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CRITERIA FOR AWARDING PUBLIC CONTRACTS TO THE LOWEST RESPONSIBLE BIDDER

NELSON ROSENBAUM

The awarding of contracts by municipal and other public corporations is of vital importance to all of us, as citizens and taxpayers. Careless and inefficient standards and procedures for awarding these important community commitments have increased unnecessarily the tax burdens of the public. To secure a standard by which the awarding of public contracts can be made efficiently and economically, and with fairness to both the community and the bidders, the constitutions of some states,¹ and the statutes regulating municipal and public corporations provide for the award of public contracts to the lowest responsible bidder.²

In adopting this standard, the people (in the case of state constitutions) and the legislature have sought to avoid favoritism and its concomitant evils.³ Where no restraint exists upon the power of an awarding official as to the standard he is to use in entering into public contracts,⁴ pressure is almost invariably placed upon him to award these contracts to the friends of the group that is in power, or simply on the basis of friendship or otherwise, without regard to the interests of the taxpayers. It is natural that if such a

¹ARK. CONST. Art. XIX, §§ 15, 16 require certain state and county contracts to be awarded to the lowest responsible bidder. See also, W. VA. CONST. Art. VI, § 34.

²Many municipal corporations and state agencies of our country are required to award contracts in excess of a certain sum to the lowest responsible bidder. Since 1938, the largest municipality of our nation, New York City, has been added to the cities required to award contracts to the lowest responsible bidder. N. Y. CITY CHARTER §§ 343(b), 344(a). Boards of Education are also obliged to award contracts to the lowest responsible bidder, e.g., N. Y. EDUC. LAW § 875, subd. 8.

The requirement that award of a contract be made to the lowest responsible bidder has been made applicable also to public utilities in certain instances. Under N. Y. PUB. SERV. LAW § 115 (L. 1935, c. 13, effective January 25, 1935) the Public Service Commission or the Transit Commission, whenever they are of the opinion that the public interest so require, may direct any public utility subject to their jurisdiction to award contracts for the construction, improvement or extension of its plant, work or system, exceeding in amount twenty-five thousand dollars in any calendar year, to the lowest responsible bidder, after competitive bidding under regulations to be prescribed by them.

³People *ex rel.* Coughlin v. Gleason, 121 N. Y. 631, 634, 25 N. E. 4 (1890).

⁴Where there are no restraints or restrictions, public contracts may be entered into in the same manner as are contracts of individuals or ordinary corporations. *Montgomery County v. Barber*, 45 Ala. 237, 243 (1871); *Kingsley v. City of Brooklyn*, 78 N. Y. 200, 213, 214 (1879); *Underwood v. Fairbanks, Morse & Co.*, 205 Ind. 316, 330, 331, 185 N. E. 118, 123 (1933). "It is well settled that a municipal corporation need not, in making its contract, advertise for bids and let to the lowest bidder, in the absence of an express statutory requirement; and where a city is not required to advertise for bids, neither is it required to let to the lowest bidder, in case it does adopt such course." *Lee v. City of Ames*, 199 Iowa 1342, 1350, 203 N. W. 790, 793 (1925). See also, *Archambault v. Mayor of Lowell*, 278 Mass. 327, 331, 180 N. E. 157, 159 (1932); *Schulte v. Salt Lake City*, 79 Utah 292, 299, 300, 10 P. (2d) 625, 628 (1932).

condition were to continue, economy and efficiency in the award and performance of public contracts would largely disappear. Furthermore, it is not fair to bidders, who have expended time and money in the preparation of bids for public contracts, to be faced with the prospect that they will not be treated on the basis of equality.⁵

The basis of making awards to the lowest *responsible* bidder has been adopted with the view of enabling a public body to enter into its contracts with the same efficiency and economy that a prudent business man does in his everyday business affairs⁶—this beneficial result cannot be obtained when the award must go to the lowest bidder.⁷

CONDITIONS PRECEDENT TO MAKING AN AWARD OF CONTRACT TO THE LOWEST RESPONSIBLE BIDDER

In addition to the necessity of advertising for bids,⁸ there is implied in the award of public contracts required to be let to the lowest responsible bidder that previous to such advertising, definite plans and specifications be adopted in order to enable all bidders to make intelligent bids for the exact work to be done.⁹ A common standard is thus obtained by which to measure the

⁵People *ex rel.* Coughlin v. Gleason, *supra* note 3; Fones Hardware Co. v. Erb, 54 Ark. 645, 650, 17 S. W. 7, 8 (1891); Hannon v. Board of Education, 25 Okla. 372, 377, 378, 107 Pac. 646, 648, 649 (1909). There is, however, a very salutary purpose in requiring competitive bidding on public contracts. It is with the idea of placing safeguards around awarding officials which "will tend to remove them from temptation and opportunity for fraud and favoritism," and "assist in removing suspicion of unfairness and favoritism, and relieve honest men upon whom these duties devolve [awarding contracts] of unjust charges." Under this scheme, it is hoped that good men, "without fear of being corrupted or slandered" will be inclined to enter the public service and "the dishonest man will find more difficulty in plundering the public." Hannon v. Board of Education, 25 Okla. 372, 393, 394, 107 Pac. 646, 655 (1909).

⁶Gilmore v. City of Utica, 131 N. Y. 26, 35, 29 N. E. 841, 843 (1892); Commonwealth v. Mitchell, 82 Pa. 343, 350 (1876). In Leskie v. Hazletine, 155 Pa. 98, 25 Atl. 886 (1893) it was decided that a private person in awarding a contract for the construction of a building is not required to let it to the lowest bidder, but can consider the responsibility of the bidders and award the contract to any bidder he deems qualified after inquiring into the bidder's fitness, skill, experience and ability to properly perform the contract. See *post* p. 45.

⁷If, however, the *statute* requires that the contract *shall be awarded to the lowest bidder*, no contract can be let to any person other than the lowest bidder." 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 811 and cases cited.

⁸Galbreath v. Newton, 45 Mo. App. 312, 322 (1891). In Reiter v. Chapman, 177 Wash. 392, 397, 31 P. (2d) 1005, 1007 (1934) it was said that "a sound public policy supports the proposition that a reasonable notice be given of the letting of public contracts, in order that, by competition in bidding, the public may receive the benefit of the greatest possible value for the least expenditure."

