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A CRITIQUE OF BEST VALUE CONTRACTING IN MINNESOTA

Dean B. Thomson, Mark Becker, and Jeffrey Wieland[†]

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Governments owe a duty to their constituents to use public funds wisely and prudently. For decades, governments have used sealed competitive bidding procedures to award public construction projects on the basis of lowest price, which safeguards the public from procurement fraud, favoritism, imprudence, and extravagance and ensures that public funds are expended in the wisest, most efficient, and least objectionable manner.¹

In the spring of 2007, the Minnesota Legislature radically changed Minnesota's public-procurement policy by enacting a "best value" alternative to the familiar "lowest responsible bidder" method of awarding public construction contracts.² The best value model allows public entities to consider factors other than cost when awarding contracts.³ In doing so, the best value model injects subjectivity into the decision-making process that could result in many justifiable challenges to the integrity and validity of best value procurements.⁴ Any Minnesota public body that chooses to use the new best value method needs to be aware of the potential for abuse that exists within the method. They should implement sufficient safeguards so that the taxpaying public has confidence the method does not result in procurement fraud, undue influence, favoritism in the selection of contractors, or extravagant and improvident procurements.

This article begins with a history of Minnesota's public procurement law and Minnesota's traditional use of competitive bidding, and it discusses important Minnesota Supreme Court decisions and the overarching public policies involved in that system.⁵ The next section reviews the statutory framework

1. See *Coller v. City of Saint Paul*, 223 Minn. 376, 387, 26 N.W.2d 835, 841 (1947).

2. See Act of May 25, 2007, H.F. No. 548, ch. 148, art. 3, 2007 Minn. Sess. Law. Serv. 1690, 1734-44 (West).

3. MINN. STAT. § 16C.02 subdiv. 4a (Supp. 2007).

4. See *United Techs. Commc'ns Co. v. Wash. County Bd.*, 624 F. Supp. 185, 192 (D. Minn. 1985) (stating that "if subjectivity can violate the relevant standard of review [then] such a violation is reasonably likely . . .").

5. See *infra* Part I.A.

governing public procurements as it existed prior to the new best value legislation, and it discusses the careful introduction of agency discretion in more recent statutes allowing the use of the design-build and construction management at risk methods of project delivery.⁶ The subsequent section describes the key provisions of the new best value legislation, and it presents a table showing how the new method applies to public procurements.⁷ Finally, this Article analyzes and critiques the new legislation, and it recommends that amendments be made to increase the likelihood that the best value procurements will truly yield the best value.⁸

I. AN OVERVIEW OF COMPETITIVE PROCUREMENT IN MINNESOTA

A. *Case Law and Public Policies*

As early as 1894, the Minnesota Supreme Court addressed the need for controls in public contracting. In *Elliot v. City of Minneapolis*,⁹ the court expressed concern that there was little to govern the award of public contracts other than “the honesty, discretion, and good judgment” of the public body.¹⁰ The court observed that the public would be better served if government bodies were required to award contracts to the lowest responsible bidder¹¹ and invited state and local legislative bodies to enact such requirements.¹²

Over time, competitive bidding evolved into a strict regime with little or no room for government bodies to exercise subjectivity or discretion. As the Minnesota Supreme Court observed in *Coller v. City of Saint Paul*:¹³

Statutory and city charter provisions requiring competitive bidding in the letting of public contracts require, as necessary corollaries, that the public officials whose duty it

6. See *infra* Part I.B.

7. See *infra* Part II.

8. See *infra* Part III.

9. 59 Minn. 111, 60 N.W. 1081 (1894). *Elliot* involved the purchase of fuel oil by the city for its public works. *Id.* at 112, 60 N.W. at 1082.

10. *Id.* at 114, 60 N.W. at 1083.

11. “Lowest responsible bidder” is a term of art, defined as “[a] bidder who has the lowest price conforming to the contract specifications and who is financially able and competent to complete the work, as shown by the bidder’s prior performance.” BLACK’S LAW DICTIONARY 966 (8th ed. 2004).

12. *Elliot*, 59 Minn. at 115, 60 N.W. at 1083.

13. 223 Minn. 376, 26 N.W.2d 835 (1947). *Coller* involved a contract for the installation of 1070 parking meters. *Id.* at 377–78, 26 N.W.2d at 837.

is to let a contract should adopt definite plans and specifications with respect to the subject matter of the contract; that the plans and specifications be so framed as to permit free and open bidding by all interested parties; that a bid shall constitute a definite offer for the contract which can be accepted without further negotiations; and that the only function of the public authority with respect to bids after they have been received shall be to determine who is the lowest responsible bidder.¹⁴

This goal, “born of ‘distrust’ of public officers,” was to remove as much discretion as possible from the public officials because “discretion is precisely where such abuses as fraud, favoritism, extravagance, and improvidence in connection with the letting of contracts are prevalent.”¹⁵

Minnesota courts strictly enforced the competitive bidding regime. To challenge the award of contract, one did not have to show actual fraud, or even intent to defraud, but only that the prescribed procedures had not been followed, thus raising the possibility or opportunity that fraud could have occurred.¹⁶ The courts never lost sight of the ultimate purpose of competitive bidding legislation, which is to give the taxpayers “the best bargain for the least money.”¹⁷ Courts approved exceptions to the lowest responsible bidder method only where necessary to protect the taxpayers’ funds. Accordingly, courts permitted government bodies to accept bids with minor, immaterial irregularities, but they never permitted consideration or acceptance of bids that were materially non-responsive to the terms of bid solicitation.¹⁸

14. *Id.* at 384–85, 26 N.W.2d at 840.

15. *Id.* at 387–88, 26 N.W.2d at 841.

16. *Griswold v. Ramsey County*, 242 Minn. 529, 535–36, 65 N.W.2d 647, 652 (1954); *see also United Techs. Commc’ns Co. v. Wash. County Bd.*, 624 F. Supp. 185, 188 (D. Minn. 1985) (“Even the slightest deviations from prescribed form are viewed with a most jaundiced eye.” (citing *Foley Bros. v. Marshall*, 266 Minn. 259, 123 N.W.2d 387 (1963))).

17. *Griswold*, 242 Minn. at 535, 65 N.W.2d at 652; *see also Foley Bros.*, 266 Minn. at 264, 123 N.W.2d at 391 (“The basic purpose of competitive bidding is to give the public the benefit of the lowest obtainable price from a responsible contractor.”).

18. *See Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 207 (Minn. 1990) (noting that a bid variance is material if it gives the bidder a substantial advantage over the other bidders); *Tel. Assocs. v. St. Louis County Bd.*, 364 N.W.2d 378, 382 (Minn. 1985) (“A board may waive bid defects if public rights are not thereby prejudiced.”); *Foley Bros.*, 266 Minn. at 265, 123 N.W.2d at 391; *Lovering-Johnson, Inc. v. City of Prior Lake*, 588 N.W.2d 499, 502 (Minn. Ct. App. 1997) (“[T]he issue [is] whether a change or modification to the bid is ‘substantial

Case law in Minnesota is consistent in its disdain for government contract formed on a substantial or material deviation from the specifications.¹⁹

On all matters involving the substance of a competitive bid, such as those that may affect the price, quality or quantity, or the manner of performance, or other things that go into the actual determination of the amount of the bid, there may be no material variation or deviation from the specifications.²⁰

Any variance in a bid that gives one bidder a substantial advantage or benefit not enjoyed by other bidders is a matter of material responsiveness.²¹ Construction law commentators similarly define “bid responsiveness” in this manner:

Public contracts—federal, state, and local—may only be awarded to contractors who submit bids “responsive” to the material requirements of the invitation for bids. Evaluation of bid responsiveness focuses on compliance of the bid with the mandatory requirements of the invitation and any governing statutes. . . . A deviation is “material” if it gives the bidder substantial competitive advantage and prevents other bidders from competing on an equal footing.²²

Bids on proposals that are materially non-responsive must be rejected to ensure that all competitors are given an equal opportunity to win the contract.²³ The Federal Court of Claims has

or material.’”). Variations that affect “price, quality, or quantity, or the manner of performance, or other things that go into the actual determination of the amount of the bid” are considered material. *Foley Bros.*, 266 Minn. at 263, 123 N.W.2d at 390.

19. *United Techs. Comm’n*s, 624 F. Supp. at 191.

20. *Foley Bros.*, 266 Minn. at 259, 123 N.W.2d at 390.

21. *Carl Bolander & Sons Co.*, 451 N.W.2d at 207.

22. 1 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 2:74 (2002 & Supp. 2007).

23. *Carl Bolander & Sons Co.*, 451 N.W.2d at 208. *Foley Bros.*, 266 Minn. at 263, 123 N.W.2d at 390; *Duffy v. Vill. of Princeton*, 240 Minn. 9, 12, 60 N.W.2d 27, 29 (1953); *Sutton v. City of St. Paul*, 234 Minn. 263, 267, 48 N.W.2d 436, 439 (1951); *Coller v. City of Saint Paul*, 223 Minn. 376, 385, 26 N.W.2d 835, 840 (1947); *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502–03 (Minn. Ct. App. 1997). Case law from federal courts and state courts across the country similarly recognize an absolute obligation to reject non-responsive bids. *See, e.g.*, *Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371, 1376 (Ct. Cl. 1979); *Albert Elia Bldg. Co. v. Sioux City*, 418 F. Supp. 176, 179 (N.D. Iowa 1976); *Lower Kuskokwim Sch. Dist. v. Found. Servs., Inc.*, 909 P.2d 1383 (Alaska 1996); *D.H. Williams Constr., Inc. v. Clovis Unified Sch. Dist.*, 53 Cal. Rptr. 3d 345, 350 (Cal. Ct. App. 2007); *Abadie v. D.C. Contract Appeals Bd.*, 916 A.2d 913, 916 (D.C.

provided the following salient explanation for the rule that materially non-responsive bids must be rejected.

These principles rest upon and effectuate important public policies. “Rejection of irresponsible bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud.” The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified. The rule also avoids placing the contracting officer in the difficult position of having to balance the more favorable offer of the deviating bidder against the disadvantages to the government from the qualifications and conditions the bidder has added. In short, the requirement of responsiveness is designed to avoid a method of awarding government contracts that would be similar to negotiating agreements but which would lack the safeguards present in either that system or in true competitive bidding.²⁴

*Griswold v. Ramsey County*²⁵ is one of the leading Minnesota cases on public contracting. In 1952, Ramsey County appropriated \$600,000 to build a new county jail.²⁶ After an initial round of bids, the county discovered that the construction was going to cost more than that amount.²⁷ All the bids were rejected and a new round of bidding was initiated.²⁸ In the new solicitation document, the bidders were instructed to submit a basic bid and then a list of cost reductions for various alternative designs such as elimination of a tunnel to the courthouse, not finishing the fourth floor, or use of

2007); *Am. Combustion, Inc. v. Minority Bus. Opportunity Comm'n*, 441 A.2d 660, 671 (D.C. 1982); *Bigley v. MSD of Wayne Twp. Sch.*, 823 N.E.2d 278, 284–85 (Ind. Ct. App. 2004); *Irwin R. Evens & Son, Inc. v. Indianapolis Airport Auth.*, 584 N.E.2d 576, 585 (Ind. Ct. App. 1992); *Smith & Johnson Constr. Co. v. Ohio Dep't of Transp.*, 731 N.E.2d 720, 724–25 (Ohio Ct. App. 1998).

24. *Toyo Menka Kaisha*, 597 F.2d at 1377 (citations omitted).

25. 242 Minn. 529, 65 N.W.2d 647 (1954). *Griswold* has been cited more than thirty-five times by subsequent Minnesota appellate courts.

26. *Id.* at 531, 65 N.W.2d at 649.

27. *Id.* at 531, 65 N.W.2d at 649.

