Competitive Bidding—Public Construction Contracts in the State of Washington

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COMMENT

COMPETITIVE BIDDING—PUBLIC CONSTRUCTION
CONTRACTS IN THE STATE OF WASHINGTON

The expanding demand for a multitude of public facilities, such as highways, schools, and sewers, brought about by continually increasing urban population, has created a growing potentiality for legal difficulty in the area of competitive bidding for public construction contracts. This comment will offer a brief exposure to the problems encountered under present Washington practice. The formalities of the bidding process and the bidder's attempted withdrawal will be discussed. Primary emphasis will be given to the challenge of an award of a contract. To date, the courts have been reluctant to interfere with an award without a clear showing of fraud or abuse of discretion.¹ Presently, there are indications that the "hands off" attitude of the courts is being subjected to question from within as well as from outside the judiciary. The broad scope of review apparently afforded by the Washington Administrative Procedure Act,² combined with an inclination on the part of some courts to afford more effective relief to the disappointed bidder, promises a probable increase in litigation.

In Washington, bidding procedures are controlled by a number of statutes. These have been set out in the appendix for the convenience of the reader. For the most part these statutes are unrelated in scope or content.³ The lack of uniformity in statutory pattern and the countless variations in administrative practice make any generalization dangerous. However, a brief statement of the general pattern is set out in the footnotes.⁴

² RCW 34.04.
³ See the text of the pertinent statutes set out in the appendix.
⁴ The determination of whether competitive bidding is required is generally made on the basis of the dollar value of the work. When competitive bidding is required the state must publish, for a specified time, a "call" for bids. Interested contractors may acquire proposal forms and file their bids with the proper authorities. "Prequalification" may be required in some instances. The bid must comply with the requirements of the statute and the advertisement in order to qualify for consideration. Each bid must be accompanied by a bond, certified check or deposit to guarantee that the bidder, if successful, will execute the formal contract. In the call for bids, an opening date is set at which time the bids will be publicly opened and read. It is generally understood that a bidder may withdraw his bid up to the time of opening.
FORMALITIES OF THE BIDDING PROCESS

In order to create a valid contract, the state and the contractor must follow certain prescribed procedures. The initial step in the letting of a contract is the determination of whether competitive bidding is required. Once this question is answered in the affirmative, the applicable statute must be consulted to determine the steps to follow.

It appears to be settled law throughout the country that if a factual situation requires competitive bidding, failure to meet that requirement voids any resulting contract. In some situations the contractor who has performed under such an invalid contract may recover the reasonable value of work completed. Where the requirement of competitive bidding depends upon the dollar value of the work exceeding a specified amount, an interesting question may arise concerning the authority of the state to breakdown a particular job into smaller units for the purpose of avoiding the bidding requirement. When the obvious purpose of the break down is to avoid the statute, the courts have generally held the resulting contract invalid. Where it appears

A withdrawal after that point raises considerable uncertainty and forfeiture of the accompanying bond or check may result.

Generally no contract is awarded immediately after opening, nor is the apparent low bidder assured of receiving the award. Rather the state reserves the right to consider the bids and to notify the successful bidder at a later date. If no bid meets the approval of the state, or if all bids are over the engineer's estimate it is generally recognized that the state may reject all bids and re-advertise.

In determining the successful bidder the state may consider factors other than the dollar amount of the bid submitted. The general statutory scheme contemplates discretion in the official to accept the bid that will be most beneficial to the public. Once the successful bidder is notified and gives a performance bond, then the formal contract will be executed. If he declines to enter the formal contract, it may be awarded to another bidder or a new call may be made.

Any discussion of problems under the various bidding procedures is made exceedingly difficult by the existence of a multitude of rules and regulations promulgated by the various administrative agencies. The attorney confronted by a problem in the area should first consult the particular agency to ascertain whether it has ruled on the question. If there is a ruling the problem then becomes one of the extent of the agency's authority. DAVIS, ADMINISTRATIVE LAW ch. 5 (1958). Because of the number of agencies and the variation in the extent and substance of their rulings, it is impossible to include a discussion of their impact within the confines of this comment. Discussion will therefore be limited to regulations of the Washington State Highway Commission.

10 McQUILLIN, op. cit. supra note 1, § 29.30. See also Hilliard v. Seattle, 63 Wn.2d 401, 387 P.2d 536 (1963), Hailey v. King County, 21 Wn.2d 53, 149 P.2d 823 (1944). The court has shown its intent to construe the requirement of the statutes with regard to the legislative purpose in calling for competitive bidding and with a policy against limiting the reach of such statutes. Reiter v. Chapman, 177 Wash. 392, 105 P.2d 1005 (1934). However, where not required by the legislature, competitive bidding will not be required by the courts. Dalton v. Clarke, 18 Wn.2d 322, 139 P.2d 291 (1943). See also 10 McQUILLIN, op. cit. supra note 1, § 29.41.

O'Connor v. Murray, 152 Wash. 519, 278 Pac. 176 (1929), Besoloff v. Whatcom County, 140 Wash. 280, 248 Pac. 381 (1926).


