

Putting “Responsible” Back Into the “Lowest Responsible Bidder” Standard in Public Contracting

Generally, public construction projects must be competitively bid and awarded to the “lowest responsible bidder.” See Wis. Stat. §§ 16.75, 23.41(5), 38.18, 43.17(9), 59.52(29), 59.70(13), 62.15(1) and (6), 61.54, 62.15(1) and (6), 60.47(3), 66.0901, 83.04, 85.077(1), 86.31(2), 86.51(4), or 88.62(1). The statutes and state administrative regulations provide little, if any, meaningful guidance on what constitutes a “responsible” bidder. As a result, many public project owners are reluctant to award the work to anyone other than the lowest bidder, even if there is good reason to believe that the lowest bidder may end up costing the taxpayers more in the long run due to poor work quality, project delays and change orders.

Public project owners do not want to risk being sued and are concerned about project delays caused by a lawsuit. These risks, however, can be mitigated to a large degree by both understanding the law and creating a proper administrative record of the bid award decision.

The legal standards applicable to a public entity’s decision to award a contract are very favorable to the public entity. As a threshold matter, bidders have no legal right to a contract with the public entity. A “public bidding authority cannot be compelled to award the contract to the lowest bidder...” *Five Star Airport Alliance, Inc. v. Milwaukee Cnty.*, 939 F. Supp. 2d 936, 941 (E.D. Wis. 2013) (citing *N. Twin Builders, LLC v. Town of Phelps*, 334 Wis. 2d 148, 154, (Ct. App. 2011)). While courts have authority to review a public entity’s decision to award work, the standard of review is deferential to the public entity. “A reviewing court will only interfere with a bidding authority’s discretionary act if it is arbitrary or unreasonable.” *PRN Assocs. LLC v. State Dep’t of Admin.*, 313 Wis. 2d 263, 268 (Ct. App. 2008).

“An arbitrary action is one that is either so unreasonable as to be without rational basis or is the result of an unconsidered, willful, or irrational choice of conduct. An unreasonable action is one that lacks a rational basis.” *Id.* Specifically with respect to determining whether a bidder is responsible, a decision will pass the arbitrary and unreasonable bar if the decision is based on “bona fide judgment, based upon facts tending to support the determination.” *Aqua-Tech, Inc. v. Como Lake Prot. and Rehab. Dist.*, 71 Wis. 2d 541, 551 (Wis. 1976) (internal citation and quotations omitted).

For example, in *D.M.K., Inc. v. Town of Pittsfield*, 290 Wis. 2d 474, 476-77 (Ct. App. 2006), the Court of Appeals upheld a Town’s determination that the lowest bidder was not responsible due to “numerous legitimate concerns about D.M.K.’s performance of prior contracts...” The record created by the Town to support their decision included past instances of unsupervised workers, damage to new asphalt while shouldering, leaving gravel on the road, and not responding to calls during projects.

What if, however, the public entity does not have personal experience with the lowest bidder as with the Town in the *D.M.K.* case? Bid statutes allow public entities to require a sworn statement as to the bidder’s “responsibility” prior to submitting a bid. See e.g., Wis. Stat. § 66.0901(2). Public entities can request, among other things: verification of a principal place of business; proof of licensure to do business in Wisconsin; disclosure of investigations and law violations; proof of a substance abuse prevention program, required by Wis. Stat. § 103.503; proof of training and safety programs; proof of financial ability to perform; examples of previous similar experience; and much more. Some public entities have taken the additional step of

enacting an ordinance or administrative code section setting forth prequalification, responsibility standards. *See e.g.*, Wis. Admin. Code § Adm. 21.02(8)(c).

Even in the absence of specific bidder prequalification forms or a responsible bidder ordinance/administrative code section, project owners can conduct independent research to verify the responsibility of a bidder. General contractors can and should conduct research on subcontractors to ensure that subcontractors being used are responsible and reliable.

There are state and federal court databases that will have judgments listed. Wisconsin and neighboring states maintain debarment lists. The Wisconsin Department of Financial Institutions maintains a public, online listing of all domestic and foreign companies that are licensed to do business in Wisconsin. The Wisconsin Department of Revenue maintains a list of entities that have delinquent tax warrants. There are even online databases that collect much of this publicly available information in one place. LexisNexis maintains a business database, although accessing the database and obtaining a report involves paying a fee. Construction Business Group has compiled publicly available information on over 8,800 contractors operating in Wisconsin and offers free access to the database to registered users. *See* www.cbgwi.com.

If independent research is conducted, however, the information must be reliable and should be made part of the record for the public entity's decision not to award the contract to the low bidder due to lack of responsibility. It is the quality of the information that demonstrates a "bona fide judgment, based upon facts tending to support the determination." *Aqua-Tech, Inc.*, 71 Wis. 2d at 551.

Applying the proper legal standard to reliable facts, it is unlikely that a decision to reject the lowest bidder because the contractor is not responsible will be overturned by a reviewing court. And, rejecting a bid because the bidder is not responsible will likely save the public entity time and money in the long run. As the adage goes, cheaper is not always better.