

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

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OPINION #05-005

TO: **Mayor Dave Cieslewicz**

FROM: Michael P. May, City Attorney

SUBJECT: **Legality of Best Value Contracting in Public Works Contracts**

You have asked for my opinion as to the legality of including "Best Value Contracting" in the City's public works bidding system.

There is no Wisconsin law directly on this issue. As will be explained in detail below, I conclude that many aspects of best value contracting are already included in one form in the City's public works bidding process, some other aspects might be includable, while other aspects of this proposal are more problematic. This opinion does not deal with certain other policy issues, such as the cost and benefits of a best value contracting proposal.

What is Best Value Contracting?

The concept of Best Value Contracting is relatively simple. Rather than evaluating bidders for public contracts primarily on the basis of the lowest bid, Best Value Contracting (BVC) awards them points, or otherwise favors them, for a number of other societal factors. Among the factors which have been suggested to the City are whether or not a Contractor has the following:

- Existence of a pension system
- Provision of health care
- Support for training and apprentice systems
- Certain percentage of city residents in the workforce
- Affirmative Action Program or supporting diversity in the workplace
- Safety record and compliance with safety laws and regulations
- Meeting prevailing wage laws

A consideration of adding these types of tests into any City public works program raises a number of issues.

Statutory Structure.

Sec. 62.15, Wis. Stats., is the primary statute governing bidding for public works contracts. In addition to this statute, secs. 66.0901 and 66.0903, Wis. Stats., relate to additional procedures for public bidding and the payment of the prevailing wage in public construction contracts.

Under Sec. 62.15(1), Wis. Stats., the City is required to let public works contracts to the "lowest responsible bidder." The Wisconsin courts have recognized that the requirement that bids be awarded to the "lowest responsible bidder" implies the exercise of discretion by the municipality. *Aqua-Tech, Inc. v. Como Lake Protection and Rehabilitation District*, 71 Wis. 2d. 541, 549, 239 N.W.2d. 25 (1976); *State ex rel. Hron v. City of Port Washington*, 265 Wis. 507, 509-510, 62 N.W.2d. 1 (1953); *Power Systems Analysis, Inc., v. City of Bloomer*, 197 Wis. 2d. 817, 824, 541 N.W.2d. 214, (Ct. App. 1995).

In order to exercise its discretion in determining who is the "lowest responsible bidder," Madison has utilized the procedures in Sec. 66.0901(2), Wis. Stats., which allows the City to prequalify bidders. Under this section, entitled "Bidder's Proof of Responsibility," any bidder who passes the prequalification test is considered a "responsible bidder" under sec. 62.15(1), so that the bid then goes to the lowest bidder. Wisconsin law does not allow the award of points for meeting certain qualifications. A bidder either meets the qualifications and is "responsible" or fails to meet them and is not qualified to bid. The City of Madison has a process by which bidders are qualified on an annual basis. Bidders found to be unqualified have the right to appeal the decision at a hearing before the Board of Public Works.

Sec. 66.0901(2), Stats., provides that the prequalification process includes the filing of a statement with the City which:

" . . . shall consist of information relating to financial ability, equipment, experience in the work prescribed in the public contract, and other matters that the municipality requires for the protection and welfare of the public in the performance of a public contract." (Emphasis added.)

There are no reported court decisions interpreting the statutory language set out above. The legal question is whether the types of additional prequalification tests proposed under BVC fall within the definition in the statute.

We have not been made aware of any Wisconsin municipality that has adopted BVC. Some states that have adopted this have done so through explicit statutory authority.

In addition, Sec. 66.0903, Wis. Stats., requires that public contractors pay the prevailing wage in the area. As a practical matter, these prevailing wages are to include payment for health insurance and pension payments equivalent to those in the area. The City of Madison aggressively monitors and enforces the prevailing wage law, much more so than neighboring municipalities. This often causes increased costs in projects in Madison.

Discussion.