28. *Id.* at 531, 65 N.W.2d at 649.

cheaper building materials.²⁹ The county reserved the right to accept or reject any of the alternatives for six months.³⁰ The intent of this novel contracting scheme was to get as much work done as possible with the already appropriated money and to defer some work items until more funds became available.³¹ The result, however, was to make determination of the lowest responsive bidder at the bid opening impossible because different orders of bidders were achieved depending on which alternatives were deducted from the basic bid.³² The court noted that the process theoretically could have resulted in the contract going to the higher bidder.³³

The Minnesota Supreme Court held that though the Legislature has the authority to determine how the state, through its agencies and its various political subdivisions, let contracts, it remains with the courts to ensure that the legislatively prescribed procedures are not used in an unreasonable or arbitrary and capricious manner.³⁴ Any contracting procedure that “emasculates the safeguards of competitive bidding” is impermissible even if fraud does not occur.³⁵ In finding that the county’s procurement method violated competitive bidding law, the court reasoned that:

[a] fundamental purpose of competitive bidding is to deprive or limit the discretion of contract making officials in the areas which are susceptible to such abuses as fraud, favoritism, improvidence, and extravagance. Any competitive bidding procedure which defeats this fundamental purpose, even though it be set forth in the initial proposal to all bidders, invalidates the construction contract although subsequent events establish, as in the instant case, that no actual fraud was present.³⁶

For the same reason, the court held that no material change can be made to any bid after the bids have been received and opened, since to permit such changes would “open the door to fraud and collusion.”³⁷ As a logical corollary, “no material change

29. *Id.* at 531, 65 N.W.2d at 649.

30. *Id.* at 531, 65 N.W.2d at 649–50.

31. *Id.* at 531, 65 N.W.2d at 650.

32. *Id.* at 531–32, 65 N.W.2d at 650.

33. *Id.* at 537, 65 N.W.2d at 653.

34. *Id.* at 535, 65 N.W.2d at 651–52.

35. *Id.* at 536, 65 N.W.2d at 652.

36. *Id.* at 536, 65 N.W.2d at 652.

37. *Id.* at 536, 65 N.W.2d at 652. *See also* *Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371, 1377 (Ct. Cl. 1979) (“Responsiveness is determined by

in contract terms may be made after the contract has been let to the lowest bidder.”³⁸ In order to prevent even the “opportunity for fraud and collusion,” the courts will reject a materially non-responsive bid even if the item in question may not change the determination of the successful bidder.³⁹ These principles and rules of responsiveness govern public procurements even if public agencies attempt to reserve the right in their solicitation documents to waive or overlook them.⁴⁰ *Griswold* also observed that judicial enforcement requires enough transparency in the public contracting process for the tax-paying public to know if they need to bring suit to prevent the award of a non-responsive or illegal contract.⁴¹ Furthermore, the public needs the information to determine whether a bid was non-responsive in a timely manner, as injunctive relief ceases to be an effective enforcement mechanism once construction starts.⁴² Rather than rely on the “honesty, discretion, and good judgment”⁴³ of state officials, the Minnesota Supreme Court acknowledged in a later case the public’s role in policing letting of contracts by stating that challenges to public contracting decisions should be encouraged.⁴⁴

reference to the bids when they are opened and not by reference to subsequent changes in a bid. Allowing a bidder to modify a non-responsive bid when, upon opening the bids, it appears that the variations will preclude an award, would permit the very kind of bid manipulation and negotiation that the rule is designed to prevent.”) (citation omitted).

38. *Griswold*, 242 Minn. at 536, 65 N.W.2d at 652.

39. *Tel. Assocs., Inc. v. St. Louis County Bd.*, 364 N.W.2d 378, 382 (Minn. 1985) (“Public officials, however, have no authority to waive defects which affect or destroy competitive bidding. . . . Although [the item in question] may seem minor, in a sharply competitive bidding situation, contract awards are often determined by slight differences. Therefore, a variance in maintenance costs might have given one bidder an unfair advantage over the others.”). *See also* *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 208 (Minn. 1990) (holding that a failure to submit a bid with Minority-Owned Business Entities forms gave one bidder the opportunity to repent its bid and hence obtain a competitive advantage resulting in rejection of the bid as non-responsive: “Failure to require strict responsiveness, according to bid documents, would impair the competitive bidding process.”).

40. *Griswold*, 242 Minn. at 536, 65 N.W.2d at 652; *accord* *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. Ct. App. 1997) (“The rule prohibiting material changes once a bid has been opened applies despite provisions in the bid instructions that allow the public entity to waive irregularities.”).

41. *Griswold*, 242 Minn. at 537–38, 65 N.W.2d at 653.

42. *Id.* at 538, 65 N.W.2d at 653.

43. *Elliot v. City of Minneapolis*, 59 Minn. 111, 114, 60 N.W. 1081, 1083 (1894).

44. *Tel. Assocs.*, 364 N.W.2d at 383 (“[P]roper challenges to the bid-letting

In *Otter Tail Power Co. v. Village of Elbow Lake*,⁴⁵ the Minnesota Supreme Court faced an ancestor of today's best value procurement. Elbow Lake solicited bids for the various components of a new electric power generation and distribution system.⁴⁶ It received six bids for power meters and selected the third most expensive option.⁴⁷ An action to enjoin the procurement followed.⁴⁸ The court held that when an item cannot be described by "precise or exact specifications," the procuring body has reasonable discretion in determining the lowest responsible bid.⁴⁹ The court reasoned that "[v]alue is not always determined by price alone."⁵⁰ The procuring body may consider factors such as quality, suitability, and adaptability for the intended use, but the court cautioned that the determination must be reasonable and based upon "some substantial difference in quality or adaptability."⁵¹ The court limited its holding by reiterating that in situations where the items to be procured can be specified, the public body has no discretion and must accept the lowest bid.⁵²

Regardless of what procurement method is used, the goal is clear.

The very purpose of requiring competitive bidding is to divest the officials having the power to let contracts of discretion in some respects and to limit its exercise in others. In the area of discretion is precisely where such abuses as fraud, favoritism, extravagance, and improvidence in connection with the letting of contracts are prevalent. Ordinary legal remedies are inadequate to correct resulting wrongs. The purposes of requirements for competitive bidding are to prevent such abuses by eliminating opportunities for committing them and to promote honesty, economy, and aboveboard dealing in the letting of public contracts.⁵³

process should be encouraged.").

45. 234 Minn. 419, 49 N.W.2d 197 (1951).

46. *Id.* at 421, 49 N.W.2d at 199.

47. *Id.* at 421–22, 49 N.W.2d at 199–200.

48. *Id.* at 422, 49 N.W.2d at 200.

49. *Id.* at 424, 49 N.W.2d at 201.

50. *Id.* at 425, 49 N.W.2d at 201.

51. *Id.* at 424–25, 49 N.W.2d at 201.

52. *Id.* at 423, 49 N.W.2d at 201.

53. *Coller v. City of Saint Paul*, 223 Minn. 376, 387–88, 26 N.W.2d 835, 841 (1947).

B. Statutory Framework for Public Contracting before the 2007 Best Value Legislation

1. As Generally Applied to Construction Contracts

Before the 2007 best value legislation, most public construction contracts used the lowest responsible bidder approach. Minnesota's Uniform Municipal Contracting Law (UMCL) applied to all political subdivisions of the state, such as counties, towns, cities, and school districts.⁵⁴ For those entities, the UMCL required that all contracts exceeding \$50,000 be let by sealed bidding.⁵⁵ The statutes giving those public bodies the authority to enter into contracts then dictated that the contract must be awarded to the lowest responsible bidder.⁵⁶ For state agencies, all building and construction contracts over \$50,000 had to use a sealed bid method⁵⁷ and then had to be awarded to the lowest responsible bidder.⁵⁸

2. Best Value in State Procurement other than Construction

For procurement other than building and construction contracts, the Commissioner of Administration was required to use procurement methods that were designed to ensure that the state received a "best value."⁵⁹ When determining best value, consideration of price was both mandatory and primary.⁶⁰ Consideration of other factors, such as environmental factors, quality, and vendor performance, was permitted, but not required.⁶¹ The solicitation document was required to detail what criteria are to be used to evaluate the bids.⁶² Further, if factors other than price were to be considered, the relative weight of the

54. MINN. STAT. § 471.345 subdiv. 1 (2006).

55. *Id.* at subdiv. 3.

56. MINN. STAT. § 375.21 subdiv. 1 (2006) (counties); § 365.37 subdiv. 2 (towns); § 412.311 (statutory cities); § 123B.52 subdiv. 1 (school districts).

57. § 16C.26 subdiv. 3.

58. § 16C.28 subdiv. 1.

59. § 16C.03 subdiv. 3. These procurements included goods, services, and utilities, all of which were relatively small when compared to building and construction contracts. § 16C.03 subdiv. 3.

60. §§ 16C.02 subdiv. 4, 16C.03 subdiv. 3.

61. § 16C.02 subdiv. 4.

62. § 16C.03 subdiv. 3.

factors was required to be listed in the solicitation document.⁶³ For building and construction contracts, however, the Commissioner of Administration was required to use a request for bid process, with the contract award going to the lowest responsible bidder.⁶⁴

3. *The Trend Toward More Discretion: MnDOT*

As with other state agencies, statute traditionally required Minnesota Department of Transportation (MnDOT) contracts for construction on trunk highways to be awarded to the lowest responsible bidder.⁶⁵ In 2001, however, the Legislature granted MnDOT the authority, under carefully regulated conditions, to circumvent that requirement and to “solicit and award a design-build contract for a project on the basis of a best value selection process.”⁶⁶ The best value approach may only be used on ten percent of the contracts let by MnDOT in any given year,⁶⁷ and only after a finding that using that approach will serve the public interest.⁶⁸ The Commissioner of Transportation has final authority on the decision to use a best value acquisition on design-build projects⁶⁹ and must report annually which contracts use that method.⁷⁰

When MnDOT uses the “best value” method on a design-build contract, it must follow the so-called “two-step competitive process.”⁷¹ In the first phase, MnDOT appoints a commission of at least five members, one of whom must be a member of the

63. *Id.*

64. §§ 16C.25–28. “Request for bid” is a term of art meaning “a solicitation in which the terms, conditions, and specifications are described and responses are not subject to negotiation.” § 16C.02 subdiv. 11. That method can be contrasted with a “request for proposal,” which is “a solicitation in which it is not advantageous to set forth all the actual, detailed requirements at the time of solicitation and responses are negotiated to achieve best value for the state.” *Id.* at subdiv. 12.

65. MINN. STAT. § 161.32 subdiv. 1b (2000).

66. MINN. STAT. § 161.3412 subdiv. 1 (2006). In a “design-build contract” the contractor provides “architectural or engineering and related design services as well as labor, material, supplies, equipment, and construction services” MINN. STAT. § 161.3410 subdiv. 3 (2006). *See also* Act of July 1, 2001, ch. 8, art. 3, 2001 Minn. Sess. Law Serv. 2015 (West).

67. MINN. STAT. § 161.3412 subdiv. 3 (2006).

68. § 161.3414 subdiv. 1. When making the determination, MnDOT must consider a minimum of ten specific factors, enumerated in section 161.3414 subdivision 2.

69. § 161.3416 subdiv. 2.

70. § 161.3428.

71. § 161.3412 subdiv. 2.

