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Competitive Bidding on Public Works in Wyoming: Determinations of Responsibility and Preference

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COMMENT

COMPETITIVE BIDDING ON PUBLIC WORKS IN WYOMING: DETERMINATIONS OF RESPONSIBILITY AND PREFERENCE

Increased construction activity in the public sector in Wyoming is obvious to the casual observer. Future development of industrial potential and natural resources in Wyoming can only result in further expansion in the field of public construction. In light of this trend the basis and workability of Wyoming's laws relating to public works construction take on added significance.

Legislatures across the United States have concluded that the best method for awarding public works contracts is competitive bidding. Although the primary goal of competitive bidding is to obtain the advantages of free and fair competition for the tax-paying public, competitive bidding also seeks to provide the public works bidder with a fair and effective forum for the award of public construction contracts.[1] It is the proper balance between these two goals which is of concern to this writer. In order to assure that both goals are met, contract awarding bodies must have a clear understanding of the legal concept of "lowest responsible bidder" as used in the Wyoming Statutes.[2] This Comment will attempt to provide guidelines for interpretating this concept under present law. It will also attempt to provide awarding bodies with guidance on questions relating to variations from bid specifications. Finally, in the area of bidder responsibility, it will suggest that a new system composed of contractor pre-qualification and pre-award hearings can assist Wyoming by improving the competitive bidding process.

1. A. A. B. Electric, Inc. v. Stevenson Pub. School Dist., 5 Wash. App. 887, 491 P.2d 684, 686 (1971).
2. WYO. STAT. § 15.1-344 (1957) and § 15.1-394 (Supp. 1975) (local improvements); WYO. STAT. §§ 15.1-13, -256 (Supp. 1975) (public improvements); and WYO. STAT. § 18-292 (Supp. 1975) (construction of county jails). The implication is that all contracts let for construction or expansion of state buildings must be let to the "lowest responsible bidder," although the applicable statutes in some cases only require that the "contract be based on competitive bidding." *See* WYO. STAT. §§ 9-647.2, 9-656.2, 21-431.2, 21-431.6, 21-431.8 (Supp. 1975).

Since the concept of "lowest responsible bidder" includes not only notions of responsibility, but also determinations of cost, consideration must be given to the Wyoming statute which grants a five percent preference to resident contractors bidding on public works contracts.[3] Serious questions as to the constitutionality of such statutes under the Equal Protection and Interstate Commerce clauses of the United States Constitution must be evaluated in light of recent case law and public policies applicable to the area of public construction.

DETERMINING THE RESPONSIBILITY OF THE LOWEST BIDDER

General Bidder Responsibility

The task of determining which bidder on a public works contract is the "lowest responsible bidder" is usually left to the discretion and sound judgment of the awarding body, whether it be a city council, county commission or state agency.[4] In general, the charge of the awarding body is to let the public works contract to the contractor who will provide the best possible facility for the money.[5] However, in practice, determination of the responsibility of bidders is not

3. WYO. STAT. § 9-664 (1957), provides as follows:
> Whenever a contract is let by the state, or any department thereof, or any county, city, town, school district, high school district, or other public corporation of the state for the erection, construction, alteration, or repair of any public building, or other public structure, or for making any addition thereto, or for any public work or improvements, such contract shall be let, if advertisement for bids is not required, to a resident of the state. If advertisement for bids is required, the contract shall be let to the responsible resident making the lowest bid if such resident's bid is not more than five per cent higher than that of the lowest responsible non-resident bidder.

4. *See* WYO. STAT. § 15.1-13 (Supp. 1975), which provides as follows:
> All contracts for purchass of property or for any public improvement, contracts relating to the municipal water supply, contracts for the lighting of streets, public buildings and public places, and any other public work or improvement excepting contracts for engineering services required to complete such improvements for any city or town when the cost exceeds $1,500 shall be advertised for bid . . . . The contract shall be let to the lowest responsible bidder . . . . The governing body may reject all bids submitted when it finds that none of them would serve the public interest.

Although the governing body is required to let the contract to the "lowest responsible bidder," no guidelines are given to assist in determining the lowest bidder's responsibility, thus leaving a great degree of discretion on the issue to said governing body.

5. Clayton v. Salt Lake City, 15 Utah 2d 57, 387 P.2d 93, 94 (1963).

an easy task, especially when each awarding body must select its own criteria for such a decision. In the absence of a factual showing of dishonesty, fraud, collusion or lack of good faith, courts will not usually interfere with the exercise of the wide latitude of discretion held by awarding bodies.[6] It, therefore, becomes incumbent that awarding bodies have a clear understanding of the meaning of "lowest responsible bidder," especially if the dual goals of competitive bidding are to be obtained.

The concept of "lowest responsible bidder" has been exhaustively discussed by the courts and text writers.[7] It includes the following factors:

1. Amount of the bid.
2. Pecuniary ability of the contractor to perform the contract.
3. Skill and judgment of the contractor.
4. Experience and reputation of the contractor as shown by past participation in public works projects.
5. Conformity of the contractor's bid with the bid specifications.[8]
6. And, in Wyoming, the residence of the contractor for bidding purposes.[9]

No uniform system for applying these criteria exists in Wyoming, and therefore, their application to different public works contract situations inevitably leads to conflicts resulting in litigation either by taxpayers who feel the most responsible bidder has not been selected or by unsuccessful

6. *Id.*; COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW (1961).
7. Koich v. Cvar, 111 Mont. 463, 110 P.2d 964, 965 (1941); Housing Authority of Opelousa v. Pittman Constr. Co., 264 F.2d 695 (5th Cir. 1959).
8. Albert F. Ruehl Co. v. Board of Trustees of Schools for Indus. Educ., 85 N.J. Super. 4, 203 A.2d 410, 417 (1964).
9. WYO. STAT. § 9-664 (1957). The term "resident" is defined in WYO. STAT. § 9-663 (Supp. 1975), as follows:

