

Public Owners' Guide to Legal Issues on the Bidding and Award of Construction Contracts in Iowa

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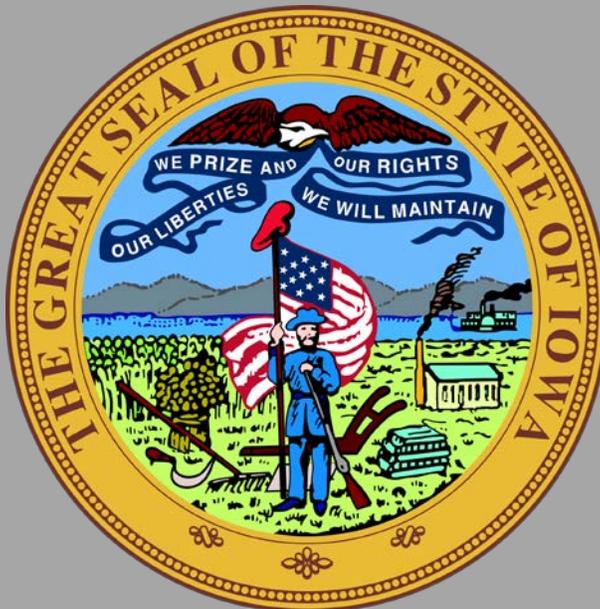


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INTRODUCTION

The purpose of this guide is to provide public owners at all levels a better understanding of Iowa's competitive bidding laws as they relate to the bidding and award of public works construction projects. The contributing parties undertook this initiative with the understanding that there is a continual need for education on this subject. This Resource Guide will focus primarily on the design / bid / build project delivery system required by Iowa law for most public contracts. Public owners will be served better by a thorough understanding of how this particular project delivery system works with an emphasis on the legal pitfalls along the way to a successful construction project.

This Resource Guide will also touch on various legal issues which may arise for owners considering the use of construction management advisors in the building process.

Contributing Associations:



Master Builders of Iowa
www.mbi.build
515-288-8904



AIA
Iowa

American Institute of Architects, Iowa Chapter
www.aiaiowa.org
515-244-7502

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Iowa

American Council of Engineering Companies of Iowa
www.iaengr.org
515-284-7055

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**Disclaimer: Nothing contained in this work shall be considered to be the rendering of legal advice on specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This work, in any form herein, is intended solely for educational and informational purposes.*

SECTION 1

DESIGN / BID / BUILD IOWA'S PUBLIC SECTOR DELIVERY METHOD

The term design / bid / build is used to refer to a specific project delivery method. It refers here solely to a method of project delivery in which the owner procures design and construction documents from an independent designer, uses competitive bidding to get prices for all work required to build the project as specified, and then selects a contractor to build the project on the basis of a responsive low bid received from a responsible contractor.

An important feature of a design / bid / build method is that it intentionally separates the design phase, bidding phase and the construction phase so that each is performed independently. This creates important consequences in the roles and responsibilities of the owner, designer and the contractor. There is a

sequential chain of events in design / bid / build contracts. The owner first enters into a contract with a designer, which prepares the building design and the necessary documents for construction. Next, the owner selects a general contractor through a competitive bidding process. The general contractor in turn selects subcontractors, (usually through competitive pricing) to perform parts of the work. Subcontractors may employ sub-subcontractors for specialty work. General contractors, subcontractors and sub-subcontractors may all provide labor and they may all purchase materials from suppliers. The designer has no contract with the contractor, but acts as the agent of the owner for design services and for contract administration during construction.

IMPORTANT TERMS ASSOCIATED WITH DESIGN / BID / BUILD PROJECT DELIVERY SYSTEMS

Construction Documents

Construction documents are a group of documents issued by the owner with the assistance of the designer to competing contractors so they can prepare bids. The construction documents typically include a project manual containing the specifications and other bidding documents, and drawings (sometimes referred to as "plans" or blueprints"). The construction documents, along with other bidding information, are sometimes called "bid documents".

Contract Documents

Contract documents consist of the construction documents, together with the agreement between owner and contractor, general and supplementary conditions of the contract, and addenda, if any. Sometimes, other bidding documents are also included in the contract's definition of contract documents, such as the invitation to bid, instructions to bidders, and contractor's bid form.

Lump Sum Fixed Price

In the design / bid / build method of project delivery, the expectation is that the bidders will compete against each other based on identical construction documents to offer the owner the lowest price. Each bidder must furnish all materials and labor necessary to complete the work required by the drawings and specifications in conformance with the terms and conditions stated in the construction documents.

Competitive Bidding

Competitive bidding is the heart of design / bid / build. Sealed bids are used in public works to ensure fairness and objectivity. Bids are opened in public and the entire process is subject to scrutiny by bidders, ordinary citizens and other interested parties. Public bidding procedures must conform to Iowa law, administrative regulations and basic principles of fairness.

Responsive Bid

In design / bid / build, the construction contract is awarded to the lowest responsive bid submitted by a responsible bidder. A “responsive bid” is an unequivocal offer by the bidder to do everything required by the construction and bid documents, without exception. If a bid contains qualifications, conditions, or exclusions that differ from the requirements stated in the construction documents, or if it is an equivocal offer, the bid is said to be non-responsive and should not be accepted or read into the record. A bid must offer to perform all requirements of the construction documents so the owner’s acceptance of the bid creates a binding contract.

Responsiveness relates to the invitation to bid and the bid itself. This is a principal reason why invitations to bid should be as clear as possible. The bid submittal is responsive if it provides all of the information required in the invitation for bids issued by the public agency, including pricing, completion time, bid bond requirements, acknowledgement of addenda, and signature of the bidder. A bid irregularity may be waived by the public agency, but only if it does not give the bidder an unfair competitive advantage. For example, in *Gaeta v. Ridley School District*,¹ the court found that obtaining a bid bond from a bonding company with a rating less than that specified was not an excusable irregularity, but a material defect giving the bidder a competitive advantage when allowed to obtain a replacement bond (presumably because the bond premium would be lower for a lower rated company, thus allowing the bidder to submit a lower price). (See **Appendix A** for more information on bid irregularities.)

Responsible Contractor

Once a low bidder has been identified through an analysis of the responsive bids, the owner must then evaluate the “responsibility” of the low bidder. The low bidder is not necessarily entitled to the award. It must then be determined to be responsible. A responsible contractor is one that can perform and complete the work required by the contract documents, demonstrated to the satisfaction of the owner. A responsible contractor must possess the necessary financial and technical capability to perform

the work as well as the tenacity to do so, usually demonstrated by the contractor’s past performance record. A responsible contractor must have the equipment, materials and workforce – or the ability to obtain them – sufficient to complete the work. This usually is demonstrated by ownership of equipment or “suitable arrangements to rent equipment,” and the ability to purchase materials and hire a workforce.

Iowa courts give governmental bodies’ considerable latitude when determining a bidder’s responsibility. In *Istari Construction Inc. v. Muscatine*,² Department of Housing and Urban Development (HUD) had determined a contractor to be responsible on a HUD-funded city project. Despite this determination, the city rejected the contractor’s bid based on the contractor’s lack of responsibility. The Iowa Supreme Court held that the city was not prevented from denying that the contractor was responsible, even though HUD had determined otherwise. This discretion must be exercised objectively and decisions deemed to be arbitrary or based on favoritism will be voided by the court.

Summary and Overview of Design / Bid / Build Method

The design / bid / build project delivery system of construction is made up primarily of a team composed of the owner, designer and contractor. A major characteristic of the design / bid / build delivery system is that the owner enters into a contract with the designer for the design and documentation and then enters into a separate contract for construction with a contractor. The owner selects the contractor by competitive bidding on the basis of the responsiveness of the bid and the responsibility of the bidder. The law requires the owner to award the contract to the lowest responsive, responsible bidder.³

This project delivery system must proceed in a linear fashion, because the design must be completed before a contractor can be selected. The primary phases consist of programming, pre-design, schematic design, design development, construction documents, bidding, and construction administration. The roles and responsibilities of the owner, designer and contractor are discussed in the following section.

¹ *Gaeta v. Ridley Sch. Dist.*, 788 A.2d 363 (Pa. 2002).

² *Istari Constr. Inc. v. Muscatine*, 330 N.W.2d 798 (Iowa 1983)

³ See, e.g., Iowa Code § 26.9, (2017).

THE LEGAL ENVIRONMENT FOR THE ROLES & RESPONSIBILITIES OF THE OWNER, DESIGNER AND CONTRACTOR ON A DESIGN / BID / BUILD PROJECT

The Owner's Roles and Responsibilities

It is the owner's duty to decide the scope, program, and budget for a project prior to design. During design and construction, the owner monitors the project's progress and quality and makes periodic payments to design and construction practitioners.

The owner in the design / bid / build method has separate contracts with the designer and the contractor. Those two contracts are governed by two very different standards, since the designer functions as the owner's agent during construction.

