

# Legal Brief

## Awarding Contracts for Public Works Projects

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It may still technically be winter, but it won't be long before you will be seeking public bids for contracts for public works projects—if you haven't already done so. In many cases, the contracts for those projects must be let through a competitive bidding process. The purpose of this column is to set forth some of the issues concerning the competitive-bidding process. It discusses how to decide whether bidding is required and how to examine the bids to determine who is the lowest responsible bidder. It also briefly discusses whether municipalities have the ability to include local hiring preferences in public works contracts.

### **Determining whether competitive bidding is required:**

Competitive bidding is a process designed to promote honest, open, and fair government and to ensure that the municipality receives the best work at the lowest prices.<sup>1</sup> **Compared to some other units of government<sup>2</sup>, however, municipalities do not face stringent bidding requirements under State statute.** For municipalities, the statute mandates only that certain public works projects are let by competitive bidding.<sup>3</sup> The general rule under the Illinois Municipal Code is that a contract for the construction of any work or other public improvement must be let by competitive bidding if the expense of that project will exceed \$20,000.<sup>4</sup> There are, however, a number of exceptions to this general rule.

The first exception is the subject matter of the contract. The competitive-bidding statute concerns only contracts for a work or other public improvement. This does not include contracts for supplies<sup>5</sup> or for services that are not connected with the public-works project.<sup>6</sup> Additionally certain professional services that are connected to the project may also be exempt. Architectural, engineering, or land-surveying services do not fall under the competitive bidding requirements, instead, those services must be selected based on qualifications and experience.<sup>7</sup>

A second exception concerns the method by which a project is financed. The competitive bidding-statute specifically exempts those projects that are paid in whole or in part by a special assessment or special taxation.<sup>8</sup>

Another exception occurs when 2/3rds of the aldermen or trustees elected vote to award a contract without competitive bidding.<sup>9</sup> Note here that the statute specifically refers to aldermen or trustees. The mayor or president is not included in that count. Additionally, the municipality may, by a vote of 2/3rds of the aldermen or trustees, opt to construct the work itself using its own employees, which the municipality must pay by the day or by the hour. In this instance, however, all material with a value of \$20,000 or more that is used in the construction of the project must be purchased through a contract let by competitive bidding.<sup>10</sup>

Finally, the competitive bidding statute does not apply to any contract with the federal government or any agency of the federal government.<sup>11</sup>

It should also be noted that the competitive bidding-statute does not preempt home-rule powers. Home rule municipalities have the power to change the bidding requirements by ordinance.

The Illinois Municipal Code also authorizes—but does not require—municipalities to pass an ordinance providing that all municipal supplies be furnished by contract subject to competitive bidding.<sup>12</sup> So it is important to know about any additional ordinance pertaining to bidding requirements.

### **Advertisements for Bids:**

Municipalities generally have broad discretion in designing the competitive-bidding process. If it is decided that competitive bidding is required, then competitive bidding statutes require only that the municipality advertise the bids in the manner set forth by ordinance.<sup>13</sup> But there are some limitations. Bidders have the right to participate in a fair bidding process.<sup>14</sup> Municipalities should take care that the bidding process is fair to all bidders and that all bid specifications are clear and unambiguous—or they risk litigation.<sup>15</sup> Other statutes set forth bidding standards that could be of guidance for municipal practitioners. These statutes include the competitive bidding requirements for the City of Chicago<sup>16</sup> and the requirements for the State of Illinois.<sup>17</sup> For example, Chicago’s competitive bidding statute requires that the following information be included in its advertisements for bids:

- A description of the character of the proposed contract in sufficient detail to enable bidders to know what their obligations will be;
- The date, time, and place for opening bids; and
- Any required bid deposit.<sup>18</sup>

You should look at these and criteria from other statutes and ordinances to help ensure that your bidding process will both attract the best possible bidders and avoid litigation by those who claim that they were improperly excluded from the process.

### **Determining the lowest responsible (and responsive) bidder:**

If a municipality lets a contract by competitive bidding, then the contract must be awarded to the lowest responsible bidder.<sup>19</sup> While it is (hopefully) easy to determine who the lowest bidder is, it is a bit more complicated determining who is the lowest “responsible” bidder. It is not as simple as looking at the bottom line contract price.

#### *Criteria for determining a responsible bidder:*

The competitive bidding statute does not define what constitutes a “responsible bidder”. The Illinois Procurement Code currently defines a “responsible bidder” as “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability that will assure good faith performance.”<sup>20</sup> This statute, however, is for State contracts, and it does not apply as a requirement upon municipalities. Municipalities have the authority to prescribe the requirements of a responsible bidder by ordinance,<sup>21</sup> but the State definition is a reasonable one. With respect to municipal bidding requirements, the Illinois Supreme Court has

defined “responsible bidder” as one that is “financially responsible and is able to discharge one’s obligations ‘in accordance with what may be expected or demanded under the terms of the contract.’”<sup>22</sup>

Municipalities may include other criteria if they so choose, provided the bidding process is fair to all bidders. When municipalities use State money for a public works contract, however, they must follow the rules set out by the ruling State agency, such as the Illinois EPA or Department of Transportation.

