

## ***The Responsible Contractor Law: What It Means for Towns***

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Towns have always been limited to awarding a sealed bid to the lowest responsible bidder.<sup>1</sup> Until recently, Minnesota law did not define a responsible contractor and left town boards to weigh various factors to determine if a contractor was, in fact, responsible. A process which inevitably involves some uncertainties and concerns over the prospect of determining a contractor is not “responsible”.

The Minnesota Legislature recently adopted requirements that contractors must meet in order to be awarded certain public construction contracts. While a contractor must meet these requirements, doing so does not necessarily mean the contractor is a “responsible bidder” for the purposes of determining the lowest responsible bidder under Minnesota Law. Rather, the new law sets minimum standards that must be met in order to deem a contractor responsible. This memo will discuss the new requirements for contractors to be considered responsible for certain construction contracts, and what towns need to do to comply with this new law.

### **To Whom Does the Responsible Contractor Provisions Apply?**

The requirements for a responsible contractor are spelled out in Minnesota Statutes, section 16C.285 (“Responsible Contractor Law”). It applies to a prime contractor, subcontractor, or motor carrier.<sup>2</sup> It does not apply to a design professional, which is defined as an architect, engineer, land surveyor, landscape architect, professional geoscientist, or interior designer.<sup>3</sup> The requirements also do not apply to a material supplier defined as a “business . . . that supplies materials, equipment, or supplies to a subcontractor or contractor on a project, including performing delivery or unloading services in connection with the supply of materials, equipment, or supplies; provided however that a material supplier does not include a business that delivers mineral aggregate such as sand, gravel, or stone that is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle.”<sup>4</sup>

Whenever a town is contracting with one of these types of contractors, it must consider if the new responsible contracting requirements apply.

### **When do Responsible Contractor Provisions Apply?**

A town must require a contractor to meet the provisions of the Responsible Contractor Law any time a town is awarding a construction contract estimated to exceed \$50,000 to the lowest responsible bidder.<sup>5</sup> Towns are required to use the sealed bid process and award the contract to

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<sup>1</sup> Minn. Stat. § 365.37, subd. 2

<sup>2</sup> Minn. Stat. § 16C.285, subd. 1.

<sup>3</sup> Minn. Stat. § 16C.285, subd. 1, citing to Minn. Stat. § 326.02.

<sup>4</sup> Minn. Stat. § 16C.285, subd. 1.

<sup>5</sup> Minn. Stat. § 16C.285, subd. 2.

the lowest responsible bidder for contracts expected to exceed \$100,000.<sup>6</sup> However, a town may choose to use the sealed bid process for any contract. Therefore, if a town decides to use sealed bids for a construction contract between \$50,000 and \$100,000 the Responsible Contractor Law would apply. However, if a town chooses to use sealed bids for a construction contract estimated to be less than \$50,000, the Responsible Contractor Law would not apply.

The chart below illustrates when the Responsible Contractor Law will apply.

| <b>Estimated Contract Amount</b> | <b>Sealed Bids</b> | <b>Responsible Contracting Law Applies</b> |
|----------------------------------|--------------------|--|
| Over \$100,000                   | Required           | Yes  |
| Between \$50,000 and \$100,000   | Optional           | Yes, if board chooses to seek sealed bids  |
| Under \$50,000                   | Optional           | No   |

### **What is Required under the Responsible Contractor Law**

In order to be an eligible contractor under the Responsible Contractor Law, a contractor must verify that it meets certain minimum criteria. The timing of when notification of compliance must be given is different depending on whether the contractor is a prime contractor or a subcontractor.

#### *Prime Contractors*

In order to comply with the Responsible Contractor Law, a contractor must submit with its bid a signed statement of an owner or officer verifying that the contractor meets the statutory requirements.<sup>7</sup> The requirements include a wide array of criteria including:

- The contractor complies with workers compensation and unemployment insurance requirements.
- The contractor is in compliance with Department of Revenue and Department of Employment and Economic Development registration requirements if it has employees.
- The contractor has a federal tax identification number or a valid Social Security number.
- The contractor has filed a certificate of authority to transact business in Minnesota with the secretary of state if a foreign corporation or cooperative.
- The contractor is in compliance with and during the three-year period before submitting the verification, has not violated State and Federal wage or labor laws.
- The contractor has not recently violated state construction codes.
- The contractor has not received a final determination assessing a monetary sanction from the Department of Administration or Transportation for failure to meet

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<sup>6</sup> Minn. Stat. § 471.345, subd. 3.

