

**FORMAL OPINION
2002-F-04**

DATE ISSUED: March 27, 2002

REQUESTED BY: Representative Matthew M. Klein

QUESTION PRESENTED

Whether the North Dakota Workers Compensation Bureau violated the competitive bidding statutes when it rejected an "approved" alternate in awarding bids to the lowest and best bidder, when choosing that alternate would have reduced the cost of the project by more than \$20,000.

ATTORNEY GENERAL'S OPINION

It is my opinion that the North Dakota Workers Compensation Bureau did not violate the competitive bidding statutes when it rejected an "approved" alternate in awarding bids to the lowest and best bidder, even though by choosing that alternate it would have reduced the cost of the project by more than \$20,000.

ANALYSIS

This opinion relates to the North Dakota Workers Compensation Bureau's (hereafter, "Bureau") request for and award of bids for the construction of its new office building.

Robert Gibb & Sons was the low bidder for the ventilation and air conditioning portion of the contract and it was awarded the bid. The Bureau's bidding documents specified that the base bid shall include automatic temperature controls provided by Energy Tech Services, Inc. (hereafter, "Energy Tech"). The bidding documents also specified that the bidder should indicate how using the automatic temperature control systems provided by the following entities instead of Energy Tech would change the base bid: ProControls Midwest (hereafter, "ProControls"), Johnson Controls, or Trane. According to Robert Gibb & Sons' bid, using ProControls instead of Energy Tech would have reduced the base bid by \$20,200. The Bureau decided to go with the base bid, which included the automatic temperature control system provided by Energy Tech, and rejected the ProControls alternate.

The issue is whether the Bureau violated the competitive bidding statutes by rejecting the use of ProControls' system, which is \$20,200 cheaper than the system provided by Energy Tech, when both Energy Tech and ProControls are specifically "approved" in the bidding documents.

The bidding documents state:

Johnson Controls, Energy Tech Services, ProControls Midwest and Trane are the only approved Systems for this section. 8 day Prior approval is required for other bidders. Prior approval shall be contingent upon review of qualifications and proposed system design.

Bidding documents, Automatic Temperature Control, paragraph 2.12 (emphasis added). In my opinion, this statement means that unless prior approval is received for other systems, only the four systems listed may be submitted as part of the bid. It does not mean that the system that is the least expensive will be chosen as part of the bid award.

The Bureau's Board of Directors, in the process of awarding the bid, needed to determine which automatic temperature control system it would choose. The bidding documents state:

The determination of lowest and best bidder and respective single contract amount for all work required for each type of bid will be the sum of selected bid items, and respective Alternates (if any) as determined by the Owner.

Supplementary Instructions to Bidders, paragraph 4.1.10. Thus, the bidding documents indicate that the determination of lowest and best bidder includes choice of alternates, if any. See also 1968-70 N.D. Op. Att'y Gen. 357 (in selecting an alternate proposal, a board is bound by the provisions that relate to the acceptance of bids and the awarding of the contract to the lowest and best bidder). Therefore, it is my opinion that determining whether to choose an alternate is part of determining the lowest and best bid.

North Dakota Century Code chs. 48-01.1 and 48-02 establish a bidding process for state agencies and political subdivisions to follow when they make public improvements, including constructing a building. Chapter 48-01.1 indicates in one place that the bid must be awarded to the lowest responsible bidder (see N.D.C.C. § 48-01.1-02), and in other places that the bid must be awarded to the lowest and best bidder (see N.D.C.C. §§ 48-01.1-05(4), 48-01.1-06, and 48-01.1-07). Chapter 48-02 indicates that the bid must be awarded to the lowest and best bidder (see N.D.C.C. § 48-02-10.2). Thus, these two chapters indicate in one place that the bid must be awarded to the lowest responsible bidder, and in all other places that the bid must be awarded to the lowest and best bidder.

This office has previously determined that the phrase “lowest and best bidder” is at least as comprehensive as the phrase “lowest responsible bidder.” 1956-58 N.D. Op. Att’y Gen. 42, 43; see also R.G. Wilmott Cole Co. v. State Purchasing Commission, 54 S.W.2d 634 (Ky. App. 1932); 86 A.L.R. 127 (1932). The North Dakota Supreme Court has not discussed the meaning of lowest and best bidder; however, it has indicated what “lowest responsible bidder” means. In 1922, a board of county commissioners awarded a bid for repairs of the county courthouse to a bidder who was not the lowest bidder. The North Dakota Supreme Court stated:

There were four bids: Schafer, \$6,389; Joyce, \$6,013; Niedermeyer, \$5,768; Schmidt, \$5,760. . . . It . . . appears that the principal reasons for awarding the contract to Joyce were: The commissioners were acquainted with Joyce. He had previously done some public work in the county. They knew him to be a responsible and good contractor. They did not know anything about Niedermeyer or Schmidt concerning their responsibility or ability. They accepted the bid of Joyce because it seemed the most desirable under the circumstances. . . . Further, it appears that Niedermeyer had never had a contract of this size Further, it appears that the commissioners, or some of them, knew about some other work that Schmidt had done, and it did not appear to be satisfactory.

Chaffee v. Crowley, 190 N.W. 308, 308 (N.D. 1922). The Court indicated what may be considered when determining the lowest responsible bid:

[T]he law provides that the lowest responsible bid must in all cases be accepted. It is well recognized that a responsible bid involves the elements of the ability, capacity, reputation, experience, and efficiency of the bidders. Responsibility must be determined as well as the pecuniary amount. The county commissioners have a discretion to exercise in this regard. There is no showing that they did not exercise their best judgment within the discretion they possessed in selecting the lowest responsible bidder, nor that they acted in bad faith or other than for the best interests of the county. In their judgment the small difference in dollars between the bids offered might be far outweighed by the ability, efficiency, and facilities of the contractor to whom the award was made. It is not shown in the record that either Niedermeyer or Schmidt possessed a responsibility in this sense equal to that of Joyce.