When the owner issues the construction documents to the bidders, the owner implies that the plans and the specifications are reasonably sufficient for the contractor to follow and use to complete the project. This is known as the *Spearin Doctrine*, which the Iowa Supreme Court arguably adopted in *Midwest Dredging v. McAninch*.⁴ If the drawings and specifications contain errors that cause the contractor to incur extra cost, the owner is responsible for the extra costs. In other words, when the owner issues the construction documents to the competing contractors, the owner asks the contractors to assume the package is correct and complete and that they need not include a contingency for the possible unknown costs due to errors or omissions in the construction documents. Allowances for unknown costs would result in a higher bid based on guesses. Instead, it is in the owner's interests to agree to bear the financial risk when such problems inevitably arise.

Although the owner warrants the constructability of the plans and specifications to the contractor, it is not common for the designer to warrant to the owner that the same plans and specifications are "perfect". Rather, the designer represents to the owner that the design and documentation were prepared with a degree of care and skill exercised by the architectural

or engineering profession at large.⁵ If the designer makes a design error that results in the owner having to pay more for the project, the designer will be liable to the owner only if the error occurred because the designer failed to perform in accordance with the standard of care and skill applicable to the profession at large.⁶

Thus, due to the unique nature of each design, there is a potential for design errors or omissions to occur even though the designer performed in accordance with the requisite degree of care and skill. In those instances, the owner must compensate the contractor for any additional costs that may result, usually through a change order to the contract. However, the designer will usually not be liable to the owner unless the error is due to professional negligence. As stated in one nationally-known treatise on construction law:

"[Thus] it is possible for an owner to be held liable to a contractor for breach of its implied warranty of design adequacy even though the owner may have no recourse against the design professional for design negligence."⁷

For this reason, the design professional will usually recommend that the owner set aside a percent of the estimated construction cost as an "owner's contingency" – a reserve allowance to cover unexpected costs such as hidden conditions. Such a contingency remains wholly under the owner's control as to when and if it is used to cover such expenses.

This does not mean, of course, that the contractor can ignore obvious design errors.

For example, the American Institute of Architects Standard General Conditions requires the contractor to

⁵ See e.g., AIA-B141 Standard Form of Agreement between Owner and Architect, Art. 1.2.3.2 (1997 ed.).

⁶ *Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975).

⁷ Bruner & O'Connor on Construction Law, Sec. 9.82, p. 670-671, West Group, 2002 (Citing various cases.)

⁴ *Midwest Dredging v. McAninch*, 424 N.W. 2d 216 (Iowa 1988). The case does not specifically adopt the *Spearin* doctrine.

report to the architect any design errors he discovers, although that same provision does not give the contractor the responsibility to discover such errors.⁸

In the design / bid / build method, the owner delegates the design and construction documentation to the designer and the construction to the contractor. But that does not mean that the owner has no duties. The owner's duties are especially important because of the competitive bidding process required by Iowa law to select the contractor.

During the design and documentation phase, the owner is responsible for providing its requirements to the designer and for providing timely responses to the designer's submissions. Similarly, during the construction phase, the owner's duties executed by its agent, the designer, include timely responses to the contractor's submittals, requests for information, and proposed changes and claims. In addition, the owner is ultimately responsible for interpreting the requirements of the contract, the drawings and specifications, usually relying on the expertise of the designer. But some of the owner's most important duties are in the bidding phase. Although the designer may advise the owner about the bids received, only the owner can accept a bid and select a contractor.

The bidding documents tell contractors how the owner will select the contractor. The owner will award a contract to the responsive, responsible contractor that submits the lowest lump sum price to complete the work in accordance with the construction documents. In public contracts the owner chooses the contractor by applying those criteria in order to comply with the Iowa statutes, regulations and the terms of the bidding documents. In addition to meeting the legal criteria, the owner should abide by the ethical procedures established by the industry.

The Designer's Role and Responsibilities

It is the designer's duty to translate the owner's needs and requirements into drawings and specifications to be used during construction. During the construction phase, the architect may assist the owner with such services as monitoring the progress of the work,

⁸ AIA-A201 General Conditions of the Contract for Construction, Art. 3.2.2 (2017 ed.).

verifying the specified level of quality is being achieved, and certifying payment applications. The architect should provide unbiased interpretations of the contract documents and give additional instructions as needed to enable the contractor to perform its work.

During the design phase, the designer's responsibilities are to the owner. The designer has the contractual and professional relationship with the owner and no contractual relationship with the contractor. However, the designer recognizes that the contractor will rely on the designer to perform in accordance with the contract documents.

The designer's responsibility is to create a design that meets the owner's needs, is structurally sound and complies with all the applicable requirements of building codes and other governmental requirements. The designer owes the owner two types of duty – a duty created by a professional standard of care expected of designers or engineers, and a contractual duty established by the contract between the designer and owner. Iowa courts consider these duties as merged within the contract terms.

As stated earlier,⁹ the designer's professional duty of care is to perform with the same degree of skill and care as may be expected of any member of the architectural or engineering profession. That professional duty of care is established by the profession itself, not by the government or by a contract.

The designer also must perform design services in accordance with requirements of its contract with the owner. The contract may impose requirements concerning a schedule, costs or approval. These contractual duties may be in addition to the designer's professional standard of skill and care.

The General Contractor's Roles and Responsibilities

The contractor's duty is to construct the project according to the designer's plans and specifications, within the time and price specified in the contract. This should be done without sacrificing either the

⁹ See *supra* note 6.

quality of the work or the safety of the workers. The contractor has complete responsibility for achieving the quality level required in the documents, and for safety. The contractor may also be involved in the training of the owner's personnel in the operation of the building systems and may provide some maintenance after construction is complete.

It is important to note that the contractor's obligation is to satisfy the minimum requirements of the

drawings and specifications. In the bidding process, the owner asks for the lowest possible price to perform only those things that are absolutely required by the drawings and specifications. Thus, the contractor is obligated to satisfy those minimum requirements and no more. Of course, the owner is always free to require additional performance by change order.

COMMON LEGAL ISSUES ARISING FROM IOWA'S COMPETITIVE BIDDING LAWS

Public Bidding Thresholds

In 2006, Master Builders of Iowa participated in a wholesale revision of Iowa's competitive bidding laws for public owners. The new law, now Chapter 26, brought together bidding requirements for most public owners and concentrated them in one specific statute.

The new law also set out a novel approach to the public bidding laws. At the time, public owners complained that the bidding laws were two cumbersome and not particularly relevant to the economic environment at the time. For example, for decades the requirements for public bidding kicked in when the estimated project cost exceeded \$25,000. That requirement caused public owners to expend otherwise scarce dollars on paperwork and process in order to build new projects.

Not only did the new law increase the initial threshold for competitive bidding from \$25,000 to \$100,000, it also established a new, more flexible approach to allow public owners to plan and build new projects with a minimum of administrative burden.

The new law swept in control over most public owners, excluding Board of Regents and Iowa Department of Transportation projects.

The bidding laws set out three classes of projects based on the estimated cost of the project, which dictate what was required for bidding under the law.

The first category simply re-established the current requirement – that projects estimated to cost over \$100,000 would still require the full competitive bidding process, complete with notice, hearing, and so forth. This amount is adjusted every two years.

The law established thresholds for bidding depending on the nature of the owner and the size of the public body itself, by population. Under the new statute, the bidding requirements set out the thresholds for bidding depending upon the identity of the owner and the population base, e.g., cities with a population over or under 50,000.

Once identifying which public entities were required to use the complete public bidding regimen, the law set out two additional subcategories of requirements for procuring projects of lesser financial significance.

Competitive Quotations for Projects Under the Bid Threshold

The first new category created for those projects for which the estimated cost did not rise to the level requiring complete adherence to the competitive bidding laws was the provision permitting "competitive quotations." Competitive quotations were codified in Iowa Code Section 26.14. Competitive quotations still retained a vestige of the stricter competitive bidding process, but allowed a more flexible approach to allow the public owner on smaller projects to obtain "bids" without undertaking the administrative expense of the former bidding requirements.

The thresholds for allowing various public owners to use the competitive quotations process is established by statute and is adjusted every two years by a committee established by the Iowa Code under the direction of the Iowa Department of Transportation. The Master Builders of Iowa has a permanent role on that committee. Please refer to **Appendix C** to see the varying thresholds that apply to the competitive quotation requirement.

The Code of Iowa provides that for projects that fall within the competitive bidding thresholds, the public owner is required only to undertake “good faith” efforts to obtain a minimum of two quotes from contractors “regularly engaged in such work.”

Negotiated Contracts

When the estimated cost of the project falls below the Competitive Quotations minimum threshold, the public owner is free to procure a construction contract through negotiations with a contractor or contractors. Although the Code does not establish any guidelines for using this process, “best practices” would dictate that the public owner exercise good faith in the selection of a contractor.

