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COMMON LAW EXCEPTIONS TO COMPETITIVE BIDDING REQUIREMENTS IN PUBLIC CONTRACTS

INTRODUCTION

The field of public contract law has been a subject of increasing interest in recent years, which is understandable when one notes the ever-increasing impact of governmental procurement upon the economy. The real glamor has been in the area of federal procurement, but the significance of state and local public contract law should not be discounted.¹ The purpose here will be to examine one aspect of public contract law: the common law exceptions to competitive bidding requirements in state and local contracts. But before examining these exceptions it is necessary to examine the essentials of competitive bidding.

PERSPECTIVE

The requirement of competitive bidding may be broadly defined as that procedure whereby after a formal advertisement for bids, contract proposals are submitted to a public authority which after due deliberation is authorized either to reject all bids, or to award the contract to the lowest responsible bidder.² It is said that competitive bidding in the letting of public contracts is employed for the protection of the public from fraud, favoritism, and corruption and to secure to the public the fruits of competition among bidders.³ As to this requirement the Supreme Court of Appeals of Virginia has said:

Such salutary safeguards are upon occasion vividly necessary to protect the public from officials at times forgetful of their city's

1. In fiscal 1965, Virginia alone spent some 805 million dollars, much of it under public contract. TAX FOUNDATION, *FACTS AND FIGURES ON GOVERNMENT FINANCES* 225 (1967). Federal procurement law, which is generally governed by the Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. §§ 2301-2314 (1964), as well as the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-524, 41 U.S.C. §§ 251-260 (1964), will be mentioned only by way of comparison. The Armed Services Procurement Regulations (ASPR), issued under authority of the ASPA, are the main body of law in federal procurement. 32 C.F.R. § 1.101 *et seq.* [Herein-after cited as ASPR.]

2. McQUILLIN, *MUNICIPAL CORPORATIONS* § 29.28 (rev. ed. 1966).

3. *Edward v. Renton*, 67 Wash. 2d 598, 409 P.2d 153 (1965); *Fonder v. South Sioux Falls*, 76 S.D. 31, 71 N.W. 2d 618 (1955).

interest. Otherwise a contract on disastrous terms could be let at will to a favored contractor who, in the event that it was afterwards questioned, might still demand pay for work done.⁴

But in the absence of controlling constitutional, statutory, or charter provisions, competitive bidding is not an essential prerequisite to the letting of public contracts.⁵ Nor need a public authority let its contracts to the lowest bidder if, in the absence of statutory requirement, it nonetheless adopts a policy of advertising for bids.⁶ But when competitive bidding is required by ordinance it must be followed by successor authorities.⁷

However, where competitive bidding is required by constitution, statute, or charter, it is mandatory; and any contract awarded without complying with the requirement is void and unenforceable.⁸ Thus strict compliance with competitive bidding requirements is a condition precedent to the awarding of the contract.⁹

Competitive bidding requirements apply as well to supplemental contracts, that is, contracts covering items not provided for by the terms of the original contract and not merely incidental to the contract already awarded, unless bids for the original contract were made on the basis of a contemplated extension under supplemental contracts to be let to the original successful bidder.¹⁰ Such requirements also apply to amendments of a contract already executed in compliance therewith where the amendments alter the original contract in some vital and

4. *Bristol v. Dominion Nat'l Bank*, 153 Va. 71, 84, 149 S.E. 632, 635 (1929).

5. *South Hampton Apts. v. Eliz. City County*, 185 Va. 67, 37 S.E.2d 841 (1946); *Schulte v. Salt Lake City*, 79 Utah 292, 10 P.2d 625 (1932).

6. *Davis v. Santa Ana*, 108 Cal. App. 2d 669, 239 P.2d 656 (1952); *Slocum v. Medford*, 302 Mass. 251, 18 N.E. 2d 1013 (1939).

7. *Cimarron Utilities v. Guymon*, 171 Okla. 344, 43 P.2d 143 (1935); *Kirksville v. Harrington*, 225 Mo. App. 309, 35 S.W. 2d 614 (1930); *Flinn v. Philadelphia*, 258 Pa. 355, 102 A. 24 (1917).

