



TO: Honorable Mayor Lagergren and City Council Members
FROM: Steven Helget, City Administrator
DATE: September 28, 2020
SUBJECT: Work Session

Proposed is to review competitive bidding requirements for cities. Enclosed are segments of the League of MN Cities informational memo on competitive bidding requirements.

Norwood Young America

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INFORMATION MEMO

Competitive Bidding Requirements in Cities

Learn what types of contracts are subject to competitive bidding requirements; the methods of best value and joint contracting; and the exemptions, exceptions, and alternatives to competitive bidding. Learn about preparing bid specifications and advertising, opening, and investigating bids. Find out about permitted changes after bid award and when a city needs to require performance and payment bonds.

RELEVANT LINKS:

Minn. Stat. § 471.345.
Minn. Stat. § 412.311.
Home rule charter cities generally have a charter provision requiring that a contract that must be competitively bid must be awarded to the lowest responsible bidder or other similar term.

Minn. Stat. § 471.345, subd. 6.
A.G. Op. 430 (Dec. 29, 1981).

Minn. Stat. § 429.041, subd. 1.
See LMC information memo, *Special Assessment Toolkit*.

Foley Bros., Inc. v. Marshall, 266 Minn. 259, 123 N.W.2d 387 (1963). *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978). *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 647 (1954).

I. Competitive bidding law

The uniform municipal contracting law (competitive bidding law) requires cities to use the competitive bidding process for certain contracts estimated to exceed a dollar threshold. Typically, this involves the solicitation of sealed bids and the award of the contract to the “lowest responsible bidder.” The law makes no distinction based on the funds from which payments will be made. For example, a contract that will be paid from municipal liquor store revenues must be competitively bid if the estimated cost is expected to exceed the bidding threshold.

The competitive bidding law generally supersedes all inconsistent laws and charter provisions. A city may, however, need to comply with additional statutory requirements. For example, the competitive bidding process for local improvement projects that are paid for with special assessments has additional requirements. It is important to review any additional requirements that apply to a particular type of contract before beginning the competitive bidding process.

A. Purpose

The competitive bidding law serves three general purposes. First, it is intended to ensure city taxpayers receive the benefit of the lowest obtainable price from a responsible contractor. Second, competitive bidding provides contractors a level playing field on which to compete for city contracts. Third, it limits the discretion of contract-making officials in situations that are susceptible to fraud, favoritism, or other similar abuses.

B. Contracts subject to competitive bidding

When this memo uses the term “contract,” it is only describing agreements subject to the competitive bidding law.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

Minn. Stat. § 471.345, subd. 2.

Minn. Stat. § 471.345, subd. 3.
See Section II. *Procedure*.

Minn. Stat. § 471.345, subd. 4

Griswold v. Ramsey County,
242 Minn. 529, 65 N.W.2d
647 (1954).

Minn. Stat. § 471.345, subd. 5.

There are two elements that determine if the competitive bidding law applies to a particular contract: the type of contract and its estimated price.

1. Types of contracts

The competitive bidding law applies to:

- Contracts for the sale, purchase, or rental of supplies, materials, or equipment.
- Contracts for the construction, alteration, repair, or maintenance of real or personal property.

2. Estimated price

The estimated price of the contract also determines if the competitive bidding process is required.

a. Contracts over \$175,000

City contracts exceeding the estimated price of \$175,000 must use the competitive bidding process.

b. Contracts exceeding \$25,000 but not \$175,000

Competitive bidding is not required on contracts that exceed \$25,000 but do not exceed \$175,000. However, competitive bidding on contracts in this price range is allowed. So, the city has the option of either using the competitive bidding process or making the contract by direct negotiation. If the city chooses to use the competitive bidding process, it must likely comply with the requirements of this process even though it was not originally required. If direct negotiation is used, the city must get at least two quotations when possible and keep them on file for at least one year.

c. Contracts \$25,000 or less

If the price of the contract is estimated to be \$25,000 or less, the city has discretion to make the contract by obtaining quotations or it may simply buy or sell the item on the “open market.” If the city chooses to use quotations for the contract, it shall be based, as far as practicable, on at least two quotations which shall be kept on file for at least one year.

d. Calculating estimated contract price

Because the competitive bidding law applies to the estimated contract price, it can sometimes be difficult to determine whether a specific contract is subject to the law.

RELEVANT LINKS:

Minn. Stat. § 16C.28, subd. 1(c).

See Innovative Contracting, Minnesota Department of Transportation for additional resources.

Minn. Stat. § 16C.28, subd. 1a (c).

Minn. Stat. § 471.345, subd. 2.

Hubbard Broad., Inc. v. Metro. Sports Comm'n, 381 N.W.2d 842 (Minn. 1986).