⁹Fones Hardware Co. v. Erb, Hannon v. Board of Education, both *supra* note 5. In Flynn Construction Co. v. Leininger, 125 Okla. 197, 201, 257 Pac. 375, 378 (1927) the court, speaking of the statutory requirement that contracts be awarded to the lowest responsible bidder, stated that this "conclusively implies competitive bidding, and all the courts are agreed that competitive bidding means bidding upon the same thing, upon the identical undertaking, upon the same material items in the subject matter."

respective bids to determine the lowest responsible bidder.¹⁰

MEANING OF THE TERM "LOWEST RESPONSIBLE BIDDER"

The generic definition of the term "lowest responsible bidder" has been defined in the leading case of *People ex rel. Martin v. Dornheimer*, 55 How. Pr. 118, 120 (N. Y. 1878) as one "able to respond or to answer in accordance with what is expected or demanded."¹¹

The term "lowest responsible bidder" has been more definitely interpreted as requiring the successful bidder to possess financial or pecuniary ability to complete the contract,¹² integrity and trustworthiness,¹³ skill,¹⁴ judgment,¹⁵ ability to perform faithful and conscientious work,¹⁶ promptness,¹⁷ experience,¹⁸ necessary facilities and equipment for doing the work,¹⁹ efficiency,²⁰ previous performance of satisfactory work,²¹ together with other

3 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 1313. *Davies v. Village of Madelia*, 205 Minn. 526, 532, 287 N. W. 1, 4 (1939); *State ex rel. Sanders v. Grisco*, 184 Okla. 348, 350, 87 P. (2d) 155, 157-158 (1939).

¹⁰*Mazet v. Pittsburgh*, 137 Pa. 548, 563, 20 Atl. 693, 698 (1890); *Fones Hardware Co. v. Erb*, *supra* note 5; *Hart v. City of New York*, 201 N. Y. 45, 53, 94 N. E. 219, 222 (1911); *Matter of McNutt Co. v. Eckert*, 257 N. Y. 100, 104, 177 N. E. 386, 387 (1931).

¹¹*Cited with approval* in *Moran v. Village of White Plains*, 58 Hun 608, 12 N. Y. Supp. 61, 62, 35 N. Y. St. Rep. 335, 337 (1890), *aff'd*, 128 N. Y. 578, 28 N. E. 250 (1891); *State v. Richards*, 16 Mont. 145, 155, 40 Pac. 210, 213 (1895); *State v. Board of Commissioners*, 105 Neb. 570, 572, 181 N. W. 530, 531, 532 (1921); *Hudson v. Board of Education*, 41 Ohio App. 402, 407, 179 N. E. 701, 703 (1931), motion to certify record overruled by Supreme Court of Ohio, 41 Ohio App. xlv (1931). A similar definition of the term "lowest responsible bidder" is found in *People v. Kent*, 160 Ill. 655, 661, 662, 43 N. E. 760, 762 (1896). Decisions interpreting the meaning of "lowest responsible bidder" are to be found in the notes in (1896) 50 Am. St. Rep. 489, (1912) 38 L. R. A. (N. S.) 672, and Ann. Cas. 1913A 500.

¹²*People ex rel. Martin v. Dornheimer*, 55 How. Pr. 118, 119 (N. Y. 1878); *Peluso v. Hoboken*, 98 N. J. L. 706, 708, 126 Atl. 623, 624 (1923); *Hibbs v. Arensberg*, 276 Pa. 24, 29, 119 Atl. 727, 729 (1923). However, financial or pecuniary ability to complete a contract should be considered in connection with the usual provision in municipal contracts providing for progress or partial payments in the course of the job.

¹³*Commonwealth v. Mitchell*, 82 Pa. 343, 349 (1885); *Douglass v. Commonwealth*, 108 Pa. 559, 564 (1885); *Moran v. Village of White Plains*, *State v. Richards*, both *supra* note 11; *Inge v. Board of Public Works*, 135 Ala. 187, 198, 33 So. 678, 681 (1903); *Williams v. City of Topeka*, 85 Kan. 857, 861, 118 Pac. 864, 866 (1911); *Ellington v. Cherry Lake School District*, 55 N. D. 141, 148, 212 N. W. 773, 775 (1927).

¹⁴*Commonwealth v. Mitchell*, *Inge v. Board of Public Works*, both *supra* note 13.

¹⁵*State v. Richards*, 16 Mont. 145, 151, 40 Pac. 210, 212 (1895); *Williams v. City of Topeka*, *supra* note 13.

¹⁶*Inge v. Board of Public Works*, *supra* note 13.

¹⁷*Reuting v. Titusville*, 175 Pa. 512, 520, 34 Atl. 916, 918 (1896); *Wilson v. New Castle City*, 301 Pa. 358, 364, 152 Atl. 102, 103 (1930).

¹⁸*People v. Omen*, 290 Ill. 59, 71, 124 N. E. 860, 865 (1919); *Paterson Contracting Co. v. Hackensack*, 99 N. J. L. 260, 263, 122 Atl. 741, 742 (1923); *Willis v. Hathaway*, 95 Fla. 608, 627, 117 So. 89, 94-95 (1928).

¹⁹*Peluso v. Hoboken*, *supra* note 12; *Willis v. Hathaway*, *Paterson Contracting Co. v. Hackensack*, both *supra* note 18.

²⁰*Hibbs v. Arensberg*, *supra* note 12.

²¹*McGovern v. Trenton*, 57 N. J. L. 580, 586-587, 31 Atl. 613, 615 (1895); *Stubbs*.

essential factors which may be dependent upon the type and kind of contract involved.²² In other words, the lowest bidder is not necessarily the lowest *responsible* bidder,²³ and the ability to furnish a bond does not alter the situation.²⁴ Even though required, financial responsibility of itself is insufficient to make the lowest bidder the lowest responsible bidder within the meaning of that term.²⁵

PROCEDURE FOR DETERMINING THE LOWEST RESPONSIBLE BIDDER

After the receipt, opening and tabulating of bids, the public official charged with the duty of making the award of contract to the lowest responsible bidder must determine two things in order to make a valid award: (1) the responsibility of the bidders, and (2) which of the responsible bidders has submitted the lowest bid.²⁶ The second step requires only a comparison of

v. City of Aurora, 160 Ill. App. 351, 358 (1911); *Wilson v. New Castle City*, *supra* note 17; *State v. Board of Commissioners*, 105 Neb. 570, 573, 181 N. W. 530, 532 (1921); *Hudson v. Board of Education*, 41 Ohio App. 402, 407, 179 N. E. 701, 703, motion to certify record overruled by Supreme Court of Ohio, 41 Ohio App. xlv (1931).

²²*Bright v. Ball*, 138 Miss. 508, 517, 103 So. 236, 238 (1925) holding that a physically handicapped bus driver is not a responsible bidder for the transportation of children to and from school. To the same effect see *Hutto v. State Board of Education*, 165 S. C. 37, 42, 162 S. E. 751, 753 (1932). See also *State v. Board of Commissioners*, *supra* note 21; *Willis v. Hathaway*, *supra* note 19.

²³*City of Denver v. Dumars*, 33 Colo. 94, 103, 104, 80 Pac. 114, 117 (1905); *Hiorth v. Chester City*, 292 Pa. 387, 388, 127 Atl. 836 (1925).

²⁴*People ex rel. Martin v. Dornheimer*, *supra* note 12; *Williams v. City of Topeka*, *supra* note 13; *Hudson v. Board of Education*, 41 Ohio App. 402, 406, 179 N. E. 701, 703, motion to certify record overruled 41 Ohio App. xlv (1931); *Wilmott Coal Co. v. State Purchasing Commission*, 246 Ky. 115, 119, 54 S. W. (2d) 634, 636, 86 A. L. R. 127 (1932).

