# PUBLIC CONSTRUCTION & PROCUREMENT

Presented To:

PURDUE UNIVERSITY ROAD SCHOOL

BINGHAM GREENEBAUM DOLL LLP BGD

# INTRODUCTION

## Topic Summary – Public Construction & Procurement

- Procedures and requirements relating to:
  - Retention of Services
  - Procurement of Supplies
    - » Ind. Code 5-22
  - Construction of Public Work Projects
    - » Ind. Code 36-1-12

- Award of Public Contracts
  - Authority/Discretion of Public Board
  - Scope of Judicial Review

- How to Deal with Bid Errors and Bid Protests
  - Bid Omissions or Variances
  - Bidder seeks rescission or reformation of its bid
  - Standing and legal theories to pursue bid protest

BINGHAM GREENEBAUM DOLL LLP BGD

# RETENTION OF SERVICES

General Rule – Very few rules

Ind. Code 5-22 – Codified common law

- Definition of "Services" – Ind. Code 5-22-2-30: "… **furnishing of labor, time or effort** by a person, **not involving the delivery of specific supplies** other than printed documents that are merely incidental to the required performance."

- Public owner has broad discretion in retaining service providers – Ind. Code 5-22-6-1: a governmental body may purchase services "**using any procedure the governmental body… considers appropriate**."

- Ability to promulgate own rules – Ind. Code 5-22-6-2: a governmental body "**may**" adopt rules governing the purchases of services."

BINGHAM GREENEBAUM DOLL LLP BGD

# RETENTION OF SERVICES

## Architects and Engineers

- Ind. Code 5-16-11.1: Retention of architects, engineers and land surveyors for Public Projects.
  - Section 5 – Public Owner may contract for professional services "on the basis of **competence and qualifications**… and **negotiate compensation** that the public agency determines to be reasonable."
  - Section 4(a) – Public Owner has broad discretion of **whether** to give notice regarding the employment opportunity.
  - Section 4(b) – **If notice is provided**, must include:
    - Location of Project
    - General description of Project
    - Criteria to be used to select design professional
    - Where additional information regarding the Project can be attained
    - Business hours of the public agency
    - Last date for accepting statement of qualifications

BINGHAM GREENEBAUM DOLL LLP BGD

# RETENTION OF SERVICES

## Construction Managers

- Construction Managers also provide a "service"

- Ind. Code 5-16-10-2 – Limitations relative to Construction Managers on Public Projects
  - Owner may not employ the architect or engineer who designed the Project, to also serve as Construction Manager
  - Construction Manager cannot compete for, be awarded or perform any portion of the construction work.

E-Verify Program – Ind. Code 22-5-1.7

- All public contracts for services entered into by a state agency or political subdivision
- Certain provisions must be included in the public contract
- Affidavit required affirming enrollment and participation in E-Verify program

BINGHAM GREENEBAUM DOLL LLP BGD

# PROCUREMENT OF SUPPLIES
# IND. CODE 5-22

## Supplies defined as "equipment, goods and materials" – Ind. Code 5-22-2-38

Four procedures available for purchasing supplies:

- Competitive Bidding – Ind. Code 5-22-7
  - Similar to competitive bid under Ind. Code 36-1-12
  - Award to lowest responsible and responsive bidder
  - Some variations to procurement procedure

- Invitation for Quotes – Ind. Code 5-22-8
  - Used for small purchases under $150,000
  - Invite quotes from 3 persons
  - Award to the lowest responsible and responsive quoter

# PROCUREMENT OF SUPPLIES
# IND. CODE 5-22

- Requests for Proposals – Ind. Code 5-22-9
  - Public Owner must issue a written determination that use of competitive bids is either not practical or not advantageous to the County
  - Allows Public Owner to identify selection criteria
  - Price to be a factor, but not necessarily controlling
  - Allows for discussions and negotiations after proposals are submitted
  - Statutory procedure must be followed

- Special Purchases
  - Normal procurement procedures can be avoided in special cases
  - What qualifies as a special purchase
    - Emergency
    - Savings to the County
    - Auctions
    - Single Source for Supply
    - No offer received under other procurement methods
    - Government Discount available
    - Gift

