

Court upholds bid rejection

Good bid documents eliminate confusion, make it easier to compare bids after they are opened, help ensure you get the lowest prices, and protect your right to ensure quality work.

IN A RULING announced this spring, the state Court of Appeals agreed that the Town of Pittsfield rightfully rejected the lowest bid on a repair project. DMK Inc., the low bidder at \$538,600, had sued the town for damages of \$216,000 for lost profits.

At the bid review meeting, Town Board members discussed their concerns about DMK's poor performance on prior contracts. They decided to award the contract to others.

"The case reinforces what I think was the law," says Rick Stadelman, Executive Director of the Wis. Towns Association. "The trial court and Court of Appeals upheld that the town has a right to make a finding that DMK was not a responsible bidder."

Good bid documents, which helped the town in this lawsuit, are very useful. They eliminate confusion, make it easier to com-

pare bids after they are opened, help ensure you get the lowest prices, and protect your right to ensure quality work.

Wisconsin municipalities are required to use the bidding process and award to the lowest bidder for local road projects over \$25,000. (The minimum was raised by the Legislature in May 2006.) While meeting this requirement does take time and effort, the benefits are substantial. To help out, the TIC has prepared sample bid documents for local road projects.

The TIC samples walk you through the decisions you need to make and use WisDOT specifications familiar to most local contractors. You need to describe your project and determine the details of where and when you want the work completed. Be sure the documents say that you reserve the right to reject the low-

est bid if the bidder is not considered responsible.

Schedule enough time to handle potential issues that may arise. It is a good idea to leave at least two weeks after the bid opening before you must make the award. Put those dates in the bid documents before you send them out.

As a public road agency you have the right and obligation to select contractors who will provide quality work. You may also reject bids that are not "responsive"—that add or delete items from those you requested be bid. Using a different sealcoat than specified is an example.

After opening bids, be careful in your deliberations and decision. If you decide to change the project, based on an alternate bid, for example, then you should re-bid it so all bidders can provide prices on the revised project.

If you decide the lowest bidder is not responsible, you must formally

RESOURCES

Print copies of publications are available free from the TIC while supplies last. Electronic copies may be downloaded from the TIC Web site.

Videos, CDs, DVDs and other media are loaned free through county UW-Extension offices.

The Web addresses listed here and elsewhere in this newsletter are live in the electronic version of **CROSSROADS** on the TIC Web page. Clicking them should take you directly to the indicated page. If you are not able to retrieve a document, contact us and we will get a print version to you.

TIC Web site

<http://tic.engr.wisc.edu/>

Publications

Gravel Roads Maintenance and Design Manual (FHWA/South Dakota LTAP April 2005) is available from TIC. This manual is a practical guide for building and maintaining gravel roads. You can view pages at www.ltapt2.org/gravel/gravelroads.htm or download from www.epa.gov/owow/nps/gravelman.pdf

How To Keep Beavers from Plugging Culverts (USDA Forest Service, November 2005, 0577-2830-MTDC) is available from TIC.

Trenching & Tunneling Near Trees—A Field Pocket Guide for Qualified Utility Workers, Dr. James R. Fazio, The National Arbor Day Foundation. A practical, pocket-sized guide that shows how to minimize tree damage for projects that involve trenching or boring. If you dig around trees you should have this guide in your pocket.

TIC publications (in print or on web site)

Gravel-PASER Manual, Pavement Surface Evaluation and Rating is intended to help you plan the maintenance and overall management of gravel roads. It discusses common problems and typical repairs and includes a simple system for evaluating conditions and rating roads.

Dust Control on Unpaved Roads, No. 13 discusses where and when to use dust control and provides information on materials for dust control and proper application procedures. Also on TIC web site.

REVISED

The update of **Work Zone Safety: Guidelines for Construction, Maintenance, and Utility Operations** (2006) is available from TIC in a convenient flipbook format.