<sup>7</sup> Minn. Stat. § 16C.285, subd. 4.

targeted group business, disadvantaged business enterprise, or veteran-owned business goals, due to a lack of good faith effort, more than once in the past three years.

- The contractor is not currently suspended or debarred by the federal government or the state of Minnesota that have the authority to debar a contractor.<sup>8</sup>

If a contractor fails to submit a verification of the requirements, that contractor is ineligible to be awarded the contract for which verification was required.

### Subcontractors

Subcontractors are also required to verify compliance with the Responsible Contractor Law. However, the verification is not required at the time a bid is submitted. Rather, the prime contractor must submit a list of all of its first-tier subcontractors that it intends to retain for work on the project.<sup>9</sup> Prior to entering into a construction contract, and as a condition precedent to the execution of the construction contract, the successful prime contractor must submit to the town a supplemental verification under oath confirming that the subcontractors meet the same criteria as the prime contractor.<sup>10</sup>

The prime contractor and subcontractors must obtain from all their subcontractors with which it will have a direct contractual relationship, a signed statement under oath verifying that they meet all of the minimum criteria required by the Responsible Contractor Law.<sup>11</sup>

If the prime contractor or subcontractor hires additional subcontractors on the project, after submitting verification of compliance, the prime contractor or subcontractor must obtain a verification of compliance from the new subcontractor and submit an updated verification to the town. If the town wishes to see the verifications received from subcontractors, it can request them from the prime contractor.<sup>12</sup> This seems overly complicated, but is intended to help ensure all contractors working on the project are responsible.

### **How Does a Town Comply with the Responsible Contracting Law**

As stated above, when the Responsible Contractor Law applies, towns cannot award a construction contract to a contractor that does not meet the minimum criteria in the statute. Therefore, towns need to keep this new law in mind and should have a process to ensure that its contractors are meeting the minimum criteria. Attached to this memo is a sample contractor verification form, **Exhibit A**. Towns can use this form to get the required verifications from their prime contractors. The form should be required of every contractor submitting a bid for an eligible project. Prime contractors should also require such a form from its subcontractors.

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<sup>8</sup> Minn. Stat. § 16C.285, subd. 3.

<sup>9</sup> Minn. Stat. § 16C.285, subd. 5.

<sup>10</sup> Minn. Stat. § 16C.285, subd. 5.

<sup>11</sup> Minn. Stat. § 16C.285, subd. 5.

<sup>12</sup> Minn. Stat. § 16C.285, subd. 5. (Note: the Responsible Contracting Law allows the contractor statements to be signed electronically).

Also attached is a supplemental verification form, **Exhibit B**. This form needs to be completed by the prime contractor, and a subcontractor that is hiring additional subcontractors, and must be submitted to the town before entering into a contract with the successful bidder. The requirement to submit the supplemental verification form should be made part of the list of documents (e.g., performance bond, payment bond, certificates of insurance) spelled out in the instructions to bidders that the successful bidder must submit at the time of entering into the contract.

This memo does not discuss all aspects of the Responsible Contractor Law, but is instead intended to assist towns to get a better understanding of this new law and to ensure it is incorporated as part of a town's contracting procedures as needed. Be sure to work closely with the town's attorney and engineer as needed to comply with this law.

**Exhibit A**

\_\_\_\_\_ TOWNSHIP

\_\_\_\_\_ COUNTY, MINNESOTA

**RESPONSIBLE CONTRACTOR STATEMENT**

Contractor: \_\_\_\_\_

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

Project: \_\_\_\_\_

The Contractor hereby agrees, states, verifies, and represents to \_\_\_\_\_ (“Town”) as follows:

