

**A Fire/EMS/Safety CENTER PUBLICATION**



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**THE ASSISTANCE TO FIREFIGHTER GRANT  
PROGRAM  
AWARD OF FUNDS AND THE BID PROCESS  
RESPONSIBILITIES**

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The State level Public Safety training office, Fire/EMS/Safety Center was established in 1957. Fire/EMS/Safety Center's mission is to advance the professional development of emergency services personnel and of other persons engaged in fire prevention and control and other Public Safety activities. The Fire/EMS/Safety Center has developed an effective program linkage with established Minnesota State Colleges and Universities public safety training programs which exist at the local levels. It is the responsibility of this division to support and strengthen these delivery systems. The Fire/EMS/Safety Center is the point of contact for the Department of Homeland Securities, Federal Emergency Management Agency (FEMA) National Fire Academy (NFA).

The Fire/EMS/Safety Center gathers and distributes information concerning and benefiting the fire service. It gathers and catalogs information and houses an extensive library. Its staff uses those resources as a foundation to offer advice and consultation to fire departments, municipal officials, state agencies, legislators and the public. The State Director of Fire Training facilitates the delivery of firefighting training programs to over 12,000 Minnesota firefighters on an annual basis. In conjunction with the Minnesota State Colleges, the Fire/EMS/Safety Center sponsors the Minnesota State Fire School.

Fire/EMS/Safety Center  
Minnesota State Colleges & Universities  
30 7th Street East, Suite 350  
St. Paul, MN 55101-7804  
651-201-1920  
800-311-3143  
Fax: 651-649-5409  
<http://www.firecenter.mnscu.edu>

Author

**Warren R. Jorgenson**  
Southern District Coordinator  
Office of The Chancellor  
Minnesota State Colleges and Universities District Office  
1205 16<sup>th</sup> St SW  
Willmar, MN 56201-2825  
320-231-5454 - District Office Call anytime 320-894-5071 - Cell  
320-231-5454 - Fax  
[wjorgen@gmail.com](mailto:wjorgen@gmail.com)

## **Low Bid Clarification Assistance to Firefighters Grant Program (AFGP)**

The following information is prepared based on communications with the program staff Assistance to Firefighters Program Office in Washington, DC., League of Minnesota cities documents and staff, and the author, Warren Jorgenson, Fire/EMS/Safety Center.

We frequently receive questions about the spending of award dollars and the low bid award process. The interoperability and other issues that are spelled out in the AFG program guidance sometimes appears to conflict with the lowest bidder on equipment etc.

This document is intended to provide guidance to governing authorities with some direction with regards to the requirement to always except the lowest bid from vendors for the AFG program.

This document addresses the direction from the Assistance to Firefighter Grant Program (AFG) and how their requirements impact the bidding process and the use of **Minnesota's Cooperative Purchasing Venture (CPV)**.

### **AFG Policy Regarding Requiring Two Bids Versus the State Bid Contract**

An example of this is the MN Cooperative Purchasing Venture Program (CPV Program). Cities that participate in this program are allowed to purchase equipment under state contracts at prices the state has already competitively bid.

<http://www.mmd.admin.state.mn.us/cpv2.htm>

AFG will allow grantees to use the CPV list as a single bid and the grant recipient must seek an additional bid. If the grantee informs the subsequent bidder that they have access to the State list, the second bidder will most likely beat the CPV list.

The AFG requirement is to have two bids. Several grantee's are under the impression that they don't have to go to bid because they always buy from this list in their normal day to day purchases and they forget about the requirements under a the AFG contract.

The State "lists" in many cases may not have been a true bid. They may be no more than a menu from which shoppers can select. In many cases the authors of the "list" will tell you that they didn't pit one vendor against another and settle on the best vendor or item. Some State lists charge vendors to be listed much like the yellow pages.

Grantee's NEED to solicit TWO bids as per AFG requirements and they should not rely entirely on the State Bid Process.

**Assistance to Firefighters Program Office in Washington, DC.,**

**Help Desk: 1-866-274-0960 or [firegrants@dhs.gov](mailto:firegrants@dhs.gov)**

Competition is a must. There is no excuses/exemptions/waivers/amnesty/forgiveness of the requirement to get the best deal. If you are using Federal funds you must demonstrate that you have instilled competition in your procurement. The grantees with formal procurement processes must use their own process (e.g., they must treat the Federal funds with the same care/prudence that they treat their own funds).