Underwriters of surety bonds are also of the opinion that the mere fact that a bidder can furnish a surety bond is not conclusive on the question that such bidder should be awarded the contract where the criteria of award is that of lowest responsible bidder. Surety companies favor discretionary awards, such as lowest responsible bidder, where all the factors of responsibility, other than the ability to furnish a surety bond and the submission of the lowest bid, have to be considered in making the award. Surety bonds are primarily credit guarantees and not insurance that the contractor will in fact perform as required by the terms of the contract. These views are expressed in a brochure published by The Surety Association of America entitled "How Can Contract-Bond Conditions Be Improved?" (1925) wherein it is further stated at p. 34: "It is well known to all students of the subject and to everybody at all experienced in public contracts that the bidders who may be the lowest in price are sometimes not the bidders whose work will ultimately turn out to be the cheapest for the governmental body. The fact that a lowest-price bidder may be able to satisfy the bond requirement of the law does not dispose of the question." Further at p. 42: "Surety companies deem it a wholesome development of the business [of writing surety bonds] that contract-awarding officials feel justified under some conditions in rejecting bidders even when the latter can qualify with bonds."

²⁵*People v. Kent*, 160 Ill. 655, 662, 43 N. E. 760, 762 (1896); *People v. Omen*, *supra* note 18; *Ellingson v. Cherry Lake School District*, *supra* note 13; *Wilson v. New Castle City*, *supra* note 17; *Hallett v. City of Elgin*, 254 Ill. 343, 346, 98 N. E. 530, 532 (1912).

²⁶*Inge v. Board of Public Works*, *supra* note 13; *Osburn v. Mitten*, 39 Ariz. 372, 377, 6 P. (2d) 902, 904 (1932). See also notes in (1896) 50 Am. St. Rep. 489; (1912) 38 L. R. A. (N. S.) 655; *Id.* at 672, and Ann. Cas. 1913A 500.

arithmetical figures and does not involve the exercise of judgment and discretion.

The awarding of a contract required to be let to the lowest responsible bidder is mandatory,²⁷ and no authority, except by statute,²⁸ authorizes the awarding official to accept any other bidder.²⁹ Failure to make the award to the lowest responsible bidder results in an invalid contract which the courts will not sustain.³⁰

Determination of the responsibility of a bidder is not ministerial³¹ but requires the exercise of judgment and discretion.³² In exercising such judgment and discretion, the awarding officer must always consider his duty of fidelity to the public corporation and the public interest he represents, and never the private interests of bidders or other individuals.³³ Such judgment and discretion involve the performance of a judicial act,³⁴ and must be exercised honestly and fairly, not arbitrarily nor capriciously, and must be based on *facts* obtained after investigation into the responsibility of the bidders.³⁵ These facts must tend to show that the lowest bidder to whom the award was not made was not a responsible bidder.³⁶

Failure to make such investigation vitiates the contract awarded, if it has not been made to the lowest responsible bidder.³⁷ The investigation to be made by an awarding official must cover those factors which come within

²⁷*People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 634, 25 N. E. 4, 5 (1890); *Hoole v. Kinkead*, 16 Nev. 217, 220 (1881); *Williams v. City of Topeka*, *supra* note 13; *Hassiter & Co. v. Taylor*, 99 Fla. 819, 825, 831, 128 So. 14, 17, 19, 69 A. L. R. 689 (1930).

²⁸For example, § 343 (b) of the New York City Charter (effective January 1, 1938) providing that the city agency letting the contract shall award it to the lowest responsible bidder, "unless the board of estimate by a three-fourths vote shall determine that it is for the public interest that a bid *other* than that of lowest responsible bidder shall be accepted." (*Italics writer's.*) In *Picone v. City of New York*, 176 Misc. 967, 969, 29 N. Y. S. (2d) 539, 541 (Sup. Ct. 1941), the court construed this provision of law as applicable when the award is to be made to the higher of two responsible bidders.

²⁹*American Pavement Co. v. Wagner*, 139 Pa. 623, 629, 21 Atl. 160, 161 (1891).

³⁰*Molloy v. City of New Rochelle*, 198 N. Y. 402, 410, 411, 92 N. E. 94, 97 (1910); *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 634, 25 N. E. 4, 5 (1890).

³¹*Commonwealth v. Mitchell*, 82 Pa. 343, 349 (1876).

³²*Commonwealth v. Mitchell*, *supra* note 31; *Hoole v. Kinkead*, *supra* note 27 at 221; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 634-635, 25 N. E. 4, 5 (1890); *East River Gas-Light Co. v. Donnelly*, 93 N. Y. 557, 560 (1883); *Madison v. Harbor Board*, 76 Md. 395, 397, 25 Atl. 337, 338 (1892).

³³*Inge v. Board of Public Works*, 135 Ala. 187, 198, 33 So. 678, 681 (1903).

³⁴*East River Gas-Light Co. v. Donnelly*, *supra* note 32 at 561; *Johnson v. Sanitary District*, 163 Ill. 285, 287, 45 N. E. 213, 214 (1896).

³⁵*People ex rel. Coughlin v. Gleason*, *supra* note 32; *State v. Richards*, 16 Mont. 145, 162, 40 Pac. 210, 216 (1895); *Williams v. City of Topeka*, 85 Kan. 857, 863, 864, 118 Pac. 864, 866-867 (1911); *Syracuse I. S. Board v. Fidelity & Deposit Co.*, 255 N. Y. 288, 294, 174 N. E. 657, 659 (1931). Sidewalk gossip is not the kind of investigation contemplated. *Fourmy v. Town of Franklin*, 126 La. 151, 154, 52 So. 249, 250 (1920).

³⁶*People ex rel. Coughlin v. Gleason*, *supra* note 32; *Williams v. City of Topeka*, *supra* note 35.

³⁷*People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 634, 25 N. E. 4, 5 (1890);

the meaning of the term "lowest responsible bidder".³⁸ An award denied to the lowest responsible bidder, based on factors which are not within the meaning of the term "responsible bidder", will not be upheld.³⁹

The lowest bidder is not as a matter of law the lowest responsible bidder.⁴⁰ Neither does the award to one other than the lowest bidder create a presumption of fraud.⁴¹ On the contrary, there is the presumption of official integrity attached to the action of a public officer,⁴² but it is not conclusive and may be rebutted.⁴³ To impugn his action in awarding a contract to one other than the lowest bidder, there must be proof that an investigation of the responsibility of the bidders was not made, or that such action was not the result of the exercise of an honest and fair discretion in determining the responsibility of the bidders, but was arbitrary or capricious.⁴⁴

The procedure to be adopted by contracting officers in recording their determination as to the lowest responsible bidder has been judicially suggested in *Seysler v. Mowery*,^{44a} in the following language:

" . . . if the contract is let to another than the lowest bidder, the ultimate facts upon which that action is based should be entered in the clerk's minutes for the information of the taxpayers, the protection of the officers who let the contract from unjust criticism of an act which, in the absence of explanation, would appear to be an unjustified expenditure of public money, and to the end that the courts may, if called upon to do so, review the facts and reasons upon which the contract was awarded and pass upon their sufficiency."⁴⁵

Seysler v. Mowery, 29 Idaho 412, 417, 160 Pac. 262, 263 (1916); *Hibbs v. Arensberg*, 276 Pa. 24, 29, 119 Atl. 727, 729 (1923).