Notice to Bidders

On July 1, 2016, a new law was signed that increases the estimating time between a notice to bidders being published to when a public owner can actually set a bid letting date. A notice to bidders shall be “posted” at least once, not less than 13 days and not more than 45 days before the date for the bid filing. Previously, the timeframe was 4 days and 45 days. (Iowa Code Section 26.3.1)

The old law stated that a public owner was required to “publish” its Notice to Bidders in a local newspaper of general circulation at least weekly in the same general area as the public improvement. Under the new law, the public owner now has the opportunity to expand the coverage of its Notice to Bidders via plan rooms and websites. Rather than relying on a local newspaper of general circulation in the area in which the project is being built, the public owner is now able to more effectively notify the bidder community through the use of contractor plan rooms and lead

generating services, as well as public owner websites or websites sponsored by statewide organizations representing public owners. (All of the aforementioned distribution networks shall now be utilized in lieu of the newspaper ad.)

There are multiple options for contractor plan rooms and lead generating services, but the Construction Update Network (CU Network) is one local option to help public owners and their representatives meet the new Notice to Bidders guidelines at **no expense to the public owner**. The CU Network meets both the definition of “a relevant contractor plan room service with statewide circulation” and “a relevant construction lead generating service with statewide circulation”. The CU Network has been operating for over 30 years with nearly 2,000 contractor-subscribers. A Notice to Bidders should be submitted to mbiplanroom-dsm@mbionline.com.

To help ensure compliance, a confirmation-of-receipt reply email from representatives of the CU Network will be sent the very same date to the entity that submitted the Notice to Bidders. The next business day, the respective required Notice to Bidders will be posted to all Construction Update Network subscribers via a member-wide email. In addition, on the day the Notice to Bidders is posted, the owner or owner’s representative will be provided a copy of this notice for audit compliance.

Distribution of Plans and Specifications

Iowa Code Section 26.3.2 requires that the project’s contract documents, including all drawings, plans, specifications and estimated total cost of the proposed public improvement, shall be made available for distribution at no charge to prospective bidders, subcontractor bidders, suppliers and contractor plan room services. In addition, if a public owner requires a deposit as part of its paper plan distribution policy that deposit must be refundable and cannot exceed \$250 per set. The deposit shall be refunded upon return of the contract documents within fourteen days after the award of the project, unless the project’s contract documents are not returned in a timely manner or in a reusable condition, in which case the deposit shall be forfeited. Lastly, the new law also states that the architect and / or engineer of record are

not financially responsible for costs associated with paper plan preparation and subsequent distribution (distribution in this case includes postage and handling).

Proprietary or Sole-Source Specifications

Proprietary or sole-source specifications are prohibited under Iowa law because they are by definition non-competitive.¹⁰ Exceptions to a proprietary specification for a product can be made only if bidding contractors or suppliers are allowed to substitute an equivalent (“or equal”) product for the applicable specification and such substitutions must be permitted in the specifications.

Sole-sourcing is not allowed under Iowa’s competitive bidding statute. In *Siemens Building Technologies, Inc. v. Polk County, Iowa*, the District Court reinforced a prohibition against sole-sourcing.¹¹ More specifically, Siemens prepared and submitted a proposal for the design, programming, training and verifications services, and hardware components for the Iowa Events Center’s building automation, fire alarm and security systems. Polk County originally took the position that Siemens’s proposal did not require public bids, but after a competitor complained, the county reversed direction, and required public bids for the items in the Siemens’s proposal. A suit was initiated by Siemens, which eventually was dismissed with the final ruling upholding the illegality of sole-source contracts for Iowa public projects.

Excessive Use of Alternates

Owners or designers may elect to include alternates on the bid form. An alternate invites the bidder to increase or reduce its bid depending on whether it chooses to price the alternate. A bidder may decline to price the alternate, but the owner generally has the discretion to select or reject alternates, and thus can effectively determine the overall low bidder.

¹⁰ See e.g., *id.* § 73.2(1) (“All requests made for bids ... shall be made in general terms and by general specifications and not by brand, trade name, or other individual mark.”); see *Keokuk Water Works v. City of Keokuk*, 277 N.W. 291 (Iowa 1938). This principle has been widely accepted by other state and federal courts. See, e.g., *Diamond v. City of Mankato*, 93 N.W. 911 (Minn. 1903); *Waldinger v. Ashbrook-Simon-Hartley*, 564 F. Supp. 970 (C.D. Ill. 1983).

¹¹ 697 N.W. 2d 126 (IA S. Ct. 2005)

Alternates used to manipulate the selection of a low bidder violate Iowa law and violate the principle of accepting and honoring the lowest responsible and responsive bid.¹² A minimal use of alternates minimizes bidder confusion and minimizes claims of improper selection and bid manipulation. Bid forms which contain alternates should be clear as to how contractors are to respond on the bid form as to the alternates they do not wish to bid on; e.g., “no bid.”

It is important to note that voluntary alternates are prohibited and should not be considered in the award of a contract.

Retainage

Iowa law mandates that no more than 5% of the total project cost can be retained by the owner. (Iowa Code Section 573.12) The same state law limits the retainage a contractor may withhold from a subcontractor to the same rate the owner imposes on the contractor.

When the Iowa competitive bidding laws were overhauled in 2006, changes were made that allow for the early release of partial retainage. (See Iowa Code Section 573.28.) The law establishes four “triggers” for when a project can be deemed “substantially complete” and eligible for the early release of partial retainage. Pursuant to this provision, a project is deemed substantially complete at the first date on which any of the following occurs:

1. The project has been substantially completed in general accordance with the terms and provisions of the contract.
2. The project is substantially complete so that the governmental entity can occupy or utilize the public improvement or designated portion of the public improvement for its intended purpose.
3. The public improvement has been designated substantially complete by the architect or engineer authorized to make such a certification, or the authorized contract representative.
4. The project is substantially complete when the governmental entity is occupying or utilizing the public improvement for its intended purpose.

¹² As stated in one Iowa case, “The primary purpose of competitive bidding is to prevent fraud and collusion and for protection of public funds.” *Miller v. Incorporated Town of Milford*, 276 N.W. 826 (Iowa 1937).

Triggers 2 and 4 do not apply to highway, bridge or culvert work.

Prior to applying for the release of retained funds, the contractor must notify all known subcontractors, sub-subcontractors, and suppliers that a request for the early release of retained funds will be made to the public entity. (See **Appendix D** – “Notice of Contractor’s Request for Early Release of Retained Funds”.)

At the time of the request for release of partial retainage, the public entity has the right to retain an amount equal to two hundred percent of the value of labor or material yet to be provided and may be withheld until such labor and materials are provided. The owner is also obliged to withhold from the retainage twice the amount of any properly filed claims under Ch. 573.

Claims

In 2018, a significant change was made to the claims on retainage statute in Iowa Code. More specifically, the law now requires potential claimants who have furnished labor or supplied materials to a subcontractor to provide a one-time written notification to the principal contractor within 30 days of first commencing work. (Iowa Code Section 573.15) The notification is a requirement to assert claim rights for anyone that does not have contractual privity with the principal contractor. The Code also requires that if any such claimant files a claim under Ch. 573, it must be supported by a certified statement that the required notice had been given.

It is important to note that this notification only applies to vertical construction and does not apply to highway, bridge, or culvert projects.

Contractor Registration Requirements

Under Iowa Code Section 91C.2, a “contractor” doing business in Iowa is required to register with the labor commissioner. A “contractor” is defined under Iowa Code Section 91C.1 as a person who engages in the business of “construction,” as the term is defined in Iowa Admin. Code Section 345-3.82, for the purposes of the Iowa employment security law.

A “contractor” may be exempted from registration if he or she: 1) earns less than \$2,000 per year or works on his or her own property, or 2) is self-employed and does not pay more than \$2,000 annually to employ other contractors in the same phases of construction. (Iowa Code Section 91C.1)

As a condition of registration, the contractor must meet the following requirements: 1) be in compliance with Iowa law relating to workers’ compensation insurance, and 2) the contractor shall possess an employer account number or a special contractor number issued by the division of job service of the department of employment services pursuant to the Iowa employment security law. (Iowa Code Section 91C.2)

Out of State Contractor Registration

Each contractor with a principal place of business outside of Iowa must file a \$25,000 bond in order to register as a contractor. Having a branch office in Iowa does not exempt a contractor from the bonding requirement. The bond guarantees that the non-Iowa contractors pay all taxes, penalties and other monies due to the State of Iowa as a result of working in Iowa. Only the State and its agencies can collect under the bond. An out-of-state bond must be prepared using the bond form provided by the Division of Labor Services.

Bid Bonds

The Iowa Code requires bid bonds for most public projects. A bid bond is a bond that is posted by a bidder at bid time. Should the bidder be tendered the contract but refuse to sign, the owner may forfeit the bond. (Iowa Code Section 26.8)

The amount of the bond shall be not be less than five percent and not more than ten percent of the estimated cost of the project. (Iowa Code Section 26.8) Normally the information for bidders contains any bid bond requirements.

Payment and Performance Bonds

Iowa law requires that a contractor on a public project furnish a payment and performance bond. Contracts for the construction of a public improvement shall, when the estimated contract price exceeds \$25,000, be accompanied by a bond, with surety, conditioned for

the faithful performance of the contract, and for fulfillment of other requirements as provided by law i.e., payment of subcontractors and suppliers. (Iowa Code Section 573.2) The payment bond protects subcontractors and suppliers in the event the contractor does not pay them. A performance bond protects the owner in the event the contractor does not complete the project. Generally, payment and performance bonds are combined on one form.

