



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-1022/P5
CMH:sac&kjf:jm

DOA:.....Bong, BB0313 - Adopt single prime contracting as the default method of contracting for services

FOR 2013-2015 BUDGET -- NOT READY FOR INTRODUCTION

AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

STATE GOVERNMENT

STATE PROCUREMENT

Under current law, with some exceptions, DOA must let by contract to the lowest qualified responsible bidder all construction work when the estimated construction cost of the project exceeds \$50,000 or, if the estimated cost is less, when contracting is in the best interest of the state. This bill requires DOA, for any project that has an estimated construction cost that exceeds \$185,000, to let the project to the lowest qualified responsible bidder through single prime contracting. "Single prime contracting" is a process in which DOA selects all mechanical, electrical, and plumbing contractors, but contracts only with a general prime contractor, who then must contract with the selected mechanical, electrical, and plumbing contractors. This bill also requires DOA to certify persons as qualified and responsible and provides criteria for such certification.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 13.48 (19) of the statutes is amended to read:

13.48 **(19)** ALTERNATIVES TO STATE CONSTRUCTION. Whenever the building commission determines that the use of innovative types of design and construction processes will make better use of the resources and technology available in the building industry, the building commission may waive any or all of s. 16.855, except s. 16.855 (13) and (14m), if such action is in the best interest of the state and if the waiver is accomplished through formal action of the building commission. The building commission may authorize the lease, lease purchase or acquisition of such facilities constructed in the manner authorized by the building commission. Subject to the requirements of s. 20.924 (1) (i), the building commission may also authorize the lease, lease purchase or acquisition of existing facilities in lieu of state construction of any project enumerated in the authorized state building program.

SECTION 2. 16.855 (1) of the statutes is renumbered 16.855 (1m) and amended to read:

16.855 **(1m)** The department shall let by contract to the lowest qualified responsible bidder all construction work when the estimated construction cost of the project exceeds \$50,000, except for construction work authorized under s. 16.858 and except as provided in sub. (1r) or (10m) or s. 13.48 (19). If factors other than dollar amounts are required to be evaluated for a project, the department shall specify a formula that will convert the other factors into a dollar value for comparison.

(1r) If a bidder is not a Wisconsin firm and the department determines that the state, foreign nation or subdivision thereof in which the bidder is domiciled grants a preference to bidders domiciled in that state, nation or subdivision in making governmental purchases, the department shall give a preference over that bidder to Wisconsin firms, if any, when awarding the contract, in the absence of compelling

reasons to the contrary. The department may enter into agreements with states, foreign nations and subdivisions thereof for the purpose of implementing this subsection.

SECTION 3. 16.855 (1g) of the statutes is created to read:

16.855 (1g) In this section:

(a) “Mechanical, electrical, or plumbing subcontractor” is a contractor that performs mechanical, electrical, plumbing, or fire protection work and enters into a contract with a general prime contractor to perform their division of work.

(b) “Qualified bidder” means a person that the department certifies under sub. (9m) (b) 1.

(c) “Qualified responsible bidder” means a person who is a qualified bidder and who is a responsible bidder.

(d) “Responsible bidder” means a person that the department certifies under sub. (9m) (b) 2.

(e) “Single prime contracting” means bidding and contracting through a process in which only a general prime contractor has a contractual relationship with the state and all mechanical, electrical, or plumbing subcontractors are selected by department and are subcontractors to the general prime contractor.

SECTION 4. 16.855 (2) (a) 5. of the statutes is amended to read:

16.855 (2) (a) 5. Date, when and place where plans will be available.

SECTION 5. 16.855 (2) (a) 6. of the statutes is created to read:

16.855 (2) (a) 6. That the department shall consider only bids from persons who are responsible bidders and, unless sub. (9m) (ar) 2. applies, qualified bidders.

