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Practice Area: Construction Law and Litigation

Hidden in the voluminous 603-page biennial budget (2013 Wisconsin Act 20, the "Act"), a seemingly insignificant portion of the Act will have a significant impact on Wisconsin's public sector construction bidding process. Specifically, the Act amends portions of Wis. Stat. § 16.855 and restructures the bidding process from a multiple prime contracting system to a single prime hybrid contracting system for public projects with an estimated cost that exceeds \$185,000. This single prime hybrid contracting system will become effective on January 1, 2014. Both general contractors and subcontractors need to be aware of how the new law changes the bidding, contracting and payment process in public construction projects. A summary of the pertinent provisions of the new law follows:

Eligibility

Under the new law, the bidding process includes a registration system by which the Department of Administration ("DOA") will certify whether a contractor is qualified and responsible. This is important, because DOA will only consider bids from those contractors who are responsible and (in most circumstances) qualified bidders. This certification will be valid for two years unless DOA determines that a bidder no longer meets the responsible and qualified criteria.

To be deemed a "qualified bidder" under Wis. Stat. § 16.855(9m)(b)(1), the bidder must have performed at least one project that involved similar work to the work being bid, and that previous project must have been at least half of the size or value of the project being bid. Further, the bidder must have access to all the equipment necessary to perform the work and possess the skills and capacity to perform the work properly and expeditiously.

To be considered a "responsible bidder" under Wis. Stat. § 16.855(9m)(b)(2), the bidder must satisfy twelve requirements. Some of these requirements include certain organizational requirements for the bidding entity, sworn representations as to the bidder's sound financial position, bonding eligibility requirements, and a record of satisfactorily completing projects. In addition, the bidder must not have had any of its employees disciplined under a professional license currently in use, been debarred from any government contracts (within the previous ten years), found to have committed tax evasion (within the previous ten years), disciplined under a professional license (within the previous ten years), or otherwise be listed on an "ineligible list" maintained by DOA or another government agency. Most notably, the bidder must have been in business for at least one year and performed at least one other public project for a government entity. These last two requirements are controversial as they may preclude otherwise capable startups from being able to bid on public projects.

The "Open and Public Bidding Process"; Liability of the State

After DOA receives the subcontractors' bids and verifies that the subcontractors are qualified responsible bidders, it will identify the lowest bids and publish the bids, including the bid documents, on its website. Within five days of publishing the successful subcontractor bids, bidders for the general contractor, who are considered qualified responsible bidders, must then submit their bids to DOA. Those bids must only include the successful subcontractor bids. Within the following 30 days, DOA will identify the lowest bid (with limited exceptions for minority and/or disabled-veteran owned businesses) and notify the successful general contractor bidder, after which the general contractor must then enter into contracts with the successful subcontractor bidders. Unlike the previous multiple prime contracting system, DOA will not contract directly with the subcontractors; rather, DOA will contract with the general contractor, only. This new law will make the contracting process between the state and its contractors more efficient and is anticipated to reduce administrative costs. Additionally, the public bidding process will promote transparency and increase fairness amongst the bidding subcontractors (e.g., by preventing bid shopping).

The new law provides that the state will not be liable to a contractor for damage from delay caused by another contractor if DOA takes reasonable action to require the delaying contractor to comply with its contract. Moreover, Wis. Stat. § 16.855(14)(b)(2) further limits a subcontractor's ability to hold the state liable for its damages. The delayed contractor, however, may still bring an action for damages against the delaying contractor if the state is not liable.

Contract Requirements; Retainage; Subcontractor's Right to Payment

The contracts between the general contractor and the subcontractors must satisfy certain requirements specified under Wis. Stat. § 16.855(14m). For example, contracts must include provisions relating to the general contractor's (and if applicable, the subcontractor's) payment requirements, retainage, the subcontractor's bonding requirements, and the subcontractor's indemnification obligations.

With respect to retainage, the structure of the retainage process is virtually identical for both general contractors and subcontractors. The new law allows DOA (not the architect or engineer) to certify whether the job is proceeding "satisfactorily" when determining whether additional amounts are allowed to be retained at 50% completion. Moreover, the new law now requires any retained amounts to be paid to the contractor, less the value of any required corrective or uncompleted work.

In addition, the new law requires the general contractor to, upon request, pay the subcontractor an amount equal to the proportionate value of the subcontractor's properly completed work, less retainage. Any payments made by the general contractor to the subcontractor must be made within seven calendar days after the date on which the general contractor receives payment from DOA.

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