³⁸*Miller v. City of Des Moines*, 143 Iowa 409, 122 N. W. 226 (1909); *Taylor v. Philadelphia*, 261 Pa. 458, 467, 104 Atl. 766, 768 (1918); *Pearlman v. Pittsburgh*, 304 Pa. 24, 30-31, 155 Atl. 118, 120 (1931). A contract stipulation as to minimum wages and maximum hours, inserted to secure a federal grant of money and in accord with a subsequent statute, does not violate the requirement of award to the lowest responsible bidder. *Campbell v. School District*, 328 Pa. 197, 200, 201, 195 Atl. 53, 54, 55, 113 A. L. R. 841 (1937). This is also true when the grant of federal funds is greater than the excess cost resulting from the insertion of such provision in a contract. *Iowa Electric Co. v. Town of Cascade*, 227 Iowa 480, 288 N. W. 633, 129 A. L. R. 758 (1939).

³⁹See *supra* note 38.

⁴⁰See *supra* note 23.

⁴¹*Peckham v. City of Watsonville*, 138 Cal. 242, 244, 71 Pac. 169 (1902).

⁴²*Gilmore v. City of Utica*, 131 N. Y. 26, 35, 29 N. E. 841, 843 (1892).

⁴³*People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 634-635, 25 N. E. 4, 5 (1890); *Gilmore v. City of Utica*, *supra* note 42; *Hallett v. City of Elgin*, 254 Ill. 343, 347, 98 N. E. 530, 532 (1912).

⁴⁴*Coughlin v. Gleason*, *supra* note 32; *Hallett v. City of Elgin*, 254 Ill. 343, 350, 98 N. E. 530, 533 (1912); *Seysler v. Mowery*, *supra* note 37.

^{44a}29 Idaho 412, 417, 160 Pac. 262, 263 (1916).

⁴⁵The New York City Charter, §§ 343(a), 343(b), which requires the award of a contract in excess of \$1,000.00 to the lowest responsible bidder, makes it mandatory for the awarding agency, when an award is made to one other than the lowest bidder, to "file in its office and in the offices of the comptroller and treasurer a statement in detail of the reasons therefor."

In deciding upon the lowest responsible bidder, the awarding officer is not required to give the bidders a hearing⁴⁶ and it is recognized that there are practical difficulties in applying such a rule.⁴⁷

Failure to make an award to the lowest responsible bidder, whether in good faith or otherwise, does not subject the awarding officer to personal liability for damages to such bidder,⁴⁸ nor is the municipality, for which such awarding official acts, liable.⁴⁹

Even when a contracting officer is required to award a contract to no one other than the lowest responsible bidder, it is not mandatory that he make the award to such bidder, if, in his honest judgment and discretion, he believes the public interest demands that he reject all bids.^{49a}

FACTUAL SITUATIONS IN WHICH THE FACTORS OF RESPONSIBILITY ARE JUDICIALLY CONSIDERED

A. *Financial or Pecuniary Ability*

It is elementary that, in order to be able to complete or perform any project or undertaking, financial resources are required by the party undertaking such venture.⁵⁰ The awarding official has the right, and in many cases the duty, to demand of a low bidder a financial statement to determine his financial or pecuniary ability.⁵¹ Failure to furnish such statement is a basis for considering the recalcitrant bidder not responsible.⁵² A financial statement of a contractor which does not favorably impress the awarding officer

⁴⁶*Hudson v. Board of Education*, 41 Ohio App. 402, 409, 179 N. E. 701, 703, motion to certify record overruled by Supreme Court of Ohio, 41 Ohio App. xlv (1931). In New Jersey the rule is to the contrary. *Kelly v. Board of Freeholders*, 90 N. J. L. 411, 101 Atl. 422 (1917); *Paterson Contracting Co. v. City of Hackensack*, 99 N. J. L. 260, 122 Atl. 741 (1923); *American Water Corporation v. Mayor and Council of Borough of Florham Park*, 5 N. J. Misc. 969, 972, 139 Atl. 169, 170 (1927).

⁴⁷*Kelling v. Edwards*, 116 Minn. 484, 492, 134 N. W. 221, 224 (1912).

⁴⁸*East River Gas-Light Co. v. Donnelly*, 93 N. Y. 557 (1883); *American Pavement Co. v. Wagner*, 139 Pa. 623, 631, 21 Atl. 160, 162 (1891).

⁴⁹*Molloy v. City of New Rochelle*, 198 N. Y. 402, 408-409, 92 N. E. 94, 96-97 (1910). In *Boseker v. Board of Commissioners of Wabash County*, 88 Ind. 267, 268 (1882) while it was held that the county and its officers were not liable in damages when making a discretionary award of contract for error of judgment, the court went on to state that an unsuccessful bidder on a contract to be awarded at competitive bidding cannot recover for the cost of preparing such bid.

^{49a}*Walsh v. Mayor*, 113 N. Y. 142, 20 N. E. 825 (1889); 1 WILLISTON ON CONTRACTS (Rev. ed. Williston and Thompson, 1936) § 31.

⁵⁰Some uninitiated awarding officials and inexperienced bidders labor under the impression that all that is required of a bidder to be "responsible" is financial or pecuniary ability. This is not true. See *supra* note 25.

⁵¹*Syracuse I. S. Board v. Fidelity & Deposit Co.*, 255 N. Y. 288, 294, 174 N. E. 657, 659 (1931); *Matter of Tuller Construction Co. v. Lyon*, 257 N. Y. 206, 207, 177 N. E. 421, 422 (1931).

⁵²*Syracuse I. S. Board v. Fidelity & Deposit Co.*, *supra* note 51.

is cause for rejecting his bid.⁵³ Unsatisfactory reports concerning a bidder from well known credit, financial or business organizations can be the factual foundation for holding that such bidder is not responsible.⁵⁴ The fact that the bidder proposes to perform the contract on borrowed capital is indicative of lack of financial ability.⁵⁵

B. Integrity and Trustworthiness

The absolute fulfillment of an obligation is the minimum required by law, barring the existence of legal excuses for lesser performance. The one best likely to give such full performance is he who has by reputation, character and previous acts a name for integrity, honesty and trustworthiness. When the award of a contract is not to be measured solely by the smallest amount bid for its performance, but also by the "responsibility" of the bidder, it naturally follows that the integrity, honesty and trustworthiness of the bidder is to be considered. Otherwise the award must be based on "the difference of a single dollar, in a bid for the most important contract" and thereby "determine the question in favor of some unskillful rogue as against an upright and skillful mechanic."⁵⁶

An awarding official is justified in considering a bidder not responsible if he has previously defrauded the public in such contracts⁵⁷ or if, on the evidence before him, the official bona fide believes the bidder has committed such fraud, despite the fact that there exists no judicial determination to that effect.⁵⁸ Likewise, a bidder, who has failed to enter into a previous contract awarded to him, may be considered irresponsible by the awarding officer.⁵⁹ A bid of a contractor, which is unbalanced and suggestive of a fraud upon the municipality, can be rejected as that of a bidder who lacks integrity and trustworthiness.⁶⁰

⁵³People *ex rel.* Martin v. Dornheimer, 55 How. Pr. 118, 119 (N. Y. 1878); Matter of Tuller Construction Co. v. Lyon, *supra* note 51.