SECTION 6. 16.855 (9) of the statutes is renumbered 16.855 (9m) (b) 1. c. and amended to read:

16.855 (9m) (b) 1. c. ~~The~~ If the department may require bidders to submit so requires or the bidder will be considered unqualified, the bidder has submitted a sworn statements statement as to financial ability, equipment, and experience in construction and ~~require such~~ other information as may be necessary to determine ~~their~~ the bidder's competency.

SECTION 7. 16.855 (9m) of the statutes is created to read:

16.855 (9m) (ag) In this subsection, "bidder" includes a potential bidder.

(ar) 1. The department shall certify bidders as qualified bidders under par. (b) 1. and responsible bidders under par. (b) 2. and shall administer a registration process for all bidders submitting bids on any construction project under this section. The department shall issue, in a timely manner, a certification decision on a complete application for certification. A certification under this subdivision is valid for 2 years except the department may decertify a bidder if the department determines that the bidder no longer meets the qualifications under par. (b) and if the department follows a decertification process developed by rule that provides to the bidder notice, hearing, and a means to appeal.

2. Notwithstanding sub. (1m) or (14) (e), the department may waive the condition of certification as a qualified bidder if the project is of such magnitude as to limit competition if the conditions under par. (b) 1. were required.

3. The department shall consider for certification under par. (b) associations consisting of at least 2 contracting firms that are organized for the purpose of entering into a construction contract as a single entity if at least one of the contracting firms is qualified under par. (b) and if the assignment of, and provisions for the continuity of, the various responsibilities within the association are agreed upon before the contract is awarded.

(b) 1. To be certified as a qualified bidder, a bidder must meet all of the following conditions:

a. The bidder has completed at least one project that involved similar work to the work being bid and the project was at least 50 percent of the size or value of the division of the project being bid. If the department determines that more experience is necessary for a particular project, the department may include additional requirements in the specifications and certify bidders accordingly.

b. The bidder has access to all necessary equipment and the organizational capacity and technical competence necessary to perform the project work properly and expeditiously.

2. To be certified as a responsible bidder, a bidder must meet all of the following conditions:

a. The bidder maintains a permanent place of business.

b. The bidder submits a sworn statement, upon the department's request, that indicates that the bidder has adequate financial resources to complete the work being bid, taking into account any other work the bidder is currently under contract to complete.

c. The bidder is bondable for the term of the proposed contract.

d. The bidder has a record of satisfactorily completing projects. In determining this factor, the department shall consider if the bidder has completed all contracts in accordance with drawings and specifications; diligently pursued execution of the work and completed contracts according to the time schedule, taking account of extensions granted; fulfilled guarantee requirements of contracts; if the contract included an affirmative action program requirement, complied with the

requirement; and, if the contract included a safety program requirement, complied with the requirement.

e. The bidder is not on an ineligible list that the department maintains under s. 16.705 (9) or 16.765 (9) or on a list that another agency maintains for persons who violated construction-related statutes or administrative rules.

f. The bidder has been in business for at least 12 months.

g. The bidder is a legal entity and authorized to do business in Wisconsin.

h. The bidder has performed at least one other public project for a government entity.

i. The bidder can provide information, upon request, to the department on the bidder's ownership, management, and control.

j. In any jurisdiction, the bidder, in the previous 10 years, has not been debarred from any government contracts and has not been found to have committed tax avoidance or evasion.

k. In any jurisdiction, in the previous 10 years, the bidder has not been disciplined under a professional license and none of the bidder's employees and no member of the bidder's organization has been disciplined under a professional license.

SECTION 8. 16.855 (10m) (am) 3. of the statutes is amended to read:

16.855 (**10m**) (am) 3. The department may award any contract to a minority business or disabled veteran-owned business, or a business that is both a minority business and a disabled veteran-owned business, ~~that~~ if the business is a qualified responsible bidder and the business submits a ~~qualified responsible~~ bid that is no more than 5 percent higher than the apparent low bid.