Schwandt Sanitation of Paynesville v. City of Paynesville, 423 N.W.2d 59 (Minn. Ct. App. 1988). A.G. Op. 707-A (Feb. 8, 1990).

Minn. Stat. § 471.345, subd. 4.

Minn. Stat. § 471.345, subd. 5.

Minn. Stat. § 471.345, subd. 16.

The criteria used to evaluate best value contracting proposals must be included in the RFP. The RFP must also state the relative weight of price and other selection criteria. If an interview of the vendor or contractor's personnel is a factor in the selection criteria, the relative weight of the interview must be stated in the RFP and applied accordingly.

It appears that cities are limited to using best value contracting for either one project annually or 20 percent of their projects, whichever is greater for the first three fiscal years in which best value contracting is used.

E. Exemptions, exceptions, and alternatives

While the types of contracts subject to competitive bidding are broadly defined, a number of city contracts, purchases, or related agreements are not subject to the competitive bidding law. The following are some of the most common exemptions, exceptions, or alternatives to competitive bidding:

- **Non-contracts.** An agreement that does not meet the definition of a contract under the competitive bidding law is exempt from the competitive bidding requirements. For example, an agreement in which a company supplied a special scoreboard system in exchange for the right to sell or lease advertising space on it was found to be exempt because it was not only a contract for "materials, supplies, or equipment." Likewise, contracts for refuse hauling and janitorial services were also found to be exempt from the competitive bidding requirements.
- **Contracts below the competitive bidding threshold, but above \$25,000.** As an alternative to competitive bidding, contracts that are estimated to cost more than \$25,000, but not more than \$175,000, may be made by direct negotiation. If direct negotiation is used, the council must seek at least two quotations when possible and keep them on file for at least one year after receipt.
- **Contracts of \$25,000 or less.** If a contract is estimated to be \$25,000 or less, the city has the choice of making the contract upon quotation or in the "open market." If the city makes the contract upon quotation, it shall be based, as far as practicable, on at least two quotations which shall be kept on file for at least one year after their receipt.
- **Electronic purchases through reverse auctions.** Cities may, regardless of costs, contract for the purchase of supplies, materials, and equipment through an electronic reverse auction process. Vendors compete to provide the requested supplies, materials, or equipment at the lowest selling price in an open and interactive electronic environment.

RELEVANT LINKS:

Minn. Stat. § 471.345, subd. 17.

Minn. Stat. § 471.345, subds. 3a, 4a, and 5.
Minn. Stat. § 412.311, subd. 2.
See Section I-D, *Best value contracting*.

Minn. Stat. § 471.345, subd. 10.

Minn. Stat. § 471.345, subd. 11.

Minn. Stat. § 471.345, subd. 13.

Minn. Stat. § 465.035. Minn. Stat. § 471.64.
A.G. Op. 59-A-15 (Mar. 30, 1965).
A.G. Op. 707a (Mar. 5, 1986).

A.G. Op. 707a-15 (Sept. 14, 1987).
Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N.W. 635 (1937).

Krohnberg v. Pass, 187 Minn. 73, 244 N.W. 329 (1932). *Schwandt Sanitation of Paynesville v. City of Paynesville*, 423 N.W.2d 59 (Minn. Ct. App. 1988).
A.G. Op. 707a-7 (July 22, 1985). A.G. Op. 707-A (Feb. 8, 1990).

- **Electronic sales of surplus supplies, materials, and equipment.** Cities may, regardless of value, sell surplus, obsolete, or unused supplies, materials, and equipment using an electronic process in which purchasers compete to offer the highest purchase price in an open and interactive environment.
- **Best value contracting.** Under certain circumstances, cities may use best value contracting for construction projects. Best value contracting authorizes cities to consider performance criteria in addition to price in the selection process.
- **Shared hospital or ambulance service contracts.** Certain hospital or ambulance purchases and leases are exempt from competitive bidding if made through a shared service purchasing agreement.
- **Some fuel contracts.** Fuel purchased by municipal power plants for the generation of power may be made using either direct quotations or competitive bidding.
- **Guaranteed energy-savings contracts.** Contracts for energy conservation measures that will reduce energy consumption or operating costs are not subject to competitive bidding. There are additional procedural requirements that must be considered and satisfied.
- **Intergovernmental contracts.** Cities do not need to follow the competitive bidding requirements when contracting for the sale, lease, or purchase of real or personal property with another government entity (federal, state, or political subdivisions).
- **Real estate contracts.** The purchase or sale of real property is generally not required to be competitively bid. However, a home rule charter may require a competitive bidding process for the purchase or sale of real estate.
- **Professional services contracts.** Cities are not required to follow the competitive bidding process when contracting for professional services such as those provided by doctors, engineers, lawyers, architects, accountants, as well as other services requiring technical, scientific, or professional training.