If the grantee doesn't have a formal process then they must assure that competition is instilled in accordance with the OMB Circulars (\*see note below). **Unfortunately, the Circulars don't dictate or define what "competition" means, but intuitively it means more than one quote. As such, no less than two quotes must be obtained.**

The Federal government is not obligated to reimburse grantees for expenses where there is no evidence of competition. Minimally, we could/would question what we would consider to be the excess costs over what could have been a lower quote. Worst case scenario is that we could question the entire expense.

For legitimate expenses where competition was instilled, we are only obligated to pay the lesser amount – the low bid.

A low bid may be passed-over and a higher bid accepted (and we would allow the higher costs) IF the grantee's formal procurement process allows for such. For example, most procurement policies dictate low bid as fait accompli (something that has happened and is unlikely to be reversed). But some have provisions for skipping over the low bid and selecting a higher-cost bid. Again, any such action must be allowed for, and consistent with, the grantee's policy. If not, then they jeopardize reimbursement.

If a grantee has no procurement policy and they can't accept the low bid, then we might allow reimbursement of the higher-cost bid if there is sufficient justification (interoperability, maintenance, etc.).

## **Emphasis for FY 2010 – Procurement Integrity**

Through audits conducted by the Department of Homeland Security's Office of Inspector General (OIG) and through the Assistance to Firefighters Program Office grant monitoring, it has become apparent that some Assistance to Firefighters Grant (AFG) recipients have not adhered, or are not totally adhering, to the proper procurement requirements when spending grant funds. Anything less than full compliance with Federal procurement policies jeopardizes the integrity of the grant as well as the grant program. As such, in FY 2010 we will place a greater emphasis on oversight of grantees' procurement actions. Below, we have reiterated the Federal procurement requirements for fire departments and EMS organizations grantees when buying goods and services with Federal grant funds. DHS will include a review of grantees' procurement practices as part of the normal monitoring activities.

**Competition:** All procurement transactions shall be conducted in a manner that provides, to the maximum extent practical, open and free competition. Grantees are expected to promote competition and ensure advantageous pricing by soliciting bids from multiple vendors. Purchases shall be made from the vendor whose bid is responsive to the solicitation and is most advantageous to the grantee when price, quality, and other factors are considered. Grantees may use their own procurement procedures, which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal laws and standards. Grantees who fail to adhere to their own procurement policy, or otherwise fail to fully “compete” any purchase involving Federal funds, may find that their expenditures will be questioned and subsequently disallowed.

**Documentation:** Grantees are required to maintain and retain backup documentation such as bids, quotes, and cost/price analyses on file for review by Federal personnel. The required documentation for federally funded purchases should include specifications, solicitations, competitive quotes or proposals, basis for selection decisions, purchase orders or contracts, invoices, and cancelled checks. Grantees who fail to fully document their purchases may find that their expenditures will be questioned and subsequently disallowed.

**Specifications:** Specifications developed for solicitations shall clearly set forth all requirements that the bidder shall fulfill in order for the bid or offer to be evaluated by the recipient. However, those specifications may not be so narrowly constructed or contain features which unduly limit, restrict, or eliminate competition unnecessarily. Grantees may, when developing their solicitations, list factors that will be used in their evaluation of proposals that are submitted, as long as those evaluation factors are not found to limit competition. Finally, grantees cannot impose in-State or local geographical preferences in the evaluation of bids or proposals. Applicants and grantees are encouraged to obtain product information from vendors in order to be more informed about the items they plan to purchase. However, grantees may not use specifications obtained from vendors for any solicitation with Federal grant ii iii funds if the specifications would be found to be restrictive. It is the grantee’s responsibility to assure that vendor specifications are not used in a manner which would result in restricting or limiting competition from other vendors of similar products. Additionally, if a vendor or manufacturer drafts, writes, edits, critiques, or provides any direct consultation on a grant application that vendor or manufacturer cannot submit a bid for that purchase. Likewise, if a vendor or manufacturer drafts, writes, edits, critiques, or provides any direct consultation on a specification to be used for the solicitation for the purchase of a specific product, that vendor or manufacturer cannot submit a bid for that purchase. See Conflicts of Interest below.

Grantees shall, on request, make available to DHS pre-award review and procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, *etc.*, if

- 1) the purchase specifies a "brand name" product or
- 2) the proposed award is to be awarded to other than the apparent low bidder under a sealed bid process.