> Any person who shall have been a bona fide resident of the state for one year or more immediately prior to bidding upon the contract; a partnership or association, each member of which shall have been a bona fide resident of the state for one year or more immediately prior to bidding upon the contract; a corporation which has been organized under the laws of the State of Wyoming and has been in existence therein for one year or more immediately prior to bidding upon the contract and which has its principle [sic] office and place of business within the State of Wyoming.

bidders who feel their rights to a public works contract have been abridged.[10]

The questions relating to the determination of bidder responsibility per se have never been considered by the Wyoming Supreme Court, perhaps due to the deference presently given to the discretion existing in awarding bodies. While the courts may eventually be forced to address such questions, it would seem appropriate to consider various legislative and judicial alternatives available to remedy potential conflicts.

Variations From Bid Specifications

A question bearing on, but not directly related to, bidder responsibility has been addressed by the Wyoming Supreme Court. In *Centric Corporation v. Barbarossa & Sons, Inc.*,[11] the court, in its specific holding, found that the failure to submit an affirmative action plan as required by the bid specifications was only a minor and inconsequential omission which could and should have been waived by the awarding body.[12] More important, however, was the court's announcement of the test to be applied by awarding bodies in determining the materiality of variations from bid specifications. The court held that a variation is material if it gives the bidder an advantage not allowed the other bidders such that the competitive nature of the bidding process is destroyed.[13] The difficulty inherent in the court's test is not in its theory but in its application by the various awarding bodies.

The application of the "competitive advantage" test to variations from bid specifications has been considered by courts in other jurisdictions, and their decisions should be

10. Centric Corp. v. Barbarossa & Sons, Inc., 521 P.2d 874 (Wyo. 1974). The *Centric* decision deals with the effect of variations from bid specifications as bearing on a bidder's responsibility.
11. *Id.* It is important to recognize that variation from bid specifications is an oftentimes crucial factor in determining bidder responsibility. The court in *Centric*, however, would seem to be implying that a material variation from a bid specification causes an invalidation of the bid, rather than a determination of bidder responsibility. The distinction may be significant, but the result is the same.
12. *Id.* at 878.
13. *Id.* at 877-78. The court based this test on an earlier Washington decision. Eastside Disposal Co. v. City of Mercer Island, 9 Wash. App. 667, 513 P.2d 1047 (1973).

instructive to those involved in this area of the law. In *Eastside Disposal Co. v. City of Mercer Island,*[14] the court held that a failure to sign a bid may be a mere formality, waivable by the awarding body, in certain circumstances.[15] The importance of the *Eastside* decision is that it was based on a finding that where a bidding requirement is not expressly made in the authorizing city ordinance, bid specification, or bid advertisement, then the bid requirement is implicitly one of form rather than substance. Taken together, *Centric* and *Eastside* suggest that awarding bodies should first determine whether or not the bidding requirement in question was expressly mentioned. Since this determination may not always be controlling further criteria should be considered.

The best criterion which has been advanced is that a variation from bid specifications is not material, and thus does not raise a competitive advantage, unless it affects the price, quality, quantity or manner of contract performance, or affects those things which go into the actual determination of the amount of the bid.[16] A bid variation affecting the amount of the bid almost always provides a competitive advantage to the bidder, thereby giving an awarding body the most reliable indicator of materiality.

Other criteria to look for in the bid variation situation include rather nebulous concepts such as the intent of the bidder,[17] and whether or not the effect of a waiver of the variation would be to deprive the awarding body of assurance that the contract would be performed in accordance with the bid specifications.[18] These last-mentioned criteria

14. Eastside Disposal Co. v. City of Mercer Island, *supra* note 13, at 1050-51.
15. *Id.* at 1051. *See* A. A. B. Electric, Inc. v. Stevenson Pub. School Dist., *supra* note 1, at 686, wherein the court held that the failure to sign a bid, when this was expressly required by the bid specifications, would be a substantive variation since an omitted signature would raise a competitive advantage. This rationale is based on the finding that a lower bidder could accept or reject an award in retrospect if his signature was absent.
16. Foley Bros., Inc. v. Marshall, 266 Minn. 259, 123 N.W.2d 387, 390 (1963). The *Foley* criterion was approved in Otter Tail Power Co. v. MacKichan, 270 Minn. 262, 133 N.W.2d 511 (1965), which in turn was cited with approval in Centric Corp. v. Barbarossa & Sons, Inc., *supra* note 10, at 877. As a result it would seem that the *Foley* rule can be cited as the Wyoming rule to be used in interpreting the *Centric* test.
17. Township of River Vale v. R. J. Longo Constr. Co., 127 N.J. Super. 207, 316 A.2d 737, 744-45 (1974).
18. *Id.* at 741.

should not be relied on primarily by the awarding body, but they may be helpful in deciding close questions.

Both the determination of bidder responsibility and the consideration of bidding variances potentially raise difficult problems for the awarding bodies. Although established to assure that the award of a public works contract goes to the most qualified contractor, and that the public receives the best possible facility for the money,[19] the competitive bidding system as it exists in Wyoming does not guarantee attainment of these goals. No indictment of the public contract awarding bodies in Wyoming is intended, rather the point must be made that there are procedures and approaches available which can improve the competitive bidding system and thus better assure attainment of a viable public works system.