Id. at 499.
that the official has acted in good faith, his action is generally upheld.\textsuperscript{9} No Washington case has expressly considered the point. Practically speaking, the question is unlikely to arise in Washington because the great majority of contracts involve a higher amount than the low figures set by the statutes.\textsuperscript{10}

Where competitive bidding is required, the state must comply with the formal procedures set out in the applicable statute.\textsuperscript{11} Failure to do so will also result in a void contract.\textsuperscript{12} Where the statute requires that notice or a call for bids be posted for a prescribed period, this requirement must be met.\textsuperscript{13} Where competitive bidding is required, it must be competitive in fact. The state may not so word its advertisement so as to restrict competition.\textsuperscript{14} Thus, an advertisement phrased so that only one contractor could comply with the specifications would not meet the requirement of competitive bidding. However, the Washington court has held that the state may specify a patented article in an advertisement for bids.\textsuperscript{15} Such a position seems contrary to the policies of competitive bidding in that only one product can meet the specifications, but it is thought to be the better rule by at least one eminent writer.\textsuperscript{16}

Assuming that the state meets the requirements of the statute, the contractor must submit a bid which is responsive to the advertisement before the state will consider it.\textsuperscript{17} Generally the state will waive any minor irregularities, particularly where the other bidders consent.\textsuperscript{18} Practically speaking, any irregularity may cause the state to refuse to consider the bid and even if the refusal is wrongful, there is little the contractor can do to obtain effective relief.\textsuperscript{19}

The ability of the state to accept a bid which is not responsive to the advertisement raises a somewhat different question. It is often stated that where a variance is material the state cannot legally award the contract.\textsuperscript{20} An immaterial variance may validly be waived by the

\textsuperscript{9} Ibid. See also 10 McQuillin, \textit{op. cit. supra} note 1, § 29.33 and cases cited.
\textsuperscript{10} See appendix.
\textsuperscript{11} 10 McQuillin, \textit{op. cit. supra} note 1, § 29.41.
\textsuperscript{12} Ibid.
\textsuperscript{13} Reiner v. Clark County, 137 Wash. 194, 241 Pac. 973 (1926), Wyant v. Independent Asphalt Co., 118 Wash. 345, 203 Pac. 961 (1922).
\textsuperscript{14} 10 McQuillin, \textit{op. cit. supra} note 1, § 29.44.
\textsuperscript{15} Smith v. Seattle, 192 Wash. 64, 72 P.2d 588 (1937).
\textsuperscript{16} Ibid.
\textsuperscript{17} Shields v. Seattle, 79 Wash. 308, 140 Pac. 353 (1914). See also Annot., 65 A.L.R. 835 (1930).
\textsuperscript{18} Seattle Const. & Dry Dock Co. v. Newell, 81 Wash. 144, 142 Pac. 481 (1914).
\textsuperscript{19} Application of Glen Truck Sales & Service Inc., 31 Misc.2d 1027, 220 N.Y.S.2d
state. The test for determining the materiality of a variance is generally stated in terms of whether the bidder's proposal gives him "an advantage or benefit which is not enjoyed by other bidders." Such a test raises difficult questions of fact which must be resolved case by case. However, the problem is not one which lends itself to any other method of analysis, and it is likely the cases will continue to turn on close factual questions with considerable deference given the administrative discretion. The Washington court has not expressly considered the point.

Withdrawn Offers

It is generally recognized in the setting of private negotiation, that a bid is simply an offer to enter into a contract. Unless consideration is found for a promise by the contractor to hold the offer open he is free to withdraw until his offer is accepted. This elementary contract principle causes considerable conceptual difficulty when placed in a public contract setting.

Due to procedures followed in Washington and in other states, there is considerable delay between the submission of bids and the execution of a formal contract. In most instances the state makes no binding acceptance until the execution. Thus, it would seem that the bidder would be free to withdraw until the binding acceptance. In order to dissuade the successful bidder from withdrawal, which would cause delay and expense to the state, the Washington statutes require each bid to be accompanied by a deposit, certified check or bid bond. This requirement does not make the bid irrevocable but merely causes forfeiture if the attempted withdrawal takes place too late in the bidding process. The difficulty arises in attempting to determine the point in time at which the bidder may no longer withdraw without forfeiture. In order to protect the state effectively, the contractor's power to revoke without forfeiture should be terminated at some time prior to a


23 See appendix.

binding acceptance by the state. The present Washington system does not seem to offer this protection.

REQUIREMENT OF DEPOSIT OR CERTIFIED CHECK. Where the state seeks to retain a cash deposit or certified check upon the successful bidder's withdrawal the significant factor seems to be whether the bid has been accepted prior to the withdrawal. An early Washington case allowed a successful bidder to withdraw without forfeiture of a certified check accompanying his bid on grounds that the bid had not yet been accepted and thus there could be no "mutuality."²³

Where there is a reservation on the part of a municipality to reject any and all bids, there can be no mutuality until the bid is accepted, and until it is accepted, the proposer is under no obligation to keep it good, but may withdraw it.²⁷

Thus the threat of forfeiture is ineffective until acceptance. Other Washington authority has upheld the forfeiture of a certified check where the withdrawal followed the state's acceptance.²⁸

The only difficulty left by these cases is a bothersome failure of the court to clearly outline whether the acceptance it speaks of must contractually bind the state. May the acceptance the court refers to be the notification given to the bidder that his bid is the apparent low bid and is accepted? As stated earlier, this acceptance does not generally bind the state. However, some courts have allowed the state to keep the deposit without analyzing the effect of the acceptance.²⁹ Others have found consideration for an implied promise not to withdraw in the state's consent to give the bid fair and impartial attention.³⁰ Thus, the contractor cannot be certain of the effect of his attempted withdrawal. A further difficulty is raised by the use of the certified check in that there is considerable authority which would allow the drawer to stop payment on such a check.³¹ At present, Washington bankers will honor a stop payment although there is no Washington case which supports their view.

