



Dean B. Thomson
Direct: 612.359.7624
dthomson@fwhtlaw.com

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BY FAX, E-MAIL & U.S. MAIL

Jason E. Green, Esq.
City of Rapid City
Attorney's Office
300 Sixth Street
Rapid City, SD 57701
(605) 394-6633 (fax)
jason.green@rcgov.org

Dan Coon
City of Rapid City
Public Works Department
300 Sixth Street
Rapid City, SD 57701
(605) 355-3083 (fax)
dan.coon@rcgov.org

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ENGINEERING DIVISION

**RE: Jackson Springs Water Treatment Plant
Project No. W10-1858/CIP No. 50789**

Dear Messrs. Green and Coon:

We represent Graham Construction Services, Inc. ("Graham"). Graham was the lowest responsive and responsible bidder regarding the subject Project. Graham looks forward to being awarded the contract and starting the Project immediately. We understand that Rapid City's ("City") city council will be deciding whether to award the contract at its next meeting. Graham hopes that the City will value and accept the \$405,000 savings that would be achieved by awarding the project to Graham as opposed to the next low bidder. In these times of tight budgets, the taxpaying public will want to know that the City is maximizing each dollar. The \$405,000 savings no doubt could be put to use by the City on other important matters as opposed to being spent unnecessarily on a higher priced bid.

Since bids were opened, Graham has learned that an inquiry has been made by the second low bidder into whether Graham's bid may be accepted by the City. Graham understands the focus of the concern to be that Graham furnished information regarding Graham's responsibility with the bid instead of before the bid or that Graham provided additional qualifications information after the bid. Please be assured that the City may safely award the Project to Graham, and it is in the City's best interests to do just that.

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A. General Background Regarding the “Lowest Responsible and Responsive” Bidder Method for Procuring Construction Services

The City used the “lowest responsive and responsible bidder” method to solicit bids for this contract. In fact, the instruction to bidders specifically states “[a]ward of the contract will be to the lowest responsible bidder.” See Information and Instructions to Bidders at 2.10. When a municipality decides to use the lowest responsible and responsive bidder method to procure construction services, the municipality **must** award the contract to the lowest responsible bidder. See S.D.C.L. § 5-18A-5(7) (stating that the “contract **shall** be awarded . . . to the lowest responsible and responsive bidder”).

A municipality has no discretion to award to second low, third low, or high bidders if the low bid is responsive, and the low bidder responsible. The reasons why are self-evident: if a municipality could ignore the lowest bidder in favor of higher bidders, public confidence in the system would be eroded by the perception of fraud, favoritism, extravagance, and improvidence – all of which public officials are required to avoid. See, e.g., *H&W Contracting, LLC v. City of Watertown*, 633 N.W.2d 167 (S.D. 2001). Also, awarding to the lowest responsible bidder encourages competition among bidders, which is beneficial to the public and protects the public’s interest in avoiding excessive contracts and corresponding tax burdens. *Id.*

It should be clear, then, that if the City awards the contract, the City must award the contract to Graham. The City has no authority to award the contract to other bidders.

B. The City Can Award Safely to Graham

Awards must be made not only to responsive bidders, but also to “responsible” bidders. A bidder is “responsible” if it is able and capable of performing the work. Graham submitted information related to its qualifications and “responsibility” with its bid instead of before. On request, Graham furnished additional information after the bid. This Project was bid on an “open” basis, meaning any bidder could submit a bid with no pre-qualification requirements. The original Article 8.01.A. of the Supplementary Conditions provides: “Prequalification statements are not required.” Thus, Graham was not required to have submitted any “prequalification statements.” That same article clearly states that qualifications were to be evaluated after bid opening: “[t]o be considered a responsive Bid the apparent low Bidder shall submit to Owner, within three (3) days after the bid opening, information demonstrating the minimum qualifications for each evaluation criteria.” Thus, there is no grounds to challenge Graham’s bid on the grounds that Graham submitted qualification information regarding its responsibility with or even after its bid.

Article 8.01.A. was modified by Addendum 1. The new Article 8.01.A. states: “A contractor must submit a completed Contractor’s Qualification Statement. Contractors are encouraged to submit a completed Contractor’s Qualification Statement as soon as possible. A Contractor’s Qualification Statement will be accepted up until the stated time of bid opening.”

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Graham submitted its Contractor's Qualification Statement with its bid, and Graham submitted its bid prior to bid opening which satisfies the requirement.