⁵⁴Syracuse I. S. Board v. Fidelity & Deposit Co., *supra* note 51.

⁵⁵*Ibid.*

⁵⁶Commonwealth v. Mitchell, 82 Pa. 343, 350 (1878); Wilmott Coal Co. v. State Purchasing Commission, 246 Ky. 115, 118, 54 S. W. (2d) 634, 635 (1932).

⁵⁷Douglass v. Commonwealth, 108 Pa. 559, 564 (1885); Jacobson v. Board of Education, 64 Atl. 609 (N. J. 1906).

⁵⁸Douglass v. Commonwealth, *supra* note 57; *cf.* Sikorski v. Board of Education, *infra* note 62.

⁵⁹Girvin v. Simon, 116 Cal. 604, 608, 48 Pac. 720, 721 (1897).

⁶⁰Moran v. Village of White Plains, 58 Hun 608, 12 N. Y. Supp. 61, 35 N. Y. St. Rep. 335 (2d Dep't 1890), *aff'd*, 128 N. Y. 578, 28 N. E. 250 (1891). An "unbalanced bid" occurs in what are called "unit price" contracts. This type of contract requires the bidder to state a unit price for each of the various classes of work provided for in the contract. The estimated quantities of the various classes of the work are furnished to the bidders in the proposal for bids by the contracting officer. The bids are evaluated by multiplying the unit prices bid by the estimated quantities of each class of work and the total so obtained for each class is added to make a grand total which is the

A corporate bidder, whose former employee four years previously bribed the officials of a municipality to secure the award of a contract to it, can be rejected by the standard under consideration, even though it is claimed by the bidder that it has since the act of bribery performed only faithful and conscientious work.⁶¹

Even the employment by a bidder of a superintendent, indicted for failing to pay the required prevailing rates of wages to mechanics employed on his own public contracts, is a basis for considering such bidder lacking in moral worth.⁶²

Under the factor now being discussed, any previous act or any present act of a bidder in connection with the award of the contract pending which is indicative of want of moral worth is the basis for rejecting such bidder as not responsible. Neither can such bidder successfully seek to hide behind the entity of another corporation, partnership or individual.⁶³

C. Skill, Judgment and Experience

Skill, judgment and experience are three dominant factors relating to responsibility of bidders which are usually intermingled with each other. Skill is usually acquired by experience—judgment is very often the result of wide experience. A bid of a contractor can be rejected, when in the opinion of the awarding official the bidder does not possess the skill, judgment and experience necessary to perform faithfully and expeditiously the work contemplated.⁶⁴ The rejection of a bidder solely because of the lack of experience will also be upheld.⁶⁵

amount bid based on the given estimated quantities. These amounts are used to determine which bid is numerically lowest. In *People ex rel. Williams v. McDonough*, 85 App. Div. 162, 164, 83 N. Y. Supp. 125, 127 (3d Dep't 1903) an unbalanced bid in a public contract was defined to be one "for the performance of a given work at specified rates for each of various kinds of labor or materials required which by being made on an erroneous estimate of quantities of each appears, assuming these quantities to be correct, to be low in comparison with other bids when a computation based upon the true quantities would make the bid high." An "unbalanced bid" was described in *Walter v. McClellan*, 48 N. Y. Misc. 215, 219, 96 N. Y. Supp. 479, 481 (Sup. Ct. 1905) as "a bid based upon nominal prices for some work and enhanced prices for other work." For examples of unbalanced bids, see *Matter of Anderson*, 109 N. Y. 554, 17 N. E. 209 (1888) and *Nelson v. Mayor*, 131 N. Y. 4, 11, 29 N. E. 814, 815 (1892).

The validity of "unit price" contracts was sustained in *Devir v. Hastings*, 277 Mass. 502, 178 N. E. 617, 79 A. L. R. 222 (1931).

⁶¹*Williams v. City of Topeka*, 85 Kan. 857, 118 Pac. 864 (1911); cf. *Picone v. City of New York*, 176 N. Y. Misc. 967, 969, 29 N. Y. S. (2d) 539, 541 (Sup. Ct. 1941).

⁶²*Sikorski v. Board of Education*, 98 N. Y. Law Journal 100 (July 10, 1937), *aff'd*, 253 App. Div. 824 (2d Dep't 1938).

⁶³*Picone v. City of New York*, 176 Misc. 967, 969, 29 N. Y. S. (2d) 539, 541 (Sup. Ct. 1941); *Stubbs v. City of Aurora*, 160 Ill. App. 351, 358 (1911).

⁶⁴*Willis v. Hathaway*, 95 Fla. 608, 617, 623, 117 So. 89, 92, 94 (1928) (construction of a hard surfaced road).

⁶⁵*Id.* at 624, 117 So. at 94; *Reuting v. Titusville*, 175 Pa. 512, 518, 34 Atl. 916, 917

D. Promptness

Public contracts invariably state a time within which the contractor agrees to complete performance. Timely performance is very vital to public bodies, particularly in the case of large improvements which are financed by funds payable over the contemplated life of the project. Thus, delays in performance of such contracts result in payment of interest charges without the municipality securing the benefit of the improvement as contemplated. In the case of toll paying projects, delays of contractors result in a direct monetary loss which could be used to pay the accruing interest charges. At any rate, delays in the performance of public contracts of any nature deprive the public of the use of the matter contracted for during such dilatoriness, whether it be a bridge, an automobile, or printed forms. These procrastinations adversely affect the interests of the municipality and if they have occurred in the past they should be considered by awarding officers in determining the "responsibility" of bidders. It is therefore wise for an awarding official to examine the past record of a low bidder for prompt completion of contracts.

Accordingly, a low bidder who is or has been in default in completing public contracts within the stipulated contract time cannot complain if his bid is not accepted.⁶⁶ An awarding officer also should review the present factual situation of the bidder and determine on the basis of such facts whether the bidder will be able to give timely performance of the contract. Instances exist where such action of public officials has been upheld. Therefore, if the amount of the low bid is less than the estimated amount of the actual cost of the work and the awarding agency believes, because of that fact, the contract will not be completed as required, the agency is justified in rejecting the bid.⁶⁷ A low bidder can be rejected, though he is financially responsible, where he has all the work he can presently handle with his equipment and facilities and the awarding officer believes that such bidder cannot complete the contract within the stipulated time.⁶⁸

It is well known that union mechanics in the construction field will invariably strike or walk-out when non-union workmen are employed on the job, thereby delaying the progress of the project. So, in the construction of a

(1896). Cf. *Paterson Contracting Co. v. City of Hackensack*, 99 N. J. L. 260, 263, 122 Atl. 741, 742 (1923).

