

Competitive Bidding of Municipal Contracts in Pennsylvania and the Litigation It Generates: Who Is the Lowest Responsible Bidder?

*By John K. Gisleson**

I. INTRODUCTION

The Pennsylvania First Class Township Code (“the Code”)¹ establishes a procedural framework for competitive bidding of public contracts that is intended to ensure that municipal contracts for goods and services exceeding \$10,000 in value are awarded only to “the lowest responsible bidder.”²

Bidding requirements “are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.”³

Although the procedure for bidding contracts is clear, there has been significant litigation challenging contract awards based on the process used to award contracts and the basis for selecting the lowest responsible bidder. “When competitive

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¹ See generally First Class Township Code, 53 PA STAT. ANN. § 55101 *et seq.* (2002).

² 53 PA STAT. ANN. § 56802 (2002).

³ *Yohe v Lower Burrell Township*, 208 A.2d 847, 850 (Pa. 1965) (quoting 10 MCQUILLAN, MUNICIPAL CORPORATIONS, § 28.19 at 266-67 (3d ed. 1981)); *Price v. Philadelphia Parking Auth.*, 221 A.2d 138, 146 (Pa. 1966).

bidding is used and the procedures followed emasculate the benefits of such bidding, judicial intervention is proper.”⁴

This article addresses the competitive bidding requirements applicable to first class townships⁵ under the Code, identifies various issues that arise in the context of evaluating bids, and discusses challenging a contract award in an injunctive proceeding.

II. COMPETITIVE BIDDING REQUIREMENTS UNDER THE FIRST-CLASS TOWNSHIP CODE

“Townships may make contracts for lawful purposes and for the purpose of carrying into execution the provisions of this act and the laws of the Commonwealth.”⁶ Whether bidding requirements apply to particular contracts, and what those requirements are, will vary depending on the dollar value of the contract.

A. *When Competitive Bidding Requirements Apply*

When a contract is less than four thousand dollars (\$4,000) in value, the township is not required to competitively bid the contract in any way.⁷

When the contract exceeds four thousand dollars (\$4,000) but is less than ten thousand dollars (\$10,000), modified competitive bidding requirements apply.⁸

⁴ *Ezy Parks v. Larson*, 454 A.2d 928, 932 (Pa. 1982) (citing *American Totalisator, Inc. v. Seligman*, 489 Pa. 568, 576, 414 A.2d 1037, 1041 (1980)).

⁵ Section 55201 of title 53 of Purdon’s provides:

Townships of the first class shall be those having a population of at least three hundred inhabitants to the square mile, which have heretofore fully organized and elected their officers and are now functioning as townships of the first class in the manner provided in this act. All townships, not townships of the first class, shall be townships of the second class.

53 PA. STAT. ANN. § 55201 (2002). The website <http://www.dgs.state.pa.us/PAManual/Section6/sec6.htm> identifies whether a particular municipality is a first-class township. For purposes of this article, the terms “municipality” and “township” are used interchangeably.

⁶ 53 PA. STAT. ANN. § 56801 (2002).

⁷ § 56802(a) (2002). The threshold for competitive bidding had been seven hundred and fifty dollars (\$750), which presumably was raised to reduce the administrative burden on township officials from complying with competitive bidding requirements.

⁸ 53 PA. STAT. ANN. § 56802(a)(1) (2002).

Rather than pursue public bidding for the contract, the township shall request “[w]ritten or telephonic price quotations from at least three qualified and responsible contractors.”⁹ If price quotations cannot be obtained from at least that many such bidders, the township shall keep on file a “memorandum Y showing that fewer than the three qualified contractors exist in the market area within which it is practicable to obtain quotations.”¹⁰ The township must maintain a written record of the quotations identifying “at least the date of the quotation, the name of the contractor and the contractor’s representative, the construction, reconstruction, repair, maintenance, or work that was the subject of the quotation and the price.”¹¹ The township must maintain those records for three years.¹²

With certain exceptions,¹³ the full panoply of competitive bidding requirements (discussed *infra*, section C) applies when contracts exceed \$10,000 in value.¹⁴ In determining whether a contract value exceeds \$10,000 and therefore triggers the competitive bidding requirements, the measure is the total payment necessary “to obtain the services or property, or both.”¹⁵ Thus, for a multi-year contract, the contract amount is that which is paid over the course of the contract and not the amount paid in a particular year (such as the first year of the contract). In addition, a township may not break a contract into parts with each part falling under the \$10,000 threshold in order to circumvent the bidding process.¹⁶ It in fact is “unlawful” to “evad[e] advertising requirements by making a series of purchases or contracts each for less than the advertising requirement price, or by making several simultaneous purchases or contracts, each below said price, when in either case, the transactions involved should have been made as one transaction for one price.”¹⁷ Any township commissioner who evades the advertising requirements may be civilly and criminally liable.¹⁸

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See 53 PA. STAT. ANN. § 56802(d) (2002). In addition, competitive bidding requirements will not apply if purely private money funds the contract even though a public entity acts as a financing conduit. *Williams v. Children’s Hospital of Pittsburgh*, 479 A.2d 452, 456 (1984).

¹⁴ 53 PA. STAT. ANN. § 56802(a) (2002).

¹⁵ *Id.*

¹⁶ 53 PA. STAT. ANN. § 56803(a) (2002).

¹⁷ *Id.*

¹⁸ Section 56803(a) and (b) of Title 53 of Purdon’s provides:

Moreover, the bidding requirement for contracts exceeding \$10,000 applies even if the residents of the township—each of whom individually would pay far less than \$10,000—directly pay the contractor, such as occurs in some townships for refuse collection. “The need for bidding requirements is just as compelling ... where the [contractor] is compensated directly by the recipients of his service as it is when the recipients pay for service through the conduit of the municipal treasury.”¹⁹ The reason is that taxpayers ultimately pay the contract costs in either scenario. “A municipality cannot have unbridled discretion to enter into a contract and then transfer the burden to pay to the citizens, without the citizens having the opportunity to question the propriety of such contract.”²⁰ Those creating a contract [the Board of Township Supervisors] must be responsible to others for their conduct, if only to insure honesty in fact.

Although competitive bidding is clearly the preferred course of letting contracts, the Code exempts six categories of contracts from competitive bidding even though the value of the contracts may exceed \$10,000.²¹ Those categories are: (1) “maintenance, repairs or replacements for water, electric, light, or other public works of the township,” but only so long as “they do not constitute new additions, extensions or enlargements of existing facilities and equipment;” (2) “improvements, repairs and maintenance of any kind made or provided by any township through its own employees, [p]rovided, however, [t]hat all materials” used for those activities shall “be subject to” bidding requirements if their cost is in excess of four thousand dollars; (3) contracts or

Any commissioners who so vote in violation of this provision, and who know that the transaction upon which they so vote is or ought to be a part of a larger transaction, and that it is being divided in order to evade the requirements as to advertising for bids, shall be jointly and severally subject to surcharge for ten per centum of the full amount of the contract or purchase. Any commissioner who votes to unlawfully evade the provisions of [‘ 56802] and who knows that the transaction upon which he so votes is or ought to be a part of a larger transaction and that it is being divided in order to evade the requirements as to advertising for bids commits a misdemeanor of the third degree for each contract entered into as a direct result of that vote. This penalty shall be in addition to any surcharge which may be assessed pursuant to subsection (a).

53 PA. STAT. ANN. § 56803(a), (b) (2002). Section 56803(a) also provides that if a commissioner votes in favor of splitting a contract in violation of that section, “but the purchase or contract on which he so voted was not approved by the board of commissioners,” then the commissioner will not be personally liable.

¹⁹ *Yohe v. Lower Burrell Township*, 208 A.2d 847, 850 (Pa. 1965).

²⁰ *Gleim v. Bear*, 616 A.2d 1064, 1067 (Pa. Commw. Ct. 1992).

