

MEMORANDUM

To: Chairman Kirkbride, Chairman Nethercott, Members of the Joint Judiciary Committee

cc: Brian Fuller, Mary Beth Oatsvall, LSO

From: Clark D. Stith

Re: Bid Rigging In Public Contracts

Date: May 12, 2020

In connection with our meeting on May 19-20, 2020, the following presents my thoughts on the topic of bid rigging in public contracts.

I. What is bid rigging?

Bid rigging is a scheme whereby the normal process of government procurement for public works contracts is corrupted so that the playing field is skewed in favor of one or more bidders. Bid rigging directly harms taxpayers, because it results in government contract awards that are higher than they would otherwise be.

Bid rigging is a federal crime, under both Section 1 of the Sherman Antitrust Act and as a species of mail and wire fraud under 18 U.S.C. §1341 *et seq.* It is not, however, a state law crime in Wyoming. Although the U.S. Attorney's office in Cheyenne may take action against bid rigging where federal contracts are involved, it has not prosecuted cases in involving state and local government contracts.

Because of the lack of prosecution of bid rigging in the context of state and local contracts in Wyoming, it is hard to know extensive it is. There is reason to believe, however, that it occurs in one form or another on a regular basis. In at least one Wyoming municipality during the past decade, bid rigging of one sort or another appeared to have occurred in each of four consecutive years on public contracts, for a total contract value of approximately \$18 million. If the average "overbid" was 15% of what it should have been, then that would represent a direct loss to taxpayers of approximately \$2.7 million. If one community had suffered bank robberies of \$2.7 million over a four year period, that would certainly make news, but bid rigging is a quieter affair.

There are two broad categories of bid rigging: (1) fraudulent schemes instigated by private sector bidders; and (2) actions by government officials to artificially exclude bidders.

A. Private Contractor Bid Rigging.

Private contractors can rig a bid by (1) bid suppression; (2) complementary bidding; and (3) bid rotation. A typical example is as follows: The local government holds a mandatory pre-bid meeting, which prospective bidders must attend. At the meeting they each learn the identities of everyone who will be allowed to submit a bid. If the number is three or fewer, that creates an environment ripe for collusion. On bid day, the prospective bidders hold a conference call with each other to decide who will get the bid. Once that is decided, the next issue is to decide how the two losing bidders get compensated. The pre-ordained winning bidder promises to hire the two losers as subcontractors and to inflate their subcontracts so that each will make as much money that they would have made had they won the bid and become the general contractor for the project. The result is a 15-20% bid inflation for those subcontracts. The two losing bidders either submit no bid at all or they submit intentionally high bids. The local government then awards the contract to the “lowest” bidder.

B. Bid Rigging By Government Officials.

Government officials can engage in bid rigging by: (1) imposing artificially stringent pre-qualification requirements that reduce the number of bidders; (2) structuring or bundling work items in a contract so that very few or only one bidder is eligible to bid; (3) awarding sole source contracts where no emergency or other circumstances exist justifying such sole source award; and (4) allowing unbalanced bidding, whereby high dollar values are charged early in a project and lower values later, subjecting taxpayers to risk if the contractor defaults or disappears mid-project.

Notice that none of these schemes requires that the government official be “corrupt” per se. Each of these can happen where the government official is acting in good faith and is not receiving a kickback or a bribe. For example, the government official (or government-hired design engineer) may prefer to work with contractors who have done many similar projects in several states, or dislike working with a particular contractor, and may require as a pre-qualification that the contractor have previously performed many such projects where the official knows that most Wyoming contractors have not. Overly stringent prequalification requirements result in out-of-state contractors being favored over Wyoming contractors.

Unbalanced bidding in and of itself does not hurt the taxpayers if the contractor finishes the project in a quality manner and on time. It does hurt taxpayers if the contractor does not finish and is terminated from the job either for convenience or for cause. It is a common bidding practice in Wyoming on public works projects for the contractor to put most of its expected profit for the project into the single line item “mobilization”, for which the contractor is entitled to demand full payment upon showing up at the project site for work and thus “mobilizing”. The problem that creates is that the

contractor is then less motivated to finish the job. If the government terminates the contractor, the bond company may refuse to pay the full amount necessary to complete the project, because it is a defense for the bond company to say that the government was irresponsible in overpaying on an unbalanced contract. Unbalanced contracts are not illegal in Wyoming, although they are illegal for federal contracts.

Finally, no-bid, sole source contracts are an obvious source of concern, because the government and taxpayers have no way of knowing how much money could have been saved by having a competitive process. Sole source contracts are becoming more common in Wyoming government contracts, as governments move away from the traditional design-bid-build process, where a separate engineering company designs the project and then there is a public bid by contractors, to a single design-build contract where the same party that designs the project also constructs it. Design-build contracts can theoretically benefit the government where time is of the essence, but they tend to disadvantage Wyoming contractors because there are few firms that have both design and construction capability within the same company.

