

The Big Picture on Bid Protests

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The Department of Transportation has just announced that the major multi-million dollar bridge project that your company spent weeks preparing your best and most competitive bid for has been awarded to another contractor. You know your company has the experience and qualifications to do the work, your bid was highly competitive, and this is the type of project that could have kept your company busy and profitable for years. You know you have the right to file a bid protest regarding the decision, but should you? What would be the grounds for the protest? What would be the chances of success? Is it worth the time, effort and expense?

These are all important considerations when deciding whether to pursue a

bid protest. Unfortunately, in most cases, there is not much time to sit back and mull things over, as almost all bid protests have to be lodged quickly, usually within a matter of days after the public entity announces the contract award. This article is intended to provide a “big picture” understanding of the basic framework for bid protests and of certain common types of issues that may be the basis for a successful protest. Of course, each situation is unique, and the varying governmental entities putting projects out for bid each have their own specific rules, procedures, deadlines and standards, which can sometimes be traps for the unwary. Therefore, it is important to consult legal counsel to advise and assist you with proceeding with a bid protest.

Act Fast

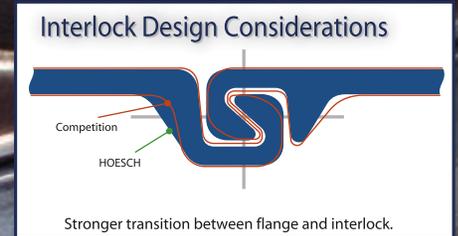
As noted above, bid protests almost always require fast action. The very first thing to do is review the applicable bid protest procedures of the public entity to determine the key deadlines and what needs to be done to file a protest. Failure to meet any of the deadlines generally



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acts as a complete waiver of the right to protest, so understanding what has to be done and when it has to be done by is critically important to a successful protest.

Second, it is important to be able to review documentation related to the bidding and evaluation process as soon as possible. Many of the key documents may be in your files, but some will have to be requested from the public entity via a public records request or other method. It is important to make such a request to the public entity as soon as possible after the award is announced, and even before the decision to protest is made, in order to try to allow time to review prior to the bid protest filing deadline. In particular, you should request and review the bid solicitation documents issued by the public entity, including all addenda or amendments, the bids submitted by you and the other relevant bidders, the bid tabulations by the public entity, minutes or transcripts of any meetings of bid evaluators, and any emails or other communications from the public entity related to the bid solicitation or award.

Common Grounds for Successful Bid Protests

Obviously, not every bid lost will provide the basis for a protest. As a practical matter, if your company's bid is not at least close to the lowest bid, there is likely to be little chance of a successful bid protest. This is because most successful bid protests turn on either the lowest bid having been erroneously rejected by the governmental entity, with the successful protest resulting in the award being granted to the lowest bid, or they turn on the governmental entity having failed erroneously to