8. *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P.2d 34 (1946); 1 *ANTIEAU, MUNICIPAL CORPORATION LAW* § 10.11 (1967).

9. *Fineran v. Bitulithic Paving Co.*, 116 Ky. 495, 76 S.W. 415 (1903). It is not necessary in order to establish the invalidity of a contract for failure to comply with competitive bidding requirements to show fraud or other affirmative wrongdoing. *Coller v. St. Paul*, 223 Minn. 376, 26 N.W. 2d 835 (1947). And a failure to observe the statutory requirement is not excused by the fact that the only competitors would have necessarily incurred a much larger expense in execution of the work than the one who secured the contract. *Philadelphia Co. v. Pittsburgh*, 253 Pa. 147, 97 A. 1083 (1916).

10. *Brevilacqua v. Clark*, 377 Pa. 1, 103 A.2d 661 (1954); 63 C.J.S. *Municipal Corporations* § 996(b) (2) (1950).

essential particular, and this is so notwithstanding a clause giving the public authority a right to modify without supplemental bidding.¹¹ When a contract which was originally let upon competitive bidding is abandoned, the public authority may proceed to complete the work without again advertising for bids, the theory being that the original contractor has made himself liable for the extra expense incurred.¹²

It has been mentioned previously that at common law competitive bidding is not an essential prerequisite to the letting of public contracts. As such statutes are contrary to the common law, they are subject to the rule of strict construction.¹³ It is not remarkable, then, that there has grown up a body of case law dictating certain exceptions to such requirements and independent of any statutory distinctions. Thus we may say that there is a common law of exceptions, stemming from the tendency of the courts to construe bid statutes strictly in close cases.

These exceptions are: contracts requiring special skills, contracts made under public exigency, contracts specifying unique items, contracts for purchase of utility services, and contracts requiring patented items. In some instances these exceptions have been embodied into statutes on the state and local level.¹⁴

CONTRACTS REQUIRING SPECIAL SKILLS

Constitutional, statutory, or charter provisions requiring competitive bidding as a basis for entering into contractual relations with a public authority are not intended to apply to contracts for personal services requiring special skill or training.¹⁵ Thus contracts with accountants, actors, architects, artists, attorneys, auditors, abstractors, engineers,

11. *Cullingham v. Omaha*, 143 Neb. 744, 10 N.W.2d 615 (1943).

12. *Moriarity v. Orange County*, 90 N.J.L. 328, 98 A. 465 (1916). Statutes requiring competitive bidding on public improvements are applicable only to contracts whereby the public authority itself assumes obligations or indebtedness and are thus not applicable to projects financed by revenue bonds. *Wring v. Jefferson*, 413 S.W.2d 292 (Mo. 1967); *Massey v. Franklin*, 384 S.W.2d 505 (Ky. 1964).

13. *Fonder v. South Sioux Falls*, 76 S.D. 31, 71 N.W. 2d 618 (1955); *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 647 (1954).

14. In federal procurement these exceptions are recognized in the seventeen exceptions to formal advertising under the ambit of which each negotiated procurement must come. ASPR § 3.200 *et. seq.*

15. *Ex parte Houston*, 224 P.2d 281, 295 (Okla. Crim. App. 1950); *Potts v. Utica*, 86 F.2d 616 (2d Cir. 1937); *Commonwealth v. Tice*, 272 Pa. 447, 116 A. 316 (1922); *Miller v. Boyle*, 43 Cal. App. 39, 184 P. 421 (1919); *Braaten v. Olsen*, 28 N.D. 235, 148 N.W. 829 (1914).

clerks, interior decorators, musicians, stenographers, and surveyors have been held exempt from competitive bidding requirements.¹⁶

The most widely accepted rationale for this exception is that, if contracts for this type of work must be let to the lowest bidder, the inevitable result would place the public in a position which would require it to accept the services of incompetent persons who are lacking in such special skills or training since they would be able to underbid those more talented as the natural result of competitive pressures.¹⁷