II. Proposed Solutions.

The solution to bid rigging by private contractors is conceptually easier than solving bid rigging that occurs by government officials, because bid rigging by private contractors never has a positive public benefit, whereas the government actions may sometimes carry a public benefit. For example, prequalifying contractors can be a legitimate activity in order to ensure that contract awards are only made to those who can be expected to complete the project satisfactorily. Likewise, sole source contracts can be legitimate in emergency circumstances, such as repairing a bridge that has been washed out by flood.

Because the government side is difficult to get right, I do not presently have proposed language for dealing with that issue. The following is proposed language for dealing with the private contractor side of the problem, largely based on an Illinois statute, but customized for Wyoming:

Proposed Bid Rigging Bill Draft To Deal With Private Contractors.

“Interference With Public Contracting Act” 20LSO -XXXX

Section 1.

It is the finding of the Wyoming Legislature that the cost to the public is increased and the quality of goods, services and construction paid for by public monies is decreased when contracts for such goods, services or construction are obtained by any means other than through independent noncollusive submission of bids or offers by individual contractors or suppliers, and the evaluation of those bids or offers by the governmental unit pursuant only to criteria publicly announced in advance.

Sec. 2. Definitions. In this Act:

(a) "Public contract" means any contract for goods, services or construction let to any person with or without bid by any unit of State or local government.

(b) "Unit of State or local government" means the State, any unit of state government or agency thereof, any county or municipal government or committee or agency thereof, or any other entity which is funded by or expends tax dollars or the proceeds of publicly guaranteed bonds.

(c) "Person" means any individual, firm, partnership, corporation, joint venture or other entity, but does not include a unit of State or local government.

(d) "Person employed by any unit of State or local government" means any employee of a unit of State or local government and any person defined in subsection (d) who is authorized by such unit of State or local government to act on its behalf in relation to any public contract.

(e) "Kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(f) "Prime contractor" means any person who has entered into a public contract.

(g) "Prime contractor employee" means any officer, partner, employee, or agent of a prime contractor.

(h) "Stringing" means knowingly structuring a contract or job order to avoid the contract or job order being subject to competitive bidding requirements.

(i) "Subcontract" means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining

goods or services of any kind under a prime contract.

(j) "Subcontractor" (1) means any person, other than the prime contractor, who offers to furnish or furnishes any goods or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and (2) includes any person who offers to furnish or furnishes goods or services to the prime contractor or a higher tier subcontractor.

(k) "Subcontractor employee" means any officer, partner, employee, or agent of a subcontractor.

Sec. 3. Bid-rigging.

(a) A person commits the offense of bid-rigging when he knowingly agrees with any person who is, or but for such agreement would be, a competitor of such person concerning any bid submitted or not submitted by such person or another to a unit of State or local government when with the intent that the bid submitted or not submitted will result in the award of a contract to such person or another and he either (1) provides such person or receives from another information concerning the price or other material term or terms of the bid which would otherwise not be disclosed to a competitor in an independent noncollusive submission of bids or (2) submits a bid that is of such a price or other material term or terms that he does not intend the bid to be accepted.

(b) Bid-rigging is a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years . Any person convicted of this offense or any similar offense of any state or the United States which contains the same elements as this offense shall be barred for 5 years from the date of conviction from contracting with any unit of State or local government. No corporation shall be barred from contracting with any unit of State or local government as a result of a conviction under this Section of any employee or agent of such corporation if the employee so convicted is no longer employed by the corporation and: (1) it has been finally adjudicated not guilty or (2) if it demonstrates to the governmental entity with which it seeks to contract and that entity finds that the commission of the offense was neither authorized, requested, commanded, nor performed by a director, officer or a high managerial agent in behalf of the corporation as provided in paragraph (2) of subsection (a) of Section 5-4 of this Code.

Sec. 4. Bid rotating.

- (a) A person commits the offense of bid rotating when, pursuant to any collusive scheme or agreement with another, he engages in a pattern over time (which, for the purposes of this Section, shall include at least 3 contract bids within a period of 10 years, the most recent of which occurs after the effective date of this act) of submitting sealed bids to units of State or local government with the intent that the award of such bids rotates, or is distributed among, persons or business entities which submit bids on a substantial number of the same contracts.
- (b) Bid rotating is a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years. Any person convicted of this offense or any similar offense of any state or the United States which contains the same elements as this offense shall be permanently barred from contracting with any unit of State or local government. No corporation shall be barred from contracting with any unit of State or local government as a result of a conviction under this Section of any employee or agent of such corporation if the employee so convicted is no longer employed by the corporation and: (1) it has been finally adjudicated not guilty or (2) if it demonstrates to the governmental entity with which it seeks to contract and that entity finds that the commission of the offense was neither authorized, requested, commanded, nor performed by a director, officer or a high managerial agent in behalf of the corporation as provided in paragraph (2) of subsection (a) of Section 5-4 of this Code.