BINGHAM GREENEBAUM DOLL LLP BGD

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

## Ind. Code 36-1-12-4: Key elements to competitive bidding

- Scope of Ind. Code 36-1-12
  - Governs public work performed on property owned or leased by political subdivisions – Ind. Code 36-1-12-1(a)
  - Other statutory options to perform public work
    - Design-Build contract – Ind. Code 5-30; and
    - Utility efficiency program or guaranteed savings contract – Ind. Code 36-1-12.5
  - Chapter does not apply to a person who has entered into an "operating agreement" with a political subdivision under Ind. Code 5-23.

- Definition of Public Work – Ind. Code 36-1-12-2
  - Means the "construction, reconstruction, alteration or renovation of a public building … or other structure that is paid for out of a public fund or out of a special assessment."
  - The term includes the construction, alteration, or repair of a highway, street, alley, bridge, sewer, drain, or other improvement that is paid for out of public fund or special assessment.

BINGHAM GREENEBAUM DOLL LLP BGD

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Competitive bid – Ind. Code 36-1-12-4
  - Required when cost of the public work will be
    - At least $150,000 – Ind. Code 36-1-12-4(a); or
  - Develop plans and specs – avoid specs which might unduly limit completion – Ind. Code 36-1-12-4(b)(1)
  - Plans and specs made accessible to public as specified in the Invitation to Bid – Ind. Code 36-1-12-4(b)(2)
  - Publish notice soliciting bids (per Ind. Code 5-3-1) – Ind. Code 36-1-12-4(b)(3), (4) & (5)
    - Publish twice
    - At least one week apart
    - Date between the first notice and bid date may not be more than 6 weeks if estimated cost is less than $25,000,000 and not more than 10 weeks if estimated cost is at least $25,000,000
    - Second publication at least seven days before bid date
    - Notice must specify where the plans and specs are on file and the bid place, date and time

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Requirement for State Board of Accounts Form 96 – Ind. Code 36-1-12-4(b)(6)
  - Financial statement
  - Statement of experience
  - Proposed plan for performing work
  - Available equipment

- Requirement for Bidders to submit Non-Collusion Affidavit – Ind. Code 36-1-2-4(b)(12)

- Bid bond or certified check shall be required on projects estimated to be more than $200,000 (optional for projects under $200,000) – amount of bid bond not to exceed 10% of the bid - Ind. Code 36-1-12-4.5

- Bids to be opened publicly and read aloud at designated time and place – Ind. Code 36-1-12-4(b)(7)

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Except as provided in Ind. Code 36-1-12-22, the award of the contract is to be made to the "lowest responsible and responsive bidder" or "reject all bids" – Ind. Code 36-1-12-4(b)(8)

- Factors to consider in determining whether a bidder has submitted a responsive bid – Ind. Code 36-1-12-4(b)(10)
  - Does bid or quote conform in all material respects to the specifications
  - Does bid comply specifically with the invitation to bid and instructions to bidders
  - Does bid comply with all applicable statutes, ordinances, resolutions or rules

- Factors to consider in determining whether a bidder is "responsible" – Ind. Code 36-1-12-4(b)(11)
  - Ability and capacity of the bidder to perform the work
  - Integrity, character and reputation of the bidder
  - Competence and experience of bidder

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- "Responsive" and "Responsible" are threshold tests and cannot be used to rank bidders.

> The Board has ***not*** been given the discretion to award a contract to the ***most*** responsible bidder, rather, the statute merely provides that the Board must require the winning bidder to be responsible.
>
> The definition of "responsible contractor" . . . suggests the determination for "responsibleness" is to be made ***independently*** for each bidder. The Board may not make comparisons of bidders to determine responsibleness. Responsibleness is a minimal requirement of bidders, not a competitive standard among bidders. A bidder can be unresponsible only if the awarding body would not award the contract to the bidder ***even if*** that bidder had submitted the sole bid.