*Criteria for determining a responsive bidder:*

Although none of the competitive-bidding statutes that apply to municipalities use the term “responsive” with respect to bidders, Illinois law requires that winning bidders not only be the lowest responsible—they must also be responsive. For a bidder to claim that it was the lowest responsible bidder, it must have complied with all of the requirements of and submitted all of the materials and information in the invitation for bids.<sup>23</sup>

In one case, for example, in, a water district awarded a public works contract to another bidder, despite the fact the plaintiffs submitted the lowest bid for the project. Although the plaintiffs submitted the lowest bid, the water district denied their bid because they failed to sign a page in the bid packet—even though they were informed that the signature was required. Following the denial of its bid on the project, the plaintiffs filed an action seeking a preliminary injunction against the District to prevent it from awarding the contract to the other bidder. The appellate court denied the plaintiffs’ preliminary injunction because it determined that they, among other things, did not submit a *responsive* bid because they failed to sign the required page, and they did not show that the failure to include the required page was an immaterial variance.<sup>24</sup>

Thus, for a contractor to successfully challenge a public works contract award, the contractor must show that it was the lowest, responsive, and responsible bidder.

Conclusion:

Competitive bidding is a process that could help your municipality obtain the best contract for the best price. It is designed to promote honest, open, and fair government, and it will help avoid any appearance of impropriety in awarding contracts. Your municipality has broad discretion to determine when and how the competitive bidding process will work.

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*This monthly column examines issues of general concern to municipal officers. It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney. As always, when confronted with a legal question, contact your municipal attorney as certain unique circumstances may alter any conclusions reached herein.*

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<sup>1</sup> O'Hare Express, Inc. v. City of Chicago, 235 Ill. App.3d 202 (1<sup>st</sup> Dist. 1992); see also, 10 E. McQuillin, Municipal Corporations § 29.29, at 375 (3d ed. 1966).

<sup>2</sup> See e.g., 55 ILCS 5/5-1022 (counties are required to competitively bid for services, materials, equipment, and supplies); 70 ILCS 1205/8-1 (park district must competitively bid for supplies, materials, or work); and 60 ILCS 1/85-30 (townships must competitively bid for services, material, equipment, or supplies).

<sup>3</sup> 65 ILCS 5/8-9-1. Notably, the courts have declared that competitive bidding statutes are to be narrowly construed. See, People ex rel Adamowski v. Daley, 22 Ill. App.2d 87 (1<sup>st</sup> Dist. 1959).

<sup>4</sup> Id. Note, however, that this statute does not govern bidding in Chicago. Bidding requirements for the City of Chicago are covered under Division 10 of Article 8 of the Municipal Code (65 ILCS 5/8-10-1 et seq.).

<sup>5</sup> See 65 ILCS 5/8-9-2 (authorizing municipalities to require competitive bidding on supply contracts at their discretion).

<sup>6</sup> See Young v. Village of Glen Ellyn, 120 Ill. App.3d 692 (2<sup>nd</sup> Dist. 1983); Western Lion Limited v. City of Mattoon, 123 Ill. App.3d 381 (4<sup>th</sup> Dist. 1984)(holding that competitive bidding is not required for garbage-collection contracts).

<sup>7</sup> See generally, The Local Government Professional Services Selection Act (50 ILCS 510/).

<sup>8</sup> 65 ILCS 5/8-9-1.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> 65 ILCS 5/8-9-2.

<sup>13</sup> 65 ILCS 5/8-9-1.

<sup>14</sup> Keefe-Shea Joint Venture, Inc. v. City of Evanston, 332 Ill. App. 3d 163, 172 (1st Dist. 2002); app'1 den. 201 Ill. 2d 570 (2002).

<sup>15</sup> See generally, W.H. Lyman Construction Co. v. Village of Gurnee, 131 Ill. App.3d 87 (2<sup>nd</sup> Dist. 1985).

<sup>16</sup> 65 ILCS 5/8-10-1 et seq.

<sup>17</sup> 30 ILCS 500/20-5 et seq.

<sup>18</sup> 65 ILCS 5/8-10-7. Note that the advertisement, itself, may set forth the description of the contract or it may refer to may refer to detailed plans and specifications on file at the time of the advertisement. Id.

<sup>19</sup> 65 ILCS 5/8-9-1.

<sup>20</sup> 30 ILCS 500/1-15.80. Beginning July 1, 2010, Section 1-15.80 of the Illinois Procurement Code will read in its entirety as follows:

Section 1-15.80. Responsible bidder or offeror. "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability that will assure good faith performance. A responsible bidder or offeror shall not include a business or other entity that does not exist as a legal entity at the time a bid or proposal is submitted for a State contract.

<sup>21</sup> See Williams Brothers Construction, Inc. v. Public Building Comm'n of Kane County, 243 Ill. App. 3d 949 (2d Dist. 1993).

<sup>22</sup> Joseph J. Henderson and Son v. Crystal Lake, 318 Ill. App.3d 880, 885 (2d Dist. 2001); quoting S. N. Nielsen Co. v. Public Building Comm'n, 81 Ill.2d 290, 299 (1980); quoting People ex rel. Peterson v. Omen, 290 Ill. 59, 67 (1919).

<sup>23</sup> See Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago, 97 Ill. App. 3d 340 (1st Dist. 1981); Bodine Electric of Champaign v. City of Champaign, 305 Ill. App. 3d 431 (4th Dist. 1999); George W. Kennedy Construction Co. v. City of Chicago, 135 Ill. App. 3d 306 (1st Dist. 1985), vacated on other grounds, 112 Ill. 2d 70 (1986).

<sup>24</sup> Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago, 389 Ill. App. 3d 138 (1st Dist. 2009).