

Tips to avoid traps of public-project bidding

Contractors that dot their i's and cross their t's will have an edge in the competition for work



CONSTRUCTIVE ADVICE

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There is a world of difference between bidding on public projects and on private ones.

Public projects and those funded with stimulus money will provide at least some

relief to the struggling construction industry in 2010. The lack of private projects will lead some contractors to enter the public arena for the first time, and competition will be fierce. Newcomers and experienced contractors alike are advised to consider the following tips when bidding for public projects.

1. Low bid vs. best bid

Not all public projects are awarded to the lowest bidder. Some are awarded to the "best bidder," meaning the bidder that provides the best overall offer (usually referred to as a "proposal" rather than a "bid") in terms of price, experience, personnel, schedule and even financial strength. The best bidder in this process will not necessarily offer the lowest price, but it will achieve the highest score from the public agency's review committee when considering all factors.

Public agencies should make clear in the solicitation document whether the project is a low-bid or best-bid procurement, but sometimes the lines are blurred. In addition, contractors can be confused by how the selection criteria are weighted and scored. To maximize odds for success, contractors should take time to identify the selection criteria, clarify the criteria with the agency if necessary, and then focus bid or proposal efforts accordingly.

2. Take no exceptions

Even straightforward low-bid projects can be tricky. A fundamental rule of public bidding is that bidders must take no exceptions to all requirements of the solicitation. Requirements include agreeing to supply the full scope of work requested, and also agreeing to all legal terms and conditions of the offering document.

For example, if the solicitation includes a form of performance bond that bidders must utilize, the substitution of a different bond form will render the bid "nonresponsive" and could lead to it being rejected. Another good example of nonresponsiveness is the failure to acknowledge receipt and agreement with all addenda issued by the agency after the initial solicitation document was published. Contractors must be sure to dot every "i" and cross every "t," or risk bid rejection.

3. Confirm licensing, insurance and bonding

In addition to being "responsive" to every term and condition of the solicitation document, bids or proposals must come from "responsible" parties. Contractors can be found non-responsive because of improper licensing, bonding or insurance, or for criminal convictions or unsatisfactory performance on prior public contracts.

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Licensing and insurance issues are particularly troublesome. Oregon's contractor licensing scheme is now multitiered, making it prone to licensure in the wrong category, and insurance policies often do not match the insurance requirements found in the public (and private) owners' solicitation documents. In some cases, a bidder can adjust responsibility criteria after a bid is submitted, but that can be risky.

4. Become familiar with agencies' rules

Another common mistake is failing to learn an agency's contract rules. While many agencies have adopted Oregon's model public contracting rules, many others have chosen to adopt some of their own. These rules govern the solicitation and bidding processes, and failure to adhere to them can lead to bid or proposal rejection.

5. Clarify often, protest seldom

Litigation by aggrieved bidders is not for the faint of heart or faint of resources. Oregon statutes provide that the winning party is entitled to recoup its legal fees. And there are several legal presumptions that favor public contracting agencies, including the presumption that the agencies (and not the courts) are better suited to determine which contractor best meets the evaluation criteria. For this reason, protesting the award to a competitor under a "best bid" procurement has a low chance of success, especially if the protest is based on the subjective scoring of the review committee.

On the other hand, a protest based on a bid that is clearly non-responsive has a better chance of success, though bidders should beware that agencies have broad authority to waive minor irregularities (such as typographical or mathematical errors) in bids and proposals that may appear nonresponsive. Finally, if the solicitation document is flawed or unfair in any way, bidders must usually protest such issues before submitting their bids, not after, or they will have waived the protest.

Public bidding comes with laws, rules and techniques not seen in the private arena. The careful, thorough contractor that studies the rules and solicitation documents has the best chance of meeting the responsiveness and responsibility requirements that often stymie the competition.

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