

## **TESTIMONY ON TITLE 48 – PUBLIC BUILDINGS**

My name is Bonnie Johnson and I serve as the Cass County Administrator. In that capacity, I am here today to speak on behalf of the Cass County Board of Commissioners regarding the legislative study on Title 48/Public Buildings.

I have been involved in the construction of the Cass County Annex, (\$4.5M); the Cass County Jail (\$20M and \$4M), and am currently working on an addition to the historic Cass County Courthouse (\$14M estimate). For each of these projects, the Board has appointed me the project manager, so I have experience in most every facet of the process, beginning with project conception and continuing through construction completion. Once a building project is complete, it is also my job to "commission" the new structure to operational function, and it becomes a permanent part of the facilities management program in Cass County. I am also responsible for small remodeling projects at the Courthouse, or other county buildings, from start to finish.

I was asked by the North Dakota Association of Counties to present testimony to your committee, and I would like to discuss several items that may warrant further review by your committee.

### **Title 48- Public Buildings**

#### **A. Lowest responsible bid vs. qualified bidders (See 48-01.2-07)**

- What is the best public policy?
- What about the "public gains" in project continuity?

Awarding contracts to the lowest bidder is optimistic at best and dangerous at worst. While it is widely used, I would argue it's not widely successful.

The lowest price is dangerous because you don't know why it's low. I've listed a couple of thoughts:

1. The bidder may misunderstand the difficulty of the task.
2. They underestimate the task or are looking to make it up in change orders later when they say the specification was not clear or open to an alternative interpretation.
3. They understand the task and are deliberately bidding low because they are eager (or desperate) for your business.
4. They understand the task, and have outstanding skills which will allow them to complete it quickly.

Only the last reason is a good one. The others, to greater or lesser degrees, may all threaten a good public project. Yet, in terms of price, they all look the same.

Price tells you nothing about capability. A low price may signal superior capability (reason #4), inferior capability (reason #1), desperation (reason #3) or nothing (reason #2).

Enabling the owners of public building projects to qualify and screen bidders may yield the taxpayer optimum results. Qualifying bidder criteria could include experience/references on previous or similar projects; years in business; and experience of the firm's staff, in addition to the "responsible" bidder attributes added in 2007 language.

**B. Index for inflation ...\$100,000 limit (See 48-01.2.02)**

The current "ceiling" maximum deserves attention by this committee. While I don't know the last time the limit was raised, I would recommend periodic revisions to account for any inflationary values in the marketplace.

For example, Cass County cannot even re-shingle the roof of the Courthouse without using the complexities of a bidding process because the price would be in excess of \$100,000. While one might argue, every job at a public building should be bid, I would suggest shingling might not be one of them.

In these circumstances, Cass County would prefer issuing an RFP, (Request for Proposals), to qualified companies, where we would outline the scope of work and receive competitive pricing responses. We need value and quality with a warranty we know can be honored.

If the \$100,000 limit were raised to a more realistic number, such as \$250,000, local government might be better positioned to work with local companies on small projects rather than have large bidders from other cities/counties.

**C. Purpose of the bid bond (See 48-01.2-05)**

A bid bond is required of every contractor submitting a bid on projects that meet the required thresholds. If a contractor then refuses to undertake the project, the bid bond assures (lol) the owner will be paid the difference between the lowest bid and the next lowest bid. The bid bond encourages contractors to make serious bids. Using a bid bond theoretically assures the owner the contractor is financially secure.

The bid bond is markedly different than the performance bond, which is based on the value of a project. A public entity could use this bond, (% of project), to complete unfinished work left by the contractor or to pay sub-contractors who were not paid by the general contractor.

We believe the bid bond component is necessary for larger projects, but we prefer the RFP process for smaller jobs, i.e. under \$100,000.

**D. Specifying brands or patented articles (See 48-01.2-03)**

- Good for the taxpayer?
- Continuity in expansion projects?
- Public efficiency?

