

May 13, 1970 (OPINION)

Honorable Ben Meier

Secretary of State

RE: State - Public Buildings - Contracts

This is in response to your letter in which you ask for an opinion on the following:

1. Can a department, agency, board or commission negotiate with the bidder or bidders when the total low base bid or bids exceeds the sum of moneys authorized for the project?
2. When alternate proposals are a part of the general plans and specifications, can a department, agency, board or commission accept any alternates they consider to be in the best interest of the state or the project?"

Chapter 48-02 of the North Dakota Century Code sets forth the various requirements, such as methods of advertising for bids, contents of advertisements, who must make plans and specifications and opening of bids, as well as other requirements. Section 48-02-10.2 provides that the governing body shall open publicly and read aloud all bids received and may reject all bids or award the contract to the lowest and best bidder. Section 48-02-10.1 provides that the advertisement for bids shall be in accordance with section 48-02-03, section 48-02-04 and section 48-02-05.

The obvious purpose of advertising for bids is to give notice to all parties of interest what is expected so that they in turn may make an offer in response to such bids, including the cost for doing the specified work. The advertisement must contain sufficient information so that a prospective bidder may be adequately informed as to what is expected. The object of the bids is to provide competition and to secure the performance at the lowest cost to the governing body and yet provide assurance that the completed project will meet all of the standards specified.

A bid submitted which varies substantially from the advertisement is not a true offer. If the Board were permitted to accept bids which vary substantially from the specifications of the advertisement it would, in effect, destroy the very purpose of bidding. If the Board were to accept a bid which varies substantially from the specifications, it would be giving an advantage or benefit to a certain bidder which is not enjoyed by others. Substantial compliance with the advertisement for bids and specifications contained therein is necessary to make the bidding process successful. Every bidder must be given the same opportunity.

Thus in direct response to your first question, it is our opinion that the Board may not negotiate with the bidder or bidders when the total low base bid or bids exceeds the sum of money authorized for the project. If the bids received all exceed the amount of money

available, the Board should reject all bids and re-advertise. The Board should consult the architect and determine which items may be eliminated, or in what manner the plan may be altered so as to reduce the cost, and then re-advertise.

As to Question No. 2, alternate proposals can be accepted if the bid, in effect, asks for alternate bids. The answer to this question depends to a great degree upon the advertisement for bids and the contents thereof. If the advertisement for bids calls for alternate proposals, then such alternate bids may be accepted. However, if the advertisement does not call for alternate bids, it would be unfair to other bidders if the Board were to accept alternate bids upon which others did not have the same opportunity.

The question whether or not the Board wishes to entertain alternate proposals is again one which must be resolved before the advertisement for bids is published. In some instances the Board may wish to entertain alternate proposals and if this is desirable, the advertisement should specify in which areas the Board will entertain alternate proposals and what such alternate proposals must contain.

In selecting an alternate proposal, the Board is also bound by the provisions that relate to the acceptance of bids and the awarding of the contract. It must at all times keep in mind that the Board is to allow the contract to the lowest and best bidder. The term, "lowest and best bidder", by its terms implies that the Board is required to make a finding of fact. The facts in each instance would be material.

HELGI JOHANNESON

Attorney General