RELEVANT LINKS:

Minn. Stat. § 471.6161.

See Section II- A-1, *Bids and proposals*.

Minn. Stat. § 12.37.

Minn. Stat. § 12.03, subds. 2, 3.

Layne Minn. Co. v. Town of Stuntz, 257 N.W.2d 295 (Minn. 1977).

See Handbook, *Expenditures, Purchasing, and Contracts*.

Village of Excelsior v. F.W. Pearce Corp., 303 Minn. 118, 226 N.W.2d 316 (1975).

Minn. Stat. § 453.59.

Minn. Stat. § 453A.09.

Minn. Stat. § 471.345, subd. 5b.

- **Insurance contracts.** Cities are not required to follow competitive bidding requirements for insurance contracts. However, group insurance coverage for 25 or more employees must be solicited through a request for proposals. The request for proposals must be in writing and must include the coverage to be provided, the criteria for evaluation of carrier proposals, and the aggregate-claims records for the appropriate period. The request for proposals must be published in a newspaper or trade journal for at least 21 days before the final day for submitting proposals.
- **Emergency contracts.** The Emergency Management Act gives cities the ability to declare an emergency for a limited period of time. During an emergency (“an unforeseen combination of circumstances that calls for immediate action to prevent a disaster from developing or occurring”) or disaster (“a situation that creates an actual or imminent serious threat to the health and safety of persons”), cities are not required to use mandated contracting procedures. If the facts of the situation do not indicate that a true emergency existed, such a contract would likely be considered void.
- **Some intergovernmental construction contracts.** Competitive bidding is not required for a cooperative agreement to construct a project with the state or with another political subdivision of the state when the other unit does the construction. This applies only where there is an agreement prior to the initial advertising for bids on the project.
- **Some municipal electric power construction contracts.** A city may contract for the planning, acquisition, construction, reconstruction, operation, maintenance, repair, extension, and improvement of generation and transmission facilities without advertising for bids. The facilities must be located outside of the city’s corporate limits.
- **Some municipal gas construction contracts.** A city may contract for the planning, acquisition, construction, reconstruction, operation, maintenance, repair, extension, and improvement of generation and transmission facilities outside of its corporate limits or those of its members without advertising for bids.
- **Water tank service contracts.** Multi-year contracts for water tower tank maintenance work used to be an exception to competitive bidding such that professional water tank services could be negotiated on the open market. Effective for agreements entered into on or after September 1, 2018, the portion of any water tank maintenance work that includes “sale or purchase of supplies, materials, equipment or the rental thereof, or the construction, alteration, repair, or maintenance of real or personal property” must go through competitive bidding or best value contracting.

RELEVANT LINKS:

Minn. Stat. § 471.35.
Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

Minn. Stat. § 16C.02, subs. 11, 12.

See Appendix A, Outline of a Request for Proposal.

Ad for Sealed Equipment Bid, LMC Model Form.
For construction projects see Section II-B-1, Content – *Responsible contractor requirements*.

Minn. Stat. § 16C.28, subd. 1(c).

Minn. Stat. § 16C.02, subd. 12.

See Section I- D, *Best value contracting*.

Minn. Stat. §§ 471.35-37.
Major Indus., Inc. v. Krech, Ojard & Associates, Inc., No. A04-1052 (Minn. Ct. App. Dec. 21, 2004) (unpublished opinion).

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

- The specifications may not be drawn in such a way as to exclude all but one type or kind of supplies or equipment. The specifications must permit free and unrestricted bidding. However, this does not mean the specifications must be drawn to include every possible bidder.
- In situations where drawing tight specifications would have the effect of unreasonably limiting competition, the city may draw the specifications so as to include a variety of more or less comparable equipment so officials can evaluate the resulting submissions based on overall value. If this kind of procedure is used, it is a good idea to include a statement to that effect within the specifications. This will tell bidders how the bids will be evaluated and what factors will be considered in addition to price. In this type of situation, the specifications should spell out the minimum functions the equipment must perform to be acceptable.

1. Bids and proposals

While often used interchangeably, there are differences between a request for proposals (RFPs) and a request for bids (often referred to as a “bid advertisement” or “advertisement for bids”). A bid advertisement is used to obtain sealed bids that indicate the price for which a bidder is willing to perform a contract that was specifically defined by the city. In contrast, an RFP broadly defines the scope of the contract, and asks interested persons for proposals that specifically define the services that will be offered and the amount they will cost. RFPs are commonly used for contracts that are not required to be competitively bid, such as contracts for professional services.