²¹ *See* 53 PA. STAT. ANN. ‘ 56802(d) (2002).

purchases “where particular types, models, or pieces of new equipment, articles, apparatus, appliances, vehicles or parts thereof are desired by the commissioners which are patented and manufactured products;” (4) contracts or purchases “for used equipment, articles, apparatus, appliances, vehicles or parts thereof being purchased from a public utility;” (5) policies of insurance and surety company bonds; and (6) contracts “involving personal or professional services.”²²

Finally, even if a township is not required to implement competitive bidding under the Code for a contract exempted under § 56802(d), the township nonetheless must comply with bidding requirements if it chooses to competitively bid a contract.²³ In *American Totalisator Company, Inc. v. Seligman*,²⁴ for example, the Commonwealth announced in its bid specifications that it would award a contract for the supply of equipment and technology for the Commonwealth lottery to the lowest responsible bidder and proceeded to establish procedures for competitive bidding. The municipality, however, failed to abide by the terms of its own proposal in awarding the contract and permitted the successful bidder to clarify its bid after the bids were opened.²⁵ After being challenged by an unsuccessful bidder, the municipality argued that it was exempt from competitive bidding requirements because the contract was for professional services.²⁶ The Supreme Court rejected the argument: “When competitive bidding is used and the procedures followed emasculate the benefits of such bidding, we believe judicial intervention is proper.”²⁷

B. Requirements Applicable to Contracts Exceeding \$10,000

Section 56802 of the Code establishes procedures a township must follow to ensure that a contract “shall not be made except with and from the lowest responsible

²² See 53 PA. STAT. ANN. § 56802(d) (2002). See, e.g., *The Lieberman Organiz. v. City of Philadelphia*, 595 A.2d 638, 641 (Pa. Commw. Ct. 1990) (“in order to qualify for a professional services exemption to competitive bidding, an individual need not possess state certification licensure or have a baccalaureate degree.”) (holding that homeless services contract was exempt under Philadelphia’s Home Rule Charter).

²³ *American Totalisator Company, Inc. v. Seligman*, 414 A.2d 1037, 1040 (Pa. 1980); *Stapleton v. Berks County*, 593 A.2d 1323, 1330 (Pa. Commw. Ct. 1991).

²⁴ 414 A.2d 1037 (Pa. 1980).

²⁵ *American Totalisator*, 414 A.2d at 1041.

²⁶ *Id.* Cf. 53 PA. STAT. ANN. § 56802(d)(5) (2002) (exempting contracts “involving personal or professional services” from competitive bidding requirements).

²⁷ *American Totalisator Company, Inc.*, 414 A.2d at 1041.

bidder.”²⁸ The mandatory nature of those procedures is evident from the fact that “[a]ny contract made in violation of the provisions [in Section 56802] shall be void.”²⁹ A township needs to closely follow the procedures established by the Code, while parties challenging a contract award should scrutinize whether the township in fact complied with those procedures.

First, the township must develop a notice to advertise the contract to be awarded. The notice must provide the “full plans and specifications” of the project or provide a place where such plans and specifications can be viewed and copied.³⁰ The notice must also set forth “the time and place of a public meeting” of the township commissioners or a committee thereof.³¹ At that meeting, the “bids shall be publicly opened and read.”³²

Second, the township secretary must publish the notice. Publication must occur both by placing notice in an appropriate local newspaper and by posting the notice “in a conspicuous place within the township.”³³ The township must publish the first advertisement “not more than forty-five days and the second advertisement not less than ten days prior to the date fixed for the opening of bids.”³⁴

Third, “[a]ll plans and specifications shall be on file at least ten days in advance of opening bids.”³⁵

Fourth, the board of commissioners may, if it chooses to do so, have the bids opened and reviewed but then have the information forwarded to them “for

²⁸ 53 PA. STAT. ANN. § 56802(a) (2002).

²⁹ 53 PA. STAT. ANN. § 56802(b)(3) (2002).

³⁰ 53 PA. STAT. ANN. § 56802(a), (b)(1) (2002).

³¹ *Id.*

³² *Id.* If said meeting “is an open meeting of the township commissioners, the contract may be awarded.” *Id.*

³³ 53 PA. STAT. ANN. § 56802(a) (2002). Notice must be placed: in one newspaper of general circulation, published or circulating in the county in which the township is situated, at least two times at intervals of not less than three days where daily newspapers of general circulation are employed for such publication, or in case weekly newspapers are employed then the notice shall be published once a week for two successive weeks. *Id.*

³⁴ *Id.*

³⁵ *Id.*

subsequent award at a public meeting.”³⁶ Such a procedure allows the committee to evaluate the responsibility of the bidders and to tabulate bids to determine who is the lowest bidder. The commissioners may wish to have the township manager and/or other supervisors most directly affected by the contract on the committee to evaluate a contractor’s responsibility to perform the contract. To the extent that the committee makes recommendations concerning the responsibility of particular bidders to the commissioners, it is advisable that the committee have a clearly documented basis for the recommendation that is worthy of reliance by the commissioners (*i.e.*, knowledge of specific facts, as opposed to hearsay, that is supported by first-hand observation or by investigation of committee members). Even though a committee is used to review the bids, the township still must notify bidders “and other interested parties, upon request, of the date, time and location of the opening of bids [so that they] may be present when the bids are opened.”³⁷

Fifth, unless a shorter time is prescribed by the township commissioners, the successful bidder “shall be required,” within twenty days after the contract is awarded, “to furnish bond with suitable reasonable requirements guaranteeing the performance of the contract, with sufficient surety, in an amount as determined by the township commissioners which shall be not less than ten per centum nor more than one hundred per centum of the amount of the liability under the contract.”³⁸ The contract award “shall be void” if the successful bidder fails to provide the appropriate bond to the township.³⁹

Finally, all contracts or purchases “shall be in writing.”⁴⁰

III. “LOWEST RESPONSIBLE BIDDER”

Like many state statutes,⁴¹ as well as the City of Pittsburgh Code of Ordinances,⁴² the Code imposes a mandatory, unqualified duty on a township to award

³⁶ 53 PA. STAT. ANN. ' 56802(b)(2) (2002).

³⁷ *Id.*

³⁸ 53 PA. STAT. ANN. ' 56802(c) (2002).

³⁹ *Id.*

⁴⁰ 53 PA. STAT. ANN. ' 56802(a) (2002).

⁴¹ *See, e.g.*, The Separations Act, 53 PA. STAT. ANN. ' 1003, and the Public Auditorium Authorities Law, 53 PA. STAT. ANN. ' 23851(a).

⁴² Code of Ordinances of City of Pittsburgh, §161; City of Pittsburgh Home Rule Charter, § 511.

the contract only to the lowest responsible bidder.⁴³ “In every instance in which any contract for any public work, construction, materials, supplies, or other matters or things for any township shall be awarded upon competitive bids, it shall be the duty of the authorities authorizing the same to award said contract to the lowest responsible bidder.”⁴⁴ “The Legislature repeatedly directs, as our cases hold, that all levels of government—state, county, and municipal—award contracts only to the ‘lowest responsible bidder.’”⁴⁵

If a township fails to comply with this legislative mandate to award a contract to the lowest responsible bidder, the affected contract is “void.”⁴⁶ “Supervisors are public officers of limited authority, and their right to contract is statutory. Hence contracts entered into by them in violation of a statute are void, and a contract in violation of the statute cannot be enforced although not expressly made void.”⁴⁷ The Pennsylvania Supreme Court has noted that those who contract “with the officials of a quasi-municipality” must keep in mind that these officials have only “limited power to contract.”⁴⁸

There are two components to the statutory requirement that a municipality award a contract to the “lowest responsible bidder.” First, the successful bidder must be the “lowest bidder.” Second, that bidder must be “responsible.” Those components must

⁴³ Although statutorily required to award a contract to the lowest responsible bidder, an invitation to bid on a contract is not an offer that can be accepted by such a bidder. *See, e.g., National Constr. Servs., Inc. v. Philadelphia Regional Port Auth.*, 789 A.2d 306, 309 (Pa. Commw. Ct. 2001) (quoting CORBIN ON CONTRACTS' 2.3 (rev. ed. 1993)).