Websites

The Minnesota Local Technical Assistance Program has a series of two-page safety tip sheets that can be useful for your safety meetings. Download at: www.mnltap.umn.edu/publications/safety-tips/

Topics currently available are:

Abrasive Wheel Machinery and Tools

Fleet Safety: Backing Accidents

Forklift Operation

Heat Stress

Ladders

Safe Lifting Techniques

Medical Services at Construction Job Sites

Personal Fall-Protection Systems

Scaffolding 101: The Basics

Excavation Requirements

An article in the spring 2006 issue of **Crossroads** included links to general information on Wisconsin plant species and invasives. A common-name list of plants is at: www.botany.wisc.edu/wisflora/CNList.asp Click on the common name to be linked to photos of the plant and a map showing Wisconsin counties where it is found. A photo gallery of invasive plant species is available at: www.dnr.state.wi.us/invasives/photos/index.asp?SF=Common

record the decision and state your reasons. "Put it into a motion that says "We find "X" not a responsible bidder," and take a vote," says Stadelman. "The Town of Pittsfield didn't do this and that gave DMK an argument in its lawsuit."

According to the Wis. Statutes:

"Responsible bidder means a person who, in the judgment of the town board, is financially responsible and has the capacity and competence to faithfully and responsibly comply with the terms of the public contract. —Sec. 60.47(b)

"The town board must use their judgment based on the criteria in the law, not just personal likes or friends," says Stadelman. "Past performance in the town or in other towns is the best evidence of responsibility."

Save time; plan alternates

After DMK threatened to sue, town board members tried to negotiate. They offered DMK two of the

projects if it would waive its right to sue. DMK wanted three projects, arguing that their bid was based on the cost of doing all five. Doing two would be less profitable since fixed costs would take a bigger bite out of the total. The town refused and DMK sued.

"Negotiating alternates outside the bidding process is unfair to the other bidders," says Stadelman. "In court DMK argued that the offer of two projects was in effect a statement that he was a responsible bidder." The court rejected that argument.

Consider including alternates in your bid documents, Stadelman recommends. For example, in this case they could have asked for individual bids for each single project as well as for the whole group. "You might get a lower total cost," he says. "And you have the option to choose a different low bid on each item."

Court extends protection

An important new precedent in this case is what the court decided about the contractor's remedy. They rejected the demand for lost profits. They said that the contractor must first apply for an injunction to keep the town from awarding the contracts to other bidders. They also determined that the damages would be limited to the cost of doing the bidding.

"This is good for towns because it means they won't end up paying double—both to the contractor that does the work and to a rejected contractor that sues later for lost profits," Stadelman says.

DMK petitioned the Wisconsin Supreme Court to review the case. On May 11, the Court denied the petition. This means that the Court of Appeals decision will stand as reported.

Bidding minimum raised

The state Legislature changed bidding requirements in May 2006. They raised the minimum project size to \$25,000 from \$15,000. This applies to all towns, villages, cities, sanitary districts, and federated library systems in the state. The limit for counties is also \$25,000 and was not changed.

Order sample bid documents on CD or hard copy from the TIC. See [Resources](#).

Videotapes/Multimedia

REVISED *2006 TIC Video Catalog* Updated listing of 300 video tapes and DVDs in the TIC Library. Excellent for training. Topics include pavements, maintenance, safety, management, and liability. One copy is being sent to each local agency, and additional copies can be ordered from the TIC. Available electronically on the Web page.

Gravel Road Maintenance: Meeting the Challenge, Univ. of Minnesota Center for Transportation Studies, 2005. DVD and CD #188802.

The DVD has video modules on Correct Roadway Shape, Shaping the Roadway, Good Surface Gravel, and Dust Control. The CD has the instructor's guide and the FHWA *Gravel Roads Maintenance and Design Manual*.

Managing Pavement Edge Drop-offs ... to Improve Safety and Reduce Tort Liability, US FHWA Safety Office, 2006, CD-ROM #18810.

Presentations on pavement edge drop-offs including safety issues, research findings, and construction and maintenance practices. Has video and Power-Point presentation materials from the 2/04 Atlanta workshop, "Managing Pavement Edge Drop-offs" and the 1/05 follow-up session in Washington, DC. Includes PDF format documents and drawings.

Dangerous Travelers: Controlling Invasive Plants Along America's Roadways, USDA Forest Service, DVD, 26 min., #18818

Best management practices to help road maintenance crews control the rapid spread of invasive plants. Highlights plant identification, inventory systems, mapping, mechanical removal, herbicide treatments, weed-free products, maintenance techniques, and cleaning equipment.

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