The best value contracting alternative uses RFPs in the solicitation and selection process. Otherwise, the competitive bidding law does not provide for the use of a “request for proposal.”

2. Noncompetitive supplies and equipment

State law makes it a gross misdemeanor to draft specifications to exclude all but one type of supplies or equipment. However, there is an exception for noncompetitive supplies and equipment. Just what would be considered “noncompetitive” supplies or equipment is not clear. Even though noncompetitive supplies or equipment are an exception from the requirement concerning specifications, they are still subject to the other competitive bidding requirements.

3. Restrictive specifications

Minnesota courts have recognized that some items are not capable of precise specifications.

RELEVANT LINKS:

Minn. Stat. § 574.26.
Minn. Stat. § 471.345, subd.
3.

*Goodin Co. v. City of Prior
Lake*, No. A14-1144 (Minn.
Ct. App. Mar. 9, 2015)
(unpublished opinion).

*Green Elec. Systems, Inc. v.
Metropolitan Airports Com'n*,
486 N.W.2d 819 (Minn. Ct.
App. 1992).

*Local Oil Co., Inc. v. City of
Anoka*, 303 Minn. 537, 225
N.W.2d 849 (1975).

Minn. Stat. § 574.29.
*Collins Elec. Systems, Inc. v.
Redflex Traffic Systems, Inc.*,
No. A07-0675 (Minn. Ct.
App. Apr. 8, 2008)
(unpublished opinion).

Minn. Stat. § 574.26, subd. 3.
Office of the State Auditor,
Statement of Position:
Contract Change-Orders and
Contractor's Bonds, Revised
May 2019.

Minn. Stat. § 574.27.

B. Bonds

While some bonds are specifically required by statute, others are not. Cities often choose to require them to protect the city from costs that it may incur resulting from these contractual relationships.

1. Performance and payment bonds

Before any contract for public work over \$175,000 becomes binding, the contractor must provide a performance bond and a payment bond to the city. (Cities may choose to waive these bonds for projects of \$175,000 or less.) Whether a contract is one for doing of public work “depends on ownership of project, funding of project, scope of municipality's participation in project, and extent project is put to public use.”

The bond amounts must each be in at least the amount of the contract. The performance bond is to guarantee that the contractor will complete the contract according to its terms and conditions and to protect the city from all costs and charges that may accrue in the course of completing the work. The payment bond is to ensure that all workers, subcontractors, and persons furnishing materials are paid.

If a city fails to get a payment bond from a contractor, it can be held liable for losses to any workers, subcontractors, and persons who furnish materials if the contractor doesn't pay them. The city should make sure all subcontractors and material suppliers have been paid by the contractor before making final payment to a contractor.

Although a payment bond and a performance bond are not required for contracts that are \$175,000 or less, cities may want to require these bonds for all contracts.

If the contract price for public work increases due to change orders, unforeseen conditions, cost overruns, or any other reason after the contract is signed, the governing body has the option of increasing the amount of the contractor's payment bond or performance bond.

2. Bid bonds

Cities may require bidders to submit a bid bond with their bids. Generally, a bid bond ensures the city does not waste its time with a frivolous bid. It guarantees the bidder will enter into a contract with the bid that was submitted and provide the required bonds and insurance.

RELEVANT LINKS:

LMC Marketplace.

Ad for Sealed Construction Project Bid, LMC Model Form.

Ryan v. City of Coon Rapids, 462 N.W.2d 420 (Minn. Ct. App. 1990).

Minn. Stat. § 16C.285.

See responsible contractor clause for bid solicitation in *Ad for Sealed Construction Project Bid, LMC Model Form.*

Minn. Stat. § 16C.285. (A “responsible contractor” must verify compliance with various state and federal requirements, including tax, workers’ compensation, unemployment insurance, wage, and safety requirements).

In addition, the city may want to mail an invitation or personally contact those contractors it thinks might be interested in submitting a bid.

The League will post, at no cost to member cities, bid advertisements on its website.

1. Content—Responsible contractor requirements

The published notice should contain the following information:

- A description of the project or purchase being sought.
- The availability and location of specifications.
- Bid requirements (such as sealed bids or accompanying security).
- Where bids must be submitted.
- The deadline for submitting bids.
- The time and place of the bid opening.
- The city officers who will be present for the opening.
- A statement indicating that the city may delay the award until certain events occur.
- A statement indicating that the city reserves the right to reject all bids submitted.

Effective Jan. 1, 2015, specific content must appear in the solicitation document for a public construction “project” that is estimated to exceed \$50,000 and is awarded pursuant to a lowest responsible bidder selection method or a best value selection method. The amount of any tax increment financing must be excluded in determining whether a construction contract exceeds \$50,000. A “project” means “building, erection, construction, alteration, remodeling, demolition, or repair of buildings, real property, highways, roads, bridges, or other construction work performed pursuant to a construction contract.”

