



*Peace Sign, Mosaic, Grade 10, East Grand Forks Senior High School*

# School Construction and the New “BEST VALUE” Contracting Law

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Over the years, school construction projects have moved from remodeling and additions to expansive new high school campus projects exceeding \$100 million. As the focus of public construction has changed and costs have increased, some professionals involved in school design and construction sought an alternative to Minnesota’s competitive bidding laws that would allow public entities to receive the best value for the large sums of public monies expended for these projects.

In 2007, the Minnesota Legislature passed a “Best Value” law that by 2010 will allow all school districts to elect an alternative method for awarding construction contracts.

## **Best Value Contracting – Introduction**

In contrast to the traditional “lowest bid” method of awarding contracts, Best Value permits public owners to consider several factors in the evaluation and selection of potential contractors, including price, quality and timeliness of prior work, technical capabilities, and customer satisfaction.

School leaders are optimistic about the change. “Having gone through a number of multi-million dollar construction projects, we welcome the chance to include the Best Value method as a project delivery option,” said Mark Fortman, assistant director of Buildings and Grounds at West St. Paul-Mendota Heights-Eagan. “With the Low Bid method, the cheapest price may not result in the highest quality. On the other hand, the Best Value option will allow school boards to consider a variety of factors when evaluating bids, which promotes the better use of tax dollars and the increased opportunity to award public contracts to more qualified, competent and dedicated contractors. We’ll be watching as the use of Best Value expands across the state.”

## **Lowest Responsible Bid – The Traditional Method**

State and local public entities are generally required to award public contracts to the lowest responsible bidders, depending on the project’s cost. This statutory and court-recognized mandate requires public owners to conduct an objective evaluation of the responsiveness of the bids, the responsibility of the bidders and the bid amount.

The evaluation of whether a low bidder is a “responsible” low bidder may include a review of the bidder’s financial responsibility, skill, integrity, ability, and the likelihood of performing faithful, prompt and satisfactory work.

If an unsuccessful bidder prevails in an action challenging the validity of a municipal contract, damages are limited to the costs of preparing the unsuccessful bid. In addition, a successful bid challenge can result in a determination that the contract is void, and no longer legally enforceable.

### **Bonding – A Measure of Protection**

In Minnesota, three bonds provide protection to public owners: Bid, Performance and Payment Bonds. Bid bonds guarantee the successful bidder will enter into the contract and protect against losses from the bidder's failure to enter into the contract, including costs to re-advertise and project delays. Performance bonds protect the public owner against damages from the contractor's failure to properly complete the contract. Payment bonds protect persons furnishing labor and materials from damages arising out of the contractor's failure to pay for such items.

### **Prequalification – Precursor to Best Value**

The lowest responsible bid method is not without drawbacks. Occasionally, contractors may submit low bids in order to win public contracts only to later pursue excessive or costly change orders. Also, the subjective difficulty with determining the lowest responsible bidder and fear of bid protests can prompt school districts to award to the low bidder with little or no consideration of whether the low bidder is the lowest "responsible" bidder.

School districts can even find themselves involved in expensive litigation with bond sureties over termination and payment issues involving a defaulted contractor. To mitigate potential abuses and eliminate unqualified contractors, public owners began to utilize prequalifying and responsible contractor policies with greater frequency over the last decade.

The goal of prequalification is to determine whether potential contractors meet acceptable standards of ability, experience, performance, integrity, and financial capacity before being allowed to bid. In Minnesota, legal authority supporting the power of a public body to utilize prequalification procedures is unclear. Courts across the country are divided on this issue.

In Minnesota, appellate courts considering challenges to public bidding irregularities have explained the need for public entities to properly comply with competitive bidding laws once the decision is made to invoke competitive

# THE PROS AND CONS OF BEST VALUE CONTRACTING

## Advantages

- Ability to evaluate both technical capabilities and cost
- Enhances ability to select qualified contractors
- Reduces delays
- Reduces cost overruns/ change orders
- Promotes innovative design
- Improves quality
- Improves customer satisfaction

## Disadvantages

- Subjective evaluation may cause more bid protests/lawsuits
- Requires public owners to possess technical skill, time and resources to evaluate bids
- Highly technical aspects make evaluation difficult
- Potential for increased costs
- Eliminates/reduces competition

bidding as the method of contract procurement. In general, if a public owner follows a procedure "which emasculates the safeguards of public bidding" or otherwise fails to comply with competitive bidding laws, a public contract is void, even without a showing of fraud.