Grantees found to be using proprietary, or otherwise limiting specifications, may find their expenditures questioned and subsequently disallowed.

**Personal and Organizational Conflicts of interest:** In order to ensure objective vendor performance and eliminate a real or apparent unfair competitive advantage, anyone that develops or drafts specifications, requirements, statements of work (including the grant application), invitations for bids, and/or requests for proposals shall be excluded from competing for such procurements. Additionally, no employee, officer, or agent of the grantee shall participate in the selection, award, or administration of a procurement supported by Federal funds if a real or an apparent conflict of interest would be involved.

A conflict of interest could arise when any of the following conditions exists:

- a) An officer, employee, or agent of the grantee has a financial or other interest in the vendor selected for the procurement.
- b) Any member of the grantee's officers', employees', or agents' immediate family has a financial or other interest in the vendor selected for the procurement.
- c) An organization which employs a grantee's officer, employee, or agent is a vendor or has a financial or other interest in the vendor selected for the procurement.

For the purposes of this program, we consider volunteers of an organization and grant writers to be employees, officers, and/or agents of the grantee. As such, no volunteer or member of an organization or anyone involved in the application for funding can participate in, or benefit from, the procurement if Federal funds are involved. Grantees that purchase items with grant funds from vendors who employ any of their volunteers/members will have to document how they avoided a conflict of interest during the procurement process (*i.e.*, specific details regarding how the members/volunteers removed themselves, or how they were prevented from participating in the process). Grantees who fail to fully document their purchases may find that their expenditures will be questioned and subsequently disallowed.

## Grantee Responsibilities

**AFG award recipients (grantees) must agree to:**

**(5) Ensure all procurement transactions** are conducted in a manner to provide, to the maximum extent practical, open and free competition. Grantees are expected to promote competition and ensure advantageous pricing by soliciting bids from multiple vendors and to select the lowest bidder able to meet the requirements. Procurements shall be made from the bidder whose offer is responsive to the solicitation and is most advantageous to the grantee when price, quality, and other factors are considered. The grantee must follow its established procurement processes when purchasing vehicles, equipment, and services with AFG funds. If the grantee has no established procedures, it should obtain at least two quotes/bids for the items being procured and document the process used in the grant files. Sole-source purchasing is not an acceptable procurement method except in unusual circumstances. Grantees who fail to adhere to their own procurement policy or otherwise

fail to fully “compete” any transaction involving Federal funds may find that their expenditures will be questioned and subsequently disallowed. Specifications developed for solicitations shall clearly set forth all requirements that the bidder shall fulfill in order for the bid or offer to be evaluated by the recipient. However, those specifications may not be so narrowly constructed or contain features which unduly limit, restrict, or eliminate competition unnecessarily. See *also* Item 7 below regarding conflicts of interest. Grantees shall, on request, make available to DHS, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, *etc.*, if a) the procurement specifies a "brand name" product, or b) the proposed award is to be awarded to other than the apparent low bidder under a sealed 58 bid process. Grantees found to be using proprietary specifications may find that their expenditures will be questioned and subsequently disallowed.

**(6) Conduct all bidding activities** (solicitation, receipt, and evaluation) after award, *i.e.*, during the period of performance. Quotes obtained prior to submittal of the application - for the purposes of applying for this grant - are not considered to be sufficient to satisfy the requirements for competition as outlined at 44 CFR Part 13. Grantees may be jeopardizing their awards if they do not adhere to the requirements set forth herein.

**(7) Avoid conflicts** of interest in order to ensure objective vendor performance and eliminate a real or an apparent unfair, competitive advantage. Grantees must assure that anyone that develops or drafts specifications, requirements, statements of work (*including the grant application*), invitations for bids and/or requests for proposals are excluded from competing for such procurements. Grantees must assure that no employee, officer, or agent of their organization participates in the selection, award, or administration of any procurement supported by Federal funds if a real or an apparent conflict of interest would be involved.

A conflict of interest could arise when any of the following conditions exists: a) An officer, employee, or agent of the grantee has a financial or other interest in the vendor selected for the procurement. b) Any member of the grantee’s officers’, employees’, or agents’ immediate family has a financial or other interest in the vendor selected for the procurement. c) An organization which employs a grantee’s officer, employee, or agent, is a vendor or has a financial or other interest in the vendor selected for the procurement.

