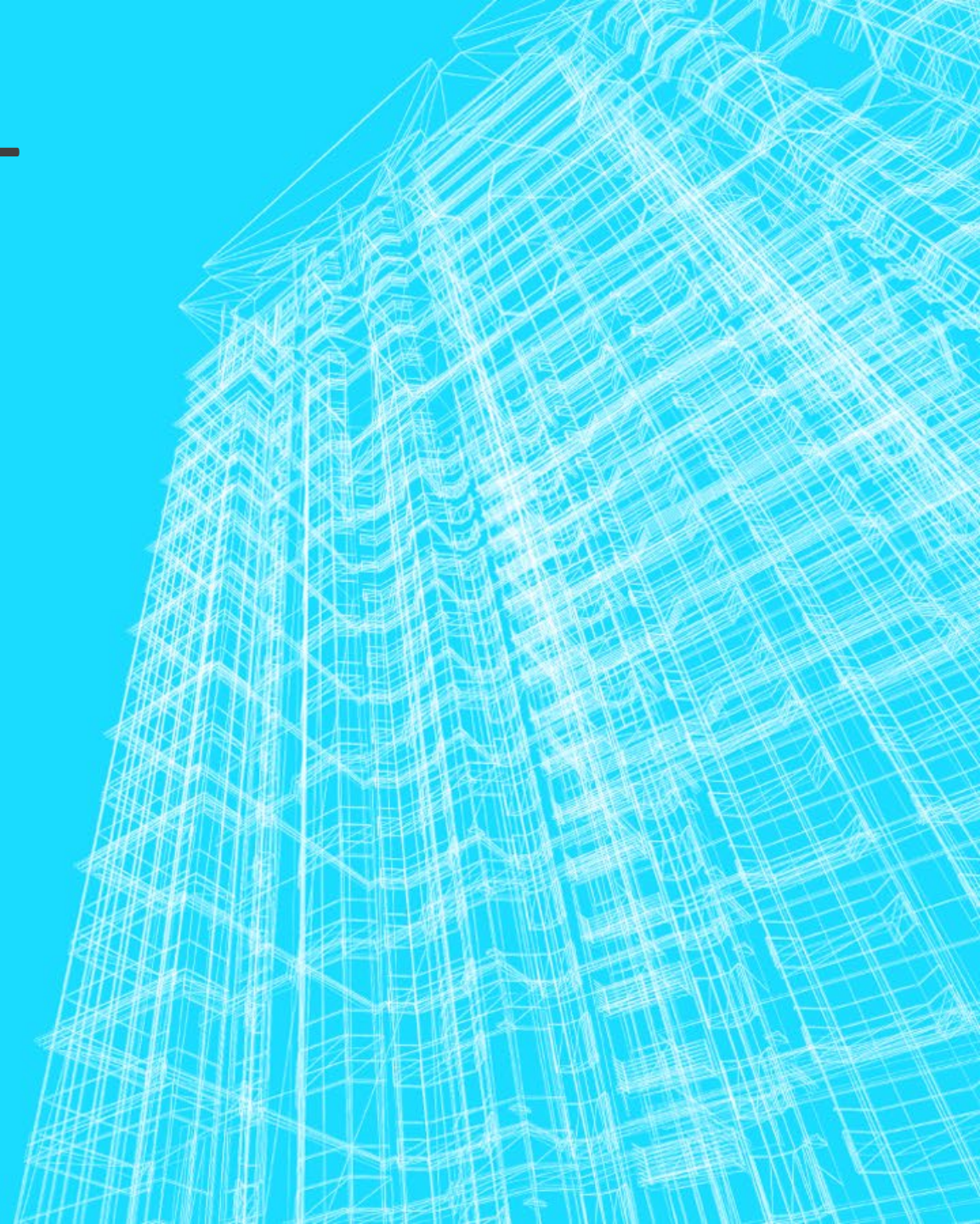


FINDING THE LOWEST RESPONSIBLE BIDDER FOR YOUR CONSTRUCTION PROJECTS

League of Wisconsin Municipalities
Annual Conference
October 8, 2020





SPEAKERS

- **Kail Decker**

- Kail Decker is the West Allis City Attorney. His career in municipal law started 14 years ago as an intern for his current employer before serving as an assistant city attorney for Green Bay and Milwaukee. During that time, he has occasionally acted as special counsel for several towns and villages. He is the chairperson-elect of the Administrative & Local Government Law Section Board of the state bar and a regular presenter on legal issues facing municipalities

- **Cindy Buchko**

- Cindy is the General Counsel of Construction Business Group (CBG), a trade organization protecting the interests of 30,000 construction workers and 4,000 contractors. Prior to joining CBG, Cindy spent 15 years in private practice and was a shareholder and the Vice President of Legal Services for a leading Wisconsin law firm. Cindy is a past Chair of the Construction and Public Contract Law section of the Wisconsin State Bar. She is a Board Member of both Heartland Farm Sanctuary and the YWCA of Madison Foundation.



