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Legal Opinion 2016-028

TO: Mayor John Engen, Dale Bickell, Leigh Griffing, Scott Paasch, Steve Johnson, Marty Rehbein, Kirsten Hands, John Wilson, Doug Harby, Monte Sipe, Brian Hensel, Starr Sullivan, Donna Gaukler, Morgan Valliant, David Selvage, Chris Boza, Mike Brady, Scott Hoffman, Jason Diehl, Jeff Brandt, Chad Nicholson, Rod Austin, Tiffany Brander, Ellen Buchanan, Chris Behan, Lori Hart, Mike Haynes, Kevin Slovarp, Don Verrue, Carl Horton, Ginny Merriam

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE December 19, 2016

RE: Competitive bidding phrase “Lowest Responsible Bidder” is not limited to lowest pecuniary bid. Public government allowed some good faith discretion to determine bid that best serves public and protects the government and the public taxpayer through consideration of skill, ability, judgment, integrity, material necessary to the faithful conscientious performance of the contract or purchase

FACTS:

Each year there are city staff inquiries pertaining to competitive bidding and what the phrase “lowest responsible bidder” allows with respect to potentially considering bids that are not the lowest pecuniary monetary bid.

ISSUE(S):

Legally does any contract award discretion exist with respect to competitive bidding and the lowest responsible bidder criteria that would allow a government to consider bids that are not the lowest pecuniary monetary bid?

CONCLUSION(S):

Yes. It has been settled law in Montana and elsewhere for many decades that the phrase “lowest responsible bidder” does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best. The term “responsible” in the competitive bid phrase “lowest responsible bidder” is held to imply consideration of the bidder who is most likely in regard to skill, ability and integrity to do faithful conscientious work and promptly fulfill the contract according to its letter and spirit.

LEGAL DISCUSSION:

Initially it is important to note that the primary purpose of public government competitive bidding is to obtain competitive pricing for the benefit of the public government and its taxpayers as well as to guard against favoritism, improvidence, extravagance, fraud and corruption, and not for the benefit of an unsuccessful bidder. See MCQUILLIN, MUNICIPAL CORPORATIONS, 3rd edition revised, volume 10, section 29.34, pages 476-481 and section 29.81 at pages 654-655 as well as continuing legal education manual, CLAIMS & THE CONSTRUCTION OWNER, by Irv Richter and Roy S. Mitchell, pages 6 and 7.

Generally, the primary criteria or tests for reviewing competitive bids solicited by government is to determine if the bid was responsive to the bid specifications as well as whether the bid was a responsible bid. Most government competitive bidding laws contain a provision providing for the government contract or purchase to be awarded to the “lowest responsible bidder”. The Handbook of Construction Law & Claims by Irv Richter and Roy S. Mitchell at page 74 pertaining to state and local government bids and purchases states:

“The statutes of most states require that awards be made to the ‘lowest responsible bidder’ or to the ‘lowest and best bidder.’ The statutes leave the definition of responsibility and its application to the procurement agency.”

In a related continuing legal education book entitled “CLAIMS & THE CONSTRUCTION OWNER” by Irv Richter and Roy S. Mitchell, it is stated at page 9 with respect to the term “responsibility” that:

“(1) RESPONSIBILITY. The test of responsibility is whether the contractor can and will perform as promised in the bid; that is whether he has the experience, financial resources, facilities, equipment, manpower and material necessary to do the job. (. . . citations omitted . . .). The term ‘lowest responsible bidder’ is held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.” (. . . citation omitted. . .)

MCQUILLIN, MUNICIPAL CORPORATIONS, 3rd edition revised, section 29.82 at pages 656-662 states:

“Frequently the laws provide that the contract shall be awarded to the ‘lowest responsible’ bidder, and this means the lowest responsible one who complies with all the requirements of the statute and the specifications. While it has been held that this also means the lowest bidder who is financially responsible, it is generally held to mean not merely the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is the most likely, in regard to skill, ability, and integrity, to do faithful, conscientious work and promptly fulfill the contract according to its letter and spirit.