For the purposes of this program, we consider volunteers of an organization and grant writers to be employees, officers and/or agents of the grantee. As such, grantees must assure that no volunteer or member of their organization or anyone involved in the application for funding participates in, or benefits from, the procurement if Federal funds are involved. Grantees who select vendors that employ volunteers or members of the organization will have to document how they avoided a conflict of interest during their procurement process. Grantees who fail to fully document their purchases may find that their expenditures will be questioned and subsequently disallowed.

# Interoperability

**Equipment/technology requests should have the goal of solving interoperability or compatibility problems.** Therefore, applicants should describe in their narrative sections how the purchase of equipment would comply with standards and/or facilitate solving interoperability or compatibility problems.

[I want to buy radio equipment that all of my neighboring departments use, and there is only one vendor that sells those radios. Do I have to seek other bids or may I use the sole source?](#)

Interoperability is justification for selection of a specific vendor but CANNOT be used as justification to avoid obtaining bids from other sources. You must ensure all procurement actions are conducted in a manner that provides, to the maximum extent possible, open and free competition, and document your choice of vendors in your grant files. Refer to the "*Part VI. Section B. Grantee Responsibilities*" Section, item (5), on page 57 of the 2009 Program Guidance.

**In short, interoperability may be a reason to by-pass the lowest bid. It is NOT an excuse to forgo competition.**

[44 CFR Part 13 references A-110.](#)  
[The Articles of Agreement references A-110.](#)

## OMB Circular

<http://www.whitehouse.gov/omb/grants/attach.html>

Although there are six grant circulars, you are only covered by three of them, depending on type of entity:

## Which Circular do I Follow?

Although there are six grant circulars, you are only covered by three of them, depending on type of entity:

**States, local governments, and Indian Tribes follow:**

- [A-87](#) for cost principles, [Relocated to 2 CFR, Part 225](#) (18 pages, 362 kb)
- [A-102](#) for administrative requirements, and
- [A-133](#) for audit requirements

**Educational Institutions (even if part of a State or local government) follow:**

- [A-21](#) for cost principles, [Relocated to 2 CFR, Part 220](#) (30 pages, 384 kb)

- [A-110](#) for administrative requirements, [Relocated to 2 CFR, Part 215](#) (18 pages, 280 kb), and
- [A-133](#) for audit requirements

**Non-Profit Organizations follow:**

- [A-122](#) for cost principles, [Relocated to 2 CFR, Part 230](#) (17 pages, 362 kb)
- [A-110](#) for administrative requirements, [Relocated to 2 CFR, Part 215](#) (18 pages, 280 kb), and
- [A-133](#) for audit requirements

**Minn. Stat. 471.345 UNIFORM MUNICIPAL CONTRACTING LAW.**

<https://www.revisor.mn.gov/statutes/?id=471.345>

**471.345 UNIFORM MUNICIPAL CONTRACTING LAW.**

**Subdivision 1. Municipality defined.**

For purposes of this section, "municipality" means a county, town, city, school district or other municipal corporation or political subdivision of the state authorized by law to enter into contracts.

**Subd. 2. Contract defined.**

A "contract" means an agreement entered into by a municipality for the sale or purchase of supplies, materials, equipment or the rental thereof, or the construction, alteration, repair or maintenance of real or personal property.

**Subd. 3. Contracts over \$100,000.**

If the amount of the contract is estimated to exceed \$100,000, sealed bids shall be solicited by public notice in the manner and subject to the requirements of the law governing contracts by the particular municipality or class thereof. With regard to repairs and maintenance of ditches, the provisions of section [103E.705, subdivisions 5, 6, and 7](#), apply.

**Subd. 3a. Contracts over \$100,000; best value alternative.**

As an alternative to the procurement method described in subdivision 3, municipalities may award a contract for construction, alteration, repair, or maintenance work to the vendor or contractor offering the best value under a request for proposals as described in section [16C.28, subdivision 1](#), paragraph (a), clause (2), and paragraph (c).

#### **Subd. 4. Contracts exceeding \$25,000 but not \$100,000.**

If the amount of the contract is estimated to exceed \$25,000 but not to exceed \$100,000, the contract may be made either upon sealed bids or by direct negotiation, by obtaining two or more quotations for the purchase or sale when possible, and without advertising for bids or otherwise complying with the requirements of competitive bidding. All quotations obtained shall be kept on file for a period of at least one year after receipt thereof.

