**BIDDING YOUR COUNTY PROJECT**

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**Purpose of Bidding**
Statutory competitive bidding requirements are enacted for the benefit of the public and taxpayers to invite competition; to prevent favoritism, fraud, corruption, improvidence, extravagance, and collusion; and to secure the best work or supplies at the lowest price practicable. Competitive bidding requirements “promote honesty, economy, and aboveboard dealing in the letting of public contracts.”

**First the Law**
- Where is the bidding law?
- Can be a Frustration!
- Generally – Most State’s have a smattering of bidding laws in various statutes and differ depending on the jurisdiction.
  - In ND 92 statutes containing counties and advertising/bidding.
- Add to that overlapping requirements from professional standards and potential federal law issues.
The Good News

- Luckily your projects usually will fall into a few well defined chapters of law.
- What do most of attendees at LTAP usually do?
- Design & Construction of:
  - Machines, Roads, Bridges & Buildings

The Common Misconception

- It is NOT the lowest bid…
- It is the lowest RESPONSIBLE bid!
  - Colorado 30-20-622
  - Iowa 26.10
  - Kansas 19-214
  - Missouri 227.100
  - Montana 18-1-102
  - North Dakota 24-05-04.2
  - Nebraska 39-1620
  - South Dakota 15.2024
  - Wyoming 16-6-102

Low Bid Not Accepted

- Frequently litigated!
- Frequently Dismissed!
- “Courts should not interfere with the determination of the authorities involved in such matters when the determination as to who was the lowest reliable and responsible bidder is made in good faith….. The exercise of discretion is provided for and expected.
  - McNichols v. City and County of Denver 274 P.2d 317

The Process

- Starts with the government decision to go ahead with the project.
- Larger projects will require professional services. (engineer or architect)
  - Typically trigger by $ value or type of project
- First the advertisement for services
  - Commonly called:
    - Requests for Proposals (RFP)
    - Request for qualifications
Traditionally Un-Ethical

Section 11 -- The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding . . .

Then comes:

National Soc. of Professional Engineers v. United States, 435 U.S. 679 (US 1978)

A complete ban on competitive bidding violates Sherman Act’s prohibition on conspiracies to restrain commerce

What’s the Ethical Rule now?

“nothing contained in the NSPE Code of Ethics, policy statements, opinions, rulings or other guidelines prohibits the submission of price quotations or competitive bids for engineering services at any time or in any amount.”

However, State Rules are still in play...

Road Projects generally straightforward.

So too Road machinery.

Couple of hurdles though:

- Usually not allowed to use trademarks.

Make sure you give yourself options in the invitation to bid!

Example:

Option for multiple purchases.
Building Projects

- Building projects may require multiple prime bids depending on State.

Example:
- In ND Must bid out general, electrical and mechanical separately
- Unless
- They are under $25K or
- Single bid is lower than the multiple combinations

Advertisements

- Time limits vary depending on the project! Statute specific.
- Always Minimum times!
- Positive – ND Supreme Court
- Bidder cannot complain about defect in timing if they submitted a bid.
  - Baukol Builders v. County of Grand Forks,
  - 2008 ND 116

Bids shall be accompanied by a separate envelope containing a Bidder's bond in a sum equal to ($%) five percent of the full amount of the bid, executed by the Bidder as principal and by a surety company authorized to do business in this state, conditioned that if the principal's Bid be accepted and the contract awarded to him, he, within ten days after notice of award, will execute and deliver a contract in accordance with the terms of his Bid and a contractor's bond as required by law and the regulations and determinations of the governing body.

No bids will be read or considered which do not fully comply with the North Dakota bond and license requirements. In compliance with Section 43-07-12 of the North Dakota Century Code, each contractor submitting a bid must have a copy of his North Dakota Contractor's License or certificate of renewal thereof, issued by the Secretary of State. Failure to comply in the bid bond requirement must be licensed for the highest amount of his total bid combination including add alternates; and such license must have been in effect at least 10 days prior to the date of the bid opening.

No bid will be read or considered which does not fully comply with the provisions herein as to bonds and licenses, and any deficient bid submitted will be rejected and returned to bidder immediately.

Bid security shall be made payable to the City of Fargo, North Dakota. Bid security of two lowest Bidders will be retained until Contract has been awarded and executed, but not longer than 45 days.

The Owner reserves the right to reject any or all Bids and to waive informalities therein.

BY: Ms. Bonnie Johnson, County Administrator, Cass County – North Dakota.
New Innovative Approach?

- Design Build
- Government
- Design & Builder
- Sub-Contractors

The Big Day - Bid Openings

- Bid must be complete!
- Must including bond or cashiers check.
- Most State’s law is a percentage.
  - Typically 5%
- Incomplete bids resealed and returned

Handling the opening

- Generally:
  - Mistakes before bid opening can be corrected by withdrawing and resubmitting
  - Mistakes discovered after opening but before award can be corrected if clearly evident on the face.

Handling the opening

- Mistake discovered after award does not relieve the contractor from performing!
- Under contract law –
  - Offer (i.e. bid)
  - Opening (i.e. acceptance)
- Government has right to bond submitted.
  - Almost never enforced in my experience.
Once bid is accepted you cannot significantly re-negotiate the bid.

Bismarck violated the competitive bidding statutes contained in Ch. 48-02, N.D.C.C., when it revised specifications to reduce construction costs and negotiated with the four low bidders without affording other bidders an opportunity to bid on the revised project.

- Danzel v Bismarck, *451 N.W.2d* 127

Insignificant omissions or nonjudgmental mistakes

- Form rather than substance

- NDAC 4-12-10-01

You enter into a contract.

Require a Surety Bond.

- (Sometimes called a Performance Bond)

- At least the price of the contract.

Not much unless fraud or bad faith

- Maybe costs

- “we assume that his purpose in bringing suit was to have the invalidity of the proceedings by which the award was made adjudicated and determined as a protection to [himself] and to the public against similar irregularities in the future.” Danzel v Bismarck, *451 N.W.2d* 127
Thank you!

Questions or comments?
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