

**LETTER OPINION
2010-L-09**

May 19, 2010

The Honorable George J. Keiser
State Representative
422 Toronto Dr
Bismarck, ND 58503-0276

Dear Representative Keiser:

Thank you for your letter asking whether the construction of the Biomass Heater Building associated with the Bismarck Aquatic and Wellness Center should have been competitively bid under state law. For the reasons indicated below, it is my opinion that the Bismarck Parks and Recreation District (Park District)¹ was required to follow the state's competitive bidding requirements when it funded and constructed the Biomass Heater Building which was built and attached to the Bismarck Aquatic and Wellness Center (Aquatic Center), even though the Park District was exempt from the competitive bidding requirements for Streamline Foundation's funding and construction of the Aquatic Center.

ANALYSIS

The Aquatic Center was recently constructed on the Bismarck State College campus. The Aquatic Center was built and is owned by Streamline Foundation ("Streamline"), a private entity. The Biomass Heater Building is a separately constructed structure which is attached to the Aquatic Center and houses the Aquatic Center's biomass heating system.² The Park District provided the funding for and constructed the Biomass Heater Building.

¹ Your question is phrased in terms of whether the Executive Director of the Bismarck Parks and Recreation District, Steve Neu, violated the state's competitive bidding laws. Since these laws place specific requirements on a park district or a district's governing body, this opinion addresses whether the Bismarck Parks and Recreation District and the Bismarck Park Board, as opposed to an employee of the district, followed the competitive bidding requirements.

² The biomass heating system is the Aquatic Center's sole source of heat.

In a previous opinion, N.D.A.G. 2008-L-08, I determined the Park District was exempt from competitive bidding requirements for the Aquatic Center because the Aquatics Center was funded and constructed by a private, non-profit corporation pursuant to a development agreement. A question has now arisen whether construction by the Park District of the Biomass Heater Building attached to the Aquatic Center was subject to state law competitive bidding requirements.

Two relevant statutes require competitive bidding by a park district. Section 40-49-14, N.D.C.C., states:

Except as provided in chapter 48-01.2, all contracts exceeding twenty-five thousand dollars must be let to the lowest responsible bidder after advertisement in the official newspaper of the municipality once each week for two successive weeks.

A provision in N.D.C.C. ch. 48-01.2 states:

[I]f the construction of a public improvement is estimated to cost in excess of one hundred thousand dollars, the governing body shall advertise for bids by publishing for three consecutive weeks.³

These two laws indicate that all contracts entered into by a park district that exceed \$25,000 must be competitively bid under N.D.C.C. § 40-49-14, unless the contract is for the construction of a public improvement estimated to cost in excess of \$100,000. A park district and its board must then solicit bids in accordance with N.D.C.C. ch. 48-01.2.⁴

Although these two state laws require competitive bidding, an issue arises whether another chapter in state law, N.D.C.C. ch. 48-02.1, provides an exemption from the competitive bidding requirements for the construction of the Biomass Heater Building. Chapter 48-02.1, N.D.C.C., authorizes certain public entities to work with private entities to construct buildings for the public entity's benefit. The Aquatic Center was funded and constructed by a private entity, Streamline, pursuant to N.D.C.C. ch. 48-02.1, which refers to the building constructed by the private operator as a "fee-based facility".⁵ This chapter provides, "[n]otwithstanding any other provision of law, private operators may construct . . . fee-based facilities subject to the terms of this chapter."⁶ A public entity "may negotiate

³ N.D.C.C. § 48-01.2-04(1).

⁴ Cf. Brusegaard v. Schroeder, 201 N.W.2d 899, 904-05 (N.D. 1972) (to the extent the provisions of N.D.C.C. ch. 48-02 (a predecessor to ch. 48-01.2) regarding bidding, conflict with those of N.D.C.C. ch. 11-11 regarding county bidding, the former provisions prevail).

⁵ See N.D.C.C. § 48-02.1-01(4).

⁶ N.D.C.C. § 48-02.1-02.

and enter into a development agreement with any private operator” for the construction of a fee-based facility.⁷

Section 48-02.1-12(2), N.D.C.C., provides:

[T]he construction . . . of fee-based facilities by private operators under this chapter [is] subject to all competitive bidding and procurement requirements otherwise applicable under state and local laws, rules, and ordinances, if so determined by resolution of the governing body of the public authority.

In this situation, the “fee-based facility” is the Aquatic Center, the “private operator” is Streamline, and the “public authority” is the Park District. This provides that Streamline’s construction of the Aquatic Center is subject to competitive bidding only if determined by resolution of the governing body of the Park District. The Park District never made such a resolution,⁸ thus the construction of the Aquatic Center by Streamline was not subject to competitive bidding requirements.

