

***Amended**

- Agenda -



**Sauk County Board Of Supervisors
Special Meeting**

Pursuant to §59.11(2)(a), Wisconsin State Statutes

Tuesday, September 30, 2008 @ 6:00 p.m.

West Square Building, 505 Broadway, Rm. #326, Baraboo, Wisconsin 53913

- **Call to order, and certify compliance with Open Meeting Law.**
- **Roll call.**
- **Invocation and pledge of allegiance.**
- **Adoption of agenda.**

- **Scheduled appearances:**
 - Possible appearance by Sharon Schmelling, Jefferson County Board Chair, regarding recent history with Countryside Home.
 - **Possible* teleconference presentation by representatives of ICF construction.

• **Public comment.**

• **Communications.**

*Letter from Melli Law, S.C., Attorneys At Law, regarding Sauk County Health Care Center Project No. S7190. **(pages 14 - 17)**

• **Reports** - informational - no action required:

Page #

- **Supervisor Ashford, Chair UW Extension, Arts & Culture, regarding Wisconsin Counties Association (WCA) conference - Sauk County booth.*

- 3 - 11 *Pro forma information, estimated cost of operations on new 82 bed Building. -Supervisor Paul Endres; and Kimberly Gochanouor, Sauk County Health Care Center Superintendent/Administrator, available for questions.*

***Amended**

• Resolutions & Ordinances:

- | | |
|---------------|---|
| Page # | COMMITTEE: |
| | HEALTH CARE CENTER BUILDING COMMITTEE: |
| 18 | *Resolution 99-08 Waiving Irregularities in McGann Construction Bid |
| | HEALTH CARE CENTER BOARD OF TRUSTEES and
HEALTH CARE CENTER BUILDING COMMITTEE: |
| 12 & 13 | Resolution 98-08 Authorizing A Contract With _____ For Construction Of
The Sauk County Health Care Center. |
- Adjournment to a date certain.**

Respectfully submitted,



Marty Krueger
County Board Chair

✓ **ATTENTION - County Board members, County staff, & public:**

Materials handed out at Sauk County Board of Supervisors meetings are required to be placed on file with the official records of the Proceedings of the Sauk County Board of Supervisors. **Furnish the County**

Clerk a copy of:

- 1.) informational handouts distributed to Board members; and
- 2.) original letters/communications presented to the Board.

✓ **ATTENTION - County Board members:** Stop in the Office of the County Clerk prior to each Board meeting to sign original resolutions/ordinances approved by committees to be brought to the full County Board.

Any person who has a qualifying disability that requires the meeting or materials at the meeting to be in an accessible location or format should contact Sauk County at 608.355.3269, or TTY at 608.355.3490, between the hours of 8:00 A.M. and 4:30 P.M., Monday through Friday, exclusive of legal holidays, at least 48 hours in advance of the meeting so that reasonable arrangements can be made to accommodate each request.

www.co.sauk.wi.us

Agenda mail date via United States Postal Service: Wednesday, September 24, 2008

Amended: Monday, September 29, 2008 @ 4:05 p.m.

Agenda preparation: Marty Krueger, County Board Chair, with the assistance of Kathryn Schauf, Administrative Coordinator and Beverly J. Mielke, County Clerk

s:/everyone/admin/ctybdagenda/2008/093008specialctyb.lwp

JAMES K. PEASE, JR.
JAMES K. RUHLY
THOMAS R. CRONE
PHILIP J. BRADBURY
SUSAN C. SHEERAN
DOUGLAS E. WITTE
DEVON R. BAUMBACH
JENIFER L. KRAEMER
MARK P. TILKENS
CHARITY A. MCCARTHY
ELIZABETH ERICKSON PEVEHOUSE
MICHAEL P. GALLAGHER
MOLLY K. BUSHMAN
RACHEL E. ABHOLD
JAMES W. FASII



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RECEIVED

SEP 29 2008

Sauk COUNTY CLERK
MADISON, WISCONSIN

SENDER'S E-MAIL ADDRESS: jlk@mellilaw.com

September 26, 2008

VIA FACSIMILE AND OVERNIGHT MAIL

Ms. Alene Kleczek
Sauk County Corporation Counsel
505 Broadway, Room #315
Baraboo, WI 53913

Re: Sauk County Health Care Center;
Project No. S7190

Dear Ms. Kleczek:

This letter is submitted on behalf of Kraemer Brothers, LLC and relates to bids recently taken on the Sauk County Health Care Center project in Reedsburg, Wisconsin (the "Project").

Kraemer Brothers has become aware of a decision made by the County's Long Term Care Committee to recommend that certain irregularities in another contractor's bid on the above project be waived. We believe that the Committee's recommendation must be rejected by the County, as it would result in an abuse of the County's discretion under Wisconsin law.