While there is certainly a case to be made for not allowing brand specification, the converse can also be true. I believe it may prudent to carve out a few exceptions to the "named brand" or "like equivalent".

One exception might be in a project dealing with public safety and security, in public buildings. This could include a sophisticated security system in a county jail or a keyless entry system in a county courthouse. Public safety should not be compromised for the sake of a "similar" system.

A second exception may be an expansion project AHU (Air Handling Unit) system. When interfacing parts, sequencing and software, should public buildings be held to a higher standard, resulting in labor intensive trouble shooting and change orders to programming?

## **E. Conclusion**

Thank you for the opportunity to share my thoughts on public building construction. Cass County Government has built a number of projects in the last decade and is poised to begin a Courthouse addition this spring or summer. If you have other questions that I might answer that may assist you in your legislative study, please let me know.



99-294 [100 Stat. 426; 43 U.S.C. 390a], must be licensed for the full amount of the bid as required by sections 43-07-05 and 43-07-12. For projects using funds provided under Public Law No. 99-294 [100 Stat. 426; 43 U.S.C. 390a], the advertisement must state that, unless a bidder obtains a contractor's license for the full amount of its bid within twenty days after it is determined the bidder is the lowest responsible bidder, the bid must be rejected and the contract awarded to the next lowest responsible bidder.

6. That no bid may be read or considered if the bid does not fully comply with the requirements of this section and that any deficient bid submitted must be resealed and returned to the bidder immediately.
7. That the governing body reserves the right to reject any and all bids and rebid the project until a satisfactory bid is received.

Source: S.L. 2007, ch. 403, § 14.

**48-01.2-06. Bid requirements for public improvements.** Multiple prime bids for the general, electrical, and mechanical portions of a project are required when any individual general, electrical, or mechanical contract or any combination of individual contracts is in excess of one hundred thousand dollars. If a general, mechanical, or electrical contract is estimated to be less than twenty-five thousand dollars, the contract may be included in one of the other prime contracts. A governing body may allow submission of a single prime bid for the complete project or bids for other specialized portions of the project. A governing body may not accept the single prime bid unless that bid is lower than the combined total of the lowest responsible multiple bids for the project.

Source: S.L. 2007, ch. 403, § 14.

**48-01.2-07. Opening of bids — Award of contract.** At the time and place specified in the notice, a governing body shall open publicly and read aloud each responsible bid received and award the contract to the lowest responsible bidder. A governing body may reject any and all bids and readvertise for bids if no bid is satisfactory or if the governing body determines any agreement has been entered by the bidders or others to prevent competition. The governing body may advertise for new bids in accordance with this chapter until a satisfactory bid is received.

Source: S.L. 2007, ch. 403, § 14.

#### DECISIONS UNDER PRIOR LAW

##### Substantial Compliance.

County was allowed to exercise some discretion in awarding the public improvement construction contract to the "lowest responsible bidder" and, when coupled with the use

of the date of completion as an item of competition, the county was allowed to exercise discretion to consider the bidder's ability, capacity, reputation, experience, and efficiency. *Baukol Builders, Inc. v. County of Grand Forks*, 2008 ND 116, 751 N.W.2d 191, 2008 N.D. LEXIS 117 (June 9, 2008) (decided under former N.D.C.C. § 48-01.1-03).

**48-01.2-08. Officers must not be interested in contract.** A governing body, or any member, employee, or appointee of a governing body, may not be pecuniarily interested or concerned in a contract for a public improvement entered by the governing body.