When I wrote N.D.A.G. 2008-L-08, the information provided to me was that the Aquatic Center would be funded and constructed by the private operator, Streamline. The terms of the development agreement were still being negotiated and were not available at that time.⁹ There was no information provided to me that any part of the Aquatic Center would be funded and constructed by any entity other than Streamline. Based on those facts, I concluded in N.D.A.G. 2008-L-08 that N.D.C.C. ch. 48-02.1 gives the Park District “the authority to enter into a development agreement with a private entity for funding and constructing a fee-based facility without following competitive bidding requirements.” I also stated that “the Park District is exempt from complying with the competitive bidding requirements because N.D.C.C. ch. 48-02.1 exempts some projects from the competitive bidding laws.”¹⁰

The conclusion in N.D.A.G. 2008-L-08 was based upon a specific set of facts, some of which were hypothetical. The facts and circumstances surrounding all aspects of the Aquatic Center’s actual funding and construction differed from the facts provided to me

⁷ N.D.C.C. § 48-02.1-03.

⁸ Telephone call from Patrick Ward, attorney for Bismarck Parks and Recreation District, to Lea Ann Schneider, Assistant Attorney General (Mar. 16, 2010).

⁹ See N.D.A.G. 2008-L-08.

¹⁰ Id. Whether it was reasonable for the Park District, or Mr. Neu on its behalf, to believe that the previous opinion from this office exempted the Park District from the competitive bidding requirement of state law for its construction of the Biomass Heater Building is a question of fact which I cannot determine in a legal opinion.

which formed the basis of N.D.A.G. 2008-L-08. This different set of facts requires a different analysis. As I previously explained, N.D.C.C. ch. 48-02.1 authorizes a public authority¹¹ and private operator¹² to enter into a development agreement so that the private operator may construct a fee-based facility to be utilized by the authority or be “subject to the public authority’s jurisdiction.”¹³ The law does not necessarily prohibit a public authority from constructing part of a fee-based facility pursuant to a development agreement, but the law also does not exempt a public authority from following competitive bidding requirements if it chooses to construct part of the facility. On the contrary, “[a] development agreement may . . . [i]ncorporate related improvements into the fee-based facility, subject to requirements of state . . . law.”¹⁴

Because the Park District, and not Streamline, funded and constructed the Biomass Heater Building, it is my opinion that neither N.D.C.C. § 48-02.1-12(2) nor any other section of N.D.C.C. ch. 48-02.1 exempted the Park District from soliciting bids in accordance with N.D.C.C. ch. 48-01.2 and section 40-19-14 for the construction of the Biomass Heater Building, even though it is part of the Aquatic Center.¹⁵ The conclusion in N.D.A.G. 2008-L-08 is valid under the facts provided there, *i.e.*, that the private entity, Streamline, would be financing and constructing the entire Aquatic Center. In conclusion, the Park District was required by law to solicit bids for the construction of the Biomass Heater Building.¹⁶

Further, you asked about the consequences of the Park District’s failure to competitively bid the Biomass Heater Building. There is no specific penalty provided in state law should

¹¹ In N.D.A.G. 2008-L-08, I determined the Park District was a public authority as defined by N.D.C.C. § 48-02.1-01(6).

¹² “‘Private operator’ means a private person, a corporation or partnership, a cooperative or unincorporated association, a joint venture or consortium that constructs, improves, rehabilitates, owns, leases, operates, or manages a fee-based facility subject to this chapter. The term includes related parties and entities that together perform some or all of these functions for the same facility.” N.D.C.C. § 48-02.1-01(5).

¹³ N.D.C.C. § 48-02.1-03.

¹⁴ N.D.C.C. § 48-02.1-04.

¹⁵ N.D.C.C. § 48-02.1-12(2) provides for an exemption from bidding requirements only for parts of a facility constructed by the “private operator.”

¹⁶ The construction of a public improvement estimated to cost in excess of \$100,000 is subject to the bidding requirements in N.D.C.C. ch. 48-01.2. Contracts between \$25,000 and \$100,000 are subject to the bidding requirements in N.D.C.C. § 40-49-14. See also N.D.A.G. 2007-L-15 (“the law does not prevent a governing body from soliciting bids for specialized portions of a project beyond the general, electrical and mechanical portions.”)

a project not be bid as required by N.D.C.C. ch. 48-01.2 or N.D.C.C. § 40-49-14.¹⁷ In determining what to pay the contractors, the Park District should be guided by the North Dakota Supreme Court case, Danzl v. City of Bismarck, 451 N.W.2d 127 (N.D. 1990). In Danzl, the city violated the competitive bidding statutes. However, the North Dakota Supreme Court determined the city should pay the reasonable value of what it received under the contracts, where there was no favoritism, fraud, corruption, collusion, improvidence, or extravagance, the prices charged were not unreasonable, and the city and bidders acted in good faith.¹⁸ Also, because the bidding statutes are enacted to benefit the public and are not intended to directly benefit contractors, a competing contractor generally may not recover damages against a public entity for violation of the competitive bidding statutes.¹⁹

Sincerely,

Wayne Stenehjem
Attorney General

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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.²⁰

¹⁷ Cf. N.D.C.C. § 15.1-09-34 (a school board member who participates in a violation of bidding requirements is guilty of a class B misdemeanor).

¹⁸ See Danzl v. City of Bismarck, 451 N.W.2d 127 (N.D. 1990). See also Alstad v. Sim, 109 N.W. 66 (N.D. 1906).

¹⁹ See Becker Elec., Inc. v City of Bismarck, 469 N.W.2d 159 (N.D. 1991).

²⁰ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).