SECTION 1

THE TRANSPORTATION CONSTRUCTION CONTRACT

A. METHODS OF CONTRACTING FOR TRANSPORTATION CONSTRUCTION

1. Competitive Bidding—The Design-Bid-Build Method

State and federal law nearly always requires that public works projects be procured through a competitive selection process.[1] Most transportation construction projects have traditionally used the "design-bid-build" method, or competitive sealed bidding. Using this method, the transportation agency designs the project, either with its own staff or through a consultant, and prepares the project plans and specifications. The agency then advertises the project for bids, and selects the lowest responsible bidder to build the project. Recently, some state transportation agencies have obtained legislative authority to use other methods such as design-build and public-private partnerships; however, most agencies still use the design-bid-build method for most projects.

The 2000 Model Procurement Code for State and Local Governments includes processes for competitive sealed bidding as well as competitive sealed proposals, which is used for design-build and other alternative contracting methods.[2] The Model Code no longer states a statutory preference for competitive sealed bidding, although it is still the default source selection method.[3]

Procedures for selection of contractors to construct, maintain, improve, and repair public highways are based on state statutes and administrative rules.[4] These rules have no common law antecedents, and thus they constitute a set of positive policies and requirements that distinguish the conduct of public officials from the practices of those in private business. Two objectives underlie the development of most of today's laws and regulations requiring competitive bidding—the prevention of favoritism in spending public funds, and the stimulation of competition in the construction industry.[5]

The importance of complying with statutory bidding procedures is illustrated in cases in which governments have attempted to use the public contracting process to help achieve policy and program goals, especially in connection with social and economic issues and public safety. When an agency modifies its competitive bidding procedures to accommodate extraneous public interests, disappointed bidders may challenge the award as violating bidding requirements.[6] This occurred when a transportation authority awarded a contract to paint subway stations to a nonprofit 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 quasi-public sources, and its program implemented the state's social services laws. The painter's union successfully challenged the transportation authority's award. The court held that neither the good intentions of the contracting agency nor the laudable work of the contractor could overcome the statutory requirement for competitive bidding.

> 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]…renders a public works contract void.
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> 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….

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[1] Portions of this section are derived from *Competitive Bidding and Award of Highway Construction Contracts* by Dr. Ross D. Netherton, published by the Transportation Research Board in 1976 and included in the first edition of SELECTED STUDIES IN HIGHWAY LAW, vol. 3., p. 1175 or supplemented *id.* at pp. 1214–51 (1988).

[2] AMERICAN BAR ASSOCIATION, MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS (hereinafter "Model Code") § 3-202 (2000). A number of states have enacted some variation of the Model Code as their state procurement code. In those states, the commentary contained in each section of the Model Code may be useful as legislative history. In addition, the ABA regularly publishes compilations of cases decided under state law in states that have enacted the Model Code. For further discussion of the development of the 1979 Model Code, *see* C. Cushman, *The ABA Model Procurement Code: Implementation, Evolution, and Crisis of Survival*, 25 PUB. CONT. L.J. 173–98 (1996); and F.T. vom Baur, *A Personal History of the Model Procurement Code*, 25 PUB. CONT. L.J. 149–72 (1996) (written by chairman of ABA committee that drafted 1979 Model Code).

[3] Model Code, *supra* note 2, at xiii.

[4] Aschen-Gardner, Inc. v. Superior Court In and For County of Maricopa, 173 Ariz. 48, 839 P.2d 1093, 1095–96 (1992) (competitive bidding for public works projects is required only when mandated by statute); *see also* Smith v. Intergovernmental Solid Waste Disposal Ass'n, 178 Ill. Dec. 860, 605 N.E.2d 654, 664, 239 Ill. App. 3d 123 (1992) (in absence of statute requiring it, competitive bidding is not necessary for public agency to enter into valid contract); *but see* City of Philadelphia v. Commonwealth of Pa. Dep't of Envtl. Resources, 133 Pa. Commw. 565 577 A.2d 225, 228 (1990).

[5] Computer Shoppe v. State, 780 S.W.2d 729, 737 (Tenn. App. 1989) (public bidding statutes are intended to promote public interest by aiding government in procuring best work or materials for lowest practical price, providing bidders with fair forum for competing for government contracts, and protecting public from its officials' self-dealing, extravagance, and favoritism).

[6] District Council No. 9, Int'l Bhd. of Painters & Allied Trades v. Metropolitan Transp. Auth., 115 Misc. 2d 810, 454 N.Y.S.2d 663, 667 (1982).

> As well motivated as this sentiment may be, the statute does not support [the authority's action].[7]

Even though avoidance of favoritism and fraud is important, it is not the most important purpose of public bidding rules. The primary objective has always been to obtain a full and fair return for an expenditure of public funds.[8] This may be accomplished by extending invitations for public contract work on an open and equal basis to all persons who are able and willing to perform the work. Through effectively supervised competition among the parties, the public is assured that there will be a real and honest cost basis for the work desired.[9]

Therefore, competitive bidding requirements serve multiple purposes, and statements of these purposes by the courts have varied in emphasis. An illustrative list of the major objectives of competitive bidding is found in *Wester v. Belote*:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove, not only collusion, but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values [for the public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the public authorities, by affording an opportunity for an exact comparison of bids.[10]

a. The Essential Principles of Competitive Bidding

i. The Form of Competitive Bidding Rules.—An agency satisfies the objectives of competitive bidding when it follows uniform procedures relating to: (1) public advertisement to bidders inviting the submission of proposals; (2) preparation of plans, specifications, and related information about the work and the location where those materials may be obtained by prospective bidders; (3) formal submission of proposals to the contracting agency, together with the deposit of financial security guaranteeing that the bidder will accept the award of a contract if it is the lowest responsible bidder; (4) consideration of proposals under uniform criteria, and (5) award of contracts to lowest responsible bidders.

Any effort to fully describe the law relating to competitive bidding and award of contracts must take into account statutes, administrative regulations, and the informally followed practices of the contracting agency. Patterns regarding the mix of statutory and administrative elements in the law vary from state to state. Connecticut's statute illustrates an unusually broad delegation of procedural rule making authority to administrative officials:

> The commissioner may, at any time, call for bids to construct, alter, reconstruct, improve, relocate, widen or change the grade of sections of state highways or bridges.
>
> All bids shall be submitted on forms provided by the commissioner and shall comply with the rules and regulations provided in the specifications….[11]

In contrast, other states leave certain aspects of bidding to administrative judgment, and specify other aspects in statutes. Such variations in the form of competitive bidding laws reflect the tension between allowing flexibility and curbing the agency discretion that pervades public contract law. The Model Code sets out very general requirements, with more detailed requirements left to agency regulations.[12]

ii. Single or Separate Contracts.—Public works agencies customarily have wide discretion as to when to subdivide a project and award separate contracts for each segment or component of the work. Because this decision determines the monetary size of the contract, the agency's decision in this matter may directly affect the number and type of available bidders. However, compelling economic, engineering, and financial reasons may influence an agency's decisions regarding the dividing of contracts. As long as these considerations are reasonable, courts have tended to uphold the contracting agency's actions in determining the size and scope of the contract.

However, if the specifications issued by the contracting agency result in limiting the bidding or otherwise impairing free competition in the selection of public contractors, the award may be enjoined or nullified, or the agency may be required to reject all bids and readvertise on more appropriate terms. For example, an agency was not allowed to arbitrarily divide a project for installation of traffic signals into separate contracts for procurement of materials, equipment, and labor where these items were parts of an integrated project. The apparent purpose of the separation was to keep each contract under the statutory minimum price for requiring competitive bidding.[13]

On the other hand, where these items are not necessarily integrated in the type of construction work called for, they may be provided under separate contracts. Specialty work frequently is sufficiently different from basic construction tasks to warrant separation of contracts.[14] Separate contracts have also been upheld for

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[7] *Id*. at 667–68 (citations omitted).

[8] *See, e.g.,* City of Atlanta v. J.A. Jones Constr. Co., 260 Ga. 658, 398 S.E.2d 369, 370, *on remand*, 198 Ga. App. 345, 402 S.E.2d 554, *cert. denied*, 111 S. Ct. 2042 (1990).

[9] Carbro Constr. Co. v. Middlesex County Util. Auth., 233 N.J. Super. 116, 558 A.2d 54, 58 (1989) (curtailing local discretion and requiring strict compliance with bidding requirements protects public against favoritism, extravagance, and corruption).

[10] 103 Fla. 976, 723–24, 138 So. 721, 722 (1931).

[11] CONN. GEN. STAT. ANN. § 13a-95 (1999).

[12] Model Code, *supra* note 2.

[13] National Elec. Contractors Ass'n, Puget Sound Chapter v. City of Bellevue, 1 Wash. App. 81, 459 P.2d 420, 421 (1969) (where bidding statute was written in conjunctive, "improvement, including materials, supplies, and equipment," a project could not be broken out into separate contracts for materials and installation).

[14] *See*, *e.g.,* notes 16 through 19 *infra.*

construction of two similar facilities where the projects were to be paid for from separate funding sources.[15]

Although state laws mandating separate bidding for different construction trades are not normally applicable to transportation construction contracts, the Ohio Supreme Court addressed the question of whether a state separation statute applied to a contract for the construction of 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.[16] In this case, each rest area involved construction of public facilities and storage buildings with janitors' and storage rooms, and installation of a complete wastewater treatment system. Examining the Ohio 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.[17] 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 involved.[18] 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.[19]

Because transportation construction programs generally use standard specifications and procedural manuals, the room for discretionary combining or splitting of projects for bidding is reduced.[20] Competitive bidding practices have been standardized along lines that courts, agencies, and contractors agree are reasonable and feasible and that do not weaken the process of procurement by competition. This standardization has also contributed to stabilizing this aspect of bid preparation.

iii. Lump Sum Versus Unit Price Bids.—Another aspect of bidding that is normally left to the discretion of the contracting agency is whether bids must be submitted in the form of a lump sum for the entire project or in a series of prices for units of work or materials. Lump sum bids are favored where construction jobs involve a variety of operations and it is impractical to break down the work into a few basic units of materials and labor. Ultimately, the success of this method requires complete and accurate specifications, detailed work plans, and accurate quantities of labor and materials. Failure to provide full guidance on these technical matters increases the risk of excessively high bids as bidders attempt to price risks that they cannot reasonably evaluate.

Unit price bidding is favored where a project requires large quantities of relatively few standardized materials and construction operations, or where the exact quantities of materials and labor are not known in advance. A proposal form is furnished to bidders, containing the agency's estimate of the quantities to be used in the project. In submitting its bid, the contractor inserts the unit price as requested, and extends the unit prices by the agency's estimated quantities.[21]

When a contract is bid on a unit price basis, reasonable variations may be made in the work without the necessity of formal change orders. However, this flexibility applies only to items originally covered in the contract. If material discrepancies occur between the estimated and actual quantities required for the work, the agency may reconsider the original contract.

In a bid based on unit prices, 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 which figure will be accepted, the parties to the contract are held to resolving discrepancies by that means. Whether the bid must be rejected will depend on how much discretion an agency's statute allows in resolving bidder mistakes.[22] One court has held that the contracting agency could not reject the bid as being ambiguous when this error occurred.[23] Another has held that the agency had the right to reject a bid in spite of an "errors in bid" formula contained in the bid advertisement, where accepting the bid would have allowed the bidder to choose between two differing price totals.[24] Where the

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[15] Daves v. Village of Madelia, 205 Minn. 526, 287 N.W. 1, 123 A.L.R. 569 (1939).

[16] Mechanical Contractors Ass'n of Cincinnati v. State, 64 Ohio St. 2d 192, 414 N.E.2d 418 (1980) (rest areas were considered part of the highway, thus the Department of Transportation was authorized to contract for their construction and improvement).

[17] *Id.* at 420–21.

[18] OHIO REV. CODE ANN. §§ 153.02, 153.03 (1985 Supp.), repealed 1996.

[19] 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 at 421–22 (citing OHIO REV. CODE § 5529.05).

[20] *See* UTAH CODE § 72-6-102 (agency required to adopt standard plans and specifications for construction and maintenance of state highways).

[21] State Highway Admin. v. David A. Bramble, Inc., 351 Md. 226, 717 A.2d 943, 944 (1998).

[22] *See* Model Code, *supra* note 2, at § 3-202(6) and commentary.

[23] Pozar v. Department of Transp., 145 Cal. App. 3d 269, 193 Cal. Rptr. 202 (1983).

[24] Colonnelli Bros. v. Ridgefield Park, 665 A.2d 1136, 1139 (N.J. Super. A.D. 1995).

specifications clearly require that both unit prices and total prices for each bid item be included, a bid may be found nonresponsive for failure to include both.[25] A Louisiana court addressed this issue:

> Even though DOTD's rigid specifications as to the bid form may have seemingly harsh results, any interpretation but the most literal would contravene the *stricti juris* nature of the public contract laws. As our brethren on the Fourth circuit have noted:
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> "[B]idding in accordance with the advertisement is essential to satisfy the purposes for which the public bid laws were enacted. If public bidding is an honest attempt at getting the best value for tax moneys, then every bidder must be held bound by the terms of the advertising. To allow anything less than a bid conforming on its face to the advertised specifications would constitute an open invitation to the kind of impropriety and abuse the public bid laws were designed to prevent."[26]

One cause of confusion may be a contracting agency's reservation of the right to award contracts on only a part of the total work described in the bid advertisement. In *Devir v. Hastings*, a municipal agency requested bids for resurfacing four streets, but reserved the right to award contracts for less than all four.[27] The bid advertisement specified that bids must be submitted on a per yard basis. The challenger argued that the agency's reservation deprived bidders of a common basis for such a unit price bid. The court held, however, that prospective bidders could determine both the minimum and maximum amounts of material needed and so could compete on an equal footing.

b. Advertisement for Bids

i. General Requirements for Advertisement.—For competition to be fostered in public bidding, (1) everyone qualified and desiring to bid on the project must be adequately informed of it, and (2) all bidders must be given equal opportunity to bid and have their bids considered on the same terms. Requirements for public advertisement of projects and invitations to bid are implemented through a publication of a formal call for proposals or invitation for bids. This must contain the essential information about how bids should be submitted, and must inform bidders of all the essential features of the project.[28] For example, Louisiana's public procurement statute, which is based on the Model Code, requires that the invitation for bids contain all contractual terms and conditions applicable to the procurement, as well as the evaluation criteria to be used.[29] Requirements of state laws regarding advertisement for bids on highway construction are found in Appendix A.

The requirement for public advertisement, and the terms on which it must be provided, are based in statute.[30] Typically, statutes relating to advertisement of public works projects set forth the times, places, and forms of publication of the advertisement. Most statutes favor newspapers of general circulation in the county where the work is to be done as the principal means of advertisement.[31]

In addition, since contractors often do business in multi-state regions, they may be contacted more easily through industry trade journals than through local newspapers. Therefore, contracting officers in many states are either directed or authorized to publish notices of their projects and invitations to bid in these trade journals. Other devices for accomplishing this same purpose include publication in an "official newspaper" of the state, and listing in a departmental bulletin published by the state transportation agency.[32] Some states also post information about projects and bid opening dates on their Internet web sites. Colorado allows Internet publication as follows: "The executive director of the department of transportation may invite bids using electronic on-line access, including the internet, for purposes of acquiring construction contracts for public projects on behalf of the department of transportation."[33]

Agencies must strictly comply with the statutory time for publication of bid announcements. Where exact dates are not given, the rules must be construed so that the agency accomplishes the legislative purpose of adequate and reasonable notice. Confusion has occasionally arisen over the method of correctly calculating the period over which notices must appear. One typical style of drafting this provision states that the agency shall advertise "for two consecutive weeks" in designated newspapers. An Ohio court gave this interpreta-

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[25] V.C. Nora, Jr. Building & Remodeling v. State, Dep't of Transp. and Dev., 635 So. 2d 466, 472–73 (La. App. 3d. Cir. 1994).

[26] *Id*. (quoting Gibbs Constr. v. Board of Sup'rs of L.S.U., 447 So. 2d 90 (La. App. 4th Cir. 1984)).

[27] 277 Mass. 502, 178 N.E. 617 (1931).

[28] Model Code, *supra* note 2, at § 3-202(2), (3), and commentary.

[29] Pacificorp Capital v. State, Through Div. of Admin., Office of State Purchasing, 647 So. 2d 1122, 1124 (La. App. 1 Cir. 1994), *writ denied*, 646 So. 2d 387 (1994).

[30] In the absence of legislation, public advertisement for bids would be entirely discretionary with the contracting agency, and when utilized would follow procedures designated in the contracting agency's resolution authorizing the contract. Failure to comply with the requirements of such a resolution may defeat the validity of a contract just as surely as failure to comply with procedures specified by statutes or regulations. Reiter v. Chapman, 177 Wash. 392, 31 P.2d 1005, 1006–07, 92 A.L.R. 828 (1934).

[31] *See* Appendix A.

[32] *See* ALASKA STAT. § 36.30.130 (1998) (publication by the procurement office is required in Alaska in the online Public Notice System for 21 days prior to bid opening); MISS. CODE § 65-1-85 (requiring publication in newspaper of general circulation published in state capital, having general circulation throughout the state).

[33] COLO. REV. STAT. § 24-92-104.5 (1999); *see also* D.C. CODE § 2-303.03 (C-1) (2002) .

tion: "In our opinion, the work 'for' [means that]…such advertisement is required 'during the continuance of' or 'throughout' the period of two weeks….[I]t follows that two full calendar weeks must elapse subsequent to the date of the first publication before the date fixed for receiving the bids."[34]

Some statutes address this potential statutory construction problem by specifically requiring publication "at least once per week" for 2 consecutive weeks.[35]

Federal approval is required before any advertisement for bids or undertaking of bids in federally-funded projects. The Federal Highway Administration (FHWA) requires that a minimum of 3 weeks must be available to bidders before the opening of bids.[36] However, the FHWA Division Engineer is authorized to approve shorter periods in special cases.[37] Ultimately, the question of justification is likely to be a practical one. FHWA recognizes that advertising longer than 3 weeks is desirable for "large, complicated projects that will require considerable time for study and developing of cost data before realistic bids can be prepared."[38] In contrast, small, simple problems of construction and maintenance can be prepared and submitted on short notice.

ii. Content of Bid Advertisements.—Bidding statutes have a variety of approaches to informing prospective bidders of the nature of the work required. The contracting agency's announcement must be sufficient to indicate the character, quality, location, and timetable of a construction project, or the type, quantity, and delivery requirements for purchases of supplies and construction materials.[39] When a bidder claims that there is a patent ambiguity in bid documents, a court limits its inquiry to whether a reasonable person could find gross discrepancies, obvious errors in drafting, or a glaring gap.[40] Bid documents are subject to the same rules of interpretation as are contracts: the documents must be interpreted so as to give meaning to all parts and in a manner that does not create internal conflicts.[41] An agency's exercise of discretion in adopting bid specifications is reviewed for arbitrary action.[42]

Requirements relating to the content of bid advertisements often vary according to the transportation system involved. Within a state, there may be separate laws regarding state highways, county and municipal roads, turnpikes, and transit systems. Each may differ regarding the information that bid advertisements must contain. For example, Kansas's law relating to contracts of the state highway commission and the county boards of commissioners illustrates these differences. Notice of state highway projects must "specify with reasonable minuteness the character of the improvement contemplated, the time and place at which the bids will be received, and invite sealed proposals for the same…."[43]

For projects undertaken by county boards of commissioners, the public notice must

> specify with reasonable minuteness the character of the improvement contemplated, where it is located, the kind of material to be used, the hour, date and place of letting of such contract, when the work is to be completed, and invite sealed proposals for the same. Such other notice may be given as the board may deem proper….[44]

In addition to the character and location of the work, some states have added other items in which there is special interest. Examples include notice that prevailing wage rates must be paid to laborers on the job,[45] whether prequalification of subcontractors is required,[46] whether bids must lie on the entire project unless the contracting officer formally determines that a separation is necessary,[47] and that bid bonds will be required in specified amounts.[48] It is also common for statutes to require that bid invitations reserve to the contracting agency the right to reject all bids if it is deemed appropriate.[49] They may also require that the notice include information as to where the project plans, specifications, and other pertinent papers may be inspected.[50] Where bid specifications set out the factors on which bids may be evaluated, they are not necessarily re-

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[34] State ex rel. Dacek v. Cleveland Trinidad Paving Co., 35 Ohio App. 118, 171 N.E. 837, 840–41 (1929).

[35] *See*, *e.g.*, 29 DEL. CODE § 6962(b) (1998).

[36] 23 C.F.R. § 635.112(b) (1999).

[37] *Id*.

[38] FEDERAL-AID POLICY GUIDE, Oct. 9, 1996, Transmittal 16 (nonregulatory supplement to 23 C.F.R. § 635.112).

[39] *See* Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Auth., 67 Ohio App. 3d 812, 588 N.E.2d 920, 925, *jurisdictional motion allowed*, 53 Ohio St. 3d 717, 560 N.E.2d 778 (1990), *cause dismissed*, 57 Ohio St. 3d 721, 568 N.E.2d 1231 (1991) (invitation to bid and specifications present common basis for bidding).

[40] Fry Communications v. United States, 22 Cl. Ct. 497, 509 (1991).

[41] Vanguard Security v. United States, 20 Cl. Ct. 90, 103 (1990).

[42] Glacier State District Services v. Wis. DOT, 221 Wis. 2d 359, 585 N.W.2d 652, 656 (1998) (specifications reviewed to determine whether they were arbitrary or unreasonable).

[43] KAN. STAT. ANN. § 68-408 (1999).

[44] KAN. STAT. ANN. § 68-521(a)(1999); *see also*, *e.g.*, S.D. Codified Laws § 5-18-3 (2001) (requirements for advertising of state highway projects) and § 31-12-14 (2001) (requirements for advertising county road projects).

[45] OR. REV. STAT. § 279.312(1)(a) (1999).

[46] 29 DEL. CODE ANN. § 6962(c) (1999).

[47] CAL. PUB. CONT. CODE § 10141 (1999).

[48] MONT. REV. STAT. § 18-2-302 (1999).

[49] *See*, *e.g.*, 23 ME. REV. STAT. ANN. § 753 (2002).

[50] *Id; see also* Ragland v. Commonwealth, 172 Va. 186, 200 S.E. 601, 602–03 (1939) (plans and specifications placed on file for public inspection or as a reference to bidders become the only authentic and binding specifications).

quired to include the relative weight that will be given to those factors.[51]

Contracts in which federal-aid funds are used must comply with certain requirements of federal law or regulations, which must be mentioned in the project advertisement. Federal-aid regulations call for specific assurance that state procedures afford all qualified bidders a nondiscriminatory basis for submitting proposals and having their proposals considered.[52] If there are any features of state law that may operate in a manner to prohibit submission of a bid, or prevent consideration of a bid made by a qualified contractor, the project advertisement must state that those features are not applicable to the advertised contract.[53] In addition, all advertisements must advise prospective bidders that, as a condition precedent to federal approval of the contract, the successful contractor must execute and file with the state transportation agency a sworn statement that it has not been a party to any collusion or restraint of free competitive bidding in connection with the project.[54]

Finally, federal-aid regulations specifically state that bid advertisements shall not be issued until the provisions of regulations and directives covering administration of the Uniform Relocation Assistance Act have been met and that all needed right-of-way has been acquired.[55] In the event the requirement that all right-of-way be available is not met before advertisement, the advertisement must include appropriate notice identifying all locations where right of possession and use has not been obtained.[56]

iii. Change of Specifications Following Advertisement.—The project announcement and bidders' proposals are considered to be only invitations and offers, either of which may be changed or withdrawn without penalty prior to the opening of bids and contract award. However, limits are placed on an agency's reserved right to make changes by addendum during the bidding process. Properly issued and provided to all prospective bidders, the addendum becomes part of the invitation for bids.[57] A change announced unilaterally by the contracting agency after advertisement of a project must not give any bidder or group of bidders an unfair advantage, nor may the contracting agency include in the contract any provision benefiting the successful bidder that was not within the terms or specifications that were the basis for the bidding.[58] Extensions of time for performance and agreement to accept substitute materials or modified designs are common types of changes that test the application of this rule. Where the change made in the originally announced terms or specifications is substantial, the validity of the competitive award can be preserved best by readvertising the project for bids, giving consideration to the changed terms.

If a contracting agency decides to make additions or modifications in the specifications or bidding instructions after they have been advertised but before the bids are opened, it must make those changes in a manner that assures that all bidders receive notice of them.[59] If statutory procedure is silent on the notification method, 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 that ensures the integrity of the 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.

> But where 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….[60]

In issuing an addendum, the agency must be careful that the addendum provides all of the information that it expects bidders to abide by, and that it states very clearly what is being amended in the original invitation for bids. For example, in *Air Support Services International, Inc. v. Metropolitan Dade County*, the court held that the agency could not impose the time limit for submission of bids that was included in the invitation for bids where none was given in the addendum that extended the time for submission.[61] The court found that the addendum implied that bids would be due by the close of business on the date indicated, rather than at the earlier time of day stated in the original invitation for bids.

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[51] Dunnuck v. State, 644 N.E.2d 1275, 1279 (Ind. App. 1 Dist. 1994).

[52] 23 C.F.R. § 635.110 (1999).

[53] 23 C.F.R. § 635.112(d) (1999).

[54] 23 C.F.R. § 635.112(f) (1999).

[55] 23 C.F.R. § 635.309(c) (1999).

[56] 23 C.F.R. § 635.309(c)(3) (1999).

[57] Leaseway Distribution Centers v. Department of Admin. Servs., 49 Ohio App. 3d 99, 550 N.E.2d 955, 960 (1988).

[58] Lake Constr. & Dev. Corp. v. City of New York, 221 A.D. 2d 514, 621 N.Y.S.2d 337, 338 (1995).

[59] *See* Air Support Services Internal v. Metropolitan Dade County, 614 So. 2d 583, 584 (Fla. App. 3 Dist. 1993) (public bid requirements may not be materially altered after submission of bids); Glynn County v. Teal, 256 Ga. 174, 345 S.E.2d 347 (1986) (agency cannot make material changes in plans and specifications without notice to prospective bidders); 29 Del. Code § 6923 (g) (2001).

[60] Boger Contracting Corp. v. Bd. of Comm'rs., 60 Ohio App. 2d 195, 396 N.E.2d 1059, 1064 (1978) (emphasis in original).

[61] 614 So. 2d 583, 584 (Fla. App. 3 Dist. 1993).