Minnesota Chapter of the Associated General Contractors, to serve as a Technical Review Committee.⁷² Next, MnDOT prepares a Request for Qualifications (RFQ), which must include the minimum qualifications of the bidders, a statement of work, a schedule, project requirements, the form of a contract to be awarded, the number of firms to be selected for the short list, the weighted criteria for selection, a description of the request for proposal requirements, the maximum allowed time for the project, MnDOT's estimated cost of the project, and requirements for resources and experience.⁷³ After issuing the RFQ, the "selection team" evaluates the responses.⁷⁴ If fewer than two firms respond, MnDOT may either reissue the RFQ or cancel the project.⁷⁵ If enough responses are received, between two and five firms are selected to be on the "short list."⁷⁶ These firms proceed to the second phase of the process.⁷⁷

In the second phase, MnDOT issues a Request for Proposals (RFP) to short-listed builders.⁷⁸ The RFP must include a statement of work, a description of the required qualifications, the weighted selection criteria, copies of the contract that the winning proposer will be expected to sign, the maximum allowed time for the project, and the estimated cost of design and construction.⁷⁹ The bidders must turn in their proposals in two separately sealed packages: a technical portion and a price portion.⁸⁰ The RFP specifies the date, time, and location for the public opening of the sealed price proposals.⁸¹

The Technical Review Committee then reviews the technical proposals, rejects any it considers non-responsive,⁸² and submits scores for the responsive proposals.⁸³ At the bid opening, MnDOT announces the technical scores and then opens the price

72. § 161.3420 subdiv. 2.

73. *Id.* at subdiv. 3.

74. *Id.* at subdiv. 4. Interestingly, this subdivision uses the undefined term "selection team" rather than "Technical Review Committee," even though the Technical Review Committee is the administrative body designated to evaluate the RFQ responses. *See id.* at subdiv. 2.

75. *Id.* at subdiv. 4.

76. *Id.*

77. § 161.3422.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See supra* notes 18–21 and accompanying text.

83. MINN. STAT. § 161.3426 subdiv. 1(a) (2006).

proposals.⁸⁴ The winning proposal is calculated by dividing each bidder's price by its technical score to yield an adjusted score.⁸⁵ MnDOT's commissioner only has discretion either to reject all the proposals or award the contract to the responsive proposal with the lowest adjusted score.⁸⁶

MnDOT was the first public agency to receive design-build authority in the 2001 legislative session, and the new legislation was a result of industry, agency, and bar collaboration. Obviously, this new type of system allows public officials more discretion and judgment in selecting the successful bidder than the traditional procurement methods, which required that the award be made to the lowest responsible bidder. All parties involved in drafting this legislation, however, were very concerned about maintaining the procedural integrity and transparency of the process given the inherent subjectivity involved in scoring the proposers' technical proposals.⁸⁷ Accordingly, the new legislation contains important safeguards and unique provisions.

First, according to the new statute, the assertion of claims on previous projects by a proposer cannot be used to evaluate or score a bidder's "past performance" or "experience."⁸⁸ This important provision protects contractors who assert their legal rights on one project from being penalized in the evaluation process on a subsequent design-build project.

Second, the evaluation and award criteria for each phase must be clearly identified and then weighted or prioritized in terms of importance in the RFQ and RFP.⁸⁹ The award must then be made according to scores obtained from evaluating the proposals

84. *Id.* at subdiv. 1(b).

85. *Id.* If time was listed as a selection criterion in the RFP, MnDOT may adjust the scores by assigning a value per day factor. *Id.* at subdiv. 1(c). That factor is multiplied by the contractor's estimated time to completion, yielding a dollar amount. *Id.* That amount is added to the price and then divided by the technical score. *Id.* The lowest resultant adjusted score must be selected as the winner. *Id.* The statutory language is interesting because it is permissive; MnDOT is not required to use the time factor, but may if it chooses to do so. The statute does not describe when or by whom that decision must be made. Likewise, the statute does not require that the value per day time factor be included in the RFP, nor does it describe how that factor is to be determined. The statute clearly differentiates between the selection time factor and other contractual time factors, like the liquidated damages schedule and incentive clauses. *Id.*

86. *Id.* at subdiv. 1(d).

87. *Id.*

88. § 161.3420 subdiv. 3(10).

89. § 161.3422(2).

according to the weighted criteria.⁹⁰ This was intended to prevent awards from being justified on vague, after-the-fact statements that the successful proposals somehow represented the “best value” to the public. Instead, the awards have to be based on scoring criteria that are established and weighted by MnDOT before proposals are received.⁹¹

Third, the proposers selected to submit an RFP get a stipend to help defray the costs of preparing a design for the phase two competition, which can be quite expensive.⁹² This should help small bidders compete on more equal footing with larger and better capitalized competitors.

Fourth, the commissioner cannot use design-build procurement on more than ten percent of all transportation contracts awarded each year.⁹³ In addition, before using design-build procurement, the commissioner must satisfy several criteria intended to gauge whether design-build procurement will best serve the public interest on the particular project in question and issue a written report justifying use of the method.⁹⁴ These requirements should help ensure that traditional competitive bidding for MnDOT projects will not be immediately jettisoned in favor of design-build procurement and that design-build procurement will only be used on appropriate projects.

Finally, the statute makes clear that the principle of responsiveness is to be enforced in evaluating proposals. The Technical Review Committee reviewing phase two proposals is expressly instructed that it “shall reject any proposal it deems non-responsive.”⁹⁵ The statute further declares that “[t]he design-builder selected must be that responsive and responsible design-builder whose adjusted score is the lowest.”⁹⁶ In stating how this award must be made, the statute imposes the following independent duty on the commissioner: “Unless all proposals are rejected, the commissioner shall award the contract to the responsive and responsible design-builder with the lowest adjusted score.”⁹⁷ Clearly, by the repeated use of the word “responsive,” a

90. § 161.3426 subdiv. 1(d).

91. *Id.* at subdiv. 1(a).

92. *Id.* at subdiv. 3.

93. § 161.3412 subdiv. 3(a).

94. *Id.*; § 161.3414 (2006).

95. § 161.3426 subdiv. 1(a).

96. *Id.* at subdiv. 1(b).

97. *Id.* at subdiv. 1(d).

well understood term of art, and the mandatory injunction only to award to the responsive proposer, the Legislature intended MnDOT to enforce the principle of rejecting materially non-responsive proposals. Indeed, it is pointless for the statute to require MnDOT to clearly state and weight its RFP evaluation criteria if, by ignoring the principles of responsiveness, those criteria can be disregarded or effectively modified by the Technical Review Committee.

4. *The Trend Continues: Department of Administration, University of Minnesota, and the Minnesota State Colleges and Universities*

In 2005, the Legislature introduced new procurement options for the Minnesota Department of Administration, the University of Minnesota (U of M), and the Minnesota State Colleges and Universities (MnSCU).⁹⁸ The administrative department and MnSCU were granted authority to use construction manager at risk (CM at Risk) and job order contracting.⁹⁹ All three entities were given authority to use design-build contracting.¹⁰⁰ Before the administrative department or MnSCU can use CM at Risk or design-build contracting, however, the administrative department commissioner or the Board of Trustees of MnSCU, as appropriate, must make a written determination, including specific findings, that the desired method serves the public interest.¹⁰¹ This requirement is designed to ensure that the new procurement methods are not used on projects for which they may not be best suited. To make sure that these new procedures did not immediately displace the old, the Legislature also limited the number of projects on which CM at Risk and design-build contracting can be used.¹⁰²

98. See generally MINN. STAT. §§ 16C.32–.35 (2006); Act of May 25, 2005, ch. 78, 2005 Minn. Sess. Law Serv. 417 (West).

99. § 16C.32 subdiv. 2(a)(2)–(3). The definition of the term “commissioner” in section 16C.32 subdivision 1(6) limits the applicability of the new contracting methods to the administrative department and MnSCU. See also § 16C.34 (detailing constructing manager at risk); § 16C.35 (detailing job order contracting).

100. See MINN. STAT. § 16C.32 subdiv. 2(a)(1) (granting authority for design-build contracting to Minnesota Department of Administration and MnSCU); § 16C.33 subdiv. 4 (granting design-build contracting authority to U of M).

101. § 16C.32 subdiv. 2(e).

102. See *id.* at subdiv. 2(b) (limiting the administrative department and MnSCU use of CM at Risk and design-build contracting to no more than five percent of its projects in 2006 and 2007 and no more than ten percent thereafter);

a. Design-Build

Two types of design-build procurements are authorized. The first is Qualifications Based Selections (QBS).¹⁰³ As its name implies, the QBS method focuses on qualifications. To start a QBS design-build procurement, the agency issues an RFQ that lists the weighted criteria and subcriteria that will be used to evaluate the proposals.¹⁰⁴ At a minimum, the criteria to be evaluated shall include the proposer's experience as a constructor, designer or design-builder, its key personnel, its technical competence, its past performance on similar projects, its safety record, and its availability to and familiarity with project locale.¹⁰⁵ The last criterion was demanded by out-of-state contractors and designers who wanted some evaluation credit for their proximity to a local project.

So that quality concerns do not overwhelm or render irrelevant the issue of cost, the solicitation may also ask the proposers to state the proposed overhead and fee that the design-builder proposes to charge for its construction services.¹⁰⁶ The proposers' qualifications are then judged by the state Designer Selection Board and it creates a short list of at least three, but not more than five, proposers.¹⁰⁷ After receiving proposals from the short-listed proposers, the Board conducts formal interviews of the short-listed proposers.¹⁰⁸ The administrative department commissioner must award the design-build contract to the proposer that scores the highest based on the established evaluation criteria and subcriteria as determined by the Board, unless the commissioner elects to reject all proposals.¹⁰⁹ For both the U of M and MnSCU, the state Designer Selection Board recommends the top two scoring proposers to the U of M Board of Regents or the MnSCU Board of Trustees, as appropriate, which then makes the final selection.¹¹⁰

§ 16C.33 subdiv. 4(d) (imposing similar limits on design-build contracting for U of M.).

103. § 16C.33 subdiv. 5.

104. *Id.* at subdiv. 5(a)(1).

105. *Id.* at subdiv. 5(a)(2).

106. *Id.* at subdiv. 5(a)(3).

107. *Id.* at subdiv. 5(b).

108. *Id.* at subdiv. 5(c).

109. *See id.* at subdivs. 4(c) (for U of M), 5(d) (for the administrative department and MnSCU).

110. *Id.* at subdivs. 4(c), 5(d).

The second type of design-build procurement is Design-Price Based Selection (DPBS).¹¹¹ This method also uses a two-step process. First, the agency uses an RFQ process very similar to the QBS/RFQ process to narrow the field of potential proposers.¹¹² In the second stage, the administrative department, U of M, or MnSCU issues an RFP to the short-listed competitors, the state Designer Selection Board evaluates the proposals according to the criteria and subcriteria defined and weighted in the RFP, and the commissioner must award the contract to the highest scoring proposer as determined by the Board.¹¹³ Because the DPBS method primarily evaluates the design and proposed price, the RFP solicits preliminary plans and specifications, a critical path method schedule, and a guaranteed maximum price for the project.¹¹⁴

b. Construction Management at Risk

The CM at Risk selection process also consists of two stages.¹¹⁵ The first involves an RFQ process, the specifics of which are very similar to the RFQ for either the QBS or DPBS design-build process.¹¹⁶ Because the respective cost for the CM at Risk's services is necessary for a rational comparison of proposals, the commissioner may include in the RFQ a request for the proposer's overhead and fee for the CM at Risk's services.¹¹⁷

The commissioner is required to create a selection committee to evaluate the RFQs and RFPs of at least three persons, at least one of whom must have construction industry expertise to provide the evaluations with some informed foundation.¹¹⁸ The selection committee must announce the weighted criteria and subcriteria to

111. *Id.* at subdivs. 7–8.

112. *Id.* at subdiv. 7(a).

113. *Id.* at subdivs. 7–8. As in QBS design-build procurement, the top two scoring proposers on U of M and MnSCU procurements are submitted to the U of M Board of Regents or the MnSCU Board of Trustees, as appropriate, for final selection. *Id.* at subdiv. 8(a).