In Pennsylvania, as in most states, the ‘best bidder’ has no right to have the contract awarded to it because the ‘lowest responsible bidder’ provisions are not there to give the bidder any rights but to protect taxpayers as evidenced by the settled law that only taxpayers have a right to seek an action to enjoin the contract.

National Constr. Servs., 789 A.2d at 309.

⁴⁴ 53 PA STAT. ANN. § 56802(b) (2002).

⁴⁵ *Lutz Appellate Printers, Inc. v. Commonwealth of Pennsylvania*, 403 A.2d 530, 534 (1979).

⁴⁶ 53 PA. STAT. ANN. § 56802(b)(3). *See, e.g., Price v. Philadelphia Parking Auth.*, 221 A.2d 138, 147 (Pa. 1966) (contract, which involved the lease of air rights above a parking garage, was “entered into by private negotiation rather than by competitive bidding [and therefore] was unauthorized and void.”); *Foresman v. Gregg Township*, 147 A. 64 (Pa. 1929) (contract void due to failure to comply with statute in entering contract to purchase tractor).

⁴⁷ *Foresman v. Gregg Township*, 147 A. 64, 65 (Pa. 1929).

⁴⁸ *Id.* at 67.

be analyzed separately because a municipality may exercise discretion as to the latter component whereas there is no discretion as to the former.

A. Lowest Bidder

Although the definition of “lowest bidder” may seem self-evident, that term “implies a common standard under which all bids may be received. That common standard implies previously prepared specifications, freely accessible for all competitors; on these alone shall their bids be based.”⁴⁹ Without a common standard, “the integrity of the competitive bidding process is violated and the purpose of competitive bidding is frustrated.”⁵⁰ “If the kind or amount of work or material which a municipal corporation will require under a contract is indefinite, the advertisement for bids thereon should contain sufficient information concerning the work or material to enable bidders intelligently to calculate their bids.”⁵¹ The common standard thus ensures “that interested persons may bid intelligently and will be induced to bid by the promise of impartiality and thereby freely and openly compete upon a basis of equality.”⁵²

Although the lowest bidder is an objective issue that can be determined by who submitted the lowest bid in terms of price, counsel seeking to challenge a contract award should examine the bid specifications to ensure that there in fact was a common basis for the bids. If the bid specifications were written in such a way to favor one bidder over another, or if there was an ambiguity in the specifications that, intentionally or inadvertently, favored one bidder over another or misled the bidders, then there was not a “common basis” for the bids, and there is a basis for challenging the award.⁵³ If bidders “are misled by anything which the [municipality] may have done, or the notice [concerning the bid] may have required, the bidding was not on a common basis; the lowest figures submitted would not, in law, be the lowest bid, because it lacked fair

⁴⁹ *Ezy Parks*, 454 A.2d at 932-33.

⁵⁰ *Id.* at 932 (quoting MCQUILLAN, *supra* note 3, ' 29.29 at 302). As explained in *Ezy Parks*, competitive bidding requirements also apply when a municipality is seeking to sell or lease an asset for the highest price to be paid to the municipality. “We see no reason why the same rationale should not apply where the purpose is to secure the highest price for Commonwealth realty which is available for lease.” *Ezy Parks*, 454 A.2d at 933.

⁵¹ *Id.* at 933 (quoting MCQUILLAN, *supra*, note 3, § 29.66 at 378).

⁵² *Id.* at 932-33.

⁵³ *Id.* at 933.

competition.”⁵⁴ In short, “[n]o scheme or device promotive of favoritism or unfairness or which imposes limitations, not applicable to all bidders alike, will be tolerated.”⁵⁵

For example, in *Ezy Parks v. Larson*,⁵⁶ the Supreme Court upheld an injunction prohibiting a contract award based on bid specifications that were ambiguous. The Pennsylvania Department of Transportation (“PennDOT”) leased certain parcels of land along a right-of-way it owned to Ezy Parks, which operated parking lots on those parcels and made valuable improvements to those parking lots during the term of its lease.⁵⁷ When PennDOT sought to competitively bid contracts for the parcels, its specifications were unclear as to whether the improvements were included with the parcels.⁵⁸ PennDOT and the current leaseholders in fact had disagreed over who owned the improvements and whether the leaseholders would be compensated for the improvements.⁵⁹ The Supreme Court agreed with the Commonwealth Court that because of the ambiguity regarding the improvements, the specifications did not provide a common basis on which to determine who submitted the highest bid to lease the parcels. The court determined that the same rationale applied to leases as it did to bidding of projects: ensuring fair competition. Because bidders might have “reduce[d] their bids ... to adjust for ambiguous instructions,” the Commonwealth might have to pay both Ezy Parks for its improvements to the Commonwealth’s property and pass the improvements to a high bidder who may not have included the benefit of these improvements in its bid.⁶⁰

Finally, the bid instruction virtually precluded appellees [who paid for the improvements while they had the leases] from entering meaningful bids. Submitting bids which would include the value of the improvements that have already been paid for would put them in the position of paying for those items twice. Entering bids which would

⁵⁴ *Id.* at 932-33.

⁵⁵ *Ezy Parks*, 454 A.2d at 932 (quoting 10 MCQUILLAN, *supra* note 42 ' 29.29 at 302). As explained in *Ezy Parks*, competitive bidding requirements apply when a municipality is seeking to sell or lease an asset. “We see no reason why the same rationale should not apply where the purpose is to secure the highest price for Commonwealth realty which is available for lease.” *Id.* at 624, 454 A.2d at 933.

⁵⁶ 454 A.2d 928, 932 (Pa. 1982).

⁵⁷ *Id.* at 931.

⁵⁸ *Id.* at 931-32.

⁵⁹ *Id.* at 932.

⁶⁰ *Id.* at 933.

not include that value would decrease their chances of being awarded the leases because a competitor might well be including the value of those permanent improvements which would customarily go with the land.⁶¹

1. Rejection of Bids

For a number of reasons relating to obtaining the lowest bid,⁶² townships routinely insert a provision into the bid instructions that they may reject any or all bids, in whole or in part.⁶³ Although a bid certainly may be rejected if it fails to comply with the bid instructions or if the bidder is not responsible, there are limitations on the extent to which a township may reject bids.⁶⁴ “[I]f a municipality, in connection with competitive bidding, is empowered to do so, it may reject any and all bids in the absence of fraud, collusion, bad faith, or arbitrary action.”⁶⁵ Thus, in considering whether a township may reject bids, it is necessary to determine whether it is “empowered to do so,” as well as whether the bids were rejected due to “fraud, collusion, bad faith, or arbitrary action.”⁶⁶

In *Weber v. City of Philadelphia*, the Pennsylvania Supreme Court upheld the rejection of bids for a general concession at a sports stadium in Philadelphia after examining the Philadelphia Home Rule Charter, which provides that Philadelphia “may reject all bids if it shall deem it in the interest of the City so to do. Otherwise the contract

⁶¹ *Ezy Parks*, 454 A.2d at 933. Notably, a township may not cure ambiguous bid instructions by clarifying the instructions for less than all of the bidders. “[B]id instructions which do not provide a common basis cannot be clarified on an *ad hoc* basis by *ex parte* explanations from officials of a public body to those potential bidders who are either clever enough to seek such advice or who simply, for whatever reason, have special access to the ears of [municipal] officials.” *Id.*

⁶² See, e.g., *Midasco, Inc. v. Pennsylvania Turnpike Commission*, 813 A.2d 942, 944 (Pa. Commw. Ct. 2002) (rejection of bids proper where bids made project economically infeasible); *Richland School Dist. v. Central Transp., Inc.*, 560 A.2d 885, 887-89 (Pa. Commw. Ct. 1989) (holding that municipality was permitted to reject all bids due to a clerical error in one bid since all bidders had right to re-bid and municipality reasonably expected to receive lower bids in the re-bidding).

⁶³ For a detailed discussion on the right to reject bids, see Annotation, *Public Contracts: Authority of State or its Subdivisions to Reject All Bids*, 52 A.L.R. 4th 186.

