Bidding and Other Cool Stuff

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Purpose of Bidding

Statutory competitive bidding requirements are enacted for the benefit of the public and taxpayers to invite competition; to prevent favoritism, fraud, corruption, improvidence, extravagance, and collusion; and to secure the best work or supplies at the lowest price practicable. Competitive bidding requirements "promote honesty, economy, and aboveboard dealing in the letting of public contracts."

First the Law

- Where is the bidding law?
- Frustration!
- My count 92 Statutes containing counties and advertising/bidding.
- Covering Chapters:11, 21, 23, 24, 38, 39, 40, 43, 44, 46, 48, 54, 57 and 61.

The Good News

- Luckily your projects usually will fall into a few well-defined chapters of law.

- What do counties usually do?
  - Roads and Bridges
  - Road Machinery
  - Courthouse and Jail buildings

No bid requirement?

- “Strong public policy considerations always favor a competitive bidding approach.”
- AG Letter to R.R. Robinson September 1, 1966
- You can establish a bidding system for anything you want
- However, once you start that process you need to follow through

The Majors

- Counties need to bid:
- Fuel above 4K – 11-11-26 & 27
  - Informally (telephone at least 2) or;
  - Formally (newspaper weekly for 2 weeks)
- Road work above 100K – 24-05-04
  - Newspaper weekly for 2 weeks
- Road work between 100K – 50K
  - (informal – shall seek at least 2)

The Majors Cont.

- Road machinery > 100K – 24-05-04
  - (newspaper weekly for 2 weeks)
  - Rental no more then 1 year if 20% of value
  - Lease purchase limited to 7 years
  - No Bidding necessary for public auction & State Surplus

- Bridges > 30K – 24-08-03
  - Newspaper for 30 days
  - Unless destroyed and public interest would suffer then no need to bid

Public Improvements – Vertical Construction

- 200K – 48-01.2-02.1
  - Architect or engineer required if 200K
- Advertise – 3 consecutive weeks 48-01.2-04
- 1st ad published at least 21 days before opening in official paper
  - AND
- In a daily in the region
  - AND
- In trade publication in general circulation!
  - NDCC 48-01.2-04
- Plans must be done before publication!
  - NDCC 48-01.2-02
- Declared Emergencies may avoid bidding NDCC 48-01.2-04(2)

Public Improvement – Cont.

- Multiple Prime Bids 48-01.2-06
- Must bid out general, electrical and mechanical separately
- If one is under 25% of 200K ($50,000) then can include in another bid.
- BUT
- Single bid allowed as long as lower then combined total

Public Improvement Cont.

- If in a multiple bid you don't get a one of those required bids
- You can negotiate with largest portion bidder without rebidding.
  - (Only up to 150K)
- Remember* It's Combined $ for thresholds!
  - Letter to Rep. Keiser 97-L-84

Public Works – Professional Engineer's section

- Public works $200K+
- Needs Professional Engineer sign off
  - 43-19.1-28
- What is the difference between public improvements and public works?
  - Probably Vertical vs Horizontal

Advertisements for all projects

- No trademarks
  - NDCC 44-08-01(3) & NDCC 48-01.2-03
- **UNLESS**
- It is advantageous
- Board must document the circumstances **AND**
- Provide **WRITTEN** justification
  - Who to?

The Process

- Starts with the commission's decision to go ahead with the project.
- Then the advertisement
  - Commonly called:
  - Requests for Proposals (RFP)
  - Invitation to bid

Professional Services – Selection Based On Fees?

- Traditionally Un-Ethical
- Section 11 -- The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding . . .
- Then comes:
- National Soc. of Professional Engineers v. United States, 435 U.S. 679 (US 1978)

US Supreme Court holding

- A complete ban on competitive bidding violates Sherman Act's prohibition on conspiracies to restrain commerce
- What's the Ethical Rule now?
- "nothing contained in the NSPE Code of Ethics, policy statements, opinions, rulings or other guidelines prohibits the submission of price quotations or competitive bids for engineering services at any time or in any amount."
- However, State Rules are still in play…

The Big Day – Bid Openings

- Bid must be complete
- Including bond in a separate envelope with a sum of 5% or a cashiers check
  - NDCC § 11-11-28 & NDCC § 48-01.2-05
- Incomplete bids resealed and returned

