



REBECCA OTTO  
STATE AUDITOR

# STATE OF MINNESOTA

## OFFICE OF THE STATE AUDITOR

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November 7, 2008

The Honorable James Schminski  
Chair, Floodwood Town Board  
4856 Highway 73 South  
Floodwood, Minnesota 55736

The Honorable Dennis Juusola  
Supervisor, Floodwood Town Board  
11867 Floodwood Road  
Floodwood, Minnesota 55736

The Honorable Ronald G. Bailey  
Supervisor, Floodwood Town Board  
11842 Highway 2  
Floodwood, Minnesota 55736

Dear Floodwood Town Board,

The Office of the State Auditor received concerns regarding the contracting procedures used by the Floodwood Town Board for improvements to Hill Road in 2006 and 2007. Specifically, the concerns alleged that the Town Board divided the road improvements into smaller projects in order to avoid the \$50,000 competitive bidding threshold.

Based upon our review, we are unable to conclude that the Town divided the Hill Road project simply to avoid the competitive bidding requirements. However, we were provided with no evidence that the Town obtained at least two quotes for the 2007 work performed on Hill Road, as required by Minnesota's contracting laws. In this letter, we offer several recommendations to improve the Town's contracting procedures in the future.

### **Minnesota's Contracting Laws**

Under Minnesota's contracting laws applicable at the time this project commenced, towns were required to solicit sealed bids by public notice for construction projects estimated to exceed \$50,000.<sup>1</sup> For contracts with estimated costs between \$10,000 and \$50,000, towns had the authority to use either the competitive bidding process or direct negotiations.<sup>2</sup> If the town used the direct negotiation process, the town was required to obtain at least two quotes when possible and to keep them on file for at least one year.<sup>3</sup>

<sup>1</sup> Minn. Stat. § 471.345, subd. 3 (2006). As of August 1, 2008, the amount requiring competitive bidding was raised to \$100,000.

<sup>2</sup> Minn. Stat. § 471.345, subd. 4 (2006). As of August 1, 2008, the range for contracts requiring at least two quotes was raised to between \$25,000 and \$100,000.

<sup>3</sup> *Id.*

A town may not split a contract into a series of smaller contracts in order to keep the dollar amount of the contract under the various threshold dollar amounts.<sup>4</sup>

### **The Hill Road Improvement Project**

Based on documents sent to this Office by the Floodwood Town Clerk, it appears that the Town Board first decided to solicit sealed bids for improvements to Hill Road in June 2006.<sup>5</sup> A notice was published, calling for bids for the rebuilding of Hill Road.<sup>6</sup> The sealed bids were to be opened at the Town Board's June 27, 2006 meeting.<sup>7</sup> However, according to the meeting minutes, the Town Board did not open the bids it received. Instead, the minutes indicate that there was a discussion about why other potential vendors had not submitted bids.<sup>8</sup>

The Town Board again decided to solicit sealed bids for improvements to Hill Road in September of 2006.<sup>9</sup> The bids were to be opened on October 3, 2006.<sup>10</sup> According to the October 3, 2006 meeting minutes, the bids were examined, and the Town Board appeared to favor one bid, but no vote was taken. Instead, according to the minutes, the Town Board decided to obtain further information about one of the bids at its October 10, 2006 meeting. The minutes do not describe the bids received. One of the bidders informed us that four bids were received for approximately the following amounts: \$48,000, \$52,000, \$56,000 and \$86,000.

On October 10, 2006, the Town Board decided to reject all of the bids submitted, citing the lateness of the season and the approaching winter weather.<sup>11</sup> However, the Town Board then decided to proceed with "grub work" on the road, to be completed in one month's time.<sup>12</sup> According to the minutes, the Town's Attorney advised the Town Board that the Town would not have to advertise for bids if the cost of the grub work was under \$35,000.<sup>13</sup> The Town's Attorney also recommended that the Town obtain at least two quotes. According to the minutes, the Town Board decided to take "bids" for one week, setting a deadline of October 17, 2006.<sup>14</sup> Under the word "bids", the minutes also contain the word "quotes" in parentheses.<sup>15</sup> Minutes from the October 17, 2006 meeting

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<sup>4</sup> See Op. Att'y Gen. 707-a-4 (April 29, 1952).

