



## **Woodbury County Law Enforcement Center Authority**

620 Douglas St., Room 104

Sioux City, Iowa 51101

712 – 279-6525

Ron Wieck - Chair

Dan Moore - Secretary

Rocky De Witt - Treasurer

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### **Agenda**

September 14, 2021 3:00 p.m.

First Floor Boardroom, County Courthouse

#### **3:00 p.m.** Call Meeting to Order

1. Approval of the agenda
2. Approval of the minutes of the August 27, 2021 meeting
3. Approval of claims
4. Discuss and Approve Alt. #1 - County Attorney space
5. Discuss and approve Alt.#3 - Secure Fence
6. Discussion on LEC project status
7. Woodbury County Law Enforcement Center Authority Capital Improvement Projects, quality assurance policies, resolution, and provisions- action item
8. Commissioners concerns

### **ADJOURNMENT**

# *Woodbury County Law Enforcement Center Authority*

## **Minutes**

August 27, 2021 10:00 a.m.

First Floor Boardroom, County Courthouse

Attendance:

Members: Rocky De Witt, Ron Wieck, Dan Moore

Staff: Karen James, Dennis Butler, Kenny Schmitz

Meeting was called to order at 10:00 a.m.

1. Motion by De Witt, second by Moore to approve the agenda. Carried 3-0
2. Motion by De Witt, second by Moore to approve the minutes of the August 10, 2021 meeting. Carried 3-0
3. Motion by De Witt, second by Moore to receive Notice to Proceed document. Carried 3-0

Motion by De Witt, second by Moore to change the project address from South 28<sup>th</sup> Street to 28<sup>th</sup> Street on the Notice to Proceed document. Carried 3-0

Motion by De Witt, second by Moore to approve Chairman to sign the notice to proceed. Carried 3-0

4. Motion by De Witt, second by Moore to receive AGCS Marine Insurance Company quotation. Carried 3-0

Motion by De Witt, second by Moore to make no changes to the Builder's Risk Policy. Carried 3-0

5. Motion by De Witt, second by Moore to authorize Chairman to write letter to city to get city bond waved for LEC project main. Carried 3-0

6. Motion by De Witt, second by Moore to receive Davis-Bacon Act Question – Answer from Eryn Hurley, NACO

Shane Albrecht, Baker Group discussed the Davis-Bacon and prevailing wage for LEC project.

7. Motion by De Witt, second by Moore to receive letter from CW Suter. Carried 3-0

It was the consensus of the Authority not to post Supervisor Matthew Ung's letter on the LEC Authority Facebook page.

Dennis Butler gave an update on the taxable bonds and tax exempt bonds.

Motion by De Witt, second by Moore to adjourn.

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Dan Moore, Secretary



Woodbury County

# Expense Approval Report

By Segment (Select Below)

Post Dates 9/14/2021 - 9/14/2021

Vendor Name	Account Number	Payable Number	Description (Item)	Post Date	Amount
<b>Office: 45 - Law Enforcement Authority</b>					
Hausmann Construction, Inc.	4750-45-9111-000-61003	21-068-002	Jail Project - Construction - Pay...	09/14/2021	52,250.00
Hausmann Construction, Inc.	4750-45-9111-000-61003	21-068-003	Jail Project - Construction - Pay...	09/14/2021	56,715.00
Certified Testing Services Inc	4750-45-9111-000-61008	SC43536	Jail Project - Site Prep - Testing	09/14/2021	590.00
<b>Office 45 - Law Enforcement Authority Total:</b>					<b>109,555.00</b>
<b>Grand Total:</b>					<b>109,555.00</b>

## Report Summary

### Fund Summary

Fund	Expense Amount	Payment Amount
4750 - Construction Law Enforcement Authority	109,555.00	0.00
<b>Grand Total:</b>	<b>109,555.00</b>	<b>0.00</b>

### Account Summary

Account Number	Account Name	Expense Amount	Payment Amount
4750-45-9111-000-61003	Construction	108,965.00	0.00
4750-45-9111-000-61008	Site Prep - Testing	590.00	0.00
<b>Grand Total:</b>		<b>109,555.00</b>	<b>0.00</b>

### Project Account Summary

Project Account Key	Expense Amount	Payment Amount
4750-9111-CONSTRUCTION	108,965.00	0.00
4750-9111-SITE PREP TEST	590.00	0.00
<b>Grand Total:</b>	<b>109,555.00</b>	<b>0.00</b>

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August 31, 2021

Kenny Schmitz  
Building Services Director  
401 8<sup>th</sup> Street  
Sioux City, Iowa 51101

Dear Mr. Schmitz,

I would like to pass on some concerns over the use of the Quality Assurance Questionnaire as part of the procurement documents. I believe the intent of the document is to give the Owner the ability to review a potential contractor's credentials and assure the County that they indeed have a responsive and responsible contractor and avoid potential performance, financial or legal issues during the course of a construction project. However, in my opinion, this document has created some unexpected and counterproductive issues.

While the intent of the Quality Assurance Questionnaire may have been good, a large portion of it is redundant to the standard contract documents already in place. The AIA document A701, Instructions to Bidders, which is part of the binding contract documents that Bidders must acknowledge, states that Bidders are aware and comply with the governing rules, laws and regulations, tax laws, registration and bonding requirements that apply to the State of Iowa and meets all qualifications indicated in the Procurement and Contracting Documents. It also states that the Bidder complies with the laws and regulations of "Iowa's Contractor Law" and with the contracting requirements of the LEC Authority and each of its members. Article 6 of the A701 Instructions to Bidders gives the Owner the ability to request any and all information permitted by law from the Contractor and gives the Owner the rights to accept or reject any bid on determination of a Contractor being properly qualified to carry out the obligations of the contract.

AIA document A201, General Conditions of the Contract for Construction covers in great detail the Owner's, Architect's and Contractor's rights, responsibilities and roles for the project. More specifically, this document covers the Contractor's agreement to comply with all applicable laws, statutes, codes, rules and regulations having jurisdiction over the project, including the US Department of Labor and the Occupational Safety and Health Standards.

The questions regarding a Contractor's financial standing, current and past litigation, again seem like valid questions to ask, but can also create a slippery slope. Depending on the Contractor's response to these questions, and any explanation provided with that response, they could potentially become a double-edged sword. A contractor may have a negative answer to a question, but also have a justifiable reason for a negative response. These questions and subsequent responses are subject to a matter of opinion. At the point this Questionnaire becomes part of public record, a Contractor that wasn't selected could potentially file a bid protest or take other legal action on the grounds they feel the awarded Contractor should have been disqualified based on a particular question's response. On the other hand, if the low bid Contractor was not awarded the project and felt it was due to a "negative" response to a specific question, they could potentially do the same. In any of these events, if any legal actions were to be taken this would negatively impact the project from both a time and potentially a cost standpoint. As we have seen on the LEC project, this type of opinion or interpretation has cost the



LEC Authority, the County, the Baker Group and our firm an exorbitant amount of time and effort addressing disgruntled individuals' and organizations' views.

In closing, I feel that with the tools already in place within the contract documents, the Owner and their team have the ability to verify a Contractor and their Sub-contractors' qualifications and ability to successfully complete a building project.

Sincerely,

---

Kevin Rost, AIA

Sr. Project Architect

Goldberg Group Architects, PC

CC: Shane Albrecht, Baker Group  
GGA File



**SUTER**  
*Service that suits you!*

August 30, 2021

Kenny Schmitz  
Building Services Director – Woodbury County  
401 8<sup>th</sup> St.  
Sioux City, Iowa 51101

Dear Mr. Schmitz,

The last project that we bid for Woodbury County we were asked to respond to a Quality Assurance Questionnaire. The questionnaire seems to be a duplication of two aspects of what is required for most large projects. The first aspect is bonding and the steps that a contractor goes through to get bonded by a bonding company. The bonding company has the contractor's financial information, knows if the contractor has not performed on a prior project, and if there have been in legal issues in the past. The second aspect is the AIA documents that are used for bidding the project and when the contract is awarded.

In my opinion requiring a bond and utilizing the proper AIA documents would suffice in ensuring that a capable contractor is selected for projects being bid for Woodbury County. If you have any questions please let me know.

Regards,

John Baker  
President CEO  
C.W. Suter Services



## Kenny Schmitz

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**From:** Steve Thiele <stevet@hausmannconstruction.com>  
**Sent:** Wednesday, September 1, 2021 1:34 PM  
**To:** Shane Albrecht; Kenny Schmitz  
**Subject:** Woodbury LEC / Quality Assurance Questionnaire

**CAUTION:** This email originated from **OUTSIDE** of the organization. Please verify the sender and use caution if the message contains any attachments, links, or requests for information as this person may NOT be who they claim. **If you are asked for your username and password, please call WCICC and DO NOT ENTER any data.**

Shane & Kenny,

You asked that we provide some feedback regarding the QA Questionnaire form and process used on the Woodbury County LEC project based on what we have experienced on other similarly-sized public awards.

To be clear, we are more than willing to comply with any QA process as required as part of a project award and have been successfully involved in many over the course of our company history. Currently, however, we find that many public entities do not use a separate questionnaire to fuel the QA process like the one involved in the present project, simply because the information typically solicited is largely duplicative of the requirements of the contract or other information that is otherwise available to the public.

For instance, appropriate payment bond, performance bond, and insurance requirements ensure responsible and capable firms vie for the project. These requirements also protect project owners and participants from contractor performance or financial instability more concretely than generalized QA responses. Even safety related information can be found on OSHA's website through a publicly-available establishment search - <https://www.osha.gov/pls/imis/establishment.html>. As such, many public ownership groups do not expend their resources, time, and effort verifying historical responses on a separate questionnaire for those bidders that are demonstrably capable of meeting the contractual bonding and insurability requirements.

If you have further questions or concerns please don't hesitate to let me know.



**STEVE THIELE, VICE PRESIDENT**  
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## Immediate Changes to Iowa's Public Bidding Law

**April 20, 2017**

*By: Attorneys Maria Brownell, Danielle Haindfield and Jim Wainwright*

On April 13, 2017, Governor Branstad signed Senate File 438, An Act Relating to Bidding and Contracting for Public Improvement Projects (the "Act"), into law. The new law affects notices to bidders for public improvements, bids awarded for public improvements, and contracts for public improvements entered into on or after April 13, 2017.

The law limits governmental entities' rights to determine and assess bidders' qualifications and to require or prohibit prospective bidders, offerors, contractors, or subcontractors from entering into or adhering to an agreement with one or more labor organizations regarding a public improvement. Specifically, the law prohibits a governmental entity from:

1. Requiring a potential bidder on a public improvement to provide any information which the potential bidder may deem to be confidential or proprietary as a requirement for being deemed a responsive, responsible bidder; and

2. Imposing any requirement that directly or indirectly restricts potential bidders to any predetermined class of bidders defined by experience on similar projects, size of company, union membership, or any other criteria.

Governmental entities may still request information from the apparent lowest responsive bidder to assist the governmental entity in determining that bidder's responsibility. However, a governmental entity may only request information related to the apparent lowest responsive bidder's experience, number of employees, and ability to finance the cost of the public improvement.

Additionally, governmental entities and their architects/engineers will now be limited in the type of specification language that may be used to establish minimum bidder criteria based on experience or qualifications. For example, mandating a bidder have a set number of years of experience performing similar work on comparable size projects may now be subject to challenge.

The law also establishes a new subchapter of Iowa Code Chapter 73A, entitled "The Fair and Open Competition in Governmental Construction Act." Governmental entities awarding a contract for a public improvement and any construction manager acting on their behalf shall not, in any bid specifications, project agreements, or other controlling documents do any of the following:

1. Require a bidder, offeror, contractor or subcontractor to work with labor organizations with respect to the public improvement project, or a related public improvement project; or
2. Prohibit a bidder, offeror, contractor or subcontractor from working with labor organizations with respect to the public improvement project, or a related public improvement project; or
3. Discriminate against any bidder, offeror, contractor or subcontractor for its choice to work with or not work with any labor organization with respect to the public improvement project, or a related public improvement project.

The law also prohibits a governmental entity from awarding a grant, tax abatement, or tax credit where that award is conditional on any term that would be contrary to the new law's requirements.

Finally, any public official who fails to perform any of the duties of this new Act could be found guilty of a simple misdemeanor and be removed from office. Governmental entities should work closely with their design/construction administration team and legal counsel to ensure all documents related to publicly bid projects on or after April 13th comply with the new law.

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## BRIEFING PAPERS

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### Public Bidding: The City of Des Moines Solves a Problem That Appears Not to Exist

October 24, 2014

By Kristine Kroenke & Gregory T. Spalj

When it comes to awarding of government contracts to private contractors, the goal is to make sure that there is free competition among all of the contractors who submit bids such that the government gets the lowest responsive bid from a "responsible" contractor. Competitive public bidding laws are intended to avoid fraud, favoritism, and wasteful spending of taxpayer dollars, and to ensure that a bidder obtains no unearned competitive advantage over its competitors. A public authority has an absolute obligation not to take any action that would interfere with competitive bidding. The award of public contracts usually involves a two step analysis. The first question is, who submitted the lowest bid that is "responsive" to the call for bids. Simply stated, "responsive" means that the bidder followed all of the instructions for the bid and did not deviate from what all bidders were required to do. The second question is whether the lowest responsive bidder is "responsible." That is, is it qualified to do the work and complete it on time?

The determination of whether a bidder is responsible is an essential step in public procurement. But how should responsibility be determined? The question is being asked by more government bodies<sup>1</sup> and their answers may lead to unintended consequences, increasing subjectivity in the public bidding process, and increasing the cost of public construction projects. The City Council for the City of Des Moines, Iowa, recently approved (6 votes in favor to 1 dissenter) a measure establishing a "City of Des Moines Taxpayer Quality Assurance Policy" for "Vertical Infrastructure Projects" (defined below) that are estimated to cost over \$1,000,000. The measure implements a lengthy and detailed questionnaire that contractors may be required to submit two weeks before bid opening.

The stated intention of the new policy and the questionnaire is to permit the City of Des Moines to have more information about contractors bidding on the City's projects. More information sounds like a reasonable basis, but is the measure needed? And is it even a good idea? Critics, including one on the Des Moines City Council, have already spoken out against the new measure as unnecessary, duplicative of contractors' bond underwriting, and unjustified by increased costs in staff time and the increased potential for higher bids from contractors. Governmental entities have discretion in determining contractor responsibility. This Briefing Paper examines whether the new measure from the Des Moines City Council is a good use of its discretion.

### Iowa Public Bidding Law

The Taxpayer Quality Assurance Policy was implemented to complement Iowa public bidding law, which requires that contracts for public improvements be awarded to the "lowest responsive, responsible bidder." Under Iowa law, construction projects for a public improvement that exceed an estimated total cost of \$100,000 are subject to the Iowa Construction Bidding Procedures Act, codified at Iowa Code §§ 26.1-.15. Section 26.14 of the statute also requires "competitive quotations" for public improvements on smaller projects for particular entities. Cities with populations of fifty thousand or more must obtain competitive quotations for public improvements on projects that exceed \$51,000.



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The Iowa Construction Bidding Procedures Act imposes certain requirements on the bidding process for public construction projects, which include that "the contract for the public improvement must be awarded to the lowest responsive, responsible bidder." Iowa Code § 26.9.<sup>2</sup> The statute applies to "governmental entities," which include "the state, political subdivisions of the state, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements, excluding the state board of regents and the state department of transportation." Iowa Code § 26.2. Political subdivisions of the state include cities and counties.

Iowa law provides little detail on how a governmental entity may determine whether a bidder is responsible, but court cases indicate that a significant amount of deference is given to the government entity. As long as the determination is not arbitrary or capricious, it will not be second guessed by the courts.

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## City of Des Moines Taxpayer Quality Assurance Policy

The Taxpayer Quality Assurance Policy implemented by the Des Moines City Council involves the use of a General Contractor Quality Assurance Questionnaire ("Questionnaire") for "Vertical Infrastructure Projects" that (1) are to be bid and constructed by the City of Des Moines, Iowa, (2) have an estimated construction cost greater than \$1,000,000, and (3) are funded without federal, state or other funding that would prohibit or limit the use of the Questionnaire.

A Vertical Infrastructure Project is defined as "construction, addition, or major alteration of a facility that will require a certificate of occupancy." The definition therefore excludes construction projects involving roads, bridges, sanitary sewers, and levees, among others.

The Taxpayer Quality Assurance Policy is not mandatory on all Vertical Infrastructure Projects, but it gives the Des Moines City Council the discretion to determine whether "the proposed Vertical Infrastructure is of such magnitude, scope or complexity that Council deems it necessary to request bidders, on the proposed Vertical Infrastructure Project, to complete the General Contractor Quality Assurance Questionnaire ('Questionnaire') to assist the City Council in determining the lowest responsible bidder pursuant to Iowa law." It is similar to a questionnaire already in use by Polk County, Iowa (the County in which Des Moines is located). Because the information is submitted to a public entity, all information provided on the Questionnaire is public.

The 26 questions on the Questionnaire are broad and do not distinguish between public and private projects, and a few questions are unlimited on time. The following is a partial list of information that contractors must provide on the Questionnaire under the Taxpayer Quality Assurance Policy:

- a list of construction projects with a value over \$5 million that the contractor has in progress, giving the name of the project, owner, architect, contract amount, key contractor personnel, percent complete and scheduled completion date.
- a list of the "major" projects that contractor has completed in the past three (3) years, giving the name of the project, owner, architect, contract amount, Officer in Charge, Project Manager, Project Superintendent and any other key contractor personnel, date of completion and percentage of the total project performed by contractor's own employees.
- a list of all work on the project that the contractor intends to self perform, specifying the level of training and experience contractor's employees have had. The contractor must also state whether such training has been in a United States Department of Labor (DOL) certified apprentice program or "substantially equivalent" apprenticeship program.
- a list of the contractor's last five (5) completed projects, providing the scheduled completion date, the final completion date, and noting any owner approved extensions.
- an identification of all projects on which the contractor defaulted on a contract, or been disqualified, removed or otherwise prevented from bidding on or completing the project, including providing the year of the incident, the owner, and the project name and location.
- whether the contractor has ever been unable to obtain a bond or whether it has ever been denied a bond.
- a list of all surety/bonding companies the contractor has used in the past five (5) years.

- whether the contractor is being investigated for or previously has been found to have violated, in the past five (5) years any of the following state or federal laws: the Iowa Minimum Wage Act; Iowa Non-English Speaking Employees Act; Iowa Child Labor Act; Iowa Labor Commissioner's Right to Inspect Premises; Iowa Compensation Insurance Act; Iowa Employment Security Act; Iowa Competition Act; Iowa Income, Corporate and Sales Tax Code; a "willful" violation of the Iowa or Federal OSHA; Iowa Employee Registration Requirements; Iowa Hazardous Chemicals Risks Act; Iowa Wage Payment Collection Act; Federal Income and Corporate Tax Code; The National Insurance and Social Security Act; or The Fair Labor Standards Act.
- whether the contractor has ever failed to complete any work awarded to it.
- whether there are any judgments, arbitration proceedings or suits pending or outstanding against the contractor or its officers that "relate to, arise out of or are in the course of the contractor's business" and providing "all relevant details" on any such matters.
- whether the contractor has filed any lawsuit or demanded arbitration regarding any construction contract within the past five (5) years and providing "all relevant details" on any such matters.
- whether the contractor has been found by a court or agency of competent jurisdiction to be delinquent in meeting its obligations under local, state, or federal tax laws within the last five (5) years.

In the Questionnaire, the contractor must also affirm that it will use only subcontractors that meet the requirements in the "Subcontractor Quality Assurance Bid Requirements" and must also affirm that "it will be responsible for ensuring that each subcontractor" meets such requirements.

On projects where the Questionnaire is used, the bidder must "submit a completed Questionnaire no later than two weeks prior to the deadline for accepting bids." (Emphasis added). This turns the typical timing for responsibility on its head. Unlike the issue of responsiveness, which is determined from the bid itself, whether a bidder is responsible is traditionally determined at the time of the award of the contract. Thus, if a bidder does not appear to be qualified at the opening of the bid, the bidder could become qualified if it took the necessary steps to become responsible by the time of the award of the contract, which may be weeks *after* the bid opening. However, under the City of Des Moines Taxpayer Quality Assurance Policy, contractors that do not complete the Questionnaire two weeks before bid opening are subject to being deemed non-responsive.