²³ See appendix.
²⁶ Seattle Const. & Dry Dock Co. v. Newell, 81 Wash. 144, 142 Pac. 481 (1914).
²⁷ Id. at 146, 142 Pac. at 483.
²⁹ 1 CORBIN, CONTRACTS § 47 (1963). Other fact questions can arise. Where does acceptance occur? At opening? Is notification to the bidder a prerequisite? When is notification effective?
COMPETITIVE BIDDING

Requirement of a Bid Bond. Many of the problems discussed above are alleviated where a bid bond is required in lieu of a deposit or certified check. The bid bond obligates a surety, generally a bonding company, to pay a stated amount should the contractor fail to enter into a formal contract after being declared the successful bidder. When a bonding company is involved there is no need to consider whether or not there is consideration for the bidder's implied promise not to withdraw. The promise is that of the bonding company for which consideration is given by the bidder. In a sense the state is the third party beneficiary of a contract between the contractor and the bonding company. In any case the fact of whether or not the state has become contractually bound prior to the attempted withdrawal is immaterial to the question of the liability of the bonding company. The liability of the bonding company depends entirely upon the scope of its promise. The general understanding appears to be that the company's obligation becomes operative at the opening of the bid. It can be argued that the obligation does not arise until the bid has been accepted, in the sense of notifying the successful bidder, and runs until the formal contract is executed. Such an argument has not been precluded and would seem to have some logical support.

Suggested Solution to the Withdrawn Offer Problem. Of the various methods used throughout the country to clarify the withdrawn offer problem the most effective is legislation stating bids shall be irrevocable at some point in the bidding process. The most logical point in time to withdraw the power to revoke seems to be the opening

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32 Most of the Washington statutes are worded in the alternative and would allow either a bid bond or certified check to accompany a bid.
33 See generally the statutes set out in the appendix. Also note the surety bond form in Wash. State Highway Comm'n, op. cit. supra note 24, § 79 (1963), the text of which is set out in footnote 36 infra.
34 Keyes, supra note 30, at 458; Contra, Peerless Casualty Co. v. Housing Authority, 228 F.2d 377 (5th Cir. 1955), noted, 36 Neb. L. Rev. 618 (1957).
35 Keyes, supra note 30, at 458.
36 With regard to such an argument, it is interesting to note that the "Proposal Bond" required by the Washington State Highway Commission is at best somewhat vague in its language.

Now, Therefore, If the said proposal bid by said principal be accepted, and the contract be awarded to said principal, and if said principal shall duly make and enter into and execute said contract and shall furnish bond as required by that State Highway Commission within a period of twenty (20) days from and after said award, exclusive of the day of such award, then this obligation shall be null and void, otherwise it shall remain and be in full force and effect. (Emphasis added.)

Wash. State Highway Comm'n, op. cit. supra note 24, § 79. See also §§ 2.06, 2.08, 3.01, 3.02 and 3.07.
37 See Keyes, supra note 30.
since it gives adequate protection to the state without unduly discouraging prospective bidders. Such a law would preclude any question of lack of consideration for a promise to keep the bid open as the legislature's power to do away with this element of a contract is beyond question. The Washington statutes contain no such pronouncement and as a result the contractor cannot effectively predict the effect of his withdrawal.

MISTAKE. The contractor who can show evidence of a material mistake in his bid is generally allowed to withdraw the bid, without forfeiting bond, where the mistake is known to the state within a reasonable time after opening. In the Puget Sound Painters case the contractor erroneously omitted one-half of the work to be done in computing his bid. In an action to enjoin the forfeiture of the bid bond, the contractor, having given notice to the state prior to the acceptance of its bid, was allowed relief. The court stated:

We are convinced that the opinion in the Donaldson case establishes the principle or policy in this jurisdiction: that equity will relieve against forfeiture of a bid bond, (a) if the bidder acted in good faith, and (b) without gross negligence, (c) if he was reasonably prompt in giving notice of the error in the bid to the other party, (d) if the other party's status has not greatly changed, and relief from forfeiture will work no substantial hardship on him.

Thus the Washington court's abhorrence of forfeiture affords the mistaken bidder an excellent opportunity to withdraw without detriment.

This privileged withdrawal for mistake raises another problem. If a bidder withdraws his bid on grounds of mistake, the state is left with three alternatives. It may allow the mistaken bidder to modify the bid and re-enter it, awarding the contract if the bid is low. It may award the contract to the second low bidder; or it may reject all bids and re-advertise. The first alternative is rarely followed unless the mistake is minor and other bidders consent. The contractors' associations generally favor the second alternative as it does not allow the negligent contractor to ultimately benefit from his mistake. The third alternative is apparently favored by the state for the reason that the

41 Id. at 823, 278 P.2d at 304.
public is expected to benefit in a second call for bids. If the first or third alternative is chosen, the mistaken bidder may use to his advantage the information derived at the public opening. At the second call, with knowledge of the amount of other bids, he may place his bid so as to receive the award at the highest possible figure. A bid figure honestly reached will be unlikely to change to any substantial degree at the second call as a contractor in theory bids as low as he thinks he may to obtain the award at the first call. Thus, much of the risk of the competitive nature of the bidding process can be removed by the mistaken bidder with a little ingenuity. In some cases one might wonder whether the mistake was intentional. The awarding of the contract to the second low bidder would seem to be a workable solution where that bid is not in excess of the engineer's estimate and is otherwise acceptable to the state.

**Award of the Contract to the Higher Bidder**

Often the contractor that receives the award will not be the lowest bidder. The lowest bid will be passed by for that of another on the grounds that the other bidder has some quality which, in terms of public interest, makes him the better candidate. When such a situation occurs the disappointed low bidder is understandably upset. In some cases he may suspect that the state's motives in granting the award to his competitor were not altogether altruistic. His remedies seem clear at this point. However, one soon discovers a number of imposing obstacles in the path of effective judicial relief. These obstacles will provide the basis for the discussion that follows.

**Limits of Discretion, Scope of Review.** The first question that must be answered is whether the state has the power to award a contract to other than the low bidder. The most common statement concerning the award of the contract found in the Washington statutes is couched in terms of "lowest responsible bidder." This legislative directive authorizes, in fact requires, the administrative body to exercise discretion in awarding the contract to the bidder who offers in the opinion of the officials, the best rather than the lowest bid. In

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42 These statements are the opinion of the writer based on discussions with various contractors and officials.

43 See appendix.

44 "The bidder who is most likely, in regard to skill, ability and integrity, to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit..." is the most responsible bidder. 10 McQuillin, *op. cit. supra* note 1, § 29.73.
determining the best bid, the state may, and perhaps must, consider a multitude of factors other than the dollar amount of the bid.\textsuperscript{45} Even where the statutory language specifically requires that the award be made to the lowest bidder, there is discretion left to the state.\textsuperscript{46}

Modernly, there can be little doubt of the discretion to award to other than the low bidder under the proper circumstances.\textsuperscript{47} An attempt to define the limits of that discretion or to determine what constitutes an abuse quickly runs into heavy going. The primary stumbling block to predictability is the unwillingness of the courts to interfere with the determination of the administrative body. The legislature has vested in the agency the authority to exercise its discretion to determine the bid most advantageous to the public. In making the determination the agency may call upon a wealth of knowledge and experience which is unavailable to the court. The weighing of the many technical factors which can come into play in determining the relative qualifications of contractors is thought best left to the expertise of the agency.

This court has expressed the view that courts should let administrative boards and officers work out their problems with as little judicial interference as possible. One of the primary reasons for the creation of administrative agencies is to secure the benefit of special knowledge acquired through continuous experience in difficult and complicated fields.\textsuperscript{48}

The courts often repeat the statement that they will not interfere with an administrative determination in absence of fraud or arbitrary and capricious action amounting to a clear abuse of discretion.\textsuperscript{49} Moreover, they refuse to lay down any standards by which the future exercise of discretion can be judged, feeling that this is a task for the legislature.\textsuperscript{50}

It is thus exceedingly difficult to set down any reliable definition of "lowest responsible bidder." About all that can be done is to recognize

\textsuperscript{45}For an example of some important considerations in determining who is the most responsible bidder see RCW 43.19.1911, set out in full in the appendix.
\textsuperscript{46}"The responsibility of the bidder, his experience, and his facilities for carrying out a contract, may be looked into, and an honest determination that on the whole his bid will not be, in the long run, the lowest, will be entitled to control." Time Publishing Co. v. Everett, 9 Wash. 518, 523, 37 Pac. 695, 696 (1894). See also 10 McQUILLIN, \textit{op. cit. supra} note 1, at 351.
\textsuperscript{47}10 McQUILLIN, \textit{op. cit. supra} note 1, § 29.72.
\textsuperscript{49}See cases and authorities cited note 1 \textit{supra}.
\textsuperscript{50}"A hard and fast rule cannot be applied in ascertaining what is or is not an abuse of discretion. Each case must be determined upon its own merits, taking into consideration all of the facts and circumstances present." Washington State Toll Bridge Auth. v. Yelle, 197 Wash. 110, 124, 84 P.2d 688, 694 (1938).
some of the many elements that have been considered by various courts in the past. Of course we have no assurance that these factors would be considered important in a different situation and they might, in some context, even be improper. Common elements often cited by the court as significant include quality of materials proposed, quality and quantity of equipment, ability, experience, reputation, judgment, capacity, pecuniary responsibility, past defaults, and present work load. It cannot be overemphasized that mistake or bad judgment on the part of the state are not grounds for challenging the award. The failure of the state to consider a particular element, which the disappointed bidder believes is significant, seldom leads to overturning the state's action so long as other reasonable factors are weighed.

At this juncture the effect of the Washington Administrative Procedure Act (APA) becomes significant in predicting the court's future position. Professor Cornelius J. Peck speculated in 1958 that the judicial review provisions of the new act would give less freedom to the administrative agencies than was true under the law at that time. Prior to the adoption of the statute, the court refused to substitute its judgment in areas of administrative discretion due to the strong presumption of superior experience in the agency. The review provisions of the APA appear to compel the court to subject the agency decision to a more searching scrutiny.

Only one Washington case has interpreted the review provisions of the act. The results of this interpretation are inconclusive and a bit confusing. The case involved a controversy over a proposed off-ramp

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51 "The lowest responsible bidder ... must be held to imply skill, judgment, and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." 10 McQUILLIN, op. cit. supra note 1, at 353.

52 For a considerable listing of cases on the subject see 25 Words AND PHRASES 499 (1961), Annot., 27 A.L.R.2d 917 (1956). See also RCW 43.19.1911, and Prequalification form, note 65 infra.

53 RCW 34.04.

54 Professor of Law, University of Washington.


56 RCW 34.04.130 (6) provides: "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
(a) in violation of constitutional provisions; or
(b) in excess of the statutory authority or jurisdiction of the agency; or
(c) made upon unlawful procedure; or
(d) affected by other error of law; or
(e) unsupported by material and substantial evidence in view of the entire record as submitted; or
(f) arbitrary or capricious."

to a limited access freeway. The plan contemplated would have required the condemnation of part of the plaintiff's property and would have deprived him of his access to the adjoining street. Relying on the APA, the plaintiff alleged that the findings and the order of the highway commission were "arbitrary and capricious [and] unsupported by substantial evidence." The court found the provisions of the APA applicable to the commission and held that the commission had complied with its requirements.

The difficulty of the case is the method by which the court reaches its conclusion. First the court asks:

Are the findings of fact and order of the highway commission arbitrary and capricious, or unsupported by material and substantial evidence?

The court then quotes the long standing Washington test of arbitrary and capricious action from *Miller v. Tacoma.* Applying this test the court continues:

It is sufficient to state that we find nothing to indicate that the judgment of the highway commission was not "exercised honestly and upon due consideration" of the extensive record before it. We cannot say that the action of the commission was arbitrary and capricious, or unsupported by material and substantial evidence.

