

Wisconsin's Public Bidding Laws

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When Public Bidding Law Applies

- State Statutes
 - Cities, Wis. Stat. § 62.15(1)
 - Villages, § 61.54
 - Towns, § 60.47
 - Counties, § 59.52(29)
 - Metropolitan sewerage districts, §§ 200.11(5)(d), 200.47(2)
 - Town sanitary districts, § 60.77(6)(a)
 - Local Roads Improvement Program, § 86.31
- Local ordinance
- Federal law if federal funding for project

Projects Subject to Public Bidding

- Projects that are a “public contract”
- The estimated cost of which exceeds \$25,000
 - May not avoid the public bidding law by dividing a project into smaller projects valued at less than \$25,000
 - If the estimated cost of a project is less than \$25,000 but more than \$5,000, must give a class 1 notice of the project before the construction contract is executed

“Public Contract” Includes:

Defined as: “a contract for the construction, execution, repair, remodeling or improvement of any public work or building or for the furnishing of materials or supplies, with an estimated cost greater than \$5,000.”

Includes activities and improvements that combine materials, supplies, and labor

- Erection, reconstruction, or renovation of structures
- Construction of treatment facilities
- Construction of collection or distribution systems
- Installation of “fixtures”

“Public Contract” Doesn’t Include:

- Contracts for professional services – consulting, engineering, legal, building inspector, etc.
- Day-to-day maintenance
- Equipment that doesn’t become a fixture
- Inventory not for a project
- Vehicles (if not purchased for a project)

Bidding Requirements Don't Apply:

- When the work is done
 - Directly by town personnel
 - By another government or utility
 - By volunteers or with donated material
- Or when there's a declared public emergency

Volunteers or Donated Materials

- Wis. Stat. § 60.47(5): “This section is optional with respect to a public contract if the materials related to the contract are donated or if the labor that is necessary to execute the public contract is provided by volunteers.”
- How would you advise your town in these situations?
 - A. \$100,000 donated materials and \$50,000 contracted labor
 - B. \$80,000 donated materials and \$20,000 contracted labor
 - C. \$25,000 donated materials and \$3,000 contracted labor

Public Bidding Law Requirements

- Sealed competitive bids
- Contract let to “lowest responsible bidder”
- No preference based on geographic location or minority ownership
 - Unless required by funding source (e.g., FEMA)

Town versus City/Village Authority

- City / Village public bidding law is Wis. Stat. § 62.15
- Contains provisions not found in §§ 60.47 or 66.0901
 - Alternative bids, bid bonds, increased quantities, guarantees, price escalator, patented materials, contractor liability
- 2009 WI Act 173 changed village public bidding statutes to align with cities did not change town statutes
- Can a town rely on authority provided to cities and villages?

* will mark provisions based on § 62.15

Step 1: Plans and Specifications

- Town prepares plans and specs*
 - Describe the Work
 - Describe the materials to be used
 - Give an “intelligent idea of the work” to be done
 - Prepare a form of contract and required bond with sureties
- Plans and specs given to town clerk

Step 2: Bid Advertisement

- Class 2 notice under Wis. Stat. ch. 985
- Plans and specifications for the project, including materials to be used
- Notice of bid bond requirement*
- Form of contract

Optional Bid Provisions

- Bids may require contractor to use materials directly purchased by owner
- Bids on alternatives*
 - Allows comparison of different kinds of articles, materials, or processes

Sales Tax Exemption on Some Construction Materials

- As of 1/1/16, building materials purchased by a contractor for use in certain local gov't public construction projects may be exempt from sales tax (2015 Act 126)
- For exemption to apply
 - Construction must be for local gov't
 - Property must become part of a facility owned by local gov't
 - Ownership must be transferred to the local gov't
- "Facility" includes any building, parking lot, storm sewer, water supply system, or sewerage and waste water treatment facility
 - Excludes a highway, street, or road

Step 3: Bid Award

- Sealed bids are opened and reviewed
- Award must be made to the “lowest responsible bidder”
- A Responsible Bidder is –
 - Capable and competent to perform the work
 - Financially responsible
 - Can comply with the terms of the contract
- Don't have to use an unqualified contractor even if lowest bidder

Prevailing Wage Law

Wis. Stat. § 66.0903

- Prevailing wage law has not applied to public construction projects since 1/1/17
- A town ordinance that sets its own prevailing wage rate is void

Requirements for Submitted Bids

For a bid to be accepted, a bidder must provide:

- All information required by the bid packet
 - Bid form
 - Statement of qualifications
 - Designation of subcontractors
 - Wis. Stat. § 66.0901(7)
 - Bidder's certificate on review of plans and submission of proposal
 - Wis. Stat. § 66.0901(7)
- Bid bond*
- Performance and payment bond

An incomplete submission is non-responsive and should not be accepted



Project Plans and Specifications

- Plans and specs must provide sufficient information to allow the project to be built
- Bidder is entitled to rely upon plans and specs in preparing bid
- Unclear or ambiguous plans and specs can result in costly change orders and delays for the project

Bid Bonds*

Wis. Stat. § 62.15(3)

- Bid bond required in order to ensure the selected contractor executes the contract
- Certified check or bid bond in an amount not less than 5% nor more than 10% of the total bid amount
- Should a town require a bid bond?