Most agencies' procedures limit the time that an addendum may be issued, and may prohibit the issuance of an addendum within a certain short period of time before bid opening. This time limitation acknowledges that late-issued addenda may not reach all bidders prior to bid opening, and also recognizes that bidders may need time to adapt their bids to the new specifications. Thus a Louisiana court found that an addendum issued within 72 hours of bid opening was issued improperly.[62] Not all bidders had been informed of the change, resulting in bidders submitting bids on different specifications. The court enjoined the Parish from awarding the contract, thus requiring the agency to reject all bids.[63]

c. Bid Security Deposits

The purpose of the statutory requirement for a bid security deposit is to assure that the bidder is acting in good faith, and that if its bid is successful it will enter into the contract and furnish the necessary bonds for performance of the work and for payment for labor and materials.[64] Maine's statute is an example:

> Each bidder must accompany his bid with a deposit of a good and sufficient bid bond in favor of the State for the benefit of the department, executed by a corporate surety authorized to do business in the State, or certain securities, as defined in Title 14, section 871, subsection 3, payable to the Treasurer of State, for an amount which the department considers sufficient to guarantee that if the work is awarded to him, he will contract with the department for its due execution….[65]

Statutes or regulations typically specify the amount of the deposit, either as a percentage of the total amount of the bid, or a fixed dollar amount determined by the contracting agency, and the acceptable method or methods of providing the security. A comparative summary of state statutes and regulations relating to bid security deposits is given in Appendix B. In most instances, the statutes and regulations also specify how security deposits will be released or returned to unsuccessful bidders.[66] For example, Alabama's statute provides that all bid bonds except those of the three lowest bidders will be returned immediately after determination of the low bidder, with others returned after the contract is executed.[67] Requirements for bid bonds may also be detailed in standard specifications, consistent with the agency's statutory authority.[68]

State statutes may also specify the form of the bid bond. Where a statute required the bonds for public works projects to be written by a surety that was currently on the United States Treasury Department Financial Management Service list of approved bonding companies, bid bonds were held to be covered by that requirement.[69] More typically, statutes require that the bond be issued by a surety authorized to do business in the state.[70]

When bidders may satisfy security requirements by furnishing a surety bond, the surety's obligation typically covers the difference between the amount of the bid and the amount the contracting agency must pay to another contractor to perform the work covered by the bid.[71] When bidders may meet security requirements by depositing a check or bank draft, they must post a specific dollar sum, which is then subject to forfeiture if the bidder fails to execute the contract.

Whether bid security deposits are penalties or liquidated damages has frequently been questioned. One court has considered the forfeiture of the bid bond to be liquidated damages, intended to compensate the agency for its costs in awarding to the next low bidder or readvertising.[72] Another has interpreted the bid bond as a penalty, noting that the bid bond document describes the amount of the bond as a "penal sum."[73] The language of these forms has not, however, been considered conclusive proof of their intention or effect. When questions of enforcement have arisen, courts have allowed the circumstances to govern each case, and forfeiture of security deposits may be avoided where unusual hardship or inequity would result.

Much of the reported litigation over interpretation of bid security requirements arises from circumstances where bidders want relief from bid mistakes.[74] However, one case involved the bidder's deliberate refusal to execute the contract because of alleged failure of the

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[62] Grace Constr. Co. v. St. Charles Parish, 467 So. 2d 1371, 1374 (La. App. 1985).

[63] *Id*.

[64] Model Code, *supra* note 2, at § 5-301.

[65] 23 ME. REV. STAT. ANN. § 753 (2002).

[66] *See* Environmental Safety and Control Corp v. Auburn Enlarged City Sch. Dist., 167 A.D. 2d 876, 561 N.Y.S.2d 972 (1990).

[67] *See* ALA. CODE § 39-2-5 (2001 supp.).

[68] *See* WASH. REV. STAT. § 47.28.090 and WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, *Standard Specifications for Road, Bridge and Municipal Construction*, § 1-02.7 (2002).

[69] Gibson Roofers v. Terrebonne Parish Consol. Gov't, 577 So. 2d 362, *writ denied*, 580 So. 2d 672 (La. App. 1 Cir. 1991).

[70] *See* KAN. STAT. ANN. § 68-410 (2000).

[71] City of Cheyenne v. Reiman Corp., 869 P.2d 125, 127 (Wyo. 1994) (forfeiture of bid bond is liquidated damages for low bidders' failure to execute contract or proceed with construction); WYO. STAT. § 15-1-113 (2002); *see also* Nebraska Standard Specifications § 103.05 (forfeiture of bid security for failure to execute contract is not penalty but rather in liquidation of damages sustained).

[72] *See* Reiman Corp., *supra* note 71.

[73] Powder Horn Constructors v. City of Florence, 754 P.2d 356, 366–68 (Colo. 1988).

[74] *See* § 3.

contracting agency to perform. A successful bidder believed that the contracting agency would not be able to furnish the needed right-of-way by the time of execution, and delayed executing the contract.[75] Ultimately, the contractor had to forfeit its deposit when the court held that the contracting agency had adequate legal authority to obtain the right-of-way through condemnation, and was under no obligation to acquire the land in advance of the contract execution. Unless conditional terms are set out and accepted in the bid, the bidder is not relieved of its contractual duty under the bid merely because it believes that the contracting agency will not be able to perform its part of the contract.

Compliance with bidding procedure is an administrative function, and courts do not substitute their judgment for that of the contracting agency in the absence of fraud. So where an agency rejected a bid because the bidder's security deposit check was not properly certified, the court upheld the agency's action over arguments that the defective certification complied with the intent of the law.[76] Depending on statutory requirements, the requirement of a bid bond may be considered permissive and subject to waiver by the agency.[77] Also, where the contractor's signature on the bond is not necessary for enforcement of the bond, the requirement of that signature may be waived.[78] However, a bid could properly be rejected because of the surety's failure to use the bid bond form required by the agency, where the failure resulted in required information being omitted.[79] This was found to be an error of substance and not merely of form, because required information was not provided to the agency.

d. Other Bidder Requirements

Some agencies may require attendance at the pre-bid conference as a condition for having the contractor's bid considered. Where the invitation for bids expressly stated that a bidder's attendance at the pre-bid meeting was mandatory in order for its bid to be considered, the agency did not violate competitive bidding requirements when it rejected the low bidder who had not attended the pre-bid meeting.[80] Because of concern about particular site conditions, the agency had determined that prospective bidders must visit the site before bidding, and had written the specifications to require attendance at a pre-bid meeting held at the site. The court did not rule as to whether the agency had authority to waive the attendance requirement, but found that it was not arbitrary to refuse to do so.[81]

e. Submission of Bids and Award of Contract

i. Authority of Contracting Agencies.—Procedures for submission of bids and award of contracts for public works projects are based on statutory provisions. The validity of an award depends on strict compliance with these statutes.[82] In some instances, statutes describe in detail the steps that bidders and agencies must take in moving from bid filing to contract award. However, these procedural requirements may also be promulgated as rules. Where administrative rules are within the agency's statutory authority and are consistent with the implicit requirement that they be designed to strengthen free and open competition among qualified bidders, they have withstood challenge as unconstitutional delegations of rule making authority.

ii. Submission, Opening, and Acceptance of Bids.—Requirements designating the time and place for filing bids, and the form of the bid, may be set out in the contracting agency's regulations, in its standard specifications, and in the instructions issued with the proposal form.[83] Strict compliance with these requirements is essential. Contracting agencies, either by statute or administrative rules, generally reserve the right to reject any bid that fails to adhere to these requirements.[84] Courts have upheld these technical requirements as mandatory for both bidders and contracting agencies and have taken the position that these requirements may not be waived.[85] It is customary for state transportation agencies to require that proposals be submitted on official bid forms that include specific instructions as to the time and place for submission of bids, and that warn that proposals received after the time and date designated will be returned to the bidder unopened.[86]

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[75] Coonan v. City of Cape Girardeau, 149 Mo. App. 609, 129 S.W. 745 (1910).

[76] Menke v. Bd. of Educ., Indep. School Dist. of West Burlington, 211 N.W.2d 601 (Iowa 1973) (bank used rubber stamp to certify check instead of officer's handwritten signature).

[77] F.H. Myers Constr. Corp. v. City of New Orleans, 570 So. 2d 84, 85 (La. App. 4 Cir. 1990); Thigpen Constr. Co. v. Parish of Jefferson, 560 So. 2d 947, 953 (La. App. 5 Cir. 1990); LSA-R.S. 38:2218(A).

[78] State v. Integon Indem. Corp., 105 N.M. 611, 735 P.2d 528, 530 (1987).

[79] M & L Industries v. Terrobonne Parish Consol. Gov't, 602 So. 2d 321, 322 (La. App. 1 Cir. 1992) *writ denied*, 604 So. 2d 1010.

[80] Scharff Bros. Contractors v. Jefferson Parish School Bd, 641 So. 2d 642 (La. App. 5 Cir. 1994), *writ denied*, 644 So. 2d 399, *reconsideration denied*, 648 So. 2d 384 (1994).

[81] *Id*., 641 So. 2d at 644.

[82] Percy J. Matherne Contractor v. Grinnell Fire Protection Systems Co., 915 F. Supp. 818 (M.D. La. 1995), *aff'd*, 102 F.3d 550 (5th Cir. 1995) (public bid law is mandatory, and any contravention of its provisions renders the contract null and void).

[83] *See*, *e.g.*, Hawaii Corp. v. Kim, 53 Haw. 659, 500 P.2d 1165, 1169 (1972) (contracting officer could set out bidding procedure in absence of a specific statute doing so).

[84] MONT. REV. STAT. § 18-2-303(3) (1999) (agency may not accept bid that does not comply with statutory requirements).

[85] Hawaii Corp. v. Kim, 53 Haw. 659, 500 P.2d 1165, 1169 (1972).

[86] *But see* Gostovich v. City of West Richland, 75 Wash. 2d 583, 452 P.2d 737 (1969) (holding that where a bid was mailed more than 24 hours before the time for bid opening, and there was no suggestion of fraud or undue competitive advantage, the bid could be accepted despite its late arrival).

Bidding statutes and rules normally specify that bids will be opened in a public session, which all bidders may attend.[87] Courts have reached varying results on the issue of whether the time for submission of bids must be strictly complied with. The Washington Supreme Court has held that the timeliness requirement could be held to have been complied with when the bidder mailed its bid in enough time to reach the agency prior to bid opening, even though it did not arrive on time. [88] However, most courts have taken a much stricter approach. For example, the Georgia Court of Appeals held that the agency's award to an untimely bidder was improper, and upheld an award of bid preparation costs.[89] The court discussed at some length the importance of adhering to a strict rule of timely submission, noting how bidders often adjust their prices up to the last minute before bids are due.[90] Thus, even an additional few minutes could be a material advantage that the untimely bidder would have over the other bidders. The Virginia court also held that the statement in the invitation for bids fixing the time for submission of bids is a material and formal requirement that must be strictly complied with, and that cannot be waived.[91] An Ohio appellate court held that while there is a presumption that the clocks in the agency's building are correct, it is a rebuttable presumption and the rejected bidder may be allowed to show that its bid was submitted in a timely fashion. [92]

The rule on opening of bids in accordance with the terms set forth in the advertisement of the project and bidding instructions, together with a corollary requirement that the award will be announced at that time or within a specified or a reasonable time thereafter, are mandatory duties that contracting agencies owe to bidders. Thus, where an agency issued the original invitation for bids specifying that bids must be submitted on the due date by 1:00 p.m., then issued an addendum extending the date without setting a time, it was to presume that bids were due to be submitted by the close of business that day and not at 1:00 p.m.[93]

Postponement of scheduled bid openings and contract award without strong justification may be challenged as abuse of discretion. Generally, the need to introduce changes in project specifications, or to enable bidders to evaluate and reflect such changes in their bids, has been the most readily accepted justification for postponement.[94]

There is no contract until the bid is accepted and a contract is awarded by the agency. The agency's acceptance of the low bid may be conditional.[95] In *Dick Fischer Development No. 2, Inc. v. Department of Administration*, an agency acknowledged the submission of the low bid with a notice that indicated that the contract would be awarded provided that no bid protests were filed within 5 days.[96] The notice provided that if a protest was filed, the award would be held in abeyance until the protests were resolved. The project was then canceled before the protests were resolved. The court held that there was no breach of contract, because no contract had been formed due to the failure of a condition precedent, which was the resolution of bid protests.

The rules are positive and explicit regarding acceptance of bids that do not fully and precisely meet all formal requirements set forth in regulations and instructions. Bids that are technically defective or deficient must be considered "irregular" or "informal," and may be rejected. The rules calling for rejection of irregular bids are generally stated in permissive terms. As a result, the possibility of waiver of technical defects is always present.[97] However, the courts recognize a distinction between nonmandatory bidding requirements that can be waived and mandatory requirements that cannot be waived without impairing the essential competitive nature of the contract award.[98]

f. Bidder Preferences and DBE Requirements

One or both of these items may be required as an element of bid responsiveness. Both are addressed in detail in Section 4.

g. Determination of Lowest Responsible Bidder

i. Time for Award and Execution.—Some states' statutes provide for a time period in which the agency must award the contract, and a subsequent time period in

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[87] *See* Model Code, *supra* note 2, at § 3-202(4).

[88] Gostovich, 452 P.2d at 740. Query whether this would still apply when more reliable and commonly used methods of delivery, such as overnight mail, are now available to contractors.

[89] City of Atlanta v. J.A. Jones Constr. Co., 195 Ga. App 72, 392 S.E.2d 564, 569 (Ga. 1990), *rev'd on other grounds*. 260 Ga. 658, 398 S.E.2d 369, 370 (1990). The Supreme Court upheld an award of bid preparation costs, but reversed awards of lost profits and damages for violations of due process.

[90] *Id.*, 392 S.E.2d at 566.

[91] Holly's, Inc. v. County of Greensville, 250 Va. 12, 458 S.E.2d 454, 457 (1995).

[92] PHC, Inc. v. Village of Kelleys Island, 71 Ohio App. 3d 277, 593 N.E.2d 386, 387 (1991).

[93] Air Support Services Int'l, Inc. v. Metropolitan Dade County, 614 So. 2d 583, 584 (Fla. App. 3 Dist. 1993).

[94] Yonkers Contracting Co. v. Tallamy, 283 A.D. 749, 127 N.Y.S.2d 646 (1954).

[95] Dick Fischer Dev. No. 2, Inc. v. Department of Admin., State of Alaska, 778 P.2d 1153 (Alaska 1989).

[96] *Id*.

[97] Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Auth., 67 Ohio App. 3d 812, 588 N.E.2d 920, 925 (1990), *cause dismissed* on joint applications to dismiss, 568 N.E.2d 1231, 57 Ohio St. 3d 721 (1991).

[98] This is discussed more fully in § 2 infra.

which the contractor must execute the contract.[99] An Ohio court has held that the statutory time period for award and execution, which was 60 days, could be extended by mutual agreement of the parties, which could be implied from the parties' conduct.[100] The court further noted that the only entities that may invoke the 60-day limit are the parties, either of whom may withdraw its consent to further extensions of time.[101]

The Model Code allows the award to be made electronically. The award is required to be made in writing, and the Model Code defines "written or in writing" to include electronic means.[102] Once an award of a contract has been made, it may not be withdrawn by the agency.[103]

ii. Selection of Lowest Responsible Bidder.—State statutes generally require that public works contracts shall be awarded to the "lowest responsible bidder."[104] A comparison of State statutes regarding award of contracts is found in Appendix C.

One court has noted that even in the absence of a statutory requirement to do so, public policy requires the award of contracts to the lowest responsible bidder where the agency has chosen to solicit bids.[105] This term is often used without any language reserving the contracting agency's ability to consider any factors other than price. However, some statutes allow additional criteria for selection of successful bidders, such as Illinois' statute, which is based on the Model Code:

> Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award, such as discounts, transportation costs, and total or life cycle costs, shall be objectively measurable. The invitation for bids shall set forth the evaluation criteria to be used.[106]

In a variation on determining the lowest responsible bidder, statutes may allow the agency to consider factors such as the time that the bidder proposes to take to complete the project in addition to the contract price. Arizona recently enacted a statute allowing "A + B" bidding, in which the agency may select the low bidder based on a combination of (A) the contract price, plus (B) the calendar days needed to complete the project.[107] In order to assign value to the calendar days, the agency determines the cost to the traveling public of using roads that are under construction.[108]

Court decisions also provide a working definition of "lowest responsible bidder" that fits the pattern formed by most statutes and reflects the interests of the public and the capabilities of contract administration techniques. These decisions address both the elements of "bidder responsibility" and "bid responsiveness." Generally, a bid will be considered "responsive" if it promises to do what the bid specifications demand, and a bidder is considered "responsible" if it can perform the contract as it has promised.[109]

Bidder responsibility thus includes a wide range of factors in addition to the capacity to supply labor and materials, and may involve business morality or trustworthiness.[110] It may also include the bidder's previous performance on similar contracts.[111] However, the obligation to award to the lowest responsible bidder does not allow the agency to choose the "most responsible;" once a bidder is qualified as responsible, the agency may not compare relative degrees of responsibility.[112]

Most of the factors bearing on a contractor's ability to perform satisfactorily generally are discovered in the processes of licensing and prequalification.[113] Thus, most instances in which a contracting agency rejects the lowest-priced bid in favor of a higher-priced offer occur because the rejected bid fails to meet some tech-

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[99] *See* WASH. REV. CODE § 47.28.100 (contractor must execute within 21 days after award).

[100] Prime Contractors v. Girard, 655 N.E.2d 411, 101 Ohio App. 3d 249 (Ohio App. 11th Dist. 1995).

[101] *Id*., 655 N.E.2d at 416.

[102] Model Code, *supra* note 2, at §§ 3-202(7), 1-301(26).

[103] Fumo v. Redevelopment Auth. of Philadelphia, 541 A.2d 817, 820, 115 Pa. Commw. 542; *appeal granted*, Greek Orthodox Cathedral of St. George v. Fumo, 557 A.2d 727, 521 Pa. 625; *appeal dismissed*, 568 A.2d 947, 524 Pa. 32; *reargument denied*, 580 A.2d 294, 525 Pa. 292 (1990).

[104] *See*, *e.g.*, Pataula Electric Membership Corp. v. Whitworth, 951 F.2d 1238, 1241 (11th Cir. 1992), *reh'g denied*, Georgia Power Co. v. Pataula Elec. Membership Corp., 506 U.S. 907, *appeal after remand*, Flint Elec. Membership Corp. v. Whitworth, 68 F.3d 1309, *opinion modified*, 77 F.3d 1321 (11th Cir. 1996) (Georgia law requires award to lowest responsible bidder).

[105] City of Philadelphia v. Commonwealth Dep't of Envtl. Resources, 577 A.2d 225, 228, 133 Pa. Commw. 565 (1990).

[106] 30 ILL. COMP. STAT. 500/20-10(e) (1999); Model Code, *supra* note 2, at § 3-202(5).

[107] ARIZ. REV. STAT. § 28-6923(I).

[108] *See* Arizona DOT's Web site for information about A+B Bidding at http://www.dot.state.az.us/roads/constgrp/A+BGuide.pdf.

[109] Taylor Bus Service v. San Diego Bd. of Educ., 195 Cal. 3d 1331, 1341–42, 241 Cal. Rptr. 379 (1987); *see also* Irwin R. Evens & Son, Inc. v. Board of Indianapolis Airport Auth., 584 N.E.2d 576, 585 (Ind. App. 4 Dist. 1992) (bid is responsive if it conforms in all material respects to the agency's bid specifications).

[110] Boydston v. Napa Sanitation Dist., 222 Cal. 3d 1362, 1369, 272 Cal. Rptr. 458, *reh'g denied*, 273 Cal. Rptr. 331, 222 Cal. 3d 1362 (1990); Trap Rock Indus. v. Kohl, 59 N.J. 471, 284 A.2d 161 (1971).

[111] Nevada State Purchasing Div. v. George's Equipment Co., 105 Nev. 798, 783 P.2d 949, 954 (1989); Hanson v. Mosser, 247 Ore. 1, 427 P.2d 97, 101 (1967).

[112] Boydston v. Napa Sanitation Dist., 462, 222 Cal. 3d 1362, 1369, 272 Cal. Rptr. 458 (1990) (citing City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court, 7 Cal. 3d 861, 103 Cal. Rptr. 689, 500 P.2d 601 (1972)); *see also* Bowen Eng'g Corp. v. W.P.M., Inc., 557 N.E.2d 1358 (Ind. App. 2 Dist. 1990).

[113] *See* Section 2 *infra*.

nical specifications of the project. Responsiveness to the advertised specifications is an essential element of the competitive bidding process. The contracting agency's duty to assure compliance with this requirement may be enforced either by a bidder who is passed over or by a taxpayer who has standing to challenge the agency's action. An unsuccessful bidder may be able to challenge the legality of the contracting agency's action by way of injunctive or declaratory relief or by mandamus.[114] Some courts have held that in the absence of a statute, an unsuccessful bidder does not have standing to challenge an award unless it is also a taxpayer. [115] In an Ohio case, the fact that the challenger paid gasoline taxes was insufficient to establish standing as a taxpayer, even though the project was funded with federal gas tax dollars.[116] The use of a "special fund" required a showing that the plaintiff had a special interest in the use of that fund, that its own property rights were in jeopardy, and that it would sustain damages different from those sustained by the public generally.[117]

However, some statutes specifically allow unsuccessful bidders to challenge contract awards, even if they are not also taxpayers.[118] A bidder on a federal contract has been found to have standing under the federal Administrative Procedure Act to challenge the award of a federal contract.[119]

iii. Rejection of All Bids.—A contracting agency may reject all bids received for a particular project and readvertise the contract. Although it is arguable that this authority is implicit in the agency's general power to select the lowest responsible bidder, the authority of state transportation agencies to reject all bids is generally set forth in statute.[120] Therefore, actions challenging the use of this authority tend to look for violations of agency procedures or actions that exceed the scope of the contracting officer's lawful discretion. An agency's decision to reject all bids is subject to judicial review under a variety of standards. However, in most jurisdictions, the decision will be sustained unless it was arbitrary or otherwise unlawful.[121]

In some cases it has been held that public authorities claiming the right to reject all bids must show that they had a rational basis for doing so.[122] Others have required that there be a finding of just cause or best interest of the state.[123] Louisiana's statute was amended to include a requirement that the agency have just cause for rejecting all bids.[124] In overturning a lower appellate court, the Louisiana Supreme Court held that this amendment indicated the Legislature's intent to change the awarding agency's previous broad discretion in rejecting all bids.[125] Some states' statutes require that the agency set out in writing its reasons for rejecting all bids.[126] Where there is such a requirement and it is fulfilled, no further demonstration of facts supporting rejection of all bids is necessary.[127]

If bids are to be rejected, fairness requires that determination and notification be prompt, but no standard for measurement of promptness fits all cases. Where there is a statute requiring the agency to award the contract within a certain period of time, it may be implied that if the agency is going to reject all bids, it should do so within that same time period.[128]

Where rejected bidders are entitled to an administrative hearing, the hearing officer's inquiry is narrow and is limited to whether the purpose of competitive bidding has been subverted or whether the agency acted fraudulently, arbitrarily, or illegally.[129] However, one court has held that where all bids are rejected, as op-

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[114] Conway Corp. v. Construction Eng'rs, Inc., 300 Ark. 225, 782 S.W.2d 36, 41, *cert. denied*, 494 U.S. 1080 (1989).

[115] L & M Enterprises v. City of Golden, 852 P.2d 1337, 1339 (Colo. App. 1993) (contractor not among class of persons protected by public bidding statute); Michael Facchiano Contracting v. Pa. Turnpike Comm'n, 153 Pa. Commw. 138, 621 A.2d 1058, 1059 (1993) (disappointed bidder must be a taxpayer to sue; has no property interest in contract and has suffered no injury entitling it to a remedy).

[116] Ohio Valley Mall Co. v. Wray, 104 Ohio App. 3d 629, 662, N.E.2d 1108 (1995).

[117] *Id*., 662 N.E.2d at 1111.

[118] *See*, *e.g.*, ALA. STAT. § 41-16-31.

[119] Clark Constr. Co. v. Pena, 930 F. Supp. 1470, 1475 (M.D. Ala. 1996).

[120] Model Code, *supra* note 2, at § 3-301. In the absence of a legislative reservation of the right to reject all bids, courts have recognized that public authorities have this right implicit in their contracting authority. *See* Annotation, 31 A.L.R. 2d 469 (1953).

[121] William A. Gross Constr. Assoc., Inc. v. Gotbaum, 150 Misc. 2d 478, 568 N.Y.S.2d 847, (1991).

[122] Computer Shoppe v. State, 780 S.W.2d 729, 737 (Tenn. App. 1989).

[123] *See* WASH. REV. STAT. § 47.28.090.

[124] New Orleans Rosenbush Claims Service v. City of New Orleans, 653 So. 2d 538, 544 (La. 1995) (applying La. Stat. Ann. – R.S. 38:2214).

[125] Starlight Homes, Inc. v. Jefferson Parish Council, 632 So. 2d 3, 4 (La. 1994); *reconsideration denied*, 638 So. 2d 1079 (1994) (prior to amendment of statute, court held that rejection of all bids did not require a showing of just cause, as rejection of low bidder would require).

[126] *See*, *e.g.*, CAL. PUB. CONT. CODE § 10185; COLO. REV. STAT. § 24-92-105 (1998).

[127] Vining Disposal Service v. Board of Selectmen of Westford, 416 Mass. 35, 616 N.E.2d 1065, 1067 (1993).

[128] New Orleans Rosenbush Claims Service v. City of New Orleans, 653 So. 2d 538 (La. 1995) (at end of 30-day period for agency to award contract, mandamus will lie to compel award).

[129] Fort Howard Co. v. Department of Management Services of State of Florida, 624 So. 2d 783, 784 (Fla. App. 1 Dist. 1993).

posed to the low bidder being rejected individually, a rejected bidder is not entitled to a hearing.[130]

A contracting agency may be denied the right to exercise its authority to reject all bids because of its own mistakes or procedural errors. Such questions have been raised when illegal bids were accepted,[131] bids exceeded estimated costs or appropriated funds for the contract,[132] errors were committed in official estimates,[133] and acceptance of a bid was withdrawn prior to notification of the bidder.[134] In *Clark Construction Company v. Pena*, Clark was the low bidder for a federally-funded contract being awarded by the Alabama Department of Transportation (ADOT).[135] FHWA refused to concur in the award to Clark due to the Department's omission of a traffic control note in the approved plans and specifications. The Department then rejected all bids and readvertised the project. Clark sued to enjoin the award after the second round of bidding. The federal court found that the omission of the traffic control note was immaterial to the integrity of the bidding process. The Department admitted that but for FHWA's lack of concurrence, it would have awarded the contract to Clark. The court held that both ADOT and FHWA had violated the Federal Highway Act, and permanently enjoined the award and ordered ADOT to accept Clark's original bid.[136] The court sought to avoid sending a message to future bidders that their chances of obtaining government contracts would be dependent on the agency's not making "careless mistakes of questionable importance," and also sought to prevent public officials from violating bid award requirements at will.[137]

In another federal case involving the review of a rejection of all bids, the court held that clear and convincing evidence would be required in order to support reinstatement of the canceled solicitation, as reinstatement amounted to a form of injunctive relief.[138]

An agency was found to have exceeded its power when it rejected all bids and intended to readvertise, hoping to get a bid for the same amount as a low bid that had been properly rejected as nonresponsive.[139] Also, a board that had authority to negotiate with the lowest bidder could not do so after notifying all other bidders that all bids were being rejected and that the project would be readvertised.[140] In another case, however, the court held that the expectation of attaining better bids for surplus property constituted a rational basis for rejecting all bids.[141] Also, a New Jersey court found that a concern for obtaining lower bids was an adequate reason to reject all bids.[142]

iv. Right of Low Bidder to Award of Contract.—Throughout the process of awarding contracts through competitive bidding, public contracting agencies must act in accordance with due process. Accordingly, rejection of the lowest bid received may be challenged as taking or injuring the bidder's right to the contract award.[143] Where it appears that a contractor has a legitimate property right or liberty interest that is entitled to protection, due process requires that the contracting agency grant a hearing in which the rejected bidder is told the reasons for the action and has an opportunity to answer and explain the agency's concerns.[144] Due process protections are required only where property rights or liberty interest are involved, however, and neither courts nor legislatures have been inclined to recognize that every unsuccessful bidder has lost the right to pursue a livelihood when it is not awarded a contract in a properly conducted competition.[145] On the other hand, an agency's actions or written materials may serve to create an entitlement to due process, where it has represented that contracts will always be awarded to the lowest responsible bidder.[146]

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[130] Gannett Outdoor Co. v. City of Atlantic City, 249 N.J. Super. 217, 592 A.2d 276, 278 (1991).