The facts as we understand them are that the second low bidder on the base bid, McGann Construction, submitted its List of Owner-Purchased Materials and Equipment on the day after the deadline specified in the bid form. The List of Owner-Purchased Materials and Equipment is Section VIII of the revised Bid Form. The County's bid instructions require the bidders to timely submit the bid form. The Committee voted to waive the irregularities in McGann's bid. However, waiving the irregularities in McGann's bid is not within the County's discretion under these circumstances.

According to section 59.52(29), Wis. Stats., where the cost of the work is estimated to exceed \$25,000, the work "shall be let by contract to the lowest responsible bidder." Although the County has some discretion under the bidding statutes and the bid documents, the County's discretion is not unlimited. A court will interfere with a bidding authority's discretionary act if it is arbitrary or unreasonable. *Glacier State Distributing Services, Inc. v. Wisconsin Dept. of Transportation*, 221 Wis. 2d 359, 368 (Ct. App. 1998). An arbitrary action is one that lacks a rational basis or is the result of an "unconsidered, willful or irrational choice of conduct." *Id.* at 370.

For several reasons, a decision by the County to accept McGann's late bid, under these circumstances, would be arbitrary and unreasonable. First, the exercise of discretion is unreasonable because the irregularity is material to the bidding process. Second, the Committee's decision is arbitrary because the Committee failed to consider several factors in reaching its decision, including the advantage to McGann and the purpose of the lowest responsible bidder requirements.

1. The Amount of Tax Savings is Material to the Bidding Process.

There is no question that the List of Owner-Purchased Materials and Equipment was part of the bidder's Bid and was required to be submitted by a specific date and time. The County's bid instructions for the Project define the "Bid" as a "complete and properly signed Bid Form to do the Work for the sum stipulated therein submitted in accordance with the Bidding Documents." Section 7.2 of the Bid Instructions states, "Bids are due in the office of the County Clerk ... prior to the time and date stated on the Invitation to Bid. Bids received after the time and date for receipt of Bids will be returned unopened."

Section 1.06 of the Invitation to Bid states, "The list noted in 'VIII. LIST OF OWNER-PURCHASED MATERIALS AND EQUIPMENT for Base Bid' of Section 00300-Bid Form is due at **2:00 PM on Monday, September 22, 2008.**" (emphasis in original) Section VIII of the Bid Form also notes that "Contractor must provide this complete section by 2:00 PM on September 22, 2008."

The List of Owner-Purchased Materials and Equipment is intended to provide the County with specific information about the amount of tax savings that the County would realize in contracting with the bidder. The tax savings is identified in a lump sum for the base bid and for each alternate, and the bidders were required to provide the County with the name of the supplier, purchase order amount and tax savings for each lump sum amount. The Contract was to be awarded on the basis of the Base Bid plus any accepted Alternates. However, the amount of tax savings that would be realized by the County in selecting a bidder certainly is a material item as it ultimately impacts the contract price. A non-material item, in contrast, has been found to be something such as allowing a bidder to complete a blank space identifying the amount of the required penalty bond. See *Dillingham Construction, Inc. v. Milwaukee Metropolitan Sewerage District*, 629 F. Supp. 406, 410 (E.D. Wis. 1986). Under the reasoning in *Dillingham*, one issue that should be reviewed by a court in determining whether a bidding authority unreasonably exercised its discretion is whether the bidder's noncompliance with the bidding rules was material. *Id.* In this case, it was.

2. The Committee's Decision is Arbitrary because it was Unconsidered.

In reaching its recommendation, the Committee failed to consider the advantage that it was giving to McGann by accepting its late bid. In order to prepare the List of Owner-Directed Materials and Equipment, each bidder was required to determine: (a) what materials and equipment would be owner-direct purchased, (b) who would provide the materials/ equipment, (c) the total cost of the purchase order to that subcontractor or supplier, and (d) the sales tax savings to the County. This means that not only did the contractor have to review its own work for these items, but also contact

each subcontractor and supplier and request that information from them – all in a relatively short time period.

The bid instructions contain a list of materials that would be owner purchased, but expressly state that the items are “not necessarily limited to” the list. This means that the more items a bidder identifies for owner-purchase, the greater the possibility of tax savings to the County. Having an additional day to compile this information is a definite advantage.

Further, having an additional day to compile information from subcontractors and suppliers provides another advantage, in the form of more definite pricing information. After being contacted by the contractor, the subcontractors and suppliers were required to then evaluate their own scope of work, determine whether any other materials could be owner-direct purchased, contact its second tier subs and suppliers, complete any negotiations between them to determine which competing prices to accept, and finalize its costs. To the extent the subcontractor or supplier is short on time, the final number back to the contractor (bidder) may not be as complete or accurate as it could be – and therefore, is more likely to be a conservative (i.e., lower) projection of the sales tax savings.