## Few Justifications for the Policy and a Lot of Criticisms

The City Council's explanation is that the Questionnaire it to permit it to make better informed decisions about bidders. In its justification for the measure, the policy states that "Iowa court decisions allow public entities to consider factors other than price in determining who is the lowest responsible bidder." Because responsibility is an entirely different issue from price, by definition, public entities must consider factors other than price when determining contractor responsibility. Iowa courts have explained that the term "responsible" "implies a measure of discretion on the part of a political subdivision in its consideration of what bid to ultimately accept for a project." *Master Builders of Iowa v. Polk County*, 653 N.W.2d 382, 394 (Iowa 2002). "'Responsibility' may embrace factors other than the low dollar figure, including such considerations as the business judgment of the bidder and the bidder's record for reliability in performance." *Dickinson Co., Inc. v. City of Des Moines, Iowa*, 347 N.W.2d 436, 440 (Iowa App. 1984).

Nowhere in the City's justification, however, is any statement that previous methods were inadequate to justify the use of the Questionnaire and its associated costs and burdens. It remains to be seen how frequently the Questionnaire will be used. The new policy only applies to Vertical Infrastructure Projects with estimated costs greater than \$1,000,000 and then the City has discretion on whether to use the Questionnaire. The City identified only four projects in the last five years that met the definition in the policy (and were not otherwise disqualified by other factors preventing use of the Questionnaire). Based on the current listing of Capital Improvements Projects and other discussions, the City estimates that the new policy might affect four projects over the next five years.

The City has not pointed to any particular need for the Questionnaire. Although the City report stated that the City "experienced some contractor issues in the past related to schedule completion and quality issues," it also stated, "[i]n general the City of Des Moines has not



experienced major issues in its public bid construction program." Of the four projects that the City identified that would have qualified for the Questionnaire in the past five years, all were evaluated as: from standard quality (1 project, which also won an award) to excellent quality (2 of the 4 projects); all were completed essentially on time; only one had claims (which totaled less than 2% of the contract price); and none involved litigation. That would appear to be a good record of projects involving responsible contractors, not a justification for a new policy.

The City has not explained why the requirement that the contractor provide payment and performance bonds does not already provide adequate protections and, indirectly, the analysis of the same information asked by the Questionnaire. In performing underwriting, sureties conduct the same investigation about the contractor that the Questionnaire is designed to facilitate. An advantage to the contractor is that the surety file is not a public document. The Questionnaire is public information – information that contractors may not want to become public. Additionally, the review by the surety is for the purpose of deciding whether the contractor is of the quality and character such that the surety will financially stand behind it. There is no opportunity for favoritism or bias in favor of one contractor over another to enter into the sureties' calculus. On the other hand, the whole purpose of the competitive public bidding laws is to limit the effects of favoritism and bias in awarding public contracts. Allowing the City to consider the extensive data required by the Questionnaire increases the opportunity for bias or favoritism to taint the process.

The Questionnaire also expressly asks for details about "arbitration proceedings" in which the contractor has been involved. Arbitration is often preferred because the parties can resolve their dispute in a private proceeding. If the contractor will be required to disclose everything about its arbitration proceedings, that lessens the value of arbitration.

Communications from the City Council show that the estimated average cost for each project in which the Questionnaire is used will be \$5,600 for additional staff time to review the Questionnaire. The City noted that "if the program is expanded to other projects, subcontractors, or other than award enforcement then the costs will escalate quite rapidly requiring additional staff and possibly costing hundreds of thousands of dollars." The City's estimates do not include the added costs and time required of the contractors to complete the Questionnaire.

The City also estimates that the Questionnaire could lead to higher bids. If contractors must spend additional time preparing their bids two weeks in advance, these costs may be reflected in the bids. It may also cause bidders to forgo bidding altogether. The City admits that it cannot determine whether the Questionnaire might deter bidders "and therefore result in higher bids." However, the City estimated that the potential increased cost on the four qualifying projects, discussed above, alone could have been \$408,466.

Critics of the new policy state that (1) it is unnecessary and duplicative of bond underwriting; (2) it will increase City staff time costs; (3) it will decrease competition; and (4) it will lead to higher bids. The policy has been criticized "as an unnecessary expense that duplicates measures already in place." Timothy Meinck, "Contractors for big D.M. projects face greater scrutiny," *The Des Moines Register* (online), October 12, 2014. Some are concerned, including the lone dissenter on the City Council, that the policy may benefit union contractors. *Id.* Other critics fear it will "chill the bidding pool," particularly discouraging DBE contractors.

Supporters of the measure disagree with many of the criticisms and believe that obtaining more information about the contractors is "common sense" and that the market, not the Questionnaire, determines the number of bidders on a project. Other supporters argue that the "policy is a victory for employees and subcontractors who have been mistreated and denied earned wages by contractors," citing court judgments on labor disputes. Timothy Meinck, "Contractors for big D.M. projects face greater scrutiny," *The Des Moines Register* (online), October 12, 2014. Some supporters want the policy to be implemented on all projects, not just those greater than \$1,000,000.

## Conclusion

It remains to be seen how often the Des Moines City Council will use the Questionnaire, particularly given the costs and the fact that its previous methods for selecting contractors appear to have worked well. However, other cities in Iowa are following suit. Cedar Rapids already requires a two-page "contractor qualifications" form with nine questions that are similar to those on the Questionnaire. Dubuque officials also report they are developing a policy.

The unfortunate reality is that these types of measures often lead to other government entities jumping on the bandwagon without having fully vetted all the consequences. It sounds like a

good idea to require contractors to provide detailed information about their business so the government entity is fully informed when determining contractor responsibility. But increased information and scrutiny can come at a cost, in higher contract prices, increased staff costs, the opportunity to use this subjective analysis in a way to favor one contractor over another, and lower competition. The measure also confuses the concepts of responsiveness and responsibility by making the responsibility Questionnaire an issue of responsiveness, requiring its completion before the bids are even received. Responsibility is not intended to be a continuum allowing government entities to interfere with the public bidding process by letting them subjectively determine who they believe is the most responsible bidder. It begs the question why the City of Des Moines wants a measure that appears likely to increase the costs to the public and to contractors when the City has cited no need for the measure.

<sup>1</sup> For example, the Minnesota Legislature recently enacted the "Responsible Contractor" bill, codified at Minn. Stat. § 16C.285, which was examined in last month's Briefing Paper and can be read [here](#).

<sup>2</sup> Certain contracts for public utilities are excluded from this requirement: "However, contracts relating to public utilities or extensions or improvements thereof, as described in sections 384.80 through 384.94, may be awarded by the city as it deems to be in the best interests of the city." Iowa Code § 26.9.

## Announcements

**Gary Eidson** and **Rory Duggan** will be presenting at **The 2014 Real Estate Institute** on November 13 and 14, 2014, at the Saint Paul RiverCentre. Gary will be a member of a panel of experienced faculty presenting a discussion of issues arising in commercial leasing transactions, and, on the second afternoon of the Institute, will also be a member of a panel discussing current issues affecting the development of commercial real estate. Rory will be a member of a panel of key participants discussing the JW Marriott mixed-use expansion at the Mall of America. For more information, contact Gary at 612.359.7621, [geidson@fwhtlaw.com](mailto:geidson@fwhtlaw.com) or Rory at 612.359.7675, [rduggan@fwhtlaw.com](mailto:rduggan@fwhtlaw.com).

**Greg Spalj** and **Julia Douglass** will be presenting for **Bankruptcy/Debtor-Creditor Series: Debtor-Creditor Handbook - Mechanics' Liens** sponsored by Minnesota Continuing Legal Education on Thursday, January 22, 2015, from 12:00-1:00 p.m. If you would like information about this seminar, contact Greg Spalj at 612.359.7631 or [gspalj@fwhtlaw.com](mailto:gspalj@fwhtlaw.com) or Julia Douglass at 612.359.7622 or [jdouglass@fwhtlaw.com](mailto:jdouglass@fwhtlaw.com).

**Dean Thomson** will be speaking at the **National AGC's 2015 Conference on Surety Bonding and Construction Risk Management** being held in Naples, Florida on February 1-3, 2015. For more information please contact Dean Thomson at 612.359.7624 or [dthomson@fwhtlaw.com](mailto:dthomson@fwhtlaw.com).

**Fabyanske, Westra, Hart & Thomson, P.A.** is pleased to welcome **Colin Bruns** as an associate in the Construction and Commercial Litigation group. Colin earned his J.D. from the University of Minnesota Law School in May 2014 and his B.A. from the University of Wisconsin in May 2010. Colin will be admitted to the Minnesota Bar on October 31, 2014.

*This discussion is generalized in nature and should not be considered a substitute for professional advice. © 2014 FWH&T.*



# OUR FIRM

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## Our Firm

For 40 years, Fabyanske, Westra, Hart & Thomson has provided our valued clients with exceptional services—resolving cases, closing deals and continually helping to make our clients’ businesses succeed. We offer a targeted portfolio of services to support our clients’ complex needs, including unparalleled experience in construction law, real estate law, complex commercial litigation, mergers and acquisitions, business planning, financial restructuring, and bankruptcy.



Our lawyers understand how markets shift and fit together, how regulations compete and complicate, how litigation integrates with business objectives and how legal and economic strategies must coordinate. Beyond finding the best legal solution for any single real estate or business transaction, deal, or case, we focus on helping our clients achieve their overall business goals while satisfying their need for practical, cost-effective representation. That is why a hallmark of our practice is building small teams around a single, senior-level point of contact. The result? A targeted, cost-effective and client-centered approach built upon expert insights and proven strategies.

Our clients include some of the most successful construction companies, design professionals, real estate and business entrepreneurs, lenders, sureties, and insurers. They come to us from many industries across the state and nation.

At Fabyanske, Westra, Hart & Thomson, our workplace is the foundation of a culture that seeks out and celebrates the diverse talents of its attorneys, professionals who are graduates of leading national and regional law schools, experienced practitioners drawn from prominent firms and government service, and leaders within state and national organizations in their fields. Our lawyers are supported by a firm that focuses on one clear goal: providing consistently great work for our valued clients.



# AIA<sup>®</sup> Document A312<sup>™</sup> – 2010

## Performance Bond

**CONTRACTOR:**

*(Name, legal status and address)*  
Hausmann Construction, Inc.  
8885 Executive Woods Drive  
Lincoln, NE 68512

**SURETY:**

*(Name, legal status and principal place of business)*  
Westport Insurance Corporation  
1200 Main Street, Suite 800  
Kansas City, MO 64105

**OWNER:**

*(Name, legal status and address)*  
Woodbury County Law Enforcement Center Authority  
620 Douglas Street  
Sioux City, IA 51101

**CONSTRUCTION CONTRACT**

Date: June 28, 2021

Amount: \$58,390,000.00

**Description:**

*(Name and location)*

Woodbury County Law Enforcement Center, 3701 28th Street, Sioux City, Iowa

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

AIA Document A312-2010 combines two separate bonds, a Performance Bond and a Payment Bond, into one form. This is not a single combined Performance and Payment Bond.

**BOND**

Date: June 28, 2021

*(Not earlier than Construction Contract Date)*

Amount: \$58,390,000.00

Modifications to this Bond:  None  See Section 16

**CONTRACTOR AS PRINCIPAL**

Company: *(Corporate Seal)*  
Hausmann Construction, Inc.

**SURETY**

Company: *(Corporate Seal)*  
North American Specialty Insurance Company

Signature: 

Name: Chad Wiles

and Title: *COO Executive Vice President*

*(Any additional signatures appear on the last page of this Performance Bond.)*

Signature: 

Name: Maura P. Kelly

and Title: Attorney-in-Fact

*(FOR INFORMATION ONLY — Name, address and telephone)*

**AGENT or BROKER:**

FNIC  
14010 FNB Parkway, Suite 300  
Omaha, NE 68154  
(402) 861-7000

**OWNER'S REPRESENTATIVE:**

*(Architect, Engineer or other party:)*  
Baker Group  
1600 SE Corporate Woods Drive  
Ankeny, IA 50021  
(515) 262-4000



§ 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.

§ 2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.

§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after

- .1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;
- .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; and
- .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.

§ 4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.

§ 5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

§ 5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;

§ 5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;

§ 5.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or

§ 5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

- .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
- .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.

§ 6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- .1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

§ 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.

§ 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.

§ 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

§ 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

§ 12 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.

§ 13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

#### § 14 Definitions

§ 14.1 **Balance of the Contract Price.** The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

§ 14.2 **Construction Contract.** The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.

§ 14.3 **Contractor Default.** Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.

§ 14.4 **Owner Default.** Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.

§ 14.5 **Contract Documents.** All the documents that comprise the agreement between the Owner and Contractor.

§ 15 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

§ 16 Modifications to this bond are as follows:

*(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)*

**CONTRACTOR AS PRINCIPAL**

**SURETY**

Company:

*(Corporate Seal)*

Company:

*(Corporate Seal)*

Signature: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address \_\_\_\_\_

Signature: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address \_\_\_\_\_

CAUTION: You should sign an original AIA Contract Document, on which this text appears in RED. An original assures that changes will not be obscured.

 **AIA** Document A312™ – 2010

Bond No. 2320031

**Payment Bond**

**CONTRACTOR:**

*(Name, legal status and address)*  
Hausmann Construction, Inc.  
8885 Executive Woods Drive  
Lincoln, NE 68512

**SURETY:**

*(Name, legal status and principal place of business)*  
Westport Insurance Corporation  
1200 Main Street, Suite 800  
Kansas City, MO 64105

**OWNER:**

*(Name, legal status and address)*  
Woodbury County Law Enforcement Center Authority  
620 Douglas Street  
Sioux City, IA 51101

**CONSTRUCTION CONTRACT**

Date: June 28, 2021

Amount: \$58,390,000.00

**Description:**

*(Name and location)*  
Woodbury County Law Enforcement Center, 3701 28th Street, Sioux City, Iowa

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

AIA Document A312-2010 combines two separate bonds, a Performance Bond and a Payment Bond, into one form. This is not a single combined Performance and Payment Bond.

**BOND**

Date: June 28, 2021

*(Not earlier than Construction Contract Date)*

Amount: \$58,390,000.00

Modifications to this Bond:  None  See Section 18

**CONTRACTOR AS PRINCIPAL**

Company: *(Corporate Seal)*  
Hausmann Construction, Inc.

**SURETY**

Company: *(Corporate Seal)*  
Westport Insurance Corporation

Signature: 

Name: Chad Wiles

and Title: COO Executive Vice President

Signature: 

Name: Maura P. Kelly

and Title: Attorney-in-Fact

*(Any additional signatures appear on the last page of this Payment Bond.)*

*(FOR INFORMATION ONLY — Name, address and telephone)*

**AGENT or BROKER:**

FNIC  
14010 FNB Parkway, Suite 300  
Omaha, NE 68154  
(402) 861-7000

**OWNER'S REPRESENTATIVE:**

*(Architect, Engineer or other party:)*  
Baker Group  
1600 SE Corporate Woods Drive  
Ankeny, IA 50021  
(515) 262-4000



§ 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference, subject to the following terms.

§ 2 If the Contractor promptly makes payment of all sums due to Claimants, and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the Surety and the Contractor shall have no obligation under this Bond.

§ 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety.

§ 4 When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.

§ 5 The Surety's obligations to a Claimant under this Bond shall arise after the following:

§ 5.1 Claimants, who do not have a direct contract with the Contractor,

- .1 have furnished a written notice of non-payment to the Contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were, or equipment was, furnished or supplied or for whom the labor was done or performed, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the Claim; and
- .2 have sent a Claim to the Surety (at the address described in Section 13).

§ 5.2 Claimants, who are employed by or have a direct contract with the Contractor, have sent a Claim to the Surety (at the address described in Section 13).

§ 6 If a notice of non-payment required by Section 5.1.1 is given by the Owner to the Contractor, that is sufficient to satisfy a Claimant's obligation to furnish a written notice of non-payment under Section 5.1.1.

§ 7 When a Claimant has satisfied the conditions of Sections 5.1 or 5.2, whichever is applicable, the Surety shall promptly and at the Surety's expense take the following actions:

§ 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and

§ 7.2 Pay or arrange for payment of any undisputed amounts.

§ 7.3 The Surety's failure to discharge its obligations under Section 7.1 or Section 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant.

§ 8 The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3, and the amount of this Bond shall be credited for any payments made in good faith by the Surety.

§ 9 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any construction performance bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work.

§ 10 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that are unrelated to the Construction Contract. The Owner shall not be liable for the payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligation to make payments to, or give notice on behalf of, Claimants or otherwise have any obligations to Claimants under this Bond.

§ 11 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

§ 12 No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year from the date (1) on which the Claimant sent a Claim to the Surety pursuant to Section 5.1.2 or 5.2, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

§ 13 Notice and Claims to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears. Actual receipt of notice or Claims, however accomplished, shall be sufficient compliance as of the date received.

§ 14 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

§ 15 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor and Owner shall promptly furnish a copy of this Bond or shall permit a copy to be made.

#### § 16 Definitions

§ 16.1 Claim. A written statement by the Claimant including at a minimum:

- .1 the name of the Claimant;
- .2 the name of the person for whom the labor was done, or materials or equipment furnished;
- .3 a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
- .4 a brief description of the labor, materials or equipment furnished;
- .5 the date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
- .6 the total amount earned by the Claimant for labor, materials or equipment furnished as of the date of the Claim;
- .7 the total amount of previous payments received by the Claimant; and
- .8 the total amount due and unpaid to the Claimant for labor, materials or equipment furnished as of the date of the Claim.

§ 16.2 Claimant. An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Construction Contract. The term Claimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.

§ 16.3 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and all changes made to the agreement and the Contract Documents.

§ 16.4 **Owner Default.** Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.

§ 16.5 **Contract Documents.** All the documents that comprise the agreement between the Owner and Contractor.

§ 17 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

§ 18 Modifications to this bond are as follows:

*(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)*

**CONTRACTOR AS PRINCIPAL**

Company:

*(Corporate Seal)*

**SURETY**

Company:

*(Corporate Seal)*

Signature: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address \_\_\_\_\_

Signature: \_\_\_\_\_

Name and Title: \_\_\_\_\_

Address \_\_\_\_\_

**CAUTION:** You should sign an original AIA Contract Document, on which this text appears in RED. An original assures that changes will not be obscured.

SWISS RE CORPORATE SOLUTIONS

NORTH AMERICAN SPECIALTY INSURANCE COMPANY  
WASHINGTON INTERNATIONAL INSURANCE COMPANY  
WESTPORT INSURANCE CORPORATION

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, THAT North American Specialty Insurance Company, a corporation duly organized and existing under laws of the State of New Hampshire, and having its principal office in the City of Kansas City, Missouri and Washington International Insurance Company a corporation organized and existing under the laws of the State of New Hampshire and having its principal office in the City of Kansas City, Missouri, and Westport Insurance Corporation, organized under the laws of the State of Missouri, and having its principal office in the City of Kansas City, Missouri, each does hereby make constitute and appoint:

DAVID A. DOMINIANI, JOAN LEU, MAURA P. KELLY, SHARON K. MURRAY, JACQUELINE L. DREY and DUSTIN COOPER

JOINTLY OR SEVERALLY

Its true and lawful Attorney(s)-in-Fact, to make, execute, seal and deliver, for and on its behalf and as its act and deed, bonds or other writings obligatory in the nature of a bond on behalf of each of said Companies, as surety, on contracts of suretyship as are or may be required or permitted by law, regulation, contract or otherwise, provided that no bond or undertaking or contract or suretyship executed under this authority shall exceed the amount of:

TWO HUNDRED MILLION (\$200,000,000.00) DOLLARS

This Power of Attorney is granted and is signed by facsimile under and by the authority of the following Resolutions adopted by the Boards of Directors of North American Specialty Insurance Company and Washington International Insurance Company at meetings duly called and held on March 24, 2000 and Westport Insurance Corporation by written consent of its Executive Committee dated July 18, 2011.

"RESOLVED, that any two of the President, any Senior Vice President, any Vice President, any Assistant Vice President, the Secretary or any Assistant Secretary be, and each or any of them hereby is authorized to execute a Power of Attorney qualifying the attorney named in the given Power of Attorney to execute on behalf of the Company bonds, undertakings and all contracts of surety, and that each or any of them hereby is authorized to attest to the execution of any such Power of Attorney and to attach therein the seal of the Company; and it is

FURTHER RESOLVED, that the signature of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be binding upon the Company when so affixed and in the future with regard to any bond, undertaking or contract of surety to which it is attached."



By [Signature]  
Steven P. Anderson, Senior Vice President of Washington International Insurance Company  
& Senior Vice President of North American Specialty Insurance Company  
& Senior Vice President of Westport Insurance Corporation

By [Signature]  
Michael A. Ito, Senior Vice President of Washington International Insurance Company  
& Senior Vice President of North American Specialty Insurance Company  
& Senior Vice President of Westport Insurance Corporation

IN WITNESS WHEREOF, North American Specialty Insurance Company, Washington International Insurance Company and Westport Insurance Corporation have caused their official seals to be hereunto affixed, and these presents to be signed by their authorized officers this 25th day of June, 2020.