PRE-QUALIFICATION OF CONTRACTORS SUBMITTING BIDS ON PUBLIC WORKS PROJECTS

If an awarding body is held to have mistakenly granted a public works contract, the courts may not direct the body to award the contract to another bidder.[20] In such a situation the awarding body may be forced to reconsider the bids of all bidding contractors, or rebid the entire project.[21] The hazards inherent in such a situation warrant consideration of any procedures available to reduce the possibility of mistake by the awarding body. Pre-qualification of contractors desiring to bid on public works projects is one option used by numerous states to avoid mistakes in determinations of general bidder responsibility.[22]

19. Clayton v. Salt Lake City, *supra* note 5.
20. Centric Corp. v. Barbarossa & Sons, Inc., *supra* note 10, at 878.
21. It would seem fundamentally unfair to reconsider existing bids due to the fact that the contractor involved in any such litigation would be put in a potentially disfavored light before an awarding body whose decision has been overruled. On the other hand, rebidding the project would seem unfair in that the bidders would then have knowledge of the bids submitted by the other bidders.
22. A significant number of states have prequalification requirements relating to public works bidding. The most notable include: Alaska, 27 OP. ATT'Y GEN. (1959); California, CAL. GOV'T. CODE § 14310, *et seq.* (West Supp. 1975); Colorado, COLO. REV. STAT. ANN. § 24-30-505 (1973); Delaware, DEL. CODE ANN. tit. 29, § 6905 (1974); Hawaii, HAWAII REV. STAT. § 103-25 (1968); Indiana, IND. CODE § 5-16-1-2 (1974); Maine, ME. REV. STAT. ANN. tit. 5, § 1747 (1964); Michigan, MICH. COMP. LAWS ANN. § 123.501 (1967);

The advantages and disadvantages of pre-qualification are numerous,[23] but when applied to the circumstances existing in Wyoming its advisability and feasibility become evident. The greatest advantage in pre-qualifying contractors is the improved assurance that public works contracts will not be let to irresponsible bidders. Under the present procedures in Wyoming the awarding body determines general bidder responsibility after the bids are open, this being a system of "post-qualification." In light of the absence of any uniform criteria for determining bidder responsibility, reliance on "post-qualification" can result in a hit-or-miss approach, which places a great deal of weight behind hearsay and the contractor's own representations relative to his responsibility. Secondly, pre-qualification would serve to shorten deliberation time and expense presently incurred by Wyoming awarding bodies in their determination of bidder responsibility. Under present Wyoming procedures, in order to be in compliance with their statutory charge to award public works projects to the "lowest responsible bidder,"[24] awarding bodies must make some determination of bidder responsibility. Usually this takes the form of a bid specification requirement that a bidding contractor provide a statement of financial responsibility and experience credentials. It is then up to the awarding body to evaluate such statements along with any other information it can obtain about the contractor. A uniform system of state-wide pre-qualification, such as that used in California,[25] or Indiana,[26] would obviate the need for such procedures since the awarding body would need only request such information from the appropriate state agency. Third, a system of pre-qualification would save the bidding contractors time and money. Rather than submitting information in support of their responsibility every time a public works project is advertised for

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Montana, MONT. REV. CODES ANN. § 84-3502 (1947); Nebraska, NEB. REV. STAT. § 73-102 (1971); Oklahoma, OKLA. STAT. ANN. tit. 61, § 118 (Supp. 1974); Oregon, ORE. REV. STAT. § 279.014 (1974); Pennsylvania, PA. STAT. ANN. tit. 71, § 642 (1962); and Wisconsin, WIS. STAT. ANN. § 66.29 (1965).

23. COHEN, *supra* note 6, at 89-92.

24. WYO. STAT. § 15.1-13 (Supp. 1975).

25. CAL. GOV'T. CODE § 14310, *et seq.* (West Supp. 1975).

26. IND. CODE § 5-16-1-2 (1974).

bids, the contractors need only file an annual statement with the appropriate state agency.

The opponents of bidder pre-qualification suggest that it will restrict the number of responsible bidders and thus have adverse effects on competitive bidding.[27] Although this may be a supportable fear in a state with relatively few construction contractors, the danger can be considerably reduced by equal treatment and carefully drawn procedures.[28] Secondly, those who oppose pre-qualification statutes suggest that new contractors may be shut out of bidding on many projects due to their lack of experience in the public works area.[29] A significant problem could arise in Wyoming in this respect, given the relative infancy of the construction business and its great potential for growth. However, procedures such as the right to a hearing on pre-qualification ratings have been used in other states[30] to avoid such problems.

The California Approach

Assuming that a system of contractor pre-qualification is needed in Wyoming, it is desirable at this point to consider and evaluate approaches used in several other states. Perhaps the most comprehensive system of contractor pre-qualification and rating exists in California.[31] The California system provides that the State Department of Public Works may require answers to a standard questionnaire and a financial statement, including past experience in performing public works, from all prospective bidders.[32] The Department is also directed to establish a uniform system for rat-

27. COHEN, *supra* note 6, at 89.
28. RHYNE, THE LAW OF MUNICIPAL CONTRACTS 70 (1952).
29. COHEN, *supra* note 6, at 90.
30. IND. CODE § 4-13-7-16 (1974). The Indiana procedure provides for certification of all contractors bidding on public works projects. IND. CODE § 4-13-7-1 (1974). If a contractor is denied certification he may appeal this decision under the Indiana Administrative Adjudication Act. IND. CODE § 4-22-1-24 (1974).
31. CAL. GOV'T. CODE § 14310, *et seq.* (West Supp. 1975). For an analysis of the California system of pre-qualification, *see* Comment, *Due Process in Public Contracts: Pre-Award Hearings to Determine Responsibility of Bidders*, 5 PACIFIC L. J. 142, 146 (1974).
32. CAL. GOV'T. CODE § 14310 (West 1963). This requirement is made mandatory for contracts the estimated cost of which exceeds $50,000. Wyoming could, of course, choose the dollar limit it finds to be most desirable.