The earlier cases on this point relied on the view that contracts for professional services were not intended to be included in the terms "work, materials, and labor" included in so many statutes and charters.¹⁸ This was unfortunate since it forced the courts to follow the tenuous route of interpreting legislative intent, which is certainly a rather circuitous method to reach the salutary results dictated by the weight of authority. A recent case, however, has found a more cogent rationale, holding that because *discretion* is involved in the selection of the ones to perform personal services requiring special skill, public contracts for such services are not the subject of competitive bidding.¹⁹

To come within the special skills exception, the contract must be for services that are *personal*. Thus in *Johnson-Olmstead Realty v. Denver*²⁰ it was held that a contract between a city and a cooperative association of architects to furnish architectural services was invalid because of noncompliance with competitive bidding requirements. Here the city had delegated its rights to select an architect to an association inherently impersonal; the reason for validating the contract under the exception had failed. Further, for a contract to fall within the exception, it must require some *peculiar skill*. Thus it has been held that a contract between a city and an individual for the maintenance and collection of monies from parking meters does not fall within the exception.²¹

16. Annot., 44 A.L.R. 1150 (1926).

17. *Parker v. Panama City*, 151 So. 2d 469 (Fla. 1963); *Hellman v. St. Louis County*, 302 S.W.2d 911 (Mo. 1957); *Hordin v. Cleveland*, 77 Ohio App. 491, 62 N.E. 2d 889 (1945). The exception for personal and professional services has been recognized in federal procurement, ASPR § 3.204-1, and there is some indication that this exception is recognized in Virginia. *Newport News v. Potter*, 112 F. 321, 331 (4th Cir. 1903).

18. See, *People ex. rel. Smith v. Flagg*, 17 N.Y. 584 (1858). *Accord*, *Delker v. Atlantic*, 90 N.J.L. 473, 101 A. 370 (1917).

19. *Masters v. Pack*, 215 Tenn. 629, 288 S.W.2d 144 (1965).

20. 89 Colo. 250, 1 P.2d 928 (1931); *accord*, *Franklin v. Horton*, 97 N.J.L. 25, 116 A. 176 (1922); *O'Brien v. Niagara Falls*, 65 Misc. 92, 119 N.Y.S. 497 (1909).

21. *Pensacola v. Kirby*, 47 So.2d 533 (Fla. 1950). See also, *Terry v. Cookeville*, 184

It is apparent that the special skills exception is premised upon a basic economic fact, and when recognized as such, serves to adapt public bidding procedures to the parameters of the marketplace.

CONTRACTS MADE UNDER PUBLIC EXIGENCY

An emergency has been defined as an unforeseen occurrence or combination of circumstances which call for an immediate action or remedy.²² When such a condition exists, requirements for competitive bidding are dispensed with.²³ *Ratio cessante cessit lex*. Thus where a city manager ordered necessary repairs to an installation in a municipal utility without soliciting competitive bids for such repairs, and it appeared that an emergency existed, the governing body had the power to approve the contract.²⁴

The exception, however, does not apply to a condition which may clearly be foreseen in abundant time to take remedial action before serious damage to the health or safety of persons or property is likely to occur. Thus projects which display so imminent a need that normal procedures may be dispensed with must result from a sudden or unexpected occurrence or exhibit a new condition calling for immediate action.²⁵ Also, it has been held that where the making of emergency repairs is only incidental to a principal contract let without competitive bidding where such is required, the contract is void.²⁶

Under a provision to that effect, a determination of emergency made by a public authority is a condition precedent to the letting of a contract without submitting it to competitive bidding,²⁷ but where such determination has been made, it is subject to collateral attack in the courts.²⁸ Similarly, where a statute creates an emergency exception and

Tenn. 347, 198 S.W.2d 1010 (1947); *Cleveland v. Lausche*, 71 Ohio App. 273, 49 N.E.2d 207 (1943).

22. *Oakes v. Peter Pan Bakers*, 138 N.W.2d 93, 100 (Ia. 1965); *Pickett v. Cooper*, 202 Va. 60, 116 S.E.2d 48 (1960).

