1979), qualification for preference.

City of Scottsdale v. Deem, 27 Ariz. App. 480, 556 P.2d 328 (1976), found no inherent conflict between federal funding and

state preference states, and held that such statutes may be applied to federally funded contracts except where expressly prohibited by federal law.

¹⁰⁰ *The Tanner Companies v. United States*, U.S.D.C. Ariz., CIV-79-1021-PHX-CAM, February 5, 1980.

¹⁰¹ *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F. Supp. 625 D. Pa., 1980, suit for tort liability and civil rights violation by failure to hold hearing on bid rejection.

¹⁰² *Fischbach and Moore, Inc. v. New York City Transit Auth.*, 435 N.Y.S.2d 984 (1981).

¹⁰³ *See: Telephone Associates, Inc. v. St. Louis County Board*, 350 N.W.2d 398, (Minn. App., 1984).

¹⁰⁴ *Dalton v. Kunde*, 31 Ohio Misc. 75, 286 N.E.2d 483 (1972).

¹⁰⁵ *Excavation Constr., Inc. v. Ritchie*, 230 S.E.2d 822 (W.V., 1976), failure to file a "free competition affidavit" with original bid papers.

¹⁰⁶ *Butler v. Federal Way School Dist.* No. 210, 17 Wash. App. 288, 562 P.2d 271 (1977), where contracting agency mislaid bid and did not open it until 15 minutes after others were opened in the presence of other bidders. *Farmer Constr., Ltd. v. State Dept. of Gen. Admin.*, 98 Wash. 2d 600, 656 P.2d 1086 (1983), omission of signature on bid form.

¹⁰⁷ *Berry v. Okaloosa County*, 334 So.2d 349 (Fla. App., 1976), airport parking facilities. *See also: Hanover Area School Dist. v. Sarkisian Bros., Inc.*, 514 F. Supp. 697 (D. Pa., 1981); *John J. Brennan Constr. Corp., Inc. v. City of Shelton*, 187 Conn. 695, 448 A.2d 180 (1982).

¹⁰⁸ CAL. GOV'T CODE, § 4101 (1986 supp.): "The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils."

See also: Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co., 56 Cal. App.3d 361, 128 Cal. Rptr. 632 (1976): "Bid shopping is the use of the lowest bid already received by the general or prime contractor to pressure other subcontractors into submitting even lower bids; bid

shopping is prohibited by the statute after the award of the prime contract." *Id.* at 634. *E. M. Watkins & Co., Inc. v. Bd. of Regents*, 414 So.2d 583 (Fla. App., 1982), interpreting Fla. Stat., § 255.05:5 (1986 supp.).

¹⁰⁹ *Boger Contracting Corp. v. Bd. of Comm'rs.*, 60 Ohio App.2d 195, 396 N.E.2d 1059, 1064 (1978).

¹¹⁰ *Worth James Constr. Co. v. Jacksonville Water Comm'n*, 590 S.W.2d 256 (Ark. 1979); *Hanson Excavating Co., Inc. v. Cowlitz County*, 28 Wash. App. 123, 622 P.2d 1285 (1981); *State through Office of the Governor v. L. W. Eaton Constr. Co., Inc.*, 392 So.2d 477 (La. App., 1980).

¹¹¹ *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352, So. 2d 1190, (Fla. App., 1977); *Albert Elia Bldg. Co., Inc. v. New York State Urban Dev. Corp.*, 388 N.Y.S.2d 462 (1976).

¹¹² *Inge v. Bd. of Pub. Works*, 135 Ala. 187, 33 So. 678, 681 (1903).

¹¹³ *Catamount Constr., Inc. v. Town of Pepperell*, 7 Mass. App. 211, 388 N.E.2d 716 (1979).

¹¹⁴ 491 A.2d 950, 952 (Pa. Cmwlth. Ct., 1985).

¹¹⁵ *Marriott Corp. v. Metropolitan Dade County*, 383 So.2d 662 (Fla. App., 1980).

¹¹⁶ *Gerard Constr. Co., Inc. v. City of Manchester*, 415 A.2d 1137 (N.H., 1980).

¹¹⁷ *Case-Bros. Co., Inc. v. City of Ottawa*, 226 Kan. 648, 602 P.2d 1316 (1979).

¹¹⁸ *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (6 Cir., 1981).

¹¹⁹ *Keeco Industries, Inc. v. U.S.*, 492 F.2d 1200 (C. Cl., 1974).

¹²⁰ *M. A. Stephen Constr. Co. v. Borough of Rumson*, 125 N.J. Super. 67, 308 A.2d 380 (1973), damage for increased cost and anticipatory profits; *Dept. of Transp. v. Brooks*, 254 Ga. 303, 328 S.E.2d 705 (1985), contract declared void because of previous conflict of interest.