Bowen Engineer Corp. v. W.P.M. Inc., 557 N.E.2d 1358, 1366 (Ind. App. 1990) (Court's emphasis)

BINGHAM GREENEBAUM DOLL LLP BGD

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- If public owner awards contract to someone other than the apparent low bidder (low bidder was found to be not responsive or not responsible) – Ind. Code 36-1-12-4(b)(9)
  - Board must state, in minutes or memorandum at the time of award, the factors used to determine which was the lowest responsible and responsive bidder
  - Keep copy of minutes or memorandum for public inspection

- Price Preferences under Ind. Code 36-1-12-22
  - Statute took effect on July 1, 2011
  - Adopts a procedure, defined in Ind. Code 5-22-15-20.9, whereby local companies (as deferred in the statute) are entitled to an adjustment in their bid or quote solely for the purpose of determining to whom a contract is to be awarded.

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- "Local Indiana business" is defined to include the following – Ind. Code 5-22-15-20.9(c):

  (i) A business whose principal place of business is located in the same county as the political subdivision that is awarding the contract, or an adjacent county collectively the "Affected Counties")

  (ii) A business that pays a majority of its payroll (in dollar volume) to residents of Affected Counties.

  (iii) A business that employs residents of Affected Counties as a majority of its employees.

  (iv) A business that makes significant capital investments in the Affected Counties as defined in rules adopted by the political subdivision; or

  (v) A business that has a substantial positive economic impact on the Affected Counties as defined by criteria in rules adopted by the political subdivision.

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- If the lowest responsive and responsible bidder or quoter is a Local Indiana Business, award the contract as usual.
- If a Local Indiana Business is not already the lowest responsive and responsible bidder or quoter, but Local Indiana Businesses have submitted bids or quotes and have claimed a price preference as calculated below:

  (i) 5% preference for a project expected to be less than $50,000;

  (ii) 3% preference for a project expected to be at least $50,000 but less than $100,000; and

  (iii) 1% preference for a project expected to be at least $100,000.

  then the bid or quote of the Local Indiana Businesses shall be reduced by the amount of the calculated price preference (solely for the purpose of determining to whom the contract is to be awarded) and the contract shall then be awarded to the bidder or quoter that has the lowest responsive and responsible bid or quote after taking the price preference into consideration.

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- A business that wants to claim the preference must do all the of the following:

  (i) State in the bid or quote that the business claims the preference; and

  (ii)Provide information showing that the business qualifies as a Local Indiana Business under one of the criteria set forth above

## Additional requirements applicable to Public Work Projects

- Payment and performance bond
  - Payment Bond – Ind. Code 36-1-12-13.1
    - Required if cost of public work exceeds $200,000
    - At Board's discretion if cost of public work is $200,000 or less
  - Performance Bond – Ind. Code 36-1-12-14
    - Required is cost of public work exceeds $200,000
    - At Board's discretion if cost of public work is $200,000 or less

BINGHAM GREENEBAUM DOLL LLP BGD

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Prevailing/Common wage – Ind. Code 36-1-12-15
  - A contract for a public work project of $250,000 or more must conform to the wage scale provisions of Ind. Code 5-16-7.
  - The threshold increases to $350,000 as of January 1, 2013.

- Retainage requirements and limitations
  - Limitations on retainage for typical public works project – Ind. Code 36-1-12-14(c)
    - No more than 10% nor less than 6% until the public work project is 50% complete, and no retainage thereafter, or
    - No more than 5% nor less than 3% throughout duration of the Project.
  - Highway, road, street, alley and bridge projects are excluded from Ind. Code 36-1-12-14

- Change Order Limitations – Ind. Code 36-1-12-18
  - Limited to 20% of the original contract price
  - Limitation does not apply to circumstances that could not have been reasonably foreseen

BINGHAM GREENEBAUM DOLL LLP BGD

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Public work in excess of $100,000 may be undertaken by public owner only in accordance with plans and specifications approved by a licensed architect or engineer – Ind. Code 36-1-12-7.

- All plans and specifications for public buildings must be approved by the state department of health, the division of fire and building safety and other agencies designated by statute – Ind. Code 36-1-12-10.