The purpose of competitive bidding is to give all contractors an equal opportunity to present a bid and ensure taxpayers receive the best bargain. Mindful of this purpose, a more acceptable approach may be to use prequalification criteria within project bid specifications as a means to evaluate "responsible" bidders. Nonetheless, it remains an open question whether Minnesota appellate courts will ultimately view prequalification as a permitted practice.

### **Best Value Contracting Explained**

The "Best Value" procurement method provides school districts and other public entities with a new alternative to award public construction contracts. Best Value allows public entities to award contracts based upon a variety of factors that consider overall value and performance.

"Although projects must continue to be publicly solicited, and price remains a factor, Best Value may offer the opportunity to better control costs, improve quality, deliver projects on time, and lessen the adversarial relationship between owners and contractors often found with the lowest bid method," said John R. Gockel, a civil engineer and construction consultant.

Customer satisfaction is a critical goal for school districts. "We're hoping the use of Best Value will increase the ability to successfully deliver the construction projects promised to

*Continued on page 10*



*Continued from page 9*

the citizens of the district," notes Phil Belden, building and grounds supervisor with Mahtomedi Public Schools. "What this means to me is receiving high quality workmanship at a competitive cost with less risk of defects or other problems that may cause delays or additional costs."

Best Value contracting allows public owners to consider not only price, but also a number of performance criteria, which are found in Minnesota Statutes section 16C.02, subd. 4a:

Best value; construction. For purposes of construction, building, alteration, improvement, or repair services, "best value" describes the result determined by a procurement method that considers price and performance criteria, which may include, but are not limited to:

- the quality of the vendor's or contractor's performance on previous projects;
- the timeliness of the vendor's or contractor's performance on previous projects;
- the level of customer satisfaction with the vendor's or contractor's performance on previous projects;
- the vendor's or contractor's record of performing previous projects on budget and ability to minimize cost overruns;
- the vendor's or contractor's ability to minimize change orders;
- the vendor's or contractor's ability to prepare appropriate project plans;
- the vendor's or contractor's technical capacities;
- the individual qualifications of the contractor's key personnel; and
- the vendor's or contractor's ability to assess and minimize risks.

"Performance on previous projects" does not include the exercise or assertion of a person's legal rights. \* \* \*

This list represents sample criteria. The development of discernible criteria and sub-criteria plays a key role in communicating to potential sources a clear understanding of the public owner's basis of contractor selection.

### **Safeguards**

In order to avoid issues of favoritism, and to include transparency in the process, the Best Value law includes safeguards. Two important safety measures are the information that must be included in the solicitation document and the evaluation process. The

solicitation document must state the "criteria to be used to evaluate the proposals," and the "relative weight of price and other selection criteria." The award must be evaluated "in an open and competitive manner," and "must be made to the vendor or contractor offering the best value applying the weighted selection criteria."

These measures seek to reduce potential abuses by forbidding post-bid changes to the weighting schedule identified in the solicitation document in order to select a favored contractor. Full disclosure of all criteria and sub-criteria and their weighted ranking also provides a standard of objectivity in a process that will include the subjective evaluation of contractor proposals. Public owners will find guidance in procedures the state will establish.

The law is also careful to prohibit a public owner from considering a contractor's prior assertion of "legal rights" as part of the evaluation of prior performance.

### **Training**

School Districts administering Best Value procedures and consultants retained to prepare or evaluate solicitation documents must be trained in the Best Value process. The Commissioner of Administration is empowered to establish a training program, but no specific training procedure has been promulgated to date.

Public owners may not use Best Value contracting for more than one project annually or 20 percent of all projects, whichever is greater, during the first three fiscal years during which Best Value bidding is used.

