

Select Bids Fairly, or Bid Farewell



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Anytime a road is renovated, a public school is built, or a city storage shed is constructed, that construction project likely began through a process called competitive bidding. Despite its frequent use, the requirements and intricacies of competitive bidding can be a surprise to project owners and contractors alike.

What is Competitive Bidding?

The Purpose.

Minnesota competitive bidding laws were enacted by the legislature to ensure that all contractors have an equal opportunity to bid on projects and to ensure that the taxpayers are getting the best bargain possible. Minnesota courts require rigid adherence to the requirements of public bidding to ensure that public entities act transparently and economically. To achieve those purposes, public officials must follow their own designated procedures and have limited discretion in selecting bidders outside of the low, responsible bidder. If a public entity rejects a low bid, that decision must be based upon a substantial reason.

The Bidding Process.

Public entities must use competitive bidding for projects with an estimated price of over \$175,000.00. Competitive bidding applies to construction, alteration, repair, and maintenance of real or personal property as well as for the sale or rental of supplies, materials, and equipment.

To begin the process, a public entity issues a solicitation with instructions for bidders. The instructions may be amended by

addenda. It is important to analyze every addendum issued, as the addenda typically amend the bid requirements. On or before the bid due date included in the instructions, bidders submit a "sealed" bid, frequently through an online portal.

Then, the public entity will read and tabulate the bids aloud. All bidders are able to, and should, watch (online or in person) as bids are read. Minnesota competitive bidding law requires the public entity to award the project to the lowest, responsible, responsive bidder. The lowest responsive bidder must be determined immediately at bid opening.

Responsive and Responsible Bidders.

A responsive bid is one that conforms substantially to the advertised plans and specifications issued by the public entity. A bid may be considered non-responsive if it fails to, for example, acknowledge all addenda or include required companies that qualify as a part of the Disadvantaged Business Enterprise Program. A bid that is not responsive cannot be awarded the project.

A responsible bidder is one who is financially able and competent to complete the work. The specific requirements to be a "responsible" bidder include compliance with various state and federal requirements, including tax, workers' compensation, wage, and safety requirements. Public entities also require bidders to submit a bid bond to verify the bidders' financial qualifications and abilities.

Bid Protests and Consequences for Public Entities.

A bidder or a taxpayer may bring a bid protest action against the public entity that is the owner of the project in various instances. The two most common instances are:

- (1) by the low bidder that was not awarded the project because the public entity deemed the bidder to not be responsible or responsive; or
- (2) by another bidder when the selected bidder's bid was not responsive to the solicitation.

Should a contractor desire to protest a bid, time is of the essence. The contractor or contractor's counsel should, as soon as possible, put the public entity on notice that its bid process and award of contract is not legal under Minnesota competitive bidding law. At this stage, the public entity may re-bid the project or award the project to the low, responsive, responsible bidder. The contractor cannot start a lawsuit challenging the award until it has exhausted its administrative remedies.

Bid Protest Lawsuit.

The public entity may decide to move forward with the bidder it selected, even if that bid was not responsive or the bidder is not responsible. If this is the case, the contractor may continue to protest the bid and contract award through legal action with a summons and complaint and motion for temporary restraining order.

Temporary Restraining Order.

In a motion for a temporary restraining order, the court will consider:

- (a) the harm to be suffered by the contractor if the order is denied, compared with the harm to the public entity if the order is granted;
- (b) the contractor's likelihood of success on the merits;
- (c) public policy considerations;
- (d) the nature and history of the parties' relationship; and
- (e) any administrative burdens to enforce the order.

Put plainly, the contractor must show that it is likely that the public entity violated Minnesota competitive bidding law, the public entity's actions will harm the contractor and the public, and the violation of Minnesota law will frustrate the legal process. The purpose of a temporary restraining order is for the court to maintain the status quo and prevent any further wrongdoing while the legal system resolves the dispute.

Permanent Injunction.

After the temporary restraining order is granted, the contractor then will move the court for a motion for a permanent injunction. Through a permanent injunction, the court is able to label the public entity's actions illegal and require the public entity to begin the bidding process again or abandon the project. The contractor can only recover its bid preparation costs. The contractor may not recover any damages, aside from the bid preparation costs, through a permanent injunction order.

Violation of the Court's Orders.

Should the court order the public entity to stop work and the public entity does not, the contractor may bring a motion asking the court to find the public entity in contempt.

Recently, a public entity ignored a Minnesota court's order that it stop work on its public project and stop payments to the bidder to which it illegally awarded the contract. The public entity did not stop work and, as a result, the trial court held the public entity in contempt of court, advising the public entity that it would be sanctioned. The public entity appealed the trial court's permanent injunction order before the trial court could issue sanctions. The ruling from the Court of Appeals will be helpful as no public entity has been sanctioned for violating a permanent injunction related to Minnesota competitive bidding. This is an evolving area of the law.

Moss & Barnett's Construction Law Team's Competitive Bidding Experience.

The Construction Law team at Moss & Barnett is experienced in quickly putting together bid protest letters, complaints alleging public entities violated Minnesota competitive bidding laws, motions for temporary restraining orders, and motions for permanent injunctions. The Construction Law team has argued dozens of motions for temporary restraining orders and motions for permanent injunctions stemming from competitive bidding violations.

If you believe your bid was low, responsive, and responsible and you should have been issued a public project, contact the Construction Law team at Moss & Barnett for immediate assistance.