Section 5. Acquisition or disclosure of bidding information by public official.

- (a) Any person who is an official of or employed by any unit of State or local government who knowingly opens a sealed bid at a time or place other than as specified in the invitation to bid or as otherwise designated by the State or unit of local government, or outside the presence of witnesses required by the applicable statute or ordinance, commits a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years.
- (b) Any person who is an official of or employed by any unit of

State or local government who knowingly discloses to any interested person any information related to the terms of a sealed bid whether that information is acquired through a violation of subsection (a) or by any other means except as provided by law or necessary to the performance of such official's or employee's responsibilities relating to the bid, commits a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years.

(c) It shall not constitute a violation of subsection (b) of this Section for any person who is an official of or employed by any unit of State or local government to make any disclosure to any interested person where such disclosure is also made generally available to the public.

(d) This Section only applies to contracts let by sealed bid.

Section 6. Interference with contract submission and award by public official.

(a) Any person who is an official of or employed by any unit of State or local government who knowingly conveys, either directly or indirectly, outside of the publicly available official invitation to bid, pre-bid conference, solicitation for contracts procedure or such procedure to any person any information concerning the specifications for such contract or the identity of any particular potential subcontractors, when inclusion of such information concerning the specifications or contractors in the bid or offer would influence the likelihood of acceptance of such bid or offer, commits a misdemeanor punishable by a fine of not more than \$1,000 and imprisonment not to exceed one (1) year. It shall not constitute a violation of this subsection to convey information intended to clarify plans or specifications regarding a public contract where such disclosure of information is also made generally available to the public.

(b) Any person who is an official of or employed by any unit of State or local government who, either directly or indirectly, knowingly informs a bidder or offeror that the bid or offer will be accepted or executed only if specified individuals are included as subcontractors commits a felony fine of not more than \$10,000 and imprisonment not to exceed five (5) years.

(c) Any public official who knowingly awards a contract based on criteria which were not publicly disseminated via the invitation to bid, when such invitation to bid is required by law or ordinance, the pre-bid conference, or any solicitation for contracts procedure or such procedure used in any sheltered market procurement procedure adopted pursuant to statute or ordinance, commits a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years.

(f) It shall not constitute a violation of subsection (a) for any person who is an official of or employed by any unit of State or local government to provide to any person a copy of the transcript or other summary of any pre-bid conference where such transcript or summary is also made generally available to the public.

Section 7. Kickbacks.

(a) A person violates this Section when he knowingly either:

- (1) provides, attempts to provide or offers to provide any kickback;
- (2) solicits, accepts or attempts to accept any kickback; or
- (3) includes, directly or indirectly, the amount of any kickback prohibited by paragraphs (1) or (2) of this subsection (a) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to any unit of State or local government for a public contract.

(b) A violation of subsection (a) is a felony punishable by a fine of not more than \$1,000 and imprisonment not to exceed one (1) year.

(c) Any unit of State or local government may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct which violates paragraph (3) of subsection (a) of this Section in twice the amount of each kickback involved in the violation. This subsection (d) shall in no way limit the ability of any unit of State or local government to recover monies or damages regarding public contracts under any other law or ordinance. A civil action shall be barred unless the action is commenced within 6 years after the later of (1) the date on which the conduct establishing the cause of action occurred or (2) the date on which the unit of State or local government knew or should have known that the conduct establishing the cause of action occurred.

Section 8. Bribery of inspector employed by contractor.

(a) A person commits bribery of an inspector when he offers to any person employed by a contractor or subcontractor on any public project contracted for by any unit of State or local government any property or other thing of value with the intent that such offer is for the purpose of obtaining wrongful certification or approval of the quality or completion of any goods or services supplied or performed in the course of work on such project. Violation of this subsection is a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years.

(b) Any person employed by a contractor or subcontractor on any public project contracted for by any unit of State or local government who accepts any property or other thing of value knowing that such was intentionally offered for the purpose of influencing the certification or approval of the quality or completion of any goods or services supplied or performed under subcontract to that contractor, and either before or afterwards issues such wrongful certification, commits a felony punishable by a fine of not more than \$10,000 and imprisonment not to exceed five (5) years.

[END]

/cds

[Any confidentiality for this proposed bill draft is hereby waived by the author].