

## Public Works Contracts in Missouri



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PROVIDING LEGAL SOLUTIONS FOR LOCAL GOVERNMENTS

## Introduction/Background

- Bidding the project
- New construction safety training requirements
- Construction management
- Missouri laborers requirement
- Prevailing wages
- Prompt pay



## Competitive Bidding- Statutory Requirements



- § 8.250 RSMo- Cities over 500,000
- § 50.660 Counties
- § 88.940 Cities 75,000 – 80,000
- § 91.170 initial City water works
- § 177.086 School Districts
- § 182.270 Public Libraries and Cities over 10,000
- § 248.110 Sanitation Districts
- § 253.080 Dept. Natural Resources

## Competitive Bidding- Charter/Code Requirements



- City of Oak Grove
  - Purchases in excess of \$5,000 require legal advertisement, written specifications, *sealed bids* and are awarded by the Board of Aldermen
- City of Lawson
  - All purchases and contracts for supplies and services (except professional and engineering services) shall be based wherever possible on competitive bids
  - Formal bidding and contract procedures *required* where extended cost exceeds \$2,000
- City of Kansas City- Charter, art. IV, Section 80
  - Sealed bids required on construction contracts exceeding \$100,000
  - Contracts \$100,000 or less do not require public notice or sealed bid unless otherwise required by City Charter or federal or state statute. Bids should be solicited by any reasonable method and from a reasonable number of qualified sources
- City of St. Louis- Charter, art. XXII, Section 4
  - Board of Public Service must advertise bids three times
  - Sealed bids required, along with bid deposit
  - Board to let contracts to the lowest responsible bidder

## Bid Bonds

- No general statute in Missouri that requires bid bonds
  - Bid bonds are required for contracts for the construction of roads, bridges or culverts if the engineer's costs estimate exceeds \$500. Section 229.050, RSMo.
- Guarantees to assure the owner that the bidder will honor its bid
- Often a letter of credit, cash, certificate of deposit or surety bond
- Provides leverage to the owner when the bidder fails to do the work- owner doesn't have to sue, instead can call on the guarantee to cover costs incurred out of the bidder's failure to honor the bid
- These are usually in the amount of 5% to 20% of the bid amount
- Contractor and its surety are released from liability on the bid bond once the contractor executes a valid contract with the owner and replaces the bid bond with a performance bond, payment bond or both.

Source: II Mo. Construction Law Section 10.25 (MoBar 2d 2004)

## Competitive Bidding- Bid Selection



- A public body has wide discretion in deciding whether to accept bids
- Bids are an offer to contract and their acceptance does not automatically create a contract with the municipality
  - Section 432.070, RSMo, the "Municipal Statute of Frauds" will apply
- Bid documents should include language that makes it clear that submitted bids are irrevocable offers, valid for a set time that allows the city to evaluate and accept the bid
  - If bid documents are silent, then the bids will remain open for a "reasonable time."
- Whenever possible, only accept bids that conform to the bid invitation
  - This promotes fair competition by requiring the bidders to submit bids for exactly the same work.
- Using prequalification measures increases the likelihood of responsible bidders
  - Require the bidders to submit a resume demonstrating their ability to complete similar projects and their current financial responsibility.

## Competitive Bidding- Bid Selection

- "Lowest responsible qualified bidder" or "lowest and best bidder"
  - "Lowest" bidder may be determined with monetary standards
- "Best" bidder involves other factors and elements
  - Honesty and integrity
  - Skill and business judgment
  - Experience and facilities for carrying out the contract
  - Previous conduct under other contracts
  - Quality of previous work



## Competitive Bidding- Bid Rejection



- Bid rejection is often for one of three reasons:
  - bid is non-responsive,
  - bidder not "responsible" or
  - owner rejects all bids and solicits new bids or abandons the project
- Rejected bidder has no vested or protectable interest in the award of a public works contract
  - Since no property right incurred in submission of a bid, due process does not require a hearing to establish the exercise of reasonable discretion in bid decision
- Bids containing a material variance from the bid invitation must be rejected
  - Material variance is one that gives one bidder a substantial advantage or benefit not enjoyed by other bidders. Examples include:
    - Proposals that include products that are different than those specified in the bids
    - Proposals that change or delete contract terms or conditions specified in the bidding documents
    - Proposals that contain a conditional offer
- Where the authority requiring competitive bidding provides the owner the right to "reject any or all bids", Missouri Courts hold that the owner has an unconditional right to reject any one bid, including the low bid.
  - A public body can reject all bids and start over
  - Public body must act in good faith and without favoritism or improper motives in making bid selection.

