

Basic Legal Issues for Bid Solicitation and School Purchasing



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Introduction

- **Patchwork of statutes and case law**
- **Purpose**
 - **Equal opportunity**
 - **Prevent favoritism, fraud, corruption and extravagance**
 - **Avoid misuse of public funds**
 - **Obtain best price**
 - **Obtain best product or service**
 - **Benefit and protect taxpayer**

Duty to Seek Bids

- **“Under common law, and generally, there is no requirement that public contracts be let by competitive bidding in the absence of a statutory provision requiring such a bidding process. In that regard, competitive bidding is not an essential prerequisite to the validity of . . .**

Duty to Seek Bids

- ... contracts with public bodies, and the government has the unrestricted power to determine with whom it will deal, and to fix the terms and conditions upon which it will make purchases. However, even in those instances where a public body has no duty to require bids in letting . .

Duty to Seek Bids

- ... public contracts, it must act in the public interest, and must be fair, honest, and exercise a wise discretion in the awarding of public contracts.”

Neb. Op. Atty. Gen No. 03008 (April 9, 2003) citing 72 C.J.S. Supp. Public Contracts.

Duty to Seek Bids

- **In other words, NO DUTY to seek bids in absence of constitutional provision or statute requiring it**
- **Cities, Counties, and State have many mandatory bidding provisions that do not apply to school districts, but those statutes can provide helpful guidance to schools**

Duty to Seek Bids

- **Generally competitive bidding is in best interest of public even when not required**
- **Contract for matter requiring bids is void in absence of competitive bidding**

Emergencies

- **SOME courts - bidding requirements do not apply in emergency.**
- **Emergency expenditures MAY be allowed without competitive bidding, but be careful how you define “emergency.”**
- **DO NOT count on it in Nebraska**

Professional Services

- **Attorney, architect, engineer, surveyor, accountant, auditor, real estate appraisers, insurance broker**
- **Relationships based on**
 - **Skill, ability, training and knowledge**
 - **Experience, trust and competence**
 - **Financial responsibility**
- **Lowest bid could = least amount of all of the above.**

Nebraska Bidding Statutes

73-101 – Public lettings

Whenever . . . the officers of any school district . . . shall advertise for bids in pursuance of any statutes of the State of Nebraska, on any **road contract work** or any **public improvements work**, or for **supplies, construction, repairs, and improvements**, and in **all other cases where bids** for supplies or work, of any character whatsoever, **are received** for the [school district] . . .

Nebraska Bidding Statutes

73-101 – Public lettings

... they shall fix not only **the day upon which such bids shall be returned, received, or opened,** as provided by other statutes, but shall also fix **the hour at which such bids shall close, or be received or opened,** and they shall also provide that such bids shall be **immediately and simultaneously opened in the presence of the bidders,** or representatives of the bidders, when the hour is reached for the bids to close.

Nebraska Bidding Statutes

- **73-101.01 and .02 – Resident Bidder and Exceptions**
- **73-102 – FLSA Statement of Compliance**
- **73-103 – FLSA Disqualification**
- **73-104 – FLS Defined – wages and conditions of employment paid by 50% of contractors in same business**

Nebraska Bidding Statutes

- **73-105 – Violations and Penalties**
 - **Early opening or disclosure or violation of 79-101 through 104 = Class IV misdemeanor (\$100-\$500 fine)**

Nebraska Bidding Statutes

Section 73-106 – School Districts

- If a school spends **\$40,000** or more for **construction, remodeling, or repair** of any school-owned building or for site improvements, **must advertise** for bids in manner established by **board policy** and **accept or reject bids as in 73-101**.
- Does not apply to acquisition of existing buildings, purchase of new sites, or site expansions.

Nebraska Bidding Statutes

- **Competitive bidding statutes are strictly construed against schools if public bids are required**
- **However, competitive bidding statutes should not be extended beyond their clear implications**

Threshold \$ Amounts

- **More than \$40,000 for Construction, remodeling, or repair of any school-owned building or for site improvements**
- **Goods and services – no bidding requirements by law**
- **Check your policies!**

Bid Splitting

- Is the “work” considered one contract or can it be split into different contracts?
- Contracts are invalid IF the work is split up to avoid \$ amount in statute
 - *Elview Const. Co., Inc v. North Scott Community School Dist.*, 373 N.W.2d (Iowa 1985) \$25,000 limit/26 contracts

Bid Splitting

- **Generally must include labor and materials together**
- ***State ex rel. Schuler v. Board of County Comm'rs*, 210 Neb. 594 (1982)**
 - **Individual gravel orders less than \$5,000, total orders more than \$15,000**
 - **Individual commissioners ordered gravel as needed**
 - **No bid splitting violation**