ing bidders which utilizes the aforementioned questionnaires and financial statements; the Department makes such rating determinations according to the size of public works projects.[33] It would seem best to combine the above system with some type of hearing procedure so that dissatisfied contractors could have a means to redress their grievances.[34]

The California system would seem to fit well into already existing agencies in Wyoming. The recently established State Department of Economic Planning and Development[35] is given the authority to "[r]eceive, initiate, investigate, consider, recommend and promote . . . projects, plans and proposals for orderly and planned development, improvement and extension of public works . . . ."[36] The establishment of a uniform system of contractor pre-qualification for public works projects would seem logically to fall within the Department's purpose of "the planning for and the development of the physical and economic resources of the state."[37] Since all departments of state government are subject to the Wyoming Administrative Procedure Act,[38] the mechanisms are already established to afford aggrieved contractors the ability to contest the Department's determination of their qualifications.

The Idaho and Montana Approach

Several other approaches are available to Wyoming in order to improve its competitive bidding procedure. The neighboring states of Idaho and Montana have adopted licensing procedures which seek to obtain the same advan-

33. CAL. GOV'T. CODE § 14311 (West Supp. 1975), provides as follows:
> The department shall adopt and apply a uniform system of rating bidders, on the basis of the standard questionnaires and financial statements, in respect to the size of the contracts upon which each bidder is qualified to bid. . . .
>
> In no event shall any bidder be awarded a contract if such contract award would result in the bidder having under contract work in excess of that authorized by his prequalification rating. . . .

34. *See, e.g.*, HAWAII REV. STAT. § 103-25 (1968); IND. CODE § 4-13-7-16 (1974); ME. REV. STAT. ANN. tit. 5, § 1749 (1964); and ORE. REV. STAT. § 279.024 (1974).
35. WYO. STAT. §§ 9-160.19 to -160.39 (Supp. 1975).
36. WYO. STAT. § 9-160.29(a)(iii) (Supp. 1975).
37. WYO. STAT. § 9-160.19 (Supp. 1975).
38. WYO. STAT. § 9-276.20 (Supp. 1975). The term "agency" is defined to include any department of the state. WYO. STAT. § 9-276.19(b)(1) (Supp. 1975).

tages available under a pre-qualification statute. In Idaho, it is unlawful to engage in the business of public works contractor without first obtaining a license.[39] Upon application for a public works contractor license, the Public Works Contractors State License Board may investigate, classify, and qualify applicants by written or oral examinations.[40] According to the established qualifications, the contractor is classified into license classes based on the size of public works contract which the contractor is qualified to execute.[41] The Montana licensing system seems to have been a model for the one adopted in Idaho and, therefore, contains no significant deviations from the Idaho scheme.[42]

The licensing approach could be accomplished in Wyoming under the auspices of the newly created Department of Revenue and Taxation,[43] with added statutory provisions establishing authority to transfer requested information to public works contract awarding bodies so that they can have proof of contractor responsibility,[44] or providing for the development of lists of qualified contractors.[45]

PRE-AWARD HEARINGS AND DETERMINATION OF BIDDER RESPONSIBILITY

Whether or not Wyoming chooses to implement a prequalification or licensing system to determine public contractor responsibility, questions of due process dictate consideration of the appropriateness of hearing procedures within the

39. IDAHO CODE § 54-1902 (1957). Failure to obtain a license by a person or firm acting in the capacity of a public works contractor may lead to imposition of criminal penalties. IDAHO CODE § 54-1920 (Supp. 1975).
40. IDAHO CODE § 54-1910 (Supp. 1975). This provision also sets forth the qualification criteria to be required of the applicant, including experience and knowledge of constructon-related laws and practices; character; financial responsibility; and the size and scope of contract work completed within the prior three years.
41. IDAHO CODE § 54-1904 (Supp. 1975). License fees are charged at a sum dependent upon which license class the contractor is assigned. Licenses are issued for one year and renewable at the same cost as the original license. IDAHO CODE § 54-1912 (Supp. 1975).
42. MONT. REV. CODES ANN. § 84-3501, *et seq.* (Supp. 1974).
43. WYO. STAT. §§ 39-43.1 to -43.6 (Supp. 1975). This type of department is used in Montana to carry out the purposes of its public works contractor license provisions. MONT. REV. CODES ANN. § 84-3503 (Supp. 1974).
44. The licensing approach has been adopted in several other states. *See* N.M. STAT. ANN. § 6-6-2 (1966); N.D. CENT. CODE § 43-07-02 (Supp. 1973); S.C. CODE ANN. § 56-410 (Supp. 1974); and WASH. REV. CODE ANN. § 39.06.010 (1972).
45. COLO. REV. STAT. ANN. § 24-30-505(1)(k) (1973).

competitive bidding context. This is particularly true since pre-qualification will not solve problems raised in the bid variation situation. Wyoming presently has no statutory provisions which would require a pre-award hearing on the issue of bidder responsibility.[46] However, such a requirement may arguably be judicially determined to exist.

The United States Supreme Court, in *Board of Regents of State Colleges v. Roth*,[48] addressed the question as to when a person is entitled to a hearing under the Due Process clause of the fourteenth amendment to the United States Constitution.[49] In concluding that the "requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property,"[50] the Court stated, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[51] The essential question, when one applies the preceding concepts to the competitive bidding context, becomes whether a bidder has a legitimate claim of entitlement to a public works contract.