A. Applicable Legal Standard: Arbitrary or Unreasonable.

As noted above, a municipality has discretion in the application of the bidding statutes. The Wisconsin courts have determined that the standard for reviewing that discretion is whether the municipality's decisions were "arbitrary or unreasonable." *Glacier State Distribution Services v. Wisconsin DOT*, 221 Wis. 2d. 359, 368, 585 N.W.2d 652 (1998).¹ The court in *Glacier State* described the standard as follows:

An arbitrary action or decision is "one that is either so unreasonable as to be without a rational basis, or one that is the result of an unconsidered, willful, or irrational choice of conduct -- a decision that has abandoned the 'sifting and winnowing' process so essential to reasoned and reasonable decisionmaking." [citations omitted.] Generally, we have equated the term "unreasonable" with irrational or lacking "a rational basis." [citations omitted.]

221 Wis. 2d. at 369-370.

The courts have also indicated, in the context of court rulings, that an exercise of discretion is beyond the limits of discretion if it is based upon an error of law. *Kenosha Hospital and Medical Center v. Garcia*, 2004 WI 105 ¶ 15, 274 Wis. 2d. 338, 347, 683 N.W.2d 425 (2004).

B. "Protection and Welfare of the Public in the Performance of a Public Contract."

While the City could reasonably conclude that matters such as the provision of health insurance or a pension by public bidders is "in the public interest," that is not the statutory question. The statutory question is if those matters relate to the protection and welfare of the public "*in the performance of a public contract.*" Certain levels of training, health care, and pension systems arguably may make for a better work force, but it is not as clear whether that meets the statutory burden of protecting the public "in the performance of a public contract."

There are at least two ways of interpreting this language relating to the performance of a public contract. Arguably, any specification that increases the overall quality of the workforce means that the workforce will do a better job, and may meet the statutory standard. Another possible interpretation of this standard is that the qualification must directly relate to whether or not the bidder will construct the work according to the specifications and timeline and costs set out in the contract, that is, how the contract is to be performed, not the types of benefits provided to the workforce. It is not clear whether BVC standards that may increase the quality of the workforce meet the statutory standard because bidders who do not meet those standards may be just as likely to perform the contract satisfactorily.

¹ The *Glacier State* case, relying on *Aqua-Tech*, clarified that the standard was whether the municipality acted in "arbitrary or unreasonable" manner. Some earlier cases suggested that the standard might be whether the municipality acted in a matter that was "abuse amounting to fraud."

One municipal law treatise describes the “lowest responsible bidder” standard as:

The lowest responsible bidder must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.

McQuillin Mun. Corps., sec. 29.73.05 (3d Ed.). Unfortunately, this standard, like those set out above, gives only general guidance to the Council and Board of Public Works.

In this regard, we have been provided with a copy of a letter from Wisconsin Attorney General Peg Lautenschlager to a labor representative, dated July 27, 2005. In that short letter, the Attorney General notes the "arbitrary or unreasonable" standard that would be applied to bid specifications utilized by municipalities. The Attorney General concludes that "a court could find" that some aspects of best value contracting "would not be arbitrary or unreasonable." (Emphasis added). The Attorney General cautions a municipality to make a good record to justify use of any such standards. The letter of the Attorney General does not specifically examine the limiting statutory language "in the performance of a public contract."

In considering whether a prequalification standard relates to the protection and welfare of the public in the performance of a public contract, may the municipality consider the relative costs to the public compared to the perceived benefits? Although outside the scope of this opinion, it is believed that many of these items would impose additional costs on Madison, costs that some of our neighboring communities do not have. It seems beyond argument that in assessing whether any prequalification standard is to be used in determining whether the bidder is a “responsible” one, the City of Madison may consider the costs for compliance with the standard, in relation to the benefits to the City of Madison in the performance of the public contract.

As noted above, remember that the use of prequalification standards under 66.0901(2) is a zero-sum game. The contractor is either qualified or not. The statutes do not allow the City to award extra points for certain practices, only to set standards that must be met to be a qualified bidder.

I conclude that sec. 66.0901(2), Stats., gives the City sufficient discretion that it could, if it so desired, add certain elements to the prequalification process, so long as the City reasonably concluded that those elements were for the “protection and welfare of the public in the performance of a public contract.” As noted above, this standard is less than a paragon of clarity.

C. Application of the Standards to Specific Suggestions.

With these legal standards in mind, we can examine some of the specific alternatives that have been proposed to the City of Madison as part of a best value contracting system.