⁶⁴ *Lutz Appellate Printers, Inc. v. Commonwealth of Pennsylvania*, 403 A.2d 530, 533 (1979) (citations omitted).

⁶⁵ *Weber v. Philadelphia*, 262 A.2d 297, 299-300 (Pa. 1970) (citing cases).

⁶⁶ *Id.*

shall be awarded to the lowest responsible bidder.”⁶⁷ According to the Court, “as we read this Charter Provision, the City, in competitive bidding, is authorized and empowered to reject all bids subject only to the limitation that such rejection be ‘in the interest of the City,’ and the determination of that question is placed, at least initially, in the judgment not of the courts but of the City...”⁶⁸ Consistent with Philadelphia’s Home Rule Charter, the bid specifications “clearly placed [all bidders] on notice that, under the provisions of the City Charter and under the specifications, the City had the right to reject any and all bids.”⁶⁹

In contrast to the Philadelphia Home Rule Charter, the First Class Township Code does not “empower” municipalities to reject conforming bids. As a result, an argument can be made that a municipality does not have the right to reject all bids when they are submitted by responsible bidders. However, the Supreme Court held in *Straw v. City of Williamsport*,⁷⁰ that a municipality had the right to reject a portion of all bids based solely on the fact that it retained such a right in its advertisement for bids. The City of Williamsport had solicited bids for road paving and for certain sewer work.⁷¹ Due to financial constraints, Williamsport eliminated the sewer work after bids were received.⁷² Once the sewer work was eliminated, the lowest bidder became the second lowest bidder.⁷³ The party challenging the award argued that the bids had to be tabulated as submitted and the lowest bid determined based on that tabulation before elimination of any work and the associated costs.⁷⁴ The court rejected this interpretation, noting that the fact that “[t]he advertisement [soliciting bids] reserved the right to reject any or all bids or parts of bids” was “conclusive of the question.”⁷⁵ All contractors bidding on the

^{67.} *Id.* Like Philadelphia, the City of Pittsburgh has expressly reserved the right to reject bids in its Code of Ordinances. *See* City Code, § 161(d).

^{68.} *Id.*

^{69.} *Id.* at 300.

^{70.} 132 A. 804, 805 (Pa. 1926).

^{71.} *Straw*, 132 A. at 805.

^{72.} *Id.*

^{73.} *Id.*

^{74.} *Id.*

^{75.} *Id.* *See also* *R.S. Noonan, Inc. v. York School Dist.*, 162 A.2d 623 (Pa. 1960) (“As a final observation on the case, attention is drawn to the fact that the advertisement inviting bids included this statement: ‘right is reserved to waive informalities and to accept any bid or to reject any or all bids.’ This put all bidders on notice that their bids might be rejected.”) (rejection of all bids upheld); *Kimmel*, 633 A.2d at 1276 (“In the absence of evidence of fraud, collusion, or arbitrary action, whether a municipality was wise in its rejection of a bid is not within the court’s province to determine.”) (*citing* *Weber*, 262 A.2d 297).

project were given notice that the city might eliminate parts of the bid.⁷⁶ As long as the elimination was applied consistently, the rejection was proper. The trial court determined in its duties as fact finder “that there was no fraud, imposition, over-reaching or unfair dealing in striking out the items or awarding the contract.”⁷⁷ The *Straw* decision thus appears to stand for the proposition that a township may reject any part or all of the bids so long as it advises of that right in the advertisement of bids and applies the rejection equally to all bidders.

Reservation of a right to reject bids does not, however, insulate a municipality’s rejection of bids from scrutiny. In *Stapleton v. Berks County*,⁷⁸ the bid specifications provided Berks County with “the right to reject any or all proposals with or without cause.” Berks County in fact rejected all bids when its preferred contractor did not submit the lowest bid.⁷⁹ “Private meetings and negotiations with some bidders to the exclusion of others before the contract is awarded is precisely the sort of favoritism and unfair advantage that *Harris* and its progeny disdained.”⁸⁰ “In cases where public contract bidding irregularities are shown, it is proper for a reviewing court to enjoin the contract awarded according to those faulty procedures.”⁸¹ “Berks County’s attempt to reserve the right to have bids clarified and to negotiate with bidders after the bids were opened has no effect since our Supreme Court has rejected those procedures.”⁸²

⁷⁶ *Straw*, 132 A. at 805.

⁷⁷ *Id.*

⁷⁸ 593 A.2d 1323, 1330 (Pa. Commw. Ct. 1991).

⁷⁹ *Stapleton*, 593 A.2d at 1330.

⁸⁰ *Id.* at 1331 (Pa. Commw. Ct. 1991).

⁸¹ *Id.* at 1332.

⁸² *Id.* at 1330. See also *Lutz Appellate Printers, Inc. v. Commonwealth of Pennsylvania*, 403 A.2d 530, 534 (1979) (Commonwealth Department of Property and Supplies was required to award contract to lowest responsible bidder even though statute gave Commonwealth Department the right to reject any or all bids). The *Lutz* case involved the Administrative Code of 1929, which (unlike the First Class Township Code at issue here), specifically provided in § 2410 that the Department “shall have the right to reject any or all bids.” *Id.* at 532. Yet even though the Department had a statutory right to reject bids, the Supreme Court repudiated the argument that the Department had “absolute discretion” to reject bids.

But to read [§ 2410] to give the Department absolute discretion, except in cases of ‘fraud or collusion,’ would be to ignore the language of Section 2410 requiring the Department to award the contract to the ‘lowest responsible qualified bidder.’ ... [T]his requirement is ‘mandatory, not discretionary.’ ... [W]here a ‘sound discretion, exercised according to the standards fixed for the protection of the

2. Waiver of Defects in Bids

Although a township may have the right to reject bids, a related issue frequently arises as to whether a township may waive an irregularity in a bid submitted by the low bidder. In order to award a contract to the lowest bidder, that bidder must have complied with all material terms of the bid instructions. “Bid instructions set forth in an invitation to bid are mandatory and must be strictly followed for the bid to be valid.”⁸³ In reviewing a bid, the township does not have discretion to waive material defects in the bid.⁸⁴ “[D]etermining whether the requirements contained in the bid invitation were met is not a discretionary matter. These requirements are mandatory. [I]f the bid fails to comply with the instructions, the bid is invalid, even if the bidder wishes to cure the non-conformity after the bids are opened.”⁸⁵

The court may, however, waive non-material bid defects. In *Gaeta v. Ridley School District*,⁸⁶ the Supreme Court approved a contract award to a bidder whose bid failed to comply with a non-material requirement of the bid instructions. The school district required a bid (as opposed to performance) bond from a surety with a rating of “A-” or better.⁸⁷ The district awarded the contract to the low bidder, whose bid was approximately \$100,000 less than the next lowest bid, even though that bidder submitted a bid that included a bid bond from a surety with a “B” rating.⁸⁸ Prior to awarding the

public—is required of public officials who reject a low bid and award a public contract to a higher bidder, the same ‘sound discretion’ must be exercised here where the Department determines Section 523 of the Code renders a low, responsible bidder ‘unqualified.’

Id. at 533 (citations omitted).

⁸³ *City of Philadelphia v. Canteen Co.*, 581 A.2d 1009, 1013 (Pa. Commw. Ct. 1990); *Kimmel v. Lower Paxton Twp.*, 633 A.2d 1271, 1275 (Pa. Commw. Ct. 1993); *Gaeta v. Ridley School Dist.*, 788 A.2d 363 (Pa. 2002) (“this prerequisite of compliance with bid documentation assures equal footing among competing bidders in furtherance of core legislative objectives.”).

⁸⁴ *Kimmel*, 633 A.2d at 1275; *Staeffer*, 754 A.2d at 723 (waiver by county of violation of bid requirements gave a competitive advantage, which amounted to favoritism).