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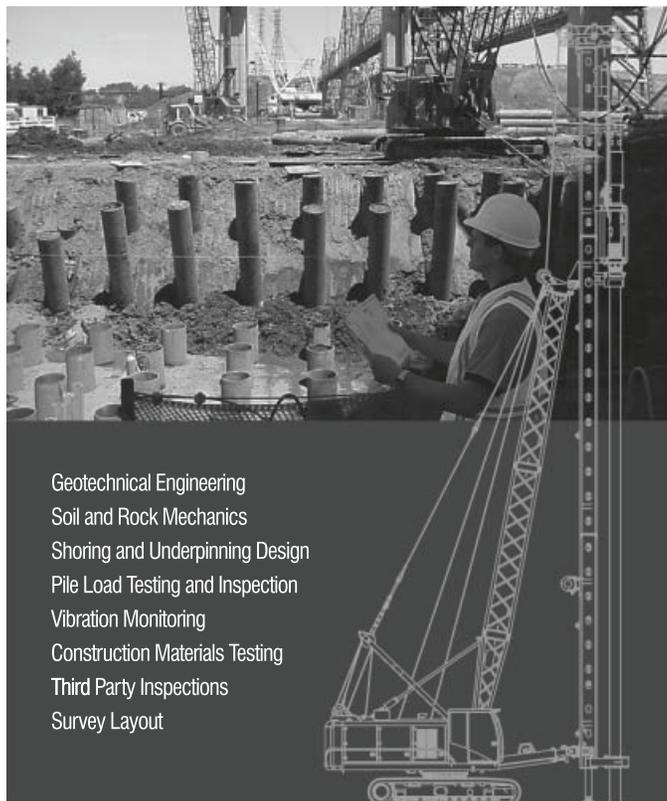
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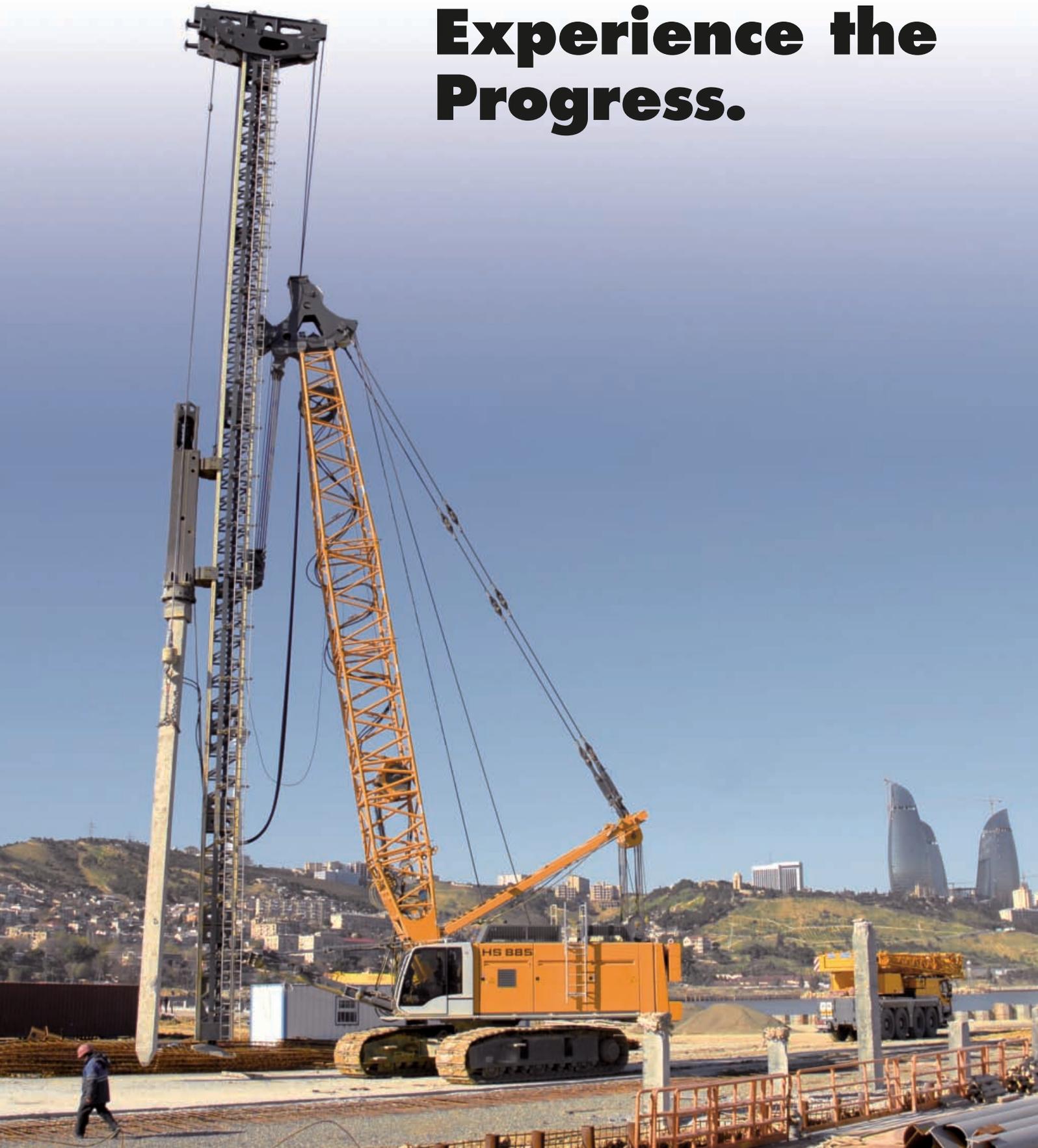


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reject the lowest bid for some reason, with the successful protest resulting in rejection of the lowest bid and award of the bid to the second lowest bidder. Although there are cases where a protest by a bidder other than the lowest or second lowest bidder is successful, such as when the top two lowest bids should have been rejected or when the entire bid process was so flawed as to require a re-bid, such situations are much less common.