North American Specialty Insurance Company  
Washington International Insurance Company  
Westport Insurance Corporation

State of Illinois  
County of Cook ss:

On this 25th day of June, 2020, before me, a Notary Public personally appeared Steven P. Anderson, Senior Vice President of

Washington International Insurance Company and Senior Vice President of North American Specialty Insurance Company and Senior Vice President of Westport Insurance Corporation and Michael A. Ito Senior Vice President of Washington International Insurance Company and Senior Vice President of North American Specialty Insurance Company and Senior Vice President of Westport Insurance Corporation, personally known to me, who being by me duly sworn, acknowledged that they signed the above Power of Attorney as officers of and acknowledged said instrument to be the voluntary act and deed of their respective companies.



[Signature]  
M. Kenny, Notary Public

I, Jeffrey Goldberg, the duly elected Vice President and Assistant Secretary of North American Specialty Insurance Company, Washington International Insurance Company and Westport Insurance Corporation do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney given by said North American Specialty Insurance Company, Washington International Insurance Company and Westport Insurance Corporation which is still in full force and effect.

IN WITNESS WHEREOF, I have set my hand and affixed the seals of the Companies this 28th day of June, 2021.

**Public Owners' Guide  
to Legal Issues  
on the Bidding and  
Award of Construction Contracts in Iowa**

**Volume I, Edition IV  
Published April 2006  
Updated January 1, 2019**

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## INTRODUCTION

The purpose of this guide is to provide public owners at all levels a better understanding of Iowa's competitive bidding laws as they relate to the bidding and award of public works construction projects. The contributing parties undertook this initiative with the understanding that there is a continual need for education on this subject. This Resource Guide will focus primarily on the design / bid / build project delivery system required by Iowa law for most public contracts. Public owners will be served better by a thorough understanding of how this particular project delivery system works with an emphasis on the legal pitfalls along the way to a successful construction project.

This Resource Guide will also touch on various legal issues which may arise for owners considering the use of construction management advisors in the building process.

### *Contributing Associations:*



*Master Builders of Iowa*  
[www.mbi.build](http://www.mbi.build)  
515-288-8904



*American Institute of Architects, Iowa Chapter*  
[www.aiaiowa.org](http://www.aiaiowa.org)  
515-244-7502



*American Council of Engineering Companies of Iowa*  
<http://www.iaenr.org>  
515-284-7055

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*\*Disclaimer: Nothing contained in this work shall be considered to be the rendering of legal advice on specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This work, in any form herein, is intended solely for educational and informational purposes.*



## **SECTION 1**

### **DESIGN / BID / BUILD IOWA'S PUBLIC SECTOR DELIVERY METHOD**

The term design / bid / build is used to refer to a specific project delivery method. It refers here solely to a method of project delivery in which the owner procures design and construction documents from an independent designer, uses competitive bidding to get prices for all work required to build the project as specified, and then selects a contractor to build the project on the basis of a responsive low bid received from a responsible contractor.

An important feature of a design / bid / build method is that it intentionally separates the design phase, bidding phase and the construction phase so that each is performed independently. This creates important consequences in the roles and responsibilities of the owner, designer and the contractor. There is a

sequential chain of events in design / bid / build contracts. The owner first enters into a contract with a designer, which prepares the building design and the necessary documents for construction. Next, the owner selects a general contractor through a competitive bidding process. The general contractor in turn selects subcontractors, (usually through competitive pricing) to perform parts of the work. Subcontractors may employ sub-subcontractors for specialty work. General contractors, subcontractors and sub-subcontractors may all provide labor and they may all purchase materials from suppliers. The designer has no contract with the contractor, but acts as the agent of the owner for design services and for contract administration during construction.

### **IMPORTANT TERMS ASSOCIATED WITH DESIGN / BID / BUILD PROJECT DELIVERY SYSTEMS**

#### **Construction Documents**

Construction documents are a group of documents issued by the owner with the assistance of the designer to competing contractors so they can prepare bids. The construction documents typically include a project manual containing the specifications and other bidding documents, and drawings (sometimes referred to as "plans" or blueprints"). The construction documents, along with other bidding information, are sometimes called "bid documents".

#### **Contract Documents**

Contract documents consist of the construction documents, together with the agreement between owner and contractor, general and supplementary conditions of the contract, and addenda, if any. Sometimes, other bidding documents are also included in the contract's definition of contract documents, such as the invitation to bid, instructions to bidders, and contractor's bid form.

#### **Lump Sum Fixed Price**

In the design / bid / build method of project delivery, the expectation is that the bidders will compete against each other based on identical construction documents to offer the owner the lowest price. Each bidder must furnish all materials and labor necessary to complete the work required by the drawings and specifications in conformance with the terms and conditions stated in the construction documents.

#### **Competitive Bidding**

Competitive bidding is the heart of design / bid / build. Sealed bids are used in public works to ensure fairness and objectivity. Bids are opened in public and the entire process is subject to scrutiny by bidders, ordinary citizens and other interested parties. Public bidding procedures must conform to Iowa law, administrative regulations and basic principles of fairness.



### **Responsive Bid**

In design / bid / build, the construction contract is awarded to the lowest responsive bid submitted by a responsible bidder. A “responsive bid” is an unequivocal offer by the bidder to do everything required by the construction and bid documents, without exception. If a bid contains qualifications, conditions, or exclusions that differ from the requirements stated in the construction documents, or if it is an equivocal offer, the bid is said to be non-responsive and should not be accepted or read into the record. A bid must offer to perform all requirements of the construction documents so the owner’s acceptance of the bid creates a binding contract.

Responsiveness relates to the invitation to bid and the bid itself. This is a principal reason why invitations to bid should be as clear as possible. The bid submittal is responsive if it provides all of the information required in the invitation for bids issued by the public agency, including pricing, completion time, bid bond requirements, acknowledgement of addenda, and signature of the bidder. A bid irregularity may be waived by the public agency, but only if it does not give the bidder an unfair competitive advantage. For example, in *Gaeta v. Ridley School District*,<sup>1</sup> the court found that obtaining a bid bond from a bonding company with a rating less than that specified was not an excusable irregularity, but a material defect giving the bidder a competitive advantage when allowed to obtain a replacement bond (presumably because the bond premium would be lower for a lower rated company, thus allowing the bidder to submit a lower price). (See **Appendix A** for more information on bid irregularities.)

### **Responsible Contractor**

Once a low bidder has been identified through an analysis of the responsive bids, the owner must then evaluate the “responsibility” of the low bidder. The low bidder is not necessarily entitled to the award. It must then be determined to be responsible. A responsible contractor is one that can perform and complete the work required by the contract documents, demonstrated to the satisfaction of the owner. A responsible contractor must possess the necessary financial and technical capability to perform

the work as well as the tenacity to do so, usually demonstrated by the contractor’s past performance record. A responsible contractor must have the equipment, materials and workforce – or the ability to obtain them – sufficient to complete the work. This usually is demonstrated by ownership of equipment or “suitable arrangements to rent equipment,” and the ability to purchase materials and hire a workforce.

Iowa courts give governmental bodies’ considerable latitude when determining a bidder’s responsibility. In *Istari Construction Inc. v. Muscatine*,<sup>2</sup> Department of Housing and Urban Development (HUD) had determined a contractor to be responsible on a HUD-funded city project. Despite this determination, the city rejected the contractor’s bid based on the contractor’s lack of responsibility. The Iowa Supreme Court held that the city was not prevented from denying that the contractor was responsible, even though HUD had determined otherwise. This discretion must be exercised objectively and decisions deemed to be arbitrary or based on favoritism will be voided by the court.

### **Summary and Overview of Design / Bid / Build Method**

The design / bid / build project delivery system of construction is made up primarily of a team composed of the owner, designer and contractor. A major characteristic of the design / bid / build delivery system is that the owner enters into a contract with the designer for the design and documentation and then enters into a separate contract for construction with a contractor. The owner selects the contractor by competitive bidding on the basis of the responsiveness of the bid and the responsibility of the bidder. The law requires the owner to award the contract to the lowest responsive, responsible bidder.<sup>3</sup>

This project delivery system must proceed in a linear fashion, because the design must be completed before a contractor can be selected. The primary phases consist of programming, pre-design, schematic design, design development, construction documents, bidding, and construction administration. The roles and responsibilities of the owner, designer and contractor are discussed in the following section.

<sup>1</sup> *Gaeta v. Ridley Sch. Dist.*, 788 A.2d 363 (Pa. 2002).

<sup>2</sup> *Istari Constr. Inc. v. Muscatine*, 330 N.W.2d 798 (Iowa 1983)

<sup>3</sup> See, e.g., Iowa Code § 26.9, (2017).

## THE LEGAL ENVIRONMENT FOR THE ROLES & RESPONSIBILITIES OF THE OWNER, DESIGNER AND CONTRACTOR ON A DESIGN / BID / BUILD PROJECT

### The Owner's Roles and Responsibilities

It is the owner's duty to decide the scope, program, and budget for a project prior to design. During design and construction, the owner monitors the project's progress and quality and makes periodic payments to design and construction practitioners.

The owner in the design / bid / build method has separate contracts with the designer and the contractor. Those two contracts are governed by two very different standards, since the designer functions as the owner's agent during construction.

When the owner issues the construction documents to the bidders, the owner implies that the plans and the specifications are reasonably sufficient for the contractor to follow and use to complete the project. This is known as the *Spearin Doctrine*, which the Iowa Supreme Court arguably adopted in *Midwest Dredging v. McAninch*.<sup>4</sup> If the drawings and specifications contain errors that cause the contractor to incur extra cost, the owner is responsible for the extra costs. In other words, when the owner issues the construction documents to the competing contractors, the owner asks the contractors to assume the package is correct and complete and that they need not include a contingency for the possible unknown costs due to errors or omissions in the construction documents. Allowances for unknown costs would result in a higher bid based on guesses. Instead, it is in the owner's interests to agree to bear the financial risk when such problems inevitably arise.

Although the owner warrants the constructability of the plans and specifications to the contractor, it is not common for the designer to warrant to the owner that the same plans and specifications are "perfect". Rather, the designer represents to the owner that the design and documentation were prepared with a degree of care and skill exercised by the architectural

or engineering profession at large.<sup>5</sup> If the designer makes a design error that results in the owner having to pay more for the project, the designer will be liable to the owner only if the error occurred because the designer failed to perform in accordance with the standard of care and skill applicable to the profession at large.<sup>6</sup>

Thus, due to the unique nature of each design, there is a potential for design errors or omissions to occur even though the designer performed in accordance with the requisite degree of care and skill. In those instances, the owner must compensate the contractor for any additional costs that may result, usually through a change order to the contract. However, the designer will usually not be liable to the owner unless the error is due to professional negligence. As stated in one nationally-known treatise on construction law:

"[Thus] it is possible for an owner to be held liable to a contractor for breach of its implied warranty of design adequacy even though the owner may have no recourse against the design professional for design negligence."<sup>7</sup>

For this reason, the design professional will usually recommend that the owner set aside a percent of the estimated construction cost as an "owner's contingency" – a reserve allowance to cover unexpected costs such as hidden conditions. Such a contingency remains wholly under the owner's control as to when and if it is used to cover such expenses.

This does not mean, of course, that the contractor can ignore obvious design errors.

For example, the American Institute of Architects Standard General Conditions requires the contractor to

<sup>5</sup> See e.g., AIA-B141 Standard Form of Agreement between Owner and Architect, Art. 1.2.3.2 (1997 ed.).

<sup>6</sup> *Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975).

<sup>7</sup> Bruner & O'Connor on Construction Law, Sec. 9.82, p. 670-671, West Group, 2002 (Citing various cases.)

<sup>4</sup> *Midwest Dredging v. McAninch*, 424 N.W. 2d 216 (Iowa 1988). The case does not specifically adopt the *Spearin* doctrine.

report to the architect any design errors he discovers, although that same provision does not give the contractor the responsibility to discover such errors.<sup>8</sup>

In the design / bid / build method, the owner delegates the design and construction documentation to the designer and the construction to the contractor. But that does not mean that the owner has no duties. The owner's duties are especially important because of the competitive bidding process required by Iowa law to select the contractor.

During the design and documentation phase, the owner is responsible for providing its requirements to the designer and for providing timely responses to the designer's submissions. Similarly, during the construction phase, the owner's duties executed by its agent, the designer, include timely responses to the contractor's submittals, requests for information, and proposed changes and claims. In addition, the owner is ultimately responsible for interpreting the requirements of the contract, the drawings and specifications, usually relying on the expertise of the designer. But some of the owner's most important duties are in the bidding phase. Although the designer may advise the owner about the bids received, only the owner can accept a bid and select a contractor.

The bidding documents tell contractors how the owner will select the contractor. The owner will award a contract to the responsive, responsible contractor that submits the lowest lump sum price to complete the work in accordance with the construction documents. In public contracts the owner chooses the contractor by applying those criteria in order to comply with the Iowa statutes, regulations and the terms of the bidding documents. In addition to meeting the legal criteria, the owner should abide by the ethical procedures established by the industry.

### **The Designer's Role and Responsibilities**

It is the designer's duty to translate the owner's needs and requirements into drawings and specifications to be used during construction. During the construction phase, the architect may assist the owner with such services as monitoring the progress of the work,

verifying the specified level of quality is being achieved, and certifying payment applications. The architect should provide unbiased interpretations of the contract documents and give additional instructions as needed to enable the contractor to perform its work.

During the design phase, the designer's responsibilities are to the owner. The designer has the contractual and professional relationship with the owner and no contractual relationship with the contractor. However, the designer recognizes that the contractor will rely on the designer to perform in accordance with the contract documents.

The designer's responsibility is to create a design that meets the owner's needs, is structurally sound and complies with all the applicable requirements of building codes and other governmental requirements. The designer owes the owner two types of duty – a duty created by a professional standard of care expected of designers or engineers, and a contractual duty established by the contract between the designer and owner. Iowa courts consider these duties as merged within the contract terms.

As stated earlier,<sup>9</sup> the designer's professional duty of care is to perform with the same degree of skill and care as may be expected of any member of the architectural or engineering profession. That professional duty of care is established by the profession itself, not by the government or by a contract.

The designer also must perform design services in accordance with requirements of its contract with the owner. The contract may impose requirements concerning a schedule, costs or approval. These contractual duties may be in addition to the designer's professional standard of skill and care.

### **The General Contractor's Roles and Responsibilities**

The contractor's duty is to construct the project according to the designer's plans and specifications, within the time and price specified in the contract. This should be done without sacrificing either the

<sup>8</sup> AIA-A201 General Conditions of the Contract for Construction, Art. 3.2.2 (2017 ed.).

<sup>9</sup> See *supra* note 6.

quality of the work or the safety of the workers. The contractor has complete responsibility for achieving the quality level required in the documents, and for safety. The contractor may also be involved in the training of the owner's personnel in the operation of the building systems and may provide some maintenance after construction is complete.

It is important to note that the contractor's obligation is to satisfy the minimum requirements of the

drawings and specifications. In the bidding process, the owner asks for the lowest possible price to perform only those things that are absolutely required by the drawings and specifications. Thus, the contractor is obligated to satisfy those minimum requirements and no more. Of course, the owner is always free to require additional performance by change order.

## COMMON LEGAL ISSUES ARISING FROM IOWA'S COMPETITIVE BIDDING LAWS

### Public Bidding Thresholds

In 2006, Master Builders of Iowa participated in a wholesale revision of Iowa's competitive bidding laws for public owners. The new law, now Chapter 26, brought together bidding requirements for most public owners and concentrated them in one specific statute.

The new law also set out a novel approach to the public bidding laws. At the time, public owners complained that the bidding laws were two cumbersome and not particularly relevant to the economic environment at the time. For example, for decades the requirements for public bidding kicked in when the estimated project cost exceeded \$25,000. That requirement caused public owners to expend otherwise scarce dollars on paperwork and process in order to build new projects.

Not only did the new law increase the initial threshold for competitive bidding from \$25,000 to \$100,000, it also established a new, more flexible approach to allow public owners to plan and build new projects with a minimum of administrative burden.

The new law swept in control over most public owners, excluding Board of Regents and Iowa Department of Transportation projects.

The bidding laws set out three classes of projects based on the estimated cost of the project, which dictate what was required for bidding under the law.

The first category simply re-established the current requirement – that projects estimated to cost over \$100,000 would still require the full competitive bidding process, complete with notice, hearing, and so forth. This amount is adjusted every two years.

The law established thresholds for bidding depending on the nature of the owner and the size of the public body itself, by population. Under the new statute, the bidding requirements set out the thresholds for bidding depending upon the identity of the owner and the population base, e.g., cities with a population over or under 50,000.

Once identifying which public entities were required to use the complete public bidding regimen, the law set out two additional subcategories of requirements for procuring projects of lesser financial significance.

### Competitive Quotations for Projects

#### Under the Bid Threshold

The first new category created for those projects for which the estimated cost did not rise to the level requiring complete adherence to the competitive bidding laws was the provision permitting "competitive quotations." Competitive quotations were codified in Iowa Code Section 26.14. Competitive quotations still retained a vestige of the stricter competitive bidding process, but allowed a more flexible approach to allow the public owner on smaller projects to obtain "bids" without undertaking the administrative expense of the former bidding requirements.

The thresholds for allowing various public owners to use the competitive quotations process is established by statute and is adjusted every two years by a committee established by the Iowa Code under the direction of the Iowa Department of Transportation. The Master Builders of Iowa has a permanent role on that committee. Please refer to **Appendix C** to see the varying thresholds that apply to the competitive quotation requirement.

The Code of Iowa provides that for projects that fall within the competitive bidding thresholds, the public owner is required only to undertake “good faith” efforts to obtain a minimum of two quotes from contractors “regularly engaged in such work.”

### **Negotiated Contracts**

When the estimated cost of the project falls below the Competitive Quotations minimum threshold, the public owner is free to procure a construction contract through negotiations with a contractor or contractors. Although the Code does not establish any guidelines for using this process, “best practices” would dictate that the public owner exercise good faith in the selection of a contractor.

### **Notice to Bidders**

On July 1, 2016, a new law was signed that increases the estimating time between a notice to bidders being published to when a public owner can actually set a bid letting date. A notice to bidders shall be “posted” at least once, not less than 13 days and not more than 45 days before the date for the bid filing. Previously, the timeframe was 4 days and 45 days. (Iowa Code Section 26.3.1)

The old law stated that a public owner was required to “publish” its Notice to Bidders in a local newspaper of general circulation at least weekly in the same general area as the public improvement. Under the new law, the public owner now has the opportunity to expand the coverage of its Notice to Bidders via plan rooms and websites. Rather than relying on a local newspaper of general circulation in the area in which the project is being built, the public owner is now able to more effectively notify the bidder community through the use of contractor plan rooms and lead

generating services, as well as public owner websites or websites sponsored by statewide organizations representing public owners. (All of the aforementioned distribution networks shall now be utilized in lieu of the newspaper ad.)

There are multiple options for contractor plan rooms and lead generating services, but the Construction Update Network (CU Network) is one local option to help public owners and their representatives meet the new Notice to Bidders guidelines at **no expense to the public owner**. The CU Network meets both the definition of “a relevant contractor plan room service with statewide circulation” and “a relevant construction lead generating service with statewide circulation”. The CU Network has been operating for over 30 years with nearly 2,000 contractor-subscribers. A Notice to Bidders should be submitted to [mbiplanroom-dsm@mbi.build](mailto:mbiplanroom-dsm@mbi.build).

To help ensure compliance, a confirmation-of-receipt reply email from representatives of the CU Network will be sent the very same date to the entity that submitted the Notice to Bidders. The next business day, the respective required Notice to Bidders will be posted to all Construction Update Network subscribers via a member-wide email. In addition, on the day the Notice to Bidders is posted, the owner or owner’s representative will be provided a copy of this notice for audit compliance.

### **Distribution of Plans and Specifications**

Iowa Code Section 26.3.2 requires that the project’s contract documents, including all drawings, plans, specifications and estimated total cost of the proposed public improvement, shall be made available for distribution at no charge to prospective bidders, subcontractor bidders, suppliers and contractor plan room services. In addition, if a public owner requires a deposit as part of its paper plan distribution policy that deposit must be refundable and cannot exceed \$250 per set. The deposit shall be refunded upon return of the contract documents within fourteen days after the award of the project, unless the project’s contract documents are not returned in a timely manner or in a reusable condition, in which case the deposit shall be forfeited. Lastly, the new law also states that the architect and / or engineer of record are

not financially responsible for costs associated with paper plan preparation and subsequent distribution (distribution in this case includes postage and handling).