First, the solicitation document shall state that any prime contractor, subcontractor, or motor carrier that does not meet the minimum criteria established for a “responsible contractor” as defined in Minn. Stat. § 16C.285, subd. 3 or fails to comply with the verification requirements is not a responsible contractor and is not eligible to be awarded a construction contract for the project or to perform work on the project. Second, the solicitation document shall provide that a false statement under oath verifying compliance with any of the minimum criteria shall make the prime contractor, subcontractor, or motor carrier that makes the false statement ineligible to be awarded a construction project and may result in termination of a contract awarded to a prime contractor, subcontractor, or motor carrier that submits a false statement. Third, the solicitation document shall state that a prime contractor shall include in its verification of compliance a list of all of its first-tier subcontractors that it intends to retain for work on the project.

RELEVANT LINKS:

Minn. Stat. § 16C.285.

See sample Responsible Contractor Verification and Certification of Compliance, Minnesota Department of Transportation.

Minn. Stat. § 325L.02 (h).

Minn. Stat. § 16C.285, subd. 5.

Minn. Stat. § 16C.285, subd. 4.

Minn. Stat. § 412.311.

Minn. Stat. § 410.33.

A responding contractor shall submit to the city a signed statement under oath by an owner or officer verifying compliance with the required minimum criteria at the time that it responds to the solicitation document. A city may accept a signed statement as sufficient to demonstrate that a contractor is a responsible contractor and shall not be held liable for awarding a contract in reasonable reliance on that statement. A verification of compliance does not need to be notarized. An electronic verification of compliance made and submitted as part of an electronic bid shall be acceptable verification of compliance if it contains an electronic signature that complies with the definition in state law.

Before execution of a construction contract, a prime contractor shall submit a supplemental verification under oath confirming that all subcontractors and motor carriers that the contractor intends to use to perform project work have verified to the prime contractor, through a signed statement under oath by an owner or officer, that they meet the minimum criteria for a responsible contractor. In addition, each contractor or subcontractor shall obtain from all subcontractors with which it will have a direct contractual relationship a signed statement under oath by an owner or officer verifying that they meet the minimum criteria before execution of a construction contract with each subcontractor.

A city shall not be liable for declining to award a contract or terminating a contract based on a reasonable determination that the contractor failed to verify compliance with the minimum criteria or falsely stated that it meets the minimum criteria.

2. Time

Several factors must be considered when deciding how long an advertisement for bids must be published. It is important to consider the type of contract being advertised.

Depending upon the particular city and its policies or charter requirements, there may be special advertising requirements.

a. General publication requirements

In statutory cities, bids must be solicited by notice published once in the official newspaper at least 10 days before the last day for submission of a bid.

Home rule charter cities should consult their charters for any special advertisement requirements. If the charter is silent with regard to this matter, a city may utilize the requirement for statutory cities of advertising by published notice in the official newspaper at least 10 days before the last day for submitting bids.

RELEVANT LINKS:

Minn. Stat. § 429.031, subd. 1.
Minn. Stat. § 429.041, subd. 1.
See LMC information memo, *Special Assessment Toolkit*.

Minn. Stat. § 429.041, subd. 1.

Minn. Stat. § 331A.01, subd. 11.

Minn. Stat. § 412.311.

Minn. Stat. § 429.041, subd. 1.

Minn. Stat. § 331A.01, subd. 11.

Minn. Stat. § 429.041, subd. 1.

Minn. Stat. § 331A.03.

See LMC information memo, *Newspaper Publication*.

Minn. Stat. § 331A.03.

b. Local improvement contracts

If a city is making a contract for a local improvement under the special assessment statutes, there are special public notice and hearing requirements. Since these requirements must be met prior to advertising and awarding the contract, they are not addressed in this memo.

There are two possible advertisement requirements when seeking bids for this type of contract:

- **Bids for a local improvement contract estimated to exceed \$175,000.**
The city must advertise for bids in the official newspaper or in a recognized trade journal for the length of time the council may deem advisable. (Statutory cities must still meet the 10-day minimum advertising requirement.)
- **Bids for improvement contracts estimated to exceed \$350,000.**
If the estimated cost of the contract exceeds twice the \$175,000 threshold, or \$350,000, the publication must be made at least three weeks before the last day to submit bids. The advertisement must be published at least once in the official newspaper and at least once in a newspaper that is published in a First Class city or in a recognized trade journal.