23. *Hoffman v. Mt. Pleasant*, 126 Tex. 632, 89 S.W.2d 193 (1936); *Tobin v. Sundance*, 45 Wyo. 219, 17 P.2d 666 (1933); *Los Angeles Dred. Co. v. Long Beach*, 210 Cal. 348, 291 P. 839 (1930); *Sheehan v. New York*, 37 Misc. 432, 75 N.Y.S. 802 (1902).

24. *Merchant's Nat'l Bank v. Grand Forks*, 130 N.W.2d 212 (N.D. 1964). This exception is recognized in federal procurement. ASPR § 3.202-1 *et. seq.*

25. *Bd. of Education v. Hoek*, 38 N.J. 213, 183 A.2d 633 (1962).

26. *Smith v. Vinton*, 216 La. 9, 43 So. 2d 18 (1949).

27. *West Va. Coal Co. v. St. Louis*, 324 Mo. 968, 25 S.W.2d 466 (1930); *Tobin v. Sundance*, 45 Wyo. 219, 17 P.2d 666 (1933).

28. *Raynor v. Louisburg*, 220 N.C. 348, 17 S.E.2d 495 (1941); *Continental Constr. Co. v. Lawrence*, 297 Mass. 513, 9 N.E.2d 550 (1937).

does not confer express power on the public authority to declare an emergency, the authority cannot declare an emergency where none exists so as to defeat the provisions of the law.²⁹

The emergency exception is based on the recognition of a special fact situation and serves to provide a necessary flexibility to the requirements of competitive bidding when strict compliance with statutory provisions would be unavailing.

CONTRACTS SPECIFYING UNIQUE ITEMS

The object of requiring competitive bidding is, of course, to insure economy and exclude favoritism and corruption. But such a requirement is futile in cases where the public authority desires to obtain a particular or unique property, be it personalty or realty. In such cases it has been held that the requirement is inapplicable as it may be said to apply only to articles which are sold and consumed generally.³⁰

Thus a public contract for the purchase of a particular steamboat was valid without submission to competitive bidding,³¹ and in the absence of fraud, favoritism, or corruption, it was not illegal for a public authority to include in its contract specification features of a particular diesel engine which it felt desirable.³² Further, it was held in *Schwartz v. Bd. of Freeholders* that a public authority may specify a particular brand in its specifications.³³ Here it was intimated, however, that where a particular brand is specified, the phrase "or equal" should be added.³⁴

That at common law all realty is regarded as being unique should be sufficient justification for its inclusion within this exception, but a recent case, *Hickey v. Burke*,³⁵ provided another rationale. Here it was held the state under its police power (or any agency thereof by statute) is not required to enter into competitive bidding when specific realty is needed as it has the right of *pre-emption* in the exercise of its power of eminent domain.

29. *Scatuorchio v. Jersey City*, 14 N.J. 72, 100 A.2d 869 (1953).

30. *Leaman & Reynolds v. Housing Auth.*, 159 So.2d 365 (La. App. 1964); *Ambrozich v. Eveleth*, 200 Minn. 473, 274 N.W. 635 (1937).

31. *Boone v. Cook*, 365 S.W.2d 100 (Ky. 1963).

32. *Otter Trail Power Co. v. MacKichan*, 270 Minn. 262, 133 N.W.2d 511 (1965).

33. 6 N.J. Super. 79, 69 A.2d 885 (1949).

34. The use of brand names in federal procurement is limited to those instances in which an adequate specification or more detailed description cannot be supplied, and where brand names are used, the phrase "or equal" is required. ASPR § 1.1206-1 *et. seq.*

35. 78 Ohio App. 351, 69 N.E.2d 33 (1946).

Another facet of this exception is that line of authority holding that contracts for printing advertisements for bids are not within competitive bidding requirements, since contracts which require previous advertisement manifestly cannot be contracts for that very advertisement.³⁶ In short, a public authority need not advertise to advertise. The uniqueness lies not in the article, but in the particular fact situation.

Here again an aberration in pure competition is given tacit recognition in this exception for unique items. This common law recognition of economic realities promotes a salutary result.