TODAY'S OBJECTIVES

- Explain public bidding laws and the “responsible bidder” legal standard
- Summary of the cooperative effort between the League and CBG
- Introduction to the free, online Bidder Database



POLL QUESTION #1

Have you ever been involved with a contract signed by your municipality in which you regretted working with that contractor?



BASICS

- In general, any contract for construction work on behalf of a city or village that exceeds \$25,000 needs to be publicly bid.
- If public bidding is required, Wis. Stat. § 66.0901 lays out the procedures.
- This applies to work on buildings and land.
 - It does not apply to the purchase of equipment, professional services, or existing buildings*



BIG PICTURE

1. Public bidding laws are for the benefit of the public, not the bidders.

Aqua-Tech, 71 Wis. 2d 541, 550 (1976)

2. Determining lowest responsible bidder involves discretion.

Aqua-Tech, 71 Wis. 2d 541, 549 (1976)

3. Courts only intervene if a decision is arbitrary or capricious.

D.M.K., Inc., 290 Wis. 2d 474, 481 (Ct. App. 2006)



1. PUBLIC BENEFIT

“public bidding authority cannot be compelled to award the contract to the lowest bidder....”

Five Star Airport Alliance, Inc. v. Milwaukee Cnty., 939 F.Supp.2d 936, 941 (E.D. Wis. 2013) (citing *N. Twin Builders, LLC v. Town of Phelps*, 334 Wis. 2d 148, 154, (Ct. App. 2011)); see also *Aqua-Tech, Inc. v. Como Lake Prot. and Rehab. Dist.*, 71 Wis. 2d 541, 549-50 (1976).



2. DISCRETION

Determining whether a bidder is “responsible” necessarily requires discretion.

The idea is that voters will be the check on whether local officials are exercising that discretion appropriately.



3. LIMITED COURT REVIEW

“An arbitrary action is one that is either so unreasonable as to be without rational basis or is the result of an unconsidered, willful, or irrational choice of conduct. An unreasonable action is one that lacks a rational basis.”

PRN Assocs. LLC v. State Dep't of Admin., 313 Wis.2d 263, 268 (Ct. App. 2008)



3. LIMITED COURT REVIEW

“The determination of the question of who is the lowest responsible bidder does not rest in the exercise of an arbitrary and unlimited discretion, but upon a **bona fide judgment, based upon facts tending to support the determination.. . .**”

Aqua-Tech, Inc. v. Como Lake Prot. and Rehab. Dist., 71 Wis. 2d 541, 551 (Wis. 1976) (quoting, 10 McQuillin, *Municipal Corporations* (3d ed.), pp. 425, 426, sec. 29.73).



POLL QUESTION #2

Your RFP received three qualified bids:

- **Safe Carpentry, Inc. - \$400,000**
 - Local business; did a great job building your salt dome last year
- **High Quality Construction, LLC - \$390,000**
 - New business located in neighboring county; bonded/insured
- **Bob d/b/a Bob's Shoddy Repairs - \$290,000**
 - Exceeded deadline and budget in project for neighboring village; sued a different city that refused to award contract when he was lowest bidder

To whom would you award the contract?



RESPONSIBLE BIDDER STANDARD

- How should governments ensure a bidder is responsible?
 - Exercise discretion with care
 - Create a good record at the council or board meeting in which the determination is made
 - Look to governmental attorney for advice on how to proceed
 - Use resources available



RESPONSIBLE BIDDER STANDARD

- Towns have a definition
 - “a person who, in the judgment of the town board, is financially responsible and has the capacity and competence to faithfully and responsibly comply with the terms of the public contract.” Wis. Stat. § 60.47(1)(b)
- The state has guidelines
 - Related to place of business, adequate financial resource, bondability, record on past projects, not debarred by the state. Wis. Adm. Code § ADM 21.02(8)(c)
- Counties, cities, and villages have no statute or regulation.
 - Some guidance in case law



CASE LAW

Actual Knowledge of Work History

The court upheld a Town's determination that the low bidder was not responsible due to "numerous legitimate concerns about D.M.K.'s performance of prior contracts...."