The questions concerning due process hearing requirements should only arise in situations where the lowest bidder is not awarded a public works contract. There are at least three ways in which this situation may arise under the Wyoming statutory provision directing awarding bodies to let public works contracts to the "lowest responsible bidder:"[52] 1) The awarding body may make an express determination that the lowest bidder is not responsible; 2) The awarding body may let a contract to a bidder other than the

46. The only state presently having a statute which expressly grants a hearing to a bidder dissatisfied with a contract award is Illinois. ILL. STAT. ANN. ch. 24, § 9-2-107 (Smith-Hurd 1962).

47. For an excellent overview of the arguments supporting the constitutional right to a pre-award hearing, *see* Comment, *Due Process in Public Contracts: Pre-Award Hearings to Determine Responsibility of Bidders*, *supra* note 31, at 156-61.

48. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

49. U.S. CONST. amend XIV, § 1.

50. Board of Regents of State Colleges v. Roth, *supra* note 48, at 569.

51. *Id.* at 577.

52. WYO. STAT. § 15.1-13 (Supp. 1975).

lowest bidder without such an express determination;[53] and 3) The awarding body may invalidate the bid of the lowest bidder because of an alleged material departure from the bid specifications.[54] Whether the lowest bidder in any of these three situations is entitled to a hearing on his disqualification rests on whether he can establish a legitimate property interest in the public works contract.[55]

Recent California case law indicates a tendency in the courts to find such a property interest, even though the general rule is that the lowest bidder does not obtain a vested or property interest in the contract merely by reason of the fact that he submitted the lowest bid.[56] The court, in *Swinerton & Walberg Co. v. City of Inglewood—Los Angeles County Civic Center Authority*,[57] held that if the requirements of the Restatement of Contracts, Section 90, are met then an informal contract results between the "lowest responsible bidder" and the awarding body which entitles said bidder to damages for breach of this informal contract if he does not receive the public works contract.[58] The significance of

53. City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County, 7 Cal. 3d 861, 103 Cal. Rptr. 689, 500 P.2d 601, 604 (1972). The court therein found that if a public works contract is let to one other than the lowest bidder, the implication is that the lowest bidder is not responsible.

54. The Wyoming Supreme Court stated, in Centric Corp. v. Barbarossa & Sons, Inc., *supra* note 10, at 875, that "any material departure from the bid specifications invalidates a bid and the defaulting party cannot be classed as a bidder." It seems that what the court means is that the discovery of a material departure from the bid specifications in the bid of the lowest bidder is a determination that the lowest bidder is not responsible and, therefore, is no longer to be considered for the public works contract. *See* Albert F. Ruehl Co. v. Board of Trustees of School For Indus. Educ., *supra* note 8.

55. *See* Board of Regents of State Colleges v. Roth, *supra* note 48, at 577.

56. 10 MCQUILLIN, MUNICIPAL CORPORATIONS § 29.77 (3rd ed. 1966). This general rule is truly applicable only where the awarding body is entitled to reject all bids. Such powers are vested in Wyoming governing bodies under WYO. STAT. § 15.1-13 (Supp. 1975).

57. 40 Cal. App. 3d 98, ... P.2d ....., 114 Cal. Rptr. 834 (1974).

58. *Id.* at 837-38. RESTATEMENT OF CONTRACTS § 90 (1932) provides that:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

The court determined that the awarding body promised in the solicitation of bids to award the contract to the lowest responsible bidder and, furthermore, that the bidder's reliance on such promise was justified even though the body retained the right to reject all bids. To deny this would make the body's promise "an illusory one" and would "render the whole competitive bidding process nugatory."

this holding is in its implication that every "lowest responsible bidder" has a legitimate claim of entitlement to a public works contract. At a minimum, the decision means "that the low monetary bidder has a right to the contract subject to defeasance by a finding of non-responsibility."[59] Assuming that the low bidder has a legitimate claim of entitlement to the contract award, deprivation of that right by a finding of non-responsibility would result in a valid claim to the right to a hearing consistent with due process requirements.[60]

The preceding analysis is supported to a certain extent by recent case law. The foundation case in the area of hearing rights for unsuccessful low bidders is *Housing Authority of Opelousa v. Pittman Construction Co.*,[61] wherein the court held that before an awarding body can disqualify a low bidder as being non-responsible, the low bidder has the right to be heard and the body has the duty to listen on the subject of responsibility.[62] The court, however, refused to go so far as to say that the awarding body must hold a full evidentiary hearing.[63] A number of jurisdictions have followed the general *Pittman* rule,[64] but at least one of those jurisdictions would require a full evidentiary hearing.[65] It would seem that the decision whether to afford a full hearing rests on the degree to which one believes a property interest in the public works contract attaches and, therefore, the rule varies from jurisdiction to jurisdiction.[66]

59. Comment, *Due Process in Public Contracts: Pre-Award Hearings to Determine Responsibility of Bidders*, *supra* note 31, at 158.

60. Board of Regents of State Colloges v. Roth, *supra* note 48, at 569.

61. Housing Authority of Opelousa v. Pittman Constr. Co., *supra* note 7.

62. *Id.* at 703-04. The court premised this finding on the belief that a denial to the low bidder of an opportunity to disprove irresponsibility offends one's sense of fair play and is an arbitrary use of discretion inconsistent with the public works law.

63. *Id.* at 704.

64. City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County, *supra* note 53, 500 P.2d at 607; D. Stamato & Co., Inc. v. Township of Vernon, 131 N.J. Super. 151, 329 A.2d 65, 68 (1974).

