

Legally (Relevant



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Construction Projects: Bidding and Bonds

Every water and wastewater system will need to construct a project at one time or another. This article is intended to make the readers – managers, superintendents or governing body members-familiar with some of the processes and terms involving construction projects. There is no substitute for assembling a competent team of professionals, including engineers/architects, lawyers and others, but this article should help readers to be better equipped to participate in discussions and make decisions necessary to the successful completion of their projects.

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Bidding requirements

One of the first considerations involving a construction project concerns competitive bidding. Rules determining when and how a project must be competitively bid may be found in state law, in the owner's self-created rules (such as city ordinances, or water district rules and regulations) or from contractual obligations.

State statutes prescribe rules for bidding requirements that vary based on the type of entity constructing the project. Cities of the third class (municipalities having a population less than 2,000 and not organized as cities of the second class) are not required by state law to bid projects. Cities of the second class have varying requirements. For example, sewer districts established by such cities must get bids on sewer projects by advertising for the lowest bidder. The largest cities, cities of the first class, require that a detailed cost estimate be prepared and that projects expected to cost more than \$2,000 must be competitively bid. To complicate matters further, some cities may have adopted charter ordinances changing these rules. Rural water districts, like cities of the third class, have no state law requirement that they competitively bid projects.

Focusing on cities of the third class and rural water districts, although not required by state law to competitively bid projects, many cities have adopted ordinances, and many rural water districts have adopted rules and regulations or policies that specify when competitive bidding must be used and the process to be followed.

Finally, the project owner may be contractually obligated to bid a construction project. For example, the Kansas Public Water Supply Loan Fund administered by the Kansas Department of Health and Environment (KDHE) generally requires that projects must be competitively bid. By contracting with KDHE for a loan, the borrower obligates itself to comply with this requirement.

For cities obligated by statute, or for cities that have adopted ordinances or rural water districts that have adopted rules and regulations or policies that specify projects that must be competitively bid, careful attention must be paid to the detail of those rules that specify how that process is to be conducted. For those like cities of the third class and rural water districts not required by state law to bid projects, and that have not adopted such rules, the process to be used is generally left to the decision of the governing body considering the advice of its consultants. While the Kansas Attorney General has issued an opinion generally commending the benefits of competitive bidding because of the inherent fairness and public trust such a process tends to foster, there are times when negotiating for work, or use of a hybrid procedure such as bid-by-invitation, may offer benefits. Unless a specific form of competitive bidding is required, design consultants will often make recommendations regarding the best process for an owner to use for a given project.

Bonds and more bonds

Projects often involve the use of one or more bonds that projects owners should be familiar with.



A bid bond is issued as part of a bidding process by the surety to the project owner, to guarantee that the winning bidder will undertake the contract under the terms at which they bid

Bid Bonds

The first of these is the Bid Bond. A Bid Bond is a bond (in effect, a specialized form of insurance contract) whereby a bidder on a project and his surety (insurer) agree that if awarded the project based on that bid, the bidder will enter into a



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A performance bond is a surety bond issued by an insurance company or a bank to guarantee satisfactory completion of a project by a contractor.

contract within a specified time. Failure to enter into the contract results in the bidder forfeiting a sum of money equal to the amount of the bond. Bid Bonds are often in the amount of five percent of the total amount bid. As an example, if a rural water district requires that all bidders submit a Bid Bond in an amount of five percent of the amount bid, a contractor bidding \$1,000,000 for a project is required to submit a Bid Bond of \$50,000 (five percent of \$1,000,000). If the district then awards the project to that contractor, and the contractor refuses to sign the contract or perform the work, the district is entitled to forfeit the contractor's Bid Bond, keep the \$50,000, and award the contract to the next bidder.

Public Works Bonds

Public Works Bonds, sometimes called Statutory Bonds or Payment Bonds, are required by state law on all public works contracts for more than \$100,000. According to this Bond, the contractor and its surety agree to pay all persons supplying labor or materials to the project. This Bond is to be filed with the Clerk of the District Court. Then, any person not paid for

labor or materials can bring an action in court on that Bond. No lien attaches to the project (mechanics lien) for non-payment when the Bond is obtained and filed as provided by this state law.

Performance Bonds

The Performance Bond is a bond by the contractor and its surety that the work will be completed as bid in accordance with the plans and specifications. The Performance Bond is the insurance that an owner has that a project will be properly completed, even if the contractor goes out of business or files for bankruptcy before the project is finished.

Surety law as it relates to these various bonds is complicated. Most non-lawyers (and probably more than a few lawyers) can read these bonds and not understand what they say or how they protect the project owner. However, bonds play a very important part in construction projects. Cities and rural water districts should be sure that their attorneys and design consultants have given consideration to these bonds as projects are being prepared to bid and then review and approve the various bonds that are submitted to be sure they meet all requirements.

Conclusion

It is vital in developing a project to determine early on whether the project must be competitively bid and if so, the rules that apply. These requirements can come from various places, so be certain that your design consultants and attorneys have checked them all before proceeding.

Bonds play an important role in projects construction. Cities and rural water districts should be familiar with each type and be sure that contract documents require the right bonds be provided.

It is also important for owners to be vigilant with these bonds. If problems develop, such as subcontractors not being timely paid by the contractor or the contractor is failing to make adequate progress on the project, the owner, design consultant and attorneys need to consider contacting the surety. Delay in asserting a "claim" may cause the owner to lose some or all of the protection of this bond.