¹²¹ 314 N.W.2d 303 (S.D., 1982).

¹²² 31 Ore. App. 1137, 572 P.2d 1050 (1977), bid based on use of rock from a particular source at specified price, which became unavailable following bid opening. *See also: Mississippi State Bldg. Comm'n. v. Becknell Constr. Co., Inc.*, 329 So.2d 57 (Miss. 1976); *Baltimore County v. John K. Ruff*, 281 Md. 62, 375 A.2d 237, 2 A.L.R. 4th 985 (1977).

¹²³ *Clark Constr. Co., Inc. v. State of Alabama Highway Dept.*, 451 So.2d 298 (Ala., 1984); *Montgomery Bridge &*

Engr'g, Inc. v. State of Alabama Highway Dept., 440 So.2d 1114 (Ala., 1983).

¹²⁴ *Budd Constr. Co., Inc. v. City of Alexandria*, 401 So.2d 1070 (La. App. 1981); *Alaska Int'l Constr., Inc. v. Earth Movers of Fairbanks, Inc.*, 697 P.2d 626 (Alaska, 1985).

¹²⁵ *George Harms Constr. Co., Inc. v. Borough of Lincoln Park*, 161 N.J. Super. 367, 391 A.2d 960 (1978), failure to file stock ownership disclosure statement. *But see: Saturn Constr. Co., Inc. v. Bd. of Chosen Freeholders, Middlesex County*, 181 N.J. Super. 403, 437 A.2d 914 (1981), where omission was considered minor and did not prejudice the competitive process.

¹²⁶ *H. J. Williams, Co., Inc. v. Dept. of Transp.*, 371 A.2d 553 (Pa. Cmwlth., 1977); *In Re Contract for Route 280*, 179 N.J. Super. 280, 431 A.2d 848 (1981).

¹²⁷ *State ex rel. Missouri State Highway Comm'n. v. Hensel Phelps Constr. Co.*, 634 S.W.2d 168 (Mo., 1982).

¹²⁸ *Nelson, Inc. of Wisconsin v. Sewerage Comm'n. of Milwaukee*, 72 Wis.2d 400, 241 N.W.2d 390 (1976).

¹²⁹ *Mississippi State Bldg. Comm'n. v. Becknell Constr., Inc.*, 329 So.2d 57 (Miss., 1976).

¹³⁰ *Baltimore County v. John K. Ruff, Inc.*, 281 Md. 62, 375 A.2d 237, 2 A.L.R. 4th 985 (1977).

¹³¹ *Kotter v. Township of East Brunswick*, 160 N.J. Super. 462, 390 A.2d 634 (1978).

¹³² *Burnett Electronics Lab., Inc. v. United States*, 479 F.2d 1329 (Ct.Cl., 1973).

¹³³ *See: Ruggiero v. U.S.*, 420 F.2d 709 (Ct.Cl., 1970), where the court stated at 713: "What we are really concerned with is the overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed as something he ought to know, that the bid is based on or embodies a disastrous mistake and accepts the bid in the face of that knowledge. The correction of the mistake, perhaps in the teeth of general conditions or specifications, by rescission or reformation, represents an application of equitable principles in a legal action."

¹³⁴ 596 F.2d 448 (Ct.Cl., 1979).

¹³⁵ *Dick Corporation v. Associated Elec. Cooperative, Inc.*, 475 F.Supp. 15 (D. Mo., 1979).

¹³⁶ *F. G. Sullivan v. City of Baton Rouge*, 345 So.2d 912 (La. App., 1976), security

stated as "5% of amount of the bid" instead of a specific dollar amount; *Marvec Allstate, Inc. v. Gray & Fear, Inc.*, 148 N.J. Super. 481, 372 A.2d 1156 (1977), inadvertent error in amount of security which was promptly corrected.

¹³⁷ CAL. GOV'T CODE, § 4200-4208 (1986 supp.).

¹³⁸ *Gaastra v. Village of Fairwater*, 77 Wis.2d 7, 252 N.W.2d 60 (1977).

¹³⁹ See Table 1: Illinois, Massachusetts, New Mexico, Ohio, Oklahoma, Vermont.

APPLICATIONS

The forgoing research should prove helpful to highway and transportation administrators, their legal counsel, federal administrators, contract officers, and others involved in the development and award of contracts for transportation projects. The comprehensive coverage of the legal implications of the various elements of the competitive bidding process should provide valuable guidance for federal and state agencies. As an update of pages 1125-1214 in Volume 3 of Selected Studies in Highway Law, the information in this Digest will eventually be distributed as a supplement to Volume 3.

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