Project Labor Agreements

On April 13, 2017, Gov. Terry Branstad signed Senate File 438, an Act Relating to Bidding and Contracting for Public Improvement Projects. The new law affects notices to bidders for public improvements, bids awarded for public improvements, and contracts for public improvements entered into on or after April 13, 2017. Senate File 438, codified into law as Iowa Code Section 73A.28, prohibits state and local governments from using project labor agreements on taxpayer-funded construction projects.

Iowa is now one of 23 states that have passed laws or executive orders restricting government-mandated project labor agreements that involve public money.

Prequalification Provisions

A law also passed in 2017¹³ prohibits state and local governments (not including the Board of Regents and Department of Transportation) from imposing any pre-qualification requirements that directly or indirectly deter potential bidders from bidding. Prohibited criteria include requiring:

- experience on similar projects;
- size of company;
- union membership;
- or any other arbitrary criteria.

***EXCEPTION:** Manufacturer's requirements which call for certain installation experience or installer's certification can still be included in the project specifications, but if so, the specifications should clearly state that these are a requirement of the manufacturer.*

¹³ Iowa Code Section 26.16.

Entities responsible for awarding a contract for public improvements cannot, in any bid information or project specifications, project agreements, or other controlling documents do any of the following:

- require OR prohibit a bidder, offeror, contractor or subcontractor from working with labor organizations; or
- discriminate against any bidder, offeror, contractor or subcontractor for its choice to work with or not work with any labor organization.

Governmental entities may still request information from the apparent lowest responsive bidder to assist the governmental entity in determining that bidder's responsibility. However, a governmental entity may only request information related to the apparent lowest responsive bidder's experience, number of employees, and ability to finance the cost of the public improvement.

- Architects and engineers that have contracts with the owner must be careful when drafting project specifications which directly or indirectly impose prohibited prequalification requirements.

Governmental entities are not allowed to award a grant, tax abatement, or tax credit where the award is conditional upon any term that would be contrary to the new law's requirements.

Any public official who fails to follow the duties, could be found guilty of a simple misdemeanor and potentially be removed from office.

Statute of Repose

A statute of repose is a law that extinguishes the right to bring certain types of lawsuits relating to real property after the expiration of a certain amount of time.

In Iowa, before July 1, 2017, a third party (i.e., not a building owner) had fifteen years within which to bring a lawsuit based on alleged defective or unsafe

construction which caused personal injury or death. The law did not apply to breach of contract claims.

The Iowa legislature in 2017 amended the statute of repose. The deadline was lowered to eight years for commercial construction and ten years for residential construction projects. (Iowa Code Section 614.1.11) The law contains an exception for intentional misconduct or fraudulent concealment. Any contract entered into before July 1, 2017, on a commercial construction project, would be governed by the fifteen year deadline. Any residential or commercial construction contract signed July 1, 2017 or after, would be governed by the new ten and eight year deadlines. The statute of repose still does not apply to breach of contract cases.

Local Preference

Iowa's laws do not contain any provisions permitting a public owner to restrict, qualify or otherwise limit or differentiate or discriminate against a bidder on a public construction project because of the bidder's location (i.e., city, county, state). Such local preference considerations are generally considered to be discriminatory and illegal and should be strictly avoided under Iowa's competitive bidding laws.¹⁴

In-State Preferences / Reciprocal Bidder Laws

When a public improvement contract is to be let, a resident bidder is given preference against a non-resident bidder whose state requires preference in the same amount of such preference. (Iowa Code Section 73A.21) For example, the State of Wisconsin has a law that gives preference to Wisconsin companies over out of state companies for their public work projects. Those same preferences are given to Iowa bidders if the situation is reversed and the Wisconsin bidder is bidding Iowa public works projects.

During the 2011 legislative session, Iowa's reciprocal bidder law (Iowa Code Section 73A.21) was expanded to include workforce preferences, as well as any sort

of preferential treatment a non-Iowa bidder received in its state of domicile. In addition, enforcement duties were granted to the Iowa Labor Commissioner, which puts enforcement provisions into play to allow public owners to make out-of-state contractors who enjoy preferences in their respective state of domicile to now be subject to those same requirements when bidding Iowa projects.

The law now requires a public owner to include in invitations to bid a statement that an out-of-state bidder must identify any local preference statutes or regulations imposed by the bidder's state of residence. (Iowa Code Section 73A.21.4)

Davis-Bacon Act

The Davis-Bacon Act, which requires government-determined standard wages, applies only to federally funded or federally assisted construction projects. Local Davis-Bacon laws (standardized wages set by a local public owner) have been found to be illegal under Iowa law. *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702 (Iowa 1993). In this case a prevailing wage ordinance was struck down based upon arguments that the federal ERISA statute preempted the local wage ordinance and that the competitive bidding statute was violated by such a proposed local ordinance.

The Davis-Bacon Act applies to every contract competitively bid or negotiated for construction alteration or repair of public buildings or public works over \$2,000 to which the United States or District of Columbia is a party. It also applies to federal aided construction contracts of \$2,000 or more whenever the Davis-Bacon Act is incorporated by reference in the federal statute. Contractors and subcontractors must pay the "prevailing wage" for work covered under the Davis-Bacon Act. A prevailing wage is determined by wage surveys conducted by the Department of Labor which determine the Davis-Bacon rate per hour, including cost of fringe benefits.

On construction contracts or subcontracts over \$100,000 funded in whole or in part with federal funds, the Fair Labor Standards Act and Contract Work Hours and Safety Standards Act require payment at time and a half for all hours worked over 40 in a week for nonexempt employees. Failure to

¹⁴ To our knowledge, there have been two district court opinions which have addressed this issue. In one, *Hudson v. City of Mason City*, the court voided a contract let to a "local" contractor even though the contractor was not the low bidder. In another, the district court permitted a similar award to stand. The losing contractor appealed to the Iowa Supreme Court, which affirmed the lower court but the ruling was based on the protesting contractor's lack of standing, not the merits of the case. See *Garling Constr. v. City of Shellsburg*, 641 N.W.2d 522 (Iowa 2002).

properly comply with Davis-Bacon and other wage payment statutory requirements can subject a contractor to debarment as well as penalties, liquidated damages and attorney fees.

Waiver of Bid Irregularities

Iowa law permits public owners to waive bid irregularities but only those that are considered minor and which do not affect the competitive positions of the bidders.¹⁵ The waiving of material deviations is prohibited by Iowa law in that by doing so the owner can affect the outcome of the award of the contract. Examples of deviations considered to be minor vs. material issues are included in **Appendix A** of this publication. Frequently, the Invitation to Bids will contain a statement such that the “owner reserves the right to waive any and all bid irregularities.” There is no support for this statement under Iowa law. While many Iowa statutes allow an owner to reject all bids and rebid the project,¹⁶ an owner cannot waive material irregularities since bid “responsiveness” must be first considered by the public owner and by definition, to be responsive a bid must conform to the invitation in all *material* respects. (See page 5 regarding responsive bids.)

Deadline for Receiving Bids

Pursuant to Iowa Code Chapter 26.10, the date and time that each public bid is received by the governmental entity, together with the name of the person receiving the bid, shall be recorded on the envelope containing the bid. All bids received after the deadline as stated in the projects bid documents, shall not be considered and shall be returned to the late bidder unopened.

Venue Provisions in Commercial Construction Contracts

In 2014, there was an effort brought to provide clarity on venue provisions in commercial construction contracts. The legislature passed and Gov. Branstad signed legislation that renders provisions in construction contracts that reference another state's laws or statutes unenforceable. The bill also requires any litigation, arbitration, mediation or any other dispute resolution process to be held in Iowa. This

new law (Iowa Code Chapter 537A.6) applies to both public and private contracts entered into on or after January 1, 2014.

Bid Mistakes: Contractor's Potential Liability for Bid Errors

It is typical in the construction industry for subcontractors to wait as long as possible before placing their bids with a general contractor in order to prevent the general contractor from having time to obtain a lower bid from another subcontractor. The subcontractor must obtain prices from its subcontractors and suppliers, many of which are also submitting bids at the last minute for the same reason. Under this time pressure, mistakes can be made in the last minute push to put a bid together.

A contractor may be relieved from a mistake in his bid under proper circumstances.¹⁷

A number of factors determine whether a bid may be withdrawn due to a mistake in the bid.¹⁸

If a bid is obviously erroneous, such as when it is unreasonably low, courts will generally grant the contractor the right to withdraw his erroneous bid, at least where circumstances indicate that the owner should have realized that the bid was based on a mistake.

The mistake must be simply a clerical or mathematical error; if the mistake is one of judgment or lack of expertise in bidding, the mistake will not relieve the contractor from performance;

The contractor must have promptly notified the owner of its mistake and intent to withdraw;

The mistake is so monetarily significant it would be unconscionable to force the contractor to perform the contract at the mistaken bid price; and

¹⁵ *Urbany v. City of Carroll*, 157 N.W. 852 (Iowa 1916).

