

Successful Competitive Bidding & The Best Value Alternative



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What We're Going to Talk About

- ❑ Important questions in competitive bidding
 - Lowest Responsible Bidder
- ❑ Comparing Best Value vs. Lowest Responsible Bidder



Competitive Bidding Questions

1. What is the resulting construction contract?
2. Are bidding instructions complete?
3. Is the lowest bid "responsive"?
4. Is the lowest bidder "responsible"?
5. How do we decide about "alternates"?
6. What discretion does the District have in this process?
7. Emails



Question #1: The Construction Contract



- **Who drafts the contract for a big-dollar, publicly bid construction project?**

Contract Documents:



- **Plans and Specifications:** must be drafted by A/E
- **General Conditions of Construction:** must be drafted or reviewed by a lawyer for the owner – **before** published to bidders

What's in the Contract? Potential Problem Provisions

- Broad authority of owner's representative
- Waiver of consequential damages
- Arbitration and non-joinder clauses
- Limited construction observation role for A/E
- Short time limits to bring claims
- Utility relocation/scheduling - delays
- Other Delays
- "Changes" and "Extras"
- Claims administration process
- Warranty/correction periods

This is not an exhaustive list.

What's not in the Contract? Mandatory Provisions

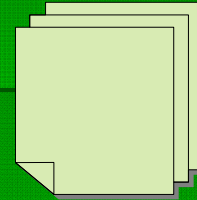
Does the contract comply with and include provisions required by state and federal law?

E.g.:

- Prompt payment (Minn. Stat. §471.425)
- Prevailing wage; project labor agreements (Davis-Bacon Act; Minn. Stat. § 123B.52, Subd. 1a)
- Record keeping (Minn. Stat. §16C.05, Subd. 5)
- Non-discrimination (Minn. Stat. § 181.59)
- Bonds (Minn. Stat. §123B.52, Subd. 1; *id.* § 574.26)

Question #2: The Rules of the Game

- **Bidding Instructions**
- **Bid Form**



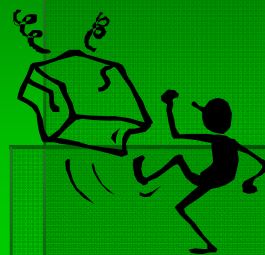
Question #3: Is the Low Bid “Responsive”?

Premise: Bidder has deviated from the bidding instructions (e.g., omitted required information; altered the form of the bid).

Test: Would it give the bidder a substantial competitive advantage to supplement after bid opening?

If the answer is yes, the bid is **not** “responsive.”

Public owner has a duty to reject non-responsive bids



Question #4: Is the Low Bidder “Responsible”?

Evaluating basic competence of contractor – is the contractor qualified to do this job?

- Bid instructions should include qualification criteria
- Cannot choose a better contractor if the low bidder is qualified
- **Caution:** In practice, the discretion to reject bidder as not “responsible” is more often the exception rather than the rule
- Counterintuitive

Question #5: “Alternates”



Alternates: Bid items that we may or may not want, and can live without

(E.g., base bid includes inexpensive “institutional tile” for the gym; alternate for more expensive sports court flooring.)

Rule: Must decide on alternates before evaluating responsibility of bidder

Question #6: What discretion do we have?

- Contents of construction contract: **significant discretion**
- Non-responsive bid: **no discretion**
- Alternates: **limited discretion**
- Responsibility of contractor: **severely limited discretion**

CAUTION

Question #7: Uniform Communications



DANGER: Administrators and board members must avoid expressing individual preferences in emails (or on the record).

What We're Going to Talk About

- ✓ Important questions in typical competitive bidding – Lowest Responsible Bidder
- ✓ Comparing Best Value vs. Lowest Responsible Bidder



BEST VALUE

➤ Alternative to lowest responsible bidder (LRB) in construction projects.

➤ Best value is an RFP process.

➤ Design-Build not available

➤ Proposal price not determinative.



Best Value and School Districts

- **Phase-in-eligibility** (law effective July 1, 2007)
 - July 1, 2007—Highest 25% Enrollment
 - July 1, 2009—Highest 50% Enrollment
 - July 1, 2010—All Districts
- **Training required before used**



The Best Value RFP Process

The RFP must:

1. Describe the criteria the district will use for determination of award;
2. Identify the relative weight of price and other criteria; and
3. Establish the relative weight of the interview, if an interview is part of the selection criteria.

RFP Criteria

In addition to price, criteria may include

1. Past performance quality
2. Past performance timeliness
3. Customer satisfaction
4. Past cost overruns



RFP Criteria (cont'd)

5. Change order record
6. Preparation of project plans (submittals)
7. Technical capacity
8. Key personnel qualifications



Best Value Process No-Nos

- Penalizing for past assertion of legal rights in court
- Favoritism, arbitrary decisions
- Appearance of secrecy, unfair advantage to one



Qualifying Bidders Under LRB

- LRB also allows non-cost criteria
- Can be used to qualify bidder, before or during bid
- Less non-cost latitude than best value

LRB Non-Cost Factors

- Financial responsibility
- Change order history
- Experience
- Reliability



City of Minnetonka's Use of Non-Cost Criteria in LRB

Qualifying Scores On:

- ❖ Experience in similar projects
- ❖ Experience of superintendent
- ❖ Change orders
- ❖ Complaints

Court Upheld Process

Best Value v. LRB

- Best value permits selection of more qualified, more expensive bidder over an otherwise qualified low bidder.
- LRB makes it difficult to reject a qualified low bidder.
- Best value more vulnerable to criticism as to “value”

Chevy v. Cadillac

- Best value
- LRB



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