114. *Id.* at subdiv. 7(c).

115. § 16C.34. A “construction manager at risk” is a person or entity selected to manage the construction process and be responsible, among other things, for the price, schedule, and workmanship of the construction performed. § 16C.32 subdiv. 1(7).

116. § 16C.34 subdiv. 1; *see also supra* Part I.B.4.a.

117. § 16C.34 subdiv. 1(b). Just as in the design-build process, the “commissioner” means not only the administrative department commissioner but also the MnSCU Board of Trustees. *See supra* note 99.

118. § 16C.34 subdiv. 2(a)(1).

be used in scoring the RFQs and RFPs¹¹⁹ and then proceed to select a short list of three to five proposers for the more detailed phase two RFP process.¹²⁰ During the second phase, the selection committee requests fee and expense proposals, conducts formal interviews with each proposer,¹²¹ and then recommends to the commissioner the CM at Risk proposer achieving the highest score according to the weighted criteria stated in the RFP.¹²² The CM at Risk is selected before the project design is complete,¹²³ which means that final pricing for the work must be obtained later in the process. In an attempt to ensure competitive pricing after contract award, the statute requires that the CM at Risk competitively bid all trade work from a list of qualified firms.¹²⁴ A competitively bid process is different than a publicly bid process. In the latter, all responsible contractors may bid, but in the former, the CM at Risk and the commissioner are allowed to determine the composition of the list of qualified subtrades allowed to bid on the work.¹²⁵

c. Job Order Contracting

Job Order Contracting was designed to create an expedited method of awarding smaller sized projects.¹²⁶ MnSCU was especially frustrated with the delays involved in traditional public bidding and successfully lobbied for a process by which any

119. *Id.* at subdiv. 2(a)(2).

120. *Id.* at subdiv. 2(c)(1).

121. The post proposal interview process is designed to further communications between the proposer and the agency, but it can also foster complaints. If the interviewers are not the same, or if they ask dissimilar questions, proposers could feel that the interview process is unevenly conducted and that it provides some proposers with competitive advantages over others. Hopefully, the agency's evaluation procedures, adopted pursuant to the statutory requirement to conduct these new procurements in "an open, competitive, and objective manner," will guard against these potential problems. *See* MINN. STAT. § 16C.33 subdiv. 5(a)(1) (2006) (QBS); *id.* at subdiv. 7(a)(2) (DPBS); § 16C.34 subdiv. 1(c)(2) (CM at Risk). Fortunately, the statute at least prevents the agency from sharing price and other confidential information among the proposers. MINN. STAT. § 16C.34 subdiv. 2(c)(3) (2006).

122. § 16C.34 subdiv. 2(c)(4).

123. One of the purposes of selecting the CM at Risk method of project delivery is to allow the CM at Risk to offer preconstruction services such as "value engineering" (cost saving) suggestions, constructability reviews, and accurate pricing of the plans and specifications as they are being developed. 2 BRUNER & O'CONNOR, *supra* note 22, at §§ 6:22, 6:59.

124. § 16C.34 subdiv. 3(e).

125. *Id.*

126. § 16C.35.

contractor who agreed to sign a standard, master agency contract would be pre-qualified to perform the agency's work.¹²⁷ Once the list of qualified contractors is created, the agency can request bids from any (but not necessarily all) contractors on the list without advertisement or public bidding.¹²⁸ For construction contracts up to \$50,000, the agency must request at least two bids; for contracts up to \$100,000, the agency must request at least three bids; for contracts up to \$250,000, the agency must request at least four bids.¹²⁹ The award must be made to the lowest bidder.¹³⁰ The agency head is responsible for developing a system to ensure a reasonable opportunity for all qualified contractors to bid on construction services on a "periodic" basis.¹³¹

d. Risks and Protections

The design-build, CM at Risk, and job order contracting procurement methods invest the administrative department, U of M, and MnSCU with increased discretion in determining the successful proposer or bidder. Just like the MnDOT design-build statute, however, the final version of Minnesota Statute sections 16C.32–.35 was a unique collaborative effort that contained language agreed upon by all industry and agency stakeholders.¹³² As a result of its careful drafting and the respect given to needs and interests of all stakeholders, the statute contains many protections

127. *Id.* at subdiv. 3.

128. *Id.* at subdiv. 4.

129. *Id.*

130. *Id.* at subdiv. 5.

131. *Id.* at subdiv. 6. It may be difficult to explain to qualified bidders why they are unable to bid on job order contracting projects simply because it is not their turn to do so. Similarly, it may be difficult to explain to the public why it is advantageous to limit competition to two, three, or four bidders depending on the size of the project if other bidders desire to submit bids. Small, emerging contractors often depend on small contracts to get established, and this system may make it unduly difficult for them to get an adequate volume of work.

132. Indeed, the drafting effort for Minnesota Statutes sections 16C.32–.35 spanned several years and involved periodic stakeholder drafting sessions involving, among others, the administrative board, U of M, MnSCU, the Minnesota Chapter of the Associated General Contractors, the Minnesota Chapter of the American Institute of Architects, and the Construction Law Society of the MSBA. For a sense of the widespread agreement on the terms of the statute, see *Hearing on S.F. 1335 Before the Senate State and Local Government Operations Committee*, 84th Leg. Sess. (Minn. March 16, 2005), available at http://www.senate.leg.state.mn.us/media/media_list.php?ls=84&archive_year=2005&category=committee&type=audio#header.

that establish parameters on the discretion given to public agencies in this legislation.

In an effort to insulate the affected agencies or institutions from political pressure, undue influence, and accusations of favoritism, the statute admirably requires that the independent state Designer Selection Board be the entity charged with evaluating and scoring the successful design-build proposer. Ironically, the Designer Selection Board selects the top candidate for the administrative department, but only the top *two* candidates for the U of M and MnSCU, even though the latter two entities are more prone to influence through donations to the college. After receiving the top two choices from the Designer Selection Board, the U of M and MnSCU are given the discretion to evaluate and select the successful proposer.¹³³

To bring more objectivity and transparency to the selection process, the agency has to list the selection criteria and subcriteria for each stage of the process *and* the relative evaluation weight that each criterion or subcriterion will be given.¹³⁴ As a result, each proposer should be better able to match what they propose to supply with what the agency demands, thereby creating an economically more efficient procurement. Furthermore, the award *must* be made to the proposer whose proposal scores the highest according to the weighted criteria. This protection should reduce concerns about excessive discretion and after-the-fact justifications for awards; it also logically requires that only responsive proposals will be received and scored.

To encourage competition in both the design-build and CM at Risk methods and to limit the agencies' discretion in the selection of criteria, the statute requires that any RFQ or RFP "criteria shall not impose unnecessary conditions beyond reasonable requirements to ensure maximum participation of qualified" design-builders or CMs at Risk.¹³⁵ Both methods further limit the acceptable criteria by stating that "[t]he criteria shall not consider the collective bargaining status" of the design-builder or CM at

133. See MINN. STAT. § 16C.33 subdiv. 4(c) (2006) (allowing U of M Board of Regents to select from the Board's top two recommendations); *id.* at subdivs. 5(d), 8(a) (allowing the MnSCU Board of Trustees to select from the Board's top two recommendations).

134. See, e.g., *id.* at subdivs. 3(b)(2), 5(a)(1), 5(b), 5(d), 7(a)(2), 8(a); MINN. STAT. § 16C.34 subdiv. 1(c)(2) (2006).

135. § 16C.33 subdiv. 3(b)(10); § 16C.34 subdiv. 1(c)(9).

Risk.¹³⁶ The requirement to ensure maximum participation is especially important, and statutorily required, when QBS design-builders and CMs at Risk conduct competitive bidding of subtrade work.¹³⁷ Since only those subtrades on a list determined by the commissioner and design-builder or CM at Risk are invited to submit competitive bids,¹³⁸ there could be complaints or concerns from those subcontractors who feel they are qualified to bid but are not invited to participate in the process. The statute attempts to address those concerns by requiring that the list be “based upon an open, competitive, and objective prequalification process” and by prohibiting unduly restrictive selection criteria.¹³⁹

To ensure that these new methods are used only in appropriate circumstances, the commissioner, for each design-build or CM at Risk contract, must make a written determination, including specific findings, indicating whether use of the design-build or CM at Risk procurement serves the public interest.¹⁴⁰ As the MnDOT design-build statute recognized, not every project is appropriate for best value design-build or CM at Risk methods,¹⁴¹ which is why findings justifying their use are essential to determine whether it would be preferable to specify the desired best value features in the plans and specifications so they can be priced as part of a low cost bid procurement to avoid unnecessary and potentially harmful subjectivity in the award process. Other issues that the commissioner’s findings should address include, without limitation, the extent to which the project requirements for design and construction can be adequately defined, the time constraints for delivery of the project, the capability and experience of potential contractors, the suitability of the project for alternative delivery methods in regard to time, cost, schedule and quality factors, and the capability and experience of the agency and its personnel to adequately manage and oversee the selected delivery method.¹⁴²

136. § 16C.33 subdiv. 3(b)(10); § 16C.34 1(c)(9). This provision was insisted upon by representatives of the Minnesota Chapter of the Associated Builders and Contractors, an organization representing non-union or “open shop” contractors, as a condition of their support for the legislation.

137. § 16C.33 subdiv. 6(b)–(c); § 16C.34 subdivs. 2(a)(2), 3(e).

138. *See supra* note 137.

139. *Id.*

140. § 16C.32 subdiv. 2(e).

141. § 161.3414.

142. *Id.* at subdiv. 2.

In an attempt to further protect the integrity of the process, the agency cannot consider a proposer's past claims history in the RFQ and RFP process.¹⁴³ Thus, design-builders and CMs at Risk may assert claims on projects without fear of reprisal or "black-listing" on future design-build or CM at Risk procurements.

The amount of time and expense required to generate preliminary designs, schedules, and pricing in response to a phase two RFP on a DPBS design-build solicitation can be significant, and a concern existed that only large regional or national firms would be able to afford to compete in this process over time. To address this concern, the amount of design work requested in an RFP cannot be exceeded by design-builders, which is intended to prevent larger design-builders from outscoring their competition by simply spending more money generating many more plan sheets than smaller design-builders can afford.¹⁴⁴ Therefore, unless compensated in excess of the minimum stipend for their effort, the statute prohibits proposers from being required to submit detailed architectural or engineering design or construction documents as part of the proposal.¹⁴⁵ To encourage competition, the short-listed phase two proposers are also entitled to a stipend to cover the cost of generating their design proposals in an amount of not less than 0.3 percent of the commissioner's estimated cost of design and construction.¹⁴⁶ If the RFP requires extensive design services beyond preliminary plans and specifications, the stipend is required to be adjusted to an amount commensurate with the amount of requested design services.¹⁴⁷ Design-build experience is typically one of the scoring factors, and those who can financially afford to continually compete over time would obtain more experience and increase their chances of selection. The stipend concept was designed to encourage competition by leveling the playing field and paying proposers up front for the services required of them.

143. § 16C.32 subdiv. 1(17).

144. § 16C.33 subdiv. 7(f).

145. *Id.*

146. *Id.* at subdiv. 7(g).

