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Q&A

FASKEN
MARTINEAU 

Q: In leaner economies, developers have a greater number of contractors bidding for work. How should developers manage this in the interest of their projects?

ASK A LAWYER

A: Over the last several years, contractors and subcontractors have been able to pick and choose their projects. This resulted in a reduction in the pool of available competent contractors and subcontractors as well as higher prices to meet demand.

The dramatic turnaround in the economy in recent months, combined with the reduced level of available work has resulted in increased competition and lower prices. While lower prices benefits developers as purchasers of the contractor services, an unreasonably high level of competition is not necessarily beneficial.

Sophisticated developers know that there is an optimum number of bidders, depending on the project. Literature sometimes puts that number at four. Knowledgeable bidders know that their probability of being successful in the bid process is directly related to the number of bidders. Therefore, they focus more attention on those projects whose number of bidders does not exceed the optimum. Some bidders might compete against a large number of bidders by attempting to significantly undercut their competition. In this case, the chances that the low bidder will have either made a significant bid error or unwisely bid too low for the sole purpose of securing the work are great. If the developer selects the bidder whose price is below cost, the developer will almost certainly have issues with that contractor pursuing claims for extras, attempting to recover its loss or - even worse - becoming insolvent.

When selecting qualified contractors, developers are well-advised to:

- (a) Identify and pre-qualify a defined number of contractors that are truly interested in the opportunity and limit the number of bidders to those pre-qualified. Do not invite so many bidders that pre-qualified bidders lose interest in the process or that you increase the likelihood of receiving a bid that is below cost.
- (b) Ensure that your bid documents, as drafted, give you the flexibility you need to accept or reject any bidder.
- (c) Carefully examine any bid that is disproportionately low relative to the remainder of the bids.
- (d) Investigate the absence of any apparent reasonable range of bid prices. It might mean that the bidding documents are ambiguous so that different bidders have made different assumptions; you will not have achieved truly comparable bids.

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