The test stated and apparently applied is solely to determine if the commission acted arbitrarily and capriciously. Is the court equating the "arbitrary and capricious" test with the "substantial evidence" test? A more feasible explanation may be that the court found the plaintiff's contention was without merit and merely failed to discuss it. In any case the court has not indicated with clarity the extent to which the APA will affect the scope of review. If Professor Peck's predictions

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68 RCW 34.04.130 (6).
71 Ibid.
72 Id. at 40, 385 P.2d at 380.
73 61 Wn.2d 374, 390, 378 P.2d 464, 474 (1963). "Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and regard for facts or circumstances. Lillions v. Gibbs, 47 Wn.2d 629, 633, 289 P.2d 203 (1955). A finding of fact made without evidence in the record to support it, and an order based upon such finding, is arbitrary. State *ex rel.* Tidewater-Shaver Barge Lines v. Kuykendall, 42 Wn.2d 885, 891, 259 P.2d 838 (1953). Where there is evidence in the record, however, and '... Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. [Citing authorities.].' Smith v. Hollenbeck, 48 Wn.2d 461, 464, 294 P.2d 921 (1956)."
74 63 Wn.2d at 41, 383 P.2d at 381 (1963).
prove correct the impact upon the letting of public contracts may be substantial. Other factors influence the bidder's relief as well.

**PRACTICAL CONSIDERATIONS.** Some of the factors affecting the availability of relief to the disappointed bidder are practices of the state. Generally speaking it is the state's practice to award to the lowest bidder if any award is made. The use of "prequalification" increases the probability of this result as allegedly unqualified contractors are not allowed to bid.65

If an official wishes to favor a particular bidder he may do so prior to the award in a number of ways. An official may leak information to a favored bidder that allows him to easily underbid his competition. For example the official may let it be known that some part of the specifications will not be rigidly enforced. Or, specifications may be written so that only one bidder may successfully comply with them.66 This type of "cheating" is extremely difficult to uncover and even if suspected, problems of proof are substantial.

**RIGHT TO REJECT.** An almost plenary power to reject bids in the hands of the state makes the use of the types of "cheating" discussed above doubly effective in Washington. By exercising this discretion the corrupt official may cause the rejection of bids over and over until the favored bidder comes up a winner.

This power to reject for any reason springs from an early Washington-
ton case, *Bellingham American Publishing Co. v. Bellingham Publishing Co.* 67 The city of Bellingham advertised for bids for printing and awarded the contract to the higher bidder of two. The disappointed low bidder commenced an action to restrain the award and to compel the award to himself. The city council then rejected all bids and called for new bids. Again the plaintiff was the low bidder and again the bids were rejected. At the third call the other bidder was low by a few cents and the council awarded the contract to him. The court affirmed a dismissal of the action. Since the city reserved the right to reject any and all bids, the plaintiff had no grounds for relief.

In the call for bids, the right to reject any and all bids was reserved. Under such a call, the *question of the motive for rejection of bids is immaterial.* The fact, if it be a fact, that the rejection was arbitrary and capricious does not present a case for injunctive relief. (Emphasis added.) 68

Another statement from an earlier case typifies the court's feelings on the matter:

In the case of *Stern v. Spokane,* 60 Wash. 325, 111 Pac. 231, we upheld the right of the city council of the city of Spokane to exercise an *almost plenary power* in the matter of refusing to contract under an invitation reserving the right to reject any and all bids. (Emphasis added.) 69

This element of the present Washington scheme is particularly disturbing. The discretion of the state to reject all bids whether that right is reserved by statute, ordinance, or in the invitation for bids is almost universally recognized. 70 The question of whether the right must be exercised in good faith has received little judicial consideration. Probably the leading case holding that motive immaterial is the *Bellingham* case. 72 The rationale behind the state's need for an absolute power to reject in the public contract area is obscure. Surely the state must be held to a higher standard of conduct than the private individual and should not act arbitrarily.

The *Bellingham* case can probably be distinguished and limited to

67 145 Wash. 25, 258 Pac. 836 (1927).
68 Id. at 29, 258 Pac. at 837.
69 Seattle Const. & Dry Dock Co. v. Newell, 81 Wash. 144, 146, 142 Pac. 481, 482 (1914).
71 31 A.L.R.2d at 474.
72 145 Wash. 25, 258 Pac. 836 (1927).
such an extent that its effect is negligible. In deciding the case the Washington court relied upon Anderson v. Board of Public Schools. The latter case involved a suit for loss of profits by a contractor whose low bid was rejected in favor of a higher bid. The plaintiff's theory in the case was that the advertisement for bids constituted an offer which he had accepted by his low bid. The refusal of the state to enter the formal contract was alleged to be a breach. The court disposed of this contention by holding that the advertisement was not an offer, and then stated in dictum, that the motive of the board in rejecting the plaintiff's bid was immaterial. It was this dictum that was picked up in the Bellingham case.

The validity of the Bellingham case may first be questioned in that had the facts been on all fours with Anderson the Washington court would have refused to follow Anderson. The court had stated that it would interfere with the rejection of one bid in favor of another where the rejection was fraudulent or an abuse of discretion. Thus the Bellingham case may be limited to its facts. The motive of the state becomes immaterial only when all bids are rejected. Even such a narrow holding does not seem justifiable. There seems to be no conceivable logic in condoning the arbitrary or fraudulent action of an official. A noted authority has stated:

In exercising the power to reject any or all bids, and proceeding anew with the awarding of the contract, the officers cannot act arbitrarily or capriciously, but must observe good faith and accord to all bidders just consideration, thus avoiding favoritism, abuse of discretion, or corruption.