Handling the opening

- Commission Designee can NOW officially open the bids
- But still must be done at the time and publicly
  - NDCC 48-01.2-07
  - (this is also the road and machine process) NDCC 24-05-04(5)

- Mistakes before bid opening can be corrected by withdrawing and resubmitting
  - NDAC 4-12-10-03
- Mistakes discovered after opening but before award can be corrected if clearly evident on the face
  - NDAC 4-12-10-05

Handling the opening

- Mistake discovered after award does not relieve the contractor from performing.
- Cannot correct if change would exceed next low bid.
- NDAC 4-12-10-06

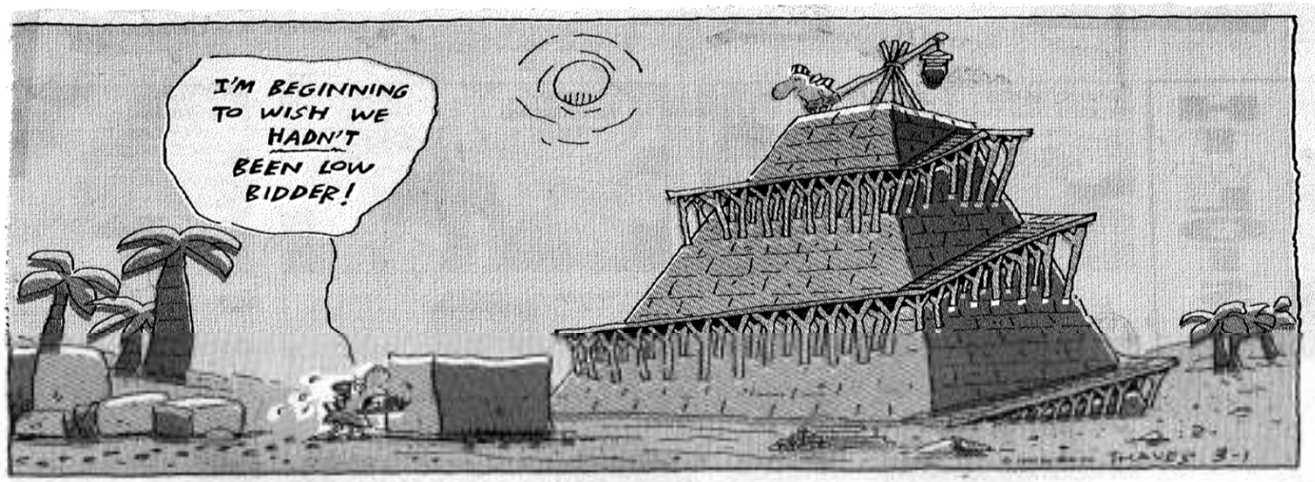
Informalities vs. Bid changes

- Once bid is accepted you cannot significantly re-negotiate the bid.
- Bismarck violated the competitive bidding statutes contained in Ch. 48-02, N.D.C.C., when it revised specifications to reduce construction costs and negotiated with the four low bidders without affording other bidders an opportunity to bid on the revised project.
  - Danzel v Bismarck, **451 N.W.2d 127**

Minor Informalities

- Insignificant omissions or nonjudgmental mistakes
- Form rather then substance
- NDAC 4-12-10-01

The Winning Bid



The winning bid

- Not the lowest bid
- Lowest **RESPONSIBLE** bid
- Best to correlate bid award with bid criteria
  - Baukol Builders v. County of Grand Forks, 2008 ND 116

Low Bid Not Accepted

- Frequently litigated!
- Frequently Dismissed!
- "Courts should not interfere with the determination of the authorities involved in such matters when the determination as to who was the lowest reliable and responsible bidder is made in good faith….. The exercise of discretion is provided for and expected.
  - McNichols v. City and County of Denver 274 P.2d 317

You have the winner – Now What?

- You enter into a contract.
- Require a Surety Bond. (Sometimes called a Performance Bond)
  - NDCC § 48-01.2-10
  - Different then the bidding bond.
- At least the price of the contract.

Remedies

- Not much unless fraud or bad faith
- Maybe costs
- “we assume that his purpose in bringing suit was to have the invalidity of the proceedings by which the award was made adjudicated and determined as a protection to [himself] and to the public against similar irregularities in the future.” Danzel v Bismarck, 451 N.W.2d 127

Thank you!

Questions or comments?

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