⁸⁵ *Kimmel*, 633 A.2d at 1276. *See also Canteen Co.*, 581 A.2d at 1013 (“It is well settled that the specifications set forth in a bidding document are mandatory and must be strictly followed for the bid to be valid. Violation of bid instructions constitutes legally disqualifying error and a public agent may reject a bid for such error.”) *Id.* (citations omitted).

⁸⁶ 788 A.2d 363 (2002).

⁸⁷ *Gaeta*, 788 A.2d at 363.

⁸⁸ *Id.*

contract, the district notified the bidder of the irregularity and requested a conforming bid bond, which was submitted the following day.⁸⁹ The contract award was challenged on the basis that the apparent low bidder did not comply with the bid specifications.⁹⁰ The bid instructions included a reservation of rights that permitted the district to waive any bid irregularities.⁹¹ The Court held that the district had discretion to waive the bid irregularity.⁹² “[C]ourts have not eliminated the discretionary aspect of executive decision making” from the bidding process.⁹³

Accordingly, the following two considerations are widely accepted as central in determining whether a non-compliant bid for public work may be accepted or cured: first, whether the effect of waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary standard of competition.⁹⁴

After identifying that standard for waiver, the Court “reiterate[d its] admonition that, in circumstances where legislative pronouncements particularize the manner in which government contracts are to be made, such requirements are not subject to waiver.”⁹⁵ Because (1) no statute or ordinance required a quality rating for bid bonds, (2) the school district reserved the right to waive irregularities, (3) the irregularity was not material, and (4) the waiver did not give an unfair advantage to the successful bidder,

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 363-64.

⁹² *Gaeta*, 788 A.2d at 364.

⁹³ *Id.* at 367-68.

⁹⁴ *Id.* at 367-68 (quoting, *inter alia*, MCQUILLIN, *supra* note 3, ¶ 29.65). Cf. *Midasco, Inc. v. Pennsylvania Turnpike Comm'n*, 2002 Pa. Commw. LEXIS 982 (Dec. 11, 2002) (affirming rejection of all bids where bids significantly exceeded estimated cost of project).

⁹⁵ *Gaeta*, 788 A2d at 368.

the Court held that the school district properly exercised its discretion in waiving the bidding irregularity and awarding the contract to the lowest bidder.⁹⁶

3. *Withdrawal of Bid by Bidder*

Whereas a municipality may reject bids, a bidder may not withdraw its bid unless expressly permitted to do so by the bid specifications or a statute.⁹⁷

“The submission of a bid for public work in response to an invitation constitutes an offer. A good and binding contract is formed when the public body, acting by responsible officers, accepts a written bid. A public contract has its inception in the award as distinguished from the formal signing of the contract, and is binding from that time on. It is the contractor, not the governmental unit, which acts at its peril in submitting bids and entering into a contract. As a general rule, one who files a bid pursuant to a competitive bidding statute has no right to withdraw the bid, the reason being that the benefits accruing to one submitting a bid under the public bidding statutes are a sufficient consideration to render a bid submitted irrevocable.”⁹⁸

Under the “firm bid rule”, the irrevocability of bids applies even if the bidder makes a clerical mistake in its bid.⁹⁹ A contractor discovering an error after bid

⁹⁶ *Id.* at 368-69. The Court distinguished the bid bond “from those [circumstances] involving price discrepancies, failure to bid on all necessary terms, the omission of cost or performance items, and defects related to a performance bond, concerning which liability is generally of far greater magnitude.” *Id.* at 369 (citing MCQUILLIN, *supra* note 3, ' 29.65). *Cf. Balsbaugh v. Commonwealth Dept. of General Servs.*, 2003 Pa. Commw. LEXIS 1, at *13 (Jan. 2, 2003) (failure to sign bid was material and could not be waived) (applying *Gaeta*); *Cardiac Science, Inc. v. Department of General Servs.*, 808 A.2d 1029 (Pa. Commw. Ct. 2002) (affirming decision to reject bid as non-conforming based on delivery term, which was material) (applying *Gaeta*).

⁹⁷ *Muncy Area School Dist. v. Gardner*, 497 A.2d 683, 687 (Pa. Commw. Ct. 1985) (“a statute may permit a bidder who makes an honest and good faith mistake of calculation in estimating his bid to withdraw his bid”); *Travelers Indemn. Co. v. Susquehanna County Commissioners*, 331 A.2d 918, 919 (Pa. Commw. Ct. 1975) (bid specifications permitted withdrawal); *Modany v. State Public School Bldg. Auth.*, 208 A.2d 276, 178 (Pa. 1965) (same).

⁹⁸ *Muncy*, 497 A.2d at 686-87.

⁹⁹ *Travelers*, 331 A.2d at 920.

opening may not withdraw his bid “without forfeiting his bid bond.”¹⁰⁰ Assuming no right to withdraw, the bidder loses its bid bond if it in fact withdraws its bid or refuses to execute the contract documents.¹⁰¹ A bidder, therefore, must take extreme care in ensuring the accuracy of its bid.

A bidder may withdraw its bid when a statute or the bid specifications permit it to do so.¹⁰² For example, a bidder on a public construction project or “for the provisions of services to or lease of real or personal property” may withdraw a bid within two days after bid opening under certain limited circumstances.¹⁰³ It should be emphasized that § 1602 does not apply to all municipal contracts and that many bid specifications do not confer a right to withdraw bids. Without carefully reviewing § 1602 and the bid specifications, a bidder should not assume that it has the right to withdraw its bid.

B. Responsible Bidder

As to a “responsible bidder,” discretion exists with the municipality to make the determination regarding the “responsibility” of the bidder.¹⁰⁴

There is a discretion vested [in the municipal decisionmakers] to determine who are and who are not responsible bidders, Y the contract must be awarded, if at all, to the one of them whose bid is lowest, though there is but a slight difference in amount between him and another bidder whom the board would like to favor. The money to be expended is public money—a trust fund—and, in matters of this kind, the law recognizes no right in the

¹⁰⁰ *Id.*

¹⁰¹ *Travelers*, 331 A.2d at 920.

¹⁰² *Muncy*, 497 A.2d at 687 (“a statute may permit a bidder who makes an honest and good faith mistake of calculation in estimating his bid to withdraw his bid”); *Travelers*, 331 A.2d at 919 (bid specifications permitted withdrawal); *Modany v. State Public School Bldg. Auth.*, 208 A.2d 276, 178 (Pa. 1965) (same).

¹⁰³ 73 PA.CON.S.TAT. § 1602.

¹⁰⁴ *A. Pickett Constr., Inc. v. Luzerne Co. Convention Center*, 738 A.2d 20, 24 (Pa. Commw. Ct. 1999) (emphasis added) (*quoting Wilson v. City of New Castle*, 152 A. 102, 104 (Pa. 1930)).

directors to expend any of it, however small, except for work done by the ‘lowest responsible bidder.’¹⁰⁵

The municipality may consider a number of factors that extend beyond whether a particular contractor has the financial ability to perform a contract. A non-exclusive list of factors that may be considered in determining whether a bidder is “responsible” “includes financial responsibility, also integrity, efficiency, industry, experience, promptness, and ability to successfully carry out the particular undertaking, and that a bond will not supply the lack of these characteristics.”¹⁰⁶

In evaluating those factors, municipalities are presumed to have acted “in a legal way” in connection with exercising their discretion. “For the law in this Commonwealth is that public officers are clothed with the responsibility of originating and executing plans for the public good; the presumption is that their acts are on such considerations and their decisions reached in a legal way after an investigation.”¹⁰⁷ As a result, the party challenging the determination of responsibility has the burden of proving an abuse of discretion, and “it is a heavy burden.”¹⁰⁸ The existence of that discretion is important because the Court’s review of a discretionary decision is carefully circumscribed:

[C]ourts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope

¹⁰⁵ *Lutz Appellate Printers, Inc. v. Commonwealth of Pennsylvania*, 403 A.2d 530, 533 (Pa. 1979) (citations omitted).

