

THE CONSTRUCTION LAW BRIEFING PAPER

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COMPETITIVE BIDDING: A NEW MINNESOTA CASE LEVELS THE PLAYING FIELD Jocelyn L. Knoll¹

INTRODUCTION

“Play by the rules.” How many times have we heard or used this oft-repeated phrase? Yet, when it comes to competitive bidding, do you sometimes wonder whether public authorities are applying the rules uniformly? Is the public authority that is letting the project permitting your competitors to gain an unearned advantage by reserving discretion to waive “informalities” or “irregularities” in a bid?

Fortunately, a recent decision from the Minnesota Court of Appeals should help level the playing field for all participants in Minnesota’s competitive bidding arena by removing a public authority’s discretion to waive a “mistake” in a bid that involves price when it affects the order of bidders. This briefing paper will discuss this recent decision, *Lovering-Johnson, Inc. v. City of Prior Lake*², and its impact on competitive bidding in Minnesota.

THE CITY’S IMPROPER AWARD

The City of Prior Lake (the “City”) issued an invitation for bids for a contract to construct a maintenance and storage facility (the “Project”). The

bid documents contained the typical reservation by the owner of its right to:

waive informalities or irregularities in a Bid received and to accept the Bid which, in the Owner’s judgment, is in the Owner’s own best interest.

The bid form required bidders to provide a base bid and bids on eleven alternates, and all bids were to be written in both words and numbers. The pre-printed bid form labeled the alternates as “adds” or “deducts” depending on how the City anticipated contractors would bid. Alternate 11, the only alternate at issue in this case, was indicated as a “deduct.” Lovering-Johnson, Inc. (“LJI”), Rochon Corporation (“Rochon”) and twelve other contractors submitted bids on the Project. Rochon inserted plus signs in front of the words and numbers for Alternate 11. At the bid opening, the City’s architect opened and read aloud each bid. The City’s architect read Rochon’s bid for Alternate 11 as a positive number (or add) of \$21,500. With Alternate 11 included as an add, Rochon’s bid was \$36,000 higher than LJI’s low bid.

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After all the bids had been read, Rochon's representative approached the City's architect and informed the architect that Rochon had intended to bid Alternate 11 as a deduct, not as an add. A few days later, Rochon's project manager called the City's architect to explain that Rochon had intended to bid Alternate 11 as a deduct, and that the "+\$21,500" written on Rochon's Alternate 11 bid was the result of human error. The project manager followed up the phone call by forwarding to the City's architect a copy of Rochon's bid worksheet for Alternate 11 and the bid from its subcontractor.

After reviewing Rochon's bid sheets and claim of human error, the City decided it would accept Rochon's explanation, waive the mistake as a clerical error, and allow Rochon to change Alternate 11 by omitting the plus signs, thereby making Rochon's bid for Alternate 11 a deduct. This change lowered Rochon's total bid by \$43,000, causing Rochon to displace LJI as the lowest bidder by approximately \$7,000. Despite protests from LJI, the City Council voted to award the Project to Rochon.

LJI informed the City that, pursuant to Minnesota's competitive bidding laws, the determination of the lowest responsive and responsible bidder must be made by comparing the original *unaltered* bids at the time of bid opening. However, citing to language in the instructions to bidders stating that "[t]he [City] reserves the right to waive all bid irregularities," the City claimed that the "+" and "-" notations on Rochon's bid were simply formalities which the City could waive. The City maintained this position despite agreement between the parties that construction industry bidders frequently bid alternates differently than what the public authority anticipates, sometimes *intentionally* bidding "adds" as "deducts" and "deducts" as "adds." In fact, on this Project at least one other bidder intentionally bid an add on Alternate 9, even though the bid form contemplated a deduct.

LJI'S BID PROTEST

The District Court's Decision

LJI filed a bid protest with the district court and sought to enjoin the City from entering into a contract for the Project with Rochon. The district

court denied LJI's bid protest, concluding that the City did not violate Minnesota's competitive bidding law because, in the court's judgment, Rochon's bid for Alternate 11 was a minor clerical error or irregularity that the City was permitted to waive, as provided in the bid documents. Accordingly, the City and Rochon entered into the contract for the Project.