CONTRACTS FOR PURCHASE OF UTILITY SERVICES

There is a conflict of authority on the applicability of competitive bidding requirements to contracts for the furnishing of such items of public utility as water, gas, and electricity. The majority view is that such requirements have no applicability to a contract between a public authority and a utility company.³⁷ The oldest rationale for this view is that such contracts are not for "work, materials, or supplies" within the contemplation of statutory or charter provisions.³⁸

A second view is that since ordinarily there is only one concern serving the area which is in a position to bid on the contract, it would be a useless practice in most cases to submit such a contract to the rigors of competitive bidding.³⁹ The broadness of this approach lends it to much abuse when it is applied to fact situations differing from that posited.

Perhaps the best reasoned rationale is that since the state or the municipality itself has the power to fix the price of the service to be rendered or of the commodity to be furnished, this fact alone affords adequate protection to the public interest.⁴⁰

Perhaps the most that can be said of the courts supporting the minority view (that contracts for the purchase of utility services must be

36. See, e.g., *Doeker v. Atlantic County*, 90 N.J.L. 473, 101 A. 370 (1917); *Public Ledger v. Memphis*, 93 Tenn. 77, 23 S.W. 51 (1893).

37. *Washington Fruit & Produce Co. v. Yakima*, 3 Wash.2d 152, 100 P.2d 8 (1940); *Hartford v. Hartford E. L. Co.*, 65 Conn. 324, 32 A. 925 (1895).

38. *Arnhold v. Klug*, 97 Kan. 576, 155 P. 1085 (1916); *Gleason v. Dalton*, 28 App. Div. 555, 51 N.Y.S. 337 (1898). The defects of this type of approach to the problem are discussed in a preceding section of this paper.

39. *Washington Fruit & Produce Co. v. Yakima*, 3 Wash. 2d 152, 100 P.2d 8 (1940); *Los Angeles Gas & Electric Co. v. Los Angeles*, 188 Cal. 307, 205 P. 125 (1922).

40. *Mullen v. Louisburg*, 225 N.C. 53, 33 S.E.2d 484 (1945); *Mutual Electric Co. v. Pomeroy*, 99 Ohio St. 75, 124 N.E. 58 (1918).

let on competitive bidding) is that their attitude has a certain historical interest in that it approaches that of the eighteenth century English courts in its rigidity. Their view is that since competitive bidding requirements are mandatory, there are no exceptions.⁴¹

The reason that the holding that competitive bidding requirements have no applicability to contracts for the purchase of utility services in the majority view is that its logical basis rests upon an economic fact. Recognition of this exception *pro tanto* better serves the objects of competitive bidding than servile adherence to the letter of a statute.

CONTRACTS REQUIRING PATENTED ITEMS

In the absence of a controlling statute, charter, or ordinance requiring the submission of contracts to competitive bidding, public authorities are not precluded from entering into contracts for public work calling for the use of patented articles.⁴² But where such requirement does exist, there is a conflict of authority as to the right to require articles subject to patents or other legal monopolies in contract specifications.

The majority, or Michigan rule, as expressed by Chief Justice Cooley in *Hobart v. Detroit*,⁴³ is that even where a statute requires competitive bidding, it is not violated when all the competition is allowed which the situation permits. A public authority should not be deprived of the right to avail itself of useful inventions and discoveries even though protected by patents, and when such an authority, in exercising its contractual powers, decides in good faith to contract for the use of patented articles, no monopoly or abatement in competition is created beyond what necessarily results from the rights and privileges given the patentee by the federal government.

Although the earlier cases followed *Hobart* in its entirety,⁴⁴ the exception soon became riddled with exceptions to the exception. Thus it was held that patented material could be specified only where the owner of the patent does not himself bid upon the contract but makes

41. See, *Hunt v. Fenlon*, 313 Mich. 644, 21 N.W.2d 906 (1946); *Morton v. Waycross*, 173 Ga. 298, 160 S.E. 330 (1931); *Philadelphia Co. v. Pittsburgh*, 253 Pa. 147, 97 A. 1083 (1916). The rule in federal procurement is in accord with the majority view. ASPR § 3.210-1 *et seq.*

42. *Dillingham v. Spartansburg*, 75 S.C. 549, 56 S.E. 381 (1907).

