

## **PUBLIC IMPROVEMENT PROJECT THRESHOLDS FOR BIDDING AND ARCHITECTURAL AND ENGINEERING SERVICES - BACKGROUND MEMORANDUM**

Section 1 of 2009 Senate Bill No. 2401 (attached as an [appendix](#)) directs the Legislative Council to study public improvement and capital construction bid requirements, plans and specifications, and the employment of architects and engineers. Senate Bill No. 2401, as introduced, would have increased the threshold from \$100,000 to \$200,000 for certain capital construction and public improvement contracts that must be open to bidding or which require an architect or engineer to provide the plans and specifications. The bill addressed two issues. The first issue was whether a public entity must advertise for bids when contracting for the construction of a public improvement project. The second issue was whether a public entity must retain a registered design professional for the specifications and design of a public improvement project.

Historically, the threshold was \$50,000 in 1995 and was increased to \$100,000 in 1997. The language in the study directive in its broadest terms directs a study of capital construction bid requirements; public improvement bid requirements, designs, and specifications; and the employment of architects and the employment of engineers. The study may be simplified in terms to be a study of public improvement project thresholds for bidding and for architectural and engineering services. This simplification of terms does not narrow the scope of the study because capital construction projects are included within the term public improvement projects and plans and specifications are relevant inasmuch as who develops the plans and specifications, whether that be an architect, engineer, the public entity, or other person.

### **STATUTORY PROVISIONS**

The definitions of terms used in this study are contained in North Dakota Century Code (NDCC) Section 48-01.2-01. The term public improvement means any improvement undertaken by a governing body of a state entity or a political subdivision for the good of the public and which is paid for with public funds and constructed on public land or within a public building and includes an improvement on public or nonpublic land if any portion of the construction phase of the project is paid for with public funds. The term does not include county road construction and maintenance, state highway, or Public Service Commission project governed by Title 11 relating to counties, Title 24 relating to highways, or Title 38 relating to mining and gas or oil production. The term construction or constructed means the process of building, altering, repairing, improving, or demolishing any public structure or building or other improvement

to any public property. The term does not include the routine operation or maintenance of existing facilities, structures, buildings, or real property or demolition projects costing not more than \$100,000.

Senate Bill No. 2401, as introduced, addressed seven sections of the North Dakota Century Code. Three of the sections of law related to when a public entity must retain a design professional. Four of the sections of law related to bidding threshold limits for public improvement projects. The three sections of law relating to design professionals were Sections 18-12-04, 43-19.1-28, and 48-01.2-02.

North Dakota Century Code Section 18-12-04 requires all plans and specifications for school construction in excess of \$100,000 to be prepared and supervised by an architect or engineer registered in this state. In particular, a design professional is required for all plans and specifications for the construction of all new school buildings, additions, and remodeling of school buildings, public and private, at either elementary, secondary, or instructional areas of institutions of higher education.

North Dakota Century Code Section 43-19.1-28 requires the state and political subdivisions to use a professional engineer for the construction of public works that exceed \$100,000 involving the practice of professional engineering. These services include drawings, specifications, estimates, the supervision of construction administration, and construction observation.

North Dakota Century Code Section 48-01.2-02 requires the governing body of a state entity or political subdivision to procure plans, drawings, and specifications for a public improvement in excess of \$100,000 from an architect or engineer except in certain limited circumstances.

The four sections of law in Senate Bill No. 2401, as introduced, relating to bidding limits were NDCC Sections 48-01.2-01, 48-01.2-04, 48-01.2-06, and 48-01.2-10.

North Dakota Century Code Section 48-01.2-01 provides definitions for the chapter on public improvement bids and contracts. The definition of construction excludes routine operation or maintenance or demolition projects costing not more than \$100,000.

North Dakota Century Code Section 48-01.2-04 requires the governing body of the state entity or political subdivision to advertise for bids for three consecutive weeks at least 21 days before the date of opening bids in the official newspaper of the political subdivision in which the public improvement will be located and in a trade publication of general

circulation once a week for two weeks at least 14 days before bid opening.

North Dakota Century Code Section 48-01.2-06 requires multiple prime bids for the general, electrical, and mechanical portions of a public improvement project if the combination of contracts is in excess of \$100,000. The section allows a multiple prime bid to be included within another prime contract if not more than \$25,000. The section allows a governing body of a state entity or political subdivision to accept the submission of a single prime bid if the bid is lower than the combined total of the lowest responsible multiple bids for the project.

North Dakota Century Code Section 48-01.2-10 requires a governing body of the state entity or political subdivision to require a contractor to provide a bond for a public improvement in excess of \$100,000. The bond must be equal to at least the price stated in the contract for the performance of all terms, conditions, and provisions of the contract and to pay all bills and claims on account of labor performed and supplies and material furnished in the performance of the contract.

### **SUGGESTED STUDY APPROACH**

Public improvement contracts were studied during the 2005-06 interim by the Legislative Council's Industry, Business, and Labor Committee. As part of

that study the committee received testimony from representatives of a construction industry working group. This group, called The Construction Leaders Coalition, has continued to meet since that time and is meeting on the issues contained in this study. As a result of recommendations of the coalition, the Industry, Business, and Labor Committee recommended a bill that was approved during the 2007 legislative session. House Bill No. 1033 consolidated and clarified the laws on bidding and public improvement contracts and allowed state and local governments to use the construction management delivery method. The commission may wish to receive testimony from the coalition on suggested solutions to the issues raised by this study.

Other groups and persons with an interest include state entities, political subdivisions, architects, engineers, contractors, and surety companies. Surety companies have an interest in keeping the threshold at a low monetary amount so that there is more demand performance bonds. From information provided by surety companies, the thresholds for bonding, which generally track the same thresholds of the study, range from \$0 to \$200,000. The great majority range from \$25,000 to \$100,000.

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