Chaffee, 190 N.W. at 308-09 (citations omitted) (emphasis added). Five years later, the North Dakota Supreme Court elaborated on the meaning of “responsible” bidder:

The term “responsible” . . . means something more than mere financial responsibility. It means responsibility as regards the duty to be assumed by the contractor by the particular contract under consideration, and includes all the various elements that bear on that question, such as the integrity of the bidder and his skill, ability, and capacity to perform that particular work.

Ellingson v. Cherry Lake School District, 212 N.W. 773, 775 (N.D. 1927) (emphasis added).

Thus, the North Dakota Supreme Court has indicated in the Chaffee and Ellingson cases that the awarding board has the discretion to determine who the lowest responsible bidder is, and such determination is based, in part, on the monetary amount of the bid. However, to determine the lowest responsible bidder, the board must also consider the ability, skill, reputation, integrity, experience, efficiency, and capacity of the bidders, and determine which bidder is most appropriate for the particular work under consideration.

Other legal materials reach similar conclusions:

It is a widely accepted principle that public authorities, in awarding a public contract, may take into consideration the differences or variations in the quality or character of the materials, articles, or work proposed to be furnished by the respective bidders, under a constitutional or legislative provision requiring that the contract be awarded to the lowest responsible bidder, the lowest and best bidder, or a similarly designated bidder, the courts generally taking the position that the terms lowest responsible bidder, and lowest and best bidder, or their equivalent, do not mean that the awarding officials are required to let the contract to the lowest money bidder, even though he or she is financially responsible, but may award the contract to a higher bidder if in their honest judgment the materials, articles, or work that he or she proposes to furnish are better in quality or more suitable to the intended purpose than the low bidder's.

64 Am.Jur.2d Public Works and Contracts § 70 (2001). See also L.C. Warden, Annotation, *Differences in Character or Quality of Materials, Articles, or Work as Affecting Acceptance of Bid for Public Contract*, 27 A.L.R.2d 917, § 2 (1953).

Statutory or charter provisions that certain contracts of municipal corporations be awarded to the lowest and best, or lowest responsible, bidder, are made for the protection of public interests and must be complied with by the municipal authorities for the benefit of the public. However, these authorities generally have a broad discretion in determining what bid is the one most nearly answering such requirements. But the discretion in

awarding the contract must be exercised fairly and reasonably within the spirit of the law.

10 Eugene McQuillin, *The Law of Municipal Corporations* § 29.72 (3d ed. 1999) (footnotes omitted). See also 64 Am.Jur.2d Public Works and Contracts § 67 (2001).

To summarize, determining the lowest and best bid includes the determination of whether to choose an alternate. "Lowest and best bidder" is at least as comprehensive as "lowest responsible bidder." Thus, in determining which automatic temperature control system to choose, the Bureau's Board of Directors could have considered at least those broad range of factors quoted above in the Chaffee and Ellingson cases that the North Dakota Supreme Court indicated may be considered when determining the lowest responsible bidder.

Before the Bureau's Board of Directors made a decision regarding the automatic temperature control system, the Board's building committee heard presentations from Energy Tech and ProControls regarding the automatic temperature control systems each of them offered. After the presentations were made, the building committee recommended to the Board of Directors that it would be in the best interests of the Bureau to accept the base bid for the ventilation and air conditioning contract and not go with any of the alternates for the automatic temperature controls. See North Dakota Workers Compensation Board of Directors Meeting Minutes, December 21, 2001. At this same meeting, Mr. Brent Edison, the executive director for the Bureau, stated it is in the best interests of the Bureau "from both an equipment and service standpoint" to follow the building committee's recommendation. The Board, thereafter, chose to go with Energy Tech, which was included in the base bid, rather than ProControls, which was a lower cost alternate. The Bureau has informed a member of my staff that the reasons the Board chose Energy Tech over ProControls included the following:

1. Energy Tech has been installing and servicing Andover Controls since 1976. They have two offices, in Bismarck and Fargo, with a staff of more than 16 employees, including 11 service technicians, 2 project managers, 3 programmers, and 1 computer aided drafting operator.
2. Energy Tech has handled many projects of this size.
3. ProControls has only 1 service technician in Bismarck and he is a new employee of the company. They also have an office in Minot with 3 persons who do programming and installation.

4. ProControls' installation and ongoing service of the Circon system would mainly be provided by alliances with other companies that work with Circon, most of which are in Minnesota.
5. ProControls has installed this system on some smaller buildings, but this would be their first large project with Circon.

It is apparent that the Board chose to go with Energy Tech rather than ProControls because the Board was convinced Energy Tech has more experience with projects which are similar in size to the Bureau's, and that the persons providing service for Energy Tech may be more readily available and have more experience with the system serviced. For the Board to base its choice of automatic temperature control system on these reasons would be appropriate considering the factors that the North Dakota Supreme Court indicated could be used to determine the lowest responsible or lowest and best bid. In its discretion, the Board determined that the experience in projects of similar size to the Bureau's and availability of services provided by Energy Tech justified the additional cost of including that automatic temperature control system within the award of the bid. Such discretion is left up to the Board, and is appropriate unless there is some indication of the Board acting arbitrarily or in bad faith.

Therefore, it is my opinion that the North Dakota Workers Compensation Bureau did not violate the competitive bidding statutes when it rejected an "approved" alternate in awarding bids to the lowest and best bidder, even though by choosing that alternate it would have reduced the cost of the project by more than \$20,000.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹

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¹ See Johnson v. Baker, 21 N.W.2d 355 (1946).