[131] Hankins v. Police Jury, 152 La. 1000, 95 So. 102 (La. 1922).

[132] Williams v. City of N.Y., 118 A.D. 756, 104 N.Y.S. 14 (1907), *aff'd* 192 N.Y. 541, 84 N.E. 1123 (1908); Marshall Constr. Co. v. Bigelow, 29 Haw. 641 (1927).

[133] Charles L. Harney, Inc. v. Durkee, 107 Cal. App. 2d 570, 237 P.2d 561 (1951).

[134] Schull Constr. Co. v. Board of Regents of Educ., 79 S.D. 487, 113 N.W.2d 663, 3 A.L.R. 3d 857 (1962).

[135] 930 F. Supp. 1470 (M.D. Ala. 1996).

[136] *Id*. at 1492 ("the ADOT must resubmit Clark Construction's original bid and the FHWA must concur and/or approve said bid"). The court also noted that its holding vindicated ADOT's original position. *Id.* at n.19. *See also* 23 U.S.C. § 112(b)(1).

[137] *Id.* at 1491.

[138] RADVA Corp. v. United States, 17 Cl. Ct. 812, 818–19, *aff'd*, 914 F.2d 271 (1989).

[139] Petricca Constr. Co. v. Com., 37 Mass App. Ct. 392, 640 N.E.2d 780, 782 (1994).

[140] Building and Constr. Trades Council of Northern Nevada v. State ex rel. Public Works Bd., 108 Nev. 605 (1992), 836 P.2d 633, 636.

[141] Feldman v. Miller, 151 A.D. 2d 755, 542 N.Y.S.2d 777 (1989).

[142] Marvec Constr. Corp. v. Township of Belleville, 254 N.J. Super. 282, 603 A.2d 184, 187 (1992).

[143] *Compare* LaCorte Elec. Constr. and Maintenance v. County of Rensselaer, 152 Misc. 2d 70, 574 N.Y.S.2d 647, 649 (1991) (low bidder has liberty interest but not property interest in award of contract) *with* Scott v. Buhl Joint School Dist. No. 412, 123 Idaho 779, 852 P.2d 1376, 1384 (1993) (low bidder has property interest in contract award).

[144] *Id*.; Triad Resources and Systems Holdings v. Parish of Lafourche, 577 So. 2d 86, 89, *writ denied*, 578 So. 2d 914 (La. App. 1 Cir. 1990) (bidder whose bid is substantially unresponsive is not entitled to due process).

[145] *See* Envirologix Corp. v. City of Waukesha, 192 Wis. 2d 277, 531 N.W.2d 357, 364 (1995) (statutory bid requirements are intended to benefit public and low bidder has no fixed right to award of contract).

[146] Pataula Elec. Membership Corp. v. Whitworth, 951 F.2d 1238, 1242 (11th Cir. 1992) (Georgia law recognizes that the lowest responsible bidder may have a property interest in award of the contract, based on agency's "vendor manual" that

v. Rejection of Low Bidder.—The process of receiving, recording, and accepting bids; determining the lowest responsible bidder; and awarding a contract on the basis of that determination has been characterized as being judicial or quasi-judicial in nature, and not merely a ministerial function.[147] Accordingly, courts have been cautious about overruling contracting authorities in the exercise of discretion.[148] There is a presumption that the power and discretion of government officials in awarding bids has been properly exercised.[149] As a rule, agency decisions are not upset except where the challenger shows that fraud, deceit, or flagrant abuse of discretion has prejudiced the competitive bidding.[150] Within a wide range of lawful methods, administrative discretion is permitted to control selection of the lowest responsible bidder, just as it is accepted in determining the prequalification of bidders. As in the case of prequalification of bidders, courts reserve the right to intervene where it appears that abuse of discretion may threaten the policy of competitive award of public contracts.

Determination of the lowest responsible bidder is an "exercise of *bona fide* judgment, based upon facts tending reasonably to the support of such determination."[151] However, contracting agencies may be challenged for arbitrary and capricious action where circumstances suggest that this may have been the case.[152] The agency has an implied contractual duty to consider solicited bids in a fair and honest manner.[153] Thus, when the agency's decision to reject the low bid is challenged, the standard of review is whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.[154] The fact that the agency acts in error may not be sufficient to overturn its decision under this standard. In one case, the agency's own erroneous estimate was the basis for rejection of all bids, yet because there was no evidence of fraud or arbitrary action, the agency was not required to accept the low bid.[155]

In one case, 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.[156] 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[157] and bid responsiveness.[158]

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stated that "contracts or open-market purchases will in all cases be awarded to the lowest responsible bidder." This was sufficient to create an entitlement.).

[147] Even when public bidding and contract award is carried out by a legislative body, the same standard applies; the legislative body is not afforded the same level of discretion that it is in legislative actions. Pittman Constr. Co. v. Parish of East Baton Rouge, 493 So. 2d 178, 181 (La. App. 1 Cir. 1986) *writ denied*, 493 So. 2d 1206.

[148] Great Lakes Heating, Cooling, Refrigeration and Sheet Metal Corp. v. Troy School Dist., 197 Mich. App. 312, 494 N.W.2d 863 (1992).

[149] Colonnelli Bros. v. Village of Ridgefield Park, 284 N.J. Super. 538, 665 A.2d 1136 (1995).

[150] Ghilotti Constr. Co. v. City of Richmond, 45 Cal. 4th 897, 903, 53 Cal. Rptr. 2d 389, 392 (Cal. App. 996).

[151] Inge v. Bd. of Pub. Works, 135 Ala. 187, 33 So. 678, 681 (1902).

[152] Catamount Constr., Inc. v. Town of Pepperell, 7 Mass. App. 911, 388 N.E.2d 716 (1979).

[153] Kila, Inc. v. State, Dep't of Admin., 876 P.2d 1102, 1105 (Alaska 1994).

[154] Overstreet Paving Co. v. State, Dep't of Transp., 608 So. 2d 851, 852–53 (Fla. App. 2 Dist. 1992).

[155] Department of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912 (Fla. 1988).

[156] Berryhill v. Dugan, 89 Commw. 46, 491 A.2d 950, 952 (Pa. Commw. Ct. 1985).

[157] Turnkey Constr. Corp. v. City of Peekskill, 51 A.D. 2d 729, 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 v. Lake City Sanitation, 585 F. Supp. 120 (E. 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 (N. D. Tex. 1982) (lack of integrity of bidder's present officers and association with contractors having unsatisfactory records of integrity and performance); 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); 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); Cave-of-the-Winds Scenic Tours, Inc. v. Niagara Frontier State Park and Recreation Comm'n, 64 A.D. 2d 818, 407 N.Y.S.2d 301 (1978).

[158] International Telecommunications Systems v. State, 359 So. 2d 364 (Ala. 1978) (low bidder's samples failed tests for specifications); 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, 41 Pa. Commw. 641, 401 A.2d 376 (Pa. Commw. 1979) (low bidder's material variance with bidding instructions determined to adversely affect other bidders); William v. Board of Supervisors, of Louisiana State Univ. Agric. and Mechanical College, 388 So. 2d 438 (La. App., 1980) (irregular and incomplete bid); Gibbs Constr. Co. v. Board of Supervisors of Louisiana State Univ., 447 So. 2d 90 (La. App. 1984) (attendance at pre-bid conference); Monoco Oil Co. v. Collins, 96 Misc. 2d 631, 409 N.Y.S.2d 498 (1978) (failure to describe pricing formula); Land Constr. Co. v. Snohomish County, 40 Wash. App. 480, 698 P.2d 1120 (1985) (failure to list certified women's business enterprise as a subcontractor in violation of bidding instructions); Kuhn Constr. Co. v. State, 366 A.2d 1209 (C. Cl., Del. Ch. 1976) (failure to list specialty subcontractors held to be material to statutory requirement for bidding, and omission cannot be waived without encouraging bid

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 the agency may not utilize extraneous factors. The validity of a contract may be questioned if the bid documents are indefinite or misleading, and capable of being interpreted in different ways by different contractors. If an irregularity in the bid documents contributes to contractors submitting bids on different terms or with unequal information, the bidding process and any contract awarded will be considered invalid. [159] 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 that contracting agency acted arbitrarily in using that factor to reject the lowest bid in favor of a higher one that called for an earlier completion date.[160] In another case, it was held to be arbitrary for an agency to induce bidders to submit high quality offers, implying that selection would be made on the basis of best value, and then reject the highest quality offer on the basis of a relatively insignificant price difference.[161]

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.[162] Bids must conform to the bid specifications in all material respects. However, not every deviation will cause an agency to find a bid to be found nonresponsive. The deviation must be substantial and must give the bidder an advantage over competitors.[163] Thus, when a bidder failed to include the time for project completion, supply pertinent data that affected budget considerations, and include an affirmative action plan, its bid was properly rejected as nonresponsive.[164] Errors such as lack of a corporate resolution or a signature of an authorized individual authorized to bind the bidder to a contract will also be considered a substantial error that renders the bid nonresponsive.[165] Such an error could be used by a bidder to withdraw its bid after bid opening, giving it an unfair advantage over other bidders who could not do the same thing without forfeiting their bid bonds.[166] The bidder bears the risk that its bid might contain a nonwaivable error; the contracting agency is under no duty to examine bids for errors and inform bidders accordingly.[167]

After bid opening, the agency may not allow bidders to correct substantive errors. Some states prohibit this by statute, as in Illinois: "After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted."[168]

However, this does not mean that communication between agency personnel and bidders is not allowed after bid opening. The agency may have a duty to contact a bidder to confirm a bid if the agency suspects that there is a mistake.[169] In *Clark Construction Company v. Pena*, it was discovered after bid opening that ADOT had omitted a traffic control note from the plans and specifications.[170] ADOT contacted the bidder, who assured ADOT that the omission of the note would have no effect on its bid. FHWA then refused to concur in the award to Clark, contending among other things that the communication amounted to "reverse bid rigging" under an FHWA policy memorandum. The court held that FHWA's and ADOT's rejection of Clark as the low bidder was without a rational basis, and found that the communication was not an attempt by ADOT to gain a price reduction but rather was a means of evaluating the materiality of the omission.[171]

However, any attempt by the agency or the contractor to negotiate after the opening of bids is generally found to be improper, at least in the absence of a statute that permits negotiation with the low bidder.[172] The contract

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shopping); LeCesse Bros. Contracting v. Town Board of Town of Williamson, 62 A.D. 2d 28, 403 N.Y.S.2d 950 (1978) (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 5-year contract option in addition to 1, 2, and 3-year options was not minor irregularity that could be waived, but rather was substantial departure from instructions).

[159] Brewer Envtl. Indus. v. A.A.T. Chemical, 73 Haw. 344, 832 P.2d 276, 278 (1992).

[160] Gerard Constr. Co. v. City of Manchester, 120 N.H. 391, 415 A.2d 1137 (1980).

[161] Latecoere Int'l. v. U.S. Dep't of the Navy, 19 F.3d 1342, 1360 (11th Cir. 1994).

[162] *See, e.g.*, City of Philadelphia v. Canteen Co., Div. of TW Services, Inc., 135 Pa. Commw., 575, 581 A.2d 1009, 1013 (1990) (failure to follow bid instructions rendered bid nonresponsive).

[163] Kokosing Constr. Co. v. Dixon, 72 Ohio App. 3d 320, 594 N.E.2d 675, 680 (1991).

[164] *Id*., 594 N.E.2d at 680.

[165] Stafford Constr. Co. v. Terrebonne Parrish School Bd., 560 So. 2d 558, 560 (La. App. 1 Cir. 1990).

[166] *But see* Leaseway Distribution Centers v. Department of Admin. Services, 49 Ohio App. 3d 99, 550 N.E.2d 955, 960 (1988) (even though signature was missing from cover page as required, signature on addendum was adequate to bind the bidder to its bid as addendum was part of bid documents).

[167] Department of Transp. v. Ronlee, Inc., 518 So. 2d 1326, 1328–29 (Fla. App. 3 Dist. 1987), *review denied*, 528 So. 2d 1183 (1988) (it was not inequitable for agency not to have informed bidder of bid error of less than 2 percent where bidder also discovered error on its own).

[168] 30 ILL. COMP. STAT. 500/20-10(f) (2001).

[169] Model Code, *supra* note 2, at § 3-202(6) and commentary.

[170] 895 F. Supp. 1483 (M.D. Ala. 1995).

[171] *Id*. at 1491.

[172] *See* Building and Constr. Trades Council of Northern Nevada v. State ex rel. Public Works Bd., 108 Nev. 605, 836 P.2d 633, 636 (1992) (statute allows Public Works Board to negotiate with low bidder after it has notified other bidders that their bids have been rejected, that the project will not be

may be found invalid where post-bidding negotiations with the apparent low bidder result in awarding a contract on specifications that have been altered from those originally advertised.[173] Courts have been clear on the issue that a contract cannot be awarded on terms that are different from those in the invitation for bids.[174] This rule is based on one of the underlying policies of competitive bidding—assurance against favoritism, fraud, and corruption. In order to effectively guard against favoritism and corruption, all bidders must be equally situated, and there must be a common standard for evaluating bids. A contracting agency may not contract, even with the low bidder, for terms that were not included in the bid specifications.[175] Thus a low bidder could not attempt to modify its bid and attempt to negotiate a more favorable contract for itself, since to do so would give the bidder an unfair competitive advantage over other legitimate bidders, and post-bid negotiations would violate competitive bidding.[176]

In *Arkansas Highway and Transportation Department v. Adams*, the transportation department's refusal to negotiate with the low bidder was upheld, as was the department's rejection of the low bid because of its failure to include either a unit price or an extended price on a specified item.[177] It was therefore impossible for the agency to discern what the unit price for that item was. The court noted that the department's published specifications authorized it to reject a bid that lacked a unit price on a bid item and that the department had a policy of not accepting a bid from which a unit price for a bid item could not be determined.[178] Where the agency's specifications or regulations are rational, then the fact that the bidder did not follow them must be considered a "rational basis" for rejecting a bid.

The Arkansas court in *Adams* noted that the agency had previously waived the defect of failure to include a unit price where the unit price could be derived from the extended price. However, in Louisiana, the result was the opposite in *V.C. Nora, Jr. Building & Remodeling, Inc. v. State Department of Transportation & Development.*[179] The court held that based on the strict language of the statute, the agency did not have discretion to waive the failure to include a unit price, even though the unit price could be derived from the extended price.[180] The statute stated: "The provisions and requirements of this Section, those stated in the advertisement for bids, and those required on the bid form shall not be considered as informalities and shall not be waived by any public entity."[181]

The court noted that this was a harsh result, but found that the strict language of the statute left the agency with no discretion to waive such a defect in the bid.[182]

h. Effect of Failure to Follow Required Procedures

Bidding procedures set forth in statutes and administrative rules are regarded as jurisdictional prerequisites for valid exercise of a contracting agency's authority. Courts have made it plain that they seek constructions of these rules that will fully carry out the intent of the law in varying situations, but will not weaken the effectiveness of the law through exceptions. Thus, the agency's failure to comply with all the specified steps before an award may result in failure to create any enforceable obligation or liability on the part of the public agency. Where an agency does not follow exactly its specified procedures, the resulting contract is void.[183]

Abuse of discretion may be found when a contracting agency fails to furnish enough or the right sort of guidelines and instructions for bidders, which could prejudice the entire bidding process.[184] For example, an

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rebid, and that it intends to negotiate with low bidder, citing N.R.S. 341.145(3)).

[173] Thelander v. City of Cleveland, 3 Ohio App. 3d 86, 444 N.E.2d 414, 427 (1981).

[174] Palamar Constr. v. Township of Pennsauken,196 N.J. Super. 241, 482 A.2d 174, 179 (A.D. 1983). The court held, however, that attachment of post-bid conditions by the agency that were more favorable to the agency was allowed if the contractor agreed to the conditions; the bidder was not required to concede to the added conditions as it was entitled to the contract as it had been bid. 482 A.2d at 181. *See also* Transactive Corp. v. N.Y. State Dep't of Social Services, 665 N.Y.S.2d 701, 705 236 A.D. 2d 48 (N.Y. App. 1997) (post-bid negotiations are proper if they do not involve a departure from the original specifications or require any concessions to the low bidder).

[175] *See* Ariz. Board of Regents ex rel. University of Ariz. v. Main Street Mesa Assocs., 181 Ariz. 422, 891 P.2d 889, 893 (Ariz. App. Div. 1 1994) *review denied* (1995) (where sale of public land was governed by competitive bidding laws, the agency may not negotiate with the high bidder for terms not included in the bid specifications; court's holding was based on general rule of competitive bidding that agency may not negotiate with lowest bidder for terms that materially depart from the invitation for bids).

[176] Lake Constr. & Dev. Corp. v. City of N.Y., 221 A.D. 2d 514, 621 N.Y.S.2d 337, 338 (1995).

[177] 300 Ark. 16, 775 S.W.2d 904, 905–06 (1989).

[178] *Id*. at 905.

[179] 635 So. 2d 466 (La. App. 3 Cir. 1994).

[180] *Id.* at 472.

[181] LSA-R.S. 38:2212(A)(1)(b) (2000).

[182] *See* Section 5, *infra*, for further discussion of waivable and nonwaivable errors.

[183] Failor's Pharmacy v. Department of Social and Health Services, 125 Wash. 2d 488 886 P.2d 147, 153 (1994) (failure to comply with statutorily mandated procedures is ultra vires and renders contract void); *see also* Spiniello Constr. Co. v. Town of Manchester, 189 Conn. 539 456 A.2d 1199, 1202 (1983); Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 341 A.2d 327 (1975).

[184] Dayton, ex rel. Scandrick v. McGee, 67 Ohio St. 2d 356, 423 N.E.2d 1095 (1981).

agency that did not disclose its policy of preferring resident bidders until after bid opening was held to have modified its requirements without proper notice to bidders.[185] In another case, the award was set aside and the agency was required to readvertise the contract where the bid specifications gave incorrect directions to bidders regarding the required amount of the bid bond.[186] The specifications did not state that the amount of the bid bond would be 10 percent of the contract price, not to exceed $20,000, as the statute required. Rather, they required 10 percent of the bid amount, which in the case of some bids was over $40,000. Some contractors had referred instead to the statute, providing only the $20,000 statutory bond amount. The court held that this gave some bidders an advantage over others, and set aside the award.[187]

In other cases, the agency's own handling of the bids and of the award process may result in a material deviation from bidding laws. For example, the court in a New Jersey case found that even though the agency had posted bids on an electronic bulletin board shortly after bid opening, the agency's failure to total bid items and announce the bid totals warranted rejection of bids.[188] In another case, where the agency's bid documents indicated that it would accept the unit item price where there was a discrepancy between the unit price and the total, it was held to be an error to reject the low bidder whose unit price was not ambiguous.[189]

Contractors who perform construction work or supply materials under an innocent impression that their contracts were awarded through correct procedures understandably complain of the hardship resulting from application of this rule. But even where the public agency accepts and uses the results of a contractor's work, the contractor may not recover in *quantum meruit*.[190] Allowing recovery in *quantum meruit* where the bidding requirements have been violated would undermine the policies of competitive bidding. In addition, the contractor may be required to repay to the agency any funds received under the arrangement. This is particularly so where the public contract has been obtained through fraud or corruption, whether on the part of the agency official or the contractor.[191] This harsh result has been found to be necessary to deter corruption and collusion in bidding.[192]

Apparent exceptions to this rule have been noted, chiefly where courts have been able to find factual bases for enforcing an implied contract, or have found that in addition to noncompliance with bidding statutes, there was proof of fraud in the award.[193] In the absence of such findings, however, contractors have little prospect of recovering for work performed because theories of quasi-contract will not be applied to promises that are beyond the authority of a public agency to make.

Failure of a contracting agency to follow mandatory procedures in conducting bidding and award of contracts has been alleged in a variety of situations. An award was challenged where the agency did not compel the successful bidder on a highway construction contract to give assurance that it would pay prevailing wage rates as required by state law.[194] 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.[195]

i. Permissible Types of Combined Bidding by Contractors

In contrast to combinations that arise from collusion, other types of combinations for purposes of bidding are permitted. Where contracting agencies have projects that are unusually large, or that have an unusually wide range of specialty requirements, it may be impossible for one contractor to undertake the work desired in a single contract. Under these circumstances joint bids by contractors who combine their resources to organize and perform this work provide a sensible solution.

Courts' acceptance of the practice of joint bidding by contractors has emphasized the distinction between these open agreements and the secrecy typically associated with collusive combinations. An early decision of a New York court illustrates this view:

> [A] joint proposal, the result of honest cooperation though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public

[185] *Id.*, 423 N.E.2d at 1097.

[186] Waste Disposal, Inc. v. Mayor and Council of Borough of Roselle Park, 145 N.J. Super. 217, 367 A.2d 449 (1976).

[187] *Id.*, 367 A.2d at 450.

[188] Statewide Hi-Way Safety, Inc. v. N.J. Dep't of Transp., 283 N.J. Super. 223, 661 A.2d 826 (A.D. 1995) (dismissed as moot, but DOT's argument was rejected as to future cases).

[189] Pozar v. Department of Transp., 145 Cal. App. 3d 269, 193 Cal. Rptr. 202, 203 (1983).

[190] J & J Contractors/O.T. Davis Constr., A.J.V. v. State, by Idaho Transp. Board, 118 Idaho 535, 797 P.2d 1383, 1384–85 (1990) (contractor may not recover if contract is void, as opposed to voidable); Trujillo v. Gonzales, 106 N.M. 620, 747 P.2d 915, 917 (1987) (violation of Open Public Meetings Act); Lanphier v. Omaha Public Power Dist., 227 Neb. 241, 417 N.W.2d 17, 21 (1987) (quantum meriut was available to the contractor where the city had authority to contract, but not where there was no authority).

[191] Curiale v. Capolino, 883 F. Supp. 941 (S.D.N.Y. 1995). However, in J & J Contractors, *supra* note 190, the agency was prevented from recovering what it had paid the contractor because it had not appealed the determination made by the hearing officer on the contractor's claim. 797 P.2d at 1385.

[192] *Id.* at 951.

[193] Gerzof v. Sweeney, 16 N.Y.2d 206, 211 N.E.2d 826, 264 N.Y.S.2d 376 (1965), *cited in* Curiale v. Capolino, 883 F. Supp. 941 (S.D.N.Y. 1995).

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

[195] Washington Mechanical Contractors v. United States Dep't of the Navy, 612 F. Supp. 1243 (N.D. Cal. 1984).

> policy. Joint adventures are allowed. They are public and avowed and not secret. The risk as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid.[196]

Subcontracts and joint ventures are both subject to scrutiny to assure that they are genuine, because either technique can be abused and become a threat to fair competition. It is contrary to public policy for bidders on a public works project to agree that some of them will refrain from bidding in favor of others. It is also contrary to many states' public bidding laws, as in Kentucky: "Any agreement or collusion among bidders or prospective bidders which restrains, tends to restrain, or is reasonably calculated to restrain competition by agreement to bid at a fixed price, or to refrain from bidding, or otherwise, is prohibited."[197]

i. Joint Ventures.—Where construction work is carried out under a single contract, unusually large or complex projects may require assembling financial resources and administrative or technical workers on a scale greater than any single contractor can provide through its own efforts and resources, or through its own staff plus the use of subcontractors. A practical accommodation of the rules of competitive bidding to the needs of contractors and contracting agencies is offered in the practice of accepting bids from two or more contractors acting in a joint venture. In this type of bid, groups of contractors combine their assets, plant, and personnel in a joint effort.

Joint ventures are similar to ordinary business partnerships. The parties share the work, the prospects of profits, and the risks of loss. The terms on which the parties share the responsibilities and results of the work are set forth in written agreements.[198] The main difference is that joint ventures are created to perform one specific job, whereas partnerships are continuing arrangements.[199] In establishing a joint venture, it is not enough to merely adopt a particular joint name. One seeking to prove that a joint venture exists must show that there is a community of interest in the venture between the two contractors, an agreement to share the profits and losses in a project, and a mutual right of control or management over the project.[200] A joint venture is not a legal entity apart from the two or more contractors comprising it. A joint venture was not a "resident" for the purpose of taking advantage of a state preference statute where neither of the two joint venturers were resident corporations.[201]

Remedies available to the parties in the event of a dispute are generally the same as those applicable to partnerships, with some differences. Among partners, the usual remedy is for the aggrieved partner to sue for an accounting. However, in joint ventures, one may sue the other for breach of the contract defining the terms of their cooperative undertaking, or for contribution to the plaintiff's losses.[202]

Joint venture bidding is permitted so long as it is a bona fide cooperative effort among its parties. Joint venture bids must fully disclose the terms of the cooperative effort the parties will undertake. Secret agreements under which several contractors undertake to share the work, risks, and profits of a project are not proper or enforceable, regardless of whether they result in a single bid for the parties to the arrangement or separate bids by all parties according to a prearranged plan.[203]

Joint venture bids have the advantage of pooling the capacity of several contractors and allowing prequalification for projects that no one of them is capable of performing individually. When such bids are filed, the bid should indicate what percentage of the dollar amount of the contract should be debited against the prequalification capacity rating of each joint venture. Where bidders do not allocate the proportions to be debited, the contracting agency should make this determination as it deems to be in its own best interest. Apportionment of the prequalification capacity rating debit among the parties to a joint venture bid does not in any way divide the responsibility of each for the execution and performance of the contract if it is awarded to them.

ii. Subcontracts.—Under a subcontract, all details of the subcontractor's work are defined in the agreement between the subcontractor and the prime contractor. The prime contractor is responsible to the contracting agency for the performance of the subcontract along with the rest of the contract work, except as to those requirements that state or federal law imposes directly and individually on both the prime contractor and the subcontractor. An example of such a requirement is the Contract Work Hours and Safety Standards Act, which requires both the prime and subcontractors to comply

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[196] Atcheson v. Mallon, 43 N.Y. 147, 151 (1870).

[197] KY. REV. STAT. § 45A.325 (1999).

[198] *But see* Libby v. L.J. Corp., 247 F.2d 78 (D.C. Cir. 1957) (existence of a joint venture may be implied from the parties' conduct even if not in writing).

[199] Ben Fitzgerald Realty Co. v. Muller, 846 S.W.2d 110, 120 (Tex. App. 1993).

[200] *Id.* at 121.

[201] Bristol Steel and Iron Works v. State, Dep't of Transp. & Dev., 504 So. 2d 941 (1987), *writ granted*, 505 So. 2d 1131 and 505 So.2d 1132, *rev'd* 507 So. 2d 1233 (1987) (finding that one of joint venturers was resident and that employee stock option plan did not constitute a "change in ownership" so as to form basis for finding that contractor did not meet statutory requirement of not having had change in ownership in previous 2 years in which it had state license).

[202] Alpine Constr. Co. v. Gilliland, 178 N.W.2d 530, 23 Mich. App. 275 (1970).