### **Proprietary or Sole-Source Specifications**

Proprietary or sole-source specifications are prohibited under Iowa law because they are by definition non-competitive.<sup>10</sup> Exceptions to a proprietary specification for a product can be made only if bidding contractors or suppliers are allowed to substitute an equivalent ("or equal") product for the applicable specification and such substitutions must be permitted in the specifications.

Sole-sourcing is not allowed under Iowa's competitive bidding statute. In *Siemens Building Technologies, Inc. v. Polk County, Iowa*, the District Court reinforced a prohibition against sole-sourcing.<sup>11</sup> More specifically, Siemens prepared and submitted a proposal for the design, programming, training and verifications services, and hardware components for the Iowa Events Center's building automation, fire alarm and security systems. Polk County originally took the position that Siemens's proposal did not require public bids, but after a competitor complained, the county reversed direction, and required public bids for the items in the Siemens's proposal. A suit was initiated by Siemens, which eventually was dismissed with the final ruling upholding the illegality of sole-source contracts for Iowa public projects.

### **Excessive Use of Alternates**

Owners or designers may elect to include alternates on the bid form. An alternate invites the bidder to increase or reduce its bid depending on whether it chooses to price the alternate. A bidder may decline to price the alternate, but the owner generally has the discretion to select or reject alternates, and thus can effectively determine the overall low bidder.

<sup>10</sup> See e.g., *id.* § 73.2(1) ("All requests made for bids ... shall be made in general terms and by general specifications and not by brand, trade name, or other individual mark."); see *Keokuk Water Works v. City of Keokuk*, 277 N.W. 291 (Iowa 1938). This principle has been widely accepted by other state and federal courts. See, e.g., *Diamond v. City of Mankato*, 93 N.W. 911 (Minn. 1903); *Waldinger v. Ashbrook-Simon-Hartley*, 564 F. Supp. 970 (C.D. Ill. 1983).

<sup>11</sup> 697 N.W. 2d 126 (IA S. Ct. 2005)

Alternates used to manipulate the selection of a low bidder violate Iowa law and violate the principle of accepting and honoring the lowest responsible and responsive bid.<sup>12</sup> A minimal use of alternates minimizes bidder confusion and minimizes claims of improper selection and bid manipulation. Bid forms which contain alternates should be clear as to how contractors are to respond on the bid form as to the alternates they do not wish to bid on; e.g., "no bid."

It is important to note that voluntary alternates are prohibited and should not be considered in the award of a contract.

### **Retainage**

Iowa law mandates that no more than 5% of the total project cost can be retained by the owner. (Iowa Code Section 573.12) The same state law limits the retainage a contractor may withhold from a subcontractor to the same rate the owner imposes on the contractor.

When the Iowa competitive bidding laws were overhauled in 2006, changes were made that allow for the early release of partial retainage. (See Iowa Code Section 573.28.) The law establishes four "triggers" for when a project can be deemed "substantially complete" and eligible for the early release of partial retainage. Pursuant to this provision, a project is deemed substantially complete at the first date on which any of the following occurs:

1. The project has been substantially completed in general accordance with the terms and provisions of the contract.
2. The project is substantially complete so that the governmental entity can occupy or utilize the public improvement or designated portion of the public improvement for its intended purpose.
3. The public improvement has been designated substantially complete by the architect or engineer authorized to make such a certification, or the authorized contract representative.
4. The project is substantially complete when the governmental entity is occupying or utilizing the public improvement for its intended purpose.

<sup>12</sup> As stated in one Iowa case, "The primary purpose of competitive bidding is to prevent fraud and collusion and for protection of public funds." *Miller v. Incorporated Town of Milford*, 276 N.W. 826 (Iowa 1937).

Triggers 2 and 4 do not apply to highway, bridge or culvert work.

Prior to applying for the release of retained funds, the contractor must notify all known subcontractors, sub-subcontractors, and suppliers that a request for the early release of retained funds will be made to the public entity. (See **Appendix D** – “Notice of Contractor’s Request for Early Release of Retained Funds”.)

At the time of the request for release of partial retainage, the public entity has the right to retain an amount equal to two hundred percent of the value of labor or material yet to be provided and may be withheld until such labor and materials are provided. The owner is also obliged to withhold from the retainage twice the amount of any properly filed claims under Ch. 573.

**Claims**

In 2018, a significant change was made to the claims on retainage statute in Iowa Code. More specifically, the law now requires potential claimants who have furnished labor or supplied materials to a subcontractor to provide a one-time written notification to the principal contractor within 30 days of first commencing work. (Iowa Code Section 573.15) The notification is a requirement to assert claim rights for anyone that does not have contractual privity with the principal contractor. The Code also requires that if any such claimant files a claim under Ch. 573, it must be supported by a certified statement that the required notice had been given.

It is important to note that this notification only applies to vertical construction and does not apply to highway, bridge, or culvert projects.

**Contractor Registration Requirements**

Under Iowa Code Section 91C.2, a “contractor” doing business in Iowa is required to register with the labor commissioner. A “contractor” is defined under Iowa Code Section 91C.1 as a person who engages in the business of “construction,” as the term is defined in Iowa Admin. Code Section 345-3.82, for the purposes of the Iowa employment security law.

A “contractor” may be exempted from registration if he or she: 1) earns less than \$2,000 per year or works on his or her own property, or 2) is self-employed and does not pay more than \$2,000 annually to employ other contractors in the same phases of construction. (Iowa Code Section 91C.1)

As a condition of registration, the contractor must meet the following requirements: 1) be in compliance with Iowa law relating to workers’ compensation insurance, and 2) the contractor shall possess an employer account number or a special contractor number issued by the division of job service of the department of employment services pursuant to the Iowa employment security law. (Iowa Code Section 91C.2)

**Out of State Contractor Registration**

Each contractor with a principal place of business outside of Iowa must file a \$25,000 bond in order to register as a contractor. Having a branch office in Iowa does not exempt a contractor from the bonding requirement. The bond guarantees that the non-Iowa contractors pay all taxes, penalties and other monies due to the State of Iowa as a result of working in Iowa. Only the State and its agencies can collect under the bond. An out-of-state bond must be prepared using the bond form provided by the Division of Labor Services.

**Bid Bonds**

The Iowa Code requires bid bonds for most public projects. A bid bond is a bond that is posted by a bidder at bid time. Should the bidder be tendered the contract but refuse to sign, the owner may forfeit the bond. (Iowa Code Section 26.8)

The amount of the bond shall be not be less than five percent and not more than ten percent of the estimated cost of the project. (Iowa Code Section 26.8) Normally the information for bidders contains any bid bond requirements.

**Payment and Performance Bonds**

Iowa law requires that a contractor on a public project furnish a payment and performance bond. Contracts for the construction of a public improvement shall, when the estimated contract price exceeds \$25,000, be accompanied by a bond, with surety, conditioned for



the faithful performance of the contract, and for fulfillment of other requirements as provided by law i.e., payment of subcontractors and suppliers. (Iowa Code Section 573.2) The payment bond protects subcontractors and suppliers in the event the contractor does not pay them. A performance bond protects the owner in the event the contractor does not complete the project. Generally, payment and performance bonds are combined on one form.

### **Project Labor Agreements**

On April 13, 2017, Gov. Terry Branstad signed Senate File 438, an Act Relating to Bidding and Contracting for Public Improvement Projects. The new law affects notices to bidders for public improvements, bids awarded for public improvements, and contracts for public improvements entered into on or after April 13, 2017. Senate File 438, codified into law as Iowa Code Section 73A.28, prohibits state and local governments from using project labor agreements on taxpayer-funded construction projects.

Iowa is now one of 23 states that have passed laws or executive orders restricting government-mandated project labor agreements that involve public money.

### **Prequalification Provisions**

A law also passed in 2017<sup>13</sup> prohibits state and local governments (not including the Board of Regents and Department of Transportation) from imposing any pre-qualification requirements that directly or indirectly deter potential bidders from bidding. Prohibited criteria include requiring:

- experience on similar projects;
- size of company;
- union membership;
- or any other arbitrary criteria.

***EXCEPTION:** Manufacturer's requirements which call for certain installation experience or installer's certification can still be included in the project specifications, but if so, the specifications should clearly state that these are a requirement of the manufacturer.*

Entities responsible for awarding a contract for public improvements cannot, in any bid information or project specifications, project agreements, or other controlling documents do any of the following:

- require OR prohibit a bidder, offeror, contractor or subcontractor from working with labor organizations; or
- discriminate against any bidder, offeror, contractor or subcontractor for its choice to work with or not work with any labor organization.

Governmental entities may still request information from the apparent lowest responsive bidder to assist the governmental entity in determining that bidder's responsibility. However, a governmental entity may only request information related to the apparent lowest responsive bidder's experience, number of employees, and ability to finance the cost of the public improvement.

- Architects and engineers that have contracts with the owner must be careful when drafting project specifications which directly or indirectly impose prohibited prequalification requirements.

Governmental entities are not allowed to award a grant, tax abatement, or tax credit where the award is conditional upon any term that would be contrary to the new law's requirements.

Any public official who fails to follow the duties, could be found guilty of a simple misdemeanor and potentially be removed from office.

### **Statute of Repose**

A statute of repose is a law that extinguishes the right to bring certain types of lawsuits relating to real property after the expiration of a certain amount of time.

In Iowa, before July 1, 2017, a third party (i.e., not a building owner) had fifteen years within which to bring a lawsuit based on alleged defective or unsafe

<sup>13</sup> Iowa Code Section 26.16.



construction which caused personal injury or death. The law did not apply to breach of contract claims.

The Iowa legislature in 2017 amended the statute of repose. The deadline was lowered to eight years for commercial construction and ten years for residential construction projects. ([Iowa Code Section 614.1.11](#)) The law contains an exception for intentional misconduct or fraudulent concealment. Any contract entered into before July 1, 2017, on a commercial construction project, would be governed by the fifteen year deadline. Any residential or commercial construction contract signed July 1, 2017 or after, would be governed by the new ten and eight year deadlines. The statute of repose still does not apply to breach of contract cases.

### **Local Preference**

Iowa's laws do not contain any provisions permitting a public owner to restrict, qualify or otherwise limit or differentiate or discriminate against a bidder on a public construction project because of the bidder's location (i.e., city, county, state). Such local preference considerations are generally considered to be discriminatory and illegal and should be strictly avoided under Iowa's competitive bidding laws.<sup>14</sup>

### **In-State Preferences / Reciprocal Bidder Laws**

When a public improvement contract is to be let, a resident bidder is given preference against a non-resident bidder whose state requires preference in the same amount of such preference. ([Iowa Code Section 73A.21](#)) For example, the State of Wisconsin has a law that gives preference to Wisconsin companies over out of state companies for their public work projects. Those same preferences are given to Iowa bidders if the situation is reversed and the Wisconsin bidder is bidding Iowa public works projects.

During the 2011 legislative session, Iowa's reciprocal bidder law ([Iowa Code Section 73A.21](#)) was expanded to include workforce preferences, as well as any sort

of preferential treatment a non-Iowa bidder received in its state of domicile. In addition, enforcement duties were granted to the Iowa Labor Commissioner, which puts enforcement provisions into play to allow public owners to make out-of-state contractors who enjoy preferences in their respective state of domicile to now be subject to those same requirements when bidding Iowa projects.

The law now requires a public owner to include in invitations to bid a statement that an out-of-state bidder must identify any local preference statutes or regulations imposed by the bidder's state of residence. ([Iowa Code Section 73A.21.4](#))

### **Davis-Bacon Act**

The Davis-Bacon Act, which requires government-determined standard wages, applies only to federally funded or federally assisted construction projects. Local Davis-Bacon laws (standardized wages set by a local public owner) have been found to be illegal under Iowa law. *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702 (Iowa 1993). In this case a prevailing wage ordinance was struck down based upon arguments that the federal ERISA statute preempted the local wage ordinance and that the competitive bidding statute was violated by such a proposed local ordinance.

The Davis-Bacon Act applies to every contract competitively bid or negotiated for construction alteration or repair of public buildings or public works over \$2,000 to which the United States or District of Columbia is a party. It also applies to federal aided construction contracts of \$2,000 or more whenever the Davis-Bacon Act is incorporated by reference in the federal statute. Contractors and subcontractors must pay the "prevailing wage" for work covered under the Davis-Bacon Act. A prevailing wage is determined by wage surveys conducted by the Department of Labor which determine the Davis-Bacon rate per hour, including cost of fringe benefits.

On construction contracts or subcontracts over \$100,000 funded in whole or in part with federal funds, the Fair Labor Standards Act and Contract Work Hours and Safety Standards Act require payment at time and a half for all hours worked over 40 in a week for nonexempt employees. Failure to

<sup>14</sup> To our knowledge, there have been two district court opinions which have addressed this issue. In one, *Hudson v. City of Mason City*, the court voided a contract let to a "local" contractor even though the contractor was not the low bidder. In another, the district court permitted a similar award to stand. The losing contractor appealed to the Iowa Supreme Court, which affirmed the lower court but the ruling was based on the protesting contractor's lack of standing, not the merits of the case. See *Garling Constr. v. City of Shellsburg*, 641 N.W.2d 522 (Iowa 2002).

properly comply with Davis-Bacon and other wage payment statutory requirements can subject a contractor to debarment as well as penalties, liquidated damages and attorney fees.

### Waiver of Bid Irregularities

Iowa law permits public owners to waive bid irregularities but only those that are considered minor and which do not affect the competitive positions of the bidders.<sup>15</sup> The waiving of material deviations is prohibited by Iowa law in that by doing so the owner can affect the outcome of the award of the contract. Examples of deviations considered to be minor vs. material issues are included in **Appendix A** of this publication. Frequently, the Invitation to Bids will contain a statement such that the "owner reserves the right to waive any and all bid irregularities." There is no support for this statement under Iowa law. While many Iowa statutes allow an owner to reject all bids and rebid the project,<sup>16</sup> an owner cannot waive material irregularities since bid "responsiveness" must be first considered by the public owner and by definition, to be responsive a bid must conform to the invitation in all *material* respects. (See page 5 regarding responsive bids.)

### Deadline for Receiving Bids

Pursuant to Iowa Code Chapter 26.10, the date and time that each public bid is received by the governmental entity, together with the name of the person receiving the bid, shall be recorded on the envelope containing the bid. All bids received after the deadline as stated in the projects bid documents, shall not be considered and shall be returned to the late bidder unopened.

### Venue Provisions in Commercial Construction Contracts

In 2014, there was an effort brought to provide clarity on venue provisions in commercial construction contracts. The legislature passed and Gov. Branstad signed legislation that renders provisions in construction contracts that reference another state's laws or statutes unenforceable. The bill also requires any litigation, arbitration, mediation or any other dispute resolution process to be held in Iowa. This

new law (Iowa Code Chapter 537A.6) applies to both public and private contracts entered into on or after January 1, 2014.

### Bid Mistakes: Contractor's Potential Liability for Bid Errors

It is typical in the construction industry for subcontractors to wait as long as possible before placing their bids with a general contractor in order to prevent the general contractor from having time to obtain a lower bid from another subcontractor. The subcontractor must obtain prices from its subcontractors and suppliers, many of which are also submitting bids at the last minute for the same reason. Under this time pressure, mistakes can be made in the last minute push to put a bid together.

A contractor may be relieved from a mistake in his bid under proper circumstances.<sup>17</sup>

A number of factors determine whether a bid may be withdrawn due to a mistake in the bid.<sup>18</sup>

**If a bid is obviously erroneous, such as when it is unreasonably low, courts will generally grant the contractor the right to withdraw his erroneous bid, at least where circumstances indicate that the owner should have realized that the bid was based on a mistake.**

**The mistake must be simply a clerical or mathematical error; if the mistake is one of judgment or lack of expertise in bidding, the mistake will not relieve the contractor from performance;**

**The contractor must have promptly notified the owner of its mistake and intent to withdraw;**

**The mistake is so monetarily significant it would be unconscionable to force the contractor to perform the contract at the mistaken bid price; and**

<sup>15</sup> *Urbany v. City of Carroll*, 157 N.W. 852 (Iowa 1916).

<sup>16</sup> See, e.g., Iowa Code § 73A.18.

<sup>17</sup> *M.J. McGough Co. v. Jane Lamb Mem. Hosp.*, 302 F. Supp. 482 (S.D. Iowa 1969).

<sup>18</sup> *Id.*

**The owner must have not changed its position to its detriment in reliance on the bid.**

If the bidding authority refuses to allow the withdrawal of the bid, the contractor is faced with two options:

1. perform the project at the mistaken bid price or;
2. refuse to sign the contract. If the contractor chooses the latter course, it runs the risk of forfeiting its bid bond.

Most public bid projects contain a clause in the bid invitation which provides that the contractor agrees to forfeit its bid bond if it is awarded the job and wrongfully refuses to enter into a contract. These provisions are designed to protect the bidding authority from damage caused by being forced to re-bid the project and any delay caused by that process.

The public owner has several choices when faced with a putative low bidder who wishes to withdraw its bid:

- Evaluate the putative low bidder's arguments under the above criteria and allow withdrawal and return the bid bond.
- Attempt to forfeit the bid bond.
- If the "low bidder" is allowed to withdraw, or if the owner decides to attempt to forfeit the bid bond, the owner may accept the next low bid or reject all bids and start the process over again.

A public owner may want to avoid requiring a bidder whose price is materially low because of a mistake to sign the contract. This virtually ensures an unsuccessful project.

Of course, once all of the bidders' bid amounts are made public and the bidders can see how their competitors priced the project, getting a fair price the next time around may be difficult unless there are modifications made to the plans and specifications so that the owner gets a "new look" at the project by the bidders.

**Bid Challenges: Standing to Protest**

In order to challenge the bid award, a party must have standing - defined as the legally recognized ability to do so. Generally, two classes of individuals will seek to challenge a bid award. The first class consists of taxpaying residents of the public authority which awarded the bid; i.e., residents of a school district, municipality, county or state.

The second class consists of the "disappointed contractors" who submitted bids, but were not awarded the contract. These may be low bidders whose low bids were not deemed responsive or non-low bidders who feel the low bidder submitted a non-responsive bid.

States almost uniformly allow a taxpayer to bring an action against the public authority challenging the award of a bid on the grounds that the competitive bidding laws were violated. This includes a disappointed contractor (or one of its employees) who is also a taxpaying resident of the appropriate public authority, but standing is granted only if the contractor can satisfy the taxpayer requirement.

States are split over the issue of whether a disappointed bidder who is not a taxpaying resident of the public authority letting the bid has standing to challenge the award. Generally, these suits are for equitable relief. That is, the party challenging the bid award is not seeking money damages but rather, a court order that the public authority must award the bid to the lowest responsive and responsible contractor.

Iowa courts have held such a bidder does not have standing to challenge an award on the grounds the bidding statutes requiring the bid to be awarded to the lowest responsive and responsible bidder are enacted to protect the taxpayers – not a particular contractor.<sup>19</sup>

As stated above, a disappointed contractor may have standing to seek an injunction to prevent the owner from *awarding* the contract where the bidding laws have been violated.<sup>20</sup> However, the contractor may not bring an action against the public authority for money damages even if the public authority wrongfully

<sup>19</sup> *Garling Constr. v. City of Shellsburg*, 641 N.W.2d 522 (Iowa 2002).

<sup>20</sup> *Id.*

awarded the bid to another contractor or did not fairly let the bid.

While a contractor may not force a public agency to award it the bid, statutory public contracting provisions permit the awarding authority the right to reject all bids. ([Iowa Code Section 26.10](#))

It has been suggested this power cannot be exercised arbitrarily or capriciously or to steer a contract away from one party or toward another.<sup>21</sup>

### **Tie Bids**

Although it is rare, tie bids (identical low bids) occasionally occur. Assuming both bidders are "responsible," how does the public owner resolve this dilemma? It would not make sense to reject both bids and rebid the project because that might result in higher bids.

It is suggested that if both bidders agree, a random selection process could be used to select the winning bidder - a flip of the coin, for example. As long as the public owner and the two bidders agree to this process, it is unlikely to be successfully challenged.

### **Negotiating After the Bid Opening**

Iowa law prohibits negotiating with the low bidder after the bids have been opened. This is based on the premise that all bidders should have the right to bid on the same bid package. An Iowa Attorney General's opinion has recognized this principle.<sup>22</sup>

It is permissible to negotiate *minor* changes with the low bidder after contracts have been signed but changes should be facilitated through the change order process. Under no circumstances should major changes be used to facilitate a negotiation process with a bidder. Major changes such as a change in scope require the project to be re-bid.

### **Indemnification – Prohibition of Broad Form**

Iowa law prohibits broad form indemnity provisions in contracts entered into on or after July 1, 2011. A broad form indemnity provision bars a situation in which one party to a construction contract could be asked to

indemnify, hold harmless or defend another party's negligence. ([Iowa Code 537A.5](#)) In short, a negligent party will be responsible for its own actions and this responsibility cannot be passed on to others.