⁶⁶*Kelling v. Edwards*, 116 Minn. 484, 491, 134 N. W. 221, 223 (1912); *Wilson v. New Castle City*, 301 Pa. 358, 365, 152 Atl. 102, 104 (1930).

⁶⁷*Hoole v. Kinkead*, 16 Nev. 217, 219, 220 (1881); *Willis v. Hathaway*, 95 Fla. 608, 616, 117 So. 89, 91 (1928).

⁶⁸*State ex rel. Nebraska B. & I. Co. v. Board of Commissioners*, 105 Neb. 570, 572, 181 N. W. 530, 531 (1921); *Willis v. Hathaway*, 95 Fla. 608, 617, 624, 117 So. 89, 92, 94 (1928).

building, where the principal or general contractor is an employer of union mechanics, it is proper for the awarding officer to reject, as not responsible, the low bidder for the plumbing work, because he maintains an "open shop".⁶⁹ This rule is also applicable to a situation where the principal contractor maintains an "open shop" and the low bidder for the plumbing is an employer of union mechanics.⁷⁰ A board of education may decline to award repair contracts for its existing buildings to "open shop" contractors, where such awards might cause strikes and walk-outs by union mechanics constructing its new buildings, so that the speed of its construction program would be delayed.⁷¹ An award of a contract for election printing to a high bidder will not be condemned where the contracting officer believes that there is the possibility that the printing matter cannot be furnished by the lowest bidder in time for holding the election.⁷²

E. Performance of Previous Satisfactory Work

As already indicated, the statutes providing for awarding public contracts to the lowest responsible bidder have for one of their purposes the granting of a range of discretion to awarding officials, such as would be exercised by prudent business men in the conduct of their affairs.⁷³ Common knowledge, as well as our own personal experience, tells us that business men do not continue to maintain commercial relations with persons or organizations who have previously failed to perform contracts in accord with their intent and requirements. There is no sensible reason why this attitude should be cast aside in awarding public contracts, when the lowest bidder, responsible in all other details, has previously performed unsatisfactory work. The expectation of complete and proper performance from such a bidder is dubious in view of his trail of previous unsatisfactory work.

When the low bidder, though otherwise responsible, has a record for unsatisfactory work, the application of the above criteria of the prudent business man by the awarding officer in refusing to contract with such a bidder has judicial sanction.⁷⁴ Unsatisfactory work can consist of defective work or the furnishing of inferior material not in compliance with the contract.⁷⁵ The construction of a defective bridge, even though built by a sub-contractor

⁶⁹*Pallas v. Johnson*, 100 Colo. 449, 450, 452, 68 P. (2d) 559, 560, 561, 110 A. L. R. 1403 (1937).

⁷⁰*Ibid.*

⁷¹*Taylor v. Ryan*, 253 App. Div. 653, 3 N. Y. S. (2d) 684 (1st Dep't 1938), *aff'd*, 278 N. Y. 641, 16 N. E. (2d) 300 (1938).

⁷²*Pugh Printing Co. v. Yeatman*, 12 Ohio C. D. 477 (1901).

⁷³See *supra* note 6.

⁷⁴*Wilson v. New Castle City*, 301 Pa. 358, 365, 152 Atl. 102, 104 (1930); *People v. Kent*, 160 Ill. 655, 659, 660, 43 N. E. 760, 761 (1896).

⁷⁵*Wilson v. New Castle City*, *supra* note 74.

of a municipality's main contractor, nevertheless, is a basis for rejecting the sub-contractor as not a responsible bidder when he bids in his own right.⁷⁶ Especially is a bidder not responsible where in the previous performance of the same type of contract involved, such as paving a street with brick, he installed defective bricks, which were never corrected, so that the roadway was left in an unsatisfactory state.⁷⁷ If the awarding agency believes on the evidence before it that the low bidder is the "front" or agent for an undisclosed principal contractor with a previous record of unsatisfactory work, the denial of an award to such a bidder will be upheld.⁷⁸

F. *Necessary Facilities and Equipment*

In almost every contract, except possibly one exclusively for personal services, the contractor must possess the necessary facilities and equipment to perform the contract. Otherwise public contracts will be solely in the hands of brokers, which is not a healthy condition.⁷⁹ Awarding a contract to a bidder lacking the essential facilities and equipment "might be trusting to the chapter of accidents" to furnish him with the required appliances and apparatus.⁸⁰ A wise and prudent administrator before entering into a public contract is certain to consider whether the low bidder has the necessary plant and equipment to fulfill the contract within the specified time.⁸¹ Thus, a contract for printing, binding and annotating of codes of practice awarded by a state agency to a higher bidder, where it appeared that the low bidder did not have the bindery or printing plant necessary to complete the job within the specified time, was held to be proper.⁸² Where speed is essential

⁷⁶Board of Commissioners v. Davis, 92 Kan. 672, 674, 675, 141 Pac. 555, 556 (1914).

⁷⁷McGovern v. Board of Public Works, 57 N. J. L. 580, 587, 31 Atl. 613, 615 (1895).

⁷⁸Stubbs v. City of Aurora, 160 Ill. App. 351, 358, 359 (1911).

⁷⁹Russell Forbes, Commissioner of Purchase, in his *Report to Mayor F. H. LaGuardia on the Work of the Department of Purchase for the Year 1935*, pp. 8, 9, relates that when he assumed office the "broker" contractor, also known as the "fly-by-night" or "gyp" vendor, found it worth while to compete for New York City's business, so that the total of the city's vendors were numbered in the hundreds. These irresponsible bidders would bid on anything the city bought. Frequently, to make deliveries they would "shop around" to find the article they had sold. If they encountered difficulty in securing the article, they made substitutions or obtained extensions of time until they found the required article. As a result of proper administrative practices this type of contractor was in the main replaced by "manufacturers and responsible distributors", so that within two years there were "more than 10,000 vendors . . . in active competition for city business."

⁸⁰Gilmore v. City of Utica, 131 N. Y. 26, 35, 29 N. E. 841, 843 (1892); Syracuse I. S. Board v. Fidelity & Deposit Co., 255 N. Y. 288, 294, 174 N. E. 657, 659 (1931).

⁸¹Mr. Harry O. Locher, an experienced contractor, in his informative book *Helps to Successful Contracting* (1934, McGraw-Hill Book Company, Inc.) in Chapter VII headed "Equipment" (p. 73) described the problem succinctly and accurately in these words "Remember that the 'works' of a construction job is well-proved, dependable equipment."

⁸²State v. Richards, 16 Mont. 145, 159, 160, 161, 40 Pac. 210, 215, 216 (1895).

in the performance of a construction contract, the ownership by a bidder of equipment suitable for the performance of the work may be considered in determining the responsibility of bidders.⁸³ On the other hand, a low bidder lacking the equipment essential for the expeditious performance of a construction contract can be rejected as not responsible.⁸⁴

If, before the award of the contract, the low bidder secures the plant and equipment necessary for the proper performance of the contract, the award to such bidder as the lowest responsible bidder is proper in the absence of statutory requirements or unless the terms of the proposal for bids require that the necessary plant and equipment be owned at the time of the filing of the bids.⁸⁵ But a public officer is not required to award a contract to a low bidder who lacks the necessary plant and equipment at the time of the submission of the bids on the promise of such bidder that he will secure the essential tools, appliances or machinery.