43. 17 Mich. 246 (1868).

44. *Silsby v. Allentown*, 153 Pa. 319, 26 A. 246 (1893); *Newark v. Bonnel*, 57 N.J.L. 424, 31 A. 408 (1895).

an offer to furnish the patented material to all bidders at a stipulated price.⁴⁵ This view was later modified in that the patentee himself was allowed to bid where, prior to the bidding, he would agree to furnish the patented material to any contractor at a specified price.⁴⁶

A more recent line of cases would seem to hold that in order to provide for patented materials in contract specifications, the public authority must make a finding that such articles are of such exceptional superiority that it would be injurious to the public interest not to use them.⁴⁷

The modern view following the *Hobart* case seems to be that public authorities are free to specify patented articles in their contracts, but they are obliged in good faith to permit the furnishing of other material equal to them.⁴⁸ This is the most salutary of the exceptions to the Michigan rule in jurisdictions where its applicability has been limited.

Virginia follows the modern view. Thus in *Taylor v. County Board*,⁴⁹ it was held that a public authority had a clear right to frame its specifications to permit it to buy a patented mechanically-stoked furnace as competition was not impossible on this account, since the mechanical stoker was made to compete with the hand-stoked type.

The minority, or Wisconsin rule, has been interpreted as stating that where competitive bidding is required, patented articles cannot be used.⁵⁰ This is an unwarranted overstatement of the rationale of the Wisconsin case, which held that where competitive bidding is required, contract specifications requiring the use of patented articles are invalid, and *where there is no general power to otherwise contract*, the contract is void.⁵¹ The case was later distinguished on this basis and limited to its facts.⁵²

It speaks ill of Wisconsin jurisprudence, then, to note that the rule

45. *Burns v. Nashville*, 142 Tenn. 541, 221 S.W. 828 (1920).

46. *Hoffman v. Muscatine*, 212 Ia. 867, 232 N.W. 430 (1930).

47. *Smith v. Seattle*, 192 Wash. 64, 72 P.2d 588 (1937); *Wegmann Realty v. St. Louis*, 329 Mo. 972, 47 S.W.2d 770 (1932); *Comley v. Bd. of Purchases*, 111 Conn. 147, 149 A. 410 (1930).

48. *Kingston Bituminous Co. v. Long Branch*, 124 N.J.L. 472, 12 A.2d 237 (1940). The rule in federal procurement is in accord with this modern view. ASPR § 1.1206-1 (a).

49. 189 Va. 472, 53 S.E.2d 34 (1949).

50. *See, e.g., Lamhorn v. Hutton*, 132 Kan. 226, 294 P. 676 (1931); *Fineran v. Bitulithic Paving Co.*, 116 Ky. 495, 76 S.W. 415 (1903).

51. *Dean v. Charlton*, 23 Wis. 590 (1869).

52. *Kilvington v. Superior*, 83 Wis. 222, 53 N.W. 487 (1892).

was resurrected in its broad form thirty years later.⁵³ Since that date, however, Wisconsin has followed the narrow view.⁵⁴

The exception for contracts requiring patented items thus enables public authorities to take advantage of the benefits that derive from the use of "intellectual property." That our forefathers afforded specific protection to patents in the federal Constitution attests to the economic value of these benefits.

CONCLUSION

The problem in this area has been the failure of the courts to recognize these common law exceptions for what they are, and instead resorting to the mumbo-jumbo of statutory construction and such a prolixity of rationale that confusion is the inevitable result. These exceptions have arisen from those cases wherein reason has dictated that bidding procedures conform to the realities of the marketplace, rather than to the strict letter of a statute. *Ratio est legis anima; mutua legis ratione mutatur et lex.*⁵⁵ Thus judicial recognition of these exceptions as common law exceptions would greatly promote certainty of result in public litigation and thereby indirectly give the public the protection from fraud and favoritism that competitive bidding was designed to provide in the first place.

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53. *Neacy v. Milwaukee*, 171 Wis. 311, 176 N.W. 871 (1920).

54. *Victoria v. Muscoda*, 228 Wis. 445, 279 N.W. 663 (1938).

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