¹⁰⁶ *Kratz v. Allentown*, 155 A. 116, 117 (Pa. 1931) (emphasis added); *Pearlman v. Pittsburgh*, 155 A. 118, 119 (Pa. 1931) (“the directors were not bound in law to give the contract to the lowest bidder, who might be irresponsible”). For example, a municipality may consider which bidder can perform the contract in the manner safest to the bidder’s employees and the public. See *J.J.D. Urethane Co. v. Montgomery Co.*, 694 A.2d 368, 370-71 (Pa. Commw. Ct. 1997).

¹⁰⁷ *A. Pickett Constr., Inc.*, 738 A.2d at 24 (emphasis added) (quoting *Wilson v. City of New Castle*, 152 A. 102, 104 (Pa. 1930)).

¹⁰⁸ *Id.*

of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That a court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; judicial discretion may not be substituted for administrative discretion.¹⁰⁹

Although township commissioners are presumed to act in a legal way, the municipality must have conducted a "full" and "careful investigation" that provides it with "knowledge of the real situation"¹¹⁰ before determining that a bidder is not responsible. Notably, a township has discretion in determining what the investigation will entail. Courts "will not ... inquire into the details of the manner adopted to carry [acts of discretion] into execution."¹¹¹

The Supreme Court has not defined the precise contours of the "investigation" that a municipality must perform to implement the discretionary act of determining whether a contractor is responsible. Nevertheless, it is clear that "knowledge of the real situation" is the touchstone for evaluating whether a municipality appropriately exercised its discretion.¹¹² To have "knowledge of the real situation," the Township's decision must be based on facts rather than supposition, speculation, bias, or another improper basis, and the investigation necessarily will vary depending on whether

¹⁰⁹ *American Totalisator Co., Inc. v. Seligman*, 414 A.2d 1037, 1040-41 (Pa. 1980) (quoting *Blumenschein v. Pittsburgh Housing Auth.*, 109 A.2d 331, 334-35 (Pa. 1954)); *Kimmel*, 633 A.2d at 1274 (same).

¹¹⁰ *Kratz v. Allentown*, 155 A. 116, 117 (Pa. 1931).

At the same time, it is held that to award the contract to a higher bidder capriciously without a full and careful investigation is an abuse of discretion which equity will restrain. Where a full investigation discloses a substantial reason which appeals to the sound discretion of the municipal authorities they may award a contract to one not in dollars the lowest bidder. The sound discretion, which is upheld, must be based upon a knowledge of the real situation gained by a careful investigation.

Id.

¹¹¹ *American Totalisator*, 414 A.2d at 1040-41 (quoting *Blumenschein*, 109 A.2d at 334-35).

¹¹² *Kratz*, 155 A. at 117.

the municipality has prior experience with the bidder that it can use to assess (among other factors) the bidder's "ability to successfully carry out the" contract.¹¹³

A court will require a more formal investigation if the township does not have prior experience with a bidder it deems not to be responsible. In *Berryhill v. Dugan*,¹¹⁴ the court found that the municipality abused its discretion in awarding a contract to the incumbent refuse collector that submitted a higher bid. Although the Borough claimed that the lowest bidder— with whom it had never contracted—was not responsible, the Commonwealth Court observed that the lowest bidder had "a favorable Dunn & Bradstreet rating, a bonding capacity of [\$3 million], it owns its own landfill and has access to 40 different trucks, with" \$7 million in gross revenues, "which information was readily available upon inquiry."¹¹⁵ And unlike the low bidder, the incumbent's bid did not conform to the bid specifications, the incumbent "was characterized by the Borough's Manager as being in poor financial condition, and the condition of its equipment was in question."¹¹⁶ The only apparent advantage the company possessed is that it had previously served as the trash hauler for the Borough¹¹⁷ Accordingly, the court held that the Borough abused its discretion in determining that the low bidder was *not* responsible.¹¹⁸

Similarly, in *Summit Hill School Directors Removal*,¹¹⁹ the Supreme Court held that directors of a school district were properly removed because they awarded a contract for the construction of a school building to a higher bidder without performing an appropriate investigation.

What the law requires is the exercise of a sound discretion by the directors; they shall call to their assistance the means of information at hand to form an intelligent judgment. They should investigate the bidders to learn their financial

¹¹³ *Id.*

¹¹⁴ 491 A.2d 950 (Pa. Commw. Ct. 1985).

¹¹⁵ *Berryhill*, 491 A2d at 952.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 951.

¹¹⁸ *Id.* at 952. If a municipality has concerns about the responsibility of one or more anticipated bidders before issuing its bid specifications, a municipality may want to pre-qualify bidders as responsible so long as the same standard applies to all bidders. See, e.g., *Harns v. Philadelphia*, 149 A.722, 734 (Pa. 1930); *Cocoran v. Philadelphia*, 70 A.2d 621, 623 (Pa. 1950).

¹¹⁹ 137 A 143 (Pa. 1927).

standing, reputation, experience, resources, facilities, judgment and efficiency as builders. Not only was this not done here, but there is every indication that a majority of the directors, including appellants, awarded the contract pursuant to a predetermined plan to do so regardless of other bidders, and followed the award by resolutions relieving the favored contractor from fulfilling important stipulations set forth in the specifications.¹²⁰

In contrast, a township does not need to conduct a formal investigation when it has prior experience with a bidder. In *Kierski v. Township of Robinson*,¹²¹ the Commonwealth Court affirmed the decision of the trial court that Robinson Township properly awarded a contract to the second lowest bidder due to the lowest bidder not being responsible. The Township competitively bid its contract for refuse collection and received three bids. In evaluating the bids, it determined that the lowest bidder—which was the incumbent refuse collector—was not responsible based on numerous problems experienced by the Township with the collector’s performance under the prior contract.¹²² In challenging the Township’s award of the contract to the second lowest bidder who was responsible, the incumbent collector (“Vogel”) argued that the Township failed “to conduct a full and careful investigation” into whether the collector was responsible.¹²³ The court rejected the claim, finding that the Township had “knowledge of the real situation” as a result of its own experience, which obviated the need for a formal investigation to commence after bids were received.¹²⁴

Here, several Township officials credibly testified about their own personal experiences with Vogel’s performance under the 2001 contract. Thus, the Township had “knowledge of the real situation” based on a year of receiving complaints and paying employees to pick up garbage, clean up hydraulic leaks and repair roads. Certainly, where a municipality has no personal experience with the ability of the lowest bidder to perform under a

¹²⁰ *Id.* at 144

¹²¹ 810 A.2d 196 (Pa. Commw. Ct. 2002). The author was counsel for Waste Management, the appellee in this case.

¹²² *Kierski*, 810 A.2d at 197.

¹²³ *Id.* at 199.

¹²⁴ *Id.*

particular contract, the municipality must conduct a full and complete investigation before awarding the contract to a higher bidder. In this case, however, no investigation could give the Township better knowledge of Vogel's ability to perform under the Township's refuse collection services contract than the knowledge gained from the Township's personal experience with Vogel in 2001.¹²⁵

Similarly, in *Cain v. Winter*,¹²⁶ the trial court evaluated the unsuccessful bidder's deficient performance of a previous contract in denying a petition for a preliminary injunction that sought to enjoin the award of a new contract to one who was not the lowest bidder. In concluding that the Philadelphia Procurement Commissioner appropriately exercised discretion in concluding that the low bidder was not responsible, the court, among other things, found that Philadelphia's "prior experience of printing work performed by [the disappointed bidder] for the City of Philadelphia with respect to a job requiring far less printing was not wholly satisfactory" and that the low bidder's "plant and personnel were inadequate to fully perform the job."¹²⁷ In reaching his decision, the commissioner had received recommendations from personnel who visited the disappointed bidder's plant that "on the basis of the conditions and capabilities observed, the award not be given to" that bidder.¹²⁸ As a result, the "Procurement Commissioner's rejection of the 'prima facie' lowest bidder was founded on a full and honest investigation and cannot be repudiated as an arbitrary or capricious abuse of discretion."¹²⁹ Moreover, as to the successful bidder, the commissioner "was satisfied with [its] past performance ... in printing election materials, its financial position as reflected by Dun & Bradstreet and had no reason to believe the company incapable of satisfactory performance of this contract."¹³⁰

¹²⁵ *Id.* at 199. See also *Adler v. Township of Bristol*, 475 A.2d 1361, 1362-63 (Pa. Commw. Ct. 1984), in which the Commonwealth Court affirmed the denial of an injunction to a waste hauler who was the lowest bidder. Bristol Township had agreements with both haulers who submitted bids and awarded the contract to the second lowest bidder as a result of, among other things, questions concerning the low bidder's responsibility based on its having sued Bristol in connection with an earlier contract and employing officers with criminal convictions.