It must be noted that the law is narrowly tailored. It only applies to construction contracts and it voids indemnification provisions requiring indemnification to the extent caused by or resulting from the negligent act or omission of the other party to the contract or persons the other party is responsible for. Other types of indemnity are allowed. The legislation and prohibition apply equally to both public and private construction projects in Iowa. The legislation has certain exceptions and does not impact the rights of sureties or their principals under a construction bond; an insurer's obligations to their insured under any policy of insurance, including workers compensation; a borrower's obligation to its lender; or otherwise impact strict liability if that is already imposed by law. These will continue, but these exceptions are not germane to the overall goal of barring broad-form indemnity.

### **Design / Build Project Delivery Method**

The design / build procurement system is not allowed under Iowa's competitive bidding laws unless the criteria to be used to select the successful bidder is lowest price, assuming bidder responsibility.<sup>23</sup> Design/build projects are rarely, if ever, structured to award the project to the lowest bidder. While some other states allow this method of project delivery system for public projects, with the exception of the Iowa Board of Regents, design/build has not been utilized to any real extent in the public sector in Iowa because of the competitive bidding requirements.

### **Construction Management (CM) at Risk / Guaranteed Maximum Price**

The CM at Risk / guaranteed maximum price delivery system would undoubtedly not pass muster under Iowa's competitive bidding laws as currently outlined in [Iowa Code Chapter 26](#).<sup>24</sup> Under this form of project delivery, the CM guarantees to the owner that

<sup>23</sup> *Id.*

<sup>24</sup> Although the Iowa Supreme Court has not yet specifically addressed this issue, it is likely to follow the lead of other states which have done so. See *Atlin Constr., Inc. v. Muncie Cmty. Schs.*, 413 N.E.2d 281 (Ind. Ct. App. 1980); *D-1 Constructors, Ltd. v. Unified Sch. Dist. No. 229*, 788 P.2d 289 (Kan. Ct. App. 1990); *McMaster Construction, Inc. v. Bd. of Regents of Okla. Colls.*, 934 P.2d 335, 339 n.21 (Okla. 1997); *Malloy v. Boyertown Area Sch. Bd.*, 657 A.2d 915 (Pa. 1995).

<sup>21</sup> *Dickinson Co., Inc. v. City of Des Moines*, 347 N.W.2d 436 (Iowa Ct. App. 1984).

<sup>22</sup> See, 1994 Iowa Op. Atty. Gen. 95 (94-4-2).

the cost of the project will not exceed a certain price. Under this form of Construction Management, the CM usually contracts directly with the trade contractors. In this respect, the CM at Risk form of project delivery closely resembles the design / bid / build model. The agency form of construction management is permissible as a professional service, as discussed in Section 2 of this Resource Guide.

### **Emergency Repair Provisions**

Under [Iowa Code Section 26.2.3](#), public owners subject to that chapter can use their own employees to perform repair work, emergency or otherwise. If the public owner needs to obtain a private contractor to perform emergency repair work, several provisions of the Code provide methods whereby the emergency work can be undertaken without adhering to the requirements of [Ch. 26](#). Emergency repair provisions in Iowa Code differ by public owner.

- For Cities: [Iowa Code Section 384.103](#)
- For Schools: [Iowa Code Section 297.8](#)



## FREQUENTLY ASKED QUESTIONS ABOUT DESIGN / BID / BUILD

**Question:** If a bid deadline of 2:00 pm is established, is it permissible to allow a bid received at 2:01 pm to be considered?

**Answer:** No. The bid should be returned to the bidder unopened and the bid should not be considered by the owner. Pursuant to Iowa Code Chapter 26.10, the date and time each bid is received shall be recorded on the envelope containing the bid. A late bid will be returned to the bidder unopened.

**Question:** Can the owner waive as an irregularity the failure of the bidding contractor to submit a performance or security bond as required by Iowa law?

**Answer:** No. The requirements for bid bonds are considered a material requirement of the public bid and cannot be waived.

**Question:** Can a bidder be pre-qualified based upon whether or not they sign collective bargaining agreements with trade unions?

**Answer:** No. Pre-qualifying based on whether or not a contractor's employees affiliate with unions or not violates Iowa's competitive bidding laws.<sup>25</sup>

**Question:** If the low bidder's price exceeds the budget, is it legitimate to conduct negotiations among bidders to lower the price?

**Answer:** No. Iowa law prohibits negotiations after the bid.<sup>26</sup>

**Question:** Is it legal to do a design / build project in the public sector in Iowa?

**Answer:** No.<sup>27</sup> However, opinions vary as to whether or not the Regents have the authority under their procurement code to utilize a design / build model.

**Question:** Is it legal to do CM at Risk for a guaranteed maximum price utilizing a construction manager or a general contractor practicing CM at risk for public sector projects?

**Answer:** No. However, opinions vary as to whether or not the Regents have the authority under their procurement code to utilize a CM at Risk model.

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<sup>25</sup> *Miller v. City of Des Moines*, 122 N.W. 226 (Iowa 1909). Iowa Code Section 26.16.

<sup>26</sup> See *supra* note 24 and accompanying text.

<sup>27</sup> See *id.*

**Question:** When no bids are received, is it permissible to forego competitive bidding and negotiate the contract with prospective contractors?

**Answer:** No. So long as the project falls at or above the competitive bidding threshold, the project must be re-advertised and bid as though the process is starting from the beginning.

**Question:** Is competitive bidding required for architectural engineering and design services?

**Answer:** No. Owners are free to select design professionals at their discretion but usually it is done on a qualification based selection process to select their design representatives for the project. These services are not considered “construction” services but rather professional services.

**Question:** A certain percentage of revenue being used to finance the public project is received from private sources. Is it legal to waive competitive bidding requirements for the project?

**Answer:** No. It may be possible under a specific set of circumstances to set aside a specified portion of the project that is to be financed solely with private funds and limit that portion only to some other process other than competitive bidding. However, all public improvements estimated to cost in excess of the bidding threshold set by statute with any amount of public funds must be competitively bid.

**Question:** Can a bidder’s proposed completion date be used as a determining factor in selecting the low responsible bidder for a project?

**Answer:** No. Alternate completion schedules must be stated in terms of specific dollar additions or deletions from the project as set out in alternates in the bid form and bidders must be informed accordingly so that an objective price evaluation can be calculated when determining the low responsible bidder. Open-ended completion date alternates invite selections based upon non-defined criteria.

## **SECTION 2**

### **AGENCY FORM OF CONSTRUCTION MANAGEMENT**

#### **Fundamental Characteristics of Agency CM**

A fundamental characteristic of the agent CM under Iowa law is that no matter how involved the construction manager is in project administration, it is not at risk for the cost or schedule of building the job (i.e., the performance risk). This is a critical point and one that is commonly misunderstood. Agent CM contracts are not required to be competitively bid under Iowa law, since they are essentially professional service contracts. Owners may elect to select agent CMs on the basis of responses to Requests for Proposals. Most typical agent CM arrangements will cap the liability of the agent CM for negligence in the furnishing of its services at its fee or professional insurance coverage for the project. It is important for the owner to consider this fundamental characteristic of the agency CM at the project's programming stage.

The Construction Manager's advisory role is in stark contrast to that of the general contractor under the design / bid / build approach, which is to assume the risk associated with the construction of the project. An agent or advisor CM is not contractually responsible for delivering the "bricks and sticks" construction. Rather, the agent CM is responsible for furnishing the management services necessary to deliver construction. Thus, it is accurate to describe agency CM as a construction management system, a way to manage the process of construction, but not a way to physically deliver construction.

#### **Warranty Limitations**

Warranty limitations derive from the nature of the agent CM's performance guarantee. Under most standard form CMA agreements, the agent CM only guarantees that it will manage the construction of a

project in accordance with terms and conditions of its contract and prevailing professional standards.

#### **Insurance and Related Issues**

Typical standard form agency CM agreements often require the agent CM to carry commercial general liability coverage (CGL) including contractual liability, broad form property damage and products and completed operations, and business automobile liability coverage. During the past decade umbrella policies have also been used to supplement liability coverage, although recent occurrences in the insurance and surety markets have dramatically changed underwriting practices and premium costs for umbrella coverage.

#### **Summary: Agency CM Services Overview**

An agency construction manager's role under Iowa law is an advisory role only and normally occurs where the CM advises the owner and the owner's team on project schedules, budgets and construction phase services, review of safety and work programs and administration of general conditions items. CM agents also will work closely with owners on project closeout and during the commissioning and occupancy stages of the project. Often misunderstood, agency construction management is not truly a project delivery system but a management system to advise the owner on the project from start to finish. However, it is important to remember that all public projects in Iowa where construction managers are employed are required to abide by all of the competitive bidding laws the same way the projects constructed under the design / bid / build approach must comply.



## OTHER LEGAL ISSUES / SUMMARY FOR CONSTRUCTION MANAGEMENT UNDER IOWA LAW

### Conflicts of Interests / Self-Performing of Work

A frequent issue that arises in CM contracts is whether the CM or an affiliate may **self-perform** some of the work, for example, paving. Iowa law does not prohibit this; however, several caveats must be noted: 1) If the CM entity or related entity is hoping to perform some of the work, it must bid on the work as any other contractor if the project is governed by the competitive bidding laws; 2) the CM will be subject to extraordinary scrutiny by the owner for any hint of favoritism being shown to the affiliate; 3) the CM will also be subject to extraordinary scrutiny by other prime contractors who may claim that the CM is playing favorites with its own sister-company in terms of schedules preferences or other accommodations. It is a no-win proposition for an agency CM to self-perform any of the work. Both the owner and the construction manager are subject to conflict of interest claims if they fail to meet the scrutiny required in a public setting using taxpayer money. An owner and a construction manager need to weigh these considerations very carefully before proceeding with this conflicting role. If circumstances leave no other options, the owner should be careful that the CM follows all the requirements of the competitive bid selection process called for by Iowa law.

### Bid Packages

It can be in the owner's benefit to allow bidding contractors on a CM or multiple-prime contract to bid any combination of one or total of all the bid packages under a single price. However, it is challenging to design a bid form which accomplishes this while still imparting a clear set of instructions to the bidders. The result of an improperly drawn set of bid documents can result in chaos on bid day. If the owner decides to use this method of "bundling bids," it must ensure that all bidders specifically know what their bid entails, and more importantly, how the public owner is to evaluate these bids. This is a difficult job for any CM to accomplish.

### Bonding & Liability Issues

Unlike general contractors under a design / bid / build project, the construction manager has no liability for the failure of the trade contractors to complete the construction or for the payment of the prime contractors' subcontractors and suppliers. Payment and performance bonds are still required under Iowa law for each prime bid package that is in excess of \$25,000.<sup>28</sup>

All of the provisions of Chapter 573 regarding claims apply to public CM agency projects, and the agent CM should clearly understand the claims process and explain it at all pre-bid meetings.

### No Bids Received

Under a construction management agency arrangement when no bids are received on one or more bid packages, the owner is required to re-bid the bid packages for which no bids were received. The owner would still need to comply with the notice and hearing provisions of the Code for the rebidding. This process could result in start-date or coordination issues with the other bid packages. Managing award dates and issuances of notices to proceed would need to be handled carefully so as not to unduly delay the project.

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<sup>28</sup> Iowa Code § 573.2

## APPENDIX A

### *WAIVER OF BID IRREGULARITIES*

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**Note:** This document is presented without legal citations in that it was prepared primarily for the benefit of laypersons; however, most of the principles discussed herein are addressed in the main body of the Resource Guide. Some of the principles are also based on case authority from other jurisdictions that were used when no Iowa cases which were on-point could be found. The author believes that these cases would be instructive to an Iowa court should similar issues arise in this state. Citations are available from the author upon request.

"The owner reserves the right to waive irregularities in the bids." There are no words which cause more consternation in the public bidding arena than the preceding sentence. Master Builders of Iowa and its legal counsel field more questions on this subject than perhaps on any other issue. And lately, as more young architects and engineers enter public service as the old guard retires, a whole new generation of owner's representatives needs to learn the basics of public bidding law. In this article we will explore the law as it relates to the issue of the owner's right to waive irregularities in the bid.

Before we get into the heart of this subject, we need to discuss several basic rules for public bidding. There are two primary considerations in awards of public contracts: bidder responsibility and bidder responsiveness. Bidder responsibility is essentially whether a bidder on a public contract will be able to perform the contract. Considerations in determining whether a bidder is responsible include the experience of the bidder, financial condition, conduct and performance on previous contracts, facilities management skills, and the ability to properly execute the contract.

#### Bid Responsiveness

The main focus of this article, however, is on bidder responsiveness. A bid is said to be "responsive" when it substantially complies with the specs and requirements set out in the invitation to bid (ITB) or the request for proposals (RFP). Responsiveness is determined at the time of bid opening, and a non-responsive bid at the time of opening cannot subsequently be made responsive. This is one reason why language in the ITB which purports to give the owner the right to waive "any and all" bid irregularities is meaningless. Some bid defects cannot be waived, regardless of what the ITB says.

Non-responsive bids should be immediately rejected and not even entered on the bid tabulation. Of course, the problem that frequently arises is that while a bid may seem non-responsive, the public owner may believe it has the right to waive the irregularity. This is too-often the result when an owner reads a seemingly nonresponsive bid only to find that it would be the low bid if not declared nonresponsive.

So when can an owner waive a bid irregularity? Courts often refer to a deviation amounting to a non-responsive bid in terms of its being "material." In general, if the deviation is material, it cannot be waived by the public owner, no matter how good the price may look (or no matter what the ITB says.)

As will be explained in more detail below, a material deviation occurs when one bidder gains a substantial competitive advantage as a result of the bidder's deviation from the requirements of the bid invitation. Deviations highly technical in nature, or in unique situations, are less likely to cross the threshold into material deviation. Also, as stated by one court, a mistake is not material and therefore is excusable if the deviation is not

"capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders."

In considering whether a technically non-compliant bid could be accepted or cured, there are essentially two relevant factors for the owner to consider. First, it must be determined whether the effect of a waiver would deprive the public entity of its assurance that the contract will be entered into and performed in accordance with the specifications. Second, is a consideration of whether the waiver would adversely affect the competitive bidding process by placing one bidder in a position of competitive advantage?

### **Competitive Advantage**

The proper test for determining whether the bid defect creates a competitive advantage is "whether the contract, with the defect included, would have afforded [the bidder] an advantage over its competitors." A public entity has no discretion to waive non-compliance with a specification where doing so would affect the bid price, or give one bidder a competitive advantage. For example, in one case, the bid documents required the prospective project to offer 50 parking spaces. One bidder's proposal lacked the requisite number of spaces, thus giving it a competitive advantage over other bidders whose bids included the necessary parking.

Any time a bidder is allowed to avoid an otherwise mandatory bid requirement and other bidders are not afforded the same opportunity there is a competitive advantage for that bidder.

### **Waiver of Minor Irregularities**

Minor - not material - irregularities in a bid may be waived. An irregularity is considered minor when the effect on price, quantity, quality, or delivery is negligible compared to the total cost.

Examples of minor irregularities include: failure to submit the correct number of copies, lack of signature where other documents indicate bidder's commitment to be bound, and in some instances failure to acknowledge addenda.

The public entity must be wary that in granting a waiver of deviation, it does not afford a "last look" to one bidder at the expense of others. Also, a public owner has no discretion to waive a defect where it would violate statutes or city ordinances on competitive bidding requirements.

Some irregularities or defects in bids are more likely, perhaps even presumed, to be material. Anything that affects bid price is not a minor irregularity that can be waived. Moreover, the completion date is a material aspect of the bid. In one Iowa case where a bid required a completion date of Nov. 1, and the bid contained a Dec. 1 completion date, the bid was deemed non-responsive, as the completion date was declared to be material.

The bidder may not alter or append the bid after it has been opened to bring it into compliance, for example by providing an important signature that was omitted from the original bid. Of course, bids must be signed to create a binding contract unless it can be determined from other bid documents that the bidder intends to be bound. When revisions to a bid are made before it is submitted, such as handwritten changes in the numbers or other information "whited-out," some states like Minnesota require that the changes be initialed or signed, or the bid is deemed non-responsive.

When there is a substantial difference between the materials required in the specifications and those described in the bid, the bid is nonresponsive. If the specifications require a particular level of performance or specify a brand name, bids that offer a product not in compliance with the specifications are subject to rejection. (Of course, the problems associated with "sole-source" procurement would itself be a suitable topic for a future article for this publication.) The public owner after opening the bids may not permit a substitution of materials.

### **Bid Bond Irregularities**

Failure to submit a proper bid bond with the bid is a material deviation rendering a bid non-responsive. Iowa law requires a proposal guarantee consisting of either a bid bond or a form of certified check. Also, the bond must be in the proper form. Where a bidder omitted the penal sum on a bid bond, the bid was declared non-responsive, and the bidder was neither allowed to explain the omission as a clerical error nor alter the bid to make it compliant. Another incident involved a photocopied power of attorney, rather than an original. Thus the bid failed to provide sufficient authority to bind the surety rendering the bid non-responsive. A third example concerned the omission of the bond commitment and period of bid validity. In these situations, the bids were held to be non-responsive.

### **Other Examples of Irregularities**

State laws or regulations often provide instances where irregularities mandate the rejection of a bid. For example, under Iowa DOT regulations, "[p]roposals will be considered irregular and may be rejected for any unauthorized changes in the proposal form or for any of the following reasons:"

- A. If on a form other than that furnished by the Contracting Authority, or if the form is altered or any part thereof detached,
- B. If there are any unauthorized additions, conditional or alternate bids, or irregularities of any kind which may tend to make the proposal incomplete, indefinite, or ambiguous as to its meaning,
- C. If the bidder adds any provisions reserving the right to accept or reject an award because of being low bidder on another proposal in the same letting,
- D. If the bidder adds any provisions reserving the right to accept or reject an award or to enter into contract pursuant to an award,
- E. If a bid on one proposal is tied to a bid on any other proposal, except as specifically authorized on the proposal form by the Contracting Authority,
- F. If the proposal does not contain a unit price for each pay item listed, except in the case of authorized alternate pay item. Iowa DOT Standard Specifications 1102.10 (2001).

### **Clerical Errors**

As all rules are subject to exception, some defects can be material and still waivable at the discretion of the public entity. The rules for this type of situation parallel those for the determination of when a low bidder can withdraw his bid if he discovers an error in the bid after the bids are opened. Regarding clerical errors there are at least two types of errors that are relevant to this discussion.

The first is where there is no latent mistake in an otherwise responsive bid. The mistake is obvious, making the bid facially non-responsive. However, the mistake is not material because it can be resolved by reference to information contained in other bid documents. One court has classified this kind of error as "one in the submission of a bid which does not support the release of the bidder."

Related to this is the situation where the mistake in the bid form is so obvious that the owner could not have construed it as anything but a mistake. This does not contravene the regular rule that the lowest bidder be awarded the contract. Examples would include such things as misplaced decimal points, reversal of prices, and mistakes in the designation of units.

The second type of problem is where the mistake is obvious and material and makes the bid facially non-responsive, but it cannot be resolved without reference to outside documents. In this situation the bid is non-responsive, and must be rejected. For example, where a bidder failed to state the dollar amounts of work by

subcontractors, and this could not be cured by information elsewhere in bid documents, the mistake was material and the bid was rejected.

Clerical errors are waivable only in the first category - where the irregularity is a matter of "form and not of substance" and only when: 1) the bidder acted in good faith in submitting the bid, 2) in preparing the bid there was an error of such magnitude that enforcement of the bid would work severe hardship upon the bidder, 3) the error was not the result of gross negligence or willful intention, and 4) the error was discovered and communicated, along with a request to withdraw the bid before acceptance.

The key distinction is whether the discovery of the mistake and the request for withdrawal is made before or after the contract is consummated.

Under competitive bidding rules, a bid is firm, and remains so, until it is either accepted, or the time for accepting bids expires. In Iowa, a bidder may withdraw a bid until the time specified in the advertisement for receiving of proposals. They may not then be withdrawn until 30 days after the letting, unless, of course, a mistake is discovered and the mistake is such that withdrawal is permissible. See, for example, Iowa DOT Standard Specifications 1102.13 (2001).

### **Timeliness**

If a bid is submitted late, it is virtually certain to be rejected, as this is not a waivable irregularity. A bid is late if it is "received in the office designated in the invitation for bids after the exact time set for opening." Timeliness of a bid is determined by time of receipt, not time of discovery of the bid by the owner. Under the late bid rule, bids may be considered if: 1) received prior to award, 2) late discovery was due primarily to government mishandling after receipt at the government installation, and 3) consideration of the bid would not compromise the integrity of the process because the bid was in the sole custody of the owner and therefore unalterable by the bidder, from its receipt at the installation to its actual opening. For example, where a bid was delivered to Federal Express in a timely manner, but was late to the government installation due to the events of 9/11/2001, the bid was acceptable because bidder had neither an added competitive advantage nor an opportunity to alter its bid.