65. Seacoast Constr. Corp. v. Lockport Urban Renewal Agency, 72 Misc. 2d 372, 339 N.Y.S.2d 188 (1972).

66. *Cf.*, City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County, *supra* note 53. This case preceded the determination in Swinerton & Walberg Co. v. City of Inglewood-Los Angeles Civic Center Authority, *supra* note 57, and as a result it might be contended in future California cases that the unsuccessful low bidder is entitled to a full evidentiary hearing consistent with the requirements of procedural due process.

At a minimum, awarding bodies throughout Wyoming should provide some procedural mechanism by which an unsuccessful low bidder may contest a determination that he is not a responsible bidder.[67] An aggrieved low bidder should at least be given notification of any evidence showing nonresponsibility, afforded an opportunity to rebut such evidence, and permitted to submit evidence that he is qualified to perform the contract in question.[68] Ideally, the dual goals of competitive bidding—benefit to the taxpaying public and fairness to bidding contractors—can be reached if statutory provisions are properly followed. However, recent studies of Wyoming counties and municipalities indicate that some governing bodies do not comply with such provisions.[69] As a result, supplemental legislation in the form of pre-qualification or licensing provisions seems necessary to protect the public interest. On the other hand, if the opportunity arises, Wyoming courts should be urged to afford contractors their procedural due process rights.[70] The necessity for such improvements in the present Wyoming competitive bidding system may well become crucial if the state is to adequately meet the burden of increased development.

CONSTITUTIONAL AND PUBLIC POLICY ISSUES IN THE WYOMING RESIDENT CONTRACTOR PREFERENCE STATUTE

Another area of concern relative to the Wyoming competitive bidding process on public works projects, is the preference granted to resident contractors over nonresident con-

67. Such a mechanism already exists in the form of the Wyoming Administrative Procedure Act, WYO. STAT. §§ 9-276.19 to -276.33 (Supp. 1975), under which all agencies are to "[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available in connection with contested cases." WYO. STAT. § 9-276.20(a)(1) (Supp. 1975). *See* Comment, *Competitive Bidding—Public Construction Contracts In The State of Washington*, 39 WASH. L. REV. 796, 805-06 (1964), for an analysis applying the Washington Administrative Procedure Act to determinations of bidder responsibility.

68. City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County, *supra* note 53, at 607.

69. MINGE & BLEVINS, EFFECT OF LAW ON COUNTY AND MUNICIPAL EXPENDITURES 115-16 (1975).

70. The Wyoming Supreme Court indirectly supports this contention when it finds that an awarding body, given sufficient time and information could have concluded that a departure from bid specifications was not material and, therefore, a low bidder should not have been disqualified. Centric Corp. v. Barbarossa & Sons, Inc., *supra* note 10, at 878.

tractors.[71] The concern rests on issues relating to the constitutionality of such a statute in light of recent court pronouncements, and the advisability of such a statute notwithstanding one constitutional question.

The constitutionality of the five percent resident contractor preference statute was raised before the Wyoming Supreme Court in *Harding v. State*.[72] An unsuccessful non-resident subcontractor alleged that the provisions of Sections 9-663 and 9-664, Wyoming Statutes (1957), violated Section 6 of article 1 of the Wyoming Constitution, and Section 1 of the fourteenth amendment to the United States Constitution.[73] The court, however, refused to rule on the constitutional issues raised on the ground that the general contractor was not alleged to be an agent or subdivision of the state and, therefore, since the plaintiff had not been denied a contract by the state he had no standing to raise the constitutional issues.[74]

Prior to this decision, the constitutionality of the preference statute had been raised in a Wyoming Attorneys General Opinion.[75] The Opinion concluded that Sections 9-663 and 9-664, Wyoming Statutes (1957), were constitutional in that it was within the state's general police power to regulate the conditions under which public work is done and, therefore, the Legislature was at liberty to encourage local in-

71. WYO. STAT. § 9-664 (1957), granting this preference is set out, *supra* note 3. The definition of "resident" as set forth in WYO. STAT. § 9-663 (Supp. 1975), can be found, *supra* note 9. It should be noted that there are limits on the amount of work a successful resident bidder can subcontract to a non-resident subcontractor. WYO. STAT. § 9-665 (1957) (limited to not more than 20 per cent).

72. 478 P.2d 64 (Wyo. 1970). In this case a non-resident subcontractor submitted a bid to a general contractor who had been awarded a contract for mechanical work on a school. The non-resident subcontractor's bid was denied on the basis of WYO. STAT. §§ 9-663 and 9-664 (1957).

73. *Id.* at 65. WYO. CONST. art. 1, § 6, provides that "No person shall be deprived of life, liberty or property without due process of law." It is assumed, but not explained in the opinion, that the plaintiff also alleged a violation of due process and equal protection under the fourteenth amendment to the United States Constitution.

74. Harding v. State, *supra* note 72, at 66.

75. 49 OP. ATT'Y GEN. 236 (Wyo. 1963). The State Superintendent of Public Instruction requested the opinion to answer questions raised in a situation where the second low bidder on a school construction project claimed the low bidder was a non-resident and, therefore, was not entitled to the contract under the preference statute. The opinion suggested that the low bidder had not complied with the technical "resident" requirements of WYO. STAT. § 9-663 (1957).

dustry by such statutory enactments.[76] In the light of a recent decision by the Wyoming Supreme Court, the question as to the weight to be given such an opinion is certainly open to argument.[77] The conclusion must be drawn at this point that the constitutionality of the Wyoming preference statute remains undecided.