SECTION 9. 16.855 (13) of the statutes is repealed and recreated to read:

16.855 (13) (a) In any project under this section let under single prime contracting, the department shall identify, as provided under par. (b), necessary mechanical, electrical, or plumbing subcontractors who are qualified responsible bidders and a general prime contractor who is submitting a bid under sub. (14) shall include the selected subcontractors.

(b) For purposes of selecting subcontractors under par. (a), the department shall develop and administer an open and public bidding process and follow the requirements and procedures under sub. (2). Within 48 hours of bid submission, the department shall make available on the department Internet site the names of the bidders and the amount of the bid. No more than 7 days after the deadline for bid submission, the department shall provide public notice of the lowest bidders who are qualified responsible bidders. The department shall make available on its Internet site the bids, including the bid documents, identified under this paragraph as the lowest bidders and they shall be open to public inspection. No other bids under this paragraph may be on the Internet site or open to public inspection.

SECTION 10. 16.855 (14) (a) of the statutes is renumbered 16.855 (14) (d) and amended to read:

16.855 (14) (d) ~~If a project requires prior approval of the building commission under s. 13.48 (10) (a) and bids are required to be solicited under sub. (2), the department shall take both single bids and separate bids on any division of the work that it designates. If a project does not require prior approval of the building commission under s. 13.48 (10) (a) and bids are required to be solicited under sub. (2), the department may take single bids or separate bids on any division of the work that it designates. If the department awards contracts by the division of work, the department shall award the contracts according to the division of work selected for~~

~~bidding.~~ Except as provided in sub. (10m) (am), the department shall award all single prime contracts to the lowest bidder who is a qualified responsible bidder or bidders that ~~result~~ results in the lowest total construction cost for the project.

SECTION 11. 16.855 (14) (am) of the statutes is created to read:

16.855 (14) (am) Except as provided in s. 13.48 (19), the department shall let all construction projects that exceed \$185,000 through single prime contracting.

SECTION 12. 16.855 (14) (b) of the statutes is amended to read:

16.855 (14) (b) The state is not liable to a ~~prime~~ contractor for damage from delay caused by another ~~prime~~ contractor if the department takes reasonable action to require the delaying ~~prime~~ contractor to comply with its contract. If the state is not liable under this paragraph, the delayed ~~prime~~ contractor may bring an action for damages against the delaying ~~prime~~ contractor.

SECTION 13. 16.855 (14) (bm) of the statutes is created to read:

16.855 (14) (bm) If the bid is being let through single prime contracting, bidders for the general prime contractor who are responsible qualified bidders shall submit their bids to the department no later than 7 days after the successful subcontractor bids become available to the public under sub. (13) (b).

SECTION 14. 16.855 (14) (c) of the statutes is created to read:

16.855 (14) (c) The department shall reject any bid for the general prime contractor from a bidder who submits a bid that includes contractors other than the ones selected under sub. (13) (a). The award of a contract may not be finalized until the department approves the required performance bond and certificate of insurance.

SECTION 15. 16.855 (14) (e) of the statutes is created to read:

16.855 (14) (e) Within 30 days after the deadline under par. (bm), the department shall notify the successful general prime contractor bidder of its selection. The contractor who is awarded the contract shall enter into contracts with the mechanical, electrical, or plumbing subcontractors selected under par. (13) (a) and shall comply with the requirements under sub. (14m). The department shall make the final bid results available on its Internet site at the time it provides the written, official notice to the successful general prime contractor bidder notifying the contractor that the contract is fully executed and that the contractor is authorized to begin work on the project.

SECTION 16. 16.855 (14m) of the statutes is created to read:

16.855 (14m) (a) The department shall develop a standard contract for a general prime contractor selected under sub. (14) to use and shall include in the contract all of the following:

1. A requirement that all subcontractors selected under sub. (13) (a) provide a 100 percent performance bond and a 100 percent payment bond to the benefit of the general prime contractor as the only obligee.

2. A delineation of the responsibilities, insurance requirements, indemnification obligations, claims processes, and termination rights and protections of all subcontractors selected under sub. (13) (a).