The advertisement must specify the work to be done and state the time when the council will publicly open the bids for consideration. The advertisement must require that the bids be sealed (unless the city authorizes electronic bids), filed with the clerk, and accompanied by a cashier's check, bid bond, or certified check made payable to the clerk.

3. Alternative notice

Under certain circumstances, cities are authorized to use two alternative means of providing notice for bid advertisements either in addition to, or as an alternative to, the statutory requirements for newspaper publication.

The two alternative means of providing notice are on the city's website or in a recognized trade journal.

There are conditions that must be met when a city uses an alternative means of dissemination:

- The alternative dissemination must be in substantially the same format and for the same period of time as required for newspaper publication.
- The city must simultaneously publish, either as part of its regular meeting minutes or in a separate notice, a description of all the solicitations being disseminated through alternative means.

RELEVANT LINKS:

Minn. Stat. § 412.311, subd. 1.
Minn. Stat. § 429.041, subd. 2.

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947). *Foley Bros., Inc. v. Marshall*, 266 Minn. 259, 123 N.W.2d 387 (1963).

State v. Snively, 175 Minn. 379, 221 N.W. 535 (1928). *Kelling v. Edwards*, 116 Minn. 484, 134 N.W. 221 (1912).

Nielsen v. City of St. Paul, 252 Minn. 12, 88 N.W.2d 853 (1958).

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

Otter Tail Power Co. v. Village of Wheaton, 235 Minn. 123, 49 N.W.2d 804 (1951).

D. Investigation of bids

After all bids have been opened, the council should investigate them. Information should be obtained to help the council evaluate each of the bidders. This may be carried out by the city engineer, purchasing agent, clerk, or other designated person. The following elements are usually considered during the evaluation process:

- The responsibility of the bidder and the probability of the bidder's adequate performance.
- Compliance with specifications.
- Reasonableness (including how the bids compare to cost estimates).
- Any other relevant factors.

1. Lowest responsible bidder

Statutory city contracts and contracts of all cities for improvements under the local improvement code must generally go to the "lowest responsible bidder." Most home rule city charters contain similar requirements, with terms such as "lowest bidder" or "lowest and best bidder" describing their selection process.

The phrase "lowest responsible bidder" does not mean the lowest bidder, but the lowest bidder who is most likely to do faithful, conscientious work and promptly fulfill the contract according to its letter and spirit. In determining who the lowest responsible bidder is, the courts have said that the council has reasonable discretion.

The successful bidder must be considered "responsible" to perform the proposed contract. "Responsibility" includes such things as the bidder's financial responsibility, integrity, ability, skill, and likelihood of providing faithful and satisfactory performance.

In determining the lowest responsible bid, the council may take into consideration not only the lowest price offered, but also the actual capability of a given vendor to perform the proposed contract and whether the bidder has adequately met the terms and conditions of the bid specifications.

The council has somewhat more latitude in purchasing items of equipment that are not capable of exact specifications. In making such a purchase, a council may exercise reasonable discretion in determining the lowest responsible bidder. In addition to the bid price, it may consider the quality, suitability, and adaptability of the equipment.

In some situations, the council may decide what weight to give to various factors and accept what it deems to be the lowest responsible bid.

RELEVANT LINKS:

A.G. Op. 707a-15 (Oct. 25, 1966).

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951). *Leskinen v. Pucelj*, 262 Minn. 461, 115 N.W.2d 346 (1962).

Sutton v. City of St. Paul, 234 Minn. 263, 48 N.W.2d 436 (1951). *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947). A.G. Op. 980-B (June 2, 1950). *Duffy v. Village of Princeton*, 240 Minn. 9, 60 N.W.2d 27 (1953).

Diamond v. City of Mankato, 89 Minn. 48, 93 N.W. 911 (1903). *Coller v. City of St. Paul*, 223 Minn. 376, 26 N.W.2d 835 (1947).

LeTourneau v. Hugo, 90 Minn. 420, 97 N.W. 115 (1903).

A.G. Op. 707-B-7 (May 21, 1946).

A.G. Op. 707-a-4 (June 4, 1947).

Rochon Corp. v. City of Saint Paul, 814 N.W.2d 365 (Minn. Ct. App. 2012).

Such a situation occurred when plans and specifications for the construction of a power plant demanded the consideration of several factors and no single bid was the lowest in all the factors. The court agreed the city council could use its discretion to determine which elements were the most important and said that such a contract will not be set aside without an abuse of discretion.

In awarding a contract for the purchase of an item, such as a police car, a council may be able to consider the proximity of repair and service facilities in addition to the bid's price.

In extreme situations, time and certainty of delivery may be grounds for not choosing the lowest bidder. However, when a city is awarding a contract on a basis other than the lowest bid, it should be able to justify its decision.

