N.D.A.G. Letter to McLean (Aug. 18, 1992)

August 18, 1992

Mr. Stephen M. McLean
City Attorney
City Hall
115 South 5th Street
Oakes, ND 58474-1699

Dear Mr. McLean:

Thank you for your June 12, 1992, letter concerning city bidding requirements, rejection of all bids, and changes to requests for bids.

You ask whether, after rejection of all bids, a city may negotiate a contract for services for waste hauling or if it must rebid the proposed contract if its ordinance requires competitive bidding "whenever possible." You further inquire whether proposed contract specifications concerning the duration of the contract and the experience of bidders may be changed if the contract is rebid.

Words in a city ordinance are to be given their usual and ordinary meaning as understood by persons reading them. In <u>McQuillin, Municipal Corporations</u>, it is stated:

> 4. Ordinances, like statutes, primarily are construed according to the ordinary meaning of their words and terms and the proper grammatical effect of their arrangement. At least, words are to be taken in their ordinary or popular sense unless it plainly appears that they are used in a different sense . . . . Common or popular words are to be construed in their popular sense; common-law words according to their common-law meaning; and technical words according to their technical meaning. Early and late cases have constantly applied the common sense rule that words employed in an ordinance or statute should be read and understoodin accordance with their natural and obvious meaning. They must be construed according to their natural import in common and approved usage.

6 McQuillin, Municipal Corporations, § 20.47 (3rd ed. 1988).

Under the Oakes city ordinance, competitive bidding is required for the procurement of contractual services when the estimated cost thereof exceeds $5,000 and otherwise "whenever possible." Art. 5, §§ 1.0601 and 1.0602, Ordinances of the City of Oakes, North Dakota. Whether it is "possible" for the city to award a contract on competitive bids is a question of fact for the determination of the governing body of the city. The customary and usual meaning of the term "possible" is:

Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible.

BLACK'S LAW DICTIONARY, (5th ed. 1979).

Under most circumstances, it is reasonable to believe that obtaining contractual services is possible using competitive bids. However, there may be times where emergencies, shortness of time, or lack of availability of the needed services from any more than one source, might allow the city to determine that it is not possible to obtain a proposed contract for an estimated $5,000 or less using competitive bids. Therefore, it is my opinion that if a city ordinance requires obtaining contracted services by competitive bid whenever possible, the city must abide by its ordinance and make a reasonable determination of the possibility of obtaining those services using that method.

If all bids for a proposed contract have been lawfully rejected, the city may begin with a new bid proposal. The new bid proposal may be different from the former bid proposal for which all bids were rejected in any respect the city desires, including the duration of the proposed contract and requiring certain qualifications of bidders. The matter of qualified bidders and requiring a certain degree of expertise may produce uncertainty over how to define the required experience level and how to determine when proposed bidders have achieved it. A common method for a city to protect itself from possibly inexperienced or inept contractors is to require a one hundred per cent performance bond from the successful bidder at the time of entering into the contract. (This performance bond is in addition to a bid bond which would protect the city from bidders that were not truly serious about being awarded the contract.)

I trust this opinion is sufficient for your purposes.

Sincerely,

Nicholas J. Spaeth

rel/jfl