#### **Subd. 4a. Contracts exceeding \$25,000 but not \$100,000; best value alternative.**

As an alternative to the procurement method described in subdivision 4, municipalities may award a contract for construction, alteration, repair, or maintenance work to the vendor or contractor offering the best value under a request for proposals as described in section [16C.28, subdivision 1](#), paragraph (a), clause (2), and paragraph (c).

#### **Subd. 5. Contracts \$25,000 or less.**

If the amount of the contract is estimated to be \$25,000 or less, the contract may be made either upon quotation or in the open market, in the discretion of the governing body. If the contract is made upon quotation it shall be based, so far as practicable, on at least two quotations which shall be kept on file for a period of at least one year after their receipt. Alternatively, municipalities may award a contract for construction, alteration, repair, or maintenance work to the vendor or contractor offering the best value under a request for proposals as described in section [16C.28, subdivision 1](#), paragraph (a), clause (2), and paragraph (c).

## **League of Minnesota Cities**

League of Minnesota Cities  
145 University Avenue West  
St. Paul, MN 55103-2044  
(651) 281-1200 (800) 925-1122 Fax (651) 281-1299

### **LMNC 130B1.3 Competitive Bidding Requirements in Cities**

<http://www.lmc.org/media/document/1/competitivebidding.pdf>

### **Handbook for Minnesota Cities: Ch. 23 - - Expenditures, purchasing and contracts**

*Published Dec 8, 2009*

Statutory regulations and procedures for the disbursement of public funds. Topics include: expenditures, procedure to pay claims, purchasing, sale of city property and equipment, contracts, competitive bidding, purchasing professional services. (Revised 12/2009)  
<http://www.lmc.org/media/document/1/chapter23.pdf>

At a minimum, Minnesota cities' normal procurement policy would comply with Minnesota state law. The fire department would work with its city council to follow state law and any additional city requirements for purchases. Independently incorporated fire departments would not be subject to these requirements.

Minnesota requires a sealed bidding procedure for equipment estimated to cost more than \$50,000. State law would only allow quotes on equipment that is estimated to cost \$10,000, but not more than \$50,000. Home rule charter cities in the state may have more stringent and/or additional requirements set out in their charters.

Minnesota law also requires statutory cities to award the contract to the lowest responsible bidder. M.S. 412.311. This may be another exception to the federal lowest-cost contract requirement since it 'part of a grantee's own formal procurement policy'. Determining "responsibility" is in the discretion of the council, and the only guidance on what is "responsible" comes from court decisions where contract disputes have arisen on this issue.

According to the League's *Handbook for Minnesota Cities*, "[C]ourts have interpreted the responsibility of bidders to mean financial responsibility, but also integrity, skill, and the likelihood of performing faithful and satisfactory work. Promptness, for example, is an element of responsibility. When bids on equipment items are not capable of precise specifications, the council may exercise reasonable discretion in determining the lowest bidder. And in so doing, the council can consider the quality, suitability, and adaptability of the article the city is seeking." In addition, "[V]alue does not always depend on price alone. The council may also consider the quality, suitability, and adaptability of the articles. Where plans and specifications demand consideration of several factors and no single bid is lowest in all these factors, the council may decide what weight to give to the various factors and, considering all of them, accept what it deems to be the lowest responsible bid."

In addition to guiding readers to the League's Information Memo on *Competitive Bidding Requirements in Cities* you might also want to mention Chapter 23 of the *Handbook for Minnesota Cities*, which is also on our web site: <http://www.lmc.org/page/1/resource-library.jsp?pageId=1608> Material in the two documents is similar but not the same.

I should also note that we are coming up on the end of the legislative session. There could be changes to the contracting law this session.

## Newspaper Publication

<http://www.lmc.org/media/document/1/newspaperpublication.pdf>

### 440.1 March 2010

The League of Minnesota Cities provides this publication as a general informational memo. It is not intended to provide legal advice and should not be used as a substitute for competent legal guidance. Readers should consult with an attorney for advice concerning specific situations.

This memo discusses newspaper-publication requirements for cities. Cities are required to give public notice for meetings and elections, as well as certain information about elections and **city finances**. Sometimes this information is required to be published. Sometimes it is not required to be published, but cities choose to publish it to better inform the public.

Minn. Stat. §§ [471.345, subd. 3](#); [412.311, subd. 1](#).