Several cases in other states have recognized that the right to reject must be exercised in good faith. Furthermore some indication can be found that the Washington legislature does not acquiesce in the court's position. The statutes setting up procedures for bidding on work or supplies to be provided to school districts state that "any or all bids may be rejected for good cause." The highway commission may reject all bids if in the opinion of the commission the acceptance of a bid "will not be for the best interest of the state." Other statutes

73 122 Mo. 61, 27 S.W. 610 (1894).
74 Id. at 612.
75 See text accompanying note 49 supra.
76 10 MCQUILLIN, op. cit. supra note 70, at 363.
78 RCW 28.58.135.
79 RCW 47.28.100, RCW 47.28.090.
contain similar language: "if, in the opinion of the commission, all bids are unsatisfactory, they may reject all of them . . . ." Some sections, however, still contain only flat reservations of the right to reject without any limiting language. What effect the varying language will have on the court is uncertain, but it is hoped that the Bellingham case will have little influence in future litigation.


challenge by most interested party. Probably the most influential factor in discouraging a disappointed bidder from seeking judicial relief from an alleged wrongful award is the ineffective remedy afforded him. Although it is clear that a taxpayer may challenge the illegal award of a contract, whether the most interested party, the disappointed bidder, may sue in his own right is questionable. Obtaining a taxpayer's name on the complaint does not involve an insurmountable difficulty, but the remedies available are geared to a taxpayer's suit. Washington takes what is probably the majority position in denying mandamus to compel the award to the disappointed bidder. The basis of the denial of the writ is the existence of discretion in the administrative official. The disappointed bidder cannot compel the award of the contract to himself even where the action of the state is an abuse of discretion and arbitrary. The only available procedure is to seek an injunction restraining the state from entering a contract beyond its authority. Thus, the bidder with a good cause of action can at best hope to receive the opportunity to bid again on the particular contract. After incurring substantial expense, he has no assurance that he will receive the award, nor has any Washington case allowed him to recover damages.

Litigation over an allegedly illegal award has been discouraged by the combination of factors discussed above. An absence of litigation is not, in itself, harmful. However, where it is a symptom of the sys-

80 RCW 53.08.130, RCW 56.08.070, RCW 57.08.070, RCW 70.44.140.
81 RCW 35.43.190, RCW 52.12.110, RCW 54.04.080, RCW 86.05.430.
83 Ibid.
85 See cases and authorities cited note 84 supra.
system's failure to protect individual rights, some changes are called for. Certainly it can be argued that no "right" of the disappointed bidder has been infringed in these situations. However, if the competitive nature of the bidding process is to be preserved, the party most interested in seeing that it remain uncorrupted should be given the means to do so. This party is the bidder himself. A consideration of the means leads us to a discussion of two recent federal cases.

**damages to the disappointed bidder.** The courts have long taken the position that the disappointed bidder has no cause of action against the state when the latter rejects the bidder's offer.\textsuperscript{88} Tested against general contract principles this position seems clearly correct. An individual would be quite skeptical if informed that he could subject himself to possible liability by rejecting an offer. On the other hand, where the state is a party there seem to be some compelling reasons for requiring that an offer be given fair and impartial consideration. The state should not be allowed to arbitrarily reject an offer after causing the hopeful contractor to expend large sums of money. This is the theory of the first of two federal cases.

In *Heyer Products Co. v. United States*,\textsuperscript{89} the court found a good cause of action for the recovery of preparation expenses, where the government failed to give the low bid fair and impartial consideration.\textsuperscript{90} The second case allowed an action for damages by the low bidder where the Commonwealth of Pennsylvania awarded a contract to another and in so doing maliciously interfered with the plaintiff's right to secure a contract.\textsuperscript{91} Both of these cases have received considerable interpretation and criticism by a number of legal writers and these comments will not be repeated here. Suffice it to say that the award of damages to the disappointed bidder, where there has been an abuse of discretion, seems to be a desirable result. Such a remedy does not unduly shackle the exercise of administrative discretion as it comes into practice only where there is a clear abuse of discretion or fraud. Damages provide an increased probability that the most interested party, the disappointed bidder, will seek and attain justice. Couple

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\textsuperscript{88} 10 McQuillan, *op. cit. supra* note 70, § 29.77.

\textsuperscript{89} 140 F.Supp. 409 (Ct. Cl. 1956).


this with an injunction restraining the state from entering the illegal contract, and the public is adequately protected.

The majority of courts would probably take a position contrary to that of the two cases discussed above. Nor can it be said that there appears to be any growing trend in the minority direction. However, the minority's position seems to this writer a sound one and one which the Washington court might find persuasive.

At present there is not a considerable amount of litigation in the area of competitive bidding. As the demand for public facilities continues to grow it seems inevitable that more and more of these problems will find their way to the courts. The withdrawn offer and the wrongful award of a contract are probable sources of the greatest potential difficulty. Some far sighted legislation, standardizing the various bidding procedures and clearing up the problem areas, could do much to avoid future litigation in this field.

RALPH L. HAWKINS
Appendix

Construction and Maintenance of Highways. RCW 47.28

RCW 47.28.050 Call for Bids. The Washington state highway commission shall publish a call for bids for the construction of that highway according to the maps, plans, and specifications, once a week for at least two consecutive weeks, next preceding the day set for receiving and opening the bids, in not less than one trade paper and one other paper. . . . Provided further, That when the estimated cost of a contract to be awarded is five thousand dollars or less, including the cost of materials, supplies, engineering, and equipment, the state highway commission need not publish a call for bids.

RCW 47.28.080 Withdrawal of Bids—New Bids—Time Fixed in Call Controls. Any person, firm or corporation proposing a bid for the construction or improvement of any state highway in response to a call for bids published therefor may withdraw such bid proposal without forfeiture and without prejudice to the right of such bidder to file a new bid proposal before the time fixed for the opening of such bid proposals. . . .