¹⁶ See, e.g., Iowa Code § 73A.18.

¹⁷ *M.J. McGough Co. v. Jane Lamb Mem. Hosp.*, 302 F. Supp. 482 (S.D. Iowa 1969).

¹⁸ *Id.*

The owner must have not changed its position to its detriment in reliance on the bid.

If the bidding authority refuses to allow the withdrawal of the bid, the contractor is faced with two options:

1. perform the project at the mistaken bid price or;
2. refuse to sign the contract. If the contractor chooses the latter course, it runs the risk of forfeiting its bid bond.

Most public bid projects contain a clause in the bid invitation which provides that the contractor agrees to forfeit its bid bond if it is awarded the job and wrongfully refuses to enter into a contract. These provisions are designed to protect the bidding authority from damage caused by being forced to re-bid the project and any delay caused by that process.

The public owner has several choices when faced with a putative low bidder who wishes to withdraw its bid:

- Evaluate the putative low bidder's arguments under the above criteria and allow withdrawal and return the bid bond.
- Attempt to forfeit the bid bond.
- If the "low bidder" is allowed to withdraw, or if the owner decides to attempt to forfeit the bid bond, the owner may accept the next low bid or reject all bids and start the process over again.

A public owner may want to avoid requiring a bidder whose price is materially low because of a mistake to sign the contract. This virtually ensures an unsuccessful project.

Of course, once all of the bidders' bid amounts are made public and the bidders can see how their competitors priced the project, getting a fair price the next time around may be difficult unless there are modifications made to the plans and specifications so that the owner gets a "new look" at the project by the bidders.

Bid Challenges: Standing to Protest

In order to challenge the bid award, a party must have standing - defined as the legally recognized ability to do so. Generally, two classes of individuals will seek to challenge a bid award. The first class consists of taxpaying residents of the public authority which awarded the bid; i.e., residents of a school district, municipality, county or state.

The second class consists of the "disappointed contractors" who submitted bids, but were not awarded the contract. These may be low bidders whose low bids were not deemed responsive or non-low bidders who feel the low bidder submitted a non-responsive bid.

States almost uniformly allow a taxpayer to bring an action against the public authority challenging the award of a bid on the grounds that the competitive bidding laws were violated. This includes a disappointed contractor (or one of its employees) who is also a taxpaying resident of the appropriate public authority, but standing is granted only if the contractor can satisfy the taxpayer requirement.

States are split over the issue of whether a disappointed bidder who is not a taxpaying resident of the public authority letting the bid has standing to challenge the award. Generally, these suits are for equitable relief. That is, the party challenging the bid award is not seeking money damages but rather, a court order that the public authority must award the bid to the lowest responsive and responsible contractor.

Iowa courts have held such a bidder does not have standing to challenge an award on the grounds the bidding statutes requiring the bid to be awarded to the lowest responsive and responsible bidder are enacted to protect the taxpayers – not a particular contractor.¹⁹

As stated above, a disappointed contractor may have standing to seek an injunction to prevent the owner from *awarding* the contract where the bidding laws have been violated.²⁰ However, the contractor may not bring an action against the public authority for money damages even if the public authority wrongfully

¹⁹ *Garling Constr. v. City of Shellsburg*, 641 N.W.2d 522 (Iowa 2002).

²⁰ *Id.*

awarded the bid to another contractor or did not fairly let the bid.

While a contractor may not force a public agency to award it the bid, statutory public contracting provisions permit the awarding authority the right to reject all bids. (Iowa Code Section 26.10)

It has been suggested this power cannot be exercised arbitrarily or capriciously or to steer a contract away from one party or toward another.²¹

Tie Bids

Although it is rare, tie bids (identical low bids) occasionally occur. Assuming both bidders are “responsible,” how does the public owner resolve this dilemma? It would not make sense to reject both bids and rebid the project because that might result in higher bids.

It is suggested that if both bidders agree, a random selection process could be used to select the winning bidder - a flip of the coin, for example. As long as the public owner and the two bidders agree to this process, it is unlikely to be successfully challenged.

Negotiating After the Bid Opening

Iowa law prohibits negotiating with the low bidder after the bids have been opened. This is based on the premise that all bidders should have the right to bid on the same bid package. An Iowa Attorney General’s opinion has recognized this principle.²²

It is permissible to negotiate *minor* changes with the low bidder after contracts have been signed but changes should be facilitated through the change order process. Under no circumstances should major changes be used to facilitate a negotiation process with a bidder. Major changes such as a change in scope require the project to be re-bid.

Indemnification – Prohibition of Broad Form

Iowa law prohibits broad form indemnity provisions in contracts entered into on or after July 1, 2011. A broad form indemnity provision bars a situation in which one party to a construction contract could be asked to

indemnify, hold harmless or defend another party’s negligence. (Iowa Code 537A.5) In short, a negligent party will be responsible for its own actions and this responsibility cannot be passed on to others.

It must be noted that the law is narrowly tailored. It only applies to construction contracts and it voids indemnification provisions requiring indemnification to the extent caused by or resulting from the negligent act or omission of the other party to the contract or persons the other party is responsible for. Other types of indemnity are allowed. The legislation and prohibition apply equally to both public and private construction projects in Iowa. The legislation has certain exceptions and does not impact the rights of sureties or their principals under a construction bond; an insurer’s obligations to their insured under any policy of insurance, including workers compensation; a borrower’s obligation to its lender; or otherwise impact strict liability if that is already imposed by law. These will continue, but these exceptions are not germane to the overall goal of barring broad-form indemnity.

Design / Build Project Delivery Method

The design / build procurement system is not allowed under Iowa’s competitive bidding laws unless the criteria to be used to select the successful bidder is lowest price, assuming bidder responsibility.²³ Design/build projects are rarely, if ever, structured to award the project to the lowest bidder. While some other states allow this method of project delivery system for public projects, with the exception of the Iowa Board of Regents, design/build has not been utilized to any real extent in the public sector in Iowa because of the competitive bidding requirements.

Construction Management (CM) at Risk / Guaranteed Maximum Price

The CM at Risk / guaranteed maximum price delivery system would undoubtedly not pass muster under Iowa’s competitive bidding laws as currently outlined in Iowa Code Chapter 26.²⁴ Under this form of project delivery, the CM guarantees to the owner that

²³ *Id.*

²⁴ Although the Iowa Supreme Court has not yet specifically addressed this issue, it is likely to follow the lead of other states which have done so. See *Attlin Constr., Inc. v. Muncie Cmty. Schs.*, 413 N.E.2d 281 (Ind. Ct. App. 1980); *D-1 Constructors, Ltd. v. Unified Sch. Dist. No. 229*, 788 P.2d 289 (Kan. Ct. App. 1990); *McMaster Construction, Inc. v. Bd. of Regents of Okla. Colls.*, 934 P.2d 335, 339 n.21 (Okla. 1997); *Malloy v. Boyertown Area Sch. Bd.*, 657 A.2d 915 (Pa. 1995).

²¹ *Dickinson Co., Inc. v. City of Des Moines*, 347 N.W.2d 436 (Iowa Ct. App. 1984).

²² See, 1994 Iowa Op. Atty. Gen. 95 (94-4-2).

the cost of the project will not exceed a certain price. Under this form of Construction Management, the CM usually contracts directly with the trade contractors. In this respect, the CM at Risk form of project delivery closely resembles the design / bid / build model. The agency form of construction management is permissible as a professional service, as discussed in Section 2 of this Resource Guide.

Emergency Repair Provisions

Under Iowa Code Section 26.2.3, public owners subject to that chapter can use their own employees to perform repair work, emergency or otherwise. If the public owner needs to obtain a private contractor to perform emergency repair, work, several provisions of the Code provide methods whereby the emergency work can be undertaken without adhering to the requirements of Ch. 26. Emergency repair provisions in Iowa Code differ by public owner.

- For Cities: Iowa Code Section 384.103
- For Schools: Iowa Code Section 297.8

FREQUENTLY ASKED QUESTIONS ABOUT DESIGN / BID / BUILD

Question: If a bid deadline of 2:00 pm is established, is it permissible to allow a bid received at 2:01 pm to be considered?

Answer: No. The bid should be returned to the bidder unopened and the bid should not be considered by the owner. Pursuant to Iowa Code Chapter 26.10, the date and time each bid is received shall be recorded on the envelope containing the bid. A late bid will be returned to the bidder unopened.

Question: Can the owner waive as an irregularity the failure of the bidding contractor to submit a performance or security bond as required by Iowa law?

Answer: No. The requirements for bid bonds are considered a material requirement of the public bid and cannot be waived.

Question: Can a bidder be pre-qualified based upon whether or not they sign collective bargaining agreements with trade unions?

Answer: No. Pre-qualifying based on whether or not a contractor's employees affiliate with unions or not violates Iowa's competitive bidding laws.²⁵

Question: If the low bidder's price exceeds the budget, is it legitimate to conduct negotiations among bidders to lower the price?

Answer: No. Iowa law prohibits negotiations after the bid.²⁶

Question: Is it legal to do a design / build project in the public sector in Iowa?