2. Conformity to plans and specifications

A successful bid must conform to the bid specifications. Unless the bid responds to the specifications in all material respects, it is not a bid but a new proposition and, therefore, should be rejected.

A bidder who has deviated from the specifications may still be awarded the contract if it was not a material deviation. The general rule is that a variance is material if it gives a bidder a substantial advantage or benefit over other bidders. Whether a material variance exists is a fact question that must be dealt with on a case-by-case basis. The following deviations were found to be material:

- A difference in the contract's payment date that was four months earlier than the date provided for in the specifications.
- A stipulation that the equipment sold to the city be installed according to the company's specifications instead of those of the city, and failure of the bidder to agree to pay for a city inspector during the six-month trial period as called for in the specifications.
- Modification to allow a bidder earlier payment and a change of specifications to relieve the bidder from completion penalties if the delayed performance was due to circumstances beyond the bidder's control.
- Bidder's deviation by adding a 10-percent escalation clause.
- Submission of a single bid for an entire contract when the specifications asked for separate bids for the contract's four parts.
- Allowing a bidder to increase its bid because of a mathematical error and selecting the modified bid because even after the modification the increased bid was still the lowest.

RELEVANT LINKS:

Minn. Stat. § 181.59.
Borom v. City of St. Paul, 289
Minn. 371, 184 N.W.2d 595
(1971).

Minn. Stat. §§ 177.41-44.
A.G. Op. (Jan. 14, 1988).
A.G. Op. (July 15, 1988).

NewMech Co. v. Indep. Sch.
Dist. No. 206, 540 N.W.2d
801 (Minn. 1995).

40 U.S.C. §§ 3141-3148.

7. Non-discrimination

All public contracts for materials, supplies, or construction must contain a statement where the contractor promises not to discriminate against prospective employees because of race, creed, or color. In addition, many state and federal grants contain requirements that construction contracts include language to ensure contractors do not discriminate with regard to age, race, sex, religion, nationality, and disability.

8. Prevailing wage

The wages paid to those working on city projects may also be a concern.

a. Minnesota law (Little Davis Bacon)

The wages of laborers, workers, and mechanics on projects financed in whole or in part by state funds should be comparable to wages paid for similar work in the community as a whole.

There is no clear definition of what constitutes “state funds” for the purpose of this requirement. Certainly, the definition would include any specific state grants a city might get for a particular project. It also may include such things as local government aid and other state aids.

Some have claimed money that has been kept in the same fund with any of these types of aids would qualify as state funds since it has commingled with such funds.

However, the Minnesota Supreme Court found that Debt Service Equalization Aid (DSEA) and Homestead and Agricultural Credit Aid (HACA) did not trigger the prevailing wage requirements in a school construction contract. The reasoning behind this decision was that these aids lacked a direct relationship to the project.

If a city has any doubts, it will probably want to be sure that at least the prevailing wages are paid. Otherwise, a city may want to be certain only non-state funds, or money that has been kept separate from anything that might be seen as state funds, are used to pay for the project.

b. Federal law (Davis Bacon)

There is a similar federal prevailing wage requirement for all public work contracts in which the United States or the District of Columbia is a party.

9. Project labor agreements

A project labor agreement (PLA) is an agreement between the city’s contractor and a union that is sometimes required by cities.

RELEVANT LINKS:

Queen City Constr., Inc. v. City of Rochester, 604 N.W.2d 368 (Minn. Ct. App. 1999).

Minn. Chapter of Associated Builders and Contractors, Inc. v. Minnetonka Indep. Sch. Dist. No. 276, C2-99-837 (Minn. Ct. App. Dec. 28, 1999) (unpublished opinion).

A.G. Op. 707a-15 (Oct. 8, 1945).

Minn. Stat. § 429.041, subd. 1.

See Section I. E. *Exemptions, exceptions, and alternatives*.

Minn. Stat. § 429.041, subd. 7.

Under this type of agreement, the project's contractor agrees to designate a particular labor organization as the exclusive bargaining representative for all employees working on the project. In addition, the contractor agrees to employ only contractors and subcontractors who agree to abide by the terms of a specific collective bargaining agreement. In return, the union agrees there will be no strikes, picketing, slowdowns, or similar disruptions during the project.

The Minnesota Court of Appeals appears to support the ability of cities to require PLAs. In a 1999 decision, the Minnesota Court of Appeals found that nothing in Minnesota law prevents a public entity from imposing a bid specification that requires successful bidders to sign a PLA.

In a challenge to a school district's PLA requirement on a construction project, the contractor claimed the PLA had an anti-competitive effect. However, in an unpublished decision, the court found that a PLA would not have an anti-competitive effect because Minnesota's prevailing wage law would require contractors on a project to pay wages essentially equivalent to union wages.