3. A requirement that the general prime contractor is subject to s. 16.528 (2m).

4. A schedule for payment from the general prime contractor to a subcontractor that is consistent with sub. (19) (b).

(b) Neither a general prime contractor nor a subcontractor selected under sub. (13) (b) may amend a contract developed under par. (a).

SECTION 17. 16.855 (19) of the statutes is renumbered 16.855 (19) (a) and amended to read:

16.855 (19) (a) As the work progresses under any contract for construction of a project the department, from time to time, shall grant to the contractor an estimate of the amount and proportionate value of the work done, which shall entitle the contractor to receive the amount thereof, less the retainage, from the proper fund. The retainage shall be an amount equal to not more than 5% of the estimate until 50% of the work has been completed. At 50% completion, no additional amounts shall be retained, and partial payments shall be made in full to the contractor unless the ~~architect or engineer~~ department certifies that the job is not proceeding satisfactorily. At 50% completion or any time thereafter when the progress of the work is not satisfactory, additional amounts may be retained but in no event shall the total retainage be more than 10% of the value of the work completed. Upon substantial completion of the work, ~~an~~ any amount retained ~~may~~ shall be paid to the contractor, less the value of any required corrective work or uncompleted work. For the purposes of this section, estimates may include any fabricated or manufactured materials and components specified, previously paid for by contractor and delivered to the work or properly stored and suitable for incorporation in the work embraced in the contract.

(c) This subsection does not apply to contracts awarded under s. 16.858.

SECTION 18. 16.855 (19) (b) of the statutes is created to read:

16.855 (19) (b) As the work progresses under any subcontract under sub. (14) (e) for construction of a project, the general prime contractor shall, upon request of a subcontractor, pay to the subcontractor an amount equal to the proportionate value of the subcontractor's work done, less retainage. The retainage shall be an amount

equal to not more than 5 percent of the subcontractor's work completed until 50 percent of the subcontractor's work has been completed. At 50 percent completion, no additional amounts may be retained, and partial payments shall be made in full to the subcontractor unless the department certifies that the subcontractor's work is not proceeding satisfactorily. At 50 percent completion or any time thereafter when the progress of the subcontractor's work is not satisfactory, additional amounts may be retained but the total retainage may not be more than 10 percent of the value of the work completed. Upon substantial completion of the subcontractor's work, any amount retained shall be paid to the subcontractor, less the value of any required corrective work or uncompleted work. All payments the general prime contractor makes under this paragraph shall be within 7 calendar days after the date on which the general prime contractor receives payment from the department for the work performed.

SECTION 9101. Nonstatutory provisions; Administration.

(1) GENERAL PRIME CONTRACTOR CONTRACT. When the department of administration develops a contract under section 16.855 (14m) (a) of the statutes, as created by this act, the department shall provide public notice of the contract development, review written comments, and hold at least one public hearing, allowing for testimony. The building commission must approve the contract before the department may use the contract.

SECTION 9301. Initial applicability; Administration.

(1) SINGLE PRIME CONTRACTING. The treatment of sections 13.48 (19) and 16.855 (1), (1g), (2) (a) 5. and 6., (9), (9m), (10m) (am) 3., (13), and (14) (a), (am), (b), (bm), (c), and (e) of the statutes, the renumbering and amendment of section 16.855 (19)

of the statutes, and the creation of section 16.855 (19) (b) of the statutes first apply to bids and proposals that are solicited on the effective date of this subsection.

SECTION 9401. Effective dates; Administration.

(1) SINGLE PRIME CONTRACTING. The treatment of sections 13.48 (19) and 16.855 (1), (1g), (2) (a) 5. and 6., (9), (9m), (10m) (am) 3., (13), and (14) (a), (am), (b), (bm), (c), and (e) of the statutes, the renumbering and amendment of section 16.855 (19) of the statutes, the creation of section 16.855 (19) (b) of the statutes, and SECTION 9301 (1) of this act take effect on January 1, 2014.

(END)