Answer: No.²⁷ However, opinions vary as to whether or not the Regents have the authority under their procurement code to utilize a design / build model.

Question: Is it legal to do CM at Risk for a guaranteed maximum price utilizing a construction manager or a general contractor practicing CM at risk for public sector projects?

Answer: No. However, opinions vary as to whether or not the Regents have the authority under their procurement code to utilize a CM at Risk model.

²⁵ *Miller v. City of Des Moines*, 122 N.W. 226 (Iowa 1909). Iowa Code Section 26.16.

²⁶ See *supra* note 24 and accompanying text.

²⁷ See *id.*

Question: When no bids are received, is it permissible to forego competitive bidding and negotiate the contract with prospective contractors?

Answer: No. So long as the project falls at or above the competitive bidding threshold, the project must be re-advertised and bid as though the process is starting from the beginning.

Question: Is competitive bidding required for architectural engineering and design services?

Answer: No. Owners are free to select design professionals at their discretion but usually it is done on a qualification based selection process to select their design representatives for the project. These services are not considered “construction” services but rather professional services.

Question: A certain percentage of revenue being used to finance the public project is received from private sources. Is it legal to waive competitive bidding requirements for the project?

Answer: No. It may be possible under a specific set of circumstances to set aside a specified portion of the project that is to be financed solely with private funds and limit that portion only to some other process other than competitive bidding. However, all public improvements estimated to cost in excess of the bidding threshold set by statute with any amount of public funds must be competitively bid.

Question: Can a bidder’s proposed completion date be used as a determining factor in selecting the low responsible bidder for a project?

Answer: No. Alternate completion schedules must be stated in terms of specific dollar additions or deletions from the project as set out in alternates in the bid form and bidders must be informed accordingly so that an objective price evaluation can be calculated when determining the low responsible bidder. Open-ended completion date alternates invite selections based upon non-defined criteria.

SECTION 2

AGENCY FORM OF CONSTRUCTION MANAGEMENT

Fundamental Characteristics of Agency CM

A fundamental characteristic of the agent CM under Iowa law is that no matter how involved the construction manager is in project administration, it is not at risk for the cost or schedule of building the job (i.e., the performance risk). This is a critical point and one that is commonly misunderstood. Agent CM contracts are not required to be competitively bid under Iowa law, since they are essentially professional service contracts. Owners may elect to select agent CMs on the basis of responses to Requests for Proposals. Most typical agent CM arrangements will cap the liability of the agent CM for negligence in the furnishing of its services at its fee or professional insurance coverage for the project. It is important for the owner to consider this fundamental characteristic of the agency CM at the project's programming stage.

The Construction Manager's advisory role is in stark contrast to that of the general contractor under the design / bid / build approach, which is to assume the risk associated with the construction of the project. An agent or advisor CM is not contractually responsible for delivering the "bricks and sticks" construction. Rather, the agent CM is responsible for furnishing the management services necessary to deliver construction. Thus, it is accurate to describe agency CM as a construction management system, a way to manage the process of construction, but not a way to physically deliver construction.

Warranty Limitations

Warranty limitations derive from the nature of the agent CM's performance guarantee. Under most standard form CMA agreements, the agent CM only guarantees that it will manage the construction of a

project in accordance with terms and conditions of its contract and prevailing professional standards.

Insurance and Related Issues

Typical standard form agency CM agreements often require the agent CM to carry commercial general liability coverage (CGL) including contractual liability, broad form property damage and products and completed operations, and business automobile liability coverage. During the past decade umbrella policies have also been used to supplement liability coverage, although recent occurrences in the insurance and surety markets have dramatically changed underwriting practices and premium costs for umbrella coverage.

Summary: Agency CM Services Overview

An agency construction manager's role under Iowa law is an advisory role only and normally occurs where the CM advises the owner and the owner's team on project schedules, budgets and construction phase services, review of safety and work programs and administration of general conditions items. CM agents also will work closely with owners on project closeout and during the commissioning and occupancy stages of the project. Often misunderstood, agency construction management is not truly a project delivery system but a management system to advise the owner on the project from start to finish. However, it is important to remember that all public projects in Iowa where construction managers are employed are required to abide by all of the competitive bidding laws the same way the projects constructed under the design / bid / build approach must comply.

OTHER LEGAL ISSUES / SUMMARY FOR CONSTRUCTION MANAGEMENT UNDER IOWA LAW

Conflicts of Interests / Self-Performing of Work

A frequent issue that arises in CM contracts is whether the CM or an affiliate may **self-perform** some of the work, for example, paving. Iowa law does not prohibit this; however, several caveats must be noted: 1) If the CM entity or related entity is hoping to perform some of the work, it must bid on the work as any other contractor if the project is governed by the competitive bidding laws; 2) the CM will be subject to extraordinary scrutiny by the owner for any hint of favoritism being shown to the affiliate; 3) the CM will also be subject to extraordinary scrutiny by other prime contractors who may claim that the CM is playing favorites with its own sister-company in terms of schedules preferences or other accommodations. It is a no-win proposition for an agency CM to self-perform any of the work. Both the owner and the construction manager are subject to conflict of interest claims if they fail to meet the scrutiny required in a public setting using taxpayer money. An owner and a construction manager need to weigh these considerations very carefully before proceeding with this conflicting role. If circumstances leave no other options, the owner should be careful that the CM follows all the requirements of the competitive bid selection process called for by Iowa law.

Bid Packages

It can be in the owner's benefit to allow bidding contractors on a CM or multiple-prime contract to bid any combination of one or total of all the bid packages under a single price. However, it is challenging to design a bid form which accomplishes this while still imparting a clear set of instructions to the bidders. The result of an improperly drawn set of bid documents can result in chaos on bid day. If the owner decides to use this method of "bundling bids," it must ensure that all bidders specifically know what their bid entails, and more importantly, how the public owner is to evaluate these bids. This is a difficult job for any CM to accomplish.

Bonding & Liability Issues

Unlike general contractors under a design / bid / build project, the construction manager has no liability for the failure of the trade contractors to complete the construction or for the payment of the prime contractors' subcontractors and suppliers. Payment and performance bonds are still required under Iowa law for each prime bid package that is in excess of \$25,000.²⁸

All of the provisions of Chapter 573 regarding claims apply to public CM agency projects, and the agent CM should clearly understand the claims process and explain it at all pre-bid meetings.

No Bids Received

Under a construction management agency arrangement when no bids are received on one or more bid packages, the owner is required to re-bid the bid packages for which no bids were received. The owner would still need to comply with the notice and hearing provisions of the Code for the rebidding. This process could result in start-date or coordination issues with the other bid packages. Managing award dates and issuances of notices to proceed would need to be handled carefully so as not to unduly delay the project.

²⁸ Iowa Code § 573.2

APPENDIX A

WAIVER OF BID IRREGULARITIES

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Note: This document is presented without legal citations in that it was prepared primarily for the benefit of laypersons; however, most of the principles discussed herein are addressed in the main body of the Resource Guide. Some of the principles are also based on case authority from other jurisdictions that were used when no Iowa cases which were on-point could be found. The author believes that these cases would be instructive to an Iowa court should similar issues arise in this state. Citations are available from the author upon request.

"The owner reserves the right to waive irregularities in the bids." There are no words which cause more consternation in the public bidding arena than the preceding sentence. Master Builders of Iowa and its legal counsel field more questions on this subject than perhaps on any other issue. And lately, as more young architects and engineers enter public service as the old guard retires, a whole new generation of owner's representatives needs to learn the basics of public bidding law. In this article we will explore the law as it relates to the issue of the owner's right to waive irregularities in the bid.

Before we get into the heart of this subject, we need to discuss several basic rules for public bidding. There are two primary considerations in awards of public contracts: bidder responsibility and bidder responsiveness. Bidder responsibility is essentially whether a bidder on a public contract will be able to perform the contract. Considerations in determining whether a bidder is responsible include the experience of the bidder, financial condition, conduct and performance on previous contracts, facilities management skills, and the ability to properly execute the contract.

Bid Responsiveness

The main focus of this article, however, is on bidder responsiveness. A bid is said to be "responsive" when it substantially complies with the specs and requirements set out in the invitation to bid (ITB) or the request for proposals (RFP). Responsiveness is determined at the time of bid opening, and a non-responsive bid at the time of opening cannot subsequently be made responsive. This is one reason why language in the ITB which purports to give the owner the right to waive "any and all" bid irregularities is meaningless. Some bid defects cannot be waived, regardless of what the ITB says.

Non-responsive bids should be immediately rejected and not even entered on the bid tabulation. Of course, the problem that frequently arises is that while a bid may seem non-responsive, the public owner may believe it has the right to waive the irregularity. This is too-often the result when an owner reads a seemingly nonresponsive bid only to find that it would be the low bid if not declared nonresponsive.

So when can an owner waive a bid irregularity? Courts often refer to a deviation amounting to a non-responsive bid in terms of its being "material." In general, if the deviation is material, it cannot be waived by the public owner, no matter how good the price may look (or no matter what the ITB says.)

