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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON DIFFERENCES IN LAWS  
APPLICABLE TO CITIES AND VILLAGES

FROM: Ronald Sklansky, Senior Staff Attorney, Don Dyke, Chief of Legal Services

RE: Letting of Contracts

DATE: July 24, 2008

This Memo reviews the current scheme of statutory regulation of the letting of contracts for works of public construction by cities and villages. The Memo is intended to facilitate discussion by the Special Committee as to whether the committee should address differences in that regulation as applied to cities and villages.

### **BIDDING**

#### **Cities**

Section 62.15 (1), Stats., generally provides that when the estimated cost of public construction exceeds \$25,000, a city must enter into a contract for the construction with the lowest responsible bidder. All other public construction may be contracted for as the city's common council directs. However, if the estimated cost of any public construction exceeds \$5,000 but is not greater than \$25,000, the Board of Public Works must provide a notice to the public of the proposed construction before the contract for the construction is executed.

There are three exceptions to the general rule regarding bidding and contracting with the lowest responsible bidder. First, the provision does not apply if the materials or labor are donated. Second, a city's common council may, by a vote of 3/4ths of the all the members-elect, provide by ordinance that any class of public construction or any part of that public construction may be done directly by the city without submitting the project for bids. Third, the bidding requirements may be avoided for the repair and reconstruction of public facilities when damage or threatened damage to the facilities creates an emergency, as determined by resolution of the Board of Public Works or Board of Public Utility

Commissioners, in which the public health or welfare of the city is endangered. [See s. 62.15 (1) and (1b), Stats. Other statutory exceptions exist outside of ch. 62, Stats.]

### **Villages**

Section 61.55, Stats., generally provides that all contracts for public construction in a village, exceeding \$25,000, must be let by the village board to the lowest responsible bidder. The statute contains no express statement as to the procedure to be followed for a project that does not exceed \$25,000, except that if the estimated cost of public construction exceeds \$5,000 but is not greater than \$25,000, the village board must provide notice to the public of the proposed construction before the contract for the construction is executed.

One exception to the general bidding requirement exists for the repair and reconstruction of public facilities when damage or threatened damage to the facilities creates an emergency, as determined by resolution of the village board in which the public health or welfare of the village is endangered. Another exception exists in the case of donated materials or labor. [See s. 61.55, Stats. Other statutory exceptions exist outside of ch. 61, Stats.]

A village board may by ordinance provide that as a complete alternative to the statutory contracting provisions for villages, a village may elect to comply with the statutory contracting provisions for cities. [See s. 61.56, Stats.]

### **SIGNING OF CONTRACTS**

#### **Cities**

Section 62.15 (12), Stats., provides that all public works contracts must be signed by the mayor and clerk, unless otherwise provided by resolution or ordinance. The form of the contract must be approved by the city attorney. No contract may be executed until the comptroller has countersigned the contract and endorsed that sufficient funds are on hand in the treasury to meet the expense of the contract or that provision has been made to pay any liability that will accrue under the contract.

#### **Villages**

Section 61.50 (1), Stats., provides that every village contract must be executed on the part of the village by the president and clerk.

### **OTHER MATTERS**

#### **Cities**

Section 62.15, Stats., provides for the additional following matters pertaining to public works contracts:

1. A contract may include an escalator clause for additional charges for labor and materials as a result of general inflation. Such a clause may not exceed 15% of the amount bid nor the amount of the increase paid by the contractor. A similar clause may be included for

increasing the quantity of construction required in the original contract by an amount not to exceed 15% of the original contract price.