## Municipal Statute of Frauds

- To be valid, municipal contracts must contain certain characteristics
  - Within the scope of the municipality's powers
  - Made upon consideration wholly to be performed after the making of the contract
  - In writing and dated when made
  - Subscribed by the parties or their authorized agents
- Those contracting with municipalities are charged with understanding these requirements and that if they aren't followed the contract may be void and unenforceable



## Competitive Bidding- Errors on Bids

- Missouri statutes do not address the correction or withdrawal of bids due to mistake
- The primary issues are:
  - Whether the mistake was **mutual** or **unilateral**; and
  - Whether the mistake was **clerical** or a **mistake in judgment**
- If **unilateral**, then relief is only permitted if the mistake was also **clerical**
  - No relief is entitled where its mistake was unilateral and one of judgment.
- Unilateral clerical errors might be grounds for rescinding a contract where 1) the mistake is not obvious; 2) agreement is entirely executory; 3) mistake is substantial; and 4) mistake is clerical or computational or a misconstruction of the specifications.
- If the mistake was **mutual**, then the contract can be rescinded.
  - This can apply to mistakes that are so obvious that both parties should have known.
- Remedies
  - Rescission of the contract or withdrawal of the mistaken bid are the most common requests for relief
  - It may be possible to have the court reform the contract

Source: 1 Mo. Construction Law Sections 2.33 - 2.36 (MoBar 2d 2004)

## Competitive Bidding- Bid Protests



- Missouri law does not provide statutory procedures for bid protests
  - No set timeframes to bring a claim
  - Bid protests are usually filed as a request for injunctive relief
- Who may protest?
  - Disappointed bidder can't because no property right is created by an invitation to bid
  - Taxpayers can for violation of state statutes or city ordinances
    - E. Mo. Laborers Dist. Council test
    - Injury suffered by challenger must be one that is shared by the public at large
  - Possible disappointed bidder standing when facts allege unfair bid process

## Competitive Bidding- Professional Services



- Missouri statutes state a specific policy for the State and its political subdivisions to negotiate contracts for the following services on the basis of demonstrated competence and qualifications
  - Architectural
  - Engineering
  - Land surveying
- Costs of these services should not be considered when determining which firms are most highly qualified
  - Proposed costs may be considered at the time of negotiation of the contract

## Competitive Bidding- Professional Services

- Political subdivisions should encourage firms to annually submit a statement of qualifications and performance data
- When a project comes up, the political subdivision must evaluate the current statements on file together with those submitted at the time of the project according to the following criteria:
  - Specialized experience
  - Capacity and capability
  - Past record of performance
  - Proximity to and familiarity with the project
- A political subdivision can exempt itself from these requirements by adopting its own qualification-based selection procedure



## Construction Safety Training



- HB 1549 signed by the Governor July 7, 2008– effective date is August 28, 2009
- Will be located at Section 292.675, RSMo
- Any person signing a contract for the construction of public works for any public body shall provide a 10-hour OSHA construction safety program for their on-site employees
- All employees must complete the program within 60 days of beginning work on the project
- If an employee is found on a worksite without documentation of successful completion of the safety course, that employee must produce the required documentation within 20 days or will be subject to removal from the project

## Construction Safety Training

**CAUTION**  
IF YOU THINK  
OSHA IS A  
SMALL TOWN  
IN WISCONSIN  
YOU'RE IN  
TROUBLE

- City requirements:
  - Must specify the safety training requirements in the resolution or ordinance approving the project AND in the call for bids
  - Must ensure that the safety training requirement is included in the terms of the contract
  - Must include notice of the penalties for noncompliance of the safety training requirement in the contract

## Construction Safety Training

- Contractor requirements:
  - Provide a 10-hour OSHA construction safety program
    - Includes an OSHA-approved course in construction safety and health or similar program approved by the Mo Dept of Labor that is at least as stringent as an approved OSHA program
  - Must require its on-site employees to complete the program
  - Must require any subcontractor to do the same



## Construction Safety Training



- Penalty Provisions:
  - For violations of these requirements the contractor must pay to the public body with which it is contracting:
    - \$2,500
    - PLUS
    - \$100 per employee employed by the contractor or subcontractor
    - For each day each employee is employed without the required training
  - Public Body can retain any amount due as a penalty from payments under the contract
  - Contractor can withhold from subcontractor any amount of penalty resulting from the subcontractor's failure to comply
  - Department of Labor responsible for enforcement

## Payment Bonds



- No mechanics' liens on public works projects
- Payment bonds required of prime contractors
  - Designed to protect subcontractors and suppliers in the way mechanics' liens protect them on private projects
  - Keeps cities from being unjustly enriched once the benefit of work and labor is received
- Not required on projects less than \$25,000
- Absolute duty of public officials to require a payment bond
- Indemnification of officers

## Performance Bonds



- No general requirement for these under Missouri law; but might be required under local law
- Performance bonds indemnify the owner against loss by reason of the contractor's failure to perform the contract.
- Typically, performance bonds give the surety the option of remedying the default; performing the contract; or soliciting bids to obtain performance.

## Maintenance Bonds



- No general requirement for these under Missouri law; but might be required under local law
- These warrant the contractor's work for a period of time after the project is completed.
- Usually, the owner is the only party who may recover on a maintenance bond.
- Surety's options:
  - repair the work,
  - contracting for repairs, or
  - pay the owner for the cost of repairs

## Use of Construction Manager



- A public owner is authorized to use a construction manager when planning, designing and constructing, or when improving altering or repairing a building or structure.
- Can be used during pre-construction or construction phases or both.

## Use of Construction Manager

What are "construction management services"?