[203] Hoffman v. McMullen, 83 F. 372 (9th Cir. 1897).

with federal standards for hours of work and worker safety.[204]

j. Competitive Bidding Requirements for Federal and Federally-Aided Highway Construction Contracts

Selection of contractors for federal agency construction projects is governed by the requirements of 41 U.S.C. § 5, which provides that, unless otherwise specified in appropriation legislation or unless they come within an authorized exception, contracts for materials, supplies, or services for the government must be awarded through public advertisement and competitive bidding. The authorized exceptions to this rule include contracts in which (1) the amount involved does not exceed $25,000; (2) immediate delivery of materials or performance of services is required because of "public exigencies"; (3) only one source of supply is available; or (4) the services required must be performed by the contractor in person and are of a technical or professional nature, or are under government supervision and paid for on a time and materials basis.[205]

A similar statute applies to federal-aid highway projects where construction is performed under contracts awarded by a state highway agency or a local government using federal funds.[206] Exceptions to this requirement are not specified in the statute, as in the case of direct federal construction. However, the Secretary of Transportation is authorized to approve modifications of the usual methods of advertisement for proposals, provided that those methods "shall be effective in securing competition."[207] Alternatives to public bidding may be allowed where the state demonstrates that another method is more cost effective or that an emergency exists.[208]

FHWA regulations applying to projects that are in any part paid for with federal funds also address competitive bidding requirements.[209] These regulations require that federal-aid highway construction work must be performed by contract awarded to the lowest responsible bidder, unless it is undertaken by the state as a force account activity, or unless the agency demonstrates that either an emergency or a more cost-effective method exists.[210] For work performed by contract, the state highway agency must assure the opportunity for free, open, and competitive bidding, including adequate publicity of the advertisement or call for bids, and must comply with the procedures in the regulation. State transportation 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.[211] Arrangements for performance of work as force account projects require that the FHWA division administrator find that those arrangements are cost effective, and that the state determine that the project can be staffed and equipped satisfactorily and cost effectively.[212]

FHWA regulations limit the extent to which subcontracting may be used and specify that prime contractors must perform at least 30 percent of the total contract price with their own personnel.[213] However, if any of the contract work requires "highly specialized knowledge, abilities or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid on the contract," that work may be designated as specialty work and may be deducted from the total contract price before computing the amounts for prime and sub contractors to perform.[214]

The minimum time for advertisement of bids is prescribed by federal regulations as 3 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.[215] Prior approval of the administrator must also be obtained if the agency issues any addenda setting out major changes to the approved plans and specifications during the advertising period, and the state transportation agency is required to give specific assurance that all bidders received such addenda.[216]

A bidder 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.[217] Finally, in the interest of increasing small business participation in federal-aid highway construction, state transportation agencies must schedule contract lettings in "balanced programs" as to size and type of contracts to assure opportunities for all sizes of contractors to compete in the federal-aid program.[218]

k. Exceptions to the Competitive Bidding Rule

Statutes and regulations specify certain circumstances in which competitive bidding procedures do not apply. The most common exceptions are concerned with the amounts of money involved in a contract, the need for responding to emergency situations, and the impracticality of procuring certain services through price competition.

i. Statutory Minimum Amounts.—Most statutes and ordinances that impose competitive bidding requirements apply only to contracts that involve more than specified

[204] 40 U.S.C. §§ 327–333(a) (1999).

[205] 41 U.S.C. § 5 (1999).

[206] 23 U.S.C. § 112(a) (1999).

[207] *Id*. at § 112(b).

[208] *Id*.

[209] 23 C.F.R. § 635.104 (2000).

[210] 23 C.F.R. § 635.204(a) (2000).

[211] 23 C.F.R. § 635.112 (2000).

[212] 23 C.F.R. § 635.104 (2000).

[213] 23 C.F.R. § 635.116 (2000).

[214] 23 C.F.R. § 102 (2000) (definition of specialty work); 23 C.F.R. § 635.116 (2000).

[215] 23 C.F.R. § 112(b) (2000).

[216] 23 C.F.R. § 112(c) (2000).

[217] 23 C.F.R. § 112(f) (2000).

[218] 23 C.F.R. § 107 (2000).

minimum amounts of money. The rationale of this exception appears to be the practical consideration that when less than this minimum amount is involved, the cost of administering competitive bidding procedures is more expensive than the risk of loss to the public justifies. Minimum levels set by statute typically are low, so that only the most minor projects are within the scope of the exception.[219]

Questionable contracting practices and ambiguities in contract language are responsible for a large share of the cases in which the application of this exception is challenged. Even with a clear statutory designation of the minimum amount required for competitive bidding, it is still possible for a contracting officer to be indefinite about the contract's total amount because unit prices rather than job prices are quoted. In such cases, evidence suggesting advance knowledge of the ultimate magnitude of the contract's cost, implying intent to circumvent the competitive bidding law, is important. Thus, where a contract was negotiated to purchase gravel at a fixed price per yard for use in road and street repair, and thereafter 74 separate purchases (each costing less than $500) were made on identical terms over a period of 8 months, the court concluded that the arrangement violated the law requiring competitive bidding for all public contracts in excess of $500.[220] Stating that the legislature could not have intended to allow its main objective to be "circumvented by multiple small open-market purchases," the court emphasized that nothing in the record indicated that the contracting agency could not and did not realize the full extent of its need for road repair material.[221]

Closely related to these cases are situations in which the agency has deliberately split a public construction project so that it can be performed under several contracts, some or all of which may fall below the statutory minimum amount for competitive bidding. Sound engineering, financial, and administrative reasons may support the decision to split a single project into segments for contracting. However, where it appears that this has been done for the purpose of evading a mandatory competitive bidding statute, the court may find the negotiated contracts invalid.[222]

ii. Specialized Personal and Professional Services.—Contracts for personal or professional services form another generally recognized exception to mandatory competitive bidding procedures.[223] A leading case on this matter has explained the exception as follows:

> The theory upon which the doctrine rests is that the competitive bidding statutes cannot be rationally or practically applied to contracts for the employment of architects or other persons whose services are required because of the special training, skill, and scientific or technical knowledge necessary to the object to be accomplished…The value of such services is not to be measured by a mere matching of dollars, so to speak; it is not to be determined upon the irrational assumption that all men in the particular class are equally endowed with technical or professional skill, knowledge, training, and efficiency, nor are such services rendered more desirable because afforded more cheaply in a competitive bidding contest. The selection of a person to perform services requiring those attributes calls for the exercise of a wise and unhampered discretion in one seeking such services, for it involves not only those attributes, but the qualities of reputation and personal and professional trustworthiness and responsibility as well.[224]

Similar views have been expressed about the services of artists,[225] auditors and accountants,[226] traffic engineers,[227] and real estate appraisers.[228] Contracts for insurance coverage have also been held to be contracts for "extraordinary, unspecifiable services" that fall outside the requirement for competitive bidding.[229]

Procurement of personal or professional services without competitive bidding 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. This rule has been extended to include services requiring aesthetic, business, or technical knowledge and judgment, and professional or scientific skill and experience.[230]

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[219] *See* Appendix C.

[220] Fonder v. City of Sioux Falls, 76 S.D. 31, 71 N.W.2d 618 (1955)

[221] *Id*., 71 N.W.2d at 621.

[222] Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (1942).

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

[224] Louisiana v. McIlhenny, 201 La. 78, 9 So. 2d 467, 471 (1942) (employment of landscape architect) (quoting Gulf Bitulithic Co. v. Nueces County, 297 S.W. 747, 753 (Tex. App. 1927)), *reh'g denied*.

[225] Adams v. Ziegler, 22 Cal. App. 2d 135, 70 P.2d 537 (1937).

[226] Cochran County v. West Audit Co., 10 S.W.2d 229 (Tex. Civ. App. 1928).

[227] City and County of San Francisco v. Boyd, 17 Cal. 2d 606, 110 P.2d 1036 (1941); Flottum v. City of Cumberland, 234 Wis. 654, 291 N.W. 777 (1940).

[228] Doverspike v. Black, 535 A.2d 1217, 1219, 126 Pa. Commw. 1 (1988) *aff'd on reargument*, 541 A.2d 1191, 126 Pa. Commw. 11 (1988); Parker v. Panama City, 151 So. 2d 469 (Fla. Dist. Ct. App. 1963).

[229] Local 1081 of Communications Workers of America, AFL-CIO v. Essex County, 255 N.J. Super. 671, 605 A.2d 1154 (N.J. Super. A.D. 1992).

[230] Attlin Constr. v. Muncie Community Schools, 413 N.E.2d 281, 287 (Ind. App. 1980), (construction manager was acting similar to architect or engineer).

In line with this reasoning, contracts for architectural and engineering services are regularly put into this category.[231] Under federal law, the Brooks Architects-Engineers Act allows the solicitation of architectural and engineering services based on factors other than price:

> The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.[232]

Although the Brooks Act does not require prequalification of engineering and architectural firms, it does encourage federal agencies to have firms submit annual statements of qualifications.[233] After the agency considers the qualifications of interested firms, the Act requires the hiring agency to select the three most qualified firms after "conduct[ing] discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services."[234] The agency may then proceed to negotiate a contract with the top qualified firm at "compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof."[235]

Courts have not always agreed with contracting agencies that a particular contract was for personal services that should be contracted for in this manner. Contracts for architects and engineering services are usually not in question, as they will likely be covered either by the Federal Brooks Act or by a state "Little Brooks Act." In contrast, a contract to film the construction of a major highway bridge was held not to be one for "personal services."[236] That contract was considered to be one for the purchase of the films rather than for professional services. A contract to manage the sale of advertising space and display facilities in an airport was also not considered a contract for specialty services.[237] 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, 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 and was thus subject to competitive bidding rules.[238] In another case, contracts for feasibility studies of programs for environmental protection and rehabilitation of lakes were challenged because the specifications were very detailed and appeared to be conducive to an objective evaluation.[239] The test is whether the nature of the work desired makes it impossible or impractical to draw specifications satisfactorily to permit competitive evaluation. Mere data collection without a requirement for analysis or opinion was looked upon more as something subject to competitive bidding.[240]

Less assurance of coming within the exception for specialized services exists for an individual hired to supervise actual construction operations. Where services under the contract involve overall management responsibilities, they generally are held to be within the exception. For example, in *Gulf Bitulithic Co. v. Nueces County*, the local government employed a contractor to act as its representative to supervise and manage an extensive road construction program. [241] Holding that the contracting agency was not required to award this contract through competitive bids, the court said:

> If [the statute] be so construed as to bring…this case within its provisions, the very object of the statute would be defeated, for the obvious reason that, when a county does a given piece of construction work, paying for the materials and labor, the ultimate cost thereof is necessarily largely dependent upon the skill, experience, and business judgment exercised in the management and supervision of such work.
>
> …It would be ludicrous indeed if a county should publish to the world that it desired to let to the lowest bidder a contract to supervise the building of an elaborate road system…Under such an advertisement, it might be compelled to place the supervision of this immense construc-

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[231] State v. Brown, 422 N.E.2d 1254, 1256 (Ind. App. 1981) (field supervision and coordination of activities at construction site performed by construction manager were professional services, and did not have to be competitively bid).

[232] 40 U.S.C. § 542 (1999) (Brooks Architects-Engineers Act).

[233] 40 U.S.C. § 543 (1999).

[234] *Id*.

[235] 40 U.S.C. § 544 (1999). The Model Code, § 5–205, contains similar requirements. Although price is still a factor in these agreements, the main difference between these statutes and competitive bidding statutes is the point in the process at which price is considered.

[236] Photo-Art Commercial Studies, Inc. v. Hunter, 42 Or. App. 207, 600 P.2d 471, 474 (1979).

[237] Transportation Displays, Inc. v. City of New Orleans, 346 So. 2d 359, 363 (La. App., 1977).

[238] Township of Burlington v. Middle Dep't Inspection Agency, 175 N.J. Super. 624, 421 A.2d 616, 622 (1980); *but see* SCA Services of Georgia v. Fulton County, 238 Ga. 154, 231 S.E.2d 774 (1977) (contract to provide garbage disposal service) and Trane Co. v. County of Broome, 76 A.D. 2d 1051, 429 N.Y.S.2d 487 (1980) (contract to provide air conditioning repair service by air conditioning unit manufacturer was held to involve use of specialized skill and expertise and so was exempt from competitive bidding).

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

[240] *Id*.

[241] 11 S.W.2d 305 (Tex. Comm'n App. 1928).

> tion program and disbursement of this vast sum of money under one of its local road overseers….[242]

Each construction management contract must be evaluated on its own merits. Where the amount of managerial discretion and responsibility is sufficient, the contract will be considered one of a technical or professional nature. Where this character cannot be established, the parties must comply with competitive bidding statutes applicable to the contracting agency. 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 performing any construction or supplying any materials—it was held that competitive bids were not needed.[243] However, where the construction manager had duties such as guarantee of a maximum price based on the subcontractor's bids, it was considered to be more like a general contractor, and competitive bidding was required.[244]

This problem is also 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.[245] The court noted that: "Competitive bidding requires 'full, clear, definite [and] precise' specifications, for there must be a common standard by which to permit the comparison of bids…."[246]

The precise specifications necessary to competitive bidding of necessity may preclude innovation by bidders. Where the agency wanted bidders to propose the best system for a waste recycling program, this ability to submit innovative proposals was essential. It was thus found to be exempt from competitive bidding requirements.

Installation of computer networks was held to be an exception where the court characterized the contract in question to involve "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.[247] However, although the purchase of computer systems and hardware may be considered the purchase of technical equipment and services, courts are more likely to hold that they are equipment purchases that are governed by public bidding requirements.[248]

iii. Response to Emergencies.—Competitive bidding statutes may provide exceptions for emergency situations in which the temporary necessity for quick action to protect public safety and welfare overrides the interest in promoting competition. Generally, definitions stress imminent danger to life or destruction of property, or a similar expression of unforeseen, unusual, and unacceptable hardships or costs.[249]

Courts have required a showing that preventive measures could not have avoided or lessened the risk.[250] Accordingly, resort to emergency procedures has been approved when an agency needed to take immediate action to restore interrupted supplies of water, heat, and electricity,[251] or to stop pollution of the public water supply.[252] On the other hand, courts have not fully sanctioned exceptions to competitive bidding where the purpose was to expedite construction of an addition to a courthouse to accommodate a new judge,[253] or repair roads in spring following a normal winter.[254]

Economic advantage and convenience for the public agency are not enough to constitute an emergency, even though the contracting officer believes in good faith that these benefits can be more readily obtained for the public through direct negotiation than through advertisement for competitive bidding.[255] Thus, it was invalid for an agency to declare an emergency and invoke the

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[242] *Id.*, 11 S.W.2d at 309–10.

[243] Mongiovi v. Doerner, 24 Or. App. 639, 546 P.2d 1110 (Or. App. 1976); Attlin Constr. v. Muncie Community Sch., 413 N.E.2d 281 (Ind. App. 1980).

[244] City of Inglewood-Los Angeles County Civic Center Auth. v. Argo Constr. Co., 7 Cal. 3d 861, 103 Cal. Rptr. 698, 500 P.2d 601, 604 (1972).

[245] Waste Management, Inc. v. Wisconsin Solid Waste Recyling Auth., 84 Wis. 2d 462, 267 N.W.2d 659, 665 (1978).

[246] *Id.*, 267 N.W.2d at 665.

[247] Autotote Limited v. New Jersey Sports and Exposition Auth., 85 N.J. 363, 427 A.2d 55, 59 (1981).

[248] Pacificorp Capital, Inc. v. State, Through Div. of Admin., Office of State Purchasing, 612 So. 2d 138 (La. App. 1 Cir. 1992).

[249] Model Code, *supra* note 2, at § 3-206.

[250] Grimm v. City of Troy, 60 Misc. 2d 579, 303 N.Y.S.2d 170, 175 (Sup. Ct. 1969) (a resolution of the contracting agency reciting certain facts and declaring that they constitute an emergency is not conclusive, but is sufficient prima facie evidence of an emergency to shift the burden of proof to the party attacking the validity of the award).

[251] Merchants Nat'l Bank & Trust Co. v. City of Grand Forks, 130 N.W.2d 212 (N.D. 1964).

[252] Northern Improvement Co. v. State, 213 N.W.2d 885, 887 (N.D. 1973) (statute did not include exception for emergencies, court refused to imply one).

[253] Reynolds Constr. Co. v. County of Twin Falls, 92 Idaho 61, 437 P.2d 14 (1968).

[254] Bak v. Jones County, 87 S.D. 468, 210 N.W.2d 65 (1973).

[255] Reynolds Constr. Co. v. County of Twin Falls, 92 Idaho 61, 437 P.2d 14, 23 (1968).

emergency exception to competitive bidding where it found that if the project were bid the prices would likely be unreasonable.[256]

In the absence of statutory emergency contracting procedures, the exception may be implied from the nature of the contract and other provisions of the public contracting laws.[257] In such cases, the special circumstances of the case also are influential. Unexpected necessity requiring prompt action must be shown.[258] An emergency situation has been described as one that demands immediate attention, and that threatens the public health and safety of a community.[259] In that case, an excavator had been hired to excavate a malfunctioning sewer line. While the line was exposed, falling rock punctured the line. The excavator repaired the line and sought additional compensation. The court held that the district was authorized to allow the additional work to be done by that contractor on an emergency basis without advertising for new bids.[260]

Where emergency circumstances meet the criteria for an exception to the statutory competitive bidding rules, the extent of the exception and the alternative procedure generally are specified in the statute. To the extent the statute sets forth alternative procedures, such procedures must be complied with fully in order to produce valid contracts. Where the statutory requirements are not complied with, the contractor may not be entitled to payment either under the contract or in quasi-contract.[261] In other words, the emergency is not a defense to having failed to comply with the applicable statutes.

Emergency procedures generally allow the contracting agency to determine that the emergency exists; there is not a requirement for a formal declaration of emergency.[262] Such a finding may be challenged by a prospective bidder or by a taxpayer, depending upon the state's requirements for bid protests generally.[263]

Alternative emergency procedures vary substantially in detail. However, because the need for speedy action is critical in an emergency, a common feature of all such procedures is the temporary suspension of the mandatory requirement for advertisement over a specified period. When freed of this requirement, some agencies have found it most advantageous to procure supplies, services, and construction through direct negotiation with contractors whose capabilities are known from past performance. In some instances, statutory provisions for emergencies specify this course. In others, the requirement of competitive bidding is retained in the emergency situation, but the contracting agency is authorized to compress the process into a shorter time period,[264] or negotiate a contract subject to approval of the contract by the governor.[265]

In a few cases, special reporting and accounting requirements are established for expenditures of public funds in emergency situations where regular competitive bidding procedure was not followed. An example is the emergency exemption in the Illinois Procurement Code, which applies in emergencies involving public health, public safety, immediate repairs needed to avoid further loss or damage of state property, disruption to state services, or the integrity of state records.[266] Under this law, an agency must report funds spent in emergencies to the state's Auditor General within 10 days after execution of the contract, with full details of the circumstances. Quarterly reports by the Auditor General to the Governor and Legislative Audit Commission permit both offices to thoroughly review these transactions and evaluate any apparent abuse of the emergency procedures.[267]

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.[268] Similarly, the need to build a temporary floating bridge to replace a structure damaged by a windstorm did not justify limiting bidders by prequalification to the builder of the floating bridge, despite the fact that use of a major regional highway was interrupted until the temporary bridge was in place.[269] Nor did the possible threat to public safety from prison riots

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[256] *Id*., 437 P.2d at 23.

[257] *See* General Building Contractors of N.Y. State v. State of N.Y., 89 Misc. 2d 279, 391 N.Y.S.2d 319, 322 (1977); *but see* Smith v. Graham Co. Comm. College Dist., 123 Ariz. 431, 600 P.2d 44, 47 (1979) (even if an emergency existed, college still needed authority to avoid competitive bidding in an emergency; in fact, leaky roof had existed for some time and college had had time to bid project); Northern Improvement Co. v. State, 213 N.W.2d 885, 887 (N.D. 1973) (statute did not include exception for emergencies; court refused to imply one).

[258] *See, e.g.,* Martin Excavating, Inc. v. Tyrollean Terrace Water & Sanitation Dist., 671 P.2d 1329 (Colo. App. 1983).

[259] *Id*., 671 P.2d at 1330.

[260] *Id*. at 1331.

[261] Bak v. Jones County, 89, S.D. 468, 210 N.W.2d 65 (S.D. 1973) (contractor not entitled to payment for work on rain-damaged roads did not comply with statutory requirement of filing plans and specifications).

[262] *See, e.g.*, WASH. REV. CODE § 47.28.170 (2000).

[263] *See* Grimm, *supra* note 250.

[264] *See, e.g.,* WASH. REV. CODE § 47.28.170 (2002).

[265] FLA. STAT. tit. 26, § 337.11(6)(a) (2000).

[266] 30 ILCS 500/20-30(c) (1999).

[267] 30 ILCS 500/20-30(c) (1999).

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

[269] Manson Constr. & Eng'r Co. v. State, 24 Wash. App. 185, 600 P.2d 643 (1979).

justify avoidance of competitive bidding in the award of a contract for construction of prison facilities to relieve overcrowding.[270] While the court in that case 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."[271]

Whether an emergency exists for the purpose of entering into emergency contracts without competitive bids is an issue that is fully reviewable by the courts. Otherwise, agencies could claim to have emergencies in an effort to circumvent competitive bidding.[272] In an action challenging the negotiation of a pay phone contract for the state prison system on an emergency basis, the court held that the agency's declaration of emergency is "clothed with a presumption of correctness," and was reviewable only for whether it was arbitrary, capricious, or unreasonable.[273] The court noted that the "emergency" declared in that case was one of limited duration and was intended only to cover the gap in time between the expiration of one contract and the finalization of a new one, and not to circumvent bidding.[274]

iv. Contracts of a Special Nature.—Most states recognize contracts for public utility services and contracts for land acquisition or lease by an agency as being among the situations in which it is impractical to insist on strict compliance with competitive bidding procedures. Exemption of contracts for supply of electricity, heat, water, and other public utilities from competitive bidding rules generally is explained in terms of the monopolistic nature of the utility and the public regulation of its prices. Another situation in which practical considerations have justified an exception to mandatory competitive bidding involves the purchase of real property for public use. Because the specific site and condition of land are among the chief factors that make it desirable or necessary for public use, the purpose of encouraging competition among suppliers is not served by the kind of bidding provided for in the statutes. Reference to the "uniqueness of land" generally suffices to justify an exception for purchases, rentals, and other acquisitions of land or rights in land.[275]

Another exception occurs 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 redevelopment project was held to be sufficiently special in its nature due to its financing to warrant award of the contract through negotiation rather than competitive bid.[276]

Depending on statutory language, capital improvements such as replacement of heating and air conditioning systems in buildings may not be within the scope of competitive bidding. In a Nebraska case, the statute required bids on "contracts for supplies, materials, equipment and contractual services."[277] The court found no specific requirement in that language requiring that a contract for capital improvements be competitively bid.[278] However, most definitions of "public works" are likely to be broad enough to encompass capital improvements to public facilities.

When construction contracts required competitive bidding, the court held that the purchase and installation of prefabricated, portable buildings were not subject to that requirement.[279] 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. Similarly, a court 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.[280] With this rationale, the same statute was

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[270] General Bldg. Contractors of N.Y. State v. State, 89 Misc. 2d 219, 391 N.Y.S.2d 319 (1977) (prison overcrowding was not an adequate basis for declaration of emergency, as it had been known since riot occurred at Attica in 1971).

[271] *Id*., 391 N.Y.S.2d at 321.

[272] Union Springs Tel. Co. v. Rowell, 623 So. 2d 732 (Ala. 1993).

[273] *Id*., 623 So. 2d at 734.

[274] *Id*.

[275] Massey v. City of Franklin, 384 S.W.2d 505, 506 (Ky. App. 1964) (building purchase not subject to bidding requirements). However, statutes that allow an agency to lease land that it owns may require that the land be leased to the highest bidder. *See*, *e.g*., Sellitto v. Borough of Spring Lake Heights, 284 N.J. Super. 277, 664 A.2d 1284 (1995) *cert. denied*, 143 N.J. 324, 670 A.2d 1065 (1995) (statute allowing county or municipality to lease land or buildings to person who will pay highest rent does not require competitive bidding; however, another controlling statute did require competitive bidding; remanded with order to lower court to enjoin lease with cell phone company).

[276] Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631, 164 Cal. Rptr. 56, 64 (1980).

[277] Anderson v. Peterson, 221 Neb. 149, 375 N.W.2d 901, 906 (1985).

[278] *Id*., 375 N.W.2d at 906 ("Nebraska statutes covering county expenditures and competitive bidding comprise a crazy quilt of legislation."); N.R.S. § 23-324.03.

[279] Steelgard, Inc. v. Jannsen, 171 Cal. App. 3d 79, 217 Cal. Rptr. 152, 161 (1985).

[280] Andover Consultants v. City of Lawrence, 10 Mass. App. Ct. 156, 406 N.E.2d 711, 714 (1980).

construed to exclude contracts for repairing and resurfacing roofs of existing buildings.[281]

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 nonprofit agencies for handicapped persons whenever they were competent to provide the service at fair market value.[282] In another case involving the same nonprofit agency, the court held that it was proper to award a contract to the agency for the operation of rest areas prior to the statutorily-required determination of fair market price.[283] The court reasoned that delay in award of the contract would have required closure of the rest areas, and the contract contained a termination for convenience clause that could be invoked if the determination of fair market price were reversed.

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 addition, 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."[284]

v. Extensions of Existing Contracts.—The necessity for competitive bidding may also be raised where an awarding authority executes an extension or renewal of a previous contract for those services rather than advertising for bids. 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.[285] The right to renew an existing contract under identical terms is not the same as a provision that allows negotiations. The latter is inoperable where the contract is subject to competitive bidding.[286] The court noted two Washington cases that made this distinction. *Miller v. State* involved a contract for purchase of light bulbs.[287] At the expiration of the contract, the agency negotiated for the renewal of the contract with the vendor. The court held this new contract was void because the agency had not complied with competitive bidding requirements.[288] However, in *Savage v. State*, the contract contained a provision allowing for extension of the contract, at the State's option, for 1-year periods up to 3 years, on the same terms.[289] The court found this provision to be valid, as it was clearly an option-to-renew clause as opposed to a negotiation provision. The provision extended the existing contract, and did not create a new one.[290]

An agency may also run the risk of being accused of circumventing competitive bidding when it amends an existing contract, rather than advertising for a new contract at the end of the contract term. Generally, a competitively bid contract cannot be materially amended.[291] One method of analyzing whether amendment is justified, rather than advertising for a new contract, is to question whether there is justification for a sole source for that particular contract. If there is, then it makes sense for the agency to simply extend the existing contract and document its reasons for doing so. However, if the contract would not meet the criteria for a sole source, the agency should advertise for bids.

vi. 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 include (1) procedures for soliciting bids from a limited number of selected potential bidders who are prequalified, sometimes wherein negotiations with one or more bidders may result in modifications of specifications, work methods, performance criteria, or price; and (2) negotiations with a sole source. The contracting agency is allowed substantial discretion in selecting the method that best serves the public interest. However, its judgment must 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 should be limited to the minimum needs of the contracting agency. Also, a suffi-

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[281] Commonwealth v. Brown, 391 Mass. 157, 460 N.E.2d 606, 609 (1984) (definition of "construction" did not include reconstruction, alteration, repair, or remodeling).

[282] Pa. Indus. for Blind and Handicapped v. Larson, 496 Pa. 1, 436 A.2d 122, 124 (1981).

[283] Pa. Indus. for Blind and Handicapped v. Department of General Services, 541 A.2d 1164, 1166, 116 Pa. Commw. 264 (1988).

[284] District Council No. 9, Int'l Bhd. of Painters & Allied Trades v. Metropolitan Transp. Auth., 115 Misc. 2d 810, 454 N.Y.S.2d 663, 669 (1982).

[285] Browning-Ferris Indus. of Tenn. v. City of Oak Ridge, 644 S.W.2d 400, 402 (Tenn. App., 1982); *see also* Edwards v. City of Boston, 408 Mass. 643, 562 N.E.2d 834 (1990).

[286] *Id.*, 644 S.W.2d at 402.

[287] 73 Wash. 2d 790, 440 P.2d 840 (1968).

[288] *Id.*, 440 P.2d at 843.

[289] 75 Wash. 2d 618, 453 P.2d 613 (1969).

[290] *Id.*, 453 P.2d at 616.

[291] Baxley v. State, 958 P.2d 422 (Alaska 1998).

cient justification for the exception must always exist before a noncompetitive award is permitted, and should be documented.

vii. Sole Source Contracts.—When a contracting agency undertakes negotiations with a sole source, the agency must be able to show that the sole source possesses a unique capability to furnish the property, services, or performance required to meet the agency's minimum needs.[292] 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. Generally, three requirements must be met: (1) the goods or service offered must be unique; (2) the uniqueness must be substantially related to the intended purpose, use, and performance of the goods or services sought; and (3) the entity seeking to be declared a sole source must show that other similar goods or services cannot perform desired objectives of the agency seeking those goods or services.[293] Uniqueness alone does not suffice, as any products may be shown to be "unique."[294]

A distinction must be made between a sole source contract and one in which the specifications are so narrowly drawn that only one bidder will be able to meet them. While the former, if supported by the above criteria, is a legitimate method of avoiding competitive bidding, the latter is not.[295] This is discussed more fully in Section 1-B regarding "or equal" clauses.

l. Alternate Bids

When engineering problems can be solved by alternative means, the contracting agency may face a dilemma in preparing its plans and specifications. The goal of competitive bidding is to achieve economy in construction costs, and engineering judgment may honestly differ on the best way to achieve this goal. Rather than designate one particular method of construction or one list of materials that must be used, contracting agencies may ask for proposals on alternative approaches, specifying only the end result, and leaving it to the bidders to select materials, methods, and other aspects of their bids. In some cases, this approach has official status in directives to the contracting officer to solicit proposals on all feasible methods as a basis for awarding a contract. In others, the highway agency's governing legislation may not mandate the solicitation of alternative bids, but may accord the contracting officer the authority to proceed in this way where circumstances make it desirable.[296] 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.[297]

An illustration of the issues raised by another type of alternate bidding is provided by *L.G. DeFelice & Son, Inc. v. Argraves*, involving contracts for construction of the Connecticut Turnpike.[298] In the notice to prospective bidders, the highway commissioner requested alternate bids, one for construction of reinforced concrete and one for bituminous concrete pavement. The notice stated that the agency would determine the type of pavement to be used after it received bids, and after it had fully investigated all factors, including costs. Plaintiff was the low bidder on bituminous concrete, and in this bid was lower than the lowest bidder on reinforced concrete paving. Accordingly, when the highway commissioner awarded the contract to the low bidder for the reinforced concrete paving, plaintiff sought to enjoin the award as being contrary to the legal requirement for award to the lowest responsible bidder. The court denied the injunction, stating:

> [T]he great weight of authority supports the proposition that the awarding official may exercise his discretion to determine after the receipt of alternative bids which alternative to select and to select the lowest responsible bidder under that alternative…The court will not interfere with the exercise of discretionary powers vested in a public official in the absence of fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power or violation of the law….[299]

The Connecticut court stressed the significance of statutory language granting the contracting agency discretion in calling for bids and selecting the lowest responsible bidder.

Projects that allow bidding in the alternative may raise questions regarding practices that are prohibited. 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

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[292] *See* Model Code, *supra* note 2, at § 3-205.

[293] General Electric Co. v. City of Mobile, 585 So. 2d 1311, 1315–16 (Ala. 1991).

[294] *Id*. at 1315.

[295] Unisys Corp. v. Department of Labor, 220 Conn. 689, 600 A.2d 1019, 1023 (1991) (question is whether specifications are drawn to the advantage of one manufacturer, not for reasons in public interest but to assure award to that manufacturer).

[296] Ericsson GE Mobile Communications v. Motorola Communications & Electronics, 657 So. 2d 857 (Ala. 1995).

[297] V. C. Vitanza Sons v. Murray, 90 Misc. 2d 893, 396 N.Y.S.2d 305 (1977).

[298] 19 Conn. Supp. 491, 118 A.2d 626 (Super. Ct. 1955).

[299] *Id.* at 496, 118 A.2d at 628.

considered unlawful or may be set aside.[300] For example, a contract that allowed alternative proposals for all major bid terms was found to have allowed bidders to "rewrite the bid advertisement" and thus prevent fair competition by preventing an exact comparison of the bids.[301] The court found that under the circumstances, there was no fair and reasonable method to determine the highest bidder for a lease.

Other 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 an "all or none" strategy may reduce the risk of having only their excessively low bid accepted by claiming it was made by mistake and must be rejected. However, the prospect that a "high-low" bidder may be able to manipulate the award and gain an advantage over other bidders might leave the bid vulnerable to challenge.

Circumstances may alter results, however, and were held to do so in *Sempre Construction Co. v. Township of Mount Laural*.[302] An agency asked for bids on excavation work, reserving the right to award the contract 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. The contractor's action was upheld by the court when challenged by a competing bidder, because the high-low bids were free from any technical defects by which the bidder might be relieved from its duty to accept an undesired contract.

Where contract specifications call for bidding on alternative materials or methods of work, such specifications sometimes have been challenged as being inadequate for competitive bidding. Where bidding on alternatives is permitted, the contracting officer has the advantage of comparing the bidders on a range of materials and technical aspects, as well as on price. It is to be expected that greater economy for the contracting agency will result. However, bidders may believe that the call for consideration of alternatives introduces too much uncertainty into bid preparation and evaluation.

Whether asking for alternate bids or modified alternatives, the contracting agency's specifications must be full, accurate, and complete as to each of the alternatives. They must be presented in a manner that allows opportunity for free competitive bidding on each alternative. Where they meet these criteria, these methods of calling for bids are reconcilable with the principles of competition.[303] It is not fatal to alternative bidding that the agency wants to reserve its selection of one alternative over the other after seeing the prices for each. "The very concept of alternative specification bids approved in these cases is calculated to allow the responsible government entity to weigh the costs and benefits of different types of proposals after the costs are known."[304]

Under the best of circumstances, however, efforts at completeness and accuracy are subject to inadvertent discrepancies in the specifications. Where such discrepancies are discovered, a rule of reason applies. If they fail in some material aspect to inform potential bidders of the terms on which bids will be compared or performances required, the specifications are defective, and any contract awarded on them is subject to cancellation.[305]

Bidding on alternative specifications may be accomplished on separate proposal forms or in a single consolidated form. Instructions on the preparation of bids must be followed fully and exactly. Where a single combined bid form is used, it is customary for the instructions to require that all spaces must be filled, and all items of information must be furnished for each alternative. Failure to comply with this requirement exposes the bid to the risk of rejection because of its irregularity.[306]

m. Confidentiality of Contractor Records

Because of state and federal laws requiring full disclosure of records held by or used by public agencies, agencies and contractors must rely on specific exemptions from these statutes in order to assert that some contractor records are confidential. Some states provide exemptions for all documents submitted in the public bidding process.[307] Others address only the financial information submitted in the prequalification process.[308]

In addition, agency records pertaining to the procurement process will ordinarily be publicly available unless protected by a specific exemption. In federal procurement in which the Federal Acquisition Rules apply, those rules prohibit the government from releasing any source selection information during procurement proceedings, including the ranking of bids, proposals, or competitors. The disclosure of this information to one bidder has been held to give that bidder an advantage over others.[309]

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[300] Owensboro Grain Co. v. Owensboro Riverport Auth., 818 S.W.2d 605, 608 (Ky. 1991).

[301] *Id*.

[302] 196 N.J. Super. 204, 482 A.2d 36 (1984).

[303] *See* J.J.D. Urethane Co. v. Montgomery County, 694 A.2d 368, 372 (Pa. Commw. 1997) and cases cited therein (alternatives requested regarding elevator or stairway).

[304] *Id*. at 371.

[305] State ex rel. Hoeffler v. Griswold, 35 Ohio App. 354, 172 N.E. 438 (1930).

[306] Baxter's Asphalt & Concrete v. Liberty County, 406 So. 2d 461 (Fla. App. 1981).

[307] D.C. Code § 2-303.17 (2002) (documents submitted in response to invitation for bids or request for proposals will be treated as confidential).

[308] WASH. REV. CODE § 47.28.075 (2000).

[309] Ralvin Pacific Properties, Inc. v. United States, 871 F. Supp. 468, 472–73 (D.D.C. 1994).

2. Alternative Contracting Methods

a. The Design-Build Method

Many state transportation agencies have obtained legislative authority to construct transportation projects using the "design-build" contracting method.[310] Agencies must have specific statutory authority to use this method, in order to be able to vary from the competitive bidding statutes. Although there is not much case authority for this proposition, it may be easily derived from the more general case law pertaining to when competitive bidding must be used.

The typical design-builder is a joint venture consisting of an engineering or design firm and a construction company. The agency has authority to contract with the design firm without competitive bidding, as that is a recognized exception for specialized work that does not require bidding. It may also be permitted under a State Little Brooks Act. However, the agency will be required to bid the construction work. In addition, the agency is required by its bidding statutes to prepare detailed plans and specifications on which the contract may be bid. In order to circumvent the requirements of (1) preparing detailed plans and specifications and (2) bidding the construction work, the agency must have specific statutory authority to use an alternative contracting method.

Procurement for design-build contracts uses a competitive selection process, or competitive sealed proposals.[311] Proposals are solicited through publication of a request for proposals. The statute may set out a two-step request for proposal process, in which the first step is either submission of a conceptual proposal, along with a statement of qualifications, or just submission of a statement of qualifications.[312] In the second step, the transportation agency selects the top qualified contractors to submit a detailed proposal, along with either a fixed price or a guaranteed maximum price. Agencies may then be allowed further discretion in selecting the best proposal, and are not required to select the lowest priced proposal. Unlike competitive sealed bidding, which requires agencies to select the lowest responsible bidder, agencies using competitive sealed proposals may select the proposal that is most beneficial to the state.

Because in the second step of the process the proposer is required to spend a significant amount of money in preparing a more detailed proposal, the statute may allow the agency to set a stipend for the second-step proposers. In exchange for the stipend, however, the agency should become the owner of the work product prepared by the proposer, even if that proposal is not ultimately selected.

Although the process of selecting a design-build contractor technically results in a negotiated contract, there is little negotiating that should remain at the end of the selection process. Items such as indemnifications, insurance requirements, environmental obligations, and anything else that would impact the fixed price being proposed must be included in the request for proposals so that the proposer can fairly price those items. Ideally, the entire form of the contract should be included with the request for proposals. This may also be required by the design-build statute.[313]

i. Federal Approval for Use of Design Build.—Agencies seeking to use design-build or any other innovative contracting methods that vary from the competitive bidding requirement of the federal-aid highway statutes must obtain FHWA approval.[314] FHWA has a process for evaluating these projects known as Special Experimental Project Number 14, or SEP-14. This process is summarized on FHWA's Web page.[315] This process is used to review innovative contracting methods including best value, life-cycle cost, qualifications-based bidding, and any methods where other factors in addition to cost are considered in the bidding process.

FHWA has described the goal of this project as follows:

> The objective of SEP-14 is to evaluate "project specific" innovative contracting practices, undertaken by State highway agencies, that have the potential to reduce the life cycle cost of projects, while at the same time, maintain product quality. Federal statutes and regulations do set forth specific Federal-aid program requirements; however, some degree of administrative flexibility does exist. The intent of SEP-14 is to operate within this administrative flexibility to evaluate promising non-traditional contracting practices on selected Federal-aid projects.[316]

Approval is required under this program for use of design-build, cost-plus-time bidding (also known as "A + B bidding"), and warranty clauses.[317] FHWA's Web site contains additional information on these contracting methods as well as links to additional resources and studies.

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[310] UTAH STAT. § 63-56-36.1 (2002); WASH. REV. CODE §§ 47.20.750–775 (1999); FLA. STAT. tit. 26, § 337.11(7).

[311] Model Code, *supra* note 2, at § 3-203.

[312] *See* UTAH STAT. § 63-56-36.1(4) (2002) (prequalification of potential contractors through a request for qualifications process).

[313] WASH. REV. CODE § 39.10.051(4)(e) (2003).

[314] *See* 23 U.S.C. § 112 (competitive bidding required for construction contracts in federal-aid projects). See 23 C.F.R. Part 636.

[315] *See* "FHWA Initiatives to Encourage Quality Through Innovative Contracting Practices, Special Experimental Projects No. 14-(SEP-14)," on FHWA's Web page at http://wwwcf.fhwa.dot.gov/programadmin/contracts/sep_a.htm .

[316] *Id.*

[317] *Id.*

b. General Contractor / Construction Manager

A number of cases have addressed the question of whether an agency may contract with a construction manager without competitive bidding. Given the extent of the construction manager's duties and the form of the contract, the question may be one of specific statutory authority, or may be one of whether the contract may be let as one for professional services.

Some public agencies have statutory authority to contract through the general contractor/construction manager, or GC/CM, method, in which the agency contracts with a general contractor who then not only acts as the prime contractor but also manages the construction project on behalf of the agency.[318] This type of contract generally includes either a fixed price for the construction or a guaranteed maximum price. In order to contract in this manner, an agency needs express statutory authority to deviate from competitive bidding rules. Such a statute generally authorizes the agency to solicit proposals and select the best proposal, similar to the manner in which it contracts with architects and engineers.

A sample statute is found in the State of Washington, which authorizes certain agencies (not including the Department of Transportation) to use this contracting method. The statute specifically authorizes the use of this method when (1) implementation of the project involves complex scheduling requirements; (2) the project involves construction at an existing facility that must continue to operate during construction; or (3) the involvement of the GC/CM during the design stage is critical to the success of the project.[319] The statute defines a GC/CM as follows:

> For the purposes of this section, "general contractor/construction manager" means a firm with which a public body has selected and negotiated a maximum allowable construction cost to be guaranteed by the firm, after competitive selection through formal advertisement and competitive bids, to provide services during the design phase that may include life-cycle cost design considerations, value engineering, scheduling, cost estimating, constructibility, alternative construction options for cost savings, and sequencing of work, and to act as the construction manager and general contractor during the construction phase.[320]

Although the statute refers to "formal advertisement and competitive bids," it contemplates something other than the traditional invitation for bids and submission of unit price bids.

> Contracts for the services of a general contractor/construction manager under this section shall be awarded through a competitive process requiring the public solicitation of proposals for general contractor/construction manager services. The public solicitation of proposals shall include: A description of the project, including programmatic, performance, and technical requirements and specifications when available; the reasons for using the general contractor/construction manager procedure; a description of the qualifications to be required of the proposer, including submission of the proposer's accident prevention program; a description of the process the public body will use to evaluate qualifications and proposals, including evaluation factors and the relative weight of factors; the form of the contract to be awarded; the estimated maximum allowable construction cost; where applicable; and the bid instructions to be used by the general contractor/construction manager finalists….[321]

It is still a competitive process; proposers must compete on the relative superiority of their proposals based on the factors set out in the statute:

> Evaluation factors shall include, but not be limited to: Ability of professional personnel, past performance in negotiated and complex projects, and ability to meet time and budget requirements; the scope of work the general contractor/construction manager proposes to self-perform and its ability to perform it; location; recent, current, and projected work loads of the firm; and the concept of their proposal.[322]

Because the criteria to be evaluated are subjective, a different process is used than the usual determination of lowest responsive bid:

> A public body shall establish a committee to evaluate the proposals. After the committee has selected the most qualified finalists, these finalists shall submit final proposals, including sealed bids for the percent fee, which is the percentage amount to be earned by the general contractor/construction manager as overhead and profit, on the estimated maximum allowable construction cost and the fixed amount for the detailed specified general conditions work. The public body shall select the firm submitting the highest scored final proposal using the evaluation factors and the relative weight of factors published in the public solicitation of proposals.[323]

Utah's agencies are authorized to adopt rules governing the use of the GC/CM contracting method. Utah's statute requires only that those rules must require competitive selection of the GC/CM, and also that where an additional subcontractor is procured by the GC/CM, it must be publicly bid in the same manner as if the agency were managing the construction.[324]

In *City of Inglewood - Los Angeles Civic Center Authority v. Superior Court*, the agency had entered into a contract that was similar to a GC/CM contract. In addition to requiring that the contractor coordinate the solicitation and acceptance of bids and supervise the construction, it also required the contractor to guarantee a maximum price for the entire project.[325] The court held that the contract was not valid. By requiring that the contractor guarantee a maximum price, the agency went beyond the normal responsibilities of a profes-

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[318] *See* UTAH STAT. § 63-56-36(2) (2002).

[319] WASH. REV. CODE § 39.10.061(2) (2002).

[320] WASH. REV. CODE § 39.10.061(1) (2002).

[321] WASH. REV. CODE § 39.10.061(4) (2002).

[322] WASH. REV. CODE § 39.10.061(4) (2000).

[323] WASH. REV. CODE § 39.10.061(4) (2002).

[324] UTAH STAT. § 63-56-36(2) (2002).

[325] 7 Cal. 3d 861, 103 Cal. Rptr. 689, 500 P.2d 601 (1980).

sional such as an engineer or architect. The contract was more in the nature of a prime contract, which had to be competitively bid and could not be negotiated.

However, in cases in which the construction manager's role does not include guaranteeing a maximum price, these arrangements have generally been upheld as legitimate exceptions to the requirements of competitive bidding without specific statutory authority. These arrangements are similar to the GC/CM contract, in that the rationale for the contract appears to be factors similar to those set out in the Washington GC/CM statute. They are distinct from the GC/CM contract, however, in that the construction manager does not also act as a general contractor and they do not include a fixed price guaranteed by the construction manager. For example, in *Mongiovi v. Doerner*, the contract was let to a construction manager in a project using a "fast track" method of construction contracting.[326] There was to be no prime contractor; rather, the construction manager was to supervise the solicitation and acceptance of bids and then share supervisory authority over the construction with the architect. The construction manager did not perform any construction work nor did it supply materials. Because the contract involved only professional, personal services, it could be evaluated only by subjective criteria and was therefore held to be exempt from public bidding.

In another case, the hiring of a construction manager was found to be authorized by a school district's statutory authority to hire an architect or engineer to prepare plans, specifications, and estimates and to supervise construction.[327] The district had no statutory authority to employ the GC/CM method, but rather contracted with a construction manager rather than a prime contractor. The construction manager then coordinated the solicitation and acceptance of bids for 27 different school addition projects. The construction manager shared general supervisory authority with the architect during construction. The unsuccessful bidder did not contend that the district could not hire architects and engineers to act as construction managers, but argued that the exception for architects and engineers did not allow the construction management contract to be let without bids.

The court held that although the statute allowing the employment of architects and engineers was silent on construction managers, the district had general authority to hire "such other personnel or services, all as the governing board considers necessary for school purposes."[328] The construction manager function was consistent with the authority to hire architects and engineers, and was authorized by this catch-all provision.

[326] 24 Or. App. 639, 546 P.2d 1110 (1976).

[327] Attlin Constr., Inc. v. Muncie Community Schools, 413 N.E.2d 281, 287 (Ind. App. 1980).

[328] *Id*., 413 N.E.2d at 290.

c. Public Private Partnerships

This method involves not only one of the more innovative contracting methods, but also involves innovative financing for transportation construction, including private financing that is repaid with tolls or user fees collected on the transportation facility. Again, specific statutory authority is required in order to allow the agency to deviate from the competitive bidding requirement. The Model Code now provides for a type of project delivery known as design-build-finance-operate-maintain, which is a form of public-private partnership.[329]

One of the purposes of public-private initiatives in public contracting is to develop new sources of funds for public projects, providing an alternative funding mechanism for projects that are unlikely to be state-funded because of high cost.[330] Another is to take advantage of efficiencies and cost saving mechanisms that the private sector may be able to use, while retaining functions that government agencies perform better.[331] The expectation of this program is that the private developer who contracts with the State will be responsible for the design, financing, construction, and operation of the new transportation facility. The agreement between the state and the developer will authorize the developer to collect tolls on the transportation facility in order to repay its financing.[332]

Where public bidding requirements otherwise apply, a public agency must have express statutory authority to deviate from standard public bidding requirements and to contract with a developer for a public-private project. Some public works statutes may still apply, as they may be not in conflict with the public-private contracting statute, or they may be specifically included in the statute.[333]

Washington's Public Private Initiatives in Transportation Act requires only that the "secretary [of Transportation]…shall solicit proposals from, and negotiate and enter into agreements with, private entities…." [334] The Washington State Department of Transportation (WSDOT) chose to use a competitive process similar to that used for the selection of architecture and engineering firms, using a request for proposals.

The submitted proposals are technically considered public records under Washington's Public Records Act, but WSDOT took the position that they should not be subject to disclosure prior to final selection. Because of opportunities to modify the proposals, disclosure of the

[329] Model Code, *supra* note 2, at §§ 3-203, 5-203.

[330] 20 DEL. CODE § 2001 (2001).

[331] 20 DEL. CODE § 2001 (2001); WASH. REV. CODE § 47.46.010 (2001).

[332] 20 DEL. CODE § 2006 (2001); WASH. REV. CODE § 47.46.050 (2001).

[333] *See* WASH. REV. CODE 47.46.040 (2002).

[334] WASH. REV. CODE § 47.46.030(1) (2002).

proposals prior to selection would compromise the review and selection process. Also, there were portions of some proposals that were considered proprietary and that could have been used by a proposer's competitors here or in another state. The agency position was not challenged. After selection, selected proposals were made public, with the exception of material that was considered proprietary or a trade secret.

Selection of a contractor to move forward in negotiations with the agency does not in itself create a contractual right. Nonetheless, agencies should reserve the right to terminate negotiations in their requests for proposals.

Parties to a public-private venture may refer to their contractual arrangement as a "public-private partnership." However, it is not a partnership in the legal sense of the word. It is still an owner-contractor relationship, although there is a clearly stated effort to work cooperatively toward a common goal. Each party retains its own essential characteristics; the public agency must continue to carry out its statutory function as a public agency and act in the best interest of the public, and the private entity must continue to act in the best interest of its owners or shareholders.

An issue that affects many areas of the agreement is how risk will be allocated between the public agency and the private entity. Usually this will be a business and/or policy decision to be made by the agency and the developer, within the limits of the agency's authority. For example, the agency must have specific statutory authority to indemnify a contractor.[335] Risks that the agency requires the developer to insure against or indemnify the agency may result in increased costs to the project, which will in turn be included in the amount that the developer may recover in tolls. These costs will therefore be passed on to the toll-payer. Risks that are borne by the State will be passed on to gas tax payers throughout the state. The agency must balance these as a policy matter.

Another issue is whether the program violates a state's "contracting out" statutes, which ordinarily prohibit an agency from doing work by contract that its employees customarily do. A statute in California that allowed the creation of public-private partnerships was challenged on the basis that it violated prohibitions against contracting out those services traditionally performed by state workers. The California appellate court held that because the program had as one of its major goals the procurement of state transportation facilities that could not otherwise be built with the usual funding mechanisms and was an "experimental" program, the contracting out statutes were not violated by this program.[336]

Washington's statute was challenged on a number of constitutional grounds, including charges that it impermissibly delegated legislative power to a private corporation by allowing the private entity to set toll levels for the transportation facility. The court held that setting toll rates is an administrative function rather than legislative, and that the statute contained adequate safeguards to protect the public against arbitrary action by the private entity.[337]

B. ELEMENTS OF THE PUBLIC CONSTRUCTION CONTRACT

1. Agency's Responsibility for Contract Plans, Specifications, and Technical Information

a. Requirement for Detailed Plans and Specifications

A common feature of state competitive bidding requirements is that contracting agencies prepare plans and specifications for their construction projects.[338] In addition, they must make these documents available to prospective bidders, along with other documentation to assist bidders in preparing and submitting proposals.[339] Even without being specifically required by legislation, the agency's obligation to furnish detailed plans and specifications arises as a necessary implication of the requirement for competitive bidding. The objective of this policy cannot be achieved unless bidders are sufficiently well informed of the plans and specifications of the job to permit them to prepare their proposals intelligently and correctly. Whether based on statutory language or implications, the duty to provide definite plans, specifications, and technical information is strongly rooted in public policy and is consistently enforced by the courts.[340]

Standard specifications published by the various state transportation agencies show a similar pattern of statements relating to the interpretation of plans,

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[335] Barendregt v. Walla Walla School District No. 140, 26 Wash. App. 246, 611 P.2d 1385 (1980).

[336] Professional Eng'rs v. Cal. Dep't of Transp., 13 Cal. App. 4th 585, 16 Cal. Rptr. 2d 599 (1993); CAL. GOV'T CODE § 19130(a). For discussions of when privatization is allowed or not allowed, *see* Colorado Ass'n of Public Employees v. Dep't of Highways, 809 P.2d 988 (Colo. 1991) (contracting out maintenance services violated constitutional and statutory civil service provisions; statutory authority to "reorganize" department did not confer authority to contract out); Moore v. State of Alaska, Dep't of Transp. and Public Facilities, 875 P.2d 765 (Alaska 1994) (because civil service provisions allowed for efficient management of agency, department could contract out functions for economic reasons). *See also* R. Cass, *Privitization: Politics, Law and Theory*, 71 MARQ. L. REV. 449 (1988), and following commentaries.

[337] State ex rel. Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp., 142 Wash. 2d 328, 12 P.3d. 134 (2000).

[338] Portions of this section are derived from *Competitive Bidding and Award of Highway Construction Contracts* by Dr. Ross D. Netherton, published by the Transportation Research Board in 1976 and included in the first edition of SELECTED STUDIES IN HIGHWAY LAW, vol. 3, p. 1125: supplemental, *Id.*, at pp. 1214–51.

[339] *See*, *e.g.*, WASH. REV. CODE § 47.28.040 (2002).

[340] Sullivan v. State through Dep't of Transp. and Dev., 623 So. 2d 28, 30 (La. App. 1 Cir. 1993).

specifications, and technical information, in some instances going so far as to require bidders to examine the site of the proposed work as well as the technical documents describing the work required. Notwithstanding these disclaimers, state statutes emphasize the goal of opening up the bidding process to competition among all bidders on equal terms, including information about the job.

When courts have been called on to determine whether this duty has been met, they have adopted the same pragmatic approach. When the situation did not readily permit more precision or detail, they have found that the duty has been met by "substantial compliance."[341] In one case, the Minnesota court was concerned with the actual effect of the language on the bidder's ability to write its proposal:

> The court has found that the plans and specifications were sufficiently definite and precise to afford a basis for competitive bidding. Witnesses for the respective parties differed as to the range above the minimum of 1200 horsepower which would be reasonable. They all admitted that some range would be reasonable. The question was one of fact, and the evidence sustains the court's finding.[342]

Specifications that do not suffer from vagueness could, at the other extreme, become so restrictive as to preclude effective competition among bidders. However, the discretion of the contracting agency in drafting specifications for work normally will not be overruled unless it is shown to be arbitrary, oppressive, or fraudulent.[343]

The form and style in which plans, specifications, and technical information are prepared are influenced more by industry customs and agency practices than by conventions and case law. In many projects, each phase of the construction—such as earthwork, concrete, structural steel, masonry, and carpentry—is treated in a separate section of the bid documents. Likewise, equipment and machinery used in the work will be described separately, and each category of basic materials will have its own section. Although no fixed rules prescribe the organization of these elements, there is a preference for arranging them as closely as practicable to the sequence of the construction operations. In all cases the drafter should bear in mind that the method used must present the plans and specifications in a manner that enables any bidder relying on them to determine what is required in all important details of the work.

In preparing project plans and specifications, the drafter must also consider how the description of materials and methods will facilitate the inspection and testing that is required during the construction and prior to acceptance of the finished work. For projects involving major highways or structures, there is no practical way to determine by a single test or series of tests of the finished work whether it will perform its intended function throughout its expected service life. Therefore, it is customary to control the quality of materials and workmanship by testing components as they are assembled and installed. For most types of materials and construction, contracting agencies use standard specifications and test procedures. In this published form, they are incorporated by reference into project plans and specifications, subject to the special provisions or modifications for the project.

Where contracts do not involve subject matter that 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.[344] A similar standard was applied in a case in which a document was identified as "plans," even though it did not meet the technical definition of plans. The court found that the information included in the document provided boundaries, contents, and test results of borrow pits, and was provided to bidders to provide foundation material for the preparation of bids. It was thus considered part of the agency's "plans and specifications" on which the bidders were entitled to rely, even though it did not meet the definition of "plans" in the standard specifications.[345] However, in another case, where an agency specifically stated in the bid documents that pit test data was provided for information only and was not a special provision, the court held that the agency did not provide any warranty with the information. Rather, the contractor was required to determine for itself the nature of the material in the gravel pits and was not entitled to rely on the information.[346]

The same applies where bidders charge that a contracting agency has failed 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 that 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

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[341] Scanlan v. Gulf Bitulithic Co., 44 S.W.2d 967, 970 (Tex. Comm'n App. 1932) (in order for specifications to be invalid, must be more than "deficient in the most trivial respect").

[342] Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 425, 49 N.W.2d 197, 202 (1951).

[343] *See infra* note 464 and accompanying text.

[344] Plantation on the Green, Inc. v. Gamble, 441 So. 2d 299, 304 (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, 430 (1976) (failure to describe warranty or method of implementing warranty).

[345] Jack B. Parson Constr. Co. v. State, by and Through Dep't of Transp., 725 P.2d 614, 616 (Utah 1986).

[346] Mooney's, Inc. v. South Dakota Dep't of Transp., 482 N.W.2d 43, 46 (S.D. 1992).

wage determination so that 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.[347]

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 newspapers or publications where the information is announced.

An agency has no duty to disclose to bidders on a construction project facts in its possession when its superior knowledge or silence would convey a false impression, where the agency has made no affirmative misrepresentation.[348] The agency has a duty only to provide bidders with information that will not mislead them.

Where a bid item is left out of the bid specifications, the agency may be found to have failed to provide sufficiently definite plans and specifications for the contract.[349] In such a case, the agency will be liable for any additional costs incurred by the contractor in providing that item of work.

In addition to bidders, subbidders are entitled to rely on the plans, specifications, and other bid documents that are in existence at the time that their subbids are prepared.[350]

b. Responsibility for Accuracy of Specifications

When the agency sets out detailed plans and specifications for the construction of a public project, it warrants that those plans and specifications are adequate. The agency will thus bear the loss resulting from inadequate or inaccurate plans or specifications. The leading federal case on this issue is *United States v. Spearin*, a 1918 case that involved construction of a dry dock at the Brooklyn Naval Shipyard.[351] The dry dock construction necessitated relocation of a sewer line, which the contractor completed. A subsequent storm event caused failure of the sewer line due to the presence in the line of a dam that was not shown on the government's plans, and resulted in flooding of the area excavated for the dry dock. The contractor refused to rebuild the sewer, and it was unsafe to continue working in the area without doing so. The government then terminated the contract. The contractor sued for and recovered its lost profits. The United States Supreme Court held that the government was responsible for the accuracy of its specifications: "I[f] the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."[352]

Further, the Court held that this responsibility was not overcome by the contractor's duty to inspect the site and to check the plans.

> [T]he insertion of the articles prescribing the character, dimensions, and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance.[353]

In other words, the duty to inspect the site did not include a responsibility to check it in such detail, including a review of the history of the site, so as to determine the presence of the dam located inside the sewer. The contractor was entitled to rely on the government's plans as being accurate and complete and as giving it sufficient information to build what was contemplated. The government was required to bear the loss for its plans being insufficient, as it was considered to have misrepresented the site conditions.

The contractor is not liable for any defects in the project built if the defects resulted from the plans and specifications furnished to the contractor.[354] This rule, known as the doctrine of constructibility, or the implied warranty of constructibility, is not negated by the provision of a changes clause that allows for alterations in the plans and specifications.[355]

A Florida court applied the doctrine of constructibility, or the *Spearin* doctrine, in a case that involved fence construction along an Interstate highway, *Phillips & Jordan, Inc. v. State, Department of Transportation*.[356] The court held that the rule that the agency is liable for unanticipated construction costs due to a la-

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[347] Operating Eng'rs Local Union No. 3, Int'l Union of Operating Eng'rs v. Hurley, 546 F. Supp. 387, 390 (D. Utah 1982).

[348] Hendry Corp. v. Metropolitan Dade County, 648 So. 2d 140, 142 (Fla. App. 3 Dist. 1994) (DSC clause will be triggered only where there has been an inaccurate representation that is relied on, not where there has been no representation).

[349] Sullivan v. State, Through Dep't of Transp. and Dev., 623 So. 2d 28 (La. App. Cer. 1993) *writ denied*, 629 So. 2d 1179 (La. 1993).

[350] J.F. White Contracting Co. v. Department of Public Works, 24 Mass. App. Ct. 932, 508 N.E.2d 637, 639, *review denied*, 400 Mass. 1104, 511 N.E.2d 620 (1987).

[351] 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918); *see also* K. Golden and J. Thomas, *The Spearin Doctrine: The False Dichotomy Between Design and Performance Specifications*, 25 PUB. CONT. L.J. 47–68 (1992).

[352] *Id*. at 136 (citations omitted).

[353] *Id*. at 137 (footnotes omitted).

[354] O&M Constr., Inc. v. State, Division of Admin., 576 So. 2d 1030, 1039–40 (La. App. 1 Cir. 1991), *writ denied*, 581 So. 2d 691 (1991).

[355] Gilbert Pacific Corp. v. State by and Through Dep't of Transp., Comm'n. 110 Or. App. 171, 822 P.2d 729, 732 (Or. App. 1991), *review denied*, 830 P.2d 596.

[356] 602 So. 2d 1310 (Fla. App. 1 Dist. 1992).

tent defect in the plans and specifications did not apply. The plans and specifications had provided for clearing and grubbing of a 10-foot wide strip along the highway. They did not specify what equipment should be used. The contractor found that the brush in the area was so dense that it needed to use heavier equipment for the clearing, and that equipment used 12-foot wide blades. The result was that the contractor ended up clearing a larger area than called for in the contract, and the Florida Department of Transportation refused to pay for the extra area.

The court held that there was not a latent defect in the plans. The contractor was aware of the site conditions, and knew that its equipment of choice would clear an area more than 10-feet wide. It submitted its bid with full knowledge of these facts, and could not later claim that there was a latent defect.[357]

i. Duty To Inquire Re Patent Defects or Ambiguities.— An exception to the general rule that the awarding agency warrants the adequacy of its design specifications is the principle that a contractor has a duty of inquiry with respect to a patent defect or ambiguity in the contract.[358] This duty of inquiry is created regardless of the reasonableness of the nondrafting party's interpretation of the contract.[359] A bidder has the duty to scrutinize the bid solicitation for potential problems prior to bidding.[360] Upon finding an ambiguity, the contractor is charged with asking the contracting officer the true meaning of the contract. However, the contractor must inquire only as to major discrepancies, obvious omissions, or manifest conflicts in the contract provisions.[361] If the contractor fails to seek clarification of a patent ambiguity prior to submitting its bid, then it bears the risk of misinterpretation.[362]

One court has explained the reason for the doctrine of patent ambiguity as follows:

> If a patent ambiguity is found in a contract, the contractor has a duty to inquire of the contracting officer the true meaning of the contract before submitting a bid. This prevents contractors from taking advantage of the Government; it protects other bidders by ensuring that all bidders bid on the same specifications; and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact....[363]

If different interpretations of a contract are plausible, then the court will inquire as to whether the discrepancy would be apparent to the reasonably prudent contractor. It is not the contractor's actual knowledge but rather the obviousness of the inconsistency under an objective standard that imposes the duty to make inquiry.[364] The contractor's failure to notice an obvious ambiguity does not excuse the duty of inquiry.[365] However, the contractor's actual knowledge of an ambiguity is sufficient to create the duty of inquiry.[366]

The purpose of allocating to contractors the burden to inquire about patent ambiguities is to allow the agency to correct any errors before contract award, and to ensure that all contractors bid on the basis of identical specifications.[367] In providing an interpretation to the inquiring contractor, the response would be sent to all holders of bid packages so that all bidders have the benefit of the agency's interpretation. An essential element of public bidding is a common standard of competition among bidders. All conditions and specifications must apply equally to all prospective bidders, thus permitting contractors to prepare bids on the same basis.

> It is to assure a level playing field that contractors are urged in bid documents to examine the documents thoroughly, make site visits, attend prebid conferences, and raise questions about the drawings, specifications and conditions of bidding and performing the work. To every extent possible, such questions should be addressed before bid opening.[368]

Where the contract contains an order of precedence clause, the contractor is entitled to rely on the representation in the document that has higher precedence, and is not required to resolve a patent discrepancy between that document and one of lower precedence.[369] Generally, specifications will be identified in an order of precedence clause as governing over drawings where there is a discrepancy between the two. The clause is designed to excuse reporting of a patent ambiguity. It automatically removes the conflict *between* specifications and drawings by assigning precedence to the

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[357] *Id*. at 1313.

[358] Department of Transp. v. IA Constr. Corp., 138 Pa. Commw. 587, 588 A.2d 1327, 1330 (1991).

[359] International Transducer Corp. v. United States, 30 Fed. Cl. 522, 527 (1994), *aff'd*, 48 F.3d 1235 (1995).

[360] Avedon Corp. v. United States, 15 Cl. Ct. 771, 777 (1988).

[361] *Id*.

[362] Delcon Constr. Corp. v. United States, 27 Fed. Cl. 634, 638 (1993).

[363] Newsome v. United States, 230 Ct. Cl. 301, 676 F.2d 647, 649 (1982) (footnotes omitted).

[364] Maintenance Eng'rs, Inc. v. United States, 21 Cl. Ct. 553, 560 (1990).

[365] *Id*.; *see also* Troise v. United States, 21 Cl. Ct. 48, 58 (1990).

[366] D'Annunzio Bros., Inc. v. N.J. Transit Corp., 245 N.J. Super. 527, 586 A.2d 301, 303–04 (1991).

[367] *Id*., 586 A.2d at 304.

[368] D'Annunzio Bros., *supra* note 366, at 304 (citing Collins Int'l Serv. Co. v. United States, 744 F.2d 812, 814 (Fed. Cir. 1984)).

[369] Hensel Phelps Constr. Co. v. United States, 886 F.2d 1296, 1299 (Fed. Cir. 1989).

specifications.[370] However, discrepancies *within* either specifications or drawings must still be reported.

Whether the implied warranty of constructibility applies to specifications depends on whether they are design specifications or performance specifications. In making this determination, one must consider the language of the contract as a whole; the nature and degree of the contractor's involvement in the specification process; the degree to which the contractor is allowed discretion in carrying out performance of the contract; and the parties' usage and course of performance of the contract.[371]

ii. Design Specifications.—The contractor's claim of defective design specifications is based on the *Spearin* principle that there is an implied warranty that design specifications, if followed, will lead to a successful product. A design specification is one that sets out in precise detail the materials to be used and the manner in which the work is to be performed.[372] The contractor has no discretion to deviate from a design specification.[373] The contractor bears the burden of proving that a design specification is defective and that the defect cause the contractor's difficulties.[374] Design specifications contain the implied warranty under *Spearin* that if they are followed an acceptable product will result.[375]

iii. Performance Specifications.—Performance specifications set forth objectives to be achieved, and the successful bidder is expected to exercise its ingenuity in achieving that objective, selecting the means and methods of accomplishing it and assuming responsibility for that selection.[376] Performance specifications do not contain any implied warranty of constructibility.[377] Only an objective or standard of performance is set out in the contract.[378] Along with control over the choice of design, methods, and materials, there is a corresponding responsibility to ensure that the end product performs as the agency desires. The contractual risk of nonperformance is thus on the contractor.

For highway and bridge construction undertaken directly by the federal government and by state agencies under federal-aid funding programs, standard specifications for materials and workmanship provide accepted criteria for preparation of bids and, subsequently, evaluation of results. However, specifications expressed in terms of overall performance may still be used for certain items of equipment or machinery that may readily be tested prior to use by the contractor. Various types of heavy equipment, pumps, motors, generators, and other accessories may be considered as being necessary to qualify a contractor for particular work. In such cases, performance specifications for these items are frequently used, sometimes in conjunction with the additional requirement that the equipment or other items be warranted by the contractor or manufacturer to perform as proposed.

c. Use of Requests for Proposals

Statutes allowing the use of a request for proposals may allow more latitude to the agency in setting the requirements for bidding.[379] For example, a county was found not to have violated the competitive bidding requirement for a performance bond where it used a request for proposals and limited participation to only those firms that had substantial financial resources, thereby providing reasonable assurance to the county to secure performance.[380] Whether such deviations from basic public works project requirements will be allowed will depend on how broadly those requirements are written and on whether the authority allowing the use of requests for proposals allows those deviations.

Many states' transportation agencies have obtained statutory authority to use design-build contracting, in which the contractor assumes responsibility for both design and construction. These statutes allow the use of requests for proposals as an alternative to competitive bidding, recognizing the need to evaluate the qualifications of the design-build team in the same manner that other engineering contracts are evaluated.[381]

2. Required Federal Clauses

Where procurement regulations require that a contract contain a particular clause, the contract will be read as though it contained that clause, even if it is omitted.[382] Federal regulations have the force and effect of law and must be deemed to be terms of the contract even if not set forth in the contract; the contractor is charged with knowledge of the regulations.[383] Further, the regulations will apply even if inconsistent with a contract provision.[384]

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[370] Id. at 1298.

[371] Fruin-Colnon Corp. v. Niagara Frontier Transp. Auth., 180 A.D. 2d 222, 585 N.Y.S.2d 248, 253–54 (1992).

[372] Fla. Board of Regents v. Mycon Corp., 651 So. 2d 149, 153, *rehearing denied* (Fla. App. 1 Dist. 1995).

[373] Blake Constr. Co. v. United States, 987 F.2d 743, 745, *rehearing denied* (Fed. Cir. 1993), *cert. denied*, 510 U.S. 963, 114 S. Ct. 438 (1993); John Massman Contracting Co. v. United States, 23 Cl. Ct. 24, 32 (1991).

[374] Edward M. Crough, Inc. v. Department of General Services of District of Columbia, 572 A.2d 457, 468 (1990).

[375] Blake Constr. Co., *supra* note 374, 987 F.2d at 745.

[376] *Id.*

[377] John Massman Contracting Co. v. United States, 23 Cl. Ct. 24, 32 (1991).

[378] Fruin-Colnon Corp., Traylor Bros, Inc. and Onyx Constr. & Equipment, Inc. v. Niagara Frontier Transp. Auth., 180 A.D. 2d 222, 585 N.Y.S.2d 248, 253 (1992).

[379] *See* Model Code, *supra* note 2, at § 3-203.

[380] Stapleton v. Berks County, 140 Pa. Commw. 523, 593 A.2d 1323, 1331, *appeal denied*, 604 A.2d 251, 529 Pa. 660 (1991).

[381] *See* notes 311 through 318 and accompanying text.

[382] District of Columbia v. Organization for Envtl. Growth, Inc. (OFEGRO), 700 A.2d 185, 198–99 (D.C. App. 1997).

[383] Century Marine, Inc. v. United States, 153 F.3d 225, 228 n.1 (5th Cir. 1998); General Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775, 780 (Fed. Cir. 1993).

[384] OFEGRO, *supra* note 382, at 199.

However, where statutes, regulations, or policies of the contracting agency require that certain provisions must be included in all of the agency's construction contracts, they generally are incorporated into standard forms that all bidders must use. Typically, some of these provisions are concerned with procedures to be followed during performance of the contract so that administrative processing will be facilitated. Others impose positive duties on the contractor in the performance of the contract that may affect its methods of operation, and therefore must be reflected in the contractor's bid.

Examples of both types occur in the required provisions for federal-aid highway construction contracts. Requirements for keeping records and making reports on acquisition of materials, supplies, and labor illustrate the type of provisions dealing with contract administration.[385] Requirements that contractors comply with provisions of federal environmental protection laws and federal labor standards illustrate factors that must be considered in calculating bid prices.[386] Contracts for direct federal construction projects require compliance with the Buy American Act and the Walsh-Healey Act.[387]

The federal regulations require that the required clauses be included in all prime contracts for federal-aid funded construction, and that the contractor be similarly required to include the clauses expressly in its subcontracts.[388] It is not sufficient to incorporate the clauses by reference.[389]

a. Clauses Required in Form FHWA-1273

The major required federal clauses are set out in Form FHWA-1273, which is available from FHWA's Web site. The form sets out the essential requirements that its provisions must be set out in full and cannot be incorporated by reference, and that breach of any of the required stipulations will be grounds for termination of the contract.[390] Further, breach of specific sections may be considered grounds for debarment; these are discussed in Section 2.

i. Labor Standards.—Labor standards that must be addressed include the agreement to refrain from discrimination against labor from other states and not to employ convict labor, with the exception of convicts on parole, probation, or work release.[391]

In addition, clauses are required governing payment of prevailing wages and maintenance of payroll records so that prevailing wages may be verified.[392] Part VIII requires adherence to applicable federal, state, and local laws governing health, safety, and sanitation.

ii. Equal Employment Opportunity.—Part II of Form FHWA-1273 covers in detail the nondiscrimination requirements applicable to all federal-aid contracts, including equal employment opportunity, disadvantaged business enterprise requirements, and record keeping requirements. This is discussed in more detail in Section 4. In addition, Part III contains strict requirements for nonsegregated facilities, one of which is that the contractor and its subcontractors certify to FHWA that they do not utilize segregated facilities. A breach of this certification will be considered a violation of the EEO provisions.

iii. Subletting and Assignment.—Part VII establishes the conditions under which the contractor will be allowed to subcontract work or assign the contract. Generally, the contractor is required to perform at least 30 percent of the work with its own forces, excluding specialty items.[393]

iv. Compliance with Environmental Regulations.—Part X requires compliance with provisions of the Federal Clean Air Act[394] and the Federal Water Pollution Control Act (the Clean Water Act).[395] This particular section is presented as a stipulation that the contractor or subcontractor is in compliance with these provisions, the violation of which is grounds for termination under Part I.

v. Required Certifications.—Contractors and subcontractors are required under Part XI to certify that they are not presently debarred, suspended, or otherwise ineligible from participating in a federally-funded contract by any federal agency; that they have not within the previous 3 years been convicted or had a civil judgment imposed against them for offenses such as fraud, embezzlement, or false statements; and that they have not within the previous 3 years had a contract terminated for default. Part XII requires contractors to certify that no contract funds have been or will be used for lobbying elected officials or public employees.

b. Standardized Changed Conditions Clauses

In addition to the required clauses set out in Form FHWA-1273, the regulations contain additional required clauses regarding changed conditions.

i. Differing Site Conditions.—One of the longest utilized required federal clauses is the Differing Site Conditions (DSC) clause. It was preceded by a similarly-worded provision that was known as the Changed Conditions

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[385] Form FHWA-1273, Part VI, available on FHWA's Web page at http://wwwcf.fhwa.dot.gov/programadmin/contracts/1273.htm.

[386] *Id*., pts. IV and X.

[387] 41 U.S.C. §§ 10a and 35 (1999).

[388] 23 C.F.R. § 633.102(d), (e) (1999).

[389] *Id*.

[390] Form FHWA-1273, pt. I (2000).

[391] 23 C.F.R. § 635.117(a) (2001).

[392] 23 C.F.R. § 635.118; Form FHWA-1273, pts. IV and V.

[393] 23 C.F.R. § 635.116(a) (2000).

[394] 42 U.S.C. § 7401 *et seq*.

[395] 33 U.S.C. § 1251 *et seq*.

clause. Cases interpreting these clauses date back almost half a century.[396] The contractor generally accepts the risk that subsurface or other latent physical conditions may be difficult to determine prior to construction and that they may be adverse.[397] The Supreme Court noted in that case that: "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered…."[398]

The federal government has been concerned that because of this rule, contractors will have to price into their bids the risk that "unforeseen difficulties" such as adverse subsurface conditions will cause the project costs to exceed the bid price. In addition, contractors will have to factor into their bid prices the cost of investigating subsurface soil conditions.

> The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs.[399]

The use of the DSC clause shifts the risk of adverse subsurface or other latent physical conditions from the contractor to the government. Otherwise, if the contract is silent about the risk of unforeseen conditions, the contractor would bear the risk even though those conditions might significantly increase the cost of the project.[400] Preventing contractors from bidding on a "worst-case scenario" basis is the goal of inclusion of the DSC clause.[401] The clause imposes on the government the risks for conditions that the contract documents fail to disclose, but leaves upon the contractor the costs of encountering conditions described in the contract.[402] The result is that the government should as a rule get lower bids, and only pay for DSCs when they actually occur, rather than funding a contingency in each contract.

The DSC clause applies only to those conditions that exist at the time of contract execution. It does not apply to conditions that develop during performance of the contract.[403] This is true even if this time limitation is not expressed in the clause itself or elsewhere in the contract.[404] The DSC clause is addressed in greater detail in Section 5.

ii. Suspension of Work.—This clause allows the project engineer to adjust the compensation and/or schedule to account for delays that are ordered by the engineer and that are "an unreasonable period of time," which is defined as "not originally anticipated, customary, or inherent to the construction industry."[405]

iii. Significant Changes in Character of Work.—This clause defines "significant change" as:

> (A) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or
>
> (B) When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity.[406]

This clause reserves to the engineer the right "to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project."[407] It further provides that such changes "shall not invalidate the contract nor release the surety."[408] The contractor is entitled to an adjustment, including anticipated profit, in the event of a significant change.[409] Change provisions are intended to compensate the contractor for burdens not contemplated by the contract.[410] To qualify for an adjustment under a changes provision, the contractor must prove that any increased costs arose from conditions differing materially from those indicated in the bid documents, and also that the changes were reasonably unforeseeable in light of the information available to the contractor.[411]

c. Noncollusion

The federal regulations require that the state agency provide a form to be executed by each bidder, and included in the contract, stating that the bidder has not engaged in collusive behavior:

> Each bidder shall file a statement executed by, or on behalf of the person, firm, association, or corporation submitting the bid certifying that such person, firm, association or corporation has not, either directly or indirectly,

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[396] *See*, *e.g.,* United States v. Rice, 317 U.S. 61, 66–68, 63 S. Ct. 120, 123–23, 87 L. Ed. 53 (1942) (interpreting Changed Conditions clause).

[397] *See* Spearin, *supra* note 351.

[398] *Id.* at 136.

[399] Olympus Corp. v. United States, 98 F.3d 1314, 1317 (Fed. Cir. 1996) (quoting from Foster Constr. C.A. & Williams Bros. Co. v. United States, 193 Ct. Cl. 587, 435 F.2d 873, 887 (Ct. Cl. 1970)).

[400] Iacobelli Constr., Inc. v. County of Monroe, 32 F.3d 19, 23 (2d Cir. 1994).

[401] *Id*.

[402] *Id*.

[403] *See* Olympus Corp. v. United States, 98 F.3d 1314, 1317 (Fed. Cir. 1996); John McShain, Inc. v. United States, 179 Ct. Cl. 632, 375 F.2d 829 (1967).

[404] Olympus, *supra* note 403.

[405] 23 C.F.R. § 635.109(a)(2) (1999).

[406] 23 C.F.R. § 635.109(a)(3)(iv) (1999). Changes are addressed in more detail in Section 5.

[407] 23 C.F.R. § 635.109(a)(3)(i) (1999).

[408] *Id*.

[409] 23 C.F.R. § 635.109(a)(3)(ii) (1999).

[410] Willamette Crushing Co. v. State By and Through Dep't of Transp., 188 Ariz. 79 932 P.2d 1350, 1352 (1997).

[411] *Id*.

> entered into any agreement, participated in any collusion, or otherwise taken any action, in restraint of free competitive bidding in connection with the submitted bid. Failure to submit the executed statement as part of the bidding documents will make the bid nonresponsive and not eligible for award consideration.[412]

d. Nondiscrimination

All contracts with participation by any branch of the U.S. Department of Transportation are required to comply with the nondiscrimination provisions of 49 C.F.R. Section 21, which implements Title VI of the Civil Rights Act of 1964 in federal transportation programs. Appendix C to this section provides illustrations of how this section applies to the various operations of the Federal Aviation Administration, FHWA, and the Federal Transit Administration (formerly the Urban Mass Transit Administration).

e. Prompt Pay

The 1999 FHWA Disadvantaged Business Enterprise (DBE) regulations were written to address the constitutional deficiencies identified in the program in *Adarand Constructors, Inc. v. Pena*.[413] Chief among these was the requirement that the program be "narrowly tailored" to address a compelling governmental interest. As part of the "narrow tailoring" requirement, FHWA included a number of "race-neutral" measures that are intended to benefit all small or new businesses, not just those owned by minorities or women. Among these is a requirement for prompt payment of subcontractors by prime contractors.[414] FHWA specifically found: "It is clear that DBE subcontractors are significantly—and, to the extent that they tend to be smaller than non-DBEs, disproportionately—affected by late payments from prime contractors. Lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace…."[415]

The regulation requires that federal-aid recipient agencies include in their DBE programs a requirement for a prompt payment clause to be included in every prime contract in which there are subcontracting possibilities.[416] The clause must require payment to be made within a certain number of days from the time that the prime contractor receives progress payments from the agency; the number of days may be established by the agency.

If an agency has a prompt payment rule of its own, it may utilize that requirement instead. The contractor need pay only for work that has been satisfactorily completed. This clause also requires prompt return of any retainage withheld by the contractor at the satisfactory completion of the subcontractor's work.

The regulation requires that agencies include in their prime contracts an enforcement mechanism for prompt payment of subcontractors. This may be either an alternative dispute resolution process for the resolution of payment disputes, or a provision stating that the prime contractor will not be paid for its work unless it ensures that subcontractors are promptly paid for their work, or any other mechanism consistent with the regulation and with state law.[417]

A prompt pay clause does not preclude the prime contractor from withholding payments from the subcontractor based on identifiable claims.[418]

i. "Pay when paid."—The prompt-pay requirement would appear not to interfere with the prime contractor's use of a "pay when paid" clause in its subcontracts, since it does not apply until the prime contractor has been paid by the agency. The "pay when paid" clause, or "pay if paid," allows the prime contractor to condition its payment to the subcontractor on its prior receipt of payment from the agency.[419] Most jurisdictions that have considered these clauses do not construe them to release the prime contractor from its obligation to pay the subcontractor if the owner fails to perform. Rather the clause merely affects the timing of payments, regardless of whether the owner performs.[420] Courts will not shift the risk of the owner's nonperformance, or failure to pay, to the subcontractor unless the language of the clause clearly indicates that the parties intended to do so.[421] On the other hand, where the language expressly states that receipt of payment from the owner or the agency is a condition precedent to payment being owed to the subcontractor, the court will treat it as a condition precedent.[422] But because condition precedents are not favored, there must be clear contract language to create them.

f. Termination of Contract

The FHWA regulations require that state highway construction contracts using federal funds contain some

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[412] 23 C.F.R. § 635.112(f) (1999).