RCW 47.28.090 Opening of Bids and Award of Contract—Deposit. At the time and place named in the call for bids the Washington state highway commission shall publicly open and read the final figure in each of the bid proposals properly filed and read only the bid items on the three lowest bids, and shall award the contract to the lowest responsible bidder unless the commission has for good cause, continued the date of opening bids to a day certain, or rejected said bid: Provided, That any bid may be rejected if the bidder has previously defaulted in the performance of and failed to complete a written public contract, or has been convicted of a crime arising from a previous public contract. All bids shall be under sealed cover and accompanied by deposit in cash, certified check, cashier’s check, or surety bond in an amount equal to five percent of the amount of the bid and no bid shall be considered unless the deposit is enclosed therewith.

Fire Protection Districts. RCW 52

RCW 52.12.110 Contracts for Work or Purchases—Bids. Whenever the cost of any work to be done or the purchase of any materials, supplies, or equipment, will exceed the sum of one thousand dollars, the same shall be done by contract after a call for bids which shall be awarded to the lowest responsible bidder, in accordance with the terms of RCW 39.24.010. Notice of the call for bids shall be given by posting notice thereof in three public places in the district and by publication once each week for two consecutive weeks, said posting and first publication to be at least two weeks before the date fixed for opening of the bids, and such
publication to be in a newspaper of general circulation within the district. The commissioners shall have the power by resolution to reject any and all bids and make further calls for bids in the same manner as the original call. If no bid is received on the first call, the commissioners may readvertise and make a second call, or may enter into a contract without any further call.

**PORT DISTRICTS, POWERS. RCW 53.08**

RCW 53.08.120 **Contracts for Labor and Material.** All material required by port district may be procured in the open market or by contract and all work ordered may be done by contract or day labor. All such contracts shall be let at public bidding upon notice published in newspaper in the district at least ten days before the letting, calling for sealed bids upon the work, plans and specifications for which shall then be on file in the office of the commission for public inspection. The same notice may call for bids on such work or material based upon plans and specifications submitted by the bidder.

RCW 53.08.130 **Notice-Award of Contract.** The notice shall state generally the nature of the work to be done and require that bids be sealed and filed with the commission at a time specified therein. Each bid shall be accompanied by a bid proposal deposit in the form of a cashier's check, money order, or surety bid bond to the commission for a sum not less than five percent of the amount of the bid, and no bid shall be considered unless accompanied by such bid proposal deposit. At the time and place named the bids shall be publicly opened and read and the commission shall proceed to canvass the bids and may let the contract to the lowest responsible bidder upon plans and specifications on file, or to the best bidder submitting his own plans and specifications. If, in the opinion of the commission, all bids are unsatisfactory, they may reject all of them and readvertise, and in such case all such bid proposal deposits shall be returned to the bidders; but if the contract is let, then all bid proposal deposits shall be returned to the bidders, except that of the successful bidder, which shall be retained until a contract is entered into for the purchase of such materials or doing such work, and a bond given to the port district for the performance of the contract and otherwise conditioned as required by law, with sureties satisfactory to the commission. . . . If said bidder fails to enter into the contract in accordance with his bid and furnish such bond within ten days from the date at which he is notified that he is the successful bidder, the check or money order and the amount thereof shall be forfeited to the port district or the port district shall recover the amount of the surety bid bond. . . .

**PUBLIC UTILITY DISTRICTS, GENERAL PROVISIONS. RCW 54.04**

RCW 54.04.070 **Contracts for Work or Materials—Notice—Emergency Purchases.** All materials purchased and work ordered by a district commission, the estimated cost of which is in excess of five
thousand dollars, shall be by contract, except that a district commission may have its own personnel perform work utilizing material of a worth not exceeding thirty thousand dollars in value without a contract. Before awarding such a contract, the commission shall publish a notice at least thirty days before letting of the contract. . . . The commission may at the same time and as part of the same notice, invite tenders for the work or materials upon plans and specifications to be submitted by the bidders.

RCW 54.04.080 BIDS — DEPOSIT — CONTRACT — BOND. The notice shall state generally the work to be done, and shall call for proposals for doing it, to be sealed and filed with the commission on or before the time named therein. Each bid shall be accompanied by a certified or cashier's check, payable to the order of the commission, for a sum not less than five percent of the amount of the bid, or accompanied by a bid bond in an amount not less than five percent of the bid with a corporate surety licensed to do business in the state, conditioned that the bidder will pay the district as liquidated damages the amount specified in the bond unless he enters into a contract in accordance with his bid and furnishes the performance bond herein mentioned within ten days from the date on which he is notified that he is the successful bidder. At the time and place named, the bids shall be publicly opened and read, and the commission shall canvass the bids, and may let the contract to the lowest responsible bidder upon the plans and specifications on file, or to the best bidder submitting his own plans and specifications. . . . The commission may reject all bids and readvertise. . . . If the bidder fails to enter into the contract and furnish the bond within ten days from the date at which he is notified that he is the successful bidder, his check and the amount thereof shall be forfeited to the district.

SEWER DISTRICTS, POWERS. RCW 56.08

RCW 56.08.070 CONTRACTS FOR LABOR AND MATERIALS—CALL FOR BIDS—AWARD OF CONTRACT. All materials purchased and work ordered, the estimated cost of which is in excess of one thousand dollars shall be let by contract. Before awarding any such contract the board of sewer commissioners shall cause to be published in some newspaper in general circulation throughout the county where the district is located at least once, ten days before the letting of such contract, inviting sealed proposals for such work, plans and specifications which must at the time of publication of such notice be on file in the office of the board of sewer commissioners subject to public inspection. . . . Each bid shall be accompanied by a certified check payable to the order of the county treasurer for a sum not less than five percent of the amount of the bid and no bid shall be considered unless accompanied by such check. At the time and place named such bids shall be publicly opened and read and the board of sewer commissioners shall proceed to canvass the bids and may let such contract to the lowest responsible bidder upon plans and specifications; Provided, however, That no contract shall be let in excess of the cost of said materials or work, or
if in the opinion of the board of sewer commissioners all bids are unsatisfactory they may reject all of them and readvertise and in such case all checks shall be returned to the bidders.

