

CROSBY GUENZEL LLP

FEDERAL TRUST BUILDING
134 SOUTH 13TH STREET, SUITE 400
LINCOLN, NEBRASKA 68508
TELEPHONE: (402) 434-7300
FACSIMILE: (402) 434-7303

WRITER'S E-MAIL: SGS@CROSBYLAWFIRM.COM
WRITER'S DIRECT DIAL NO. (402) 434-7324

THEODORE L. KIESSNER
WILLIAM D. KUESTER
STEVEN G. SEGLIN
ROCKY C. WEBBER
DAVID A. JARECKE
WILLIAM R. KUTILEK
RICHARD L. RICE
THOMAS E. JEFFERS

ROBERT C. GUENZEL (RETIRED)

ROBERT B. CROSBY (1911-2000)
THOMAS R. PANSING (1917-1973)
DONN E. DAVIS (1929-1998)

April 20, 2004

Jay Holmquist, General Manager
Nebraska Rural Electric Association
800 South 13th Street
P.O. Box 82048
Lincoln, NE 68501

Re: Bidding and Awarding Contracts

Dear Jay:

You have asked that I discuss the recent Nebraska Supreme Court case of *Rath v. City of Sutton*, 267 Neb. 265, ___ NW 2d ___ (2004), and its application to any bidding requirements for public power districts.

The Court in *Rath* decided, among other things, the meaning of the term "lowest responsible bidder." It is this aspect of the case that is relevant to public power districts.

I. PUBLIC POWER DISTRICT STATUTES

Before I review the pertinent aspects of the *Rath* case, it may be helpful to review the bidding requirements imposed on public power districts by statutes. These requirements are generally contained in *Neb. Rev. Stat.* §§ 70-637, 70-638, and 70-639.

A. *Neb. Rev. Stat.* § 70-637 requires that a public power district:

1. Cause competent engineering estimates to be made of the cost of any contract for construction or purchase of materials of any kind on any power plant or system.
2. If the engineer's estimate of the cost exceeds \$100,000, then no contract shall be entered into without advertising for sealed bids, except the provisions for advertising for sealed bids shall not apply to the following:

(a) the board may negotiate directly with sheltered workshops pursuant to *Neb. Rev. Stat. § 48-1503* (a facility in Nebraska operated by a public agency or private non-profit corporation organized for the primary purpose of employment of and service to physically or mentally disabled clients in a program of rehabilitation);

(b) radioactive materials or the energy therefrom;

(c) to any technologically complex or unique equipment contracts;

(d) to any maintenance or repair contracts if the engineer certifies that by reason of the nature of the subject matter of the contract compliance with advertising for sealed bids would be impractical and not in the public interest and the engineer's certification is approved by 2/3 vote of the board.

3. If the board is relying on one or more of the above exemptions, then it is required to advertise notice of its intent to enter into such a contract, the general nature of the proposed work, and the name of the person to be contacted for additional information for anyone interested in contracting for such work. Notice is required to be published for 3 issues not less than 7 days between issues in one or more newspapers of general circulation in the district and a contract shall not be entered into prior to 20 days after the last advertisement.

4. Regarding any contract in excess of \$100,000 for the purchase of any materials or equipment to be used in the construction or any power plant or system, when the contract does not involve on site labor for the installation thereof, if after advertising for sealed bids, no responsive bids are received or if the board determines that all bids received are in excess of the fair market value of the subject matter of such bids, sections 70-637 to 70-639 shall not apply.

5. Notwithstanding any other provision of sections 70-637 to 70-639, a district may without advertising or sealed bidding, purchase replacement parts or services relating to such replacement parts for any generating unit, transformer, or other transmission and distribution equipment from the original manufacturer of such equipment upon certification by an engineer that such manufacturer is the only available source of supply for such replacement parts or services and that such service is in compliance with standards established by the board. A written statement containing such certification and a description of the resulting purchase of replacement parts or services from the original manufacturer shall be submitted to the board by the engineer certifying the purchase for the board's approval. After such certification, but not necessarily before the board review, notice of any such purchase shall be published once a week for at least 3 consecutive weeks in one or more newspapers of general circulation in the district.

6. Notwithstanding any other provision of sections 70-637 to 70-639, a district may purchase used equipment and materials on a negotiated basis without advertising or seal bidding upon certification by an engineer that such equipment is or such materials are in compliance with standards established by the board. A written statement containing such certification shall be submitted to the board by the engineer for the board's approval.

B. *Neb. Rev. Stat. § 70-638* requires that:

1. Prior to advertising for sealed bids, plans and specifications for the proposed work or materials shall be prepared and filed at the principal office or place of business of the district.

2. The advertisement shall be made in three issues, not less than 7 days between issues, in one or more newspapers of general circulation in the district.

3. The advertisement shall designate the nature of the work proposed to be done or materials proposed to be purchased, that the plans and specifications may be inspected at the office of the district and shall designate the time within which bids shall be filed, and the date, hour and place where the bids will be opened.

C. *Neb. Rev. Stat. § 70-639* requires that:

1. The board may let the contract for such work or materials to the **responsible bidder who submits the lowest and best bid**, or in the sole discretion of the board all bids may be rejected and re-advertised.