2. When work is let to the lowest responsible bidder, the Board of Public Works must prepare plans, specifications, and a form contract for inspection by potential bidders.
3. A bidder must submit specified financial security as a guarantee that if the bid is accepted, the bidder will execute and file the proper contract and bond.
4. A bidder must provide sufficient sureties or provide financial security during the performance of the contract.
5. The Board of Public Works may reject any bid if, in the board's opinion, any combination has been entered into to prevent free competition. Also, the city's common council may, if in its opinion any of the bids are fraudulent, collusive, excessive, or against the best interests of the city, by resolution adopted by 2/3rds of its members, reject any and all bids and direct the work to be done by the city directly under the supervision of the Board of Public Works.
6. If the Board of Public Works determines that a bidder is incompetent to perform the work, the board must report to the council a schedule of all of the bids for the work, together with a recommendation to accept the bid of the lowest responsible bidder. The common council may let the work to that bidder or re-advertise the contract.
7. A public work may be undertaken by the use of patented articles, materials, or processes if the owner of the patent permits the use of the patent or sells it.
8. Different plans and specifications for a public work may be prepared requiring the use of different kinds of materials.
9. A contract may include a provision requiring the contractor to keep the work done under the contract in good order or repair for a period not to exceed five years.
10. A specified amount of the contract payment may be retained by the city to ensure adequate performance of the contract.
11. A contractor must maintain barriers and lights to prevent accidents on streets or sidewalks. A contractor also will be liable for all damages caused by the negligent digging up of streets, alleys, or public grounds, or that result from the contractor's carelessness.
12. If an ordinance authorizes any work to be done directly by the city without submitting a proposal for bids, the Board of Public Works must keep an accurate account of the cost of the public work, including necessary overhead expenses. The board must make a complete report of the work to the common council.

[In addition, it appears that the provisions of s. 66.0901, Stats., also apply to a city that lets a contract for public construction. This statute is described in the next portion of this Memo.]

### Villages

Sections 61.55 and 61.56, Stats., provide that if a village does not comply with the provisions of s. 62.15, Stats., described above, then its contracting for public works must follow the procedures contained in s. 66.0901, Stats. This statutory provision provides for the following:

1. A municipality may require a person submitting a bid to complete a statement consisting of information relating to financial ability, equipment, experience, and other matters that the municipality requires for the protection and welfare of the public. The governing body of the municipality or the committee, board, or employee charged with, or delegated by the governing board with, the duty of receiving bids and awarding contracts must properly evaluate the statement and find whether the maker of the statement is qualified or unqualified.
2. The statement described in item 1, above, must be provided by any bidder, although a bidder who has once qualified need not separately qualify on successive public contracts unless required to do so by the municipality, committee, board, or an employee.
3. If it is determined that the statement described in item 1., above, is insufficient, the bid may be rejected or disregarded.
4. If a person submits a bid or proposal and the bidder claims that a mistake, omission, or error has been made, the bidder must, before the bids are opened, make that fact known. The bid then must be returned to the bidder unopened and the bidder may not bid again unless the project is re-advertised and re-let upon the advertisement. If the problem is discovered after the bids are opened, the bidder must immediately give written notice and make that fact known and submit to the municipality clear and satisfactory evidence of the mistake, omission, or error and that it was not caused by any careless act or omission.
5. In public contracts for the construction, repair, remodeling, or improvement of a public building or structure, other than highway structures and facilities, a municipality may bid projects based on a single or multiple division of the work.
6. A bidder must provide a sworn statement that it has examined and carefully prepared its proposal from the plans and specifications related to the contract. The bidder must submit a list of proposed subcontractors. The list may not be amended without the written consent of the municipality.
7. Whenever there is a dispute between a contractor or surety or the municipality as to whether there is compliance with the provisions of a public contract relating to the hours of labor, wages, residents, character, and classification of workers, the determination of the municipality is final. In case of a violation, the municipality may declare the contract in default and request the surety to perform or re-let upon advertisement the remaining portions of the contract.
8. A municipality may retain specified amounts of payments to the contractor in order to ensure adequate performance of the contract. [Cities and villages both specifically must comply with this provision. See ss. 61.55, 61.56, and 62.15 (10), Stats. It also appears that a village

must comply with s. 66.0901, Stats., regardless of whether it acts under s. 61.55 or 61.56, Stats.]

RS:jal