### **I-35W Bridge Replacement Project – A Best Value Test**

In a highly publicized move, MnDOT utilized a Best Value/Design-Build process for the I-35W Bridge Replacement Project. A few days after the collapse, MnDOT issued a Request for Qualifications which resulted in the pre-qualification of five design-build teams. Four of those teams submitted bid proposals in two phases: a technical proposal and a financial proposal.

The winning bidder scored the highest technical score by a significant margin, but its price proposal was also more than \$50 million higher than the lowest bidder and its construction time was the longest. Evaluation of the weighted criteria and subcriteria, however, resulted in the selection of the bidder which reportedly represented the "best value" to the state. The winning bidder is a joint enterprise between two out-of-state firms, one from Colorado and one from Washington.

Not surprisingly, a bid protest was commenced by two of the losing bidders alleging the state's actions were arbitrary and capricious with the Minnesota Department of Administration (DOA) reviewing the bid protest. A key question addressed was "How does the highest priced proposal with the longest



# MNDOT BEST VALUE DESIGN-BUILD CONTRACTS

In 2001, the Legislature granted authority for MnDOT to utilize the Best Value method. Since 2001, MnDOT reports that it has awarded six Best Value Design-Build projects:

Highway 212 in the west Twin Cities Metro - \$238 million

ROC 52 in Rochester - \$232 million

I-494 in the west Twin Cities Metro - \$135 million

Highway 52 in Oronoco - \$37 million

Highway 10/32 in Hawley - \$8.6 million

District 4 Signs - \$1.0 million

construction schedule end up in first place?” The answer, DOA determined, was not found in MnDOT’s actions, but with the statutory Best Value formula: “If a perception exists that the state will be paying too high a premium for technical excellence, the problem lies with the formula in the [best value] statute, not with MnDOT’s implementation. In fact, based on statute and language of the [Request for Proposal], MnDOT is left with two choices—award a contract to the top-ranked responder or reject all responses. Even if MnDOT chose the latter, the statutory formula would remain the same.”

Although “best value” involves more subjectivity than low-bid awards, the DOA did not find MnDOT’s actions arbitrary and capricious. The award to the “best value” contractor was affirmed, but a court challenge to the award is currently underway.

## University of Minnesota Pilot Program

The University of Minnesota gained legislative approval to utilize the Best Value method in 2005. Based on the University’s measured approach, the Best Value method has proven to be a successful method of contract procurement.

Between 2005 and 2007, the University of Minnesota utilized a pilot program to test a Best Value process developed at the University of Arizona. The pilot program involved 18 projects with 45 procurements valued at \$10 million based on the Best Value method. Each project averaged 3 proposals, and about half of the Best Value awards were also the lowest cost. Of the 18 completed projects, contractor-driven cost and schedule increases were only 0.4% and 0.8%, respectively. Sixteen of the projects had no contractor cost increases. The average increase in contractor profit was 4.5%. Based in part on the success of

the pilot program, the University of Minnesota has decided to integrate the pilot program into its standard selection process.

## Conclusion

It will take several years before the school and public construction communities are able to substantively evaluate the effectiveness of the Best Value method. Based upon the success of projects undertaken by MnDOT and the University of Minnesota, some may contend that Best Value contracting offers a clear opportunity for school communities and the general public to benefit from the delivery of high quality construction projects at competitive prices and on time.

Others may suggest the statutory Best Value criteria are vague and redundant, and may hinder out-state and non-union contractors from winning contracts, eliminate competition, and drive up the costs of school construction projects. The I-35W Bridge Project highlights concerns about Best Value, and it will be closely followed as the bid protest winds through the courts.

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# A PHASED APPROACH

The ability of public bodies to utilize the Best Value approach will be phased in over three years:

**PHASE I - JULY 1, 2007**

State Agencies

Counties

Cities

School Districts with highest 25-percent enrollment

**PHASE II - JULY 1, 2009**

Phase I entities

School Districts with the highest 50-percent enrollment

**PHASE III - JULY 1, 2010**

Phase I and II entities

All other townships, school districts and political subdivisions