

COMPETITIVE BIDDING IN PUBLIC PROJECTS AND THE QUALIFIED BIDDER

Competitive bidding is usually required as a matter of law for the construction of public buildings. The process of competitive bidding contemplates the availability of completed plans and specifications upon which each bid is based. Consequently, nonconforming bids are usually rejected because strict adherence to the plans and specifications is contemplated in order to have a common standard upon which all bids can be judged. There is no doubt that competitive bidding will not function successfully unless bidders have a sense of confidence in the system. The preparation and submittal of bids is a complex, expensive undertaking and bidders wish to be reasonable assured that they will be treated fairly, consistent with the rules of the game announced in the invitation for bids.

From time to time, inexperienced bidders desire to bid on a competitive bid project. Professional designers know that not all bidders are qualified to perform the work which is the subject of their plans and specifications. Accordingly, prequalification of bidders is an essential step in assuring both public and private owners who are engaged in procuring competitive bids that the bids represent a meaningful offer to perform the work specified for the price bid.

Public construction projects are subject to the provisions of §§16.85 and 16.855 of the Wisconsin Statutes. Section 16.855(9) states:

(9) The department may require bidders to submit sworn statements as to financial ability, equipment and experience in construction and require such other information as may be necessary to determine their competency.

The Wisconsin Department of Administration administers §§16.85 and 16.855 of the Wisconsin Statutes relating to engineering and construction of public buildings. It has promulgated administrative rules which are known as Chapter Adm 21 that relates to the advertising, bidding and award of construction contracts. In Adm 21.02 various definitions are set forth in these administrative rules, including (7) which defines, "Lowest qualified responsible bidder". Those provisions are specific and numerous. Consequently, I believe that they should

be reviewed from time to time so that design professionals and contractors are fully informed about who is regarded as a qualified or responsible bidder under the Wisconsin Statutes governing construction by competitive bidding. I set forth the entirety of Adm 21.02(7) in this article:

(7) "Lowest qualified responsible bidder" shall be defined to include all of the following which must be met to be considered for award of contract:

(a) *Lowest bidder.* The lowest bidder is one whose bid contains the lowest total dollar amount when compared with other bids submitted for the same work. Should the specifications require evaluation of other factors *in* conjunction with lowest dollar amount to determine the lowest bidder, a formula shall be specified which will permit the conversion of evaluation factors to a dollar value.

(b) *Qualified bidder.* A qualified bidder is one who meets the following conditions:

1. Has completed one or more projects of at least 50% of the size or value of the division of work being bid and the type of work completed is similar to that being bid. If a greater magnitude of experience is deemed necessary, other than size or value of the work, such requirements will be described in the specifications.

2. Has access to all necessary equipment and has organizational capacity and technical competence necessary to enable performance of the work properly and expeditiously.

3. Consideration will be given to associations consisting of 2 or more contracting firms organized for the purpose of entering into a construction contract as a single entity, providing the assignment of and provisions for continuity of the various responsibilities within the association are agreed upon prior to award of contract and further providing that either of the individual firms constituting the association is qualified as defined herein.

4. In the event that the project is of such magnitude as to limit competition as a result of the conditions established for qualification, the department may waive the condition for bidder qualification.

5. The department may require bidders to submit sworn statements as to financial ability, equipment and experience in construction and require other such information as may be necessary to determine their competency. Bidders failing to submit required sworn statements shall be deemed not qualified.

(c) *Responsible bidder.* A responsible bidder is one who meets the following conditions:

1. Maintains a permanent place of business.

2. Provides a sworn statement upon request, which evidences the bidder has adequate financial resources to complete the work being bid, as well as all other work the bidder is presently under contract to complete.

3. Is bondable for the terms of the proposed contract.

4. Has a record of satisfactorily completing past projects. Criteria which will be considered in determining satisfactory completion of projects by contractors and subcontractors will include:

- a. Completed contracts in accordance with drawings and specifications.
- b. Diligently pursued execution of the work and completed contracts according to the established time schedule unless extensions are granted by the owner.
- c. Fulfilled guarantee requirements of the contract documents.
- d. Established and diligently maintained a satisfactory affirmative action program in accordance with the contract provisions.
- e. Established and diligently maintained a satisfactory safety program in accordance with the contract provision.

5. Is not presently on an ineligible list maintained by the department of administration for noncompliance with equal employment opportunities and affirmative action requirements as provided for in s. 16.765(9), Stats., or on any other agency list for construction related violation of statutes or administrative rules.

Although competitive bidding in non-public projects is not required by law, similar provisions regarding the definition of “lowest bidder”, “qualified bidder” and “responsible bidder” are often found in bid invitations for non-public projects.