- **Advertisements for bids.** All statutory cities must publish advertisements for bids if a contract will be let using the competitive-bidding process.

## Advertisements for bids

Minn. Stat. § [471.345, subd. 3](#).

All cities must give public notice when they are seeking sealed bids on contracts using the competitive-bidding process. Although the general competitive-bidding law does not specifically require newspaper publication, this is the most common means used for providing public notice.

Minn. Stat. §§ [412.831](#); [412.311, subd. 1](#).

Statutory cities have a more stringent requirement. These cities must publish an advertisement for bids in a qualified newspaper if the contract in question is subject to the competitive-bidding law.

Many home rule charter cities have charters that contain specific requirements regarding competitive bidding. These requirements should also be considered by these cities.

## The Office of the MN State Auditor

### Avoiding Pitfalls - Minnesota's Cooperative Purchasing Venture (CPV)

Vendors sometimes market their businesses by claiming that local units of government can purchase from them without bidding. Vendors may emphasize that they are part of the “state contract” and will sell at the “state contract price.”

Public entities should be cautious before proceeding with these purchases. Public entities cannot avoid the normal bidding requirements simply by purchasing from these vendors. Instead, this exception to the bidding requirements applies only to governmental units that have joined the

Cooperative Purchasing Venture, a members-only joint powers program operated by the Minnesota Department of Administration. The Cooperative Purchasing Venture allows members to purchase goods and services under contract terms established by the State of Minnesota, for an annual fee.

More information on the Cooperative Purchasing Venture, and how to become a member, can be found at the following link: <http://www.mmd.admin.state.mn.us/cpv2.htm>

The Office of the State Auditor is located at 525 Park Street, Suite 500, Saint Paul, MN 55103. Phone: 651-296-2551 Fax: 651-296-4755 Web: [www.auditor.state.mn.us](http://www.auditor.state.mn.us)

## **UNDERSTANDING AND AVOIDING BID PROTESTS**

By Jim Cownie, Contracts Administrator, Mn/DOT Contract Management Section

Mn/DOT's selection of a design-build contractor for the new 35W bridge resulted in protests from two losing design-build firms and two taxpayers. While work on the bridge has begun, the episode illustrates potential pitfalls a public owner can encounter in awarding contracts for public works projects. The use of a "best value" process to award construction contracts may even make bid protests more likely. It is important for public agencies to understand how bid protests arise and how they work, in order to employ proactive measures to avoid such protests and to minimize their effects.

A bid protest is an attempt to compel the purchasing agency to set aside its contract award decision and to conduct a new procurement process. Bid protests can arise as either an administrative action or as a lawsuit. While a bid protest is normally raised by an unsuccessful bidder, individual taxpayers may also have standing to sue. A 1977 Minnesota case (McKee -vs- Likins) states "It is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys...as well as to restrain illegal action on the part of public officials".

The general claim in a bid protest is that something in the procurement process was unfair to the losing bidders, so the award decision should be set aside and the process started over again. If the protestor files a lawsuit, they will generally seek injunctive relief (a temporary order directing the agency not to award or proceed with the contract until a final court judgment is rendered) and declaratory relief (a court order stating that the award is invalid and prohibiting the agency from making the award). Due to practical difficulties inherent in obtaining injunctive relief (including the requirement of posting a significant bond) a protestor may opt not to seek such relief and simply attempt to obtain a declaratory judgment. Voiding the agency's award decision is, however, the best that a protestor can hope for. A protestor cannot get a court order directing the agency to award the contract to them, nor can it obtain monetary damages from the agency, through a protestor may attempt to recover their cost of bid preparation if successful.

In court, bid protestors face significant hurdles. A court will generally not step into the role of determining whether an agency made the "right" decision. A leading case (Onan Corp. -vs- United States) states "Cases involving disputes over government procurement contracts almost invariably emphasize that the courts should be extremely reticent to interfere with government procurement

policies, given the complexity of procurement decisions, the lack of expertise possessed by the courts, the discretion invested in the procurement officer, and the potential confusion, inefficiency, delay, and increased expense that can result". A Minnesota case (*Griswold –vs- City of Ramsey*) further states "An award of a public contract will be enjoined only if illegal, arbitrary, capricious, or unreasonable, or where there is actual fraud, collusion, or bad faith, or where the procedures employed are so flawed as to emasculate the whole system of competitive bidding". A decision by a government agency is generally "arbitrary and capricious" when it is based on will or whimsy, and disregards evidence or is not based on some established principles or criteria. A decision is "unreasonable" when it is absurd or irrational (i.e. the decision made doesn't seem to have any support in the evidence reviewed).