The only case in Wisconsin in which a municipality accepted a late bid, and was within its discretion to do so, arose under a situation very different from this one. In *Power Systems Analysis v. City of Bloomer*, 197 Wis. 2d 817 (Ct App. 1995), the court agreed that the City of Bloomer had the discretion to accept a bid that was delivered 90 minutes late, after bids had been opened. However, in that case, the bidder gained no advantage by providing the late bid. Rather, the bidder had explained that its bid was prepared the Friday before the bid date and was placed in a sealed envelope picked up by a courier service that day. The courier service was to deliver the bid to the City on Monday, but its delivery truck broke down on route to Bloomer. *Id.* at fn1.

The *Power Systems* court, in a concurring opinion, noted that, “In this case the bid was received one and one-half hours late and under circumstances that provide some assurance that the delay in submitting the bid did not provide an opportunity for manipulation or alteration of the bid to the detriment of the other bidders. Under these circumstances, if it can be determined that the tardiness was not material and acceptance will not compromise the integrity of the bidding process, the majority is correct in deciding that the City has the power to exercise discretion to receive the tardy bid. However, there must be a judicial determination of whether these criteria are met in this case. The City does not have the power to ignore the bidding rules it established if these criteria are not met.” *Id.* at 828.

In this case, McGann had an extra day to pull together its sales tax numbers and information. Any decision to waive irregularities and accept McGann’s late bid results in an advantage to McGann and a detriment to the other bidders, and compromises the integrity of the bidding process and the bidding rules and procedures established by the County.

3. The Committee's Decision is Arbitrary because it is contrary to the Purposes of the Low Bidding Statutes.


"Statutory bidding requirements are designed to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies at the most reasonable price practicable." *Aqua-Tech v. Como Lake Protection & Rehabilitation District*, 71 Wis. 2d 541, 550 (Wis. 1976).

The Committee's decision opens the door to allowing favoritism, or worse, into the bidding process. It is our understanding that, in considering whether to accept the noncomplying bid, several of the Committee members knew the dollar amount of sales tax savings that would be realized with McGann's bid, versus the dollar amount of sales tax savings with Kraemer Brothers' bid. That knowledge is improper in reaching this decision.

Further, from a public policy standpoint, it is difficult to believe that the County would want to open the door to the acceptance of late bids in other circumstances in which a broken down delivery truck or similar uncontrollable act is not to blame. Such a policy raises the perception that the County's bidding process is not necessarily an impartial one. If that becomes the perception, even the policy that the public is to receive the best work for the best price is in jeopardy, as contractors may choose not to invest the time or effort into participating in a process with questionable credibility, thereby eliminating the County's ability to ensure that it is receiving competitive bids for work it seeks to have performed.

For the reasons set forth above, we believe that any decision by the County to waive irregularities in McGann's bid created by its late submission of the List of Owner-Directed Materials and Equipment would be arbitrary and unreasonable and would be an abuse of the County's discretion under Wisconsin law.

We would appreciate a response from the County as soon as possible.

Very truly yours,

Jennifer L. Kraemer

JLK/sma

cc: Kraemer Brothers, LLC (via fax)



WAIVING IRREGULARITIES RELATED TO TIMING OF RECEIPT OF BID DOCUMENTATION WITH McGANN CONSTRUCTION, INC. FOR CONSTRUCTION OF THE SAUK COUNTY HEALTH CARE CENTER

WHEREAS, the Sauk County Board of Supervisors has considered and passed various resolutions, including resolutions 01-08 and 69-08, authorizing the construction of the Health Care Center facility; and,

WHEREAS, the Health Care Center Building Committee has been working with County staff and project architect Horty Elving to solicit bids from pre-qualified general contractors to accomplish construction of the Health Care Center; and,

WHEREAS, the Health Care Center Building Committee has received competitive sealed bids for the construction of the Health Care Center; and,

WHEREAS, the Health Care Center Building Committee recommends that the Sauk County Board of Supervisors waive the irregularities with regard to the tardy submission of some required documentation related to the timely bid submitted by McGann Construction, Inc., if any; and,

WHEREAS, your Committee believes it to be in the best interest of Sauk County to do so.

NOW, THEREFORE, BE IT RESOLVED, by the Sauk County Board of Supervisors, met in special session, that the bid irregularities of McGann Construction regarding the timing of receipt of required bid documentation are waived .

For Consideration by the Sauk County Board of Supervisors on September 30, 2008.

Respectfully submitted,

HEALTH CARE CENTER BUILDING COMMITTEE

Paul Endres, Chairperson

Virgil Hartje

Tommy Lee Bychinski

William Higgins

Joan Fordham

Fiscal Note: Waiving the bid irregularities will result in having an additional bid to consider for comparative purposes, and provides the Board with additional alternatives.

MIS Note: No MIS impact.