

## **LOWEST RESPONSIBLE BIDDER REQUIREMENT**

All municipalities, including towns, must follow certain statutory procedures when making contracts. This is to ensure a uniform and orderly contracting process, to protect public funds by increasing the likelihood the best price will be obtained, and to reduce the potential for fraud and abuse by public officials.<sup>1</sup>

Most of the basic contracting requirements are contained in Minn. Stat. § 471.345, which is referred to as the municipal contracting law (MCL). There are, however, a variety of other specific contracting sections in the statutes that may apply in each situation. One of the most important contracting sections for towns is Minn. Stat. § 365.37, subd. 2, states a “contract let on bid must be let to the lowest responsible bidder.” The lowest responsible bidder requirement advanced the legislature’s goal of achieving the best price on contracts paid for with public funds.

One of the most frustrating aspects of the lowest responsible bidder requirement for small towns is the inability of officers to use their knowledge and discretion to determine which contracts provide the best value for the town. However, officers must remember that the contracting procedure partially grew out of a distrust of public officials. “A fundamental purpose of competitive bidding is to deprive or limit the discretion of contract making officials in the areas which are susceptible to such abuses as fraud, favoritism, improvidence, and extravagance.”<sup>2</sup> However, some discretion is still allowed, but it is carefully limited.

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### **I. APPLYING THE LOWEST RESPONSIBLE BIDDER REQUIREMENT**

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Any town contract “let on bid” must be made with the lowest responsible bidder. Letting a contract on bid is defined in terms of the sealed bid procedure, which is the contracting process started with a published advertisement asking for sealed bids. The bids are received, held, and remain sealed until opened publicly at a meeting in accordance with the advertisement. Whenever the board initiates the sealed bid procedure, the lowest responsible bidder requirement must be followed. It

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<sup>1</sup> *Coller v. City of Saint Paul*, 26 N.W.2d 835, 841842 (Minn. 1947); *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 391 (Minn. 1963).

<sup>2</sup> *Griswold v. County of Ramsey*, 65 N.W.2d 647, 652 (Minn. 1954).

should also be noted that the notice requirement in Minn. Stat. § 365.37, subd. 3 also applies when a contract is let on bid.

Boards must keep in mind that the lowest responsible bidder requirement is separate from the requirements of MCL. Procedural requirements under the MCL are placed into three categories depending upon the estimated amount of the contract. If the total estimated amount of a contract exceeds \$175,000 the MCL requires the solicitation of sealed bids by public notice.<sup>3</sup> If a contract must be let by bid under the MCL, there is no question the contract must be let to the lowest responsible bidder. However, the lowest responsible bidder requirement can apply to a contract even if the MCL does not require the contract to be let by bid. It is possible for a board to elect to use the sealed bid procedure to let a contract even though it would not otherwise be required.<sup>4</sup>

Whenever a town makes a contract by advertising for sealed bids, regardless of the amount or whether the MCL covers the contract, it must be awarded to the lowest responsible bidder. This is counter to the common mindset that the lowest responsible bidder requirement does not apply unless the contract is for more than \$175,000.

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## II. DETERMINING THE LOWEST RESPONSIBLE BIDDER

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Determining who is the lowest responsible bidder can be much more complicated than it might seem. The legislature recognized the fact that simply letting a contract to the low bidder without considering whether the contractor can adequately perform the contract will not necessarily serve the public's interests. Courts have agreed and interpreted the lowest responsible bidder requirement as containing some degree of discretion on the part of the municipality to decide which among the bidders is actually the lowest responsible bidder.<sup>5</sup> However, courts have been careful to not allow this ability to consider the responsibility of a bidder to subvert the underlying purposes of the MCL.

### A. Scope of Discretion

Courts have “consistently stressed the necessity for strictly enforcing the law governing competitive bidding.”<sup>6</sup> At the same time, they have recognized that public officials are allowed “some latitude” in their contracting decisions. Determining the responsibility of bidders involves the exercise of deliberation and discretion of a judicial nature.<sup>7</sup> The judicial nature of

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<sup>3</sup> Minn. Stat. § 471.345, subd. 3.

<sup>4</sup> Contracts between \$25,000 and \$175,000 may be made either upon sealed bids or quotations. Minn. Stat. § 471.345, subd. 4. And contracts between \$0 and \$25,000 may be made upon sealed bids, quotations, or direct negotiation. Minn. Stat. § 471.345, subd. 5.

<sup>5</sup> *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 390 (Minn. 1963); *Kelling v. Edwards*, 134 N.W. 221, 222 (Minn. 1912) (“the determination of the responsibility of bidders calls for the exercise of deliberation and discretion of a judicial nature.”).

<sup>6</sup> *Leskinen v. Pucej*, 115 N.W.2d 346, 352 (Minn. 1962).