147. *Id.*

II. THE 2007 BEST VALUE LEGISLATION

On May 24, 2007, the Legislature presented the Omnibus State Government Finance Bill to the governor.¹⁴⁸ Article Three of this bill was entitled “Best Value Contracts.”¹⁴⁹ Governor Pawlenty signed it into law the next day.¹⁵⁰

A. *Key Provisions of the Legislation*¹⁵¹

The legislation mandates that all building and construction contracts let by the Commissioner of Administration follow the procedures dictated in Minnesota Statutes section 16C.28, and it directs the commissioner to establish procedures for developing RFPs and awarding contracts.¹⁵² The enabling section requires the criteria used for selection to be included in the solicitation document, and it requires that the evaluation must be done “in an open and competitive manner.”¹⁵³

The legislation allows “all state building and construction contracts” let by the Commissioner of Administration “*or an agency for which competitive bids or proposals are required*” to use either the lowest responsible bidder or the best value method.¹⁵⁴ The statute re-emphasizes that if the best value method is used, the solicitation document must include the weighted evaluation criteria, and the contract must be awarded to the best scoring proposal.¹⁵⁵

The definition of best value was expanded for construction contracts.¹⁵⁶ Best value procurement must consider price and

148. H.F. No. 548, 85th Leg. Sess., 2007 Minn. Sess. Law Serv. 1690, 1734–44 (West).

149. *Id.* art. 3, 2007 Minn. Sess. Law Serv. at 1734–44.

150. Act of May 25, 2007, H.F. No. 548, ch. 148, 2007 Minn. Sess. Law Serv. 1690 (West). This hurried passage prevented full and thorough consideration by all stakeholders; it was primarily driven by union pressures. Dean B. Thomson, *The New Era of Best Value Public Procurement*, CONSTRUCTION L. BRIEFING PAPER (Fabyanske, Westra, Hart & Thomson, P.A., June 2007), available at <http://www.fwhtlaw.com/articles/Briefing%20Papers%20in%20html/2007%20June.htm>.

151. All statutory citations in this part refer to the statute as added or amended by the Omnibus State Government Finance Act.

152. MINN. STAT. § 16C.03 subdiv. 3a (Supp. 2007). The term “commissioner” is defined as “the commissioner of administration.” § 16C.02 subdiv. 5.

153. § 16C.03 subdiv. 3a.

154. § 16C.28 subdiv. 1(a) (emphasis added). The italicized language seems to broaden the applicability of this section beyond the department of administration.

155. *Id.* at subdiv. 1(c).

156. § 16C.02 subdiv. 4(a). The alternate definition of best value is

performance criteria.¹⁵⁷ That statute then suggests, but does not require, the following non-exclusive performance criteria:

- (1) the quality of the vendor's or contractor's performance on previous projects;
- (2) the timeliness of the vendor's or contractor's performance on previous projects;
- (3) the level of customer satisfaction with the vendor's or contractor's performance on previous projects;
- (4) the vendor's or contractor's record of performing previous projects on budget and ability to minimize cost overruns;
- (5) the vendor's or contractor's ability to minimize change orders;
- (6) the vendor's or contractor's ability to prepare appropriate project plans;
- (7) the vendor's or contractor's technical capacities;
- (8) the individual qualifications of the contractor's key personnel; or
- (9) the vendor's or contractor's ability to assess and minimize risks.¹⁵⁸

When considering past performance, however, the contracting entity cannot consider "the exercise or assertion of a person's legal rights."¹⁵⁹

Recognizing that the implementation of best value contracting is a big shift in procurement policy, the Legislature is implementing the new method gradually. For the first three years

distinguishable because it only applies to the acquisition of goods and services. *Id.* at subdiv. 4.

157. *Id.* at subdiv. 4(a).

158. *Id.*

159. *Id.* In other words, the contracting entity cannot consider a proposer's claims history.

that any organization uses best value contracting, it can only use it on up to twenty percent of its projects.¹⁶⁰ For the first two years following the enactment of the legislation, only state agencies, counties, cities, and the largest twenty-five percent of school districts may use best value contracting.¹⁶¹ After two years, the largest fifty percent of school districts may use it as well.¹⁶² Finally, three years after enactment, the use of best value contracting is unrestricted for all other school districts and political subdivisions of the state.¹⁶³ In a final attempt to improve implementation of the legislation, all personnel administering best value contracts or writing solicitation documents must be trained in best value procedures.¹⁶⁴

B. Applicability of Best Value Contracting

While sections 16C.03 and 16C.28 appear to make best value contracting an option for all building and construction contracts in the state, over the years, the Legislature has enacted a patchwork of provisions empowering Minnesota's various types of political entities and subdivisions to enter into contracts, and it has also specified the procedures those entities are to use. The following table shows the applicable statutory provision governing contracting for various political entities, indicates whether the 2007 best value legislation changed that provision, and describes the authorized contracting method.

160. § 16C.28 subdiv. 1a(f).

161. *Id.* at subdiv. 1a(c).

162. *Id.* at subdiv. 1a(d).

163. *Id.* at subdiv. 1a(e).

164. § 16C.03 subdiv. 19. The statute does not specify the length, curriculum, or source of the training.

Statutory Section	Entity Type Governed	Expressly Modified by 2007 Legislation	Contract Award Procedure Authorized	Section 16C.28 Applies?	Notes
16C.33-.35	Admin. Dept., U of M, and MnSCU	No	Best Value	No	
103D.811	Watershed District	Yes	Lowest Responsible Bidder (LRB) or Best Value	Yes	
103E.505	Drainage Authority	Yes	LRB or Best Value	Yes	
110A.29	Rural Water Use District	No	Sealed Bidding	No	
115A.69	Solid Waste Mgmt. District	No	LRB or Best Value	Yes	
116A.13	Public Water and Sewer Systems	Yes	LRB or Best Value	Yes	
123B.52	School District	Yes	LRB or Best Value	Yes	Applies to construction, building, alterations, improvements, or repair work.
160.17	Town or County	Yes	LRB or Best Value	Yes	Applies to road construction.
160.262	MnDOT	Yes	LRB or Best Value	Yes	Applies to construction of bicycle and pedestrian paths ("recreational lanes").

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Statutory Section	Entity Type Governed	Expressly Modified by 2007 Legislation	Contract Award Procedure Authorized	Section 16C.28 Applies?	Notes
161.32	MnDOT	Yes	LRB or Best Value	Yes	Applies to trunk highway construction.
161.3206	MnDOT	Yes	Best Value (Permissive)	No	Applies to all MnDOT contracts other than design-build contracts governed by section 161.3412. Statute does not prohibit other types of contracting.
161.3412	MnDOT	No	Best Value (Permissive)	No	Applies to MnDOT design-build projects. Statute does not prohibit other types of contracting.
161.38	Road Authority	Yes	LRB or Best Value	No	
365.37	Town	Yes	LRB or Best Value	Yes	
374.13	City and County	Yes	LRB or Best Value	Yes	Applies to construction of joint city hall and county courthouse. Statute language calls for award to proposal that is "most favorable to the city or county" rather than the usual

					lowest responsible bidder.
Statutory Section	Entity Type Governed	Expressly Modified by 2007 Legislation	Contract Award Procedure Authorized	Section 16C.28 Applies?	Notes
375.21	County	Yes	LRB or Best Value	Yes	
383B.145	Hennepin County	No	LRB or Best Value	Yes	Subdivision 8 directs award to go to lowest bidder, but also has an override provision that looks like a best value approach.
383B.158	Hennepin County	No	Best Value (Permissive)	Yes	This statute authorizes design-build contracts that may use best value.
383C.094	St. Louis County	Yes	LRB or Best Value	Yes	Applies to contracts for cleaning and repair of ditches over \$500.00.
383C.807	St. Louis County	No	Any means determined by St. Louis County Board	No	Applies to solid waste facilities.
412.311	Statutory Cities	Yes	LRB or Best Value	Yes	Applies to construction, building, alteration, improvement, or repair.

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Statutory Section	Entity Type Governed	Expressly Modified by 2007 Legislation	Contract Award Procedure Authorized	Section 16C.28 Applies?	Notes
429.041	Municipality	Yes	LRB or Best Value	Yes	Municipality is defined in section 429.041. Applies to any civic improvement project.
447.31	Hospital District	No	LRB or Best Value	Yes	
453.59	Municipal Power Agency	No	LRB or Best Value	Yes	
453A.09	Municipal Gas Agency	No	LRB or Best Value	Yes	
458D.21	Western Lake Sanitary District	Yes	LRB or Best Value	Yes	Best Value for contracts greater than \$5,000.00.
469.015	Hous. and Redevelopment Authority	Yes	LRB or Best Value	Yes	
469.068	Port Authority	Yes	LRB or Best Value	Yes	
469.101	Economic Dev. Authority	Yes	LRB or Best Value	Yes	
471.345	Municipality	Yes	LRB or Best Value	Yes	This is the UMCL. Subdivision 1 defines municipality.

Statutory Section	Entity Type Governed	Expressly Modified by 2007 Legislation	Contract Award Procedure Authorized	Section 16C.28 Applies?	Notes
471.371	Municipality	No	Best Value	No	Applies to design-build contracts for wastewater treatment facilities. Municipality is defined in section 471.345 subdivision 1.
473.405	Metro. Council	Indirectly	LRB or Best Value	Yes	Section 473.123 subdivision 1 defines the Metro. Council as a political subdivision of the state so the UMCL applies.
473.523	Metro. Council	Yes	LRB or Best Value	Yes	Applies to Metropolitan disposal system construction contracts over \$50,000.00.
473.556	Metro. Sports Facilities Comm'n	No	LRB or Best Value	Yes	
473.652	Metro. Airport Comm'n	No	LRB or Best Value	Yes	
473.705	Metro. Council	Indirectly	LRB	No	Applies to Mosquito Control.
473.756	Minnesota Ballpark Authority	Yes	LRB or Best Value	Yes	

III. ANALYSIS OF THE NEW BEST VALUE LEGISLATION

It remains to be seen whether the new 2007 best value legislation will result in the best and most economically responsible procurements of public construction. The bill was drafted, reviewed, and passed in a matter of months, and many stakeholders were not able to provide comments or meaningfully participate in the development of the legislation. As a result, the present legislation regrettably bears the marks of its hurried passage and raises significant questions and concerns that will need to be resolved either by good practice, statutory amendment, or court decision. This section of the article analyzes many issues raised by the new legislation and suggests how these questions might be resolved to ensure that the public truly receives the best value.

A. *Standards of Judicial Review of Best Value Procurements*

The new best value legislation does not alter the traditional role of the courts to oversee public procurements through bid protests filed by taxpayers or bidders. At least two standards of review will apply to judicial review of best value procurements. Both are found in *Griswold*.¹⁶⁵ First, “[i]rrespective of what lawful method is adopted or used in the letting of public contracts, it is for the courts to determine whether officials in the exercise of their discretion have applied the method used in an arbitrary, capricious, or unreasonable manner.”¹⁶⁶ Thus, a procurement is subject to being set aside by the courts if the public body awards a contract in violation of this standard.

The “arbitrary, capricious, or unreasonable” standard is not as high or as difficult to establish as one might think. Administrative decisions that reflect an error of law, or that are made without substantial evidence, for example, would be subject to being overturned by the courts.¹⁶⁷ And, a decision is arbitrary and capricious if the agency relied on unintended factors, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence, or the decision is so

165. *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 647 (1954).

166. *Id.* at 535, 65 N.W.2d at 651–52.

167. *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm’rs*, 713 N.W.2d 817, 832 (Minn. 2006).

implausible that it can not be explained as a difference in opinion or an exercise of the agency's expertise.¹⁶⁸

Further, the courts' powers are not limited to reviewing solely the issue of whether the award was made in an arbitrary, capricious or unreasonable manner. The courts also have a duty under *Griswold* to make sure that all the procurements, including best value competitive bidding, is conducted in a way that safeguards the public from fraud, favoritism, improvidence, and extravagance¹⁶⁹ because safeguarding the public is the intent of any statutory procurement method.¹⁷⁰ Historically, protestors did not commonly invoke the objective "improvidence" or "extravagance" standard announced by *Griswold* to challenge the validity of a contract award. This is likely to change with the advent of best value procurement, which could result in contracts being let to the highest priced bidder. Under *Griswold*, the courts must void any contract awarded based on a competitive best value procedure that, while purporting to represent the "best value," would still waste public funds to such an egregious extent as to constitute "extravagance," "improvidence," or even "fraud" on the public.¹⁷¹ One could foresee challenges of this nature where the solicitation for bids does not specify the quantity or quality of the desired construction to be provided, and the award is made to the bidder who goes overboard supplying far higher quantities or qualities than actually needed at far greater cost.