Another unusual example of where a late bid was accepted was where three bidders were sent to the wrong location in the building where bids were to be received by a security guard, and were at that location before the time bids were due. This may be a unique situation, however. Most generally, when a bid is simply turned in late, there is little protection for the bidder.

### **DBEs, MBEs, and WBEs**

Inclusion in bids of women-owned businesses (WBEs) and minority-owned businesses (MBEs), sometimes collectively known as disadvantaged business enterprises (DBEs), when mandated in the bid documents is often material. Certain Iowa regulations provide specific DBE requirements. See, for example, Iowa DOT Standard Specifications 1102.17 (2001).

### **Filling in Blanks**

The general rule is that bid forms must be completely filled in. However, some minor discrepancies may be waivable. In some instances, it may be that failure to fill in a blank means that a bidder is willing to complete the task at no charge. This, of course, may not be the bidder's intention. For example, in a recent case, a bidder's omission of mobilization cost could have been an indication that there would be no extra charge for mobilization, thus not creating a material deviation. Leaving blank spaces on a bid form is very dangerous. It may give the owner a reason to assume the bidder meant "no charge" and accept the bid but bind the contractor to the original price.

Different states have different interpretations of the materiality of leaving blank spaces on bid forms. In some states leaving a bid space blank or entering "no bid" is not substantial and the bid may still be considered responsive. Other states have differing views of the materiality of leaving bid items blank. Iowa's appellate courts have not yet had the opportunity to consider this issue. If the bid documents provide that all blanks must be filled in, or if specific language is required to be used, such as "no bid" when the bidder does not want to bid on an alternate, the bidder must adhere to the invitation or risk having the bid rejected. If the bid documents do not address the issue, the bidder should still avoid leaving any blank spaces.

### **Acknowledging Addenda**

Characterization of some irregularities may differ from jurisdiction to jurisdiction. For instance, a bidder's failure to acknowledge receipt of addenda is immaterial in some states, such as Montana. Other jurisdictions disagree and consider the failure to acknowledge an addendum material, particularly if the addendum is a significant change to the contract requirements. Again, Iowa's courts have not yet ruled upon this issue.

### **Conclusion**

A thorough understanding of the rules relating to bidding irregularities by both public owners and contractors will help to eliminate bid-time misunderstandings and ensure that the taxpayers' interests in the maintenance of the competitive bidding process continue to be protected.

## APPENDIX B

### Hearings, Bid Solicitation and Advertisement Requirements

Public Owner	Necessity of Hearing and Publication Requirements	Notice to Bidders Publication Requirements	Code References
"Municipalities" <sup>29</sup>	Yes – notify time and place 10 days prior to hearing in at least one newspaper of general circulation in the respective "municipality"	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	<a href="#">26.12</a> <a href="#">26.3</a> <a href="#">73A.18</a> <a href="#">73A.2</a>
Counties (pertains to general construction, <i>excluding</i> the construction, reconstruction, improvement or repair or maintenance of a highway, bridge, or culvert.)	Yes – notify at least 4 days, but not more than 20 days, prior to hearing date in one or more newspapers having a general circulation in the county	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	<a href="#">26.12</a> <a href="#">26.3</a> <a href="#">331.305</a> <a href="#">331.341(1)</a>
Schools	Yes – notify time and place 10 days prior to hearing in at least one newspaper of general circulation in the respective school district	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	<a href="#">26.12</a> <a href="#">26.3</a> <a href="#">73A.18</a> <a href="#">73A.2</a>
DAS	No hearing required	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	<a href="#">8A.311</a> (10.a.) <a href="#">26.3</a>
Regents	No hearing required	None <sup>30</sup>	<a href="#">262.34</a>
Cities	Yes – notify at least 4 days, but not more than 20 days, prior to hearing in a newspaper published at least once weekly in the city	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	<a href="#">26.12</a> <a href="#">26.3</a> <a href="#">362.3</a>

*\*Pursuant to [Iowa Code Section 26.3](#), posting must occur in a relevant construction lead generating service with statewide circulation, and on an internet site sponsored by either a governmental entity or a statewide association that represents the governmental entity.*

<sup>29</sup> Includes school corporations, townships, and the state fair board. DOES NOT INCLUDE CITIES! See [Iowa Code § 73A.1\(2\)](#).

<sup>30</sup> In 2005 the Regents were exempted from the requirements of [Iowa Code Section 73A.2](#). See [Iowa Code § 262.34](#). This was done to eliminate the requirement for a hearing. [Chapter 262](#) "pertaining to regents" does require advertisements for bids but no provision of [Chapter 262](#) contains specific "notice to bidders" advertising procedures. Those procedures were spelled out in [Chapter 73A](#), which now no longer applies to the Regents.

## APPENDIX C

### Bid Thresholds for Public Improvements (Effective January 1, 2019)

<b>Threshold</b>	<b>Public Entity</b>	<b>Amount (Subject to change)</b>
Competitive Bids	1. Counties, Including County Hospitals	\$139,000
	2. Cities, School Districts, Aviation Authorities	\$139,000
Competitive Quotations	1. Counties, Including County Hospitals	\$103,000
	2. Cities <sup>31</sup> , School Districts, Population over 50,000	\$77,000
	3. Cities, School Districts, Population under 50,000	\$57,000

Competitive quotation requirements, which are outlined in Iowa Code Chapter 26.14, include:

- The governmental entity must get quotes from a minimum of two bidders
- The governmental entity must provide a description of the work to be performed and allow a contractor to visit the project site
- The contractor must include the price for labor, material, equipment and supplies required to perform the work
- The governmental entity must designate the time, place, and manner for filing quotes. The may be by mail, fax or e-mail.
- The project must be awarded to the lowest responsive, responsible bidder OR the governmental entity reserves the right to reject all quotes
- If the work can be performed by an employee or employees of the governmental entity, the governmental entity may file a quotation for the work to be performed in the same manner as a contractor.
- In no quotes are received to perform the work or if the governmental entity submits the lowest quote, the governmental entity may self-perform the work
- Architectural and Engineering plans and specifications are required on projects in which such services are necessary as defined in Iowa Code Sections 544A and 542B.

If the estimated cost of construction falls below the thresholds for competitive quotations, the public owner may select a contractor through good faith negotiations.

<sup>31</sup> City hospitals shall follow the thresholds set for the city in which the facility is located.



## **APPENDIX D**

### **Notice of Contractor's Request for Early Release of Retained Funds**

Pursuant to [Iowa Code Section 573.28](#), prior to applying for release of retained funds, the contractor shall send a notice to all known subcontractors, sub-subcontractors, and suppliers that provided labor or materials for the public improvement project. The notice shall be substantially similar to the following:

*“You are hereby notified that (name of contractor) will be requesting an early release of funds on a public improvement project or a highway, bridge, or culvert project designated as (name of project) for which you have or may have provided labor or materials. The request will be made pursuant to [Iowa Code section 573.28](#). The request may be filed with the (name of governmental entity or department) after ten calendar days from the date of this notice. The purpose of the request is to have (name of governmental entity or department) release and pay funds for all work that have been performed and charged to (name of governmental entity or department) as of the date of this notice. This notice is provided in accordance with [Iowa Code section 573.28](#).”*

## APPENDIX E



**AIA**  
Iowa

### **Guideline for Iowa Supplemental General Conditions to AIA 2017 A201**

*The Iowa Construction Industry Forum (ICIF) is a unique partnership among the Iowa Chapter of the American Institute of Architects, the American Council of Engineering Companies of Iowa (ACEC/Iowa) and the Master Builders of Iowa (MBI).*

*ICIF and the Boards of Directors of the three organizations have agreed to the following modifications to the **General Conditions of the Contract for Construction, AIA Document A201-2017**. The changes generally address concerns with how the A201 relates to the Code of Iowa and common construction practices in Iowa.*

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#### **§3.7 PERMITS, FEES, NOTICES AND COMPLIANCE WITH LAWS**

§3.7.5: Modify §3.7.5 by adding the underlined words, so that the section now reads as follows:

§3.7.5 If, in the course of the Work, the Contractor knowingly encounters and recognizes human remains, burial markers, archeological sites or previously undelineated wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence or good faith belief of such existence of such remains or features may be made as provided in Article 15.

*Comments: This was an entirely new provision in the 2007 edition of A201. The ICIF added the language requiring "knowledge" on the part of the contractor of the conditions listed so as to avoid the claim that a contractor could be liable for disturbing the listed "remains or features" even without actual knowledge of the condition. Essentially these events are treated as "differing site conditions" requiring immediate action by the contractor, but also allowing for additional time and compensation in the event the Work is disrupted by the discovery of the "events" listed.*

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### §3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

§3.10.2: Delete the last sentence of § 3.10.2 so that the section now reads as follows:

**§3.10.2** The Contractor shall prepare a submittal schedule promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. ~~If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.~~

*Comments: This provision as written penalized the contractor for not providing timely submittal schedules by depriving the contractor of the right to seek additional time/compensation for excessive delays by the design professional in the turnaround of shop drawings. The ICIF amendments eliminate that punitive provision.*

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### §9.5 DECISIONS TO WITHHOLD CERTIFICATION

§9.5.4: Delete in its entirety.

~~§9.5.4 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.~~

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### §9.6 PROGRESS PAYMENTS

§9.6.4: Delete the first two sentences of §9.6.4 so that it now reads as follows:

~~§9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid.~~ Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

*Comments: The above provision deals with the Owner's right to contact subcontractors directly on issues of payment, and to authorize joint checks without the contractor's consent. The ICIF panel agreed to eliminate the above language from the 2007 edition and return to the 1997 edition's treatment of this subject. The intent of the panel was to preserve the sole right of the contractor to deal with its subcontractors without interference by the Owner or design professional.*

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### §13.1 GOVERNING LAW

§13.1: Delete the words following “where the Project is located” in §13.1 so that it now reads as follows:

**§13.1** The Contract shall be governed by the law of the place where the Project is located ~~except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.~~

*Comments: This change basically results in a return to the 1997 edition’s language, which no one on the panel could find fault with. Generally, this means that Iowa law will apply for Iowa-located projects.*

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### §15.1.2 TIME LIMITS ON CLAIMS

§15.1.2: Strike §15.1.2 in its entirety and substitute the following:

~~§15.1.2: The Owner and the Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and the Contractor waive all claims and causes of action not commenced in accordance with 13.7.~~

### §15.1.2 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

§15.1.2 As between the Owner and Contractor:

- .1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- .2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- .3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Section 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Section 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

*Comments: This change restores the prior edition's language regarding when certain statutes of limitations begin to run. A "statute of limitations" bars commencement of a legal action after the expiration of a certain period of time. A number of Iowa Supreme Court cases have construed the language of the 1997A201 edition. The ICIF agreed with MBI that changing the language regarding statutes of limitations would invite unnecessary and expensive litigation on an issue the Iowa courts have already resolved.*

This document has important legal construction law issues.  
Users are responsible for obtaining advice from their own legal counsel.









## CHAPTER 26

### PUBLIC CONSTRUCTION BIDDING

Referred to in §8A.311, 35A.10, 218.58, 256F.4, 297.7, 314.1B, 330A.12, 331.341, 357.14, 357A.12, 384.37, 384.53, 384.103, 386.6, 386.7, 390.3, 418.4

Labor and materials on public improvements; see also [chapter 573](#)

26.1	Short title.	26.11	Delegation of authority.
26.2	Definitions.	26.12	When hearing necessary.
26.3	Competitive bids for public improvement contracts.	26.13	Early release of retained funds. Repealed by 2018 Acts, ch 1097, §6.
26.4	Exemptions from competitive bids and quotations.	26.14	Competitive quotations for public improvement contracts.
26.5	Prohibited contracts.	26.14A	Alternative procedures.
26.6	Donated funds.	26.15	Structure demolition project.
26.7	Notice to bidders.	26.16	Prequalification requirements prohibited.
26.8	Bid security.		
26.9	Award of contract.		
26.10	Opening and considering bids.		

#### 26.1 Short title.

This [chapter](#) shall be known and may be cited as the “*Iowa Construction Bidding Procedures Act*”.

2006 Acts, ch 1017, §1, 42, 43

#### 26.2 Definitions.

As used in [this chapter](#), unless the context clearly indicates otherwise:

1. “*Estimated total cost of a public improvement*” or “*estimated total cost*” means the estimated total cost to the governmental entity to construct a public improvement, including cost of labor, materials, equipment, and supplies, but excluding the cost of architectural, landscape architectural, or engineering design services and inspection.
2. “*Governmental entity*” means the state, political subdivisions of the state, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements, excluding the state board of regents and the state department of transportation.
3. a. “*Public improvement*” means a building or construction work that is constructed under the control of a governmental entity and for which either of the following applies:
  - (1) Has been paid for in whole or in part with funds of the governmental entity.
  - (2) A commitment has been made prior to construction by the governmental entity to pay for the building or construction work in whole or in part with funds of the governmental entity.
- b. “*Public improvement*” includes a building or improvement constructed or operated jointly with any other public or private agency, but excludes all of the following:
  - (1) Urban renewal demolition and low-rent housing projects.
  - (2) Industrial aid projects authorized under [chapter 419](#).
  - (3) Emergency work or repair or maintenance work performed by employees of a governmental entity.
  - (4) A highway, bridge, or culvert project.
  - (5) Construction or repair or maintenance work performed for a city utility under [chapter 388](#) when such work is performed by its employees or when such work relates to existing utility infrastructure or establishing connections to existing utility infrastructure. For purposes of this subparagraph, “*utility infrastructure*” includes facilities used for the storage, collection, disposal, treatment, generation, transmission, or distribution of water, sewage, waste, electricity, gas, or telecommunications service.
  - (6) Construction or repair or maintenance work performed for a rural water district under [chapter 357A](#) by its employees.
4. “*Repair or maintenance work*” means the preservation of a building, storm sewer, sanitary sewer, or other public facility or structure so that it remains in sound or proper

condition, including minor replacements and additions as necessary to restore the public facility or structure to its original condition with the same design.

5. "Under the control of a governmental entity" includes determining the construction work to be performed or establishing the specifications for a building or construction work to be occupied by the governmental entity.

2006 Acts, ch 1017, §2, 42, 43; 2007 Acts, ch 144, §1, 2; 2018 Acts, ch 1075, §2, 3, 12, 13; 2018 Acts, ch 1172, §71, 72; 2019 Acts, ch 59, §17; 2020 Acts, ch 1092, §1, 2

Referred to in §§ 46, 260C.38, 278.1, 297.7, 298.3, 314.1A, 314.1B, 331.341, 364.4, 384.20  
2018 amendments apply to lease-purchase contracts entered into on or after April 4, 2018; 2018 Acts, ch 1075, §12, 13; 2018 Acts, ch 1172, §71, 72

Subsection 3, paragraph b, subparagraph (5) amended  
Subsection 3, paragraph b, NEW subparagraph (6)

**26.3 Competitive bids for public improvement contracts.**

1. If the estimated total cost of a public improvement exceeds the competitive bid threshold of one hundred thousand dollars, or the adjusted competitive bid threshold established in section 314.1B, the governmental entity shall advertise for sealed bids for the proposed public improvement by posting a notice to bidders not less than thirteen and not more than forty-five days before the date for filing bids in a relevant contractor plan room service with statewide circulation, in a relevant construction lead generating service with statewide circulation, and on an internet site sponsored by either a governmental entity or a statewide association that represents the governmental entity. If circumstances beyond the control of the governmental entity cause a scheduled bid letting to be postponed and there are no changes to the project's contract documents, a notice to bidders of the revised date shall be posted not less than four and not more than forty-five days before the revised date for filing bids in a relevant contractor plan room service with statewide circulation, in a relevant construction lead generating service with statewide circulation, and on an internet site sponsored by either a governmental entity or a statewide association that represents the governmental entity.

2. A governmental entity shall have an engineer licensed under chapter 542B, a landscape architect licensed under chapter 544B, or an architect licensed under chapter 544A prepare plans and specifications, and calculate the estimated total cost of a proposed public improvement. A governmental entity shall ensure that a sufficient number of paper copies and, if available, electronic and digital copies of the project's contract documents, including all drawings, plans, specifications, and estimated total costs of the proposed public improvement are made available for distribution at no charge to prospective bidders, subcontractor bidders, suppliers, and plan room services. If a deposit is required as part of a paper contract documents distribution policy by the public owner, the deposit shall not exceed two hundred fifty dollars per set which shall be refunded upon return of the contract documents within fourteen days after award of the project. If the contract documents are not returned in a timely manner and in a reusable condition, the deposit shall be forfeited. The governmental entity shall reimburse the landscape architect, architect, or professional engineer for the actual costs of preparation and distribution of plans and specifications.

3. Sections 26.4 through 26.12 apply to all competitive bidding pursuant to this section.

2006 Acts, ch 1017, §3, 42, 43; 2007 Acts, ch 144, §3; 2009 Acts, ch 179, §107; 2010 Acts, ch 1184, §90; 2013 Acts, ch 90, §16; 2015 Acts, ch 7, §1; 2016 Acts, ch 1009, §1; 2017 Acts, ch 54, §14; 2017 Acts, ch 131, §7; 2018 Acts, ch 1097, §1  
Referred to in §§ 46, 8A.311, 26.4, 26.5, 26.12, 26.14, 26.14A, 281.9, 35A.10, 73A.2, 73A.18, 105.11, 161C.2, 218.58, 260C.38, 273.14, 278.1, 297.8, 298.3, 314.1, 314.1B, 330A.12, 331.341, 357.14, 364.4, 904.314, 904.315

**26.4 Exemptions from competitive bids and quotations.**

Architectural, landscape architectural, or engineering design services procured for a public improvement are not subject to sections 26.3 and 26.14.

2006 Acts, ch 1017, §4, 42, 43; 2007 Acts, ch 144, §4  
Referred to in §26.3, 314.1

**26.5 Prohibited contracts.**

If the estimated total cost of a public improvement exceeds the competitive bid threshold of one hundred thousand dollars, or as established in section 314.1B, a governmental entity



shall not divide the public improvement project into separate parts, regardless of intent, if a resulting part of the public improvement project is not let in accordance with section 26.3.

2006 Acts, ch 1017, §5, 42, 43

Referred to in §26.3, 314.1

### 26.6 Donated funds.

If private funds are offered to a governmental entity for a building or an improvement to be used by the public and such funds are conditioned upon private construction of the building or improvement, this chapter shall not apply to the project if the governmental entity does not contribute any funds to such construction.

2006 Acts, ch 1017, §6, 42, 43

Referred to in §26.3, 314.1

### 26.7 Notice to bidders.

1. The notice to bidders shall adequately notify a potential bidder of a proposed bid and shall include the following items:

- a. The time and place for filing sealed proposals.
- b. The time and place sealed proposals will be opened and considered on behalf of the governmental entity.
- c. The general nature of the public improvement on which bids are requested.
- d. In general terms, when the work must be commenced and completed.
- e. That each bidder shall accompany the bid with a bid security as defined in section 26.8 and as specified by the governmental entity.
- f. Any further information which the governmental entity deems pertinent.

2. The notice to bidders may provide that bids will be received for the furnishing of all labor and materials and furnishing or installing equipment under one contract, or for parts thereof in separate sections.

3. On public improvements to be financed wholly or partially by special assessments against benefited property, the governmental entity, in the notice to bidders, may request aggregate bids for all projects included in any resolution of necessity, notwithstanding variations in the sizes of the improvements and notwithstanding that some parts of the improvements are assessable and some nonassessable, and may award the contract to the lowest responsive, responsible bidder submitting the lowest aggregate bid.

2006 Acts, ch 1017, §7, 42, 43

Referred to in §26.3, 314.1

### 26.8 Bid security.

1. Each bidder shall accompany its bid with a bid security as security that the successful bidder will enter into a contract for the work bid upon and will furnish after the award of contract a corporate surety bond, acceptable to the governmental entity, for the faithful performance of the contract, in an amount equal to one hundred percent of the amount of the contract. The bid security shall be in an amount fixed by the governmental entity, and shall be in the form of a cashier's check or certified check drawn on a state-chartered or federally chartered bank, or a certified share draft drawn on a state-chartered or federally chartered credit union, or the governmental entity may provide for a bidder's bond with corporate surety satisfactory to the governmental entity. The bidder's bond shall contain no conditions except as provided in this section.

2. The governmental entity shall fix the amount of bid security prior to ordering publication of the notice to bidders and such amount must equal at least five percent, but shall not exceed ten percent, of either the estimated total contract cost of the public improvement or the amount of each bid.