As will be explained in more detail below, a material deviation occurs when one bidder gains a substantial competitive advantage as a result of the bidder's deviation from the requirements of the bid invitation. Deviations highly technical in nature, or in unique situations, are less likely to cross the threshold into material deviation. Also, as stated by one court, a mistake is not material and therefore is excusable if the deviation is not

"capable of facilitating corruption or extravagance, or likely to affect the amount of bids or the response of potential bidders."

In considering whether a technically non-compliant bid could be accepted or cured, there are essentially two relevant factors for the owner to consider. First, it must be determined whether the effect of a waiver would deprive the public entity of its assurance that the contract will be entered into and performed in accordance with the specifications. Second, is a consideration of whether the waiver would adversely affect the competitive bidding process by placing one bidder in a position of competitive advantage?

Competitive Advantage

The proper test for determining whether the bid defect creates a competitive advantage is "whether the contract, with the defect included, would have afforded [the bidder] an advantage over its competitors." A public entity has no discretion to waive non-compliance with a specification where doing so would affect the bid price, or give one bidder a competitive advantage. For example, in one case, the bid documents required the prospective project to offer 50 parking spaces. One bidder's proposal lacked the requisite number of spaces, thus giving it a competitive advantage over other bidders whose bids included the necessary parking.

Any time a bidder is allowed to avoid an otherwise mandatory bid requirement and other bidders are not afforded the same opportunity there is a competitive advantage for that bidder.

Waiver of Minor Irregularities

Minor - not material - irregularities in a bid may be waived. An irregularity is considered minor when the effect on price, quantity, quality, or delivery is negligible compared to the total cost.

Examples of minor irregularities include: failure to submit the correct number of copies, lack of signature where other documents indicate bidder's commitment to be bound, and in some instances failure to acknowledge addenda.

The public entity must be wary that in granting a waiver of deviation, it does not afford a "last look" to one bidder at the expense of others. Also, a public owner has no discretion to waive a defect where it would violate statutes or city ordinances on competitive bidding requirements.

Some irregularities or defects in bids are more likely, perhaps even presumed, to be material. Anything that affects bid price is not a minor irregularity that can be waived. Moreover, the completion date is a material aspect of the bid. In one Iowa case where a bid required a completion date of Nov. 1, and the bid contained a Dec. 1 completion date, the bid was deemed non-responsive, as the completion date was declared to be material.

The bidder may not alter or append the bid after it has been opened to bring it into compliance, for example by providing an important signature that was omitted from the original bid. Of course, bids must be signed to create a binding contract unless it can be determined from other bid documents that the bidder intends to be bound. When revisions to a bid are made before it is submitted, such as handwritten changes in the numbers or other information "whited-out," some states like Minnesota require that the changes be initialed or signed, or the bid is deemed non-responsive.

When there is a substantial difference between the materials required in the specifications and those described in the bid, the bid is nonresponsive. If the specifications require a particular level of performance or specify a brand name, bids that offer a product not in compliance with the specifications are subject to rejection. (Of course, the problems associated with "sole-source" procurement would itself be a suitable topic for a future article for this publication.) The public owner after opening the bids may not permit a substitution of materials.

Bid Bond Irregularities

Failure to submit a proper bid bond with the bid is a material deviation rendering a bid non-responsive. Iowa law requires a proposal guarantee consisting of either a bid bond or a form of certified check. Also, the bond must be in the proper form. Where a bidder omitted the penal sum on a bid bond, the bid was declared non-responsive, and the bidder was neither allowed to explain the omission as a clerical error nor alter the bid to make it compliant. Another incident involved a photocopied power of attorney, rather than an original. Thus the bid failed to provide sufficient authority to bind the surety rendering the bid non-responsive. A third example concerned the omission of the bond commitment and period of bid validity. In these situations, the bids were held to be non-responsive.

Other Examples of Irregularities

State laws or regulations often provide instances where irregularities mandate the rejection of a bid. For example, under Iowa DOT regulations, "[p]roposals will be considered irregular and may be rejected for any unauthorized changes in the proposal form or for any of the following reasons:"

- A. If on a form other than that furnished by the Contracting Authority, or if the form is altered or any part thereof detached,
- B. If there are any unauthorized additions, conditional or alternate bids, or irregularities of any kind which may tend to make the proposal incomplete, indefinite, or ambiguous as to its meaning,
- C. If the bidder adds any provisions reserving the right to accept or reject an award because of being low bidder on another proposal in the same letting,
- D. If the bidder adds any provisions reserving the right to accept or reject an award or to enter into contract pursuant to an award,
- E. If a bid on one proposal is tied to a bid on any other proposal, except as specifically authorized on the proposal form by the Contracting Authority,
- F. If the proposal does not contain a unit price for each pay item listed, except in the case of authorized alternate pay item. Iowa DOT Standard Specifications 1102.10 (2001).

Clerical Errors

As all rules are subject to exception, some defects can be material and still waivable at the discretion of the public entity. The rules for this type of situation parallel those for the determination of when a low bidder can withdraw his bid if he discovers an error in the bid after the bids are opened. Regarding clerical errors there are at least two types of errors that are relevant to this discussion.

The first is where there is no latent mistake in an otherwise responsive bid. The mistake is obvious, making the bid facially non-responsive. However, the mistake is not material because it can be resolved by reference to information contained in other bid documents. One court has classified this kind of error as "one in the submission of a bid which does not support the release of the bidder."

Related to this is the situation where the mistake in the bid form is so obvious that the owner could not have construed it as anything but a mistake. This does not contravene the regular rule that the lowest bidder be awarded the contract. Examples would include such things as misplaced decimal points, reversal of prices, and mistakes in the designation of units.

The second type of problem is where the mistake is obvious and material and makes the bid facially non-responsive, but it cannot be resolved without reference to outside documents. In this situation the bid is non-responsive, and must be rejected. For example, where a bidder failed to state the dollar amounts of work by

subcontractors, and this could not be cured by information elsewhere in bid documents, the mistake was material and the bid was rejected.

Clerical errors are waivable only in the first category - where the irregularity is a matter of "form and not of substance" and only when: 1) the bidder acted in good faith in submitting the bid, 2) in preparing the bid there was an error of such magnitude that enforcement of the bid would work severe hardship upon the bidder, 3) the error was not the result of gross negligence or willful intention, and 4) the error was discovered and communicated, along with a request to withdraw the bid before acceptance.

The key distinction is whether the discovery of the mistake and the request for withdrawal is made before or after the contract is consummated.

Under competitive bidding rules, a bid is firm, and remains so, until it is either accepted, or the time for accepting bids expires. In Iowa, a bidder may withdraw a bid until the time specified in the advertisement for receiving of proposals. They may not then be withdrawn until 30 days after the letting, unless, of course, a mistake is discovered and the mistake is such that withdrawal is permissible. See, for example, Iowa DOT Standard Specifications 1102.13 (2001).

Timeliness

If a bid is submitted late, it is virtually certain to be rejected, as this is not a waivable irregularity. A bid is late if it is "received in the office designated in the invitation for bids after the exact time set for opening." Timeliness of a bid is determined by time of receipt, not time of discovery of the bid by the owner. Under the late bid rule, bids may be considered if: 1) received prior to award, 2) late discovery was due primarily to government mishandling after receipt at the government installation, and 3) consideration of the bid would not compromise the integrity of the process because the bid was in the sole custody of the owner and therefore unalterable by the bidder, from its receipt at the installation to its actual opening. For example, where a bid was delivered to Federal Express in a timely manner, but was late to the government installation due to the events of 9/11/2001, the bid was acceptable because bidder had neither an added competitive advantage nor an opportunity to alter its bid.

Another unusual example of where a late bid was accepted was where three bidders were sent to the wrong location in the building where bids were to be received by a security guard, and were at that location before the time bids were due. This may be a unique situation, however. Most generally, when a bid is simply turned in late, there is little protection for the bidder.

DBEs, MBEs, and WBEs

Inclusion in bids of women-owned businesses (WBEs) and minority-owned businesses (MBEs), sometimes collectively known as disadvantaged business enterprises (DBEs), when mandated in the bid documents is often material. Certain Iowa regulations provide specific DBE requirements. See, for example, Iowa DOT Standard Specifications 1102.17 (2001).

Filling in Blanks

The general rule is that bid forms must be completely filled in. However, some minor discrepancies may be waivable. In some instances, it may be that failure to fill in a blank means that a bidder is willing to complete the task at no charge. This, of course, may not be the bidder's intention. For example, in a recent case, a bidder's omission of mobilization cost could have been an indication that there would be no extra charge for mobilization, thus not creating a material deviation. Leaving blank spaces on a bid form is very dangerous. It may give the owner a reason to assume the bidder meant "no charge" and accept the bid but bind the contractor to the original price.

Different states have different interpretations of the materiality of leaving blank spaces on bid forms. In some states leaving a bid space blank or entering "no bid" is not substantial and the bid may still be considered responsive. Other states have differing views of the materiality of leaving bid items blank. Iowa's appellate courts have not yet had the opportunity to consider this issue. If the bid documents provide that all blanks must be filled in, or if specific language is required to be used, such as "no bid" when the bidder does not want to bid on an alternate, the bidder must adhere to the invitation or risk having the bid rejected. If the bid documents do not address the issue, the bidder should still avoid leaving any blank spaces.