G. Special Factors of Responsibility Dependent Upon the Nature of the Contract

While the responsibility of a bidder is usually decided upon the common or ordinary factors of responsibility above discussed there are, because of the nature of some contracts, additional elements that must be considered. In other words, if the proper, efficient, and economical (as affecting the municipality) performance of a contract requires constituents of responsibility in addition to those usually associated with this term, the law permits the inclusion of these essentials in the mosaic of responsibility.

We find these essentials cropping up in certain kinds of contracts, such as a contract for the transportation of school children. It is imperative in awarding this type of contract that the driver of a school bus be physically fit in all particulars. An award to one whose right leg and thigh are missing is not the responsible bidder contemplated in law. The term responsible bidder in this instance "contemplates the letting of a contract to a responsible person in the sense that such person will be suitable and capable of looking after the children committed to his care, to the end that they may be safely transported."⁸⁶ It has been judicially expressed that on this kind of contract

⁸³Walter v. McClellan, 113 App. Div. 295, 303, 99 N. Y. Supp. 78, 84 (1st Dep't 1906), *aff'd*, 190 N. Y. 505, 83 N. E. 1133 (1907). In this case the statute authorized the awarding officers to accept the bid "which will, in their judgment, best secure the efficient performance of the work", a criterion closely similar to "lowest responsible bidder".

⁸⁴Willis v. Hathaway, 95 Fla. 608, 617, 623, 627, 117 So. 89, 92, 94-95 (1928).

⁸⁵Laabs v. Milwaukee, 236 Wis. 192, 200, 294 N. W. 1, 4 (1940), *rehearing denied*, 236 Wis. 204, 294 N. W. 814 (1940).

⁸⁶Bright v. Ball, 138 Miss. 508, 517, 103 So. 236, 238 (1925).

a bidder should be tested by "the sufficiency of his equipment, his morals, his skill and care as a driver, his faithfulness and regularity in the discharge of his duties, his ability to control a group of children and to properly protect them at all times, etc."⁸⁷ What must be considered in these contracts as paramount is the safety of the children and any factor necessary to such safety must be given due consideration.

In contracts for the purchase of machinery, such as automobiles, fire engines and other types of internal combustion engines, the ability of a bidder to furnish necessary repair parts can be considered in determining the question of responsibility.⁸⁸ It is not to be expected that municipalities should spend large sums for the purchase of machinery, which must remain useless because repair parts cannot be readily secured. The issue as to a bidder's ability to make immediate repairs to mechanical equipment can be the determining factor in favor of his responsibility, particularly in the case of fire apparatus.⁸⁹ A contract may be awarded to the manufacturer of an engine, as the lowest responsible bidder, whose machines have been in actual and satisfactory use and for which servicing and necessary repair parts are readily and promptly available, as compared to a contractor who desires to furnish a machine which has been in use for a comparatively short time.⁹⁰

A contract involving mechanical devices, such as the detention equipment of a prison, may be awarded to a contractor, as the lowest responsible bidder, on account of his equipment's quality and adaptability to the particular requirements of the job.⁹¹

Even distance may be a factor in determining the responsibility of bidders. When the plant of the low bidder is at such a distance from the offices of the awarding agency that the performance of the contract, if awarded to such bidder, would cost the public body more than if awarded to the next lowest

⁸⁷Hutto v. State Board of Education, 165 S. C. 37, 42, 162 S. E. 751, 753 (1932).

⁸⁸People v. City of Buffalo, 176 N. Y. Supp. 642, 647 (Sup. Ct. 1919).

⁸⁹Koich v. Cvar, 111 Mont. 463, 470, 110 P. (2d) 964, 967 (1941); Town of Hammon-ton v. Elvins, 101 N. J. L. 38, 41, 127 Atl. 241, 242 (1925).

⁹⁰Missouri Service Co. v. City of Stanberry, 341 Mo. 500, 509, 108 S. W. (2d) 25, 29 (1937). The orbit of responsibility on this type of contract has been widened so as to require the successful contractor to have the ability to furnish necessary repair parts and to give proper servicing of the equipment. This is due, no doubt, to the fact that the courts realize that the purchase of such equipment requires a large initial outlay of funds, that the normal life expectancy of these machines is not a short period of time, that normal use requires the replacement of worn parts at varied intervals, that the inability to secure necessary repair parts lays up the apparatus resulting either in the diminution or disruption of the service rendered to the public, and if the repair parts are not procurable, there is the possibility of the "junking" of the equipment well within its normal life at great loss to the taxpayers. The prudent businessman rarely buys a piece of machinery for his commercial enterprises without assurance of a ready source of supply parts and the existence of an organization to properly service such machinery.

⁹¹West v. City of Oakland, 30 Cal. App. 556, 560, 159 Pac. 202, 204 (1916).

bidder, the award may properly go to the higher bidder as the "lowest responsible bidder".⁹²

THE "LOWEST DISHONEST BIDDER"

It has been indicated heretofore that the rejection of the lowest bid is proper when the awarding officer believes that for the price bid the contract cannot be completed.⁹³ There is a similar situation which is becoming quite prevalent with certain groups of bidders. In these cases, the so-called low bidder appears to be responsible in every detail, but is in fact the "lowest dishonest bidder". The "lowest dishonest bidder" is low because he does not intend to pay the prevailing scale of wages as required by the contract or law, taxes for unemployment insurance and for social security and necessary premiums for workmen's compensation insurance. Such a bidder, in avoiding his obligations required under social benefit laws, which the public's conscience has demanded, places himself in an advantageous position to secure the contract, if an awarding officer is supine. Under these circumstances, the bid of the honest bidder is invariably higher, because he includes in his bid just exactly what the dishonest bidder omits. The acceptance of the dishonest contractor's bid places the honest contractor at a disadvantage and finally forces him out of business.

It has been decided recently that where an awarding officer was of the belief that the lowest bidder, because of the amount of his bid, does not intend to pay the prevailing rate of wages prescribed in the contract, such a bidder can be rejected as not a responsible bidder.⁹⁴ Since there is judicial authority for rejecting such a bid, awarding officers should not be hesitant, if the facts warrant it, to decline to contract with such dishonest low bidders.

Past experiences of municipalities indicate that the acceptance of the dishonest bid is a forerunner to collusive practices with higher and exorbitant prices. The honest bidder, in order to remain in business, enters into conspiracies with the dishonest bidder for dividing among themselves the contracts of the municipality, and, as an inducement to continue the conspiracy, charge unreasonably higher prices. These criminal combinations wrongfully add to the taxpayers' burden. Immediate recognition and rejection of these dishonest bids is the best prophylactic for keeping clean the official life of awarding officials and the business life of bidders, for corruption and bribery have been known to be in the wake of collusive bidding.