<sup>7</sup> *Kelling v. Edwards*, 134 N.W. 221, 222 (Minn. 1912).

the decision-making process, coupled with the court's reluctance to meddle with the management of municipal affairs, creates a situation where the courts will not interfere with the exercise of a municipality's contracting decision unless fraud or abuse is present.<sup>8</sup> "This discretion, however, is not arbitrary or unlimited, but must be exercised in the interest of the public; and where a bid is rejected as being made by an irresponsible bidder, there must be some fact tending to show that the bid is not that of a responsible bidder."<sup>9</sup> A bona fide judgment based on facts tending reasonably to support the determination must be used when exercising the discretion. Certain factors have been recognized as legitimate to consider when evaluating a contractor or item.

## B. Factors Considered

A variety of factors have been discussed as elements of responsibility including financial responsibility, integrity, skill, ability, and the likelihood the bidder will do faithful and satisfactory work.<sup>10</sup> Past experience with the contractor and reliable availability may also be considered when determining responsibility.<sup>11</sup> "In deciding upon the responsibility of bidders, it is the duty of the board or officers, not only to take into consideration the pecuniary ability of the bidders to perform the contract, but also to ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work, and to fulfill the terms of the contract."<sup>12</sup>

"[W]here bids are received on items of equipment which are not capable of precise or exact specifications, a municipality may exercise a reasonable discretion in determining who is the lowest responsible bidder and, in so doing, may consider, in addition to the bid price, the quality, suitability, and adaptability of the article to be purchased for the use for which it is intended."<sup>13</sup> However, the court was quick to add, "the discretion exercised must be reasonable and must be based upon some substantial difference in quality or adaptability."<sup>14</sup>

When examining whether the lowest bidder is responsible, be thoughtful and complete in the examination. Courts have considered the amount of time spent investigating the items contained in the bid and the reasonableness of the factors used to evaluate the quality and suitability of an item when deciding whether a contract was properly awarded.<sup>15</sup>

Decisions as to responsibility should be based on supportable facts that reasonably reflect on the contractor's ability to adequately perform the contract. Do not rely on vague rumors of incompetence. If you hear another entity had a problem with the contractor or product, contact them and ask for specifics. Detailed findings that are recorded in the minutes of the board's

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<sup>8</sup> *Id.*; *Queen City Const., Inc. v. City of Rochester*, 604 N.W.2d 368, 379 (Minn. App. 1999).

<sup>9</sup> *Kelling*, 134 N.W. at 222.

<sup>10</sup> *Id.* at 223.

<sup>11</sup> *Id.*; *Queen City Const., Inc. v. City of Rochester*, 604 N.W.2d 368, 378 (Minn. App. 1999).

<sup>12</sup> *Kelling*, 134 N.W. at 223 (quoting *Inge v. Board of Public Works*, 33 S. 678 (Ala.)).

<sup>13</sup> *Otter Tail Power Co. v. Village of Elbow Lake*, 49 N.W.2d 197, 201 (Minn. 1951); see also, *Leskinen v. Puceij*, 115 N.W.2d 346 (Minn. 1962).

<sup>14</sup> *Otter Tail Power Co.*, 49 N.W.2d at 201.

<sup>15</sup> *Duffy v. Village of Princeton*, 60 N.W.2d 27, 32 (Minn. 1953).

meeting are particularly important if it appears the low bidder is not responsible. Also, take great care when developing specifications for the work or item to be purchased. Carefully drawn specifications can allow the board to avoid disputes towns have faced over determining who is the lowest responsible bidder.

The decision to move to the next lowest bidder is a significant one that must be supported by recorded findings of fact. If a suit is brought challenging the board's decision on the responsibility of a contractor, the chances of having the decision upheld are much higher if the court can see, based on the board's minutes, that it went through a deliberative and objective process in reaching its conclusion.

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#### IV. VIOLATING THE LOWEST RESPONSIBLE BIDDER REQUIREMENT

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There are many potential consequences of not following the lowest responsible bidder requirement. Most significantly for town officers, the legislature has made it a crime to fail to comply with the lowest responsible bidder requirement. Under Minn. Stat. § 365.37, subd. 5, a town officer who violates the requirements of the statute (including the lowest responsible bidder requirement) is guilty of a misdemeanor and must leave office. A misdemeanor is punishable by up to 90 days in jail and up to a \$1,000 fine.<sup>16</sup> Because the defense of criminal charges are not covered by the town's insurance policies and may not be paid by the town unless the officer is ultimately found not guilty,<sup>17</sup> officers have a considerable interest in avoiding such charges.

Also, a contract made in violation of lowest responsible bidder requirement is void.<sup>18</sup> The town will remain responsible for paying the contractor who acted in good faith for any benefit conferred to the town under the voided contract.<sup>19</sup> How the board would proceed if it has a contract voided would depend on the facts of the situation and the court's order.

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<sup>16</sup> Minn. Stat. § 609.02, subd. 3.

<sup>17</sup> Minn. Stat. § 465.76.

<sup>18</sup> Minn. Stat. § 365.37, subd. 5.

<sup>19</sup> *Kotchevar v. North Fork Township, Stearns County*, 39 N.W.2d 107, 112 (Minn. 1949).