B. The Requirement of Openness in Best Value Procurement

The new best value legislation provides that best value proposals "must be evaluated in an open and competitive manner."¹⁷² The legislation does not provide much guidance on how "open" evaluations are to occur, but ordinarily, the public is

168. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens Advocating Responsible Dev.*, 713 N.W.2d at 832.

169. *Griswold*, 242 Minn. at 535-36, 65 N.W.2d at 652.

170. *Id.* at 535, 65 N.W.2d at 652.

171. *See id.* at 535-36, 65 N.W.2d at 652 ("Generally it is presumed that public officials have entered into public contracts in good faith and actual fraud in a particular instance must be proved, but this rule has no application in a determination of whether the requirements of competitive bidding have been met in the letting of a contract and, as a matter of sound public policy, such a contract is void, without any showing of actual fraud or an intent to commit fraud, if a procedure has been followed which emasculates the safeguards of competitive bidding.").

172. MINN. STAT. § 16C.03 subdiv. 3(a) (Supp. 2007).

best served by complete transparency. Again, prior decisions of Minnesota's courts provide guidance on how to interpret the new legislation.

First, there should be little question that the requirement of openness was included in the legislation so that procurement decisions are completely transparent. Transparency is necessary in public procurements to avoid any appearance of fraud, favoritism, or undue influence. Transparency and openness are also necessary to avoid neutralizing "a most important deterrent to fraud and improvidence in the letting of public contracts; namely, timely preventive action by taxpayers who, in order to act effectively, must acquire a knowledge of the true facts before it is too late."¹⁷³ The courts have long encouraged the policing of public procurement by bid protest actions filed either by taxpayers or losing bidders.¹⁷⁴ By including an openness requirement in the new best value legislation, the Legislature also has voiced its approval of such actions because the deterrent effect of bid protest actions would be lessened if the evaluations were not completely open and available to public scrutiny.

To be sure, the new legislation does not in any way modify ancient case law recognizing the rights of taxpayers to lodge protests against invalid procurements.¹⁷⁵ Nor does the new

173. *Griswold*, 242 Minn. at 537, 65 N.W.2d at 653.

174. *Id.* See also *Tel. Assocs., Inc. v. St. Louis County Bd.*, 364 N.W.2d 378, 383 (Minn. 1985).

175. Since at least 1902, the Minnesota Supreme Court has recognized taxpayer standing to sue public bodies and protest awards of public contracts. See *Schiffman v. City of St. Paul*, 88 Minn. 43, 92 N.W. 503 (1902).

Where a taxpayer has no adequate remedy at law, he has a right in his own name to resort to a court of equity to restrain by injunction a municipal corporation and its officers from illegally creating debts and liabilities which will increase his burdens of taxation; and this upon the theory that the damages which he will thus sustain are not in common with the damages to other taxpayers, but are special, affecting his private rights.

Id. at 47, 92 N.W. at 504. See also *Arpin v. City of Thief River Falls*, 122 Minn. 34, 37-38, 141 N.W. 833, 834 (1913) (holding that taxpayers have standing to challenge a city's attempt to enter into an illegal contract); *Le Tourneau v. Hugo*, 90 Minn. 420, 425-26, 97 N.W. 115, 117-18 (1903) (holding that taxpayers have standing to enjoin the execution of a contract for construction of a bridge that was let through an impermissible bidding process). Many leading Minnesota cases on public procurement were suits brought by taxpayers challenging improper government procurement practices. See, e.g., *Nielsen v. City of Saint Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958); *Griswold*, 242 Minn. 529, 65 N.W.2d 647; *Coller v. City of Saint Paul*, 223 Minn. 376, 26 N.W.2d 835 (1947); *Hendricks v. City of Minneapolis*, 207 Minn. 151, 290 N.W. 428 (1940).

legislation limit the well-settled power or jurisdiction of the courts to hear those protests to ensure that the due process rights of taxpayers are protected and that the intent of competitive bidding statutes is met.¹⁷⁶

Nevertheless, in a recent and troubling trend, certain public agencies are attempting to screen their decisions from public or judicial review by making it practically impossible to protest their awards. For example, MnDOT's solicitation for the reconstruction of the collapsed I-35W bridge attempted to require proposers to waive their right to judicial review unless the agency's decision was "wholly arbitrary;" and then, in order to deter any protests, it claimed the right to assess all costs and damages (including delays and legal fees) of a protest against the proposer if the protest was denied.¹⁷⁷ The agency also required protests regarding non-responsiveness to be filed within twenty-four hours, even though it would be impossible to determine in one day whether proposals on such a complicated procurement were responsive.¹⁷⁸ MnDOT further refused to disclose its scoring data and the proposals it received until it had formally awarded the project, making any meaningful review of its actions prior to award impossible.¹⁷⁹ MnDOT then finally awarded the project, but immediately executed the contract only moments later, further frustrating any possible proposer or taxpayer review of agency action before MnDOT committed the state to a \$234 million contract that cost the taxpayers \$85 million more in tax dollars and lost opportunity costs than an available alternative proposal.¹⁸⁰

The Minnesota Supreme Court expressly reserved to the courts the right to review agency action to determine whether a procurement decision is illegal, arbitrary, or capricious.¹⁸¹ Public bodies or agencies should not be able to limit that judicial review or heighten the judicial standard of review from "arbitrary and

176. See *supra* notes 40–44 and accompanying text.

177. See MNDOT INSTRUCTIONS TO PROPOSERS, ST. ANTHONY FALLS (I-35W) BRIDGE DESIGN-BUILD PROJECT add. 7, ¶ 3.10 (Sept. 12, 2007), available at <http://www.dot.state.mn.us/designbuild/35wbrproject.html>.

178. *Id.*

179. *Id.*

180. Jim Foti, *Judge Rejects Effort to Stop I-35W Bridge Work*, STAR TRIB. (Minneapolis), Nov. 1, 2007, at B5; Dave Orrick, *Judge Refuses to Halt Bridge Work*, ST. PAUL PIONEER PRESS (Minn.), Nov. 1, 2007, at 6B.

181. *Griswold v. Ramsey County*, 242 Minn. 529, 535, 65 N.W.2d 647, 651–52 (1954).

capricious” to “wholly arbitrary.”¹⁸² The Minnesota Supreme Court encouraged protests¹⁸³ and declared them to be the best safeguard against fraud and improvidence.¹⁸⁴ Therefore, it is against public policy to: (1) withhold data from the public and other proposers; (2) prevent their ability to protest; (3) create practically impossible protest deadlines; and (4) penalize protesting proposers for acting as private attorney generals for the benefit of the public.¹⁸⁵ Rather than force protesters to fight these new types of protest restrictions in court on a case-by-case basis, the Legislature should amend the 2007 best value legislation and the Minnesota Data Practices Act to prevent these various attempts by public bodies and agencies to shield their decisions from public review and scrutiny. It should ensure that: (1) protests be facilitated, not penalized; (2) the Data Practices Act be amended to allow earlier release of scoring data and proposals;¹⁸⁶ (3) there is an adequate time specified between award and contract execution to allow for meaningful review and potential protest of agency action; and (4) there is an unrestricted right to standard judicial review of agency action.

Once a public body has decided to award a contract, the “open evaluation” requirement in section 16C.03, subdivision 3a, should require it to publicly post all of the data and rationales it relied upon to make the best value award. This would give the public and other proposers a chance to review the award to make sure it complied with the rules and requirements of the solicitation. With the advent of new legislation, it should no longer be necessary for taxpayers and proposers to obtain information about a public body’s procurement by making a request pursuant to the Minnesota Government Data Practices Act;¹⁸⁷ all of the information to be obtained by such a request should readily and automatically be made public by the agency or municipality. As a result, the

182. See *Hunter v. Zenith Dredge Co.*, 220 Minn. 318, 326, 19 N.W.2d 795, 799 (1945) (review of agency decisions must be meaningful to satisfy due process concerns); *In re Staley*, 730 N.W.2d 289, 296 (Minn. Ct. App. 2007) (calling a meaningful opportunity to present a case “the hallmark of an individual’s right to due process of law”).

183. *Tel. Assocs., Inc. v. St. Louis County Bd.*, 364 N.W.2d 378, 382–83 (Minn. 1985).

184. *Griswold*, 242 Minn. at 537, 65 N.W.2d at 653.

185. See *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 93 (Minn. 2006) (holding that courts will refuse to enforce contracts that are contrary to public policy).

186. MINN. STAT. § 13.72 subdiv. 11 (2006).

187. § 13.03.

taxpaying public will have confidence that public officials are wisely protecting the public purse.

In addition, the new best value legislation provides that if interviews are to be a scored criterion, the weight of the interview is to be stated in the solicitation for proposals.¹⁸⁸ Because proposals are to be evaluated in an “open” manner pursuant to section 16C.03, subdivision 3a, any interviews must also be conducted and evaluated in an “open” manner. Yet, the new legislation is silent on how that is to happen. Face-to-face meetings between bidders and the public body might present an opportunity for bidders to curry favor or for agents of the public body to demand concessions or favors in ways that undermine the integrity of the process. Thus, if bidders are to meet with the public body face-to-face before an award, there should be strong checks and balances on such meetings to avoid any appearance of fraud or favoritism.¹⁸⁹ The integrity of the best value bidding procedures would be best served if the public body was required to ask the same questions of all bidders so that all proposers are offered an equal opportunity to compete on a level playing field, and all the answers to the questions could be objectively compared and scored on an “apples-to-apples” basis. Indeed, it would be very difficult to competitively and objectively score an interview if each bidder was asked completely different questions. In addition, a public body would be wise to record or videotape the interviews to provide proof that the interviews were conducted impartially, openly, and competitively.

C. A Threshold Question: Should the Lowest Responsible Bidder Method or the Best Value Method be Used?

The 2007 best value legislation provides that contracts may be awarded to either of the following:

- (1) the lowest responsible bidder . . . ; or (2) the vendor or contractor offering the best value, taking

188. MINN. STAT. § 16C.28 subdiv. 1(c) (Supp. 2007).

189. See *Griswold*, 242 Minn. at 535–36, 65 N.W.2d at 652 (“Generally it is presumed that public officials have entered into public contracts in good faith and actual fraud in a particular instance must be proved, but this rule has no application in a determination of whether the requirements of competitive bidding have been met in the letting of a contract and, as a matter of sound public policy, such a contract is void, without any showing of actual fraud or an intent to commit fraud, if a procedure has been followed which emasculates the safeguards of competitive bidding.”).

into account the specifications of the request for proposals [and] the price and performance criteria as set forth in section 16C.02, subdivision 4a, and [as] described in the solicitation document.¹⁹⁰

Unfortunately, the legislation offers no guidance on the issue of how to decide whether the contract should be awarded by the lowest responsible bidder method or the best value method.¹⁹¹ A wrong choice of method could be challenged under either of the standards of review identified in Part III.A of this article.

As mentioned in Part I of this article, prior court decisions provide sound guidance on the question of whether a public body should use lowest responsible bidder or best value procurements. In *Otter Tail Power Co. v. Village of Elbow Lake*,¹⁹² for example, the court suggested that factors other than cost should be considered only where the subject matter of the procurement “is not subject to exact specifications.”¹⁹³ Under this standard, then, the lowest responsible bidder method should be used when the subject matter of the procurement is capable of exact specification, and best value used when the opposite holds true.

