

**OPINION  
74-302**

May 22, 1974 (OPINION)

The Honorable Robert Martinson  
State Representative  
32nd District  
200 Summit Boulevard No. 39  
Bismarck, ND 58501

Dear Representative Martinson:

This is in reply to your letter of May 15, 1974, relative to awarding of contracts for a new State Laboratories facility. You enclose a copy of an editorial which appeared in a local newspaper on Monday, May 13, 1974, and, apparently, based upon such editorial, you ask the following questions:

1. Did the apparent renegotiation with bidders in excess of \$25,000 constitute a violation of the state bidding laws?
2. Did the apparent failure of the State Laboratories director to submit the plans and specifications to the State Construction Superintendent prior to letting of bids constitute a violation of state law?
3. Did the award of a construction contract for the laboratory building which could not be completed and equipped within the limits of the legislative appropriation violate either the state law or the legislative intent in making the appropriation?"

With respect to your first question, I am enclosing herewith a copy of an opinion issued by this office on May 13, 1970, to Ben Meier, Secretary of State.

The 1970 opinion was in response to the following question from the Secretary of State:

"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 monies authorized for the project?"

In response to the question we stated, page 2 of the 1970 opinion:

"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 readvertise. 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 readvertise."

The basis of the opinion is the provisions of Chapter 48-02 of the

North Dakota Century Code. The State Laboratories Commission is subject to the provisions of this chapter and thus the 1970 opinion would be applicable thereto. In response to your first question the State Laboratories Commission is not authorized to negotiate with bidders if the bids are in excess of the amount of moneys available. The 1970 opinion does not permit negotiation in any amount regardless of whether the sum is more or less than \$25,000 above the available amount.

Insofar as your second question is concerned, section 54-21-17 of the North Dakota Century Code provides in part:

"All state agencies shall, prior to the letting of bids, submit to the construction superintendent plans and specifications for any building construction, and the superintendent shall maintain surveillance during construction as might be necessary to ensure construction conforms to plans and specifications."

In view of the above provisions, we could only conclude that if, in fact, plans and specifications for the laboratories building were not submitted to as required by the above quoted provision of section 54-21-17, there would be a violation of state law. The effect of such violation is not, however, clear since there is no specific criminal penalty provided and we are not prepared to state that the award of bids, if otherwise valid, would be illegal because the plans had not been presented as required by statute. It is possible a court might hold such provision mandatory prior to the letting of bids and directory subsequent thereto, i.e., prior to the letting of bids the commission could be compelled to submit the plans to the state construction superintendent but if no such action was taken prior to the letting of bids the statute would be considered directory only and would not affect the legality of the award of bids.

We note that in this instance we did contact the construction superintendent and the plans in question were submitted prior to any letting of bids, as required by law, but not prior to the advertisement for bids which is not required by law.

With regard to your third question, there is no specific statute governing this matter. We might assume that the legislature intended a functional, usable facility be constructed within the limits of legislative appropriations. What is a functional, usable facility is a question of fact to which this office cannot provide a legal answer. The determination of that fact would require a judgment decision and what might be considered as a functional, usable facility by one person may not be so considered by someone else. Your question assumes the building would not be completed and equipped and this may actually be the case. However, it is also possible the building might be completed and equipped so as to be functional and usable. If additional requests for funds were to be made to future legislative assemblies, it would be for those assemblies to determinate whether legislative intent was foiled, whether additional funds should be made available, etc. We further note the only legislative standard with respect to the building is found in chapter 36 of the 1973 Session Laws. Subsection 1 of section 5 thereof provides: "for the purpose of paying the cost of

construction of a building to house the state laboratories department, the state laboratories commission may borrow moneys. . .  
" Subsection 3 of section 5 provides:

"The proceeds of any bonds issued under the authority of this section are hereby appropriated to the state laboratories commission for construction of a building to house the laboratories department. Construction and furnishing of the building shall be contracted for and supervised by the state laboratories commission or its designee."

In view of this provision a serious question would arise as to whether the authorization to issue bonds and the appropriations of the bonds was for the construction of the building or whether it was also to include furnishing. The actual language used by the legislature in authorizing the bonds and appropriating the moneys is for construction. The only place the term "furnishings" is found is in the provision relating to the contracts and supervision by the State Laboratories Commission. This may be sufficient indication of legislative intent that the furnishings as well as the construction be provided within the \$750,000.00 of authorized bonds. However, it would seem the legislature might well have included the term "furnishings" in the authorization and appropriation provisions if this is what was intended.

Sincerely yours,

Allen I. Olson

Attorney General