2. In determining whether a bidder is responsible, the board may consider the bidder's financial responsibility, skill, experience, record of integrity, ability to furnish repairs and maintenance services, ability to meet delivery or performance deadlines, and whether the bid is in conformance with specifications. Consideration may also be given to the quality of supplies and service to be provided, the adaptability of machinery, apparatus, supplies, or services to be provided, that adaptability of machinery, apparatus, supplies, or services to be purchased to the particular uses required, to the preservation of uniformity, and the coordination of machinery and equipment with other machinery and equipment already installed.

3. No such contract shall be valid nor shall any money of the district be expended unless advertisement and letting shall have been had as provided in this section and sections 70-637 and 70-638.

D. *Neb. Rev. Stat. § 70-640* requires that any contract shall provide that, whenever possible, workmen who are citizens of Nebraska shall be employed by the contractor.

E. *Neb. Rev. Stat.* § 70-641 requires that all provisions of section 52-118, with reference to contractors' bonds, shall be applicable and effective as to any contract let pursuant to the provisions of sections 70-637 to 70-640.

II. RATH V. CITY OF SUTTON

In *Rath*, the Court considered *Neb. Rev. Stat.* § 18-507, which requires a city to award a contract after competitive bidding to the "lowest responsible bidder." The Court discussed the policy behind competitive bidding as follows:

Competitive bidding, after public advertising, is a fundamental, time-honored procedure that assures the prudent expenditure of public money . . . Competitive . . . bid statutes exist to invite competition, and to secure the best work or supplies at the lowest possible price. Such statutes are enacted for the benefit of taxpayers.

267 Neb. at 886.

The Court established a standard for determining the lowest responsible bidder as follows:

Determining the lowest responsible bidder is a two-step process. The first step is for the public body to determine which bidders are responsible to perform the contract. Responsibility, however, is not merely a synonym for a bidder's pecuniary liability. Rather, responsibility also pertains to a bidder's ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to a particular task, and such other qualities as are found necessary to consider in order to determine whether or not, . . . if awarded the contract, he could perform it strictly in accordance with its terms.

(Citations omitted) *id.*

The Court went on further to describe public officials responsibilities under each step by saying that under the first step of determining whether a bidder is responsible, the public officials exercise discretion. However, regarding the second step of determining which responsible bidder has submitted the lowest bid, there is no discretion and the lowest bid controls. In other words, when two bidders who have been determined by public officials to be responsible submit identical bids except for price, the public body can only award the project to the lowest of the responsible bidders.

The Court commented on the policy of the above rule as follows:

If responsible bidders submit identical bids-except on price-the public body is without a valid reason to award the project to anyone other than the lowest responsible bidders. Stated otherwise, if all factors are equal except price, only price should be considered.

(Emphasis added.) *Id* at 888.

All political subdivision boards, including public power district boards, should pay special attention to language in bid documents that purport to grant such boards the authority to disregard the lowest bid. This admonishment is illustrated in the *Rath* case. The bid documents in *Rath* contained the following provision:

OWNER reserves the right to reject any or all Bids, including without limitation, nonconforming, nonresponsive, unbalanced, or conditional Bids. OWNER further reserves the right to reject the Bid of any Bidder whom it finds, after reasonable inquiry and evaluation, to be non-responsible. **OWNER may also reject the Bid of any Bidder if OWNER believes that it would not be in the best interest of the Project to make an award to that Bidder.** OWNER also reserves the right to waive all informalities not involving price, time, or changes in the Work and to negotiate contract term with the Successful Bidder.

(Emphasis added.) *Id* at 877.

The second lowest bidder argued that the City of Sutton retained the discretion to award the bid to one other than the lowest responsible bidder because the invitation to bid purported to give the City the right to accept whatever bid was in the best interests of the City in its sole discretion. The Court found this argument to be without merit. The Court's rationale is as follows:

[A] public body has broad discretion in the awarding of public contracts. Initially, that discretion allows a public body to determine whether a bidder is responsible. It also allows a public body to look beyond a bid's stated price to determine the true value of the bid. Stated otherwise, a public body has the authority to determine which of the responsible bidders has submitted the bid that offers the best value to its constituents. However, when responsible bidders submit identical bids, the public body's freedom of action is curtailed and it must award the contract to the lowest of the responsible bidders. Contracts let in contravention of this rule [citing the applicable city statutes] are illegal and can be enjoined.

Id at 889.

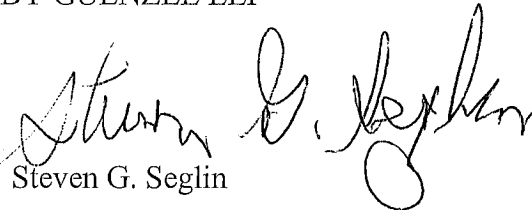
This rule is equally applicable to public power districts under *Neb. Rev. Stat.* §§ 70-637, 70-638, and 70-639. *Neb. Rev. Stat.* § 70-639 requires a public power district to award a contract to "the responsible bidder who submits the lowest and best bid." This language appears to be synonymous with "lowest responsible bidder."

Public power districts should not rely on language in bid documents similar to the language quoted above to disqualify a bidder or waive material irregularities in a bid. Public power district statutes, *Neb. Rev. Stat.* §§ 70-637, 70-638, and 70-639, are more comprehensive than the city statutes described in *Rath*. Public power district statutes have many of the same criteria that the Court adopted in *Rath* to determine whether a bidder is responsible. Nonetheless, a public power district should be wary of waiving any requirement stated in a bid document in order to qualify a bidder especially if it pertains to the question of a bidder's responsibility or the price of the bid.

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin

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