D.M.K., Inc. v. Town of Pittsfield, 290 Wis.2d 474, 476-77 (Ct. App. 2006).



PROOF OF RESPONSIBILITY

- Municipalities can require a full and complete sworn statement
 - Financial ability
 - Equipment
 - Experience in the work prescribed in the public contract
 - **Other matters that the municipality requires for the protection and welfare of the public in the performance of a public contract.**

Wis. Stat. 66.0901(2)



“OTHER MATTERS”

- Require bidders to self-disclose relevant information on a bid form
 - verification of a principal place of business
 - proof of licensure to do business in Wisconsin
 - disclosure of investigations and law violations
 - proof of a substance abuse prevention program, required by Wis. Stat. 103.503
 - proof of training and safety programs
 - Proof of financial ability to perform
 - examples of previous similar experience



ADDITIONAL TACTICS

- Contact other municipalities that have used the company
- Conduct independent basic background research



GROWING PROBLEM

- Large increase in municipal work going to out-of-state contractors
 - 2015--\$72,600,000
 - 2018--\$146,000,000
 - 42% increase in the share being awarded to out-of-state contractors

Source Wisconsin Independent Business,

<https://www.wibiz.org/2019/05/31/42increase-in-taxpayer-funded-work-awardedto-out-of-state-contractors/>



WHO IS CBG?

A trade association dedicated to enhancing business opportunities and quality of life by ensuring fairness, equity and standards of excellence in the construction industry of Wisconsin.



WHAT DOES CBG DO?

- Monitor construction projects to ensure federal prevailing wage, bid, labor standards, worker's compensation and safety laws are followed
- Investigate payroll fraud
- Assist contracting agencies with procedure and liability protection



WHAT DOES CBG DO?

- Provide direct assistance to employers and employees on complaints and problem resolution
- Provide educational opportunities for contracting agencies, contractors, engineering firms and employees



LWM & CBG COLLABORATIVE EFFORT

- Memorandum of Understanding June 2020
- Created <https://www.responsiblewisconsin.com/> website
- Platform for local governments to share experiences with contractors and subcontractors



BIDDER DATABASE

- Approximately 9,900 contractors (generals and subs)
- Publicly available information
- Research on over 13 categories of information, including
 - Debarments
 - Environmental violations
 - OSHA violations
 - Federal and state court judgments and tax liens
 - DWD actions
 - Much more



BIDDER DATABASE (CONT'D)

- Free to registered users
- Easy to become a registered user
- Verifiable information
- Easy navigation

BIDDER DATABASE (CONT'D)



IN COOPERATION
WITH



**THE BIDDER DATABASE
INCLUDES PUBLIC INFORMATION ON OVER
9,600 CONTRACTORS.**

FIND OUT WHO'S BUILDING OUR STATE

[REQUEST ACCESS](#)

[DATABASE ACCESS](#)

BIDDER DATABASE (CONT'D)

Account Information [Already have an account? Log in here](#)

Username

*

Password

*

Confirm Password

*

Email Address

*

Confirm Email Address

*

First Name

*

Last Name

*

Title

*

Organization

*

Organization Street Address

*



BIDDER DATABASE (CONT'D)

- Once registration is approved, you can access the database through the website
 - Search by contractor name, alpha or entire database
 - Live hyperlinks to public documents (pdfs)
- Cannot be manipulated by users, only CBG may add, remove or correct entries and only municipalities may provide a project evaluation



BIDDER DATABASE (CONT'D)

- Municipal registered users have exclusive access to a project evaluation
- Platform for local governments to share negative and positive information on contractors
- Form is online and easy to navigate
- Basic project information collected
 - description of the project
 - cost
 - start and end dates
 - awarded bidder



BIDDER DATABASE (CONT'D)

- Evaluation questions
 - on time
 - on budget
 - built to project specifications
 - if the project was not on time, on budget or to project specifications, additional dropdown questions allow you to provide additional information
 - overall satisfaction rating

BIDDER DATABASE (CONT'D)

Project Was Delivered on Time *

Select a response



Project Was Delivered on Budget *

Select a response



Project Met Specifications for Quality *

Select a response



Overall level of satisfaction with project *

Select a response



SURVEY COMPLETED BY

Name *

Title *

Submit



BIDDER DATABASE (CONT'D)

- Once submitted, the project evaluation becomes a PDF document that CBG staff will review for completeness
- CBG posts within the bidder database for the applicable contractor(s) and/or subcontractors
- League staff will assist CBG if any questions arise as to propriety of a submitted project evaluation



DATABASE DEMO

- <https://www.responsiblewisconsin.com/>



QUESTIONS?

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