Bid protests can arise under either a "best value" or a "lowest responsible bidder" approach, but are somewhat more likely under a best value approach. Under a low bid system, the "normal" bid protest arises is when the agency determines that the low bidder is not "responsible" and elects to award the contract to the second lowest bidder. The factors that go into determining whether a bidder is "responsible" are beyond the scope of this article, but legal advice should be sought when making such a determination. Under a low bid system, protestors may also allege that bid specifications or requirements were ambiguous or biased.

Because best value procurements necessarily involve some level of subjectivity, they are more likely to give rise to a bid protest. Protests of best value award decisions are likely to involve attacks on:

- Scoring of proposals
- Evaluation Criteria
- Weighting of evaluation criteria
- Information provided in interviews

Because scoring of proposals is ultimately an individual effort, it may be hardest to minimize the potential for attacks on that front. Protestors are likely to attempt to identify "outliers" – evaluators whose scores seem markedly different from the rest of the evaluation team – and determine whether they affected the contractor selection. The use of standardized rating scales can help to avoid problems. This involves identifying numeric ranges for evaluators to use, so, e.g. one rater doesn't use 80 points as an "excellent" score while another uses 95 points to denote an "excellent". This is not to say that individual variations in scoring can't be tolerated. Part of the great value of an evaluation team is the diversity of views and experience. Evaluators should, however, keep documentation of their comments, which may help explain differences in scores and avoid charges such as favoritism towards, or bias against, one of the proposers.

Protestors may also attack the evaluation criteria used. They may argue that the criteria used were not germane to the procurement at issue - that it is not clear why a particular criterion was used. In such a case, it might be helpful to have documentation that will help the agency to explain how the selected criteria helps produces a result that is in line with the stated objectives of the procurement. The use of "sub-criteria" which were not identified in the Request for Proposals may also arise as an issue.

The weighting of the evaluation criteria could also be called into question. The protestors may question whether the weighting bears a logical relationship to the stated or apparent objectives of the procurement. When determining weights for evaluation criteria, review the weights against the stated

project purpose, and determine if the weighting is reasonable in relation to achieving the project purpose.

While interviews can be a great way to flesh out the proposals, they also raise a possibility for a protestor to allege that the proposers were given different or unequal information. Several strategies could be employed to ameliorate these concerns, such as:

- Stick to asking scripted questions
- Designate a spokesperson who will respond to the interviewee's questions
- Keep track of information provided to each interview, consider following up with a written confirmation to each interviewee if one of the proposers misses a significant piece of information.
- Consider audio or videotaping the interviews, or possibly having them transcribed by a court reporter, so there is an official record.

Bid protests may, of course, come before a contractor is even selected. As use of best value expands, it may become more common for contractors to file protests during the RFP stage. This is due not only to the fact that there may be procedural benefits in doing so (getting a clarification before proposals are due is easier than trying to raise a protest after the contractor selection is made), but the RFP may also specify that responders waive any objections that they fail to raise during the RFP stage.

While the technical evaluation of proposals is obviously key, a public agency also needs to pay attention to the evaluation process. Employing some process safeguards can help prevent bid protests. Oversight of the evaluation process should be vested in the agency's procurement officer, rather than the project manager. For significant procurements, the purchasing agency should even consider the use of a "process oversight committee" of individuals who are not directly involved in the project. This committee would oversee the evaluation process with a focus on making sure that the technical evaluation committee complies with the terms of the RFP, uses the evaluation criteria specified in the RFP, avoids appearances of favoritism, and adequately documents comments and scores. The agency should design a protest process that encourages protests to be raised at the earliest opportunity, and requires that protests be submitted and reviewed on an expedited basis to avoid project delays. A "protest official" should be designated. Ideally, the protest official should be a procurement officer with no other direct involvement in the project. To reduce the chance for a bid protest to turn into legal action, the agency should specify that the bid protest provided in the RFP is the exclusive remedy available to proposers.

Many public works projects involve large dollar amounts and are subject to intense scrutiny by citizens and the media. While the purchasing agency can't always control the incentive for an unsuccessful bidder or proposer to raise a protest, it can take efforts to reduce the likelihood that such a protest will succeed or cause a project delay.