Ordinarily, the subject matter of a construction contract can be exactly specified. Public bodies using lowest responsible bidder methods have been doing this for years. Typically, the public owner will contract with an architect or engineer to prepare detailed drawings and specifications for the construction project which define the quality of work, materials, and other “best” or desired values required to be provided by the bidders. The bidding contractors’ responsibility is to build and provide services strictly in accordance with what is required in the drawings and specifications and thus promise that the owner’s requirements for quality, timeliness, and administration will be met. In such circumstances, the owner is receiving exactly the “best values” it specified in the drawings and specifications, and the only difference between bidders is price.¹⁹⁴ Thus, where the subject matter of the contract

190. MINN. STAT. § 16C.28 subdiv. 1(a) (Supp. 2007).

191. See *id.* at subdiv. 1(b) (stating simply that “[t]he commissioner shall determine whether to use” best value or lowest responsible bidder, but not indicating how the commissioner should make the determination).

192. 234 Minn. 419, 49 N.W.2d 197 (1951).

193. *Id.* at 423, 49 N.W.2d at 201.

194. See Dean B. Thomson & Michael J. Kinzer, *Best Value in State Construction Contracting*, CONSTRUCTION LAW., Apr. 1999, at 31, 32 (“[I]f an owner wants the better value of a longer life cycle for its equipment, a shorter construction

can be precisely specified, the lowest responsible bidder method—not the best value method—should be used.

The Legislature has already recognized the danger of a wrong choice between the lowest responsible bidder and the best value methods. In the statute that authorizes MnDOT to use the best value, MnDOT's ability to use the method is carefully limited to a fraction of MnDOT's design-build procurements.¹⁹⁵ Of course, in design-build procurement, the design-builders, and not the public owner, provide the architectural and engineering design services (drawings and specifications) for the project in addition to the labor, supplies, equipment, and materials. Design-build, then, is a type of contract that is not based on fully defined specifications. Permitting the best value method in design-build procurements is consistent with the reasoning in *Otter Tail Power Co.*, that factors other than price might be considered if the subject matter cannot be exactly specified.

It is not sufficient justification to use the best value method simply because a component of the procurement might be difficult to specify. For example, the public body might consider "public relations" to be an important aspect of the construction contract to be procured.¹⁹⁶ If best value is to be used, perhaps proposers would have an incentive to include far more public relations services than the public body needs, so that they could receive a high best value score. The result would be an award to the highest priced proposal whose proposed final constructed product was no better than other bidders' final products. Most likely, the others bidders included just enough public relationship services to satisfy the public body's needs. To avoid such results, a public body could exactly specify and expressly require that contractors provide a certain number of

schedule, or higher quality material, then the owner's design can specify these 'value' requirements in the bid package and the award will go to the lowest priced bid. In this way the public is assured that its tax dollars will be spent to obtain the desired or 'best' value for the lowest price.").

195. MINN. STAT. § 161.3412 (Supp. 2007). See *supra* Part I.B.3 (discussing limitations on MnDOT's ability to use the best value method).

196. In MnDOT's recent design-build solicitation to reconstruct the collapsed I-35W bridge, MnDOT allocated fifteen out of 100 points to public relations. MNDOT INSTRUCTIONS TO PROPOSERS, *supra* note 176, at ¶ 4.3.3.6. The result of this best value approach was the award of the design-build project to a proposal that cost approximately \$57 million more and took seventy days longer to construct than an alternative proposal. See Jim Foti, *After the Collapse: Two Bidders Feel Misled*, STAR TRIB. (Minneapolis), Sept. 21, 2007, at A1 (providing the finalist proposers' time-to-completion, estimated price, and technical and adjusted scores).

hours of public relations services, provide certain types of services, provide a number of advertisements, notices, signs, and the like, and use the lowest responsible bidder method.

A poorly made decision to use the best value method over the lowest responsible bidder method presents a significant risk to taxpayers that the public body will unnecessarily overspend. One way to lessen this risk is to impose a requirement upon the public body to first deliberate and then make a formal, detailed written finding that the best value approach will best serve the public interest. As mentioned in Part I.B.3 of this Article, MnDOT is required to deliberate on no less than ten factors and make formal findings before it can use the best value method for design-build contracts.¹⁹⁷ The administrative department commissioner and the MnSCU Board of Trustees are also required to issue similar findings before they can use design-build or CM at Risk best value methods.¹⁹⁸ If these experienced public agencies and institutions are required to deliberate and make findings before they use best value procurement, no reason exists why smaller political subdivisions, which may not have in-house expertise, should not have to do the same. The 2007 best value statute should be amended to require discussion of the appropriate procurement method and issue comparable findings before the best value method can be used.

D. Requirement of Responsiveness

Nothing in the new 2007 best value legislation overrides the long-standing rule that a public body must reject proposals that are “non-responsive” in some material respect.¹⁹⁹ As discussed in Part I of this article, a matter is “material” with respect to responsiveness if it affects time, price, quality, or manner of performance.²⁰⁰ Furthermore, a bid or proposal is non-responsive if the variance gives the proposer a substantial benefit or advantage not enjoyed by

197. MINN. STAT. § 161.3414 subdiv. 2 (2006).

198. MINN. STAT. § 16C.32 subdiv. 2(e) (2006).

199. *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 208 (Minn. 1990); *Foley Bros. v. Marshall*, 266 Minn. 259, 263, 123 N.W.2d 387, 390 (1963); *Duffy v. Vill. of Princeton*, 240 Minn. 9, 12, 60 N.W.2d 27, 29 (1953); *Sutton v. City of St. Paul*, 234 Minn. 263, 267, 48 N.W.2d 436, 439 (1951); *Coller v. City of Saint Paul*, 223 Minn. 376, 385, 26 N.W.2d 835, 840 (1947); *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499, 502–03 (Minn. Ct. App. 1997).

200. *Foley Bros.*, 266 Minn. at 263, 123 N.W.2d at 390; *Lovering-Johnson*, 558 N.W.2d at 502.

other competitors.²⁰¹ The rule that non-responsive proposals must be rejected ensures that the public receives all of the safeguards of the public procurement process because all proposers will have an equal opportunity to compete on the same basis.²⁰² When public bodies award to proposers who do not compete on the same basis as the other proposers (by including additional or excluding required matters), a risk exists that the public body did not receive the best value because the proposers were not competing on a level playing field. Also, the public is protected from fraud and favoritism because the public body is precluded from awarding the contract to a competitor on a basis other than what is set forth in the solicitation.

Two provisions in the 2007 best value legislation codify the requirement of responsiveness into best value procurements. First, the “criteria to be used to evaluate the proposals must be included in the solicitation document and must be evaluated in an open and competitive manner.”²⁰³ Second, when the best value method is used, “the solicitation document must state the relative weight of price and other selection criteria,” and the “award must be made to the vendor or contractor offering the best value applying the weighted selection criteria.”²⁰⁴

These two provisions require a public body to consider only the criteria listed in the solicitation, and no other, and only in accordance with their weights listed in the solicitation. The fact that the evaluation must also be conducted in an open manner is included to make it clear that a public body is prohibited from awarding based on secret criteria, criteria developed after-the-fact, or preferences that are not listed in the solicitation. If evaluation must also be made in a competitive manner, all proposers are entitled to compete on the same basis, which ensures that the public benefits from a competitive best value process based on materially responsive proposals.

E. Commentary on Listed Best Value Criteria

The new best value legislation gives a public body some flexibility to identify the particular criteria that will be used to

201. *Loving-Johnson*, 558 N.W.2d at 502–03.

202. *Griswold v. Ramsey County*, 242 Minn. 529, 535, 65 N.W.2d 647, 652 (1954).

203. MINN. STAT. § 16.03 subdiv. 3a (Supp. 2007).

204. § 16C.28 subdiv. 1(c).

evaluate proposals. Indeed, it permits the public body to consider “the specifications of the request for proposal [and] the price and performance criteria as set forth in section 16C.02, subdivision 4a, and [as] described in the solicitation document.”²⁰⁵ Although a public body has discretion to determine appropriate factors and to weight them in the solicitation document, a public body has no discretion to consider factors other than the criteria listed in the solicitation document or to weight the criteria differently during the evaluation process.²⁰⁶ In light of these rules, the public body will want to carefully identify and weight the criteria by which proposals are to be measured so that the formula actually yields the best value for the public. Poorly selected criteria and weights could result in challenges that the procurement process was arbitrary, capricious, improvident, or extravagant.²⁰⁷

Because section 16C.02, subdivision 4a, specifically identifies nine “performance criteria” that “may” be used, public bodies might be inclined to rely heavily upon them to structure the solicitation documents. Regrettably, the nine performance criteria identified are vague, redundant, difficult, if not impossible to objectively evaluate, and not necessarily tailored to provide the best value for the public. If they are to be used, the nine criteria should be clarified to address the concerns discussed below.

The first listed criterion is “the quality of the vendor’s or contractor’s performance on previous projects.”²⁰⁸ It is unclear how “quality” is defined or how a public body can objectively assess “quality”. For construction work, quality should be measured by the degree to which the contractor’s work complies with the design furnished and standards specified by the previous owner. If the owner of a past project wanted the contractor to provide cheap materials, and the contractor satisfied the owner’s requirements, there should be no tally against the contractor on the quality factor.

Certainly, the public body would need to perform thorough data collection and research regarding the previous performance of each proposer to obtain a complete and objective picture of the quality of the contractor’s previous performance. Such a task might require the contractor to list comparable projects completed

205. *Id.* at subdiv. 1(a)(2).

206. *Id.* at subdiv. 1(c).

207. *See supra* Part III.A.

208. MINN. STAT. § 16C.02 subdiv. 4a(1) (Supp. 2007).

by the contractor and contact information for the owner. Then, the public body would want to conduct recorded interviews of the listed owners to see if the contractor's performance met the public body's quality requirements.

In addition, the public body might conduct site inspections of the contractor's prior work. Visual inspections of a contractor's work may not be the best indicator of quality, however, if the contractor's work was in accordance with the contract and observed flaws are related to the design or quality specification provided by the previous owner, or insufficient maintenance. While collecting the data necessary to properly evaluate quality may be burdensome to a public body, a public body risks having an award overturned if its analyses of the quality criterion are not based on substantial objective evidence.²⁰⁹

The second criterion is "the timeliness of the vendor's or contractor's performance on previous projects."²¹⁰ It is important to note that delays are common in the construction industry and trying to properly determine fault or responsibility for delays is no small or easy task.²¹¹ Certainly, a public body should want to have its projects completed on time. Nevertheless, there are ways a public body can protect itself from delays other than collecting and analyzing substantial data to fairly evaluate the timeliness of a contractor's past performance. Usually, a public body protects itself from delays attributable to the fault of the contractor by including in the solicitation documents specified completion dates and liquidated-damages provisions assessing damages against the contractor for each day the project is late. Also, if the contract is to provide a performance bond, the timeliness of the contractor's performance would be secured by a construction surety.

The third criterion is "the level of customer satisfaction with the vendor's or contractor's performance on previous projects."²¹² Satisfaction is often determined by reference to a contractor's quality and timeliness, but if so, then this third criterion is redundant of the first two. Clearly, a better definition of "satisfaction" and better objective means to measure it is needed. Customer satisfaction is also difficult to measure objectively

209. See *supra* Part III.A.

210. § 16C.02 subdiv. 4a(2).

211. For a sense of how complicated this issue can be, see the 357-page discussion of construction delays in 5 BRUNER & O'CONNOR, *supra* note 22, at ch. 15.

212. § 16C.02 subdiv. 4a(3).

because satisfaction is inherently subjective. Thus, a good contractor whose last job was successful could get a bad score if the owner of the previous job was prone to complaints, understated in his praise, or unreasonably demanding. It is possible that the taxpayers will not receive the benefit of this good contractor's proposal simply because the contractor had the misfortune of working in the past for an idiosyncratic customer.