Accordingly, the requirement that the contract shall be let to the 'lowest responsible bidder' does not require the letting to the lowest bidder upon ascertaining his or her financial responsibility only, but the term 'responsible' includes the ability to respond by the discharge of the contractor's obligation in accordance with what may be expected or demanded under the terms of a contract. 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." (*Emphasis added*)

Seventy-five (75) years ago, the Montana Supreme Court in Koich v. Cvar (1941), 111 Mont. 463, 110 P. 2d 964 in a City of East Helena fire equipment purchase case stated:

"It is settled law that the phrase 'lowest responsible bidder' does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely in regard to skill, ability and integrity to do faithful conscientious work and promptly fulfill the contract according to its letter and spirit. (*citations omitted*)"

More recently, in Debcon Inc. v. City of Glasgow, 2001 MT. 124, 305 M 391, 28 P.3d 478(2001) the Montana Supreme Court when discussing Koich v. Cvar, quoted above, stated in part:

"In 1941, in a fairly lengthy discussion the Court again emphasized that the public works statute requiring that contracts be let to the lowest responsible bidder' was enacted for the protection of public interests and must be complied with by municipal authorities for the benefit of the public."

The Debcon Inc. v. City of Glasgow Montana Supreme Court decision then went on to quote the above quoted quote from Koich v. Cvar.

A relatively recent 2013 United States Ninth Circuit decision relied in part on the Debcon Inc. v. City of Glasgow case, quoting Koich v. Cvar. MK Weeden Construction Inc v. Montana Department of Transportation, 2013 Dist. LEXIS 126286 in paragraph 14 stated:

"Montana law requires that an award of a public contract for construction repair or public works must be made to the lowest responsible bidder. Montana Code Annotated 18-1-102(1)(a). 'Lowest responsible bidder' does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the lowest, but the bidder who is most likely in regard to skill, ability and integrity to do faithful, conscientious work and promptly fulfill the contract according to its letter and spirit" (quoting Debcon Inc. which was quoting Koich v. Cvar)

A 1985 Montana Supreme Court case, *Baker v. State*, 218 Mont. 235, 707 P.2d 20, 1985 Mont. LEXIS also relied on and cited *Koich v. Cvar* stating:

“In addition, we have held that the discretion of the agency to award public work contracts to the lowest bidder is not subject to judicial review under normal circumstances. *Sletten Construction v. City of Great Falls* (1973), 163 Mont. 307, 516 P.2d 1149; *Koich v. Cvar* (1941), 111 Mont. 46663, 110 P.2d 964. . . . In the absence of any showing of bad faith, fraud, or corruption of the Department, the exercise of discretion will not be disturbed. See *Koich supra*.”

Another Montana Supreme Court case relying on *Koich v. Cvar* is *County of Chouteau v. Fort Benton* 181 Mont. 123, 592 P.2d 504, 1979 Mont. LEXIS 776 stated:

“In other cases where the exercise of discretionary power by a city council has been questioned this court has said: The action is usually conclusive ‘unless palpably unjust . . . except in cases of fraud or manifest mistake (. . . citation omitted). The discretion will not be controlled ‘in the absence of a clearly arbitrary abuse (. . . citation omitted). A determination of the council will not be set aside unless ‘arbitrary, oppressive or fraudulent.’ *Koich v. Cvar* (1941) 111 Mont. 463, 110 P.2d 964.”

CONCLUSION(S):

Yes. It has been settled law in Montana and elsewhere for many decades that the phrase “lowest responsible bidder” does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best. The term “responsible” in the competitive bid phrase “lowest responsible bidder” is held to imply consideration of the bidder who is most likely in regard to skill, ability and integrity to do faithful conscientious work and promptly fulfill the contract according to its letter and spirit.

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/s/

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