A disappointed bidder in Minnesota who is unsuccessful in enjoining the award of the contract but ultimately prevails on the merits of the bid protest is limited to recovering the costs of preparing its bid (i.e., lost profits and attorneys' fees are not recoverable). Despite the small monetary incentive to proceed with its protest, LJI recognized that the purposes of the competitive bidding system would be defeated if the City were allowed to circumvent the competitor's bidding laws. Thus, in order to safeguard the integrity of the competitive bidding process, LJI appealed the district court's decision to the Minnesota Court of Appeals.

The Court of Appeals' Decision

On appeal, LJI argued that, under Minnesota's "firm bid" rule, the City had no authority to change Rochon's bid after it had been opened because the change affected price, thereby constituting a material and substantive change to the bid. The court of appeals agreed, quoting the Minnesota Supreme Court's description of the essential nature of the competitive bidding process for public contracts:

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 . . . that no actual fraud was present. *It is for this reason that no material change may be made in any bid after the bids have been received and opened since to permit such change would be to open*

the door to fraud and collusion.
(Citations omitted.)

The court of appeals observed that (i) a public authority must determine bid responsiveness at the time the bid is opened, (ii) once a bid has been opened the public authority has no discretion to make any *material* changes or modifications to the bid, and (iii) the rule prohibiting material changes once a bid had been opened applies despite provisions in the bid documents that allow the public authority to waive irregularities. The court then stated that the "issue becomes whether a change or modification to the bid is 'substantial or material.'" The court determined that the test for judging whether a change or variance is material is "whether the change gives a bidder a substantial advantage or benefit not enjoyed by other bidders."

Applying this test to the City's actions, the court concluded that the City materially modified Rochon's bid for Alternate 11 by ignoring the plus signs after the City had read Rochon's bid for this alternate as "+\$21,500:"

Once [the City's architect] read the bids, Rochon had a substantial advantage over its competitors because Rochon knew the bid of the lowest responsible bidder. As a result, Rochon was in a position to become the lowest bidder by lowering its bid to the "intended" price. Based on Rochon's certain knowledge of the lowest bid after bid opening, we believe Rochon had an impermissible unfair advantage over the other bidders.

The court stated that it was particularly concerned by these circumstances because, at the time of the bid opening, Rochon's bid for Alternate 11 was "ambiguous on its face." In other words, Rochon's insertion of the "+" after the anticipated deduct put it in the unique position of either claiming that it always intended a deduct or, alternatively, that it intended to modify the proposed "deduct" to an "add." By committing this mistake, Rochon was in the position to (i) affirm a deduct and receive the award, or (ii) insist that it intended an add if it determined, after the bids were opened and read, that its bid was too low. In fact, the parties stipulated that

Rochon had, in fact, made a clerical mistake concerning Alternate 11.

The fact that there was no evidence that Rochon or the City engaged in fraud or collusion was of no consequence to the court. The court's key concern was that such an opportunity for abuse was available. Rochon had a benefit not available to other bidders--i.e., it knew the amount of the lowest bid at the time that it argued that its bid for Alternate 11 was meant to be a deduct. The court stated that, because the change involved price and altered the order of bidders, the City's actions resulted in a material change after Rochon's bid was opened.

Accordingly, the appellate court ruled in favor of LJI and held that the change of the plus sign to a minus sign on Alternate 11 of Rochon's bid constituted a modification of a material term after bid opening in violation of Minnesota's competitive bidding laws. Consequently, the court held that LJI was entitled to its bid preparation costs.

CONCLUSION

The court of appeals' decision in *Lovering-Johnson* has clarified that, notwithstanding the insertion of language in bid documents that purports to permit the waiver of any and all irregularities or informalities in a bid, a public authority does *not* have the right to waive any irregularity or informality that involves the substance of a competitive bid. Stated differently, any variation that would affect the price, quantity, quality or delivery--the PQ²D--of the work or item being procured cannot be reformed by the public authority after the bid has been opened. Accordingly, if you submit a bid on a competitively bid project and one of your competitors is permitted to change any item in its bid relating to PQ²D factors, it may be worthwhile to consult an attorney experienced in construction law and, in particular, the competitive bidding system.

If you would like a copy of the *Lovering-Johnson, Inc. v. City of Prior Lake* decision or additional information on the competitive bidding process, please call Jocelyn Knoll or any other member of the firm.