D. Contractual changes after award

Sometimes, changes to a contract are considered after the contract has been awarded.

1. Adding on to contracts

When one construction job is the subject of competitive bidding and the contract has been let, another job may not be added to the contract at a later time. This would give the contractor an unfair advantage since other prospective contractors did not have an opportunity to bid on the second job. However, cities may combine two or more improvements in one advertisement and in one contract, if the contract is made under the special assessment statutes.

A change to add new work to a contract may not need to be competitively bid if the total added cost is \$175,000 or less. Because the cost is below the competitive bidding threshold, it is arguable that bidding would not be mandatory. However, cities should exercise caution in this area.

A city council may authorize changes in a unit price contract that is made under the special assessment statutes.

After the work on a unit price contract has begun, the council may authorize additional units of work at the same unit price, as long as the total contract price does not increase by more than 25 percent. The city may do this without re-advertising for bids.

RELEVANT LINKS:

Village of Excelsior v. F.W. Pearce Corp., 303 Minn. 118, 226 N.W.2d 316 (1975).

Carson v. City of Dawson, 129 Minn. 453, 152 N.W. 842 (1915).

Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minn., 298 Minn. 328, 215 N.W.2d 479 (1974).

Lundstrom Constr. Co. v. Dygert, 254 Minn. 224, 94 N.W.2d 527 (1959).

Shaw v. First Baptist Church of Winona, 44 Minn. 22, 46 N.W. 146 (1890).

Carson v. City of Dawson, 129 Minn. 453, 152 N.W. 842 (1915).

In applying this provision, a court approved the addition to the contract of one political subdivision of units of work to be done by another political subdivision, as long as the 25 percent restriction was not exceeded. The court found the variable in the contract was the total estimated number of units and the constant was the unit price. Therefore, no harm resulted from amending a factor that may change under many different circumstances. The harm to protect against was an unreasonable unit price, and that factor was not a proper subject of the contract modification.

2. Changes in work

A city may be able to make alterations or require extra work because of errors in plans, unforeseen conditions, or other similar reasons.

Construction contracts often contain language that authorizes these types of necessary changes. Such provisions may permit a city to make some minor changes in the work, if the changes are ordered in writing. However, cities should use caution when ordering changes in work since this type of requirement has given rise to a considerable amount of litigation.

Sometimes these provisions include a requirement that estimates must accompany or precede the order. These provisions are generally valid. A provision requiring written notice to the city of claims for extra cost is similar in effect.

Such provisions are intended as a check on the contractor, and, being for the benefit of the city, may be insisted upon or waived depending upon what best suits the city’s needs.

When the contract with the principal contractor contains such a notice provision, it is applicable to both the principal contractor and any subcontractors involved on the project.

What constitutes “extras” has also been the subject of litigation. For example, a city contract provided that the city had the right to make alterations in extent, dimensions, form of plans, or location of the work, and also provided that no claims for extra labor or material were allowed unless ordered in writing by the city. Here, the court found these provisions to be independent. As a result, when the changes that were made increased the expense, the contractors could recover the value of the necessary labor and material even though no written order had been given.

If the “extras” are needed because of errors in the specifications or unforeseen conditions, the contractor may have a right to recover because of misrepresentation. In this type of situation, a written order would not be necessary.

Appendix A: Outline of a Request for Proposal

Outline of a Request for Proposal (RFP)

I. Introduction

The City of _____ is seeking proposals from qualified firms interested in providing _____ services to the city.

II. Scope of services

(This section can contain a detailed description of the service that is being sought.)

III. Instructions to proposers

Proposals must be in writing and must be received by (time) on (date), (year). All proposals, questions, and correspondence should be directed to: (name of city staff and address of office.) In order to ensure a fair review and selection process, firms submitting proposals are prohibited from contacting any other city staff or councilmembers regarding these proposals.

IV. Statement of content of RFP

- A. Title page (*name, address, phone, contact person, date*)
- B. Table of contents
- C. Statement of the proposal (*work, timetable, availability*)
- D. Consultant's/firm's profile/history/experience (*client references*)
- E. Fees and method of payment

V. Proposal evaluations

(This section can outline the criteria that the council will use to evaluate the proposals.)

VI. Agreement terms

(This section can outline the negotiation procedures, any ethics policies, and other terms that the proposals must meet.)

VII. City's timetable

(This section can address such things as the day that the proposals will be opened, when interviews will be scheduled, and when the selection will be made.)

VIII. Other information

(This section can cover background information on the city, claims, record information for insurance purposes, or other information that might be important for firms to know when submitting their proposals.)