¹²⁶ 72 Pa D. & C.2d 64 (Phila. Co. 1975).

¹²⁷ *Cain*, 72 Pa. D. & C. 2d at 80.

¹²⁸ *Id.* at 86.

¹²⁹ *Id.* at 81.

¹³⁰ *Id.* at 90.

IV. INJUNCTIVE RELIEF

Any contract entered in violation of the Code is “void.”¹³¹ Consequently, injunctive relief is available to prevent an award of a municipal contract to one not the lowest responsible bidder. To obtain such relief, the party challenging the award must have standing to do so and must meet the standard for obtaining the extraordinary relief of an injunction.

A. *Standing to Challenge Award of the Contract*

Although a municipality must award a contract to the lowest responsible bidder, only a taxpayer of the municipality awarding the contract has standing to challenge a contract award.¹³² A disappointed bidder, in contrast, has “no claim of entitlement to a public contract based on the requirement that the contract be awarded to the lowest responsible bidder, since in Pennsylvania, that requirement is solely for the protection of the taxpayers.”¹³³

In Pennsylvania, a disappointed bidder has sustained no injury which entitles him to redress in court, even if the public official who refuses to award him the contract has a statutory obligation to award it to the lowest bidder. Although those statutory provisions requiring competitive bidding give the public in a taxpayer’s suit the right to demand that the lowest responsible bidder be awarded the

¹³¹ 53 PA STAT ANN. § 56802(b); see also *Foresman v. Gregg Township*, 147 A. 64, 65 (Pa. 1929) (township contracts “in violation of a statute are void.”).

¹³² See, e.g., *Ezy Parks v. Larson*, 454 A.2d 928, 934 (Pa. 1982); *American Totalisator Co. v. Seligman*, 414 A.2d 1037, 1040 (Pa. 1980); *Price v. Philadelphia Parking Auth.*, 221 A.2d 138, 143 (Pa. 1966) (“taxpayer may challenge the ‘wrongful expenditures of tax monies and the wasting of assets.’”) (quoting *Loewen v. Shapiro*, 133 A.2d 525, 527 (Pa. 1957); *James T. O’Hara, Inc. v. Borough of Moosic*, 611 A.2d 1332, 1334 (Pa. Commw. Ct. 1992) (Although *Mascaro* recognized that bidders who are also taxpayers may challenge public contract awards, we did not extend this right to a Pennsylvania taxpayer who paid no taxes in the county which awarded the contract.)). It is not enough that the plaintiff is a taxpayer of the Commonwealth of Pennsylvania. *Nunemacher v. Borough of Middletown*, 759 A.2d 57, 62 (Pa. Commw. Ct. 2000) (Our precedents make clear that such general taxpayer standing does not exist, notwithstanding the extent of Commonwealth funds contributed towards the local project.)).

¹³³ *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F. Supp. 625, 627 (E.D. Pa. 1980).

contract, such provisions do not vest a cause of action for breach of damage in the lowest bidder.¹³⁴

One alternative for a disappointed bidder is to review its roster of employees to determine whether any is a resident of the municipality bidding the contract. If so, the employee may challenge the award, even if the employer funds the cost of the litigation. The employee's affiliation with the disappointed bidder does not in any way preclude the employee from having standing as a taxpayer to challenge the award.¹³⁵ Indeed, a disappointed bidder has standing to challenge a contract award if the bidder is a taxpayer of the municipality awarding the contract.¹³⁶

A party may waive standing as a defense, in which case the disappointed bidder may participate in the lawsuit even if it is not a taxpayer of the municipality.¹³⁷ Counsel should consider whether there are any tactical advantages to having the disappointed bidder be a party to the action. Possible advantages might include easier discovery and the opportunity to assert that the bidder made binding admissions during discovery that may not be available if the bidder were a non-party.

B. The Standard for Injunctive Relief

Assuming there is standing to challenge the award, the taxpayer-plaintiff must satisfy five criteria to obtain injunctive relief:

- (1) Immediate and irreparable harm will occur in the absence of injunctive relief.

¹³⁴ *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 505 A.2d 1071, 1073-74 (Pa. Commw. Ct. 1986) (waste hauler lacked standing to challenge contract award). Assuming the plaintiff is a taxpayer, which can be verified through the municipality's records, litigants generally stipulate to standing such that the taxpayer need not testify at trial.

¹³⁵ *Pleasant Hills Constr. Co., Inc. v. Public Auditorium Auth. Of Pittsburgh and Allegheny Co.*, 782 A.2d 58, 76-77 (Pa. 2001) *rev'd on other grounds*, 784 A.2d 1277 (Pa. 2001).

¹³⁶ *Mascaro*, 505 A.2d at 1074 n.3 (citing *Lasday v. Allegheny Co.*, 453 A.2d 949 (Pa. 1982); *American Totalisator*, 414 A.2d 1037; *Ezy Parks*, 454 A.2d 928).

¹³⁷ *A. Pickett Constr., Inc. v. Luzerne County Convention Ctr. Auth.*, 738 A.2d 20, 23 n.1 (Pa. Commw. Ct. 1999) (citing *In re Estate of Schram*, 696 A.2d 1206, 1209 n.4 (Pa.Cmwlt. 1997), *allocatur denied*, 705 A.2d 1313 (Pa. 1997)) ("a party may waive its opportunity to contest the standing of another party by not raising the issue in a timely manner.").

- (2) Greater injury will result from a refusal of the injunction than from a grant of it.
- (3) Injunctive relief will restore the parties to their status as existing immediately prior to the alleged wrongful conduct.
- (4) Injunctive relief is appropriate to abate the Township's conduct.
- (5) Plaintiffs have a clear right to relief.¹³⁸

These requirements are addressed in order.

To demonstrate irreparable harm, a taxpayer need prove only that the contract was awarded in violation of a statute. "Statutory violations are sufficiently injurious to constitute irreparable harm, and a preliminary injunction may be upheld based upon the violation of competitive bidding requirements."¹³⁹ Township "supervisors are public officers of limited authority and their right to contract is statutory. Hence, contracts entered into by them in violation of a statute are void, and a contract in violation of the statute cannot be enforced although not expressly made void."¹⁴⁰

To demonstrate greater injury, a taxpayer must show that denial of an injunction will in effect sanction a municipality's conduct because the contract would be permitted to become effective.¹⁴¹ In contrast, a grant of injunctive relief would require a municipality to comply with its preexisting duties under the Code.¹⁴² Moreover, the grant

¹³⁸ *John G. Bryant, Co., Inc. v. Sling Testing and Repair, Inc.*, 369 A.2d 1164, 1167 (Pa. 1977); *Beck Computing Servs. Inc. v. Anderson*, 524 A.2d 990, 991-92 (Pa. Super. 1987); *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa. Commw. Ct. 2000).

¹³⁹ *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa. Commw. Ct. 2000) (citing *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317 (1947)); *Pleasant Hills Constr. Co., Inc.*, 782 A.2d 68, 79 ("violation of an express provision of a statute is per se irreparable harm for purposes of a preliminary injunction."). See also *Price v. Philadelphia Parking Auth.*, 221 A.2d 138, 147 (Pa. 1966) (agreement "entered into by private negotiation rather than by competitive bidding was unauthorized and void.").

¹⁴⁰ *Foresman v. Gregg Township*, 147 A. 64, 65 (Pa. 1929) (township contracts "in violation of a statute are void."). See also 53 PA. STAT. ANN. § 56802(b)(3). The court in *Foresman* also observed that "[i]t may not be improper to emphasize the fact that he who deals with the officials of a quasi municipality is bound to take notice of its limited authority to contract." 147 A. at 67.

