

Part I Chapter 14 Contractor Responsibility

- A. Requirements.** The Commonwealth Procurement Code requires that contracts for the procurement of supplies, services and construction be awarded to responsible bidders and offerors. 62 Pa.C.S. Sections 512(g); 513(g); 517(e); 518(e); 519(f).
- B. Responsible.**
1. In order to be considered a “responsible bidder” or a “responsible offeror”, the bidder/offeror must “possess the capability to fully perform the contract requirements in all respects and the integrity and reliability to assure good faith performance”. 62 Pa.C.S. Sections 103.
 2. “Responsible” implies the ability to perform the contract and goes to the capacity of the bidder, offeror, or contractor rather than its willingness to perform on the Commonwealth's terms.
 3. A bidder's/offeror's capacity to perform involves not only its ability to meet quality, quantity and time requirements, but its business integrity to assure honest, good faith performance.
- C. Responsibility Determination.**
1. Since the Code requires award to a “responsible” bidder or offeror, purchasing agencies are explicitly required to make an affirmative determination of a bidder or offeror's responsibility prior to award. Further, purchasing agencies are required to make a responsibility determination prior to requesting a best and final offer when the competitive sealed proposal (RFP) method of procurement is utilized.

Determining responsibility is an affirmative duty, and the purchasing agency may not presume that all bidders or offerors are responsible. However, because this duty is ongoing, a determination of responsibility earlier in the procurement process shall not preclude a purchasing agency from finding a bidder or offeror not responsible later in the process and until a contract is fully executed.
 2. Pennsylvania courts have held that in order to make the required affirmative determination that a bidder or offeror is/is not responsible, a full and honest investigation of the qualifications of the bidder/offer is required. *Pearlman v. City of Pittsburgh*, 304 Pa. 24, 155 A. 118 (1931). If a full or careful investigation is not conducted, the award will not be upheld. *Berryhill v. Dugan*, 491 A.2d 950 (Pa. Cmwlth. 1985).
 3. The determination requires the exercise of sound discretion and will necessarily involve much subjectivity. If the investigation discloses a substantial reason for a finding of “not responsible” which appeals to the sound discretion of the purchasing agency, it may award the contract to a higher bidder. In the absence of evidence tending to show bad faith or corrupt motives, the award of a contract to a higher bidder, after an

investigation, will not be stricken. *Reuting v. Titusville*, 175 Pa. 512, 34 A. 916 (1896).

4. If an agency determines that a bidder/offeror is not responsible, the bidder/offeror shall be declared ineligible to receive the contract in question. The agency should document its reasons for its finding of not responsible and include it with the contract file and also enter this information on the Central Contractor Responsibility file.
5. A hearing is not required to determine a bidder or offeror's "responsibility". Due process rights are not violated by the absence of a hearing on whether a company is a responsible bidder/offeror. *Durkee Lumber Company, Inc. v. Department of Conservation and Natural Resources*, 903 A.2d 593 (Pa. Cmwlth 2006). However, a bidder or offeror does have the right to protest the rejection of its bid/proposal because of a finding of "not responsible". In the event of a protest, the agency head has the sole discretion as to whether to conduct a hearing. 62 Pa.C.S. Section 1711.1(e). The agency head decision not to hold a hearing can only be reversed if he exercised his discretion with bad faith, fraud, capricious action or abuse of power. *Cardiac Science, Inc. v. Department of General Services*, 808 A.2d 1029 (Pa. Cmwlth. 2002). Where the record contains sufficient unchallenged facts necessary to make the required determination, no hearing is required. *Glasgow, Inc. v. Department of Transportation*, 851 A.2d 1014 (Pa. Cmwlth. 2004). If there are no disputed material facts necessary to make the responsibility determination, then the agency head has not abused his discretion by refusing to hold a hearing. *Durkee Lumber Company, Inc. v. Department of Conservation and Natural Resources*, 903 A.2d 593 (Pa. Cmwlth. 2006).

D. Responsibility Factors. Pennsylvania courts have specifically articulated the following characteristics, which can be considered by a public body, in determining bidder responsibility: judgment; skill; promptness; faithfulness; prompt, skillful, and faithful workmen; the honesty of the contractor; financial standing; reputation; experience; resources; facilities; past history of adherence to plans and specifications; capacity and ability to do the work according to the plans and specifications; availability; and efficiency. See: *Berryhill v. Dugan*, 491 A.2d 950 (Pa. Cmwlth. 1985); *Kratz v. Allentown*, 304 Pa. 51, 155 A. 116 (1931); *Wilson v. New Castle City*, 301 Pa. 358, 152 A. 102 (1930); *Hibbs v. Arensburg*, 276 Pa. 24, 119 A. 727 (1923); and *Commonwealth; ex rel. Snyder v. Mitchell*, 82 Pa. 343 (1876).

E. Establishment of Commonwealth Contractor Responsibility Program.

1. **Executive Order 1990-3.** Executive Order 1990-3 required the Secretary of the Budget and the Secretary of General Services to develop a Contractor Responsibility Program designed to "identify, evaluate, and sanction appropriately, contractors that do not meet the standards of responsibility that render deficient performance, or that engage in wrongdoing, or other activity adversely affecting their fitness to contract with Commonwealth agencies."
 - a. The executive order required the Secretaries to "cooperate in the development and maintenance of a centralized system to collect from and disseminate to Commonwealth agencies information concerning a contractor's lack of responsibility, deficient performance, wrongdoing,

- (2) Certify in writing that it has no tax liabilities or other Commonwealth obligations; or has filed a timely administrative or judicial appeal if such liabilities or obligations exist; or is subject to a duly approved deferred payment plan if such liabilities exist.
- (3) Inform the purchasing agency if, at any time during the term of the contract, it becomes delinquent in the payment of taxes or other Commonwealth obligations.
- (4) Inform the purchasing agency if it or any of its subcontractors required to be disclosed in its bid/proposal or approved by the Commonwealth are suspended or debarred by the Commonwealth, the federal government, or any other governmental entity.

F. Use of Commonwealth Contractor Responsibility Program.

1. For procurements exceeding \$5,000 (this figure can be adjusted by Management Directive 215.9) purchasing agencies are required to access the Commonwealth Contractor Responsibility File to gather and analyze information on the bidder's/offeror's current status and past performance as well as to identify tax delinquency or other liabilities. The file may contain records of past violations of law and regulations, financial capability issues, unpaid liabilities to the Commonwealth, poor performance, lack of sufficient resources/personnel to complete a project, contract defaults, suspensions, debarments and any other information deemed relative to contractor responsibility.
2. If the Commonwealth Contractor Responsibility File indicates a tax delinquency or unpaid liability to a Commonwealth agency, the purchasing agency should contact the appropriate agency to obtain the current status. If the contractor has a tax delinquency or unpaid liability, the agency should inform the bidder/offeror to resolve the tax delinquency with the Department of Revenue and/or the Department of Labor and Industry within a specific period of time (to be determined by the purchasing agency). The bidder/offeror must submit a Commonwealth Contractor Clearance Certificate within the specified period of time to the purchasing agency. If the Clearance Certificate is not provided, the agency can find the contractor "not responsible" and reject the bid/proposal/quote. As an alternative, the agencies may agree to address the tax delinquency or unpaid liability through an offset of the monies to be paid under the prospective contract.
3. For other types of nonresponsibility and/or deficient performance indicated on the Commonwealth Contractor Responsibility File, the purchasing agency should contact the appropriate agency for the current status and for further details.
4. Placement on the Contractor Responsibility Program listing is not a de facto debarment and does *not automatically bar* a listed company from any future contract award, but does provide evidence of the company's non-responsibility for the purpose of an award of a Commonwealth contract.

Durkee Lumber Company, Inc. v. Department of Conservation and Natural Resources, 903 A.2d 593 (Pa. Cmwlth 2006).

G. Contractor Integrity Provisions.

1. Management Directive 215.8, Contractor Integrity Provisions for Commonwealth Contracts, contains provisions to be included in all Commonwealth contracts to ensure that contractors doing business with the Commonwealth maintain high standards of integrity.
2. It is essential that those who seek to contract with the Commonwealth observe high standards of honesty and integrity. 62 Pa.C.S. Section 2301. They must conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth procurement process.

H. Qualification Requirements in Solicitation Document.

1. Invitations for Bids may require bidders to furnish information with their bids to evidence their responsibility.
 - a. The purpose of such a requirement is to assist the purchasing agency in its investigation and determination of the bidder's responsibility.
 - b. A bidder's failure to provide required information with its bid can result in rejection of the bid as not responsive.
 - c. The submitted information should not be compared with the information of other bidders as one bidder cannot be determined to be "more responsible" than another bidder. If the submitted information from the lowest responsive bidder results in a finding of "responsible", the agency cannot elect to award the contract to the next highest bidder, because it is more responsible (e.g. more qualified, more experience, better customer satisfaction).
2. Requests for Proposals may require offerors to furnish information with their proposals in regard to the offeror's qualifications, experience, key personnel qualifications, education, resources, facilities and equipment.
 - a. The submitted information can be used by the purchasing agency to determine the offeror's responsibility.
 - b. Provided that the RFP included evaluation criteria related to qualifications, experience, key personnel qualifications, education, resources, facilities and equipment, etc., the evaluation committee can evaluate and score the offeror's submission.
3. Reference Checks. Invitations for Bids and Requests for Proposals may also require bidder/offerors to submit names and telephone number of contact persons for clients for whom they have furnished materials or provided service. Agencies are not limited to contacting only the references provided by the bidder/offeror.