1. The Contractor proposes to serve as the “prime contractor”, as that term is defined in Minn. Stat. § 16C.285, subd. 1, on a construction contract for the above identified project (“Project”).
2. The Contractor conforms with and satisfies all of the minimum requirements of a responsible contractor set out in Minn. Stat. § 16C.285, subd. 3 (1)-(6) (“Minimum Requirements”).
3. If the Contractor does not meet any of the Minimum Requirements, or fails to verify compliance with the Minimum Requirements, the Contractor is not a responsible contractor, is not eligible to be awarded a construction contract for, or to perform any work on, the Project. If a false statement regarding the verification of compliance with the Minimum Requirements is discovered after the award, the construction contract may be terminated.
4. Attached is a list of all first-tier subcontractors the Contractor intends to retain for work on the Project. The Contractor understands that if it is awarded the contract for the Project it is responsible for collecting statements from each subcontractor and motor carrier providing any work for the Contractor.
5. If Contractor is the successful bidder for the Project, prior to entering into a construction contract, and as a condition precedent to the execution of such construction contract, the Contractor shall, with 14 days of notification as the successful bidder, submit to the Town a supplemental verification under oath confirming that all subcontractors conforms with and satisfies all of the minimum requirements of a responsible contractor set out in Minn. Stat. § 16C.285, subd. 3 (1)-(6). No subcontractor that fails to meet the Minimum Requirements, fails to verify compliance with the Minimum Requirements, or makes a false statement regarding meeting the Minimum Requirements, may perform any work on the Project. Failure to provide supplemental verification within the required time period shall be deemed as the Contractor’s failure to comply with the Minimum Requirements and Contractor will be ineligible to contract for the Project.
6. The Contractor is responsible for obtaining a statement from each subcontractor verifying the subcontractor’s compliance with the Minimum Requirements and such statement shall include a list of the subcontractor’s first-tier subcontractors before entering into a Contract with the Town. The Contractor is required to provide copies of all such statements to the Town upon request. If the Contractor or any subcontractors retain additional subcontractors after the submission of their verification statements, the Contractor or subcontractor shall obtain statements verifying compliance with the Minimum Requirements from each additional subcontractor with which the Contractor or subcontractor has a direct contractual relationship. The subcontractor shall be responsible for providing the additional statements to the Contractor and the Contractor shall, within 14 days of when the additional subcontractors were retained, submit a supplemental statement to the Town confirming the additional subcontractors comply with the Minimum Requirements.

By signing this statement, I hereby certify that I am an owner or officer of the Contractor and verify under oath that the above identified Contractor is in compliance with each of the Minimum Requirements:

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**Exhibit B**

\_\_\_\_\_ TOWNSHIP

\_\_\_\_\_ COUNTY, MINNESOTA

**RESPONSIBLE CONTRACTOR SUPPLEMENTAL STATEMENT**

Contractor: \_\_\_\_\_

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

Project: \_\_\_\_\_

The Contractor hereby agrees, states, verifies, and represents to \_\_\_\_\_ (“Town”) as follows:

1. The Contractor proposes to serve as the “prime contractor”, as that term is defined in Minn. Stat. § 16C.285, subd. 1, on a construction contract for the above identified Project (“Project”).
2. The Contractor was notified it is the successful bidder for the Project.
3. No subcontractor or motor carriers that fail to meet the Minimum Requirements, fails to verify compliance with the Minimum Requirements, or makes a false statement regarding meeting the Minimum Requirements may perform any work on the Project. Attached is a list of all first-tier subcontractors the Contractor intends to retain for work on the Project
4. If the Contractor or any subcontractor does not meet any of the Minimum Requirements, or fails to verify compliance with the Minimum Requirements, the Contractor or subcontractor is not a responsible contractor, is not eligible to be awarded a construction contract for, or to perform any work on, the Project. If a false statement regarding the verification of compliance with the Minimum Requirements is discovered after the award, the construction contract may be terminated.
5. All subcontractors and motor carriers that the Contractor intends to use have verified to the Contractor through a signed statement under oath by an owner or officer that they meet the minimum criteria listed in Minn. Stat. § 16C.285, subd.3 (1) to (6).
6. The Contractor is responsible for obtaining a statement from each subcontractor verifying the subcontractor’s compliance with the Minimum Requirements and such statement shall include a list of the subcontractor’s first-tier subcontractors before entering into a Contract with the Town. The Contractor is required to provide copies of all such statements to the Town upon request. If the Contractor or any subcontractors retain additional subcontractors after the submission of their verification statements, the Contractor or subcontractor shall obtain statements verifying compliance with the Minimum Requirements from each additional subcontractor with which the Contractor or subcontractor has a direct contractual relationship. The subcontractor shall be responsible for providing the additional statements to the Contractor and the Contractor shall, within 14 days of when the additional subcontractors were retained, submit a supplemental statement to the Town confirming the additional subcontractors comply with the Minimum Requirements.

By signing this statement, I hereby certify that I am an owner or officer of the Contractor and verify under oath that the above identified Contractor is in compliance with each of the Minimum Requirements:

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date