
Coates' Canons Blog: Low Bidder Limbo: When the Low Bid Is Too Low

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You've just received bids on a construction project estimated (by your engineer) to cost about \$2 million. The lowest bid is for \$1.5 million, and the next highest bid is \$1.9 million, with the other bids ranging from \$2.1 million to \$2.3 million. After reviewing the bids, you think the lowest bidder must have made a mistake, but you can't tell where the mistake is. What should you do?

What you shouldn't do

Before discussing what you should do, let's answer the easier question: what should you **not** do? You should **not** call the bidder and ask them to correct their bid. Why? Because at this point the bids are public so the bidder may know what the other bids are, and will be able to manipulate her bid to ensure that she is still the low bidder. Not only would this be unfair to the other bidders, but local governments have no authority to allow a bidder to change her bid after a bid opening.

The first step

So, what should you do? Contact the bidder right away, but do not ask for an explanation—simply let her know that the withdrawal statute, **G.S. 143-129.1**, provides a procedure for allowing a bidder to withdraw a bid if there is a **clerical** error in the bid. To invoke the procedure, the bidder must notify the local government in writing that she wishes to withdraw her bid within 72 hours of the bid opening (or a longer period of time if one is set out in the specifications). The local government must then hold a hearing to determine if the error was a clerical error and not a judgment error. If the government determines that the error was clerical, the bidder may withdraw her bid without forfeiting her bid bond or bid deposit. If the local government determines that the error was not clerical, then the bidder forfeits her bid deposit. If the deadline to withdraw has passed, you are probably prohibited from allowing the withdrawal.

If the bidder doesn't want to withdraw

The bidding statutes require you to award to the lowest responsive and responsible bidder "taking into consideration quality, performance and the time specified in the proposals for the performance of the contract"—so are you stuck with this too-low bid?

Some readers may wonder why you should care if the bidder has made a mistake. If you award the contract to them at this low price, doesn't that just mean you've saved your taxpayers hundreds of thousands of dollars? Maybe, but there are substantial risks. The bidder may be unable to perform the work at that price, and may instead perform badly, stop performing altogether, attempt to increase the bid price through change orders, or even go bankrupt—which will result in delays, higher costs, and bigger headaches for you.

Given these concerns, it's worth taking a few steps that might help you to avoid being stuck with the too-low bid:

1. Check the bid carefully to see if it meets the specifications. If the bid doesn't "substantially" meet the specifications and if the irregularity (between the bid and the specifications) is one that would give the bidder an unfair advantage over the other bidders if you were to ignore it, then you should reject the bid as non-responsive. (For more information about rejecting non-responsive bids, read Frayda Bluestein's Local Government Law Bulletin on "Understanding the Responsiveness Requirement in Competitive Bidding," which you can find on the **publications page** on the School's **North Carolina Local Government Purchasing and Contracting website**.) Note that to assess whether a bid is

responsive you are limited to a small universe of information: (1) your specifications and any addenda, and (2) the bid. You cannot rely on any information the bidder has provided after the bid opening, because that would allow the bidder to manipulate the bid.

2. If the bid appears to conform substantially to the specifications, or if any irregularities are so minor that you cannot reject the bid as non-responsive, then you will need to determine if the bidder is responsible. What does “responsible” mean? The North Carolina Court of Appeals has held that “responsibility implies skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.” *Kinsey Contracting Co. v. City of Fayetteville*, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609 (1992). In other words, in order to determine whether the bidder is responsible, you will need to know enough about the bidder to determine whether the bidder has the skill, judgment, integrity, financial resources, and ability to perform the contract, such as: the bidder’s performance on similar jobs (ask the bidder to provide you with contact information for owners on past projects, and then call the owners and ask the about the bidder’s performance), the bidder’s financial status, and information about how many other projects the bidder is working on and whether the bidder has sufficient staff and financial resources to work on your project at the same time. If you didn’t ask for this information in your specifications, it is appropriate to ask for this information—from at least the two or three lowest bidders (don’t single out the low bidder)—after you’ve opened bids.

3. If the bid is responsive and the bidder appears to be responsible, “taking into consideration quality, performance and the time specified in the proposals for the performance of the contract,” then you have two options: (1) award the bid to the low bidder, with the assurance that the bidder is responsible enough to perform the contract (although you are still taking a risk that the bidder will not be able to perform the contract at the price they’ve bid); or (2) reject all of the bids and rebid. You probably do not have the authority to reject the low bid simply because it is “too low” if you cannot show that the bid is non-responsive or that the bidder is not responsible. North Carolina courts have not addressed this issue, and the statute says you must award to the lowest responsive, responsible bidder, period.

Finally, before you reject a “too low” bid, consult with your attorney. You can be sure that a low bidder who doesn’t want to withdraw will be eager to protest your award of the contract to a higher bidder.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.1.html
- www.sog.unc.edu/programs/purchase/pubs.html
- www.sog.unc.edu/programs/purchase/index.html