PSCAA

- **Political Subdivisions Construction Alternatives Act**
 - **Construction Manager at Risk**
 - **Design Build**
- **Specific policy, bidding, RFP, and evaluation requirements**

Energy Financing Contract

BEFORE entering into EFC:

- **Provide 14 Days' Public Notice of:**
 - **Intention to enter into EFC**
 - **General nature of proposed work**
 - **Contact information**
- **Solicit RFQs – at least 3**
- **Obtain Written Opinion**

Bidding Process

- **Involves 3 vital principles:**
 - **Offering to public**
 - **Opportunity for competition**
 - **Basis for exact comparison of bids**
- **Advertisement**
- **Bid Submissions**
- **Public Opening**
- **Award**

Bid Solicitation

- **Certainty**
- **Modification of Specs**
- **Give enough information so that bidders know what they are bidding on!**
- **Must be sufficiently certain and definite to secure a fair basis for competitive bidding**

Bid Solicitation

- **Essential details required,
nonessential details not required**

Advertising

- **Newspaper of general circulation**
- **Publish reasonable time in advance**
- **Check your policy!**

Bid Submission & Opening

- **Must be made no later than date and time provided in solicitation**
- **Bids must be immediately and simultaneously opened in the presence of the bidders or their representatives when bidding is closed**
- **Cannot receive bids after deadline**

Debarment and Suspension

- **Prohibit individuals or entities from bidding**
- **Due to wrongful conduct or violation of public contract**

Awarding or Rejecting the Bid

State ex rel. Woodruff-Dunlap Printing Co. v. Cornell, 52 Neb. 25 (1897)

- Statute required advertisement and competitive bidding, but silent on how/who to award.
- Court said award to lowest responsible bidder.

Awarding or Rejecting the Bid

- **Lowest**
- **Responsive – complies with bidding documents**
- **Nonresponsive**
 - **Material defect (nonwaivable) v. minor variation (waivable)**

Awarding or Rejecting the Bid

- **“Material variance” is a variance that give a bidder substantial advantage or benefit not enjoyed by other bidders.**
- **Requires rejection of bid**
- **Compared to “minor variance”**

Awarding or Rejecting the Bid

- **Determining the lowest responsible bidder is a two-step process.**
- **1) Determine which bidders are responsible to perform the contract.**
 - **Responsible is not merely a synonym for a bidder's pecuniary ability.**
 - **Pertains to bidder's ability and capacity to carry on the work, his equipment and facilities . . .**

Awarding or Rejecting the Bid

- ... promptness, quality of work previously done, suitability to particular task, and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, he could perform it strictly in accordance with its terms.

Awarding or Rejecting the Bid

- In short, consider honesty, integrity, skills, business judgment, experience, equipment, facilities, past performance.
- Only bidders that are deemed responsible are proper for further consideration and ultimate approval.
- Responsibility determination is at school's discretion.

Awarding or Rejecting the Bid

- **2) Determine lowest bid.**
- **Lowest price not necessarily determinative**
- **School has discretion to determine whether and what bids offer the best value**
- **Early completion date and quality of materials may offer more value**

Rejecting Bids

- **Reserve right to reject all bids in RFP**
 - **Rejection may not be done arbitrarily or without cause.**
 - **Must be done to protect the school or to avoid collusion, fraud, or other similar cause (*Cornell*)**
- **Bids exceed expected cost or appropriations**

Rejecting Bids

- **You have power to accept or reject bids, but not power to make a material change to terms of bid or allow bidder to amend bid after opening**
- **Document, Document, Document reasons for rejection and award**

Bid, Performance & Payment Security

- **Bid Bond**
 - Not required, but highly recommended
- **Performance and Payment Bond**
 - Required by 52-118
 - Amount not less than contract price
 - Requires performance and payment of labor and materials
 - Does not apply to projects below \$10K
 - Bond v. letter of credit or cash deposit

Bids as Public Records

- **Public record includes “all records and documents . . . belonging to . . . any . . . political subdivision.”**
- **Exception: trade secrets . . . and other proprietary or commercial information which if released would give advantage to business competitors & serve no public purpose**

Challenges to Award

- **Courts give deference when reviewing challenges to a school's responsibility determinations and award decisions.**

Challenges to Award

- **If school acts from honest convictions, based upon facts, and as it believes for the best interests of the school, and there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, courts will not interfere and substitute its judgment**

Challenges to Award

- **In other words, whenever a public body has discretion to make a decision during the bidding process, a court is essentially limited to reviewing that decision for bad faith.**

How to Shop 'til You Drop: Basic Legal Issues for Bid Solicitation and School Purchasing



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