CONTRACTING BASICS

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Rapid City SD
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First - Bar “Road” Trivia!

- Where does the phrase “I’m stumped” come from?
- Where did the phrase “turnpike” come from?
- The Roman’s built how many miles “inter-district” roads?
  a. 27,700 miles
  b. 41,300 miles
  c. 53,000 miles
  Hint: US interstate system is 46,876 miles
- What State had the first DOT in 1891?

First the Basics

- Contracts are Promises
- BUT Not all Promises are Enforceable!
  - Promise = Gifts = Not enforceable
    - I promise to buy Dale Heglund a beer
  - Promise + Consideration = Enforceable
  - Consideration is generally a “Bargain”
    - Dale will buy me a beer if I speak to the conference

Contracts

- Contracts DO NOT have to be in writing!
- Fact is most “contracts” are not
- Going out to eat..
  - Legislatures can require certain contracts in writing
  - Statute of Frauds
    - Land transactions
Contracts

- Written contracts advantages
- Obviously easier to prove
- But More Importantly
- Parol Evidence Rule
- Court Bound to the 4 corners of the document

Typical Contract Issues

- Transferring of Liability
  - Watch out for hold harmless clauses or assumption of risk
  - State Statutes probably limit
- Limits on warranty work or modifications
  - ie voiding warranties

Equipment Bidding

- Invitation to Bid – “Advertisement”
- Offer by Dealer
- Acceptance by Purchaser
- Offer + Acceptance = Enforceable Promise

Advertisements

- Time limits vary - Statute specific.
  - Generally a few weeks.
  - Always Minimum times
  - Usually required publications
    - Newspapers and Trade Magazines.
    - Relevancy????
  - 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
**Invitation to Bid**

Road machinery.

- Couple of cautions:
  - Usually not allowed to use trademarks.
  - But you can require certain specs.

- Make sure you give yourself options in the invitation to bid!
  Example:
  - Option for multiple purchases.

**Lease vs Purchase**

- **Lease**
  - Pros - No large upfront payments, No surprise costs, Warranties
  - Cons - No long term asset, statutory limitations on leases (7 years in ND 24-05-04)

- **Purchase**
  - Pros - long term asset
  - Cons - upfront payments and many soft costs - especially at end of life

**Equipment Bidding**

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

- Lower the use - longer the life span

- Regardless of what you decide - you should create longer term fleet replacement schedules!
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 P2d 317

The Big Day - Bid Openings

- Bid must be complete!
- Incomplete bids resealed and returned®
- Equipment Bids generally don’t require a bond
- Different then building projects
  - Those must include bonds or a cashier’s check.
  - Most State’s law is a percentage - Typically 5%

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.
- Mistake discovered after award does not relieve the seller from performing!
- Under contract law –
  - Offer (i.e. bid)
  - Opening (i.e. acceptance)
- If required - Government has right to bond submitted.
  - Almost never enforced in my experience.
Informalities vs. Bid changes

- 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

Minor Informalities

- Insignificant omissions or nonjudgmental mistakes
- Form rather than substance
- NDAC 4-12-10-01

Emerging Trends

- State Statutes dictate bidding process
- BUT - Trend is State or National purchasing programs
- Laws haven’t really caught up

Thank you!

Questions or comments?
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