1. Participate in Training and/or Apprenticeship Programs:

This standard would require that the contractor employ or have access to apprenticeship apprentices from each building tradecraft necessary for the work on the project. Appropriate training and participation in apprenticeship programs does appear to be the type of requirement that would improve the protection and welfare of the public in the performance of a public contract. Well-trained employees, through the apprenticeship programs sponsored by the State, should result in better performance on the specific contract.

2. Provide Health Insurance:

Under this standard, the contractor would be required to provide health care benefits to employees and their family members.

The provision of health care benefits is undoubtedly a positive social benefit. It is not as clear that the provision of such benefits would relate to the protection and welfare of the public in the performance of the public contract. Presumably, the argument would be that a bidder who provides employees with health care would attract a higher quality employee than bidders that do not offer such a benefit. Whether that hypothesis is true, and whether it impacts the performance of the contract, is unknown. If the City reasonably could make such a conclusion based on a study or information, then perhaps this sort of requirement would meet the statutory standard. But this conclusion hardly seems so self-evident that the City's determination could be made without such analysis.

Also, in regard to health benefits, see the discussion of prevailing wages, below.

3. Provide Pension / Insure Retirement Security:

This standard would require that the contractor have a pension plan to which the contractor makes contributions. The existence of a pension plan, much like health insurance, appears to be a societal benefit, but it is not self evident that it is related directly to the performance of the public contract. Again, however, I conclude that if the Council had data or analysis to support such a conclusion, the City of Madison reasonably could include such a standard in its prequalification process. As with health insurance, see the discussion of prevailing wages, below.

4. Pay Family Supporting Wages:

This standard would require that the workforce be paid at or above the area of prevailing wage. In fact, the prevailing wage requirements are imposed by state law, sec. 66.0903, Wis. Stats. Madison is one of the most aggressive communities in requiring and policing the payment of the prevailing wage.

It should be noted that the prevailing wage standards applied by Madison take into account the payment of health insurance and pensions; that is, the prevailing wage is higher for a contractor that does not separately provide for health insurance or pensions.

Thus, it could be argued that Madison already covers the cost of health insurance and pensions by its use of the prevailing wage rates.

5. Value Work Force Diversity:

This standard would require the contractor to participate in a plan to bring diversity to the construction industry. Madison General Ordinances already require that contractors with the City file an affirmative action plan.

Costs and Benefits of Best Value Contracting Standards.

Measuring the costs and benefits of imposing best value contracting standards is beyond the scope of this legal opinion. We are aware that the City's costs for public contracting are often higher than neighboring communities, in part because of the City's active enforcement of the prevailing wage standards. The discretion granted to the City in terms of establishing requirements for the protection and welfare of the public in the performance of a public contract would allow the City to take into account the costs and benefits of any specific standard.

Conclusion.

Best Value Contracting (BVC) is not authorized directly by Wisconsin public construction bidding law, or by any court interpretation of that law. Thus, any decision to allow BVC is made in an uncertain legal environment. Under the State's prevailing wage laws, which Madison aggressively monitors, certain aspects of BVC already are included in the City's bidding process: pensions, health care, and prevailing wages. In addition, the City has an affirmative action requirement for contractors.

To otherwise include these or other aspects of BVC in bidding, the City would have to reasonably conclude that these matters are for "the protection and welfare of the public in the performance of a public contract." Of the potential suggested aspects of BVC, the most likely standard to meet this test is the requirement of supporting apprenticeship and training programs. Other BVC standards, to the extent the City wishes to attempt to impose them in some manner other than through prevailing wage administration, would require supporting evidence that these standards meet the statutory standard of being "for the protection and welfare of the public in the performance of a public contract."

Michael P. May, City Attorney

SYNOPSIS:

Best Value Contracting (BVC) is not directly authorized by Wisconsin public construction bidding law. Some aspects of BVC are approximated though Madison's strong enforcement of

the state's prevailing wage law, and Madison already requires affirmative action programs by its public contractors. State law would allow the City of Madison to use one aspect of BVC in its qualification of bidders: that bidders support and utilize training and apprenticeship programs. Any further movement toward BVC requires that the City of Madison have studies or other analysis to show these BVC standards are "for the protection and welfare of the public in the performance of a public contract," Sec. 66.0901(2), Stats.