¹⁴¹ *Shaeffer*, 754 A.2d at 723 (agreeing that denial of injunctive relief "would result in the sanctioning of an illegal award" of a contract).

¹⁴² See 53 PA. STAT. ANN. § 56802 (dealing with a township's general duties) and § 56527 (dealing with township's ability to regulate ashes, garbage, rubbish and refuse removal).

of an injunction will promote the goal of insuring that the Township follows a fair bidding process for its contracts, which promotes taxpayers' confidence in government. "[F]airness lies at the heart of the bidding process, and all bidders must be confronted with the same requirements and be given the same fair opportunity to bid in free competition with each other."¹⁴³ In contrast, a municipality may argue in its defense that injunctive relief would deny its residents necessary services provided under the challenged contract.

As to returning parties to the status quo, injunctive relief invalidating a contract would return the parties to their status before the municipality improperly awarded a contract to one not the lowest responsible bidder. The bids would be considered, and the contract awarded, on the basis of which contractor submitted the lowest responsible bid. However, if the contract challenge was not filed until after performance of the contract had commenced, a municipality may have a strong argument that any injunctive relief will change the status quo.

As to whether injunctive relief is appropriate to abate conduct, a contract award in violation of competitive bidding requirements is precisely the type of conduct that can be abated by an injunction. Under the Code, a contract made in violation of § 56802(b)(1) is "void,"¹⁴⁴ so entry of an injunction to enjoin a void contract is not only appropriate but necessary.¹⁴⁵

Finally, as to a clear right to relief, that element is met in connection with proof that a municipality awarded the contract to a bidder who was not the lowest responsible bidder. A "contract must be awarded to the lowest responsible bidder when a public authority elects to use the public bidding process."¹⁴⁶

C. Remedies Available If Injunctive Relief Is Successful

If the court finds that the contract was not awarded to the lowest responsible bidder, the court has two alternatives that it can pursue in the exercise of its discretion. First, the court may order the contract to be re-bid, which is most likely to

¹⁴³ *Shaeffer*, 754 A.2d at 723.

¹⁴⁴ 53 PA. STAT. ANN. § 56802(b)(3) (2002).

¹⁴⁵ *Cf. Ezy Parks v. Larson*, 454 A.2d 928, 932 (Pa. 1982) ("When competitive bidding is used and the procedures followed emasculate the benefits of such bidding, judicial intervention is proper.") *Id.* (affirming injunction against award of contract based on ambiguity in bid specifications) *Id.*

¹⁴⁶ *Shaeffer*, 754 A.2d at 723; *Metropolitan Messenger Serv. v. Commonwealth*, 317 A.2d 346, 349-50 (Pa. Commw. Ct. 1974) (affirming award of contract to lowest responsible bidder).

occur (for example) when there was an ambiguity in the bid specifications or bids themselves or an error in the bidding procedures.¹⁴⁷ Second, the court may award the contract to the unsuccessful bidder, but only if the court finds that the bidder both submitted the lowest bid and was responsible.¹⁴⁸

If the injunctive action is successful, the prevailing party has an obligation to post a bond. “[T]rial courts determine bond amounts on a case-by-case basis; of course, the bond should be sufficient to cover damages that are reasonably foreseeable.”¹⁴⁹ If the bond becomes inadequate, the municipality may petition the court for an increase in the amount of the bond.¹⁵⁰ However, because an individual taxpayer ordinarily challenges a contract award, the court may waive the requirement of a bond.¹⁵¹

D. Defenses Available to the Township and the Successful Bidder

There are several defenses that a township should consider in defending against an injunctive action challenging a contract award. The available defenses will vary depending on the allegations in the complaint, and the township should consult with its solicitor or outside counsel to evaluate the claims and prepare the defense.

First, the township should determine whether the plaintiff has standing to sue. If the plaintiff is not a taxpayer of the township, then there is no standing to sue. The township thus should review its tax rolls to determine whether the plaintiff is a taxpayer. If the plaintiff is not a taxpayer, the township should file preliminary objections to the complaint to seek its dismissal.

Second, the plaintiff may have unreasonably delayed in seeking injunctive relief, in which case the township may assert the defense of laches.¹⁵² “[F]or laches to apply, there must be a lack of due diligence in pursuing a cause of action and resulting

¹⁴⁷ *American Totalisator*, 414 A.2d at 1041.

¹⁴⁸ *Id.* at 1042.

¹⁴⁹ *Pleasant Hills*, 782 A.2d at 81 (citing *Green County Solid Waste Auth., Greene County Citizens United v. Green County Solid Waste Auth.*, 636 A.2d 1278 (Pa. Cmwlth. 1994)).

¹⁵⁰ *Pleasant Hills*, 782 A.2d at 81 (citing *Dunlap v. Larkin*, 493 A.2d 750 (Pa. Super. 1985) and 5 GOODRICH-AMRAM ' 1531(b):10).

¹⁵¹ *Stapleton v. Berks County*, 593 A.2d 1323, 1332 n.17 (Pa. Commw. Ct. 1991) (the court mentions the county’s right to waive the bond requirement under the Official Note to PA.R.C.P. 1733).

¹⁵² See, e.g., *Secor v. West Mifflin Area School Dist.*, 713 A.2d 1222, 1225 (Pa. Commw. Ct. 1998).

prejudice to the other party.”¹⁵³ Although “a one-month delay [from the date of learning of the contract award] in filing a complaint is not excessive,”¹⁵⁴ the delay likely would be excessive and prejudicial to the township if the challenge is not filed until after the successful bidder has already begun performing the contract or the township has begun using the product purchased. In the absence of appropriate stipulated facts, the court must hold a hearing prior to sustaining a laches defense.¹⁵⁵

Third, if the claim is that the township improperly found a bidder not to be responsible, the township should focus on the discretion it may exercise in determining a bidder’s responsibility and then marshal the facts supporting its decision disqualifying a bidder as not responsible. The township should compile all documents relevant to the responsibility issue and identify those witnesses with first-hand knowledge of problems associated with the bidder, such as problems with the bidder’s performance of a prior contract with the township. Because of the likelihood of a contract challenge in this situation, the township should compile its proof before awarding the contract, which will corroborate its investigation and knowledge of the “real situation” and counter any contention that the township engaged in an after-the-fact justification for its decision.

Fourth, if the claim is that the township improperly rejected bids or waived irregularities, the township should defend based on any instructions in the bid specifications which state that it has the right to reject bids or waive irregularities. The township needs to confirm that it either treated all bidders equally in rejecting bids or that the waived irregularity involved a non-material item. Although this technically may be an estoppel-type defense (*i.e.*, the bidder is estopped from challenging the bid award because it chose to submit a bid in response to bid specifications that advised of the right to reject bids or waive irregularities), the defense will fail if the rejection or waiver was arbitrary, capricious, or otherwise not consistent with the principles underlying competitive bidding. “[J]ustice does not permit a wrongdoer to escape the consequences of his illegal conduct merely by first informing the victim of his intent to commit the illegal act in question.”¹⁵⁶

¹⁵³ *Id.*

¹⁵⁴ *Pleasant Hills*, 782 A.2d at 76.

¹⁵⁵ *Secor*, 713 A.2d at 1225.

¹⁵⁶ *Pleasant Hills*, 782 A.2d at 76 (citation omitted).

V. CONCLUSION

The competitive bidding of public contracts results not just in significant cost savings to township but also in expensive litigation when there is a challenge to a contract award. By hewing closely to the statutory framework and documenting the basis for its decisions in evaluating bids and a bidder's responsibility, a township can minimize its risk of litigation. Although that framework is clear, human error or bias may cause a township to deviate from the bidding requirements and create an opportunity to challenge a contract award. In short, vigilance is required by both the township and bidders for township contracts to ensure that the competitive bidding process operates as intended to benefit taxpayers and to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts.