

"Indefinite Quantity" contracts and Wisconsin public bidding laws



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As public entities, municipal-owned electric utilities are subject to Wisconsin's public bidding laws. (A "nuts-and-bolts" overview of these laws was published in the [March 2024](#) edition of *LIVE LINES*). A typical electric utility public construction project allows contractors to bid a set amount for the project. These projects have a detailed scope of work supported by specific plans and specifications, including expected quantities, locations for the work, and a final deadline. However, not all projects are so rigid — throughout the course of a year utilities will be faced with unexpected construction needs, particularly overhead and underground distribution work. Some utilities have started implementing unit price contracts without a set (or even known) maximum quantity or location of work and which are intended to be in place for an extended period of time.

As more utilities consider whether to implement these "indefinite quantity" unit price contracts, it is important to understand the unique issues these contracts raise related to Wisconsin's public bidding and public construction laws. This article explores these issues and suggests what measures may mitigate compliance concerns. As always, this comes with an important caveat — any utility contemplating an indefinite

quantity contract should consult with their local counsel before bidding.

Unit Price Contracts Under Wisconsin's Public Bidding Law. To start, unit price contracts are impliedly authorized under Wisconsin's public bidding law, with such contracts having been affirmed by the Wisconsin Supreme Court in *Probst v. City of Menasha*, 245 Wis. 90, 13 N.W.2d 504 (1944), in *Thomsen-Abbott Const. Co. v. City of Wausau*, 9 Wis. 2d 225, 100 N.W.2d 921 (1960), and again in *Gottschalk Bros., Inc. v. City of Wausau*, 56 Wis. 2d 848, 203 N.W.2d 140 (1973). While subsequent cases make clear that there is a fine line between a unit price contract and a contract utilizing unit prices to determine the total contract price, a well drafted unit price contract should hold up to scrutiny.

When it comes to awarding a contract to the lowest responsible bidder, in the simplest unit price contract, the lowest bidder is the bidder with the lowest price per unit. This analysis gets harder where a single contract contemplates multiple unit prices. This issue may be surmountable where total quantities have been reasonably estimated, but utilities should provide a clear understanding to bidders on how the lowest bid will be determined.

Indefinite Quantity Contracts. An "indefinite quantity contract" (IQC) is a unit price contract that typically has no upper limit on the number of units which may be procured during the term of the contract. Where there are multiple unit prices in a single contract and quantities of each type of

unit are unknown, evaluating the lowest bidder becomes a much more fraught calculus.

Importantly, IQCs cannot be so open-ended as to allow a buyer to purchase no units during the term. This could render the entire contract void as a matter of law. For such an agreement to be enforceable, a buyer must be obligated to purchase a minimum quantity of units. Without a minimum quantity requirement, such contracts typically fail for lack of consideration on the part of the buyer.

IQCs and Wisconsin Law. One of the main issues with IQCs is that Wisconsin's public bidding laws generally presume that the total cost of a project, when bid, is known for determining the responsibilities of the bidder and the owner.

Wisconsin Statute § 62.15(3) requires that bids be accompanied by a certified check or a bid bond equal to at least 5% and not more than 10% of the bid. This provision provides for liquidated damages for the utility should an accepted bidder fail to sign the contract and provide surety for performance of the contract.

The total value of the contract also determines: what level of surety will be required; what level of penalty any required bond must carry; and what provisions the construction contract must include regarding the duties of the prime contractor and the ability of the owner to pay subcontractors. See Wis. Stat. §§ 779.14(1e), (1m)(d), and (1m)(e).

These issues carry beyond the formation of the contract and bidding. During the performance of the work, a utility is

obligated to grant a contractor:

[A]n estimate of the amount and proportionate value of the work done, which entitles the contractor to receive the amount of the estimate, less the retainage, from the proper fund. The retainage shall be an amount equal to not more than 5 percent of the estimate **until 50 percent of the work has been completed.** Wis. Stat. § 66.0901(9)(b) (emphasis added).

After 50% of the work has been completed, partial payments must be made in full and no additional retainage is permitted except under specific circumstances. *Id.*

However, under an indefinite quantity contract, the total cost of a project is open-ended leading to potential issues with implementing these statutory requirements — e.g., how long *must* a utility retain 5% and at what point *must* the utility stop retaining 5%?

Addressing Issues with IQCs.

Without additional court guidance, the following are only suggestions on how a utility may set up an IQC to address the issues described above. A utility should consult with local counsel during project planning to determine if any of these suggestions will work for the utility's proposed project.