Payment and Performance Bonds

Wis. Stat. § 779.14

- PPBs required to ensure completion of contract and payment of subcontractors and materials
- Required depending on the contract price
- PPB required if contract exceeds \$148,000
- PPB required if contract is between \$74,000 and \$148,000, unless municipality allows a substitute protective mechanism

“Responsible” Bidder

- Town should determine responsibility through a pre-qualification process prior to bidding
 - Wis. Stat. § 66.0901(2)
- If a town does not, can the town determine responsibility at time of bid award?

Pre-qualification Process

- May require contractor to provide information relating to:
 - Experience in the work required
 - Equipment
 - Financial ability
 - Past performance
 - Other matters requested
- Information must be submitted at least 5 days before bids are due
- Information is confidential
- Town may use this process to pre-qualify bidders on a project basis or a periodic basis

Rejection of Lowest Bidder

- Town board may reject the lowest bidder as not responsible
- Town board should provide reasons on why the lowest bidder is not responsible
- Due process considerations

Action on Bids

- Town may
 - Award the bid to the lowest responsive and responsible bidder OR
 - Reject all bids*
- Negotiation with bidders is not permitted

Bid Problems

- Bid Submitted Late
 - Town may have discretion to accept and open the bid
- Error in Bid Discovered Prior to Opening
 - Contractor has the right to withdraw the bid prior to bid opening
 - But may not submit a new bid unless the project is readvertised

Bid Problems

Error in Bid Discovered After Opening

- Bidder may withdraw mistaken bid under certain conditions
 - Give prompt notice to town
 - Identify mistake
 - Provide evidence that mistake was not caused by a careless act or omission
- Town decides whether bid may be withdrawn

Bid Challenges

- Contract may be challenged by losing bidders or by taxpayers
- Short time to challenge
 - 60 days after signing contract. Wis. Stat. § 893.75
- Remedy
 - Enjoin town from proceeding with the contract
 - Losing bidder may recover expenditures, but not lost profit

Local Road Improvement Program

Wis. Stat. § 86.31

- All TRIP projects must be competitively bid
- Preserve option for county to do work
 - Written, pre-bid sealed estimate of the cost of work
 - Must contact lowest responsible bidder if lowest bid more than 10% higher than estimate
 - A county quote less than 10% below LRB requires rebidding or accepting lowest bid
- Bid notices to include a statement that project will be funded, in part, as a TRIP project

Construction Contract

- Establishes the duties and relationship between the owner and the contractor
- Engineer/architect is not a party to the construction contract, and is not bound by it
 - There should be a separate contract between the owner and engineer/architect
 - Engineer's or architect's contract needs to be consistent with the construction contract

Contractor Performance Provisions

- Construction contract establishes contractor obligations
- Specific requirements defined by plans and specs
- May include performance standards
- May include guarantees and warranties

Provisions on Time for Performance

- Contract establishes time for performance
- Includes provisions for obtaining an extension of time
- Usually includes liquidated damages for failure to complete the project timely
 - Limit reliance on liquidated damages as they are difficult to enforce

Provisions on Contract Changes

- Can a town reserve the right to change the work if it doesn't unreasonably change the character or cost of the work?
 - For cities and villages, yes: changes may not exceed 15% of total cost unless the contract is a unit price bid contract
- Contract should address who is responsible for unanticipated changes and how additional costs will be paid for

Contract: Allowable Retainage

Wis. Stat. § 66.0901(9)

Contract may allow municipality to retain a portion of each partial payment to contractor

- Up to 50% complete: no more than 5% of each partial payment
- At or over 50% complete: no further retainage unless engineer certifies the job is not proceeding satisfactorily, but may not exceed 10% of value of work completed

Other Contractual Provisions

- May specify hours of work, wages, residence, character, and classification of workers employed
 - Wis. Stat. § 66.0901(6)
- Should require contractor to be responsible for traffic safety provisions*
 - Include provisions that contractor is liable for inadequate signage, barriers and lighting, and negligence in digging up roads. Wis. Stat. § 62.15(11)

Monitor Quality of Construction

- Good construction inspection is needed
 - Qualified inspector
 - Knows the project, the contract, and the plans and specs
 - Knows owner's expectations
- Ensure good communication between contractor, inspector, and owner
 - Raises issues when appropriate
- Document that construction meets contract requirements

Monitor Contract Cost

- Project costs tracked through pay requests
- Deal with change orders fairly and promptly
 - Agree to changes where appropriate and document agreement
 - Change of project scope
 - Unanticipated changes
 - Identify and document issues and concerns where no change agreed to
- Best way to control contract costs is through good plans and specs

Monitor Contract Time

- Require provision of construction schedule and regular updates
- Monitor actual construction progress compared to scheduled progress
- Raise concerns where appropriate, and document concerns
- Don't assume that threat of liquidated damages will keep project on schedule

QUESTIONS?

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