**Water Districts, Powers. RCW 57.08**

RCW 57.08.050 Contracts for Materials and Work—Notice—Bids. The board of water commissioners shall have authority to create and fill such positions and fix salaries and bonds thereof as it may by resolution provide. All materials purchased and work ordered, the estimated cost of which is in excess of one thousand dollars shall be let by contract; but before awarding any such contract the board of water commissioners shall cause to be published in some newspaper in general circulation throughout the county where the district is located at least once ten days before the letting of such contract, inviting sealed proposals for such work, plans and specifications which must at the time of publication of such notice be on file in the office of the board of water commissioners subject to public inspection. . . . Each bid shall be accompanied by a certified check payable to the order of the county treasurer for a sum not less than five percent of the amount of the bid and no bid shall be considered unless accompanied by such check. At the time and place named such bids shall be publicly opened and read and the board of water commissioners shall proceed to canvass the bids and may let such contract to the lowest responsible bidder upon plans and specifications on file or to the best bidder submitting his own plans and specifications: Provided, however, . . . if in the opinion of the board of water commissioners all bids are unsatisfactory they may reject all of them and readvertise. . . . If said bidder fails to enter into said contract in accordance with said bid and furnish such bond within ten days from the date at which he is notified that he is the successful bidder, the said check and the amount thereof shall be forfeited to the water district: Provided further, That if in the judgment of the water commissioners such work can be performed at less cost under the district's own superintendence than by letting a contract, then the district may cause such work to be performed independent of contract and without calling for bids where the estimated cost of such work is in a sum less than five thousand dollars.

**Cities and Towns, Local Improvements, Etc. RCW 35.43**

RCW 35.43.190 Work—By Contract or by City. All local improvements, the funds for the making of which are derived in whole or in part from assessments upon property specially benefited shall be made either by the city or town itself or by contract on competitive bids. The city or town may reject any and all bids. The board, officer, or authority charged with the duty of letting contracts for local improvements shall determine whether the local improvements shall be done by contract or by the city or town itself.
PUBLIC HEALTH AND SAFETY, PUBLIC HOSPITAL DISTRICTS.

RCW 70.44

RCW 70.44.140 Contracts for Material and Work—Call for Bids. All materials purchased and work ordered, the estimated cost of which is in excess of five thousand dollars, shall be by contract. Before awarding any such contract, the commission shall cause to be published a notice at least thirty days before the letting of said contract, inviting sealed proposals for such work. . . . Provided, however, That the commission may at the same time, and as part of the same notice, invite tenders for said work or materials upon plans and specifications to be submitted by bidders. . . . Each bid shall be accompanied by a certified check, payable to the order of the commission, for a sum not less than five percent of the amount of the bid, and no bid shall be considered unless accompanied by such check. At the time and place named, such bids shall be publicly opened and read, and the commission shall proceed to canvass the bids, and may let such contract to the lowest responsible bidder upon plans and specifications on file, or to the best bidder submitting his own plans and specifications. . . .

FLOOD CONTROL DISTRICTS. RCW 86.05

RCW 86.05.430 Contracts—Public Bidding—Notice. All district contracts for construction, labor, or materials entering therein, shall be awarded at public bidding, except as herein otherwise provided. A notice calling for sealed proposals shall be published for a period of two weeks (three consecutive weekly issues) and the date of first publication shall be at least fifteen days prior to the day of opening such bids. Such proposals shall be accompanied by a certified check for the amount specified in the form of proposal, to guarantee compliance with the bid, and shall be opened in public at the time and place designated in the notice. The contract shall be awarded to the lowest and best responsible bidder: Provided, That the board shall have authority to reject any and all bids.

PUBLIC SCHOOLS AND COLLEGES, DISTRICTS. RCW 28.58

RCW 28.58.135 Directors—Advertising for Bids—Bid Procedure—Emergencies. When, in the opinion of the board of directors of any school district, the cost of any furniture, supplies, equipment, building, improvements or repairs, or other work or purchases will equal or exceed the sum of twenty-five hundred dollars, complete plans and specifications for such work or purchases shall be prepared and notice by publication given in at least one newspaper of general circulation within the district, once each week for two consecutive weeks, of the intention to receive bids therefor and that specifications and other information may be examined at the office of the board: Provided. . . . The bids shall be in writing and shall be opened and read in public on the date and in the place named in the notice and after being opened shall be filed for public inspection. The contract
for the work or purchase shall be awarded to the lowest responsible bidder as defined in RCW 43.19.1911. Any or all bids may be rejected for good cause. . . .

STATE GOVERNMENT—EXECUTIVE, DEPARTMENT OF PUBLIC INSTITUTIONS. RCW 43.19

RCW 43.19.1911 Letting Contract—Lowest Responsible Bidder, Determination—Public Inspection of Bids. When purchases are made through competitive bidding, the contract shall be let to the lowest responsible bidder. . . . In determining "lowest responsible bidder," in addition to price, the following elements shall be given consideration:

1. The ability, capacity and skill of the bidder to perform the contract or provide the service required;
2. The character, integrity, reputation, judgment, experience and efficiency of the bidder;
3. Whether the bidder can perform the contract within the time specified;
4. The quality of performance of previous contracts or services;
5. The previous and existing compliance by the bidder with law relating to the contract or services;
6. Such other information as may be secured having a bearing on the decision to award the contract.