I. Post-submission Responsibility Investigation.

1. Agencies are not limited in their investigation to reviewing information provided by the bidder/offeror with its bid/proposal. Prior to award of the contract, the purchasing agency can request a bidder or offeror to supply financial, educational, and experience information as well as references in order to make a responsibility determination.
 2. The purchasing agency can use other resources such as Dun & Bradstreet reporting services, public corporate filings, news and internet searches, published consumer rating programs, and certification programs as tools to determine responsibility. The purchasing agency should not base a determination of nonresponsibility on a single bad item or report unless the behavior or financial condition highlighted in that report is of a sufficiently serious nature as to call into question the ability or integrity of the bidder or offeror to perform the contract.
 3. Upon receipt of the proposals, and until a contract is fully executed, a purchasing agency should take any steps it determines are necessary to ensure that a bidder or offeror is responsible, which may include requesting further clarification from the bidder/offeror as appropriate. If a bidder or offeror is determined not to be responsible, the bidder's bid or offeror's proposal shall be rejected and notice should be sent to the bidder/offeror immediately.
- J. Clear Performance Standards.** To ensure mutual understanding of the Commonwealth's expectations, the contract should contain clear performance standards, which are comprehensive, measurable and enforceable. Clear performance standards will make enforcement of the contract much easier.
- K. Liquidated Damages.** It is sometimes appropriate to use a liquidated damages clause to ensure timely performance by a contractor. A liquidated damages clause fixes damages at a certain amount in the event that the contractor does not perform as required by the contract. If performance is not made by the date specified, the amount to be paid by the Commonwealth will be reduced by the agreed upon amount for each hour/day of delay in performance.
1. A "Liquidated Damages" clause is valid if:
 - a. The amount stated as damages bears a reasonable relationship to either the amount of actual damages incurred or an amount which could have been anticipated by the parties when they entered into the contract.
 - b. The monetary damages that would be caused by the breach are incapable or very difficult to determine.
 2. Penalty. Penalties are not enforceable in Pennsylvania. A penalty is a fixed amount of payment for a breach which is not a pre-estimate of probable actual damages, but rather as a punishment in which the threat is designed to prevent the breach. If the dollar amount of the liquidated damages is set at an unreasonably high amount, it may be treated as a penalty and, therefore, unenforceable.

3. **Burden of Unanticipated Event.** Unless otherwise indicated in the contract or purchase order, the contractor is presumed to undertake the burden of an unanticipated event unless the event rises to the level of an act of God or the event was caused or created by the Commonwealth or is excused by law. *Commonwealth, Department of Transportation, v, Interstate Contractors Supply Company, 568 A.2d 294 (Pa. Cmwlth. 1990).*
 4. **Additional Cost.** Since a liquidated damages clause represents a form of guarantee of timely performance and since it requires the contractor to assume certain risks, the amount paid by the Commonwealth for the supply, service or construction will generally be higher than a similar procurement without such a clause.
- L. Incentives for Good Performance.** When an agency wants to encourage a contractor to complete performance as quickly as possible and in advance of the completion date, it may want to consider including an incentive clause in the contract which would monetarily reward the contractor for early delivery or completion of a project.
- M. Immediate Action for Poor Performance:** If a contractor fails to meet a term or condition, immediate action must be taken, but should be progressive as suggested below:
1. Initially that action may involve contacting the contractor and asking them the reason behind the failure. If the contractor provides a satisfactory response, the issue and the response should be documented.
 2. If the contractor either fails to respond, provides an inadequate response, or continues to have performance problems, continue to document the performance issue and issue a cure letter requesting a formal response as to root cause, and proposed corrective actions, including timing. This letter should be issued by the respective Contracting Officer.
 3. Progressive or egregious issues of non-performance issues require a CRP entry. The entry should be made by the using agency. If the contract is a state-wide contract issued by Bureau of Procurement (BOP), then BOP should approve the entry into the system.
- N. Qualified Persons to Determine Qualified Bidder/Offeror.** The purchasing agency should ensure that it has assigned qualified individuals to evaluate the bids and proposals. For complex RFPs, the agency may want to consider retaining some experts in the industry to assist in preparing the RFPs and in the evaluation of the proposals.
- O. Tie Performance to Payment.** A contractual tool for ensuring satisfactory performance is to provide for payment only upon satisfactory completion of identified tasks.
- P. Good Project Oversight/Management is Essential.** The agency should ensure that it has assigned the "right people" to oversee/administer/manage the contract/project. The contract administrator or project manager should: be