Contract Terms. An IQC could include all statutorily required contract terms for any value contract. For example, IQCs would require contractors to pay all claims related to the project, maintain a list of all subcontractors, suppliers, and service providers, authorize the utility to make direct payments

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to subcontractors or issue checks payable to the contractor and the subcontractor(s), and require payment and performance bonds rather than any authorized alternative assurance. Wis. Stat. § 779.14(1e)(a) & (b), & (1m)(d)1.a., 2.a., & 3.

Alternatively, the terms could be based on the guaranteed minimum quantity required to make the contract enforceable, a reasonable estimate of the total quantity expected, or an established maximum quantity that the utility can purchase under the contract. The first two options risk having statutorily non-compliant or less protective terms should the utility purchase more than the minimum quantity or estimate. And a guaranteed maximum quantity potentially limits the flexibility of having an indefinite quantity contract.

Payment and Performance Bonding and Retainage. Both a required payment and performance bond and the ability of the utility to retain amounts from completed work raise similar issues—they are based on the total cost of the project, which by the nature of an indefinite quantity contract is unknown until the contract term ends.

One approach that has been utilized (but not reviewed by any court) is using a master agreement that establishes the unit price for bidding purposes, but which contemplates the parties entering into individual task orders for each identified sub-project. Task orders entered into during the term of the master agreement would then estab-

lish the quantities and total cost for each sub-project. Bonding terms would be based on the sub-project total cost and payment estimates and retainage could be reasonably estimated based on the percentage of the sub-project that has been completed.

An alternative would be to have bonding and payment based on the guaranteed minimum quantity, reasonable estimate, or established maximum quantity options discussed above.



These options carry the risk of under or over protecting the utility, impacting the price of the bid, or arguable non-compliance with statutory retainage requirements (over or under retaining).

Bid Bonds. Bid bonds face similar issues to payment and performance bonds. The amount of the bid bond is based on the total bid cost. Solutions similar to those proposed above could be implemented.

An issue not addressed by utilizing task orders is that a utility must return the certified check or release the bid bond upon the contractor's execution of the contract and provision of the required sureties. Under the task order set-up, the master agreement is signed upon bid acceptance, but the required sureties are provided on a task order basis. This requires either a longer retention of the bid bond or a return of the bid bond prior to the provision of a payment and performance bond.

Utilities could consider utilizing the guaranteed minimum quantity to establish the amount and retention period

for the bid bond. If the guaranteed minimum quantity is based on a known portion of the project, the initial task order could be executed concurrently with the master agreement. The risk remains that the execution and provision of sureties for additional task orders will not be secured by the retention of the bid bond.

Additional Considerations

Contract Length. Just as Wisconsin law is silent on IQCs, it is also silent on what is a reasonable term for such contracts. Outside of market restrictions (a contractor may be hesitant to be tied to a unit price for an extended period of time in today's supply chain world), utilities should consider that Wisconsin's public bidding laws are there "to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies at the most reasonable price practicable." *Aqua-Tech, Inc. v. Como Lake Protection & Rehabilitation District*, 71 Wis. 2d 541, 550, 239 N.W.2d 25 (1976). Utilities should keep these considerations in mind when determining how often the utility should be going back out to bid on an IQC—whether annually, biannually, or other time frame.

Plans and Specifications and Change Orders. A contractor is entitled to rely upon the express representations in the plans and specifications prepared by a utility in preparing and submitting its bid, even where the contract places a duty of investigation upon the contractor. An IQC where the exact locations and quantities of the work may be unknown

at the time of bid could lead to costly change orders if actual site conditions differ from the general assumptions set out in the plans and specs. While this is always good advice, utilities should use extra caution when working with their engineers on the preparation of plans and specifications and their attorney on a contract that protects the utility in these situations.

It may be helpful to have different contracts for different types of projects. A utility may also wish to reserve the right to separately bid out any particularly complicated project that could otherwise be covered under the scope of the IQC.

PSC Construction Authorization. A utility should also never forget the requirements in Wis. Stat. § 196.49 to obtain a certification or approval of the PSC before beginning a project. A utility should consider how it will define its proposed project for the purposes of determining whether the project qualifies for an exemption from obtaining PSC authorization based on the "estimated gross cost of the project" under Wis. Stat. § 196.49(5g).

Conclusion. IQCs may provide additional flexibility for electric utilities. Regardless, these contracts should be used only after due consideration of all potential issues, consultation with local counsel, and careful crafting of bidding documents and plans and specifications. ●



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