

STATE PROJECTS CONSTITUTE A SUBSTANTIAL PORTION OF REVENUE EARNED BY THE PRIVATE SECTOR EACH YEAR

Professional engineers, architects and contractors enjoy access to the design and construction market offered by the State of Wisconsin. State projects constitute a substantial portion of revenue earned by the private sector each year. Unlike private construction projects, the State of Wisconsin utilizes its status as a sovereign, immune from suit, by limiting the pursuit of claims to the remedies and procedures allowed by the legislature, and by the Wisconsin Department of Administration, Division of Facilities Development. This article is intended to give the reader a quick overview of those remedies and procedures.

Section 16.85 of the Wisconsin Statutes prescribes the powers and duties of the Wisconsin Department of Administration (“the Department”) in letting contracts for professional engineering or architectural work and in taking charge of and supervising all engineering or architectural services, or construction work performed for the State of Wisconsin or any of its departments or agencies.

Section 16.855 of the Wisconsin Statutes covers the subject of construction project contracts which must be let by the Department to the lowest qualified responsible bidder where the estimated construction cost of a project exceeds \$30,000.00. The Department is required to give preference to bidders domiciled in Wisconsin, in the absence of compelling reasons to the contrary. Section 16.855, Stats., prescribes the procedure to be undertaken by a bidder if the bidder discovers an error, omission or mistake in the bid, either before or after bid opening. Of particular importance is § 16.855(4), Stats., which prescribes the procedures to be followed in the event the bid error is found after the bids are open. Unless the procedures are followed, the bidder is not entitled to recover the bid guaranty unless it can prove in the circuit court for Dane

County that in making the mistake, error or omission, the bidder was free from negligence.

If the estimated construction cost of a state project exceeds \$100,000.00, the Department is required to take both single bids and separate bids on any division of construction work.

Below that threshold of \$100,000.00, the Department *may* take single bids or separate bids.

Under the provisions of Chapter 16, the State is not liable to a prime contractor for damage from delay caused by another prime contractor provided the Department takes reasonable action to require the delaying prime contractor to comply with its contract. Where the State is not liable under the statute, the delayed prime contractor may bring an action for damages against the delaying prime contractor.

The Department promulgates rules to implement the advertising and award of contracts, and the arm of the Department that handles state construction projects is the Division of Facilities Development (“DFD”).

The DFD publishes the bidding and contract requirements for the state projects undertaken by the Department. DFD publishes the invitation to bid, instructions to bidders, bid form, bid bond, general conditions of the contract, supplementary general conditions and miscellaneous forms for subcontractor approval, minority business enterprises, value enhancement proposals, designation of confidential and proprietary information, and the construction contract and performance and payment bond form. DFD also administers state procedures for the submission and review of bids, award of contracts, and the detailed authority exercised by the State over state construction projects.

The DFD, along with the architects and professional engineers performing work for the State, as state employees or as professional firms under contract, determine and publish the plans and technical specifications for the project and have input in the general conditions.

The general conditions provide for a specific claim procedure for contractors who are interested in pursuing claims, demands and legal causes of action. First, a contractor is required to present its claim to DFD's project representative. If DFD's project representative denies the claim, the contractor may appeal to the administrator of DFD. The project representative has 21 calendar days after presentation of the claim to notify the contractor in writing of his or her decision. Failure of the project representative to act within that time constitutes a rejection of the contractor's claim. If the contractor's claim is rejected by the project representative, the contractor may appeal in writing to the administrator of DFD, provided that the appeal is made within 21 calendar days after it is rejected by DFD's project representative. If no appeal is taken, the decision of DFD's project representative is final and binding on the contractor. If the contractor files a timely appeal from DFD's project representative, the administrator of the Division of Facilities Management acts on the claim and is required to render a decision in writing within 14 calendar days of the appeal. Failure by the administrator of DFD to act within that time constitutes a rejection of the claim.

If the claim is rejected by the administrator of DFD after following the administrative route outlined above, a statutory claims procedure comes into play. It consists of filing a claim with the Wisconsin claims board under § 16.007, Stats. The claims board is required to investigate and make recommendations on the claim to the legislature. When a claim has been referred to the claims board, the board may, on its own motion, or shall upon the request of the claimant, schedule the claim for hearing. The board keeps a record of its proceedings and may require sworn testimony, the attendance of witnesses and the production of documents. Any member of the board may sign and issue a subpoena. The board reports its findings and recommendations to the legislature. If the claims board concludes that on legal or equitable

principles the State should in good conscience assume and pay the claim, it causes a legislative bill to be drafted and submitted to the legislative committee on finance. It must be therefore acted upon as any other legislative proposal. If the legislature rejects the claim or finally adjourns without acting upon the claim, the claimant is then entitled to commence a judicial proceeding against the State in the circuit court for Dane County, Wisconsin.

This protracted claims procedure suggests to both the State of Wisconsin and professional engineers, architects and contractors pursuing a claim, that sincere and productive efforts should be undertaken to settle the claim in order to avoid both the legal and commercial costs associated with the claim process. Yet, the Court of Appeals and Supreme Court in Wisconsin frequently issue decisions in those cases where settlement was not achieved.

I have spent five years as a state and federal attorney representing the government's position on claims cases, and 43 years representing private claimants before the state and federal government. I can say with confidence that Wisconsin has a fair and balanced claims procedure and is blessed with a high quality DFD staff. However, DFD employees will no doubt expect design professional and contractors to adhere to contract terms, as those terms are interpreted by state lawyers. It is therefore important for design professionals and contractors to acquire a detailed knowledge of claims procedures which can be found in the Wisconsin Administrative Code, the Wisconsin Statutes, and in the general and supplementary conditions of the specifications issued on state construction projects.