
OLR Bill Analysis

sHB 5270

AN ACT PROHIBITING BID SHOPPING.

SUMMARY

With certain exceptions, this bill prohibits general contractors from post-award auctioning subcontract work (i.e., bid shopping) for state construction, reconstruction, alteration, remodeling, repair, or demolition contracts (i.e., public works projects). In doing so, it requires the Department of Administrative Services (DAS) to develop regulations requiring construction contractors to include in their bid responses additional information about their proposed subcontractors, regardless of whether such subcontractor will be self-performing the work or subcontracting with lower-tier subcontractors (i.e., sub-bids).

Under the bill, "bid shopping" means any effort a general contractor makes after submitting a bid, to obtain a lower price from a subcontractor from whom the general contractor previously solicited bids with respect to the project that was put out to bid by the awarding authority (this, generally refers to DAS, and in some cases, Legislative Management, a constituent unit of higher education, or the Military Department). Bid shopping includes using one subcontractor's bid to coerce lower bids from other subcontractors, but does not include the substitution of a contractor for good cause.

The bill establishes several procedural requirements governing the solicitation of sub-bids on public works projects. The bill requires (1) DAS to adopt regulations to set a threshold value for sub-bids and (2) a contractor responding to an invitation to bid on a public works contract issued by an awarding authority to submit specific additional information with regard to any sub-bids that exceed this threshold value.

The bill requires the awarding authority to reject any bid by a

general contractor who fails to list a sub-bid in excess of the threshold value if the authority or construction manager at-risk (CMR - see BACKGROUND) determines that it is unreasonable for such contractor to subcontract for less than the threshold value given the project's scope and the submitted bid specifications. With certain exceptions, the bill prohibits a general contractor or higher-tier subcontractor from substituting any listed subcontractors after the submission of a bid. The general contractor must pay any savings resulting from a permitted substitution of subcontractor to the state. A general contractor who attempts to circumvent the sub-bid listing requirements may be disqualified from bidding on future DAS projects, subject to civil action, and fined up to \$20,000.

For design-bid-build contracts, the bill requires additional information regarding the portion of work, if any, which the awarding authority expects will exceed the threshold value. Finally, the bill expands the conditions under which the awarding authority can reject bids under competitive bidding.

The bill also makes minor, technical, and conforming changes.

EFFECTIVE DATE: October 1, 2018

§ 2 — SUB-BID LISTING REQUIREMENTS

Threshold Value

The bill requires (1) DAS to adopt regulations to set a threshold value for sub-bids and (2) a general contractor to delineate any sub-bid exceeding such threshold when submitting a bid.

Under the bill, once the required regulations are effective, each invitation to bid on a public works contract, including invitations issued by a CMR, must require bidders to:

1. list the name, location of the place of business, and Connecticut business identification number of all subcontractors that are to perform any work on the project in an amount over the threshold value;

2. list the dollar amount of each sub-bid;
3. submit the written sub-bids, signed by each subcontractor that is proposing to perform the work in an amount exceeding the threshold value, and if applicable, the subcontractor's prequalification certificate; and
4. list any portion of work in excess of the threshold value that the general contractor will self-perform.

The bill requires each subcontractor to submit all sub-bids to the prospective general contractor before bid submission. This includes any lower-tier subcontractor bids to higher-tier subcontractors (e.g., subcontractors contracting with a general contractor) that exceed the threshold value. All subcontractors submitting sub-bids in excess of the threshold value, including lower-tier subcontractors, must write and sign their bids on a form prescribed by DAS. The bill allows a general contractor who obtains bids from multiple subcontractors for a single project to select from among the various bids, but prohibits the general contractor from unilaterally pairing any higher-tier and lower-tier sub-bids together unless they were originally submitted as a pair.

Subcontract Execution

The bill requires a general contractor awarded a public works contract to offer the listed higher-tier subcontractors a written subcontract within five business days after the contract's execution, consistent with any other applicable statutory requirements. It requires such subcontractors to, in turn, offer the listed lower-tier subcontractors a subcontract within five business days after executing the subcontract. The bill prohibits any listed subcontractor from performing any project work before executing a subcontract and filing it with either the awarding authority or CMR.