While every potential bid protest situation is unique, there are certain common types of issues that are generally more likely to lead to a successful bid protest. First, a protest is more likely to be successful if it can be established that the public entity failed to follow its own rules or requirements, either in the bid solicitation documents or in the entity's governing statutes or regulations. For example, if the bid solicitation documents provided that the public entity will award the contract to the lowest bid from among the prequalified bidders, the public entity's award of the contract to the second lowest bidder on the basis that it was more qualified than the low bidder, when both bidders had been prequalified, may likely be the basis for a successful protest due to the public entity's failure to follow its own bid solicitation requirements. Another example might be if a public entity failed to follow or incorrectly applied the scoring or evaluation criteria described in the bid solicitation documents when evaluating or scoring the bids. If it can be established that the public entity's failure to follow the evaluation or scoring criteria changed the outcome, then that could likely serve as the basis for a successful bid protest.

A protest is more likely to be successful if it can be established that the low bid deviated from the bid solicitation requirements in a way that affects pricing or provides the low bidder with a competitive advantage over other bidders.

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Second, a protest is more likely to be successful if it can be established that the low bid deviated from the bid solicitation requirements in a way that affects pricing or provides the low bidder with a competitive advantage over other bidders. Deviations that affect price or competition are generally considered to be material deviations that cannot be waived by the public entity and that require rejection of the bid. For example, if the bid solicitation expressly required bidders to use certain specific types of materials in the work, an award of the bid to a bidder who proposed to use a different and less expensive type of material may likely give rise to a successful protest since the winning bidder would have obtained a pricing advantage over the other bidders by failing to comply with the bid requirement. Another example might be if the bid solicitation documents required the bidders to identify and list all of their subcontractors as part of their bids. If the winning bidder failed to do so, this may likely give rise to a successful protest since the winning vendor would have obtained a competitive advantage over other bidders by not being required to commit to specific subcontractors at the time of bid submittal and by potentially being able to accept lower subcontractor bids after opening of the bids.

In contrast, bid deviations that do not affect price or give a bidder a competitive advantage over other bidders are generally considered minor deviations that the public entity has the discretion to waive. Bid protests very often turn on whether a deviation in a bid was a minor deviation that could be waived or a material deviation that could not be waived and required rejection of the bid. The law generally gives public entities broad discretion in making such determinations, and an honest exercise of that discretion will generally not be overturned even if the decision may appear to be erroneous and reasonable people could disagree. However, the law also requires public entities to act rationally and in the best interest of the taxpayer, so clear cases of a significant effect on price or an unfair competitive advantage, particularly if the end result of the protest would save the public entity money, are generally strong grounds for a bid protest.





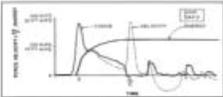
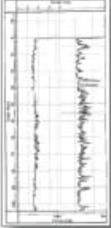
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Conclusion

Given the fierce competition for federal, state and local government work, contractors are likely to face the decision on whether to file a bid protest at some point. Contractors with a good "big picture" understanding of bid protests and of the need for fast action will be best positioned to timely protest in the right circumstances and more often obtain successful results from a bid protest, which can mean the difference between winning and losing a contract. ▼

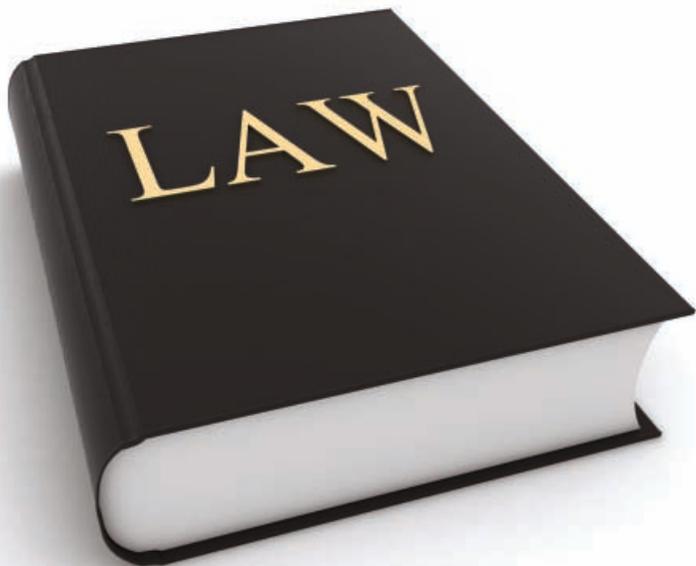


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