<sup>5</sup> See Town Meeting Minutes from June 6, 2006.

<sup>6</sup> See Affidavit of Publication, *The Floodwood Forum*, June 23, 2006.

<sup>7</sup> See Town Meeting Minutes from June 6, 2006.

<sup>8</sup> See Town Meeting Minutes from June 27, 2006.

<sup>9</sup> See Town Meeting Minutes from September 18, 2006.

<sup>10</sup> *Id.* See also Affidavit of Publication, *The Floodwood Forum*, September 28, 2006; Affidavit of Publication, *The Northern Independent*, October 2, 2006.

<sup>11</sup> See Town Meeting Minutes from October 10, 2006.

<sup>12</sup> *Id.* The minutes show that this work included tree cutting, brushing, disposing of trees, hauling of gravel and grading.

<sup>13</sup> In 2006, the sealed bidding threshold was \$50,000, not \$35,000. See Minn. Stat. § 471.345, subd. 3 (2006).

<sup>14</sup> See Town Meeting Minutes from October 10, 2006.

<sup>15</sup> *Id.*

reflect that three “bids” ranging from \$3,500 to \$4,400 were received, and the Town Board accepted the low “bid.” From the November 6, 2006 minutes, it appears that the low “bidder” was paid \$3,140 for the work.

Additional work on the Hill Road project was performed in 2007. From the information provided to us, it appears that the remaining work on Hill Road was below the dollar threshold requiring competitive bidding, but within the range requiring at least two quotes if competitive bidding was not used.<sup>16</sup> The June 5, 2007 minutes provide that “bids” for the Hill Road project would be opened on July 10, 2007. We were not provided with a notice of publication for a bid opening in 2007 for work on Hill Road. In addition, the July 10, 2007 meeting minutes state that the Town Board gave a vendor “extra time to make out his bid.”<sup>17</sup> The vendor’s “bid” of \$27,000 for Hill Road was then “exhibited” and “awarded” at the August 7, 2007 Town Board meeting.<sup>18</sup> The minutes contain no evidence that the Town obtained any other quotes for the work.

### **Analysis of the Town’s Actions**

The minutes do not contain the Town’s estimate of the work to be performed on Hill Road in 2006 or in 2007. As a result, we are unable to determine whether the Town was required to use the sealed bidding process. However, the Town provided us with a document showing that the total cost for the entire project, including the work performed in 2006 and in 2007, was only \$48,766.50. Therefore, it appears that the Town may not have been required to use competitive bidding in 2006 or 2007 because the dollar value of the work was under \$50,000.

However, once the Town decided to use the sealed bid process in 2006, it was required to follow that process.<sup>19</sup> Therefore, we are concerned that the Town requested, but apparently did not open, the bids it received at the June 27, 2006 meeting. In addition, the Minnesota Supreme Court has determined that the public entity must determine bid responsiveness at the time the bid is opened.<sup>20</sup> According to the courts, no material change in a bid can be made once a bid has been opened.<sup>21</sup> To permit such a change, according to the courts, would be to “open the door to fraud and collusion.”<sup>22</sup> Therefore, we are also concerned that the Town opened bids on October 3, 2006, but then decided not to award the bid until more information could be obtained about one of the bids.

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<sup>16</sup> According to a document that the Town provided us, the total cost of the Hill Road project, including work performed in 2006 and 2007, was \$48,766.50.

<sup>17</sup> In the sealed bid process, one vendor may not be provided with additional time to prepare a bid.

<sup>18</sup> The vendor was paid a total of \$26,300.00 for work on the Hill Road project, according to the summary document that the Town provided to us. It is our understanding that the same vendor participated in the October 2006 bidding for the work, but was not the low bidder.

<sup>19</sup> See *Griswold v. County of Ramsey*, 242 Minn. 529, 535, 65 N.W.2d 647, 652 (1954).

<sup>20</sup> See *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 206 (Minn. 1990). See also *Lovering-Johnson, Inc., v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. App. 1997).