2006 Acts, ch 1017, §8, 42, 43; 2007 Acts, ch 144, §5

Referred to in §26.3, 26.7, 314.1

### 26.9 Award of contract.

1. The contract for the public improvement must be awarded to the lowest responsive, responsible bidder. However, contracts relating to public utilities or extensions or

improvements thereof, as described in sections 384.80 through 384.94, may be awarded by the city as it deems to be in the best interests of the city. This section shall not be construed to prohibit a governmental entity in the award of a contract for a public improvement or a governing body of a city utility from providing, in the award of a contract for a public improvement, an enhancement of payments upon early completion of the public improvement if the availability of the enhancement payments is included in the notice to bidders, the enhancement payments are competitively neutral to potential bidders, the enhancement payments are considered as a separate item in the public hearing on the award of contract, and the total value of the enhancement payments does not exceed ten percent of the value of the contract.

2. A governmental entity shall not require a potential bidder on a public improvement to provide any information which the potential bidder may deem to be confidential or proprietary as a requirement for being deemed a responsive, responsible bidder. This subsection shall not be construed to prohibit a governmental entity from obtaining information from the lowest responsive bidder to determine the bidder's responsibility relating to the bidder's experience, number of employees, and ability to finance the cost of the public improvement. However, a governmental entity shall require nonresident bidders to comply with section 73A.21, subsection 4.

2006 Acts, ch 1017, §9, 42, 43; 2017 Acts, ch 65, §1, 9, 10

Referred to in §26.3, 26.10, 26.14, 314.1

2017 amendment to section takes effect April 13, 2017, and applies to notices to bidders for public improvements, bids awarded for public improvements, and contracts for public improvements entered into on and after that date; 2017 Acts, ch 65, §9, 10

### 26.10 Opening and considering bids.

1. The date and time that each bid is received by the governmental entity, together with the name of the person receiving the bid, shall be recorded on the envelope containing the bid. All bids received after the deadlines for submission of bids as stated in the project specifications shall not be considered and shall be returned to the late bidder unopened. The governmental entity shall open, announce the amount of the bids, and file all proposals received, at the time and place specified in the notice to bidders. The governmental entity may, by resolution, award the contract for the public improvement to the bidder submitting the lowest responsive, responsible bid, determined as provided in section 26.9, or the governmental entity may reject all bids received, fix a new date for receiving bids, and order publication of a new notice to bidders. The governmental entity shall retain the bid security furnished by the successful bidder until the approved contract form has been executed, a bond has been filed by the bidder guaranteeing the performance of the contract, and the contract and bond have been approved by the governmental entity. The provisions of chapter 573, where applicable, apply to contracts awarded under this chapter.

2. The governmental entity shall promptly return the checks or bidder's bonds of unsuccessful bidders to the bidders as soon as the successful bidder is determined or within thirty days, whichever is sooner.

2006 Acts, ch 1017, §10, 42, 43; 2007 Acts, ch 144, §6

Referred to in §26.3, 314.1

### 26.11 Delegation of authority.

When bids are required for any public improvement, the governmental entity may delegate, by motion, resolution, or policy to the city manager, clerk, engineer, or other public officer, as applicable, the duty of receiving and opening bids and announcing the results. The officer shall report the results of the bidding with the officer's recommendations to the next regular meeting of the governmental entity's governing body or at a special meeting called for that purpose.

2006 Acts, ch 1017, §11, 42, 43; 2007 Acts, ch 144, §7

Referred to in §26.3, 314.1

### 26.12 When hearing necessary.

If the estimated total cost of a public improvement exceeds the competitive bid threshold in section 26.3, or as adjusted in section 314.1B, the governmental entity shall not enter into a contract for the public improvement until the governmental entity has held a public

hearing and has approved the proposed plans, specifications, and form of contract, and estimated total cost of the public improvement. Notice of the hearing must be published as provided in section 362.3 and shall include a description of the public improvement and its location. At the hearing, any interested person may appear and file objections to the proposed plans, specifications, contract, or estimated cost of the public improvement. After hearing objections, the governmental entity shall by resolution enter its decision on the plans, specifications, contract, and estimated cost. This section does not apply to the state.

2006 Acts, ch 1017, §12, 42, 43; 2016 Acts, ch 1009, §2  
 Referred to in §26.3, 314.1, 384.20

**26.13 Early release of retained funds.** Repealed by 2018 Acts, ch 1097, §6. See §573.28.

**26.14 Competitive quotations for public improvement contracts.**

1. Competitive quotations shall be required for a public improvement having an estimated total cost that exceeds the applicable threshold amount provided in this section, but is less than the competitive bid threshold established in section 26.3.

2. Unless the threshold amounts are adjusted pursuant to section 314.1B, the following threshold amounts shall apply:

- a. Sixty-seven thousand dollars for a county, including a county hospital.
- b. Fifty-one thousand dollars for a city having a population of fifty thousand or more.
- c. Fifty-one thousand dollars for a school district having a population of fifty thousand or more.
- d. Fifty-one thousand dollars for an aviation authority created within a city having a population of fifty thousand or more.
- e. Thirty-six thousand dollars for a city having a population of less than fifty thousand, for a school district having a population of less than fifty thousand, and for any other governmental entity.

f. The threshold amount applied to a city applies to a city hospital.

3. a. When a competitive quotation is required, the governmental entity shall make a good faith effort to obtain quotations for the work from at least two contractors regularly engaged in such work prior to letting a contract. Good faith effort shall include advising all contractors who have filed with the governmental entity a request for notice of projects. The governmental entity shall provide such notice in a timely manner so that a requesting contractor will have a reasonable opportunity to submit a competitive quotation. Quotations may be obtained from contractors after the governmental entity provides a description of the work to be performed, including the plans and specifications prepared by an architect, landscape architect, or engineer, if required under chapter 542B, 544B, or 544A, and an opportunity to inspect the work site. The contractor shall include in the quotation the price for labor, materials, equipment, and supplies required to perform the work. If the work can be performed by an employee or employees of the governmental entity, the governmental entity may file a quotation for the work to be performed in the same manner as a contractor. If the governmental entity receives no quotations after making a good faith effort to obtain quotations from at least two contractors regularly engaged in such work, the governmental entity may negotiate a contract with a contractor regularly engaged in such work.

b. The governmental entity shall designate the time, place, and manner for filing quotations, which may be received by mail, facsimile, or electronic mail. The governmental entity shall award the contract to the contractor submitting the lowest responsive, responsible quotation subject to section 26.9, or the governmental entity may reject all of the quotations. The unconditional acceptance and approval of the lowest responsive, responsible quotation shall constitute the award of a contract. The governmental entity shall record the approved quotation in its meeting minutes. The contractor awarded the contract shall not commence work until the contractor's performance and payment bond has been approved by the governmental entity. A governmental entity may delegate the authority to award a contract, to execute a contract, to authorize work to proceed under a contract, or to approve the contractor's performance and payment bond to an officer or employee of the governmental entity. A quotation approved outside a meeting of the governing body of a

governmental entity shall be included in the minutes of the next regular or special meeting of the governing body.

c. If a public improvement may be performed by an employee of the governmental entity, the amount of estimated sales and fuel tax and the premium cost for the performance and payment bond which a contractor identifies in its quotation shall be deducted from the contractor's price for determining the lowest responsive, responsible quotation. If no quotations are received to perform the work, or if the governmental entity's estimated cost to do the work with its employee is less than the lowest responsive, responsible quotation received, the governmental entity may authorize its employee or employees to perform the work.

2006 Acts, ch 1017, §14, 42, 43; 2007 Acts, ch 144, §9; 2009 Acts, ch 133, §10  
 Referred to in §26.4, 26.14A, 314.1A, 314.1B

#### **26.14A Alternative procedures.**

1. When competitive quotations are required under section 26.14 for a public improvement, the governmental entity may proceed, in lieu of competitive quotations, as if the estimated total cost of the public improvement exceeds the competitive bid threshold under section 26.3.

2. If the total estimated cost of the public improvement does not warrant either competitive quotations under section 26.14 or competitive bidding under section 26.3, the governmental entity may nevertheless proceed with competitive quotations or competitive bidding for the public improvement.

2007 Acts, ch 144, §10

#### **26.15 Structure demolition project.**

A governmental entity may enter into annual contracts with multiple contractors for structure demolition projects, with each project having a total estimated cost of one hundred thousand dollars or less, or each project having a total estimated cost equal to or less than the competitive bid threshold as established in section 314.1B. The governmental entity shall solicit contractors by publishing a notice as provided in section 362.3. A contractor is eligible to perform structure demolition work for the governmental entity after the contractor executes an annual demolition contract in a form satisfactory to the governmental entity, including a bond and insurance. For the twelve-month period following execution of the contract or contracts, the governmental entity may obtain competitive proposals from each eligible contractor as necessary for the demolition of structures. The contractor submitting the lowest responsible proposal shall enter into a contract addendum to perform the work.

2006 Acts, ch 1017, §15, 42, 43

#### **26.16 Prequalification requirements prohibited.**

A governmental entity shall not by ordinance, rule, or any other action relating to contracts for public improvements for which competitive bids are required by this chapter impose any requirement that directly or indirectly restricts potential bidders to any predetermined class of bidders defined by experience on similar projects, size of company, union membership, or any other criteria. However, a governmental entity shall require nonresident bidders to comply with section 73A.21, subsection 4.

2017 Acts, ch 65, §2, 9, 10

Section takes effect April 13, 2017, and applies to notices to bidders for public improvements, bids awarded for public improvements, and contracts for public improvements entered into on and after that date; 2017 Acts, ch 65, §9, 10



WOODBURY COUNTY BOARD OF SUPERVISORS AGENDA ITEM(S) REQUEST FORM

Date: 7-9-2020 Weekly Agenda Date: 7-14-2020

**ELECTED OFFICIAL / DEPARTMENT HEAD / CITIZEN:** Marty Pottebaum

**WORDING FOR AGENDA ITEM:**

Quality Assurance Questionnaire

**ACTION REQUIRED:**

Approve Ordinance       Approve Resolution       Approve Motion

Public Hearing       Other: Informational       Attachments

**EXECUTIVE SUMMARY:**

This Quality Assurance Questionnaire, to be completed by winning bidders for contracts in excess of \$300,000, will make sure they adhere to all applicable laws.

**BACKGROUND:**

This questionnaire is meant to assure that all contractors doing projects in excess of \$300,000 in value for the County are adhering to all applicable laws.

**FINANCIAL IMPACT:**

None

**IF THERE IS A CONTRACT INVOLVED IN THE AGENDA ITEM, HAS THE CONTRACT BEEN SUBMITTED AT LEAST ONE WEEK PRIOR AND ANSWERED WITH A REVIEW BY THE COUNTY ATTORNEY'S OFFICE?**

Yes       No

**RECOMMENDATION:**

Pass this motion to replace the existing Quality Assurance Questionnaire with this more comprehensive one.

**ACTION REQUIRED / PROPOSED MOTION:**

Pass this motion to replace the existing Quality Assurance Questionnaire with this version.



**WOODBURY COUNTY CAPITAL IMPROVEMENT PROJECTS  
"QUALITY ASSURANCE QUESTIONNAIRE"**

Pursuant to Iowa Code 26.9 which requires that contracts for public improvements to be awarded to the "lowest responsive, responsible bidder", and also recognizes that a government entity may obtain information from the lowest responsive bidder to determine bidder's responsibility relating to the bidders's experience, number of employees, and ability to finance the cost of the public improvement, and in accordance with Iowa Law allowing public entities to consider factors other than price in determining who is the lowest responsible bidder. The fully completed Questionnaire, with attachments, shall be submitted to the Woodbury County Board of Supervisors Office by the lowest apparent bidder within 10 business days of bid opening date. Contractors that do not complete and/or submit questionnaire by date required may be deemed to be non-responsive or non-responsible.

1. Full name of Contractor: \_\_\_\_\_  
Address \_\_\_\_\_  
Telephone \_\_\_\_\_ Fax \_\_\_\_\_  
Email \_\_\_\_\_
  
2. All other names under which Contractor has operated in the past five (5) years:  
\_\_\_\_\_  
\_\_\_\_\_
  
3. Provide Contractors' Registration Number and full names of Registration Holders as per Iowa Construction Contractor Registration requirements:  
\_\_\_\_\_  
\_\_\_\_\_  
Contractor Registration Expiration Date \_\_\_\_\_
  
4. Has Registration ever been suspended or revoked in any jurisdiction?  
{ } Yes  
{ } No  
If "yes", provide information regarding suspension/revocation and attach all relevant documents.
  
5. Within the past five(5) years, has Contractor been debarred by any federal, state or local government

entity from bidding on projects?

Yes

No

If "yes", provide information related to debarment.

6. On a separate sheet, list construction projects in value in excess of \$300,000 dollars that Contractor has in progress, giving the name of the project, owner, architect, contract amount, key Contractor personnel, percent complete and scheduled completion date.
7. On a separate sheet, list the major projects Contractor has completed in the past three (3) years, giving the name of the project, owner, architect, contract amount, Officer in Charge, Project Manager, Project Superintendent, and any other key Contractor personnel, date of completion and percentage of the total project performed by your own employees.
8. On a separate sheet, identify the individuals Contractor intends to be the Officer in Charge, Project Manager, Project Superintendent and any other key personnel on this project, Include a resume and/or recent work history for each identified individual.
9. On a separate sheet, for work Contractor intends to self-perform on the project; specify the level of training and experience Contractors' employess have had. Further indicate whether or not any such training has been in a United States Department of Labor (DOL) certified apprentice program. In the event Contractor intends to utilize apprentice workers on the Project, Contractor must be able to provide, upon Owners' request, documentation that each apprentice worker utilized on the Project is properly registered as participating in a DOL certified apprentice program or substantially equivalent apprenticeship program.
10. On a separate sheet, list the Contractors last five (5) completed projects, and for each the scheduled completion date and the final completion date, noting any owner approved extentions.
11. Within the past three (3) years, has Contractor defaulted on a contract, or been disqualified, removed or otherwise prevented from bidding on or completing any project.

Yes

No

If "yes", provide the year of the incident, name, address and telephone number of the owner of The project, project name and location.

12. Has Contractor ever been unable to obtain a bond or been denied a bond?

Yes

No

If "yes", please provide all relevant details.

13. On a separate sheet, list all surety/bonding companies Contractor has utilized in the past (5) years.

14. Has Contractor ever declared bankruptcy or been in receivership?

Yes

No

If "yes" please provide all relevant details.

15. Is Contractor currently being investigated for or previously been found to have violated in the past five (5) years any of the following state or federal laws: Iowa Minimum Wage Act; Iowa Non-English Speaking Employees Act; Iowa Child Labor Act; Iowa Labor Commissioner's Right to Inspect Premises, Iowa Compensation Insurance Act; Employment Security Act; Iowa Competition Act; Iowa Income, Corporate and Sales Tax Code; a "willful" violation of the Iowa or Federal Occupational Safety and Health Act; Iowa Employee Registration Requirements; Iowa Hazardous Chemical Risks Act; Iowa Wage Payment Collection Act; Federal Income and Corporate Tax Code; The National Insurance Security Act; The Fair Labor Standards Act:

Yes

No

If "yes" please explain:

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16. Has Contractor ever failed to complete any work awarded to it?

Yes

No

If "yes" provide all relevant details.

17. Are there any judgements, arbitration proceeding or suits pending or outstanding against Contractor or its officers that relate to, arise out of or are in the course of the Contractor's Business?

Yes

No

If "yes" provide all relevant details.

18. Has Contractor filed any lawsuit or demanded arbitration with regard to any construction contract within the past five (5) years?

Yes

No

If "yes" provide all relevant details.

19. Has Contractor been found by a court or agency of competent jurisdiction to be delinquent in meeting its obligations under local, state or federal tax laws within the last five (5) years? ("delinquent" shall include, but is not limited to: failure to file, failure to pay or imposition of tax liens)

Yes

No

20. Contractor affirms that it will retain only subcontractors who can fully comply with the bid specifications, including those that address requirement concerning labor.

Yes

No

21. Contractor affirms that it will be responsible for ensuring that each subcontractor meets quality assurance specifications.

Yes

No

22. Contractor agrees to submit to the Woodbury County Facilities Director a list of all intended subcontractors **WITHIN 14 calendar days of notification** to the apparent lowest bidder. (in the event Contractor wishes to replace any originally-designated subcontractor, such may only occur with the approval of the Woodbury County Facilities Director. Such approval will not be unreasonably withheld)

Yes

No

23. Contractor attests that it will comply with each of the following:

Iowa's Minimum Wage Law.

Yes

No

Maintain worker's compensation insurance or be qualified as a self-insurer and provide proof of insurance or ability to self-insure upon request.

Yes

No

Properly license all Contractor employees with the appropriate licensing authority.

Yes

No

24. Contractor will make available to Woodbury County Facilities Director or Woodbury County representative, upon County's request, documentation to satisfy the County and the County's sole discretion, that the Contractors' workers utilized on this project are actual employees, with unemployment and workers' compensation coverage, not "leased employees" or independent contractors.

Yes

No

25. That Contractor will provide with this Questionnaire, the name, address, phone number and name of contact for three (3) entities which will provide references.

Yes

No

26. Contractor will only utilize on-site employees who have completed the Occupational Safety and Health Act (OSHA) 10 hour Construction industry Training Program.

Yes

No

Provide Contractor's Federal ID Number \_\_\_\_\_

Provide Name and address of Contractor's Registered Agent \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(Please continue to signature page)

I hereby certify, that (1) all of the information provided by me in this Questionnaire is true and correct to the best of my knowledge; (2) I am authorized to sign this Questionnaire on behalf of the Contractor whose name appears in Question #1; (3) if any of the information I have provided herein becomes inaccurate, prior to execution of any Project Contract, I will immediately provide Woodbury County Facilities Director with updated accurate information in writing; and (4) I hereby authorize any person or entity named herein to provide Woodbury County Facilities Director with whatever information might be required to verify this Questionnaire.

**THIS STATEMENT MUST BE NOTARIZED**

NAME OF CONTRACTOR \_\_\_\_\_

BY: \_\_\_\_\_  
Signature Title

\_\_\_\_\_  
Type/Print Name Date

STATE OF IOWA, \_\_\_\_\_ County, ss:

Subscribed and sworn to before me by the said \_\_\_\_\_ on this day of \_\_\_\_\_, 20 \_\_\_\_\_

\_\_\_\_\_  
Notary Public in and for the State of Iowa

\_\_\_\_\_  
Contractor Name



SPECIAL PROVISION  
CONTRACTUAL REQUIREMENTS

ON

(INCLUDE IMPROVEMENT)

SUBCONTRACTOR QUALITY ASSURANCE  
BID REQUIREMENTS

The following requirements are intended to be included in the Quality Assurance Sections of the Bid Specifications which the Contractor will, along with all other quality assurance requirements, be required to manage:

FOR ALL SUBCONTRACTORS

Subcontractor must not be under current investigation for or previously have been found to have violated in the last five (5) years any of the following state or federal laws: Iowa Minimum Wage Act, Iowa Non English Speaking Employees Act, Iowa Child Labor Act, Iowa Labor Commissioner's Right to Inspect Premises, Iowa Compensation Insurance Act, Iowa Employment Security Act, Iowa Competition Act, Iowa Income, Corporate and Sales Tax Code, a "willful" violation of the Iowa or Federal Occupational Safety and Health Act, Iowa Employee Registration Requirements, Iowa Hazardous Chemical Risks Act, Iowa Wage Payment Collection Act, Federal Income and Corporate Tax Code, The National Insurance and Social Security Act, The Fair Labor Standards Act. Subcontractor must notify the Contractor of any current investigation of Subcontractor for violation of any of the above laws.

Subcontractor will only utilize Subcontractor on-site employees that have completed the Occupational Safety and Health Act (OSHA) 10 hour Construction Industry Training Program.

Subcontractor must properly license all employees with the appropriate licensing authority.

**WOODBURY COUNTY BOARD OF SUPERVISORS AGENDA ITEM(S) REQUEST FORM**

Date: 6/26/2020 Weekly Agenda Date: 6/30/2020

**ELECTED OFFICIAL / DEPARTMENT HEAD / CITIZEN:** Keith Radig

**WORDING FOR AGENDA ITEM:**

Contractor Quality Assurance Questionnaire

**ACTION REQUIRED:**

Approve Ordinance

Approve Resolution

Approve Motion

Public Hearing

Other: Informational

Attachments

**EXECUTIVE SUMMARY:**

A quality assurance questionnaire is an added layer of security for Woodbury County before accepting a bid from a contractor.

**BACKGROUND:**

After meeting with Craig Levine from IBEW and also with Kenny Schmitz, I compiled a list of questions that I feel secure the county's interests in future construction contracts.