Furthermore, the City reserved the right to "waive any and all informalities." See Information and Instructions to Bidders at 2.10. Assuming for the sake of argument only that Graham did not comply with Article 8.01.A of Addendum 1 by submitting its Contractor's Qualification Statement with the bid (an argument that is unsupported) or that Graham provided additional information regarding its qualifications statement on request after the bids, then the City can waive this informality. S.D.C.L. § 5-19A-5(6) also permits the City to "waive technical irregularities in the bid or proposal of the low bidder or offeror which irregularities do not alter the price, quality, or quantity of the services, or items of tangible personal property bid or offered." Here, whether a Contractor's Qualification Statement should have been submitted with the bid or in some other unspecified fashion, or supplemented after the bid does not alter the price, quality, quantity or items offered by Graham. Therefore, the City can waive any irregularity or informality in Graham's bid.

It should be kept in mind that: "the public should not be denied the benefit of the lowest bidder for every minor technical defect that does not affect the substance of the bid." See *Foley Bros., Inc. v. Marshall*, 123 N.W.2d 387, 390 (Minn. 1963). Minor irregularities in a bid can be overlooked and the municipality has the right to award to the lowest bidder even if there are minor irregularities. *Nielsen v. City of Saint Paul*, 88 N.W.2d 853, 859 (Minn. 1958), ("Mere irregularity of a bid will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest bidder. . . It is in the interest of the public that the lowest bid, though it be irregular, be accepted, and if necessary, that the bidder have an opportunity to correct an irregularity, while not changing the substance of his bid.").

An error must give a bidder a "substantial advantage or benefit not enjoyed by other bidders" and affect price, quality, quantity or items of tangible personal property bid or offered. . See *H& W Contracting*, 633 N.W.2d at 175, S.D.C.L. § 5-19A-5(6). No conceivable advantage could have been obtained by Graham to submit its Contractor's Qualification Statement with its bid and prior to bid opening as permitted by the Information and Instructions for Bidders, and Addenda 1 as opposed to days before the bid. No conceivable advantage could have been obtained by Graham to supplement its Contractors Qualifications Statement after the bid.

In South Dakota, clerical errors can be corrected after bids are opened, because bids are not held to an inflexible standard. See *H& W Contracting*, 633 N.W.2d at 174-75 (permitting correction clerical error regarding unit pricing after bid opening). Thus, Graham can supplement its Contractor's Qualification Statement after bids were opened and the City could still award to Graham.

Furthermore, the Contractor's Qualification Statement was included for the City to judge "responsibility" not "responsiveness." This is clear because Addendum No. 1 removed the "responsiveness" language originally contained in 8.01.A of the Supplementary Conditions. It is well settled that responsibility can be evaluated and supplemented after bids are opened. Thus,

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if there are any deficiencies in Graham's Contractor's Qualification Statement, and there are not, Graham can supply whatever the City wanted in that regard post bid opening without any impact to the City's ability to award the contract to Graham. The principle that information regarding responsibility can be submitted after bid opening is well established. A few cases demonstrating this principal are quoted below.

- Submission of MBE subcontractor information after bid opening was proper because the requirements related to "responsibility" and not "responsiveness," especially when MBE review by the public procurer was to be performed **after bid award**. *In Matter of: A. Metz, Inc.*, 84-1 Comp. Gen. Proc. Dec. P386.
- Failure of low bidder to provide a description of how much work would be done by subcontractors versus the bidder's own forces related to the responsibility of the low bidder and not the responsiveness of the bid. The low bidder's "failure to submit the required information with its bid had no bearing on the responsiveness of the bid. Rather [Low Bidder] was required only to submit the requested work description **before the award was made.**" *In Matter of: Norfolk Dredging Co.*, 88-1 Comp. Gen. Proc. Dec. P62 (emphasis added).
- "Information concerning a bidder's responsibility need not be furnished at bid opening but may be furnished up to the time of award." *In Matter of: Joint Venture Conscoop-Meyerinck*, 98-1 Comp. Gen. Proc. Dec. P83. In *Conscoop-Meyerinck*, the Comptroller General rejected a competitor's protest that the Department of the Navy improperly received information after bid opening to establish the contract awardee's responsibility.
- "Responsibility" means "ability to perform" while responsiveness concerns whether a bidder unequivocally offered to perform services in accord with a solicitation. *In Matter of: Atlantic Co. of America, Inc.*, 91-1 Comp. Gen. Proc. Dec. P49. Information concerning "responsibility" may be furnished up to the time of contract award. *Id.* In *Atlantic Co. of America, Inc.*, the Comptroller General rejected a competitor's protest when the contract-awardee supplied responsibility information after bid opening.
- "Responsibility is determined not at bid opening, but at any time prior to award based on any information the agency receives up to that time, notwithstanding any IFB [invitation for bid] requirement that such information be provided with the bid." *In Matter of: LORS Medical Corp.*, 95-1 Comp. Gen. Proc. Dec. P222.
- A government agency may receive additional information to establish a contractor's responsibility even if the additional information is supplied after bid opening. *In Matter of: ADC Ltd.*, 93-2 Comp. Gen. Proc. Dec. P337; *In Matter of: Camran Corp.*, 76-1 Comp. Gen. Proc. Dec. P47; *In Matter of: Bow Industries, Inc.*, 74-2 Comp. Gen. Proc. Dec. P330 (supplemental information about bidder's capability and experience).