- or property and which ends when the immediate threat to public health, safety, or property ceases and services are restored. The term does not include a lack of planning on the part of the governing body, architect, engineer, landscape architect, or contractor.
14. "Engineer" means an individual registered as an engineer under chapter 43-19.
  15. "General conditions" means the written portion of a contract setting forth the governing body's minimum acceptable performance requirements, including the rights, responsibilities, and relationships of the parties involved in the performance of the contract.
  16. "Governing body" means the governing officer or board of a state entity or a political subdivision.
  17. "Guaranteed maximum price" means the maximum amount a construction manager at-risk may be paid under a contract to construct a public improvement.
  18. "Landscape architect services" means landscape architecture services governed under chapter 43-03.
  19. "Lowest responsible bidder" means the lowest best bidder for the project considering past experience, financial condition, past work with the governing body, and other pertinent attributes that may be identified in the advertisement for bids.
  20. "Public improvement" means any improvement undertaken by a governing body 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 a county road construction and maintenance, state highway, or public service commission project governed by title 11, 24, or 38.
  21. "Subcontractor" means a person that contracts to perform work or render a service to a contractor or to another subcontractor as part of a contract with a governing body.

Source: S.L. 2007, ch. 403, § 14.

**Effective Date.**

This chapter became effective August 1, 2007.

**48-01.2-02. Plans and specifications for a public improvement contract.** Except as otherwise provided in this chapter, if a contract for the construction of a public improvement is estimated to cost in excess of one hundred thousand dollars, the governing body shall procure plans, drawings, and specifications for the improvement from an architect or engineer. For a public building in use by or to be used by the North Dakota agricultural experiment station in connection with farm or agricultural research operations, the plans, drawings, and specifications, with the approval of the state board of higher education, may be prepared by an engineer in the regular employment of the agricultural experiment station. For a public building in use by or to be used by the department of transportation for the storage and housing of road materials or road machinery, equipment, and tools, the plans, drawings, and specifications may be prepared by an engineer employed by the department of transportation.

Source: S.L. 2007, ch. 403, § 14.



**48-01.2-03. Specified brands, marks, names, or patented articles may not be specified.** A governing body, in specifying materials to be used for a public improvement or in plans or specifications for a public improvement, may not request bids for any article of a specified or copyrighted brand or name, the product of any one manufacturer, or any patented apparatus or appliance when the requirement will prevent proper competition, unless the specifications also request bids on other similar articles of equal value, utility, and merit.

Source: S.L. 2007, ch. 403, § 14.

**48-01.2-04. Publication of advertisement for bids — Emergency exception.**

1. Except as otherwise provided in this chapter, if the construction of a public improvement is estimated to cost in excess of one hundred thousand dollars, the governing body shall advertise for bids by publishing for three consecutive weeks. The first publication of the advertisement must be at least twenty-one days before the date of the opening of bids. The advertisement must be published in the official newspaper of the political subdivision in which the public improvement is or will be located, and in a trade publication of general circulation among the contractors, building manufacturers, and dealers in this state, except the advertisement for a public improvement financed by special assessments need be published only once each week for two weeks in the official newspaper with the first publication being at least fourteen days before the bid opening.
2. If a governing body declares an emergency situation, the governing body may contract for the construction of a public improvement without seeking bids.

Source: S.L. 2007, ch. 403, § 14.

**48-01.2-05. Contents of advertisement.** The advertisement for bids required by section 48-01.2-04 must state:

1. The nature of the work and the type and location of the proposed public improvement.
2. When and where the plans, drawings, and specifications may be seen and examined.
3. The place, date, and time the bids will be opened.
4. That each bid must be accompanied by a separate envelope containing the contractor's license and bid security. The bid security must be in a sum equal to five percent of the full amount of the bid and must be in the form of a bidder's bond. A bidder's bond must be executed by the bidder as principal and by a surety, conditioned that if the principal's bid is accepted and the contract awarded to the principal, the principal, within ten days after notice of the award, shall execute a contract in accordance with the terms of the bid and the bid bond and any condition of the governing body. A countersignature of a bid bond is not required under this section. If a successful bidder does not execute a contract within the ten days allowed, the bidder's bond must be forfeited to the governing body and the project awarded to the next lowest responsible bidder.
5. That a bidder, except a bidder on a municipal, rural, and industrial water supply project using funds provided under Public Law No.



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7. That the governing body reserves the right to reject any and all bids and rebid the project until a satisfactory bid is received.

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