

# MAY PARTIES NEGOTIATE PUBLIC CONSTRUCTION CONTRACTS AFTER THE AWARD?

BY TERESA G. SANTIN

**W**hat is a public entity to do if, upon awarding a contract through the public bidding process, the contractor asks to negotiate some of that contract's terms? Should it take a hard line, refuse to negotiate, and risk damaging its relationship with the contractor? Should it take the path of least resistance and agree to some or all of the contractor's requests? In so doing, does the public entity violate the law? Does the public entity have any discretion? What if the contractor was by far the best among the competition in an area where there are few options? What if the public entity faces a deadline that would be put at risk by continued negotiations?

On the flip side, what if a contractor believes that it absolutely must ask for modifications after the award? What if it identified some major risks only after it submitted its bid? What if it found a mistake that, absent a correction, immediately renders the project unprofitable? What if it learned that the supplier of the critical equipment has gone out of business? Will it put itself in jeopardy by asking for a change?

Competitive bidding laws seek to create an honest and fair mechanism for awarding public contracts. Through a sealed bid process, a public entity should select the winning bidder based on merit and price alone. Competing bidders all base their bids on the same designs, specifications, and contract documents. Once bids are opened, each bidder's qualifications and prices are sealed no more and become public knowledge. Thus, the general legal view in Ohio is that modifying contract terms after bid opening could impair the sanctity of the sealed bid process and otherwise undermine open and honest competition, which protects

the public and other bidders from favoritism and fraud.

Not much case law exists in Ohio analyzing the propriety of post-award negotiations. Ohio case law concerning the selection of the lowest and best bidder, or lowest responsive and responsible bidder, in the competitive bidding process is analogous and instructive, as is case law involving negotiations following the opening of bids, but prior to an award. This case law appears to be somewhat interchangeable, as Ohio courts analyze bid defects and a public entity's discretion to waive them in the same or similar way as they analyze negotiations after bids are opened or after a contract is awarded. The courts have analyzed modifications made prior to bid opening, after bid opening, and after an award.

With these principles in mind, a "substantial" deviation or modification of a contract post-award impermissibly affords the winning bidder a competitive advantage. A modification is substantial if it affects the amount of the bid and affords a bidder an advantage not allowed to the other bidders.

Numerous Ohio courts, but not all, have permitted insubstantial modifications in the context of a variety of topics.

- A contractor's request for permission to switch to a subcontractor different from the one identified in its bid, so long as that change did not alter any legal obligations within the public contract, has been found to constitute an insubstantial modification. In that case, the change occurred after bid opening, but prior to an award.
- In another Ohio case, the court construed a winning bidder's failure to include the price of one line item to mean that the bidder would do that work at no cost and that this failure did not afford the winning bidder

a competitive advantage. Thus, that court found that the public entity at issue could waive this bid irregularity after bid opening.

- Another court determined that an insubstantial modification, post-award, may include allowing additional time to complete various stages of the work, such as more time to assume control of operations on a project.
- Likewise, the same Ohio court found that permitting a contractor, post-award, to park vehicles on publicly owned property free of charge also constituted a minor, immaterial modification. This same court found that post-award negotiations are often necessary due to unforeseen circumstances.
- In the analogous context of the waiver of bid irregularities, one Ohio court has found that submitting a list of subcontractors and commitment letters after bid opening, but prior to the award, did not give that bidder a competitive advantage.

On the other hand, Ohio courts have found that impermissible, substantial modifications after bid opening include waiving or renegotiating any aspect of the contract affecting the price. For example, in one case, the low bidder made a mistake computing its bid that resulted in a significantly lower bid price. The low bidder realized this mistake only after bid opening and sought to avoid its liability on the bid bond due to this mistake. The school board sought to enforce the bid bond against the contractor and its surety to recover the amount of the bond. Ultimately, the Ohio Supreme Court enforced the bid bond against the low bidder, concluding that the public benefits arising from strict compliance with the strictures of the Ohio Revised Code ("R.C.") § 3313.46 outweigh any benefit from releasing the low bidder from liability on

the bond due to a mistake. In so concluding, the Ohio Supreme Court cited concerns of otherwise endangering the sanctity of sealed bids and looked to the policy underpinning sealed bids — avoiding favoritism and fraud. Had the school board allowed the low bidder to adjust its price post-award, such a change would have constituted an impermissible substantial modification.