Arizona is the only jurisdiction which has clearly decided the constitutionality of its contractor preference statute.[78] In *Schrey v. Allison Steel Manufacturing Co.*,[79] the court held that Arizona's five percent preference statute was not violative of the state's constitutional bar against special legislation, basing its decision on the ground that such a statute bears a reasonable relationship to a legitimate state interest.[80] In *City of Phoenix v. Wittman Contracting Co.*,[81] the court found the same statute nonviolative of the Equal Protection clause of the United States Constitution, again resting its decision on the belief that the statute had a rational basis.[82] Finally, the court, in *City of Phoenix v. Superior Court*,[83] summarily rejected allegations that the preference statute violated the Equal Protection and Interstate Commerce clauses of the United States Constitution.[84]

76. *Id.* at 239-40. In so concluding, the then Attorney General, John F. Raper, relied totally on the case of Heim v. McCall, 239 U.S. 175 (1915).
77. The Attorney General derives his authority to issue such opinions from WYO. STAT. § 9-125 (Supp. 1975). The weight to be given such an opinion was indirectly addressed in Brimmer v. Thomson, 521 P.2d 574 (1974), wherein the Wyoming Supreme Court implicitly found that an Attorney General Opinion may provide a partial basis for a justiciable controversy. Since the question was not directly addressed the answer remains unclear.
78. ARIZ. REV. STAT. ANN. § 34-241 (1974), provides as follows:
> B. In awarding the contract for work to be paid for from public funds, bids of contractors who have satisfactorily performed prior public contracts, and who have paid state and county taxes within the state for not less than two successive years immediately prior to submitting a bid . . . shall be deemed a better bid than the bid of a competing contractor who has not paid such taxes, whenever the bid of the competing contractor is less than five per cent lower . . . .

It should be noted that the Arizona preference statute rests on whether the contractor has paid certain taxes within a specified time before the bidding, whereas the Wyoming preference statute rests totally on a determination of residency.
79. 75 Ariz. 282, 255 P.2d 604 (1953).
80. *Id.* at 607. The reasonable basis found was that it is proper to prefer contractors who have paid state and local taxes since they have contributed to the fund from which they seek to reap a benefit.
81. 20 Ariz. App. 1, 509 P.2d 1038 (1973).
82. *Id.* at 1042-43. *See* Brazie v. Cannon & Wendt Elec. Co., 1 Ariz. App. 490, 405 P.2d 281, 284 (1965) (applies analysis to subcontractor preferences).
83. 109 Ariz. 533, 514 P.2d 454 (1973).
84. *Id.* at 456.

Each of the cases in this line of Arizona precedent rests on the decision of the United States Supreme Court in *Heim v. McCall*,[85] wherein the Court held that, "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the *conditions* upon which it will permit public work to be done on its behalf, or on behalf of its municipalities (emphasis added)."[86] It is the basis and continuing vitality of this decision which causes the concern of this writer over the constitutionality of Wyoming's contractor preference statute.

The issues to be resolved in any discussion of preference statute constitutionality are relatively easy to set forth, but extremely difficult to answer. The major argument supporting the constitutionality of a contractor preference statute is that such an enactment provides a rational means by which the public interest in encouraging local industry can be achieved.[87] On the other hand, opponents of such a preference statute assert that there is a public interest in awarding public works contracts at the lowest possible price, and that this interest is undermined if contracts are awarded on the basis of residency rather than price.[88] The questions presented in attempting to balance these arguments are threefold: 1) Does the state have a legitimate interest in encouraging local industry in the construction field? 2) Is the contractor preference statute a rational means of approaching this interest? 3) Does the preference statute violate fundamental rights in liberty and property, or establish a scheme under which rights to equal protection or due process are violated?

85. Heim v. McCall, *supra* note 76.

86. *Id.* at 191. The Court made this statement as justification for upholding a New York statute which prohibited the employment of alien laborers on public works projects. The language for such a pronouncement was derived from an earlier decision, Atkin v. Kansas, 191 U.S. 207, 222-23 (1903), wherein the Court upheld a Kansas statute limiting the number of hours per day which could be worked on public projects.

87. Schrey v. Allison Steel Mfg. Co., *supra* note 79, at 607.

88. Inge v. Board of Pub. Works of Mobile, 135 Ala. 187, 33 So. 678 (1903); Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591, 594 (1932). These decisions deal with preferences granted to resident over alien laborers in employment on public works projects. *See* WYO. CONST. art. 19, § 3, prohibiting alien labor on public works projects.

The United States Supreme Court has held that states have a legitimate interest in controlling the "conditions" under which public works are performed and, therefore, the first question can be answered in the affirmative.[89] The Court, in establishing this doctrine, also ruled that a restriction on alien employment in the public works area was a legitimate means of control.[90] This latter ruling has been seriously questioned in recent case law. The Supreme Court of California, in *Purdy & Fitzpatrick v. State*,[91] held that a statute prohibiting employment of aliens on public works was unconstitutional in that it created a classification which arbitrarily discriminated against certain persons without any rational relationship to a legitimate state interest.[92] One of the bases for the court's decision was that the holding in *Heim v. McCall*[93] could no longer stand in the light of another United States Supreme Court decision, *Takahashi v. Fish & Game Commission*,[94] wherein the Court "dealt a death blow to the 'proprietary' rationale as a justification for exclusion of aliens from certain occupations."[95] The question, of course, is whether this decision can be analogized to apply to a competitive bidding statute which grants a preference to resident contractors.