- Cannot divide public work project into multiple projects to avoid bidding – Ind. Code 36-1-12-19
  - For purposes of this section, "the cost of the public work project includes the cost of material, labor, equipment rental, and all other expenses incidental to the performance of the project" – Ind. Code 36-1-12-19(a)
  - Knowing violation constitute a Class A infraction – Ind. Code 36-1-12-19(c) and (d)

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

## Statutory Alternatives to full competitive bid

- Use of the owner's own workforce – Ind. Code 36-1-12-3
  - When public work project is estimated to be less than $150,000, the owner may
    - Purchase and lease materials in the manner provided in Ind. Code 5-22; and
    - Perform the public work with its own workforce
  - The owner must have employees on its workforce that are capable of performing the construction, maintenance and repair applicable to that work.
  - In determining whether the cost of the project falls within the $150,000 limitation, must consider the cost of:
    - materials, labor, equipment and rental;
    - reasonable rate for use of trucks or heavy equipment owned by the owner; and
    - all other expenses incidental to performance of the project.
  - Public work performed by the owner's own workforce, must be inspected and accepted as complete in the same manner as a bid project.
  - A public owner "may not artificially divide the project to bring any part of the project under this section" – Ind. Code 36-1-12-3(f)

BINGHAM GREENEBAUM DOLL LLP BGD

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Small dollar projects – Ind. Code 36-1-12-4.7 and 5
  - Projects under $150,000
  - Invite quotes from 3 persons
  - Notice mailed not less than 7 days before time fixed for receiving quotes
  - Open quotes publically and read aloud
  - Except as provided in Ind. Code 36-1-12-22 (Price Preferences), award the contract to the lowest responsible and responsive quoter or reject all quotes
  - If the project is under $50,000 and the owner rejects all quotes, establishing in writing the reasons for rejecting the quotes, the owner may negotiate and enter into agreements for the work in the open market without inviting or receiving new quotes
  - If public works project is less than $25,000, the owner may solicit 3 quotes by telephone or facsimile transmission and the 7 day notice period does not apply

# PUBLIC WORK PROJECTS
# IND. CODE 36-1-12

- Routine operation or maintenance – Ind. Code 36-1-12-4.9
  - If the cost of "routine operation, routine repair or routine maintenance of existing structures, buildings or real property" is estimated to be less than $150,000, the owner may award in the manner provided in Ind. Code 5-22

- Declaration of emergency – Ind. Code 36-1-12-9
  - Board must declare an emergency
  - Invite quotes from 2 persons
  - Board minutes must reflect the emergency declaration and identify the persons invited to quote

# AWARD OF PUBLIC CONTRACTS

## Authority/Discretion of Public Board and Scope of Judicial Review

- General Rule – Public Boards have fairly broad authority and discretion
  - Public authorities are vested with discretion and their decisions are not to be interfered with in the absence of collusion, fraud, favoritism or ill will – Haywood Publishing Co. v. West, et al., 110 Ind. App. 508, 39 N.E.2d 785 (Ind. App. 1942)
  - Decision of board cannot be overturned unless arbitrary, corrupt or fraudulent – School City of Gary v. Continental Electric Co., Inc., 273 N.E.2d 293 (Ind. App. 1971)
  - Courts must not substitute their judgment for that of public boards and their decisions will be reserved only when clearly arbitrary, illegal, corrupt or fraudulent – Bowen Engineering Corp. v. W.P.M., Inc., 557 N.E.2d 1358 (Ind. App. 1990)

# AWARD OF PUBLIC CONTRACTS

- Board's authority and discretion is not, however, unlimited – Court's will set aside a board's action if found to be arbitrary, capricious or an abuse of discretion
  - Court set aside Board's contract award in each of the 3 cases cited above

- Extent of Judicial Relief
  - Should be limited to vacating the decision and remanding to the public owner for further consideration
  - Court should not award the contract – should not assume the public owner's discretion and authority

