

PERFORMING CONSTRUCTION FOR THE STATE OF WISCONSIN

During this economic slowdown, contractors are finding that governmental construction may be the best market remaining for awhile. It is important to remember the constraints placed upon contractors who wish to perform construction work for the State of Wisconsin. Under § 16.855 of the Wisconsin Statutes, the Department of Administration is required to let work to the lowest qualified responsible bidder, except when the State Building Commission determines that certain design and construction processes may make better use of the resources in technology in the construction industry. From time to time the State Building Commission has waived the requirements of § 16.855 in awarding a state construction contract.

Section 16.855, Wis. Stats., requires the state to advertise for bids and to require a bid bond or guarantee of 10% of the amount of the bid. The bids must be publicly opened and read aloud at a specified time and place. Within a reasonable time after opening the bids, they are to be made available for public inspection. No alteration of a bid is permitted except that the Department may negotiate deductive changes with the lowest qualified bidder. A bidder may withdraw its written bid after submitting it to the Department of Administration, provided that the published time for opening bids has not yet occurred. Therefore, if a contractor determines that it has made a bid error prior to the opening of bids, it may simply withdraw its bid by submitting a written request to the Department seeking such withdrawal. The contractor may also submit a new bid if it can do so before the published time of bid opening.

If a bid contains an error, omission or mistake, the bidder may limit liability to the amount of the bid bond or guarantee by giving written notice of its intent not to execute the contract within 72 hours of the bid opening. The Department of Administration, working with the state attorney general, is empowered to settle and dispose of all cases of this nature that may arise. However, if no settlement is reached, the bidder is not entitled to recover the bid guarantee

unless the bidder proves in the circuit court for Dane County that in making the mistake, error or omission, the bidder was free from negligence.

Bidders on state projects should not forget that the Department has the right to reject any and all bids provided it is in the best interest of the State. The law requires the Department to have rational reasons for the rejection of a bid and those reasons are to be expressed in a written rejection letter to the bidder.

The Department may issue contract change orders whenever they are deemed to be in the best interest of the State. A change order is an amendment to a construction contract and it must be negotiated. Both the State and the contractor must agree on the terms of the change order.

Although contractors may eagerly seek state work, particularly when there is an economic downturn as currently exists, the Department may require bidders to submit sworn statements as to their financial ability, equipment and experience in the construction involved.

When the Department believes it is in the best interests of the State to contract for certain proprietary articles available from only one source, it may contract for such articles or materials after publishing its intent in the official state newspaper.

Section 16.855 requires the Department to attempt to insure that 5% of the total amount expended in each fiscal year is awarded to contractors and subcontractors of minority businesses. A minority business is defined as a business certified by the Department of Commerce as “American Indian”, “Asian Indian”, “Black”, Hispanic”, and may be a sole proprietorship, partnership, limited liability company, joint venture, or corporation. The business must be at least 51% owned, controlled and actively managed by a minority group member or members who are U.S. citizens, lawfully admitted to the United States for permanent residence. The Department of Commerce periodically updates a list of certified minority businesses and

conducts investigations to determine whether a business qualifies as a minority business. A determination that a business qualifies as a minority business cannot be based solely on the number of minority group members employed by the business.

Interestingly, a contractor working on a state project may recover damages incurred as a result of another contractor on the site interfering with its work or nonperforming its work.

Section 16.855(11) states:

A contractor shall be liable for any damages to another contractor working on the same project caused by reason of the former's default, act or nonperformance.

Under § 16.855(13)(a) a list of subcontractors are not to be submitted with a prime contractor's bid. However, the Department may require the prime contractor to submit in writing the names of prospective subcontractors for the Department's approval before the award of a contract to the prime contractor. Under that section, all subcontractors may be approved in writing by the Department prior to their employment. Changes may be made in the list of subcontractors with the agreement of the Department and the prime contractor, when in the opinion of the Department it is in the best interest of the State to require the change.

Provision is made for the Department's promulgation of administrative rules to implement the advertising and award of contracts, and such administrative rules exist as I have previously mentioned in former articles.

Section 16.855(19) provides that as the work progresses under any state contract for construction the contractor is granted an estimate of the amount in proportionate value of the work done which shall then entitle the contractor to receive the amount less retainage. The retainage is limited to not more than 5%¹ of the estimate until 50% of the work has been completed. At 50% completion, no additional amounts are to be retained and partial payments are to be made in full to the contractor unless the architect or engineer certifies that the job is not

proceeding satisfactorily. When the work is not proceeding satisfactorily, at or after 50% completion, additional amounts of retainage may be required, not to exceed 10% of the value of the work completed. Under that section, upon substantial completion of the work, the retainage is to be paid to the contractor.

State work can be a very important market for contractors when the demand for private construction dries up. Public building expansion plans are not necessarily determined by general economic conditions.