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- A bidder's "responsibility concerns whether the bidder has the ability to fulfill the obligations it offers to assume, i.e., to perform as promised in the bid, and involves such matters as the bidder's facilities, equipment, and financing." *In Matter of: Aviation Specialists, Inc. et al.*, 85-2 Comp. Gen. Proc. Dec. P174. A contractor may be given an "opportunity after bid opening within which to cure a problem related to its responsibility." *Id.*
- Information concerning a bidder's responsibility can be furnished any time up to the time of contract award. *In Matter of: ECI Constr., Inc.*, 92-2 Comp. Gen. Proc. Dec. P239; *In Matter of: Aviation Specialists, Inc., Aviation Enters., Inc.*, 85-2 Comp. Gen. Proc. Dec. P174; *In Matter of: Beta Constr. Co.*, 96-2 Comp. Gen. Proc. Dec. P230; *In Matter of: Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., a Joint Venture*, 94-1 Comp. Gen. Proc. Dec. P223.

In addition to these decisions, the then Circuit Court Judge, now United States Supreme Court Justice Antonin Scalia, issued an important decision about responsibility determinations during government procurements in *Delta Data Systems Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984). Justice Scalia considered whether the FBI properly disqualified a bid protester based upon financial criteria and held:

In all government procurements, an offeror's financial condition is a factor in determining what is called contractor responsibility. **Responsibility assessments are made after proposal evaluation and determine whether an offeror has the capacity to perform the work.**

744 F.2d at 200 (internal citation omitted; emphasis supplied). Justice Scalia then ruled that a contractor's financial information could be used to determine responsibility, but the contractor must be given an opportunity to discuss the financial information with the government agency. 744 F.2d at 203.

Many, but not all, of the decisions listed above were issued by the Comptroller General of the United States. The *Competition in Contracting Act*, 31 U.S.C. § 3551(1) and 3553(a) gives the Comptroller General specific jurisdiction to decide bid protests involving procurements of property or services by federal agencies. Federal courts have noted that the Comptroller General possesses unique experience regarding federal procurement issues and that its opinions should be given deference in deciding such cases. See *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1298 (D.C. Cir. 1971) (stating that "we must acknowledge that the office headed by the Comptroller General provides unique experience in the area of government procurement and a tradition of care and objectivity, including freedom from prior involvement in the matter at hand"); *Wheelabrator Corp. v. Chafee*, 455 F.2d. 1306 (D.C. Cir. 1971).

Because the United States' federal government is the largest purchaser of goods and services in the world, Comptroller General decisions are frequently cited and analyzed by various state courts to decide bid protests under state law. These decisions provide ample

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support for the proposition that information regarding bidder's "responsibility" can be submitted after bid opening.

Here, Graham's Contractor's Qualification Statement conforms to the requirements of the bid and was timely submitted. And, Graham can supplement its list after bid opening and provide modifications to the Contractor's Qualification Statement. The second low bidder has no grounds to complain.

C. The City Should Not Reject All Bids

It is not in the City's best interest to reject all bids, and we would discourage the City from considering that option. The City would need to re-advertise the contract, allow for sufficient time for bidders to bid the contract, and then review the bids and award a contract. In our experience, the contract award could be delayed by at least 90 days. Graham is ready, willing and able to commence immediately after the pre-construction meeting which presently is scheduled to commence as soon as possible.

Graham is excited about performing this contract. It knows that the City has waited a long time for the facilities that are to be built under this contract. Further delay does not help the job get completed within the City's planned timeframe.

Delaying this project further could be very costly for the City. First, the City would need to pay the engineer for the additional time administering the re-bidding. This would be a sunk cost that the City could not recoup, which would not generate any value for the City. There is absolutely no reason for the City to incur this unnecessary expense.

Second, prices would likely increase with the City receiving no added value.

Third, commodity prices are quite volatile. Prices of oil based products are fluctuating almost daily. There is a risk that the second round of bidding will result in higher bids.

For all of these reasons, it is not in the best interest of the City to delay the work by engaging in an expensive, costly, time consuming re-bid. Rather, it would be better for the City to award the contract to Graham as the lowest, responsive and responsible bidder and get the work underway as soon as possible.

Very truly yours,



Dean B. Thomson

DBT/hrh

cc: Dave Lenss, Graham Construction Services, Inc. (via e-mail)
Mark Fisher, Graham Construction Services, Inc. (via e-mail)