# HOW TO DEAL WITH BID ERRORS OR BID PROTESTS

## Definitions

- Bid Errors – The entity who tendered a bid seeks relief due to an error or omission within its bid
- Bid Protest – A challenge is raised to an Owner's award of a contract

## Bid Omissions or variances from Owner's perspective

- Bids must substantially conform to the bid specifications
- Minor variances will not render a bid non-responsive, but a material variance requires rejection
- A variance is material if it affords one bidder a substantial advantage not available to other bidders

# HOW TO DEAL WITH BID ERRORS OR BID PROTESTS

## Bid Errors

- Types of Relief which the bidder may request
  - Rescission – Request to withdraw the bid from consideration for the project
    - More likely to be granted
  - Reformation – Request to revise the bid and leave it in consideration for the project
    - Courts less inclined to allow

- Factors to Consider
  - Time of Discovery – the sooner the discovery and notice, the more likely relief will be granted
    - Before Bids are Opened – Bidders have right to withdraw
    - After bid opening, yet before award – the sooner the notice the greater chance a Court will grant relief
    - After award of contract – Unlikely contractor will be granted relief

BINGHAM GREENEBAUM DOLL LLP BGD

# HOW TO DEAL WITH BID ERRORS OR BID PROTESTS

- Cause of Error
  - Mistake of Fact – Clerical/arithmetic errors – relief will be grated if
    - Mistake is material
    - Would be inequitable to enforce
    - Reasonable care was taken
    - Owner will not be substantially prejudiced
  - Mistake of Law – Contractor has misinterpreted the bidding requirements
    - Relief may be granted if bid documents are ambiguous
  - Mistake of Judgment – Error is result of bidder's subjective analysis (bidder's estimate of materials or supplies is incorrect)
    - Relief generally not allowed

BINGHAM GREENEBAUM DOLL LLP BGD

# HOW TO DEAL WITH BID ERRORS OR BID PROTESTS

## Bid Protests

- Bid procedures are for the benefit of taxpayers, not bidders.

> . . . the public bidding procedure is designed to protect the public treasury, and not to benefit a disappointed bidder. . . . Our courts have consistently held that even though a taxpayer may sure to enjoin a public body from wasting public monies by accepting a higher bid, the competitive bidding statute does not provide a course of action for a disappointed bidder seeking monetary damages.

Irwin R. Evens & Sons Inc. v. Board of Indianapolis Airport Authority, 584 N.E.2d 576, 582 (Ind. App. 1992)

BINGHAM GREENEBAUM DOLL LLP BGD

# HOW TO DEAL WITH BID ERRORS OR BID PROTESTS

- Shook Heavy and Environmental Construction Group v. City of Kokomo, 632 N.E.2d 355 (Ind. 1994) and All-Star Construction and Excavating, Inc. v. Board of Public Works, 640 N.E.2d 369 (Ind. 1994)
  - Disappointed bidder does not have a common law right to challenge an award of a public contract
  - Only viable theories to challenge an award of a public contract
    - Action brought under the Public Lawsuit Statute – Ind. Code 34-13-5 – must be a citizen or taxpayer of the governmental unit making the award
    - Allegations of fraud or collusions as part of the bid process – this legal theory has been narrowed by subsequent decisions
    - Bidding statute expressly provides for a procedure to challenge – has been narrowly construed

# HOW TO DEAL WITH BID ERRORS OR BID PROTESTS

- Summary
  - Taxpayers always have standing to file Public Lawsuit under Ind. Code 34-13-5, but must comply with the specific procedures of that Act
  - If a disappointed bidder files a bid protest and is not a taxpayer, Public Owner should promptly determine if the bid protest can be dismissed for lack of standing

**Grantland M. Clapacs**

Bingham Greenebaum Doll LLP

gclapacs@bgdlegal.com

2700 Market Tower

10 West Market Street

Indianapolis, IN 46204

Telephone: (317) 635-8900

Facsimile: (317) 236-9907

**Brad A. Wilt**

Bingham Greenebaum Doll LLP

bwilt@bgdlegal.com

Follow us on Twitter @BGDlegal

BINGHAM GREENEBAUM DOLL LLP BGD