⁹²Seventh-Day Adventist Publish. Ass'n v. Board of State Auditors, 116 Mich. 672, 673, 75 N. W. 95, 96 (1898). *But see*, Osburn v. Mitten, 39 Ariz. 372, 376, 6 P. (2d) 902, 904, 906 (1932).

⁹³*Supra* note 67.

⁹⁴Panozzo v. City of Rockford, 306 Ill. App. 443, 448, 453-454, 28 N. E. (2d) 748, 751, 753, *petition for leave to appeal denied*, 306 Ill. App. xxxii (1940).

TESTING THE CRITERIA OF RESPONSIBILITY EMPLOYED BY AN AWARDING
OFFICER

After an awarding officer has determined who, as the lowest responsible bidder, is to receive the contract, the propriety of his act is sometimes open to question, either because of improper conduct or mistake as to the proper criterion to be used. It is now well settled law, under principles of equitable jurisprudence or by reason of statutory enactments, that a taxpayer is authorized to test the act of an awarding officer of a municipality in making such contract by the institution of a taxpayer's action on the theory of preventing waste of public funds.⁹⁵ But there is no unanimity as to the right of a taxpayer to have a similar remedy against an awarding officer of a state.⁹⁶ The relief granted in such proceeding, if the taxpayer is successful, is to restrain the performance of the contract in question. To the unsuccessful lowest responsible bidder such relief is meaningless.

Yet the great weight of authority does not allow such a bidder to maintain a mandamus proceeding against the awarding officer so as to secure the award for himself.⁹⁷ This rule is applied also to federal contracts⁹⁸ and, what is more, it is now well established that taxpayers have no rights of action to prevent waste of public funds in connection with the award of federal contracts.⁹⁹

However, lately there has been a growing trend in the law granting bidders certain rights in connection with contracts to be awarded to the lowest responsible bidder. It would seem from the holding in a recent case that though the low bidder has not the right to have the court command the contracting officer to award the contract to him, nevertheless, he is entitled to have the question of lowest responsible bidder decided upon the criteria fixed by law

⁹⁵4 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 1579 *et seq.*; 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d Rev. ed. 1937) § 2759.

⁹⁶In Illinois such a remedy is given to a taxpayer. *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130 (1915). The contrary is true in New York. *Schieffelin v. Komfort*, 212 N. Y. 520, 106 N. E. 675 (1914). See note in (1926) 58 A. L. R. 588 as to the states in which the remedy is or is not allowed. See also *Asplund v. Hannett*, 31 N. M. 641, 249 Pac. 1074, 58 A. L. R. 573 (1926) for a discussion and analysis of the cases on both sides of the question.

⁹⁷*People v. Contracting Board*, 27 N. Y. 378 (1863); *idem*, 33 N. Y. 382 (1865); *Colorado Paving Co. v. Murphy*, 78 Fed. 28 (C. C. A. 8th, 1897), *appeal dismissed*, 166 U. S. 719, 17 Sup. Ct. 997 (1897); *Johnson v. Sanitary District*, 163 Ill. 285, 45 N. E. 213 (1896); *Butler v. Darst*, 68 W. Va. 493, 70 S. E. 119 (1911); *State v. Board of Commissioners*, 105 Neb. 570, 181 N. W. 530 (1921); *State v. Sevier*, 339 Mo. 483, 98 S. W. (2d) 677 (1936). See notes (1912) 38 L. R. A. (n. s.) 655 and (1932) 80 A. L. R. 1384 where cases are collected sustaining this point.

⁹⁸*International Trading Corp. v. Edison*, 71 App. D. C. 210, 109 F. (2d) 825 (1939), *cert. denied*, 310 U. S. 652 (1940).

⁹⁹*Perkins v. Lukins Steel Co.*, 310 U. S. 113, 60 Sup. Ct. 869 (1940); *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934).

for determining this standard.¹⁰⁰ In other words, if an awarding officer determines who is the lowest responsible bidder upon criteria different from that contained in the statutory definition or within the meaning of "lowest responsible bidder", the unsuccessful bidder has a standing in court to have relief commanding the awarding officer to make the award not to a particular bidder, but in accordance with the legal standard.¹⁰¹ This holding may be the opening wedge by which bidders may have tested the formula used by awarding officers in determining the lowest responsible bidder.

CONCLUSION

Under the standard of "lowest responsible bidder" awarding officials have been able to improve the public service by eliminating from the field of public contracts the bribe-giver and the defrauder.¹⁰² The fear once expressed, that "practical politics"¹⁰³ will be played by public officials using this standard to award contracts under the guise of exercising their discretion, has not materialized. With the trend in this field in the direction of granting an unsuccessful bidder the right to question the criteria of responsibility used by an awarding officer, this danger cannot readily occur.¹⁰⁴ Neither has the law in this field been static for the term "lowest responsible bidder" has expanded in accord with the developments in our daily life.¹⁰⁵

In the post-war era the use of the criteria under discussion will enable public agencies to render the expanding services required of them with efficiency, economy, and dispatch to the same degree exhibited in the business world.

¹⁰⁰Matter of Dictaphone Corp. v. O'Leary, 287 N. Y. 491, 496-497, 41 N. E. (2d) 68, 70-71 (1942). The court stated in this case that it would "not sanction" the award of a contract made upon the decision of the state awarding official "which is not in accord with the statute, though made with an eye directed solely to the best interests of the state" and concluded that the question of the award of contract should be remitted to the awarding official to determine, *if possible*, the lowest responsible bidder in accordance with the statute. Cf. Eggleston, *Mandamus and the Lowest Bidder*, 33 AM. L. REG. (N. S.) (1894) 899 at 908. ALLEN, LAW IN THE MAKING (3d ed. 1939) 464-465, and the dissenting opinion of Vann, J., in *Molloy v. City of New Rochelle*, 198 N. Y. 402, 412, 92 N. E. 94, 98 (1910) where he suggested a similar remedy to the one now given to an unsuccessful bidder on the ground that otherwise, "there is no one impelled by duty or self-interest to prevent the violation of an important provision, common to nearly all municipal charters, designed to protect the public, . . ."

The right of an unsuccessful bidder to test judicially the validity of an award of a public contract to another has been recognized in New Jersey. *McGovern v. Trenton*, 60 N. J. L. 402, 38 Atl. 636 (1897); *Paterson Contracting Co. v. Hackensack*, 99 N. J. L. 260, 122 Atl. 741 (1923).

¹⁰¹*Ibid.*

¹⁰²*Douglass v. Commonwealth*, *Jacobson v. Board of Education*, both *supra* note 57; *Sikorski v. Board of Education*, *supra* note 62; *Moran v. Village of White Plains*, *supra* note 60; *Williams v. City of Topeka*, *Picone v. City of New York*, both *supra* note 61; *Stubbs v. City of Aurora*, *supra* note 63.

¹⁰³See note (1896) 50 Am. St. Rep. 489 at 493.

¹⁰⁴See note 100, *supra*.

¹⁰⁵See note 90, *supra*.