Acknowledging Addenda

Characterization of some irregularities may differ from jurisdiction to jurisdiction. For instance, a bidder's failure to acknowledge receipt of addenda is immaterial in some states, such as Montana. Other jurisdictions disagree and consider the failure to acknowledge an addendum material, particularly if the addendum is a significant change to the contract requirements. Again, Iowa's courts have not yet ruled upon this issue.

Conclusion

A thorough understanding of the rules relating to bidding irregularities by both public owners and contractors will help to eliminate bid-time misunderstandings and ensure that the taxpayers' interests in the maintenance of the competitive bidding process continue to be protected.

APPENDIX B

Hearings, Bid Solicitation and Advertisement Requirements

Public Owner	Necessity of Hearing and Publication Requirements	Notice to Bidders Publication Requirements	Code References
"Municipalities" ²⁹	Yes – notify time and place 10 days prior to hearing in at least one newspaper of general circulation in the respective "municipality"	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	26.12 26.3 73A.18 73A.2
Counties (pertains to general construction, <i>excluding</i> the construction, reconstruction, improvement or repair or maintenance of a highway, bridge, or culvert.)	Yes – notify at least 4 days, but not more than 20 days, prior to hearing date in one or more newspapers having a general circulation in the county	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	26.12 26.3 331.305 331.341(1)
Schools	Yes – notify time and place 10 days prior to hearing in at least one newspaper of general circulation in the respective school district	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	26.12 26.3 73A.18 73A.2
DAS	No hearing required	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	8A.311 (10.a.) 26.3
Regents	No hearing required	None ³⁰	262.34
Cities	Yes – notify at least 4 days, but not more than 20 days, prior to hearing in a newspaper published at least once weekly in the city	Posting a Notice to Bidders at least once, not less than 13 days and not more than 45 days before the date for the bid letting.	26.12 26.3 362.3

**Pursuant to Iowa Code Section 26.3, posting must occur in a relevant construction lead generating service with statewide circulation, and on an internet site sponsored by either a governmental entity or a statewide association that represents the governmental entity.*

²⁹ Includes school corporations, townships, and the state fair board. DOES NOT INCLUDE CITIES! See Iowa Code § 73A.1(2).

³⁰ In 2005 the Regents were exempted from the requirements of Iowa Code Section 73A.2. See Iowa Code § 262.34. This was done to eliminate the requirement for a hearing. Chapter 262 "pertaining to regents" does require advertisements for bids but no provision of Chapter 262 contains specific "notice to bidders" advertising procedures. Those procedures were spelled out in Chapter 73A, which now no longer applies to the Regents.

APPENDIX C

Bid Thresholds for Public Improvements (Effective January 1, 2019)

Threshold	Public Entity	Amount (Subject to change)
Competitive Bids	1. Counties, Including County Hospitals	\$139,000
	2. Cities, School Districts, Aviation Authorities	\$139,000
Competitive Quotations	1. Counties, Including County Hospitals	\$103,000
	2. Cities ³¹ , School Districts, Population over 50,000	\$77,000
	3. Cities, School Districts, Population under 50,000	\$57,000

Competitive quotation requirements, which are outlined in Iowa Code Chapter 26.14, include:

- The governmental entity must get quotes from a minimum of two bidders
- The governmental entity must provide a description of the work to be performed and allow a contractor to visit the project site
- The contractor must include the price for labor, material, equipment and supplies required to perform the work
- The governmental entity must designate the time, place, and manner for filing quotes. The may be by mail, fax or e-mail.
- The project must be awarded to the lowest responsive, responsible bidder OR the governmental entity reserves the right to reject all quotes
- If the work can be performed by an employee or employees of the governmental entity, the governmental entity may file a quotation for the work to be performed in the same manner as a contractor.
- In no quotes are received to perform the work or if the governmental entity submits the lowest quote, the governmental entity may self-perform the work
- Architectural and Engineering plans and specifications are required on projects in which such services are necessary as defined in Iowa Code Sections 544A and 542B.

If the estimated cost of construction falls below the thresholds for competitive quotations, the public owner may select a contractor through good faith negotiations.

³¹ City hospitals shall follow the thresholds set for the city in which the facility is located.

APPENDIX D

Notice of Contractor's Request for Early Release of Retained Funds

Pursuant to Iowa Code Section 573.28, prior to applying for release of retained funds, the contractor shall send a notice to all known subcontractors, sub-subcontractors, and suppliers that provided labor or materials for the public improvement project. The notice shall be substantially similar to the following:

“You are hereby notified that (name of contractor) will be requesting an early release of funds on a public improvement project or a highway, bridge, or culvert project designated as (name of project) for which you have or may have provided labor or materials. The request will be made pursuant to Iowa Code section 573.28. The request may be filed with the (name of governmental entity or department) after ten calendar days from the date of this notice. The purpose of the request is to have (name of governmental entity or department) release and pay funds for all work that have been performed and charged to (name of governmental entity or department) as of the date of this notice. This notice is provided in accordance with Iowa Code section 573.28.”

APPENDIX E



Guideline for Iowa Supplemental General Conditions to AIA 2017 A201

The Iowa Construction Industry Forum (ICIF) is a unique partnership among the Iowa Chapter of the American Institute of Architects, the American Council of Engineering Companies of Iowa (ACEC/Iowa) and the Master Builders of Iowa (MBI).

*ICIF and the Boards of Directors of the three organizations have agreed to the following modifications to the **General Conditions of the Contract for Construction, AIA Document A201-2017**. The changes generally address concerns with how the A201 relates to the Code of Iowa and common construction practices in Iowa.*

§3.7 PERMITS, FEES, NOTICES AND COMPLIANCE WITH LAWS

§3.7.5: Modify §3.7.5 by adding the underlined words, so that the section now reads as follows:

§3.7.5 If, in the course of the Work, the Contractor knowingly encounters and recognizes human remains, burial markers, archeological sites or previously undelineated wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence or good faith belief of such existence of such remains or features may be made as provided in Article 15.

Comments: This was an entirely new provision in the 2007 edition of A201. The ICIF added the language requiring “knowledge” on the part of the contractor of the conditions listed so as to avoid the claim that a contractor could be liable for disturbing the listed “remains or features” even without actual knowledge of the condition. Essentially these events are treated as “differing site conditions” requiring immediate action by the contractor, but also allowing for additional time and compensation in the event the Work is disrupted by the discovery of the “events” listed.

§3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

§3.10.2: Delete the last sentence of § 3.10.2 so that the section now reads as follows:

§3.10.2 The Contractor shall prepare a submittal schedule promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect's approval. The Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Architect reasonable time to review submittals. ~~If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.~~

Comments: This provision as written penalized the contractor for not providing timely submittal schedules by depriving the contractor of the right to seek additional time/compensation for excessive delays by the design professional in the turnaround of shop drawings. The ICIF amendments eliminate that punitive provision.

§9.5 DECISIONS TO WITHHOLD CERTIFICATION

§9.5.4: Delete in its entirety.

~~§9.5.4 If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered. If the Owner makes payments by joint check, the Owner shall notify the Architect and the Architect will reflect such payment on the next Certificate for Payment.~~

§9.6 PROGRESS PAYMENTS

§9.6.4: Delete the first two sentences of §9.6.4 so that it now reads as follows:

~~§9.6.4 The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid.~~ Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

Comments: The above provision deals with the Owner's right to contact subcontractors directly on issues of payment, and to authorize joint checks without the contractor's consent. The ICIF panel agreed to eliminate the above language from the 2007 edition and return to the 1997 edition's treatment of this subject. The intent of the panel was to preserve the sole right of the contractor to deal with its subcontractors without interference by the Owner or design professional.

§13.1 GOVERNING LAW

§13.1: Delete the words following “where the Project is located” in §13.1 so that it now reads as follows:

§13.1 The Contract shall be governed by the law of the place where the Project is located ~~except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.~~

Comments: This change basically results in a return to the 1997 edition’s language, which no one on the panel could find fault with. Generally, this means that Iowa law will apply for Iowa-located projects.

§15.1.2 TIME LIMITS ON CLAIMS

§15.1.2: Strike §15.1.2 in its entirety and substitute the following:

~~§15.1.2: The Owner and the Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and the Contractor waive all claims and causes of action not commenced in accordance with 13.7.~~

§15.1.2 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

§15.1.2 As between the Owner and Contractor:

- .1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- .2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- .3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Section 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Section 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

Comments: This change restores the prior edition's language regarding when certain statutes of limitations begin to run. A "statute of limitations" bars commencement of a legal action after the expiration of a certain period of time. A number of Iowa Supreme Court cases have construed the language of the 1997A201 edition. The ICIF agreed with MBI that changing the language regarding statutes of limitations would invite unnecessary and expensive litigation on an issue the Iowa courts have already resolved.

This document has important legal construction law issues.
Users are responsible for obtaining advice from their own legal counsel.