

LETTER OPINION
93-L-23

February 1, 1993

Mr. Wayne O. Solberg
Fargo City Attorney
P.O. Box 1897
Fargo, ND 58107-1897

Dear Mr. Solberg:

Thank you for your December 7, 1992, letter concerning the proposed bidding process for the construction of a new water plant for the city of Fargo. Specifically, you ask whether the city's proposed bidding process is consistent with the provisions of N.D.C.C. ch. 48-02.

In your letter, you note the city's three-step bidding process as follows:

1. Solicit separate bids for general, mechanical and electrical work on the project.
2. Award contracts to the lowest and best bidder for each of the three components.
3. Assign the electrical and mechanical contracts to the general contractor. The original bidding documents would provide that the mechanical and electrical contractors would be required to consent to the assignment, as would the general contractor.

Using this procedure, the city intends to place greater supervisory responsibility in the general contractor attempting to alleviate the potential for disputes between the general, mechanical and electrical contractors. The city's proposal contemplates soliciting separate prime bids for the general, mechanical and electrical work, but having the work performed as if it were bid as a single prime contract.

N.D.C.C. ? 48-02-05.1 provides:

48-02-05.1. Bid requirements and acceptance.

Competitive bids for the work for which plans, drawings, and specifications are required by section 48-02-02 must be allowed to be submitted as multiple prime bids for the general, electrical, and mechanical contracts when applicable. In addition to the required multiple prime bids, the governing board may also allow submission of single prime bids or bids for other portions of the project. Determining bids for other portions of the project is the responsibility of the governing board. The governing board may not accept the single prime bid unless that bid is lower than the combined total of the lowest and best bids for the contracts.

In addressing your concerns, it is important to acknowledge the legislative history of N.D.C.C. ? 48-02-05.1. In 1991, N.D.C.C. ? 48-02-05.1 was amended as follows:

Competitive bids for the work for which plans, drawings, and specifications are required by section 48-02-02 ~~may~~ must be allowed to be submitted as multiple prime bids for the single project, individual bid for general, electrical, and mechanical contracts, when applicable. In addition to the required multiple prime bids, the governing board may also allow submission of single prime bids or bids for other portions of the project. Determining bids for other portions of the project is the responsibility of the governing board. The governing board may not accept the single ~~project~~ prime bids unless that bid is lower than the combined total of the lowest and best bids for ~~general, electrical, and mechanical~~ the contracts.

1991 N.D. Sess. Laws ch 494, ? 2. The intent of this amendment was to clarify legislation enacted during the 1989 legislative session. The intent of the 1989 legislation was to encourage participation in the competitive bidding process by providing each bidder the choice of submitting a single prime bid for the entire construction project or separate bids for the general, electrical and mechanical contracts. See 1989 N.D. Sess. Laws ch. 562. Under this scheme a small contractor who did not have the resources to bid the entire project might be able to bid one of the individual segments. Allowing the governing body to negotiate directly with separate general, mechanical and electrical contractors, rather than through the single prime general contractor as a "middle man," was considered to be more cost efficient. Additionally, the statute was enacted to prevent the single prime general contractor from "bid shopping" among individual subcontractors. Hearing on S. 2418 Before the House Industry, