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On the Cover

SL Green As the largest and most successful real estate investment trust operating in New York City, SL Green has worked to reshape the Big Apple with a number of high-profile developments, including 1551 Broadway and 1515 Broadway in Times Square and 29 West 34th Street, some of which were completed under extremely trying conditions. The company says it is proud that it had the opportunity to leave its mark on one of the world's greatest cities with innovative and visually striking buildings.

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WINNING THE BID

Public projects mean jumping through more hoops. BY MATTHEW WEINSTEIN AND R. DAVID WALKER

With the launching of the Public/Private Investment Program (PPIP) as part of the federal government's stimulus plan, the proliferation of such public/private partnerships, and the need to plug financing holes with public funds on projects that in the past were exclusively privately funded, has created many new pitfalls for the unwary developer/owner.

One of the more unique aspects of publicly funded projects – whether in whole or in part – is the selection of contractors. In the private realm, an owner/developer has considerable flexibility as to whom they wish to hire as a contractor. The public sector has more stringent and codified rules.

For example, with few exceptions, multi-part bidding is not required in the private sector (though many private parties elect to pursue such an avenue). In addition, absent a strong public relations necessity to the contrary, paying prevailing wage, complying with Davis-Bacon Wage Determination Act requirements, minority business and women business enterprise requirements, and various "Buy American" and other purchasing restrictions would not – in most cases – be programs that are voluntarily followed by private contractors.

However, the rules change when public dollars are involved, causing the owner/developer to incur extra costs and jump through additional hoops to ensure that dedicated funds and grants are not revoked due to the breach of a governmental requirement.

Being the Lowest Responsible Bidder

As noted above, in many jurisdictions, one such requirement to receive public dollars is bidding of contracts to multiple parties. Upon receipt of the bids from those multiple parties, the owner/developer is obligated to select the "lowest responsible bidder" for the work. But what exactly does "lowest responsible bidder" mean? The key here is not the fact that the contractor was the lowest bidder, but that the contractor was the lowest responsible bidder. How responsible is defined is a critical issue.

The Public Contract Code section 2001 provides a helpful definition of a responsible bidder. A "responsible bidder" is one "who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity and experience to satisfactorily perform the public works contract." What should – or rather, may – an owner/developer look for when evaluating the lowest responsible bid? The following are some questions that should be answered to the owner/developer's satisfaction when assessing the lowest responsible bidder:

- Has the contractor performed a project of this type or magnitude in the past? For example, assume a contractor has performed cement pouring work in the past, so as a result, they bid on a cityscaping

project. A cityscape may include landscaping, lighting installation, signage and façade work. The fact that the contractor may be exceptional at large-scale concrete jobs does not necessarily mean that they could handle the other work, thereby disqualifying them as a responsible bidder.

- Is the contractor licensed?
- Is the contractor debarred from bidding on or performing public works projects?
- Are the contractor's bonds legally adequate? Has the contractor had any issues obtaining payment and/or performance bonds? Are the bonds they plan to procure from a reputable bonding agency?
- Are the bids fully responsive? Simply being responsive does not mean that the bid is responsible. However, if the bid is not responsive, that may provide a clue as to whether the contractor is responsible. For example, if a job provides for a certain paint type and brand and the contractor bids a similar, less expensive brand, that may be responsive but not responsible. Bidding alternative specs that may have artificially lowered the price of the contract and made the contractor the lowest bidder does not make the bid responsible.

Federal and State Authority

The Federal Acquisition Regulations provide additional considerations for assessing the responsibility of prospective contractors. In order to obtain an award of a federal contract, a prospective contractor must, among other requirements, have adequate financial resources to perform the contract; be able to comply with the required or proposed delivery or performance schedule; have a satisfactory performance record; have a satisfactory record of integrity and business ethics; have the necessary organization, experience, accounting

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and operational controls, and technical skills or the ability to obtain them; have the necessary production, construction, and technical equipment and facilities or the ability to obtain them; and be otherwise qualified and eligible to receive an award under the applicable laws and regulations.

As noted above, contracts involving public funds at the state level are commonly subject to lowest responsible bidder requirements, as well. Many jurisdictions have adopted procurement statutes and regulations that require adequacy considerations similar to those imposed at the federal level. The New York State Finance Law, for example, requires that all prospective bidders for state contracts be subject to a responsibility determination, which involves an analysis of each

bidder's "financial ability, legal capacity, integrity and past performance." In Texas, state agencies are statutorily required to make procurements based on the best value for the state. Although the purchase price of a vendor's goods or services is the most important consideration, agencies also are directed to consider the vendor's past performance, financial resources and ability to perform, the vendor's experience or demonstrated capability and responsibility, and the vendor's ability to provide reliable support.

In other states, the lowest responsible bidder requirement has been interpreted similarly through case law to vest state agencies with significant latitude in awarding contracts to vendors that are not the lowest bidder. Florida courts have held that a public authority has wide discretion in the procurement process, as long as such discretion is "exercised based upon clearly defined criteria, and [is not] exercised arbitrarily or capriciously." In Pennsylvania, state courts have found that a responsibility determination inherently includes considerations of a contractor's "financial responsibility ... efficiency, industry, experience, industry, experience, promptness and ability to successfully carry out the particular undertaking."

Contractor Considerations

Of course, being the lowest responsible bidder and demonstrating that fact are two separate matters. To do so, the contractor will need to not only ensure that compliance with the requirements set forth above, but also remain particularly cognizant of whether their bid is responsive and accurate.

For example, if the contractor determines that the specs in the request for proposals cannot be correct, they must contact the owner/developer and confirm that the specs are correct. If the contractor still believes the specs are incorrect or that the specs required are deficient, the contractor must specifically state the deficiency and why it is deficient.

Drawing Conclusions

In all events, the reasons for the requirement of responsible bidding must be kept in mind. Where public funds are involved, the grantee has a fiduciary duty to the public to spend those funds wisely and appropriately. This means not only that the funds are spent most economically, but that they are also spent efficiently. For example, the use of cheap

Chinese drywall may have been the most sensible material economically, but cheap certainly does not equate with best – and definitely does not equate to litigation-free work.

The more efficient approach would have been to look at the quality of the drywall and purchase the most durable product.

Most important to the contractor and the owner/developer is that both parties ensure that where public funds are involved, each party use extra caution in ensuring that all requirements are met, including the selection of the lowest responsible bidder. ♦

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