[413] 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d, 158 (1995).

[414] 49 C.F.R. § 26.29 (2000).

[415] 64 Fed. Reg. 5096, at 5105–06 (Feb. 2, 1999).

[416] *Id*.; 49 C.F.R. § 26.29(a) (2000).

[417] 49 C.F.R. § 26.29(b) (2000).

[418] Pottstown Fabricators, Inc. v. Manshul Constr. Corp., 927 F. Supp. 756, 757 (S.D.N.Y. 1996) (applying state prompt pay statute allowed prime contractor to withhold payments to satisfy claims, liens, or judgments against subcontractor where those had not been discharged).

[419] *See* Urban Masonry Corp. v. N&N Contractors, Inc., 676 A.2d 26, 36 n.19 (D.C. App. 1996) (example of "pay when paid" clause).

[420] Koch v. Construction Technology, Inc., 924 S.W.2d 68, 71 and n.1 (Tenn. 1996).

[421] *Id*; *see also* Thomas J. Dyer Co. v. Bishop Int'l Eng'g Co., 303 F.2d 655, 660–61 (6th Cir. 1962).

[422] *See* Urban Masonry, *supra* note 419, at 36.

provision for termination of the contract, both for default and for public convenience:

> All contracts exceeding $2,500 shall contain suitable provisions for termination by the State, including the manner in which the termination will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.[423]

g. "Buy America" Requirements

Buy America requirements apply to federal-aid projects.[424] This regulation requires that a state's specifications require the use of domestic steel and iron products, and also requires that all manufacturing of these products have occurred in the United States.[425] A state may obtain a waiver of this requirement from the FHWA Regional Administrator if the state can show that the product is not produced in the United States in sufficient and reasonably available quantities that are of a satisfactory quality. The requirement for Buy America is not affected by the United States' participation in international trade agreements such as the World Trade Organization Government Procurement Agreement or the North American Free Trade Agreement, as Congress noted an exception for this requirement in its approval of these agreements.[426]

3. Examples of Required State Clauses

Many states' public works or transportation construction statutes set out required clauses for inclusion in construction contracts, such as clauses for termination for convenience, liquidated damages, DSCs, suspension of work, and dispute resolution.[427] Some of these are the same as or very similar to the required federal clauses. A few of these typical state clauses are examined here, along with some newer and more unusual requirements such as value engineering clauses.

a. Liquidated damages

Liquidated damages clauses are generally favored by the courts. They save the time and expense of litigating the issue of damages by fixing in advance the amount to be paid in the event of a breach. Liquidated damages clauses serve a particularly useful function "when damages are uncertain in nature or amount or are unmeasurable."[428] An example of this type of damages might be costs to "public convenience" or losses suffered by the traveling public where traffic patterns are interrupted beyond the time called for in the contract.

The test for the validity of a liquidated damages clause is whether it fairly compensates the party benefiting from it for actual damages, or whether it constitutes a penalty. A clause that results in a penalty will not be enforced. Liquidated damages may be used as a disincentive for late completion; however, they must fairly relate to the actual loss suffered by the agency.[429] The challenger has the burden of proving that a liquidated damages clause creates an unenforceable penalty.[430] If the liquidated damages clause is stricken as a penalty, actual damages may still be awarded.[431]

A liquidated damages clause need not be specially tailored to a particular contract.[432] The clause will be enforced as long as the amount is not disproportionate to the loss, so as to prove that compensation was not the object, but rather that a penalty was intended.

An example of a liquidated damages clause that was found to be unenforceable as a penalty is in *Kingston Constructors v. Washington Metro Area Transportation Authority*.[433] In that case, the Washington Metropolitan Area Transportation Authority (WMATA) was replacing transformers that contained PCB, a hazardous substance whose use is now prohibited. The contract included a liquidated damages clause charging $1,000 per day to the contractor for late completion. WMATA had included this amount as a contingency against possible penalties that could have been imposed by the Environmental Protection Agency (EPA), even though WMATA knew that EPA did not plan to assess any penalties. The court found this to be a penalty.[434]

However, an agency may be obligated in a consent decree with EPA or another regulatory agency to see that particular work is completed, and may choose or be required by its public bidding statutes to do that work by contract. If the consent decree includes a penalty for late completion of the work to be assessed by EPA

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[423] 23 C.F.R. § 633.210 (1999).

[424] 23 C.F.R. § 635.410. This program must be distinguished from "Buy American," which applies to federal direct procurements. 41 U.S.C. 10a-10c.

[425] 23 C.F.R. § 635.410(b)(1); *see also* FHWA's Web page for a summary of Buy America requirements at http://wwwcf.fhwa.dot.gov/programadmin/contracts/b-amquck.htm.

[426] *See* FHWA's Web site, "Quick facts about 'Buy America' requirements for Federal-aid highway construction," at http://wwcf.fhwa.dot.gov/programadmin/contracts/b-amquck.htm and http://www.fhwa.dot.gov/programadmin/contracts/corIIB; *see also* C.F. Corr and K. Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y. L. SCH. J. INT'L & COMP. LAW at 303 (1999), for a discussion of how the Buy American requirements applicable to direct federal procurement apply in light of international trade agreements.

[427] *See e.g.*, D.C. CODE § 2-305.07 (2002); HAW. REV. STAT. § 103D.501 (1999).

[428] DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1133 (Fed. Cir. 1996) (quoting Priebe & Sons v. United States, 332 U.S. 407, 411, 68 S. Ct. 123, 92 L. Ed. 2d 32 (1947)).

[429] State of Ala. Highway Dep't v. Milton Constr. Co., 586 So. 2d 872, 874 (1991).

[430] DJ Mfg., *supra* note 428, at 1134.

[431] *See* Kingston Constructors v. Washington Metro. Area Transit Auth. (WMATA), 930 F. Supp. 651, 656 (D.D.C. 1996).

[432] DJ Mfg., *supra*, at 1133.

[433] 930 F. Supp. 651 (D.D.C. 1996).

[434] *Id*. at 656.

against the agency, then it would appear to be reasonable to include that amount in the contract between the agency and the contractor as liquidated damages. The amount will be fixed in the consent decree and is certainly a liquidated amount from the agency's standpoint. Even though it is intended to be a "penalty" from EPA's standpoint, it would appear to be an item of damage from the transportation agency's standpoint in that the agency only has to pay the penalty if the contractor is late in completing the work. Thus the result in *WMATA* should not preclude an agency from passing along such stipulated penalties to a contractor as liquidated damages.

b. Dispute Resolution

A disputes resolution clause generally establishes one or more procedures for resolving disputes. These may include disputes review boards, typically composed of engineers or architects; mediation; arbitration, both mandatory and nonmandatory; and litigation. The clause will generally set time limits for each type of dispute resolution to be invoked, and the manner in which it is invoked. It will also establish what individual or group of individuals has jurisdiction at each particular stage of a dispute.[435] In the absence of such a clause, a party cannot be compelled to arbitrate or to utilize other alternative dispute resolution methods.[436]

Parties may be held to have waived the right to compel arbitration by initiating litigation. A "no waiver" provision in the arbitration or dispute resolution clause will preserve the right to utilize arbitration where litigation is initiated to obtain interim relief, such as attachment or injunction.[437] But protracted litigation of an arbitrable dispute will waive the parties' right to compel arbitration.

The authority to enter into binding arbitration pursuant to a disputes resolution clause will be implied in the agency's authority to contract. It need not be set out expressly in statute as it will be "necessarily or fairly implied."[438]

c. Value Engineering / Life Cycle Costs

Hawaii's public works statute requires the inclusion of a value engineering clause in contracts over $250,000.[439] The clause is required to provide:

> (1) That cost reduction proposals submitted by contractors:
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> (A) Must require, in order to be applied to the contract, a change order thereto; and
>
> (B) Must result in savings to the State or county, as the case may be, by providing less costly items than those specified in the contract without impairing any of their essential functions and characteristics such as service life, reliability, substitutability, economy of operation, ease of maintenance, and necessary standardized features; and
>
> (2) That accepted cost reduction proposals shall result in an equitable adjustment of the contract price so that the contractor will share a portion of the realized cost reduction.[440]

d. Audit Rights

Illinois' public procurement statutes require that all contracts include the requirements for the contractor's recordkeeping that will facilitate audit of the contractor's books and records. Further, it requires the following:

> Every contract and subcontract shall provide that all books and records required to be maintained under subsection (a) shall be available for review and audit by the Auditor General and the purchasing agency. Every contract and subcontract shall require the contractor and subcontractor, as applicable, to cooperate fully with any audit.[441]

e. Use of State Products

State statutes may require the use of products produced in a particular location, similar to the Federal "Buy America" requirements. These statutes have been subject to the same constitutional challenges as state preference statutes. For example, the Pennsylvania Steel Products Procurement Act requires that any Pennsylvania public works construction contract require the use of steel that is produced in the United States.[442] The statute was challenged as being preempted by international trade agreements as well as by federal law, and as being violative of the Commerce Clause.[443] The federal court held that the statute was valid because the State of Pennsylvania was acting as a market participant rather than as a regulator, and that the statute was not preempted.[444]

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[435] *See* Washington Metro. Area Transit Auth. v. Buchart-Horn, Inc., 886 F.2d 733, 735 (4th Cir. 1989).

[436] AJM Packaging Corp. v. Crossland Constr. Co., 962 S.W.2d 906, 911 (Mo. App. 1998). An exception will be if a statute required arbitration of claims within a certain dollar limit.

[437] S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 85 (2d Cir. 1998).

[438] Carteret County v. United Contractors of Kinston, Inc., 120 N.C. App. 336, 462 S.E.2d 816, 820 (1995).

[439] HAW. REV. STAT. § 103D-409 (1999).

[440] *Id*.

[441] ILL. COMP. STAT. 30 500/20-65 (b) (1999).

[442] 73 P.S. §§ 1881-1887.

[443] Trojan Technologies, Inc. v. Commw. of Pennsylvania, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212, 111 S. Ct. 2814 (1991).

[444] *Id*. at 910 (citing White Mass. Council of Constrs. Employees, Inc., 460 U.S. 204 at 210, 103 § 1042, 75 L. Ed. 2d (1983).

State legislation has occasionally imposed limitations on the preparation of bids that raise questions regarding unconstitutional interference with Interstate commerce. Early consideration of state laws requiring contractors to give preference to local construction material usually took the view that such laws were discriminatory against material produced outside the state, and therefore a restraint of trade. The New York Court of Appeals explained this view:

> It is a regulation of commerce between the states which the legislature had no power to make. The citizens of other states have the right to resort to the markets of this state for the sale of their products, whether it be cut stone, or any other article which is the subject of commerce…Under the Constitution of the United States, business or commercial transactions cannot be hampered or circumscribed by state boundary lines, and that is the effect of the statute in question….[445]

The cases that have raised this issue have presented a wide range of situations, and factual differences have distinguished permissible preferences from prohibited practices. Arizona's law relating to award of public works contracts illustrates a type of preference that has been upheld. With respect to contractors, it provides:

> [B]ids of contractors who have not been found unsatisfactorily in prior public contracts, and who have paid state and county taxes within the state of Arizona for not less than two successive years immediately prior to the making of said bid…shall be deemed a better bid than the bid of a competing contractor who has not paid such taxes, whenever the bid of the competing contractor is less than five (5) per cent lower, and the contractor making such bid, as herein provided, to be deemed the better bid, shall be awarded the contract…. Ariz Stets. § 56-109, A.C.A. 1939.

The constitutionality of this act was upheld in *Schrey v. Allison Steel Manufacturing Co.*,[446] with the Arizona Supreme Court speaking as follows:

> All discrimination or inequality is not forbidden. Certain privileges may be granted some and denied others under some circumstances, if they be granted or denied upon the same terms, and if there exists a reasonable basis therefor…The principle involved is not that legislation may not impose special burdens or grant special privileges not imposed on or granted to others; it is that no law may do so without good reason…[A] statute may be allowed to operate unequally between classes if it operates uniformly upon all members of a class, provided the classification is founded upon reason and is not whimsical, capricious, or arbitrary.[447]

States are allowed to regulate public construction contracts so as to protect or promote legitimate public interests, provided constitutional standards of reasonableness and equal treatment are satisfied. In the *Schrey* case, the question of unreasonable burdens on Interstate commerce appeared to be secondary to the question of whether the state law could be reconciled with constitutional requirements that public contracts must be awarded to the lowest responsible bidder.

4. Required Use of Exclusive Sources and "or Equal" Clauses

The contracting agency may also designate certain materials, products, or processes by standard brand names. Such designation is feasible where the items are obtainable on the open market and have been standardized by commercial use. In these cases, however, specifications must be drafted carefully because of the competitive aspects of patented or proprietary products and processes.

The agency must exercise care to assure that clear reference points are provided in the description of materials and workmanship. Then project specifications are not weakened by authorizing a measure of discretion by the contractor in selection of materials and performance of construction. This generally is done by use of the term "or equal" when describing quality or specifying materials or methods. It may also be done by stating "or other methods satisfactory to the Engineer," or "…commercial grades shown on the plans…and acceptable to the Engineer." Such terms introduce elements of discretion or negotiation into the standards of performance. However, they are controlled by the context of the language and the nature of the tasks involved.

The "or equal" clause may be phrased in terms of a "substantial equivalent." One court has held this term to mean a product that is equal in value in essential and material requirements. For competitive bidding purposes, equivalency is determined by whether the item bid is both functionally and qualitatively equal or identical to the specific product in the specification to which the equivalency standard applies.[448] Such a specification is often used when a description of the technical construction of the component is not available. The practice is in effect a "shorthand" method of describing the type of product desired rather than spelling out the engineering specifications of the product.[449]

The principles of fair competition are subjected to further tension where contracting agencies specify in their bid invitations that the work must be performed with certain designated materials or processes. Where specifications require use of materials or processes that are patented or otherwise obtainable only from exclusive sources, it is arguable that monopolistic control over one element of the contract's specifications could easily lead to bid rigging.

Early state court decisions generally aligned with the "Wisconsin view" or the "Michigan view" of this question. The difference in these two approaches was explained thus:

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[445] People ex rel. Treat v. Coler, 166 N.Y. 144, 150, 59 N.E. 776, 777 (1901).

[446] 75 Ariz. 282, 255 P.2d 604 (1953).

[447] *Id*., 255 P.2d at 606 (citation omitted).

[448] State ex. rel. Polaroid Corp. v. Denihan, 34 Ohio App. 3d 204, 517 N.E.2d 1021, 1026 (1986).

[449] Edward M. Crough, Inc. v. Department of General Services of D.C., 572 A.2d 457, 461 (D.C. App. 1990).

> The keystone of the argument in support of the Wisconsin line of cases is that where the statute requires competitive bidding, after advertising, as a condition precedent to the power of the municipality to contract for street improvement, the statute is violated when the…contract specifications require the use of a patented or monopolized article, because there can be no real competition when the bidding is practically restricted to the individual or corporation controlling the patent; on the other hand, the fundamental reason supporting the Michigan line of cases is that, even where the statute requires competitive bidding, it…does not apply, when all the competition is allowed which the situation permits; that a municipality should not be denied the right, for the benefit of its citizens, to avail itself of useful inventions and discoveries, even though protected by patents; and that when a city exercising its power to make the public improvements in good faith decides to contract for the use of patented articles, there is created no monopoly and no abatement in competition beyond what necessarily results from the rights and privileges given the patentee by the federal government….[450]

In highway construction, contracts for paving and procurement of paving supplies have furnished a large proportion of the examples of patent and monopoly problems. The period 1920 to 1960 was one of noteworthy progress in this aspect of engineering; numerous patentable improvements were developed, and highway agencies naturally sought to obtain the benefits of their use. The weight of authority gradually swung to a position of approving the specification of patented or exclusive source items or their equal, provided there is no intent thereby to restrict the competition among bidders.[451] In addition, practical safeguards against hardships in preparing bids often are provided by the contracting agency through advance agreements with owners of patented products or exclusive sources to allow their use by all bidders on equal terms. The question of whether contractors' offers of materials are equal has been the subject of much litigation.

a. Warranty of Commercial Availability

This is an important consideration, as by including a brand name product or component in its specifications, the agency warrants the commercial availability of that product or component.[452] This warranty does not, however, relieve the contractor of the usual risks of nonperformance that result from the contractor's relationship with its subcontractors and suppliers, or the willingness of the supplier to provide the product within the time period specified by the contract.[453] The agency warrants only that the sole source supplier will provide the product.

The warranty of commercial availability, in which the government warrants the commercial availability of brand name components, and the limits of the warranty, were discussed in *Edward M. Crough, Inc. v. Department of General Services of District of Columbia*.[454] That case involved a specification for a particular type of roofing material, for which there were only two known suppliers and only one local supplier. In addition to requiring the particular roofing material, the District required a 5-year guarantee. Therefore, there was not a realistic option for the contractor to deal with anyone other than the one local supplier. The specification was thus considered to be a sole source specification. Initially, the supplier agreed to supply the product, but would not provide the 5-year guarantee because it believed that the roof design was inadequate. The District then agreed to redesign the roof to accommodate the supplier's concerns, and the supplier agreed to provide the guarantee.

The contractor attempted to argue that the warranty of commercial availability had been breached. However, where there was one supplier willing to meet the terms of the specification—providing the required material and the 5-year guarantee—commercial unavailability was not shown.[455]

The court contrasted this contractor's situation with the facts of *Aerodex, Inc. v. United States*, in which the contract called for a particular brand name component "or approved substantial equal."[456] The contractor found that the sole supplier of the required part refused to sell the part to the contractor or to make its specifications available to the contractor so that they could be fabricated elsewhere. There was no way to obtain either the brand name or a "substantial equal." In that case, the court found that the government had the obligation either to ascertain the availability of the component, or to provide specifications so that the component could be duplicated by the bidder or other suppliers.

b. Challenging Sole Source Specifications

A party challenging the award of a contract who did not submit a bid will be found to have standing if it can prove that it would have submitted a bid but for the sole source specification, that its equipment was equivalent to that specified in the bid specifications, and that the restrictions of the sole source specification undermined the integrity of the competitive bidding process.[457] A sole source specification may be found invalid and contrary to public bidding requirements if it

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[450] Dillingham v. Mayor, et al., of City of Spartanburg, 75 S.C. 549, 56 S.E. 381, 384 (1907).

[451] Hoffman v. City of Muscatine, 212 Iowa 867, 232 N.W. 430 (1931).

[452] Edward M. Crough, Inc. v. Department of General Services of D.C., 572 A.2d 457 (D.C. App. 1990).

[453] *Id*. at 463.

[454] 572 A.2d 457 (D.C. App. 1990).

[455] *Id.* at 461–62.

[456] 189 Ct. Cl. 344, 417 F.2d 1361 (1969).

[457] Unisys Corp. v. Department of Labor, 220 Conn. 689, 600 A.2d 1018, 1022–23 (1991).

can be shown that comparable products or systems were available.[458]

Generally, an agency should be able to advertise for bids for and ultimately purchase the type of products that they desire, within the confines of public bidding requirements. Public bidding laws do not require that specifications be so general in description that every supplier of a product can bid on the contract, thereby denying the agency of the type and quality of goods or services that it is accustomed to. Specifications are not illegal merely because they may be met only by one vendor. They may, however be objectionable if they are drawn to the advantage of only one manufacturer, not for satisfying the public interest but to ensure award to that particular vendor.[459]

Specifications cannot be so precise as to knowingly exclude all but one prospective bidder.[460] If the agency should reasonably know that only one bidder can satisfy its specifications, then the agency should seek bids for a brand name or the equivalent of that product.[461] The "or equal" or "or equivalent" clause may serve to eliminate a challenge to specifications that the specification is proprietary or that the agency is seeking a sole source without adequate justification.

Where the choice of materials in a contract is not for a particular brand name but rather for a particular type of material over another, the agency is given greater latitude to choose the type of material that it wishes to be used in its project. Thus, there was no valid claim for an equal protection violation by a gravel supplier challenging bid specifications that called for the use of crushed stone rather than crushed gravel.[462] The Vermont DOT had rewritten its standard specifications to require the use of crushed stone rather than gravel where crushed stone was available, finding that crushed stone provided a stronger road base.[463] There was no evidence in the case that the State's exercise of choice between competing products as a consumer denied the supplier equal protection. There was no allegation in that case that there was only one available supplier of crushed stone, and there was not an argument that the specification called out a particular brand or supplier.

The agency has broad discretion to draft terms for a contract, and courts will not substitute their judgment for that of the agency in the absence of fraud or bad faith.[464] This is particularly so where the agency shows that the particular provision calling for a specific product is reasonably required in order to meet the desired performance requirements and is free from any intent to restrict or eliminate competitive bidding. The test is whether the specification is drawn to the improper advantage of any particular member or group of the relevant industry or occupation and is not for any reason that is in the public interest, but is rather intended to ensure the award of the contract to that particular member or group.[465]

Whether the use of sole source specifications is allowed at all depends on state law. New Jersey has a statute that specifically prohibits the use of a particular manufacturer's brand in bid documents.[466] The purpose of the statute is to maintain the policies underlying competitive bidding, which is guarding against favoritism and corruption.[467] Each agency must determine whether its own state contracting statutes allow the use of brand names and "or equal" clauses.

c. Warranty of Specifications

Where an agency specifies a particular brand name product in its specifications, the contractor has no discretion but to use that product in order to comply with the contract. In such a situation, the brand name provision is considered a design specification that contains an implied warranty that satisfactory performance will result from adherence to the specification.[468] However, if the contract provision contains an "or equal" clause, it is not considered a proprietary or design specification, but is rather a performance specification that does not contain an implied warranty of constructibility.[469]

5. Risk Allocation through Exculpatory Clauses

Clauses in construction contracts that limit damages are considered to be in the public interest, such as those that protect the agency from claims that the agency has caused unreasonable delay.[470] A party may exculpate itself prospectively for its own conduct, whether intentional or unintentional. Exculpatory clauses contained in public contracts are subject to the general rules of contract law regarding exculpatory clauses. Clauses such as "no damages for delay" or "no pay for delay" are considered exculpatory clauses. One

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[458] In re 1985 Washington County Annual Financial Report Surcharge, 529 Pa. 81, 601, A.2d 1223, 1226–27 (1992).

[459] Unisys Corp., *supra* note 457, 600 A.2d at 1023.

[460] Utilimatic, Inc. v. Brick Township. M.U.A., 267 N.J. Super. 139, 630 A.2d 862, 865–66 (1993).

[461] *Id*. at 866.

[462] Hinesburg Sand & Gravel Co., Inc. v. State, 166 Vt. 377, 693 A.2d 1048, 1049 (1997).

[463] *Id*. at 1046–47.

[464] Construction Contractors Ass'n of Hudson Valley v. Board of Trustees, Orange Community College, 149 Misc. 440, 565 N.Y.S.2d 997, 1000 (1991); *see also* Nev. State Purchasing Div. v. George's Equipment Co., 105 Nev. 798, 783 P.2d 949, 953 (1989).

[465] Construction Contractors, *supra* note 464, at 1000.

[466] Morie Energy Management, Inc. v. Badame, 241 N.J. Super. 572, 575 A.2d 885, 887 (1990); N.J.S.A. 40A:11-13(d).

[467] *Id*. at 888.

[468] Florida Board of Regents v. Mycon Corp., 651 So. 2d 149, 153 (Fla. App. 1995). Note, however, that the specification may be challenged as proprietary if it does not allow "or equal."

[469] *Id*. at 153–54.

[470] Calumet Constr. Corp. v. Metropolitan Sanitary Dist. of Greater Chicago, 163 Ill. Dec. 255, 581 N.E.2d 206, 209–10, 222 Ill. App. 3d 374 (Ill. App. 1 Dist. 1991), *appeal denied*, 587 N.E.2d 1012.

of the requirements for exculpatory clauses is that the clause must be conspicuous and cannot be buried in the middle of other contract language. A Texas court found that a "no damages for delay" clause was invalid because it violated the requirement that an exculpatory clause be conspicuous.[471] Whether a clause is conspicuous and meets the requirements for fair notice is a question of law. A clause is considered conspicuous if a reasonable person, against whom the clause is to operate, ought to have notice of it. The court found that a "no damages for delay" clause was inconspicuous where it was contained "in the midst of a multi-page, single-spaced contract."[472] The clause contained no heading or warning, nor was it typed in a conspicuous form such as larger or bolder typeface. Another problem with conspicuousness was found in a contract in which the exculpatory clause was printed on the back of the contract.[473]

a. No Damages for Delay

Contracting agencies may include provisions for shifting to the contractor the risk of costs caused by delay. Typically, these clauses allow only for a time extension in the event of delay. Where a no-damages-for-delay clause is enforced, the contractor will not be entitled to any damages attributable to the delay, including increased labor costs, project overhead, idle equipment, and additional bond premiums.[474]

Also, as an exculpatory clause, the clause will not be enforced against the nondrafting party if it is ambiguous. Thus, where a no-damages-for-delay clause included in a subcontract provided for "only" a time extension, it did not bar damages for delay since it was ambiguous as to whether the "only" applied to time extensions or to damages.[475]

Another court has held that another exception to the enforceability of a no-damages-for-delay clause is when the delay is caused by the "active interference" of the agency or the agency's bad faith.[476] "Active interference" is defined as something more than mere negligence, and contemplates "reprehensible behavior" beyond a simple mistake, error in judgment, lack of total effort, or lack of complete diligence. The public agency must commit some affirmative willful act, in bad faith, that unreasonably interferes with the contractor's compliance with the contract schedule.[477] Unless one of these exceptions applies, the clause will be strictly construed and enforced.[478]

The application of a no-damages-for-delay clause also may be limited if the arbitrary and capricious actions of the agency result in the delay.[479] This is particularly true where the agency declines even to grant a time extension to compensate for the delay; such a refusal may be interpreted as active interference in the contract or as bad faith.[480] The Connecticut court held in *White Oak Corp. v. Department of Transportation*[481] that while a no-damages-for-delay clause is generally enforceable and not contrary to public policy, it will not be enforced if (1) the delays were caused by the agency's bad faith or willful, malicious, or grossly negligent conduct; (2) the delay was uncontemplated at the time of contracting; (3) the delay was so unreasonable that it amounted to an abandonment of the contract and the project by the agency; and (4) the delay resulted from a breach of a fundamental obligation by the agency.[482]

Other states' courts have found the clause to cover both anticipated and unanticipated delays.[483] All appear to agree on the other three exceptions. A Maryland court in *State Highway Administration v. Griener Engineering Sciences, Inc.* considered the differences between these two lines of decisions, and found that the Maryland clause did apply to delays not contemplated by the parties at the time of contracting.[484] The court analyzed the "New York" line of cases, which follow *Corrino Civetta Construction Corp. v. City of New York*.[485] This case sets out the exceptions noted in the *White Oak* case above, including delays uncontemplated

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[471] Argee Corp. v. Solis, 932 S.W.2d 39, 61 (Tex. App. 1995).