<sup>21</sup> *Id.*

<sup>22</sup> See *Griswold*, 242 Minn. at 535, 65 N.W.2d at 652.

At its October 10, 2006 meeting, the Town Board provided a reason, namely the lateness of the season, for rejecting the bids it had received, and for breaking the Hill Road work into separate components. As a result, we are unable to conclude that the Town Board divided the work simply to avoid the competitive bidding requirements. Nonetheless, we are troubled that the Town sought bids in October 2006, but then decided not to award the work due to the lateness of the season.<sup>23</sup> The Town should have been aware that it was late in the season before it requested bids for the work.

We received no evidence that the Town obtained two or more quotes when the remaining work was to be performed on Hill Road in 2007. The Town's meeting minutes used the word "bid" when referring to both the grub work performed on Hill Road in 2006 and the remaining work performed in 2007. However, it appears that the Town actually used the quotation process for the work performed in 2006, and the remaining work on Hill Road performed in 2007. While it appears that more than one quote was obtained for the work performed in 2006, we found no evidence that more than one quote was obtained for the 2007 work. More than one quote was required for the 2007 work because the amount of work to be performed cost between \$10,000 and \$50,000.<sup>24</sup>

### **Recommendations**

The Office of the State Auditor recommends that the Town obtain more than one quotation when using the direct negotiation method, as required by Minnesota's contracting laws. The quotations must be kept on file for a period of at least one year. When the sealed bid process is used, we recommend that the Town Board comply with all requirements of the sealed bid process.

We are unable to conclude that the Town Board broke up the Hill Road work simply to avoid the competitive bidding requirements. However, had the Town Board made the decision earlier to perform only the grub work in 2006, the Town would have avoided unnecessary publication expenses associated with the 2006 sealed bid process. We recommend that the Town Board determine whether the work can be performed before soliciting bids.

Because the estimated cost of a project determines which contracting procedure must be used, it is critical that the Town estimate the cost of a project in advance. We recommend that Town Board record the estimated cost of contracts in the Town Board meeting minutes.

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<sup>23</sup> The contract planning stage of a road improvement project is important. Furthermore, if a contract for the improvement of a road must be let by sealed bid, Minnesota law requires that the plans and specifications for the project be on file with the town clerk before the contract is let. *See* Minn. Stat. § 160.17, subd. 1.

<sup>24</sup> Given the number of bids received for the work in 2006, it appears the Town should have been able to obtain more than one quote for the work in 2007.

Floodwood Town Board

November 7, 2008

Page 5

We also recommend that, in the future, the Town Board meeting minutes accurately use the terms “bids” or “quotes” to reflect the actual contracting process being used by the Town. The term “bids” should be used for the sealed bid process, and the term “quotes” should be used for quotations obtained through the direct negotiation process.

Finally, we recommend that the Floodwood Town Board take steps to improve the documentation of official actions contained in the Town Board’s meeting minutes. For example, the number of bids or quotes received, and the bid or quote amounts, should be recorded in the meeting minutes. To provide the Town with further guidance on what should be included in Town Board meeting minutes, a copy of our Statement of Position on Meeting Minutes is enclosed.

These recommendations are provided to improve the Town’s contracting procedures in the future. Because we found no evidence that the Town obtained two or more quotations in 2007 as required by Minnesota’s contracting laws, a copy of this letter is being provided to the St. Louis County Attorney, in compliance with Minn. Stat. § 6.51, to institute such proceedings as the law and the public interest require. A copy of this letter is also being filed with the St. Louis County Auditor/Treasurer, in compliance with Minn. Stat. § 6.51. If you have any questions about this letter, please feel free to contact me at 651-297-5853.

Sincerely,

*/s/ Nancy J. Bode*

Nancy J. Bode  
Office of the State Auditor

Enclosure

cc. Ms. Victoria Johnson, Town Clerk  
Ms. Theresa Zaremba, Town Treasurer  
Mr. Walter W. Vasil, Town Attorney  
The Honorable Melanie S. Ford, St. Louis County Attorney  
The Honorable Donald Dicklich, St. Louis County Auditor/Treasurer