Post-Bid Subcontractor Substitutions

Under the bill, a general contractor or higher-tier subcontractor is prohibited from substituting any listed subcontractors after bid submission, unless:

1. the subcontractor refused to execute a written subcontract within five business days after being offered one;
2. the value of the contract with the proposed substitute subcontractor:
 - a. does not differ by more than one-half of a percent than the listed sub-bid, or
 - b. differs by more than one-half of a percent, but is less than the listed sub-bid, in which case the general contractor or higher-tier subcontractor, must agree in writing to pay the savings from the substitute subcontractor to the state treasurer by check within thirty days after the project's completion;
3. the general contractor or higher-tier subcontractor has good cause for requesting a substitute as the law specifies (CGS § 4b-95(c));
4. the general contractor or higher-tier subcontractor receives written permission from the awarding authority or CMR to substitute a listed subcontractor; and
5. the general contractor or higher-tier subcontractor has otherwise met any applicable statutory requirements (CGS § 4b-96).

Risk of Contractor Disqualification

Any attempt by a general contractor to circumvent the bill's requirements by (1) listing another contractor who will subcontract portions of the contract in excess of the threshold value covered by the contract to an unlisted subcontractor or (2) failing to comply with the bill's requirements, constitutes a violation and may result in the disqualification of the contractor from bidding on public works projects for up to five years after the discovery of the violation.

The bill requires DAS to provide 30 days' written notice of such potential disqualification to each contractor alleged to have violated the requirements. The contractor may request a hearing by the

department to contest such disqualification, provided the request is made in writing within 20 days after notice receipt.

§ 3 — CIVIL REMEDIES & PENALTIES FOR BID SHOPPING

The bill prohibits contractors from engaging in bid shopping on any state or municipal public works contract. It permits the attorney general or the municipality to initiate a civil action within two years after the alleged bid shopping to recover the difference in value between a higher-price sub-bid in a contractor's submitted bid and the lower-price subcontract that the contractor subsequently obtained through bid shopping, as well as reasonable attorneys' fees and costs. It also allows any aggrieved subcontractor, who carries the burden of proof, to recover damages equivalent to 10% of the submitted bid value, as well as reasonable attorney's fees and costs.

In addition, the bill requires the commissioner of consumer protection to fine a contractor found guilty of bid shopping \$5,000 to \$20,000 for each violation.

§ 5 — DESIGN-BID-BUILD CONTRACTS

Generally, the awarding authority must award public works contracts estimated to cost over \$500,000 to the lowest responsible, qualified, and prequalified general bidder on the basis of competitive bids. However, the commissioner may require that design-bid-build projects be accomplished on a total cost basis. These contracts are awarded through a single contract with a private developer for acquisition, architectural design, and construction.

Existing law requires that state public works contracts using this design-bid-build delivery method include plans and specifications detailing all labor and materials to be furnished under the contract which must separately list (1) masonry; (2) electrical; (3) plumbing; and (4) heating, ventilating, and air conditioning classes of work if the awarding authority estimates that such work will exceed \$100,000.

The bill requires such specifications to include a table of contents, chart, or other means of identifying the portion of work, if any,

comprising each class of work identified in the DAS prequalification classifications that the awarding authority expects to exceed the threshold value defined by the bill.

§ 6 — REJECTION OF BIDS

The bill expands the conditions under which the awarding authority can reject any or all general bids under competitive bidding. Under current law, it may do so if it determines that:

1. the general bidder or bidders are not competent to perform the specified work, based on established objective criteria;
2. the low bid price exceeds the project's budget;
3. the project is cancelled; or
4. cause exists to reject such bids.

Under the bill, an awarding authority may also reject a bid if it determines that a general bidder has failed to comply with the bill's requirements.

BACKGROUND

Construction Manager At Risk (CMR) Projects

In a CMR project, the owner (e.g., DAS) hires a firm with construction experience (the construction manager or "CM"), usually during a project's design phase, to manage the entire construction process. The CM provides pre-construction services such as estimating costs, budgeting, reviewing constructability and suggesting construction alternatives, and scheduling. Once the design is finalized, the CM seeks competitive bids from subcontractors for each project element (e.g., electrical, mechanical, carpentry, and roofing).

Once the subcontractors' bids are received and verified for compliance with project requirements, scope, and specifications, the CM and the project owner negotiate and set a guaranteed maximum price (GMP) for construction including the CM's fee, the cost of the work, and contingency funds for the project. The CM assumes the risk

to complete the project within the GMP, excluding any work not included in the final GMP that the owner authorizes through a change order process.

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable

Yea 9 Nay 8 (03/23/2018)