[472] *Id*. at 61.

[473] Advance Elevator Co. v. Four State Supply Co., 572 N.W.2d 186, 188–89 (Iowa App. 1997).

[474] White Oak Corp. v. Department of Transp., 217 Conn. 281, 585 A.2d 1199, 1202–03 (1991).

[475] Ragan Enters. v. L & B Constr. Co., 221 Ga. App. 543, 472 S.E.2d 88, 89–90 (1996).

[476] Edwin J. Dobson, Jr., Inc. v. State, 218 N.J. Super. 123, 526 A.2d 1150 (1987).

[477] *Id*. at 526, A.2d at 1153.

[478] United States for Use of Wallace v. Flintco, Inc., 143 F.3d 955, 964 (5th Cir. 1998).

[479] Findlen v. Winchendon Housing Auth., 28 Mass. App. Ct. 977, 553 N.E.2d 554, 555 (1990).

[480] Miss. Transp. Comm'n v. SCI, Inc., 717 So. 2d 332, 339 (Miss. 1998).

[481] 217 Conn. 281, 585 A.2d 1199 (1991); *see also* United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 167 (2d Cir. 1996); Miss. Transp. Comm'n v. SCI, Inc., 717 So. 2d 332, 338 (Miss. 1998).

[482] White Oak Corp. v. Department of Transp., 217 Conn. 281, 585 A.2d 1199, 1203 (1991); *see also* Jensen Constr. Co. v. Dallas County, 920 S.W.2d 761, 770 (Tex. App. 1996); United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 167 (2d Cir. 1996); Miss. Transp. Comm'n v. SCI, Inc., 717 So. 2d 332, 338 (Miss. 1998).

[483] *Compare* State Highway Admin. v Griener Eng'g Sciences, Inc., 321 Md. 164, 577 A.2d 363, 370 (1990) (applies whether particular delay contemplated by parties or not) *with* Department of Transp. v. Arapaho Constr., Inc., 257 Ga. 269, 357 S.E.2d 593, 594 (1987) (applies only to those types of delay contemplated by the parties).

[484] Greiner Eng'g, *supra* note 483, 577 A.2d at 368–71.

[485] 67 N.Y.2d 297, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986).

by the parties at the time of contracting. The New York court in *Corrino Civetta* based its conclusion on the concept of mutual assent, that a party could not be held to have bargained away a right to assert a claim resulting from delay that the parties did not contemplate.[486]

The court then considered the "literal" approach, under which all delays are covered by the no-damages-for-delay clause, whether they were contemplated by the parties or not. Relying on a Wisconsin case, *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*, 147 Wrs. 2d 298, 432 N.W.2d 584 (1988) the court concluded that parties can mutually assent to such a clause without contemplating in particularity all potential causes of delay. The clause is included because parties realize that some delays cannot be contemplated.[487] Indeed, one could argue that if a delay was contemplated it could be worked into the project schedule and a cost attached to it in the bid.

Other states have enforced similar clauses. A North Carolina court found a no-damages-for-delay clause to be valid and enforceable.[488] The clause was unambiguous and provided that no contract provision would be construed as entitling the contractor to compensation for delays.[489] A Georgia court found in *Holloway Construction Co. v. Department of Transportation* that the contract did not contain an implied warranty for the department to sequence the work of prime contractors, and that a no-damages-for-delay clause applied to bar claims for damages attributable to delays by other contractors.[490] In a similar case, the Georgia court held that the grading contractor could not recover damages from the State resulting from the delay attributable to the bridge contractor's performance.[491] The contract expressed the mutual intent that the State would not assume vicarious liability for delay caused by another contractor, and that a contractor's sole remedy in the event of delay was an extension of time.[492] An agency may be found to have waived the benefits of a no-damages-for-delay clause by agreeing to pay delay claims of the prime contractor, and thereby subject itself to the delay claims of subcontractors.[493]

i. Effect of Suspension of Work Clause.—A suspension of work clause generally allows some compensation to the contractor where the work has been delayed. Where the contract incorporates the federally-required suspension of work clause, however, this does not necessarily operate to negate or to prohibit a no-damages-for-delay clause. The federal clause specifically provides that no equitable adjustment will be made for delays if they are excluded under any other provision of the contract.[494]

ii. Delay For Environmental Testing.—Where an agency knows that construction is occurring in an area that is or likely is contaminated and where environmental testing may need to be done to determine the method of disposal of excavated material, it may include a special provision addressing the potential for delay for testing. For example, the WSDOT has included such a provision for construction located in the vicinity of the Commencement Bay Nearshore/Tideflats site, which is an EPA-listed hazardous site. WSDOT's contract included work for environmental cleanup, and provided that delays of up to 60 days could occur while the agency waited for test results in order to determine how to handle certain materials. In using such a clause, the agency should take into account the reasonable time needed to accomplish sampling, receipt of results, and determination of how to proceed in light of the results. The agency should be able to document the time needed for the delay.

ii. Prohibition Of No-Pay-for-Delay Clauses.—States may prohibit the use of no-pay-for-delay clauses by statute. For example, Oregon forbids the use of such a clause in a statute that states that such a waiver is against public policy:

> Any clause in a public contract for a public improvement that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the public contracting agency or persons acting therefor, is against public policy and is void and unenforceable.[495]

b. Termination for Convenience

A provision in a highway construction contract allowing the state to terminate under certain specified conditions, such as for public convenience, with payment to be made only for work actually completed at the time of termination, is considered an exculpatory clause. As such, it is required to meet the requirements for such clauses.[496]

Ordinarily, a contract is considered to be irrevocable unless it contains terms allowing the parties to termi-

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[486] Greiner, *supra* note 483, 577 A.2d at 368–69.

[487] *Id*. at 370.

[488] APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508, 516, *review denied*, 438 S.E.2d 197 (1993).

[489] *Id.*

[490] 218 Ga. App. 243, 461 S.E.2d 257, 260 (1995).

[491] Department of Transp. v. Fru-Con Constr. Corp., 207 Ga. App. 180, 427 S.E.2d 513 (1993).

[492] *Id*. at 514.

[493] Findlen v. Winchendon Housing Auth., 28 Mass. App. Ct. 977, 553 N.E.2d 554, 556 (1990).

[494] 23 C.F.R. § 635.109(a)(2) (1999); Calumet Constr. Corp. v. Metropolitan Sanitary Dist. of Greater Chicago, 222 Ill. App. 3d 374, 581 N.E.2d 206, 209, 163 Ill. Dec. 255 (1991).

[495] OR. STAT. 279.063 (1) (1999).

[496] Department of Transp. v. Arapaho Constr., Inc., 180 Ga. App. 341, 349 S.E.2d 196, 198 (1981) *aff'd*, 257 Ga. 269, 357 S.E.2d 593 (1987).

nate the contract.[497] Clauses such as those allowing for termination for convenience must be explicitly set out in a contract between two private parties, and in the absence of such a clause the contract is presumed to be irrevocable.[498]

However, the doctrine of termination for convenience is an exception to the common-law requirement of mutuality of contract; the government is permitted to terminate the contract without being found to have breached the contract, if doing so is in the public interest. The United States Supreme Court has held that absent some contractual, statutory, or constitutional provision to the contrary, the government is entitled to terminate a contractor for any reason.[499]

This is easier to accomplish both in terms of authority and determination of compensation if the agency includes in its specifications a provision for termination of the contract for public convenience. In addition to setting out the fact that the contract may be terminated for public convenience, the clause should also establish how the contractor is to be compensated in the event of such a termination. Examples of such clauses may be found in the standard specifications of state transportation agencies and in the federal standard specifications.

A standard termination for convenience clause provides the agency with broad rights to terminate the contract whenever the agency deems termination to be in the public interest.[500] Further, it limits the contractor's recovery to costs incurred as a result of the termination, payment for completed work, and costs of preparing the termination settlement proposal.[501] The contractor is not entitled to anticipatory profits as damages for breach of contract unless the agency acted in bad faith or abused its discretion.[502] In terminating the contract for convenience, the government limits its potential liability to the contractor to the value of the work completed at the time of the termination. The terminated contractor is entitled to its quantum merit performance under the contract, but not to its anticipated profits for work not yet performed.[503] The major impact of a termination for convenience clause is that it relieves the agency from the obligation of paying the contractor's anticipated profits for unperformed work.[504]

In *Department of Transportation v. Arapaho Construction, Inc.*, the court found that a termination clause was an exculpatory clause, and was unenforceable where the contract failed to incorporate any language explicitly referencing the clause's application to breach of contract cases.[505] Rather, the termination clause referred only to injunctions, and did not cover the agency's failure to provide required rights-of-way. Thus, the contractor was entitled to its lost profits.

A termination clause allowing the agency to terminate the contract in the event conditions arose that could prevent the contractor from proceeding with or completing the work was not considered to be the equivalent to the common law doctrine of impossibility of performance in *W.C. English, Inc. v. Commonwealth, Department of Transportation*.[506] Rather, the court held that the department properly terminated the contract under that clause when the contractor's cost overruns depleted the funds available to complete the project.

An ambiguity in a termination clause will ordinarily be construed against the drafter.[507] Thus where a contract contained two clauses, one a general termination for convenience clause and one a more specific clause that stated that the contract would be terminated only for failure to perform, inadequate performance, or lack of funding, the more specific clause controlled.[508]

c. Shortened Claim Filing Periods

Washington State has a statute pertaining to state highway construction that requires that any claims against the department arising out of a construction contract be filed in state court within 180 days of final acceptance of the contract by the state.[509] This provision is also included in the state's standard specifications.[510] A court reviewing the validity of the standard specification found that the provision was not unenforceable on the grounds that it was unreasonable.[511] Rather, the court found that legislative appropriations, budgetary constraints, federal funding concerns, the state's volume of public works contracts, and the overall highway

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[497] Ham Marine, Inc. v. Dresser Indus., 72 F.3d 454, 460 (5th Cir. 1995).

[498] *Id*.

[499] Board of County Comm'rs, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668, 673–74, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996).

[500] A.J. Temple Marble & Tile, Inc. v. Long Island R.R., 172 Misc. 2d 422, 659 N.Y.S.2d 412, 414 (1997).

[501] *Id.*

[502] *Id*. at 414–15; *see also* Century Marine, Inc. v. United States, 153 F.3d 225 (5th Cir. 1998).

[503] Hancock Electronics Corp. v. Washington Metro. Area Transit Auth., 81 F.3d 451 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 299.

[504] D.C. v. Organization for Envtl. Growth, Inc., 700 A.2d 185, 199–200 (D.C. App. 1997).

[505] 180 Ga. App. 341, 349 S.E.2d 196, 198–99, *aff'd*, 357 S.E.2d 593 (1987).

[506] 14 Va. App. 951, 420 S.E.2d 252, 254–55 (1992).

[507] Commonwealth of Pa. DOT v. Brozzetti, 684 A.2d 658, 665 n.14 (Pa. Commw. 1996).

[508] *Id*.

[509] WASH. REV. STAT. §47.28.120 (2002).

[510] WASHINGTON, STANDARD SPECIFICATIONS FOR ROAD, BRIDGE, AND MUNICIPAL CONSTRUCTION, § 1-09.11(3) (2000).

[511] Yakima Asphalt Paving Co. v. Wash. State Dep't of Transp., 45 Wash. App. 663, 726 P.2d 1021, 1024 (1986).

funding scheme made the shorter limitation period reasonable.[512]

6. Other Requirements

a. Subcontractor Listing Requirements

Unless a statute or the bid specifications require listing of subcontractors, none will be required.[513] However, some states have enacted statutes that require bidders to list in their bids the subcontractors that they will contract with for the work if they are awarded the contract. An example is California's Subletting and Subcontracting Fair Practices Act. The purpose of the statute has been set out within the act as follows:

> 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.[514]

A case interpreting a similar statute describes "bid shopping" as the bidder's use of a low subcontract bid already received to pressure potential subcontractors into submitting lower bids.[515] "Bid peddling" is an attempt by a subcontractor to undercut a known bid that has already been submitted to the bidder on the prime contract.[516] Proof of actual bid shopping is not necessary to show a violation of a subcontractor listing requirement.[517] However, where bid shopping is shown, it will be considered to have prevented formation of the subcontract.[518]

The California statute requires that when a bidder on a street, highway, or bridge contract intends to subcontract to a particular subcontractor an amount "in excess of one-half of 1 percent of the prime contractor's total bid or…in excess of ten thousand dollars ($10,000), whichever is greater," then the bidder must list the name and place of business of that subcontractor.[519] It also requires that the agency must include the requirement for subcontractor listing either in its bid specifications or in its general conditions or standard specifications.[520]

New Mexico has a similar statute, the Subcontractors Fair Practices Act, modeled after the California statute.[521] It has the notable difference, however, of exempting highway construction work from its scope.[522] A case interpreting this statute is still instructive to the interpretation of similar statutes. In *Romero Excavation & Trucking, Inc. v. Bradley Construction*, a case that involved construction at a state university, the contractor was found to have violated the Act when it substituted itself for a subcontractor listed in its bid.[523] The subcontractor listing statute required that the bidder list only one subcontractor per category of work. If none was listed, then the bidder was required to perform that category of work itself. The statute essentially required the bidder to commit when it submitted its bid to either using a specified subcontractor to do a category of work or to doing that work itself.

The statute provided for circumstances when a substitution of a listed subcontractor was allowed; however, none applied in this case. The court concluded that even though the statute was directed at preventing substitution of another subcontractor, that allowing the prime contractor to substitute itself for a listed subcontractor was contrary to the purpose of the Act and was a violation.[524]

Similarly, a prime contractor in California was not allowed to substitute a subcontractor listed for one category of work for a subcontractor listed for another category of work. The bid did not divide that category of work between two subcontractors, and therefore the only listed subcontractor for that category was entitled to the subcontract.[525]

The California statute confers a right on the listed subcontractor that it will be awarded the subcontract, even though no subcontract exists at the time of bidding.[526] Unless statutory grounds for substitution are met, the prime contractor has no right to substitute another subcontractor for the one listed. The subcontractor's right to the subcontract may be enforced in an action against the prime contractor to recover the benefit of its bargain.[527] California's statute also provides for substantial penalties in the event that a violation is found. The awarding authority may, in its discretion, cancel the contract or assess a penalty against the contractor in an amount not exceeding 10 percent of the

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[512] *Id*.

[513] *See* Williams Bros. Constr. v. Public Building Comm'n of Kane County, 243 Ill. App. 3d 949, 612 N.E.2d 890, 895, 184 Ill. Dec. 14 (1993), *appeal denied*, 152 Ill. 2d 582, 622 N.E.2d 1229, 190 Ill. Dec. 912 (1993) (Illinois Public Building Commission Act did not require subcontractor listing); Pittman Constr. Co. v. Parish of East Baton Rouge, 493 So. 2d 178, 181 (1986), *writ denied*, 493 So. 2d 1206 (La. App. 1 Cir. 1986).

[514] CAL. PUB. CONT. CODE § 4101 (2002).

[515] Romero Excavation & Trucking, Inc. v. Bradley Constr., 121 N.M. 471, 913 P.2d 659, 662 (1996).

[516] *Id*. at 662; *see also* R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea, 69 Cal. App. 4th 416, 81 Cal. Rptr. 2d 615, 617 (1999).

[517] Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725, 731–32 and n.12 (1998).

[518] Pavel Enterprises, Inc. v. A.S. Johnson Co., 342 Md. 143, 674 A.2d 521, 531 (Md. App. 1996).

[519] CAL. PUB. CONT. CODE § 4104(a)(1) (2002).

[520] CAL. PUB. CONT. CODE § 4104 (2002).

[521] N.M.S.A. § 13-4-31 *et seq*. (1999).

[522] N.M.S.A. § 13-4-35 (1999).

[523] 121 N.M. 471, 913 P.2d 659 (1996).

[524] *Id.* at 663.

[525] R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea, 69 Cal. App. 4th 416, 81 Cal. Rptr. 2d 615 (1999).

[526] *Id*. at 618.

[527] *Id*.; CAL. PUB. CONT. CODE § 4103 (2001).

subcontract.[528] In addition, a violation may be grounds for discipline by the state contractors' licensing board.[529]

A federal district court has interpreted the Nevada subcontractor listing requirement as creating "pseudo-contractual" obligations on the part of the prime contractor, even though the subcontractor and prime contractor have no contract with each other at bid opening.[530] However, the statute makes them bound to one another in such a way as they may "disengage" only on specific statutory grounds. Under the statute, the subcontractor may obtain damages from the prime contractor for wrongful substitution.[531] It may also be entitled to injunctive relief against the prime contractor and the awarding agency, if it meets the standard for an injunction by showing that damages are insufficient relief. The subcontractor may meet this requirement by demonstrating that by not getting the subcontract, it will lose an opportunity to gain experience and enhance its reputation in the community. Damages cannot compensate for this loss.[532]

Where a statutory subcontractor listing requirement exists, it will be enforced even if not included in the bid specifications. A city was not estopped from enforcing the subcontractor listing requirement even though the bid package did not mention it, and even though the specifications referred to an American Institute of Architects provision requiring the identification of subcontractors following the contract award.[533]

b. Incorporation of Statutory Requirements

Any applicable statutory requirements in place at the time of contracting will be implied, even if not fully set out in the contract. The law existing at the time and place of the contract execution is part of the contract; this applies to public contracts as well as private.[534]

Statutory requirements may take the form of requiring a specific clause be included in a public contract, or may simply create an obligation for the contractor to comply with a particular legal requirement. Where valid regulations require the inclusion of a specific clause in a public contract, it will be deemed incorporated by operation of law even if it is omitted from the written contract.[535] This is true only where the required clause is consistent with the governing statute under which the contract is entered into; an inconsistent clause will not be incorporated by operation of law.[536]

c. Implied Terms and Warranties

All construction contracts have an implied warranty that they will be performed in a workmanlike manner.[537] However, where the contract contains an express provision setting out the degree of competence required for the work, such an implied warranty is considered redundant, and the warranty will not be implied.[538]

Like all contracts, public contracts contain an implied warranty of good faith and fair dealing.[539] The covenant is implied by law and "'obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.'"[540]

d. Contracts Must Be in Writing

Because most transportation construction contracts are large transactions whose performance will span more than a year's time, an oral contract would likely violate the statute of frauds. Also, each agency's authority to contract is limited by the statutory language granting that authority. State and local agencies are creatures of statute, and have only those powers that the legislature grants to them. Generally, they do not have authority to make oral contracts. In addition, where a bid was lacking the bidder's signature, acceptance of that bid and making it part of a contract would have violated the statute of frauds.[541]

In *Scheckel v. Jackson County, Iowa*, the bidder and an assistant county engineer had a telephone conversation in which the assistant engineer informed the bidder that it was the low bidder and would get the award.[542] Ultimately, that bidder did not receive the award. The court held that the conversation between the assistant engineer and the bidder did not give rise to a contract. Under the statute, the contract required approval of the county board of supervisors, and neither the county engineer nor the assistant had authority to make an oral contract that would bind the county.[543]

Where there is a legal requirement that the contract be in writing and that it be approved by a particular

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[528] CAL. PUB. CONT. CODE § 4110 (2002).

[529] CAL. PUB. CONT. CODE § 4111 (2001).

[530] Clark Pacific v. Krump, Constr., Inc., 942 F. Supp. 1324 (D. Nev. 1996).

[531] *Id*. at 1346.

[532] *Id*.

[533] Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J. Super. 421, 704 A.2d 1301, 1304–05 (1997).

[534] City of North Charleston v. North Charleston Dist., 289 S.C. 438, 346 S.E.2d 712, 715 (1986).

[535] United States v. Bills, 822 F.2d 373, 377 (3d Cir. 1987).

[536] *Id*.

[537] Korte Constr. Co. v. Deaconess Manor Assoc., 927 S.W.2d 395, 404 (Mo. App. 1996).

[538] *Id*. at 404.

[539] A.C. Shaw Constr., Inc. v. Washoe County, 105 Nev. 913, 784 P.2d 9 (1989).

[540] Record Steel & Constr., Inc. v. Martel Constr., 129 Idaho 288, 923 P.2d 995, 999 (Idaho App. 1996) (quoting Badgett v. Security State Bank, 116 Wash. 2d 563, 569, 807 P.2d 356, 360 (1991)).

[541] A.A.B. Electr., Inc. v. Stevenson Public Sch. Dist., 5 Wash. App. 887, 491 P.2d 684, 686–7 (1971).

[542] 467 N.W.2d 286, 288 (Iowa App. 1991).

[543] *Id*. at 289.

individual or body, that requirement will be strictly enforced. In *Davis, Murphy, Niemiec and Smith v. McNett*, the court found that a county code section that provided that only county commissioners could enter into contracts for the county and required that the contracts be in writing was intended to prevent fraud against the county, and thus strict compliance was required.[544]

Modifications to the contract also must be in writing, and courts will strictly enforce prohibitions on oral modifications.[545] Likewise, any efforts to extend a contract by oral agreement will be found to not be binding on the agency.[546]

An exception to this requirement is found in *PacOrd, Inc. v. United States*.[547] In that case, the court found that the subcontractor was entitled to maintain an action against the United States in the absence of a written contract, because it was able to establish the existence of an implied-in-fact contract beyond the mere oral contract.

However, a North Dakota court did enforce an oral contract between a prime contractor and its subcontractor. In *Triton Corp. v. Hardrives, Inc.*, the street repair contractor who was interested in bidding on a city contract could not do so as it could not get a performance bond required by the city.[548] It then entered into an oral agreement with another company that could qualify for the performance bond. Its arrangement was that the street repair contractor would prepare the bid, and the second company would obtain the performance bond and submit the bid to the city. In return, the second company would be paid 10 percent of the contract price. This company was awarded the contract, but then decided that because the street repair company could not get a bond, that it would subcontract the work to someone else. The street repair company sued to recover its lost profits. The court found that a valid oral contract existed between the two contractors, and awarded the lost profits.[549]

Authority to contract must be express; apparent authority cannot serve as a means of holding a governmental entity to a contract.[550] A contractor relying on an individual's statement has no claim of entitlement to a contract. Further, the contractor has no claim of having been deprived of due process, as a legitimate claim of entitlement to the contract is necessary to establish a property interest.[551]

e. Specifications are Not Rules

In *Alabama Department of Transportation v. Blue Ridge Sand & Gravel*, the aggrieved bidder challenged the department's standard specifications as "rules" that should have been adopted pursuant to the state Administrative Procedure Act.[552] The court found legislative intent to support its conclusion that the standard specifications were not "agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law or policy."[553] Each standard specification was found to be a term that may be incorporated into a contract between the department and another party. Competitive bidding laws in Alabama allow a prospective bidder to challenge the inclusion of a specification; this is inconsistent with the specifications being rules.

Similarly, a Florida court held in *Department of Transportation v. Blackhawk Quarry Co. of Florida* that the department's standard specifications for road and bridge construction were not rules and did not need to be promulgated under the state Administrative Procedure Act.[554] Rather, the standard specifications set out standards for acceptance of materials, and were contract terms between the department and the agency.

Likewise, another court has held that the instructions to bidders included in the bid documents were not agency rules.[555] The court noted that the legislature had directed the agency in its statute to develop "policy and procedure guidelines" for contract documents. This was found to be different from the situations in which agencies adopt "policies" that are in effect rules. The legislature used the specific terms "policy" and "guideline" where it could have used "rule."

The Florida court in the *Blackhawk Quarry* case did, however, find that the standard operating procedure adopted by the DOT for evaluating, approving, and controlling mineral aggregate sources was an administrative rule that had to be duly adopted under the Administrative Procedure Act. The operating procedure was an "agency statement of general applicability that implements, interprets or prescribes laws or policy."[556] Where such a policy is adopted as a rule, the agency has broad discretion in drafting and the rule will be upheld unless arbitrary and capricious.[557] Where administrative standards are adopted by the agency to govern construction projects and do not conflict with

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[544] 665 A.2d 1322, 1325 (Pa. Commw. 1995), *appeal denied*, 543 Pa. 718, 672 A.2d 310 (1996).

[545] Greater Johnstown School Dist. v. Frontier Ins. Co., 252 A.D. 2d 617, 675 N.Y.S.2d 212, 215 (1998).

[546] Alco Parking Corp. v. Public Parking Auth. of Pittsburgh, 706 A.2d 343, 348 (Pa. Super. 1998) (oral agreement to renew contract not binding on board where all contracts were required to be in writing and signed by the chairman).

[547] 139 F.3d 1320, 1323 (9th Cir. 1998) (applying Federal Acquisition Regulations, 48 C.F.R. § 2.101).

[548] 85 F.3d 343 (8th Cir. 1996).

[549] *Id*. at 346.

[550] Hutchison v. City of Huntington, 479 S.E.2d 649, 664 n.20 (W. Va. 1996).

[551] *Id*. at 664–5

[552] 718 So. 2d 27, 29–31 (Ala. 1998).

[553] *Id*. (quoting ALA. ADMIN. CODE, ch. 450-1-1 *et seq*.).

[554] 528 So. 2d 447, 450 (Fla. App. 1988), *review denied*, 536 So. 2d 243.

[555] Cleveland Constr., Inc. v. Ohio Dep't of Admin. Services, 121 Ohio App. 3d 372, 700 N.E.2d 54, 68 (Ohio App. 1997).

[556] Blackhawk Quarry, *supra* note 554, at 450.

[557] Dravo Basic Materials Co. v. State, Dep't of Transp., 602 So. 2d 632 (Fla. App. 1992).

statutes, they will be considered to have the force of law.[558]

Cases from two states—Oklahoma and Oregon—note that the transportation agency's standard specifications in those states are actually adopted as agency rules.[559]

f. On-Call Contracts

In *Faulk v. Twiggs County*, the agency awarded a competitively bid contract to a contractor for on-call paving work.[560] Although the contract was indefinite as to the ultimate quantity, it contained a unit item bid price for the paving. The agency wanted to be able to pave in designated areas as funds to pay for the work became available, without letting a new contract each time. The court held that it was sufficient if the key for determination of the sum to be paid—the unit price—and the service to be rendered were contained in the contract.[561]

g. Express Warranties

An express warranty in a public contract to perform in a workmanlike and reasonable manner was not disclaimed so as to not to operate during construction and performance testing merely because the warranty period extended beyond acceptance for a period of 1 year.[562]

h. Agency May Not Contract Away Essential Governmental Powers

An agency may not contract away any of the essential powers of government, including the police power, the power of eminent domain, and the power to tax.[563] Any contract provision that purports to do so will be considered void and unenforceable.[564]

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[558] Hoar v. Aetna Casualty and Surety Co., 968 P.2d 1219, 1221 (Okla. 1998).

[559] Anderson's Erosion Control, Inc. v. Oregon, ex rel Dep't of Transp., 141 Ore. App. 221, 917 P.2d 537 (Ore. App. 1996); Hoar v. Aetna Casualty and Surety Co., 968 P.2d 1219, 1221 (Okla. 1998).

[560] 269 Ga. 809, 504 S.E.2d 668, 670 (Ga. 1998).

[561] *Id*.

[562] Hennes Erecting Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 813 F.2d 1074, 1081 (10th Cir. 1987).

[563] State Street Bank & Trust Co. v. Commw of Pa., Treasury Dep't, 712 A.2d 811, 813 (Pa. Commw. 1998).

[564] State ex rel. Devonshire v. Superior Court, 70 Wash. 2d 630, 424 P.2d 913, 917–18 (1967) (city could not contract away power of eminent domain or bind itself to a restricted exercise thereof).