**FINANCIAL IMPACT:**

none

**IF THERE IS A CONTRACT INVOLVED IN THE AGENDA ITEM, HAS THE CONTRACT BEEN SUBMITTED AT LEAST ONE WEEK PRIOR AND ANSWERED WITH A REVIEW BY THE COUNTY ATTORNEY'S OFFICE?**

Yes  No

**RECOMMENDATION:**

Discuss and approve the contractor quality assurance questionnaire. Discuss dollar threshold for contracts to enact the questionnaire.

**ACTION REQUIRED / PROPOSED MOTION:**

Motion to approve using a quality assurance questionnaire on future construction contracts.



## WOODBURY COUNTY CAPITAL IMPROVEMENT PROJECTS

### "QUALITY ASSURANCE QUESTIONNAIRE"

Pursuant to Iowa Code 26.9 which requires that contracts for public improvements to be awarded to the "lowest responsive, responsible bidder", and also recognizes that a government entity may obtain information from the lowest responsive bidder to determine bidder's responsibility relating to the bidder's experience, number of employees, and ability to finance the cost of the public improvement, and in accordance with Iowa Law allowing public entities to consider factors other than price in determining who is the lowest responsible bidder. The fully completed Questionnaire, with attachments, shall be submitted to the Woodbury County Board of Supervisors Office by the lowest apparent bidder within 10 business days of bid opening date. Contractors that do not complete and/or submit questionnaire by date required may be deemed to be non-responsive or non-responsible.

1. Firm/ Contractor Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

E-Mail: \_\_\_\_\_

Registration Number & Expiration Date: \_\_\_\_\_

Please attach all other names under which the contractor has operated in the past Five (5) years.

2. Within the past Five (5) years, has the Contractor been disbarred by any Federal, State, or Local government entity from bidding projects, or has Registration ever been suspended or revoked in any jurisdiction?  
(If yes, please explain on separate attachment) \_\_\_\_\_ Yes \_\_\_\_\_ No

3. Within the past Five (5) years, has the Contractor- defaulted on a contract, been disqualified, removed or otherwise prevented from bidding on, or completing a Government, State, or Local project?  
(If yes, please explain on separate attachment) \_\_\_\_\_ Yes \_\_\_\_\_ No

4. Within the past five (5) years has the Contractor been found by a court or agency of competent jurisdiction, to be delinquent (delinquent shall include but not limited to

failure to file, failure to pay, or imposition tax liens) in meeting its obligation under Federal, State, or Local tax laws?

(If yes, please explain on separate attachment)  Yes  No

5. Within the past Five (5) years has the Contractor been unable to obtain, or been denied a bond?

(If yes, please explain on separate attachment)  Yes  No

6. Within the past Five (5) years has the Contractor declared bankruptcy or been under receivership?

(If yes, please explain on separate attachment)  Yes  No

7. Within the past Five (5) years has the Contractor filed any lawsuits, or sought arbitration with regard to any construction project?

(If yes, please explain on separate attachment)  Yes  No

8. Are any lawsuits, legal proceedings, arbitration, or judgment's pending/ outstanding against the Contractor, its owner, or officers?

(If yes, please explain on separate attachment)  Yes  No

9. Is the Contractor currently under investigation for or within the past Five (5) years been found to have violated any of the following Federal or State Laws:

Iowa Child Labor Act, Iowa Labor Commissioner's Right to Inspect Premises, Iowa Compensation Insurance Act, Iowa Competition Act, Iowa Employee Registration Requirements, Iowa Hazardous Chemicals Risks Act, Iowa Income Corporate and Sales Tax Code, Iowa Minimum Wage Act, Iowa Non-speaking English Employee Act, Iowa Wage Payment Collection Act, a "willful" violation of the Iowa or Federal Occupational Safety and Health Act, Federal Income or Corporate Tax Code, The National Insurance Act, OR the Fair Labor Standards Act?

(If yes, please explain on separate attachment)  Yes  No

10. Has the Contractor ever failed to complete any work awarded to it?

(If yes, please explain on separate attachment)  Yes  No

11. On separate attachment provide the following Information:

a. Three (3) references the company completed projects with in the past Three (3) years. Include entities; contact name, address, and current telephone number.

b. List all Surety/ Bonding Companies utilized by the company in the past Three (3) years.

12. Contractor affirms it, and its Subcontractors shall; adhere to all "Quality Assurance" item's as specified herein, retain only those who fully comply with all bid specifications, maintain worker's compensation insurance or be qualified as a self-insurer and provide proof of insurance or ability to self-insure upon request, utilized workforce on the project that are employees with unemployment and workers compensation coverages who are properly licensed by appropriate authorities, employees or workforce who have completed the Occupational Safety and Health Act (OSHA) 10 hour Construction Industry Training Program, and conform to Iowa's Minimum Wage and all other labor laws.

\_\_\_\_ Yes \_\_\_\_ No

*I hereby certify, that (1) all of the information provided by me in this Questionnaire is true and correct to the best of my knowledge; (2) I am authorized to sign this Questionnaire on behalf of the Contractor whose name appears #1 above; (3) if any information I have provided herein becomes inaccurate, prior to execution of any Project Contract I will immediately provide the Woodbury County Board of Supervisors Office with updated accurate information in writing; and (4) I hereby authorize any person or entity named herein to provide Woodbury County Board of Supervisors any and all information required to verify Questionnaire.*

**THIS STATEMENT MUST BE NOTORIZED**

CONTRACTOR NAME: \_\_\_\_\_

By: \_\_\_\_\_

*Signature*

*Title*

*Name (Type or Print)*

*Date*

STATE OF IOWA, \_\_\_\_\_ County, ss:

Subscribed and sworn to before me by the said \_\_\_\_\_ on

this day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public in and for the State of Iowa

\_\_\_\_\_  
Contractor Name

**WOODBURY COUNTY BOARD OF SUPERVISORS AGENDA ITEM(S) REQUEST FORM**

**#11**

Date: 4/08/2020 Weekly Agenda Date: 4/14/2020

**ELECTED OFFICIAL / DEPARTMENT HEAD / CITIZEN:** Marty Pottebaum

**WORDING FOR AGENDA ITEM:**

Woodbury County Post Bid Quality Assurance Questionnaire Policy

**ACTION REQUIRED:**

- |  |  |   |
|--|--|---|
| Approve Ordinance <input type="checkbox"/> | Approve Resolution <input checked="" type="checkbox"/> | Approve Motion <input type="checkbox"/>         |
| Public Hearing <input type="checkbox"/>    | Other: Informational <input type="checkbox"/>          | Attachments <input checked="" type="checkbox"/> |

**EXECUTIVE SUMMARY:**

In 2017 Iowa Law 26.9 changed requirements related to Quality Assurance Questionnaires which must now be provided post-bid to the lowest, responsible bidder.

**BACKGROUND:**

Iowa's Law on Quality Assurance was updated in 2017.

**FINANCIAL IMPACT:**

None

**IF THERE IS A CONTRACT INVOLVED IN THE AGENDA ITEM, HAS THE CONTRACT BEEN SUBMITTED AT LEAST ONE WEEK PRIOR AND ANSWERED WITH A REVIEW BY THE COUNTY ATTORNEY'S OFFICE?**

Yes  No

**RECOMMENDATION:**

Approve Woodbury County General Contractor Quality Assurance Post Bid Questionnaire Policy & update template as necessary.

**ACTION REQUIRED / PROPOSED MOTION:**

Motion to approve resolution of the Woodbury County General Contractor Quality Assurance Post Bid Questionnaire Policy

**RESOLUTION OF THE BOARD OF SUPERVISORS  
OF WOODBURY COUNTY, IOWA:  
RESOLUTION # \_\_\_\_\_**

**APPROVAL OF POST BID GENERAL CONTRACTOR QUALITY  
ASSURANCE QUESTIONNAIRE POLICY**

WHEREAS, pursuant to Iowa Code 26.9 which requires that contracts for public improvements be awarded to the "lowest responsive, responsible bidder", and

WHEREAS, Iowa Law recognizes that a governmental entity may obtain information from the lowest responsive bidder to determine bidder's responsibility relating to the bidder's experience, number of employees, and ability to finance the cost of the public improvement; and

WHEREAS, the Woodbury County Board of Supervisors in recognition of this and that Vertical Infrastructure Projects are designed for human occupancy and construction of these projects can be complex and difficult, desires to establish a policy requiring submission of the General Contractor Quality Assurance Questionnaire to the apparent lowest bidder on Vertical Infrastructure Projects as defined in the attached Woodbury County Post Bid General Contractor Quality Assurance Questionnaire Policy.

NOW THEREFORE BE IT RESOLVED BY THE WOODBURY COUNTY BOARD OF SUPERVISORS that it hereby approves the Woodbury County Post Bid General Contractor Quality Assurance Questionnaire Policy.

SO, RESOLVED this 14th day of April 2020.

ATTEST:

WOODBURYCOUNTYBOARD OF SUPERVISORS

\_\_\_\_\_  
Patrick F. Gill  
Woodbury County Auditor  
And Recorder

\_\_\_\_\_  
Matthew Ung, Chairman



**WOODBURY COUNTY BOARD OF SUPERVISORS AGENDA ITEM(S) REQUEST FORM**

**#13**

Date: 12-16-2016

Weekly Agenda Date: 12-20-16

**ELECTED OFFICIAL / DEPARTMENT HEAD / CITIZEN:** Supervisor Matthew Ung

**WORDING FOR AGENDA ITEM:**

Approval of requirement for Quality Assurance and Responsible Bidder Questionnaire

**ACTION REQUIRED:**

Approve Ordinance

Approve Resolution

Approve Motion

Give Direction

Other: Informational

Attachments

**EXECUTIVE SUMMARY:**

The topic of Quality Assurance for Bidding/General Contractors was previously brought before the board by Northwest Iowa Building Trades (NIBT). The goals were to improve the county's process to protect the county's liability, to more transparently receive bids, and to more appropriately define a responsible bidder as referred to in Iowa Code, "putting on notice" contractors that they are responsible for ensuring proper practices from sub-contractors. This issue being referred to the Policy Review Committee, which I chaired on Dec. 15, several trades-workers attended as concerned citizens representing carpenters and iron worker associations, as well. The Baker Group also provided valuable input. What began as a suggestion for a new policy was refined to a recommendation to this board for a new required practice—a questionnaire that will accomplish the aforementioned goals. Building Services Director Kenny Schmitz responsively drafted and adapted the attached Questionnaire to be approved by the Board of Supervisors. In response to input from NIBT, it was amended to include questions #9 and #12, and amended by County Attorney PJ Jennings with a more descriptive header/explanation of Iowa Code 26.9.

**BACKGROUND:**

I introduced the time-line of this issue and apologized to the concerned citizens in attendance that more timely action had not been taken, but despite this being the first review this committee (and myself) was undertaking, committed to walking away from the meeting with an actionable compromise for the next board meeting. The emphasis of the meeting was therefore to delineate what the Iowa Code requires, and what is most helpful/educational to require disclosure of in order to empower Building Services to prioritize truly responsible bidders.

I explained that outgoing supervisors expressed a strong preference in acting on this topic at the final meeting of 2016, and committed to finding a workable solution that solicited input from all parties. After a couple hours of discussion I made a motion to adopt a practice that appealed to the human resources director, the county attorney, the county auditor, the building services director, The Baker Group, and the trades-workers in attendance. The discussion also led to improvement ideas for the actual bidding documents themselves, regarding the county's proactive investigation to ensure compliance. The concerned citizens in attendance are once again to be commended for bringing this topic up to the county, which clearly needed to be broached.

Included in the backup material for the meeting was a Nov. 22 agenda item from Chairman Taylor, a Dec. 6 letter from Mr. Schmitz to the Policy Review Committee, documents on code and insurance requirements, and templates of questionnaires.

**FINANCIAL IMPACT:**

see "background"

**IF THERE IS A CONTRACT INVOLVED IN THE AGENDA ITEM, HAS THE CONTRACT BEEN SUBMITTED AT LEAST ONE WEEK PRIOR AND ANSWERED WITH A REVIEW BY THE COUNTY ATTORNEY'S OFFICE?**

Yes  No

**RECOMMENDATION:**

see "action required"

**ACTION REQUIRED / PROPOSED MOTION:**

"Motion to adopt the Woodbury County Capital Improvement Projects Quality Assurance Questionnaire, which must be completed and included by all prospective General Contractors at time of bid submission."

Meeting Minutes, December 15<sup>th</sup>, 2016 @ 10:00AM

EIGHTH MEETING OF THE WOODBURY COUNTY POLICY REVIEW COMMITTEE

Location: Board Chambers, first floor of the Courthouse  
620 Douglas Street, Sioux City, Iowa 51101

Members present: Matthew Ung, County Supervisor; Pat Gill, County Auditor, Ed Gilliland, Director of Human Resources; PJ. Jennings, County Attorney; Tonia Abell, Human Resources

Audience Attendees: Kenny Schmitz, County Building Services Director, John Malloy (IT Director), Shane Albrecht (Baker Group), David Jorgensen (Baker Group), Ernie Colt (NCSRCC), Felicia Hilton (NCSRCC), Scott Williams (President, NWIBCT), Reggie Torno (Northwest Building Trade), Abigail Sills, County Civil Attorney

Agenda

- I. Call to order ---Ung
- II. Public Comments  
No public comments
- III. Approval of Agenda  
Approved by consensus
- IV. New Business
  - A. **Misc. Updates** Performance Bond project  
Per Gilliland, Review of Contractors liability follows module of contract and shouldn't add cost.
  - B. **Quality Assurance for Bidding (1<sup>st</sup> review of new practice)**  
Ung began with introductory remarks. Time was needed for Building Services Director Kenny Schmitz to review state code, practices, and check for duplication. As there are three outgoing Board members, action is requested at the upcoming Tuesday board meeting.

Schmitz pinpointed three objectives: view of the County procedure, compare areas of duplication with that of state code, and show merit to improve. The County is meeting requirements of Iowa, liability and coverage. The County has \$5 million aggregate for current specifics limit project contracts within contractual requirements. Schmitz recommended quality assurance questionnaire for bids over \$135,000. Discussion to any changes, including that of language would not be allowable. Gill then observed in the past exceptions were allowable under majority of the Board. Baker Group, David Jorgenson relayed their business provides a template to contractors which follows Code A132 & 232, standard for Iowa law. Sills advised public bid process be constant, if there are exceptions it opens for complaint. Sills then recommended transparency of bid process. Jennings further noted a line could be added, "exceptions subject to Board approval apply" and the need to follow process, except in the extreme. Concern whether specification under \$135,000 be put out for bid. Schmitz requested discussion for future agenda.

Ung noted there is no past practice and that the contract questionnaire would need to be of public record.

Jennings affirmed. Ung resolved an approved practice would be a pro-active approach to improve the process going forward.

In regards to the questionnaire, Schmitz commented he had revised it to 2 pages to keep shorter and eliminate redundancies. Schmitz believes this will reduce the amount of time contractors would need to fill out and return.

Discussion was open to public comment.

NSSRCC, Felicia Hilton voiced concern of subcontractors abiding by wage and hours by the absence of two particular questions weakens point to define responsible contractor.

**Question #16 (Has Contractor ever failed to complete any work awarded to it?)**

**Question #20 (Contractor affirms that it will retain only subcontractors who will fully comply with bid specifications, including those that address requirements concerning labor)**

Baker Group, Shane Albrecht affirmed the concern is valid, whereas subcontractors misclassify workers and allow 1099 with no benefits, including work comp. Albrecht recommended to go back to Contractor and ask for records, if suspicions arise. Jennings validated keeping question #20, it may not get all workers legitimate coverage, however the County would have defense if needed. Ung affirmed adding questions #16 and #20 agreeable.

Jorgensen questioned if contractor replies "yes" what actions would be taken. Jennings commented the County would need to look further into details and put contractor on notice. Schmitz not opposed to adding #16 and #20.

Ung agreed marking "yes" would not be an automatic no, but would trigger a review.

Schmitz advised a separate sheet be added by contractor to explain any red flags. The Baker Group and the committee agreed that certain language dealing with the county's ability to investigate a bidder's practices should be added to the actual bidding documents.

**Motion by Ung to recommend to Board the adoption to follow process of Quality Assurance Questionnaire with the addition of questions #16 and #20 and more descriptive header by legal. Second by Gill. Passed 5-0.**

**C. Acceptable (Network) Use (6<sup>th</sup> review of new policy)**

Gilliland agreeable to the wording of the policy and has no issue. Gilliland plans to review progressive disciplinary action steps needed based on the outcome of phishing campaign by WCICC. Actions can lead up to termination. Ung tasked Human Resources with the investigations of network use abuse. Jennings' belief is that elected officials and managers will get policy out and stress disciplinary actions. Human Resources will disseminate the policy and investigate network abuse. Ung noted passage of this new policy will be a major topic at the January department head meeting. **Motion by Ung to add signature line and recommend to Board to adopt policy for acceptable network use for the January 3<sup>rd</sup>, 2017 board meeting. Second by Jennings. Passed 5-0.**

**D. Human Resources**

i. **Review Contractors Liability** – Discussed in items IV (a) and IV (b)

V. Policy item requests for future

**A. Contract & Archival Procedure (2<sup>nd</sup> review of new policy)**

**B. Building Use Policy (2<sup>nd</sup> review of new policy)**

Jennings will get outside input and inform Ung of timetable to bring forward.

**C. IT: Social Media, Retention, USB/Thumb Drive Storage, Cloud Storage and Mobile Device Management**

VI. Discussion: Committee reauthorization for 2017 by Board of Supervisors

Ung suggested keeping policy committee going. Ung plans to chair committee if approved and would like to add a 2<sup>nd</sup> Supervisor to sit on committee in 2017. Committee members all agreed to stay with committee if approved, and agreed the committee has done some great work. Next meeting if committee approved will be scheduled in late January or early February 2017.

VII. Meeting adjourned 11:50AM



## WOODBURY COUNTY CAPITAL IMPROVEMENT PROJECTS QUALITY ASSURANCE QUESTIONNAIRE

Woodbury County is requesting that the following questionnaire be completed by all prospective General Contractors and must be included, prior to or at the time of bid submission. Pursuant to Iowa Code 26.9, contracts for public improvements must be awarded to the "lowest responsive, responsible bidder". Factors other than price may be considered when making the award. This questionnaire is only applicable to public improvements which exceed the competitive bid amount set pursuant to Iowa Code 26.3, 26.14 and 314.1B, currently \$135,000.00.

Company/Contracting Firm: \_\_\_\_\_

Owner/ Representative: \_\_\_\_\_

Address: \_\_\_\_\_

Main Telephone: \_\_\_\_\_ E-Mail: \_\_\_\_\_

1. Within the past Five (5) years, has the Contractor been disbarred by any Federal, State, or Local government entity from bidding projects?  Yes  No
2. Within the past Five (5) years, has the Contractor- defaulted on a contract, been disqualified, removed or otherwise prevented from bidding on, or completing a Government, State, or Local project?  Yes  No
3. Within the past five (5) years has the Contractor been found by a court or agency of competent jurisdiction, to be delinquent (delinquent shall include but not limited to failure to file, failure to pay, or imposition tax liens) in meeting its obligation under Federal, State, or Local tax laws?  Yes  No

4. Within the past Five (5) years has the Contractor been unable to obtain, or been denied a bond?  Yes  No
5. Within the past Five (5) years has the Contractor declared bankruptcy or been under receivership?  Yes  No
6. Within the past Five (5) years has the Contractor filed any lawsuits, or sought arbitration with regard to any construction project?  Yes  No
7. Are any lawsuits, legal proceedings, arbitration, or judgment's pending/ outstanding against the Contractor, its owner, or officers?  Yes  No
8. Within the past Five (5) years has the Contractor been found to have violated any of the following Federal or State Laws:  
Iowa Child Labor Act; Iowa Labor Commissioner's Right to Inspect Premises; Iowa Compensation Insurance Act; Iowa Competition Act; Iowa Employee Registration Requirements; Iowa Hazardous Chemicals Risks Act; Iowa Income Corporate and Sales Tax Code; Iowa Minimum Wage Act; Iowa Non-English Speaking Employee Act; Iowa Wage Payment Collection Act; Iowa or Federal Occupational Safety and Health Act; Federal Income or Corporate Tax Code; The National Insurance Act; or Fair Labor Standards Act?  Yes  No
9. Has the Contractor ever failed to complete any work awarded to it?  Yes  No
10. If you answered yes to any Question #1-9 please explain each on attached sheet.
11. On a separate sheet provide the following:
- Three (3) references the company completed projects with in the past Three (3) years. Include entities; contact name, address, and current telephone number.
  - List all Surety/ Bonding Companies utilized by the company in the past Three (3) years.
12. Contractor affirms that it will retain only subcontractors who will fully comply with the bid specifications, including those that address requirements concerning all labor laws?  Yes  No

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date