The fourth criterion permits a public body to measure "the vendor's or contractor's record of performing previous projects on budget and ability to minimize cost overruns."²¹³ It is hard to understand the utility of this criterion. Most public contracts are awarded on a lump-sum basis, which means that the contractor has to perform the work for the quoted price. Thus, any "overruns" will be the responsibility of the contractor; in other words, the contractor will absorb its overruns and the project will always be "on budget" unless the owner requests additional work to increase the budget. Also, the public body's budget in most circumstances is established by the public body's architect or engineer. Standard agreements between owners and architects refer to budgets prepared by the architect as "preliminary estimates" and architects attempt to disclaim responsibility for them.²¹⁴ A contractor whose bid exceeds the mistakenly low or preliminary budget of the public body, engineer, or architect should not be penalized. After all, if a previous owner did not like the contractor's bid because it exceeded the architect's preliminary budget, the owner did not have to accept the bid. Instead, the owner could have rejected all bids and redesigned and rebid the project.

In addition, it is common in the construction industry for public owners to ask the contractor to perform additional work, and the contractor would be contractually entitled to additional compensation for that work. Thus, there will be a "cost overrun," but it will be a cost overrun approved in advance by the public body in a change order that modified the contract by the consent of both parties. There should be no penalties assessed against a proposer if the cost overrun in question was a change order approved and signed by the owner. Even if the public body does not agree to the contractor's change order request, the public body cannot hold an owner-driven cost overrun against a contractor

213. *Id.* at subdiv. 4a(4).

214. AM. INST. OF ARCHITECTS, AIA DOCUMENT B141 ¶ 2.1.7 (1997), *available at* <http://www.designadvisor.org/pdfs/b141.pdf>.

because public bodies are not to consider “the exercise or assertion of a person’s legal rights”²¹⁵ in the evaluation process, such as a contractor’s request for additional compensation for additional work ordered or caused by the owner.

The fifth criterion, “the vendor’s or contractor’s ability to minimize change orders,”²¹⁶ is also puzzling. A change order is a contractual modification, and as such, must be agreed to by *both* the owner and the contractor.²¹⁷ No reason exists to penalize a contractor who performs extra work at the owner’s request. The only way for a contractor to control such change orders is to refuse the requests of the customer for additional work, which is usually poor business practice and would result in a low customer satisfaction score. Thus, it is conceivable that a contractor would have to trade a future low score on customer satisfaction for a future high score on minimization of change orders. This might be a Hobson’s choice depending on whether the contractor’s next bid is to a public body who might weight the factors differently than anticipated by the contractor.

Alternatively, the contractor could decide to absorb without charge the cost of owner-initiated change order requests so as to avoid future low scores regarding change orders. However, if contractors are forced to include contingencies in their prices to cover the cost of possible owner changes, the benefits of competitive bidding are lost because the system will result in artificially inflated pricing. Certainly, the public does not receive the best value from a proposal full of contingencies included to cover possible owner requests for future change orders that may never occur.

The sixth criterion is the “vendor’s or contractor’s ability to prepare appropriate project plans.”²¹⁸ This criterion is vague in that there is no definition of “project plans.” If project plans means the detailed drawings and specifications for the project, the criterion is irrelevant because the 2007 best value legislation does not authorize design-build procurement in which the contractor is responsible for preparing design drawings. Instead, the public body is responsible for preparing the project plans for the

215. § 16C.02 subdiv. 4a.

216. *Id.* at subdiv. 4a(5).

217. BLACK’S LAW DICTIONARY 247 (8th ed. 2004).

218. § 16C.02 subdiv. 4a(6).

contractor and the contractor's job is to build the work according to the plans.

Alternatively, project plans could mean work methods. Again, except in unique circumstances, a contractor's work methods should be largely irrelevant to a public body. The public body's main concern is receiving the end project that the public body specified. Whether a contractor uses, for example, man-lifts or scaffolds to accomplish the work should not be of concern to the owner because the end result would be the same. It is also highly doubtful that a public body without in-house expertise would have any credible foundation or ability to evaluate a contractor's proposed means and methods for its work.

It may actually be against the public body's best interest to grade project plans because it may eliminate economic or useful innovations. For example, if by using scaffolds instead of man-lifts, contractor A is able to accomplish the work for half the price of contractor B, the taxpaying public would be best served by hiring contractor A. However, if contractor B receives a higher score on the project plans criterion because the public body prefers man-lifts, then contractor B might get the contract. In short, the taxpaying public would be paying twice as much for the same work simply because the public body, typically comprising lay people, thought that man-lifts were a better work plan than scaffolds. If contractors are to be graded on their work plans, they may be reluctant to use newer and more efficient methods for fear of being scored low on the project plans criterion; and the public will not realize the best values from those newer methods.

The seventh criterion is the "vendor's or contractor's technical capacities."²¹⁹ This criterion seems to overlap the first, third, and sixth criteria, each of which indirectly measure the contractor's technical capacities. Nevertheless, technical capacities could be useful for the public body to evaluate—but only on the right project. For example, if contractor A can achieve the required work by using low-tech means for a lower price than contractor B can achieve the work through high-tech means, the public would be better served by going with contractor A. Going with contractor B, simply because it scored higher on the technical capacity criterion would be extravagant and improvident. Rather than

219. *Id.* at subdiv. 4a(7).

automatically employ this criterion, the public body should be required to justify its use in written findings after due deliberation.

The eighth criterion is “the individual qualifications of the contractor’s key personnel.”²²⁰ Certainly a public body would want to hire contractors with experience in the subject matter of the construction contract. One way of assuring that bidders are sufficiently qualified is to use pre-qualification procedures to narrow the pool of possible bidders. Once contractors are pre-qualified, the public body should be required to issue written findings after due deliberation that there is further reason to discriminate based on the experience or qualifications of a contractor’s “key personnel.”

The ninth and final suggested criterion is “the vendor’s or contractor’s ability to assess and minimize risks.”²²¹ This can also be a useful factor for a public body to consider. Nevertheless, it is unclear from the statute exactly what risks contractors are to be assessing or minimizing or how this ability is to be demonstrated to and objectively measured and scored by a public body. In addition, time, quality, and cost risks are already covered in the first, second, third, fourth, and fifth criteria. The public body can protect itself from other risks by requiring the contractor to provide insurance, to agree to indemnity provisions, and to provide performance and payment bonds.

Although “the vendor’s or contractor’s price” is not listed within the nine specifically listed criteria, the statute requires a public body to consider price in best value procurements.²²² Even though the new legislation defines best value as the result of a procurement method that considers specifically “price” and “performance criteria,” it fails to mention how much relative weight should be given to either consideration. This gap could lead to arbitrary, capricious, or extravagant results. For example, the public body could theoretically assign a one percent weight to price and a ninety-nine percent weight to the fifth performance criteria, “ability to minimize change orders.” The contractor with a high price, yet a very good score in minimizing change orders, would obtain the contract over a contractor with the reverse. If there are

220. *Id.* at subdiv. 4a(8).

221. *Id.* at subdiv. 4a(9).

222. *See id.* at subdiv. 4a (“[B]est value’ describes the result determined by a procurement method that considers *price* and performance criteria”) (emphasis added).

no owner-driven change orders for the project, the public will have paid a premium with no corresponding benefit. Moreover, with so many subjective “best value” points determining which proposer will be successful, the price of the proposal can become practically irrelevant, which should never create the best value for the public.

Although the foregoing example is extreme,²²³ it is designed to illustrate that the present legislation should provide more guidance with regard to what extent price should be weighted. Other states have specified at least a minimum price weight so that subjective best value factors do not overwhelm and render irrelevant the price component of the proposals.²²⁴

IV. CONCLUSION

This article recommends that the Legislature immediately amend its new 2007 best value legislation. First, the best value method should be permitted only after a public comment period and after deliberations and written findings are issued justifying its use. Second, it should be made clear that non-responsive proposals are to be rejected to protect the integrity of the competitive process and to thwart subjective post hoc evaluation of bids. Third, the concept of “openness” should be further defined to require complete transparency in the procurement process. Fourth, price should have a required minimum weight. Fifth, the “performance criteria” should be revised so that they are reasonably tailored to lead to a true evaluation of best value. Sixth, protest rights of taxpayers and proposers need to be specifically recognized and protected.²²⁵

223. This hypothetical perhaps is no so theoretical in light of MnDOT’s selection of the most expensive contractor with the longest schedule to rebuild the collapsed I-35W bridge at a cost to the public of eighty-five million dollars more than an alternative proposal. *See supra* notes 179, 195.

224. *See, e.g.*, Thomson & Kinzer, *supra* note 193, at 32 (discussing then current South Carolina law requiring price to be given no less than sixty percent weight).

225. These legislative suggestions are consistent with the *MSBA Construction Law Section Principles Re: Procurement Legislation*, which the Section created and adopted in 2001 and has since repeatedly reaffirmed. Salient provisions of those principles include:

- Award criteria must be clearly identified, quantified, and weighted in the solicitation, and award must be made pursuant to the stated criteria.
- Any procurement method and basis for award must avoid the opportunity for favoritism, fraud, collusion, or improvidence.
- Allowed procurement methods should maximize competition.
- The public should have access to information throughout the procurement process.

With these changes, the legislation will more likely yield best value results. Nevertheless, public bodies, taxpayers, proposers, and courts will also have key roles in ensuring that the new legislation will be implemented in a way that guarantees the most responsible use of public funds. In the first instance, the public bodies owe a duty to ensure that the taxpayers truly receive the best value promised to them in this new legislation. At a minimum, responsible public bodies must: (1) conduct best value procurements in a completely transparent manner; (2) carefully deliberate on the question of whether it is appropriate to use the best value method instead of the lowest responsible bidder method; (3) carefully select and weight appropriate criteria to measure proposals; (4) ensure that the bids are measured in accordance with the selected criteria and their listed weights, not on secret or subjective factors; (5) reject bids that are non-responsive; and (6) reject all bids if the product of the best value formula yields an objectively improvident or extravagant contract.

Taxpayers and proposers must be active participants in the procurement process. They must: (1) review proposed best value criteria to determine if they are justified on their particular project and demand that they be revised if they are not; (2) demand at all times that proposers be allowed to compete on an equal playing field; (3) demand access to the materials and rationales used by public bodies to justify awards in best value procurements; and (4) lodge complaints if those decisions are made in a fiscally irresponsible, arbitrary, or capricious manner.

Courts also must meet the needs of the taxpayers by making sure that the best value legislation is construed in a manner that truly gives the taxpaying public the best value. Courts must ensure

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- In any negotiated procurement, the public agency shall not disclose, prior to award, any bidders' proprietary or confidential information such as price or design solutions (no "technical leveling").
 - The agency should provide for a specific finding explaining why the procurement method selected is preferable for the specific project and how that method will maximize the public's benefit as opposed to other methods.
 - Any responsibility, capability, or qualifications inquiry regarding a bidder will not consider that bidder's past assertions of claimed legal rights.
 - Award to a successful protestor of its costs, including attorneys' fees, when acting as a private attorney general to uphold bidding laws.

See Letter from Dean B. Thomson, Chair of the Legislative Subcommittee of the MSBA Construction Law Section to Renee Anderson, MSBA Main Office, enclosing principles for 2005 (on file with the authors).

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that the strict protocols included in the new legislation are followed by, among other things, voiding contracts awarded to non-responsive bidders and guarding against possible fraud, favoritism, or undue influence. Best value procurement requires the constant vigilance of all participants to reach its promised potential or else the 2007 legislation will not deliver “best value,” but only disappointment, to the state’s taxpayers.