- Design Phase:
  - Consulting with, advising, assisting and making recommendations to the public owner, architect, engineer or registered landscape architect
  - Review all plans and specifications as they are being developed
  - Making recommendations with respect to construction feasibility, availability of material and labor, time requirements for procurement and construction, and projected costs.
  - Making reviewing and refining budget estimates.
  - Making recommendations re: division of work
  - Analyzing bids received and awarding contracts.
  - Prepare and monitor progress schedule during design phase and prepare proposed construction schedule.



## Use of Construction Manager

What are "construction management services"?

- Construction Phase
  - maintaining competent supervisory staff to coordinate and provide general direction of the work and progress of the contractors
  - observing the work as it is being performed for general conformance with working drawings and specifications
  - Establishing and implementing procedures for coordinating among the public owner, architect or engineer, contractors and construction manager
  - maintaining job site records and making progress reports
  - implementing labor policy
  - reviewing the safety and equal opportunity programs of each contractor
  - reviewing and processing all applications for payment by contractors and material suppliers
  - making recommendations for and processing requests for changes in the work and maintaining records of change orders
  - scheduling and conducting job meetings to ensure orderly progress of the work
  - developing and monitoring a project progress schedule, coordinating and expediting the work of all contractors and providing periodic status reports to the owner and the architect or engineer
  - establishing and maintaining a cost control system and conducting meetings to review costs



## Missouri Laborers Requirement

- When there is a period of excessive unemployment in Missouri, every person charged with constructing or building a public works contract shall employ only Missouri laborers and laborers from nonrestrictive states
- Sections 290.550 to 290.580, RSMo
- To find out if these sections are in effect, contact the Division of Labor Standards at (573) 751-3403 or go to the following website:

<http://www.dolir.mo.gov/lis/index.asp>



## Prevailing Wage- The Requirement

- Sections 290.210 to 290.340, RSMo.
- Not less than the prevailing hourly rate of wages
- for work of a similar character
- in the locality in which the work is performed...
- shall be paid to all workmen employed by or on behalf of any public body
- engaged in the construction of public works
- exclusive of maintenance work



## Prevailing Wage- Determination of the Prevailing Hourly Rate

- Department of Labor and Industrial Relations investigates and determines the prevailing hourly rate of wages in each locality on or before July 1<sup>st</sup> of each year
  - Required to consider wage rates established by collective bargaining agreements
  - Also must consider rates that are paid generally within the locality
  - The Department uses the "mode" method in making the determination
- Known as the Annual Wage Order
  - Filed with the Secretary of State and the Department of Labor and Industrial Relations
  - An objection and hearing procedure is provided in the statute
- Department of Labor maintains a list of Occupational Titles of Work Description (see 8 C.S.R. 30-3.060, which can be viewed at: <http://www.sos.mo.gov/adrules/csr/current/8csr/8c30-3.pdf>)

## Prevailing Wage- Locality

- "Locality" means the county in which the physical work on the project will be completed
  - Unless there is not a sufficient amount of competent skilled workmen in a given county to construct the public works efficiently and properly
  - in which case "locality" may be expanded to two or more adjacent counties



## Prevailing Wage- Who is covered?

- The plain language of the statute: all workmen employed by or on behalf of any public body engaged in the construction of public works
  - This does not apply to city employees
  - § 290.230 also says:
    - Only such workmen as are directly employed by contractors and subcontractors
    - In actual construction work
    - On the site of the building or construction job
    - Shall be deemed to be employed upon public works
  - Workmen are "laborers, workmen and mechanics"



## Prevailing Wage- Defining "public works"



- Public works = all fixed works constructed for "public use or benefit" or "paid for wholly or in part out of public funds"
  - "Construction" includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating or major repair
- Does not apply to maintenance work
  - "Maintenance work" is the "repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased"



## Prevailing Wage- Practical Application

- Any public body that is contemplating a public works project must obtain an annual wage order from the Department
- Rates from the annual wage order must be included in the call for bids
- Public body must collect monthly copies of contractor's payroll records and keep them for 1 year
- Public body must examine the contractor's payrolls and records to ensure compliance with the Prevailing Wage Act
- If a violation is identified, the public body has a duty to withhold and retain payments to the contractor in the amount of the violation



### *Prevailing Wage- Enforcement Measures*



- Workmen may bring an action for double the amount of underpayment plus attorney's fees
- AG suit to enjoin the award of a contract or to stop work and payments under an awarded contract
- Criminal penalties for willful violations

### *Prompt Payment Statute*

- Section 34.057, RSMo, requires prompt payment by the owner to the contractor and from the contractor to the subcontractor and material supplier for all public works contracts
- Owner must make at least monthly progress payments or lump sum payment, if the contract so provides
- Retainage cannot exceed 5% unless the contract otherwise provides, but not to exceed 10% in any event
- City must pay within 30 days of receiving notice
- City can withhold payment if it has reasonable cause to believe that it has a basis to withhold payment.
- Contractor can't contractually waive its right to recover damages for delays in the performance of the contract



Source: John W. Maupin and W. Dudley McCarter, *Public Works Projects*, 52 J.Mo.B. 94 (1996)

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