The true significance of the *Purdy* decision lies in its rejection of the thought that the exercise of a proprietary as opposed to a governmental function justifies preferences relative to public works projects. A divergent viewpoint, however, does exist in other jurisdictions. A Florida United States District Court, in *American Yearbook Co. v. Askew*,[96] held that the award of public printing contracts was a proprietary function which justifies certain statutory provisions which required that all such printing be done within the

89. Heim v. McCall, *supra* note 76, at 191. The Court therein spoke only to the "conditions" relating to employment of laborers on public works projects, but the rule can be and has been extended to include all facets of public works thereby including the award of public works contracts.
90. *Id.*
91. 71 Cal. 2d 566, 79 Cal. Rptr. 77, 456 P.2d 645 (1969).
92. *Id.* at 658.
93. Heim v. McCall, *supra* note 76.
94. 334 U.S. 410 (1948).
95. Purdy & Fitzpatrick v. State, *supra* note 91, at 657. *See* Annot., 38 A.L.R.3d 1213 (1971).
96. 339 F. Supp. 719 (M.D. Fla. 1972).

state.[97] The implication of this decision is that if a proprietary function can be established, there is sufficient justification for preferences which may discriminate against nonresident bidders and in favor of resident bidders.[98] Residency, however, has been declared to be violative of the Equal Protection clause when used as a determinative basis for public employment.[99] The reasoning of these later cases is based on a belief that the state of residence of a public employee in no way guarantees that better work will be done, that unemployment will be reduced or that the human resources of a state will be upgraded.[100] Realizing the existence of these numerous divergent views, one would find it difficult to conclude that the constitutionality of contractor preference statutes has been finally determined in respect to the concepts of fundamental rights and equal protection. The same conclusion can be reached in respect to interstate commerce clause implications,[101] although the divergence is not as significant.

Even though it is conceivable that Wyoming's contractor preference statute would be upheld, public policy considerations dictate its repeal. First, recent studies indicate that the presence of a contractor preference is frequently costly to taxpayers, particularly in areas close to the Wyoming borders.[102] This additional cost placed on public works projects can only be justified if it is less than the differential in expenditures made by resident as opposed to nonresident contractors in the state. Although this occurrence was probably contemplated by the drafters of the Wyoming contractor preference law, no evidence could be found to support

97. *Id.* at 721. The court therein cites to Heim v McCall, *supra* note 76, as justification for its decision.
98. *Id.* at 724. The court cites Schrey v. Allison Steel Mfg. Co., *supra* note 79, as an example of such a justifiable preference. *See* Garden State Dairies of Vineland, Inc. v. Sills, 46 N.J. 349, 217 A.2d 126, 129 (1966), which also cites *Schrey* for support in concluding that there is a rationale basis for preferring resident milk producers bidding on state contracts.
99. York v. State, 53 Hawaii 557, 498 P.2d 644, 646 (1972); State v. Wylie, 516 P.2d 142 (Alas. 1973).
100. *Id.* at 646 and 149, respectively.
101. *See* State *ex rel.* Collins v. Senatobia Blank Book & Stationery Co., 115 Miss. 254, 76 So. 258 (1917), and Garden State Dairies of Vineland, Inc. v. Sills, *supra* note 98, both upholding state material preference statutes as non-violative of the interstate commerce clause. *Cf.*, People *ex rel.* Treat v. Coler, 166 N.Y. 144, 59 N.E. 776 (1901).
102. MINGE & BLEVINS, *supra* note 69, at 119-20.

the supposition. Secondly, the potential alleged benefits of the preference can only be obtained if the rules relating to residence are substantially met, rather than only technically met. Recent unreported cases in Wyoming district courts would indicate that in some instances nonresident contractors create subsidiary "paper" resident contracting firms in order to obtain the advantages of the preference. If the above two hypotheses are true, the preference statute needs serious reconsideration, particularly in light of the fact that Wyoming is among a minority of jurisdictions which have such statutes.[103]

CONCLUSION

The Wyoming statutes relating to competitive bidding on public works projects will be increasingly used as the state continues to develop. As a result, a clearer understanding of their meaning is crucial. Glaringly absent from the statutory provisions is any definition of "lowest responsible bidder," even though this is the abstract being who should be awarded the contract by a governing body. This Comment has set forth the various attributes of the "lowest responsible bidder," particularly in regard to the concept of responsibility. However, in dealing with potential problems of application of these attributes as they arise is not the approach to be taken by a state destined for future development. As a result, it is suggested that legislative consideration be given to either pre-qualification or licensing provisions. As an additional safeguard, and in an attempt to protect the integrity of the competitive bidding process, this Comment suggests that procedures be established to afford a dissatisfied bidder recourse consistent with the requirement of due process. Finally, consideration is given to the

103. *See* ARIZ. REV. STAT. ANN. § 34-241 (1974) (5%); ARK. STAT. ANN. § 14-622 (1968) (3%) FLA. STAT. ANN. § 255.04 (1975) (if no increase in cost is involved); HAWAII REV. STAT. § 103-53.5 (Supp. 1974) (per cent based on retail rate of general excise tax); LA. REV. STAT. ANN. § 38:2221 (Supp. 1975) (per cent reciprocal to that granted a non-resident bidding contractor in his home state); ME. REV. STAT. ANN. tit. 26, § 1301 (1964) (if no increase in cost); MINN. STAT. ANN. § 16.365 (1967) (reciprocal); MONT. REV. CODES ANN. § 82-1924 (Supp. 1975) (3%); NEB. REV. STAT. § 73-101.01 (1971) (reciprocal); N.M. STAT. ANN. § 6-6-1 (1966) (whenever practicable); S.D. COMPILED LAWS ANN. § 5-19-3 (1974) (reciprocal); VA. CODE ANN. § 11-20.1 (1973) (reciprocal); and WYO. STAT. § 9-664 (1957) (5%).

constitutionality of the Wyoming resident contractor preference statute. It is contended that the statute violates equal protection concepts and, even if it does not, that the policy rationale behind such a statute is not consistent with the public interest. In any situation subject to change, reevaluations of substantive and procedural concepts must be made. The competitive bidding procedure for public works projects is in need of such a reevaluation so that it can be better equipped to meet the demands of the future.

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