knowledgeable about the particular product or service; have a thorough working knowledge and understanding of the requirements of the contract; frequently visit the project site; schedule and attend job meetings; provide immediate notice of problems to the contractor; prepare and maintain records/reports on contractor progress/issues; inspect work; authorize payment for satisfactorily-completed work; and contact agency legal counsel when problems arise. For complex contracts, the agency may want to consider retaining an expert in the industry to assist in reviewing and in inspecting the product or work. Monitoring is needed to ensure that the contractor is meeting the terms and conditions of the procurement documents. Monitoring will include, but not limited to, items such as on-time delivery, responsiveness, completion of all requirements, and quality of supply or service provided.

Q. Scoring of Technical Proposals – RFPs.

1. Criteria for Selection. RFPs must state the factors that will be used to evaluate proposals. Those factors generally include technical, cost, and small diverse business participation. The weighting of the criteria must be fixed prior to opening the proposals. The Department of General Services has established the minimum weight for the Small Diverse Business participation criterion for the competitive sealed proposals award process as 20% of the total points. The Department has established the minimum weight for the Cost criterion for the competitive sealed proposals award process as 30% of the total points. Therefore, in most cases, the weight for the Technical criterion will be 50%.
2. Scoring. Since the Technical criterion is generally given the greatest weight, it should have the greatest impact on the selection decision. Therefore, the evaluation committee must score Technical submittals fairly, carefully and seriously so that, for example, if there is a big difference between the experience and qualifications of two offerors, the Technical scores reflect that big difference. Similarly, if an offeror's response is deficient regarding a key requirement set forth in the RFP, then the offeror's final technical score should be significantly lower than offerors whose response met the requirement.
3. Ineligibility of Unsatisfactory Technical Submittals. RFP's now provide that in order for a proposal to be considered for selection for best and final offers or selection for contract negotiations, the score for its technical submittal of the proposal must be greater than or equal to 70% of the total amount of technical points allotted to the technical criterion for selection. This will eliminate from consideration those proposals for which the committee has found the Technical Submittals to be unsatisfactory and which may be otherwise selected because of a great Cost and Small Diverse Business participation score.

R. Prequalification.

1. Commonwealth agencies may determine in advance who are responsible bidders and refuse to receive bids from those who, after treating all alike, they determine are not in that class. *Allegheny Contracting Industries, Inc, v. Flaherty*, 6 Pa. Commonwealth Ct. 164, 293 A.2d 639 (1972).
2. **Commonwealth Procurement Code.**

- a. Prospective bidders and offerors may be prequalified for particular types of supplies, services and construction. 62 Pa.C.S. Section 532.
 - b. Where prequalification is a requirement; the only required public notice for Invitations for Bids or Requests for Proposals is notification to all prequalified contractors. 62 Pa.C.S. Section 512(5).
- 3. Highway Code. Section 404.1 of the State Highway Law, 36 P.S. § 670-404.1, requires contractors to be prequalified in order to be eligible for state highway projects.
 - a. In determining the qualifications of bidders, PennDOT is required to consider the following factors relating to the contractors: 1) equipment; 2) personnel of the organization; and 3) financial condition; and, for those companies that are not newly organized: 4) past record and 5) experience.
 - b. In accordance with Section 404.1 requirements, PennDOT has promulgated regulations on the prequalification of bidders. 67 Pa.Code Section 457.1 et seq.
- 4. **The Prequalification Process.**
 - a. There must be a uniform, common standard which all bidders must attain in order to be prequalified.
 - b. It generally involves an application process.
 - c. Bidders can be prequalified by classifications for different types of procurements. *See, e.g.,* PennDOT's Prequalification regulations for highway contractors at 67 Pa. Code, Chapter 457.
- 5. Due Process Requirements. If a bidder or offeror is not prequalified and, therefore, not permitted to participate by submitting a bid or a proposal, the bidder or offeror must be given notice, an opportunity to be heard and a right to review/appeal the determination.

S. Performance Security.

1. Materials and Service.

- a. Contract performance security may be required when the Agency identifies the need to protect the Commonwealth from a potential supplier default.
- b. When performance security is required, the IFB or RFP shall clearly state all of the following:
 - (1) The requirement for performance security.
 - (2) The acceptable forms of performance security.

extension and the head of the purchasing agency must approve the determination.

6. Refer to [Part I Chapter 16, Debarment and Suspension](#), for detailed information on the Commonwealth's policies on debarment and suspension.
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References:

1. [Contractor Responsibility Program, Management Directive 215.9, Amended](#)
2. [Part I Chapter 16, Debarment and Suspension](#)