Likewise, at least one Ohio court has found that adding additional work constitutes an impermissible, substantial modification and therefore, an abuse of discretion on the part of the public entity. In that case, a municipality attempted to materially change the bid specifications by adding additional streets to a repaving project after opening the bids and awarding the contract to the second lowest bidder based on the specification changes.

At least one Ohio court, the Fifth District Court of Appeals, has taken a hard line on the issue of modifications to a contract after bid opening. That court first looked at R. C. § 153.12 and noted that it explicitly provides that plans and specifications may be modified before bid opening. It then noted that the same statute provides no mechanism for changing the plans or specifications after bid opening. The court found that the public entity violated R.C. § 153.12's plain language when it elected to modify the specifications after bid opening. In that case, the modification involved requesting residential instead of commercial prevailing wage rates. The court took exception to the fact that the modification was not publicly advertised.

The Southern District of Ohio wound up on the opposite end of the spectrum when it analyzed whether a county abused its discretion by engaging in post-award negotiations of a transportation contract. In that case, a disappointed bidder sued the county commissioners and claimed, among other things, that the contract award was invalid. The disappointed bidder pointed to the

numerous post-award revisions the winning bidder negotiated with the county. The county ultimately made multiple concessions to the winning bidder, including that it waived all penalties, liquidated damages, and/or defaults for the first three months that would have otherwise applied due to any failure to adhere to performance requirements. Additionally, the county agreed to include a provision allowing the winning bidder to recover all costs in connection with start-up transition if the county were to cancel the contract for any reason other than default for an initial period of time. The county attributed these concessions to the fact that it afforded the winning bidder very little time to take over operation of the transit system due to late notice of the award.

In reaching its decision that the county did not abuse its discretion by engaging in post-award negotiations, the court made several observations. Initially, the court questioned whether the disappointed bidder had standing to protest these post-award negotiations. The disappointed bidder failed to identify precedent for its asserted ongoing property interest in the public bid extending beyond the county's decision of which contractor is entitled to the award. Next, the court looked at cases involving negotiations after a political subdivision opened the bids, but before it made an award. In those cases, it noted that if a public entity expressly reserves the right to conduct additional negotiations after bid opening, then it has not abused its discretion in doing so. Finally, the court found that even if the disappointed bidder retained a property interest in the work post-award, it would nevertheless find that negotiations between the winning bidder and the county did not alter the terms of the request for proposals in a material or otherwise erroneous way. In so concluding, it analyzed R.C. § 307.90 and found that no evidence or precedent would allow the court to find that such negotiations constitute an abuse of discretion.

Ultimately, a public entity is well within its rights when it refuses to negotiate after it has issued an award. To avoid a protest from another bidder or a taxpayer, this is the safest route. It also avoids the appearance of favoritism or other impropriety. Moreover, bid bonds give the public entity some recourse if the contractor refuses to sign the agreement following the award. And, performance and payment bonds protect public entities from losses accruing due to a contractor's default and operate to incentivize contractors to perform their contractual obligations. Keeping in mind that at least one Ohio court has found that no negotiations are permissible following bid opening, numerous Ohio courts have found that public entities may opt to negotiate non-material contractual provisions that do not affect the amount of the bid and do not otherwise afford the winning bidder an advantage not allowed to the other bidders. If a public entity chooses to do something other than follow the safest course, or if a contractor has to decide if it is going to ask for modifications, it should research the law of the district before proceeding.



*Teresa G. Santin is an Associate at Brouse McDowell LPA practicing primarily in the area of construction and real estate litigation, both in commercial and residential contexts. She represents owners, developers, public entities, and contractors in disputes involving breach of contract, negligence, fraud, misrepresentation, and other related issues. Representative matters include disputes over construction agreements, mechanic's liens, lease agreements, franchise agreements, zoning appeals, and property tax appeals. She has been a CMBA member since 2016. She can be reached at (216) 456-3858 or [tsantin@brouse.com](mailto:tsantin@brouse.com).*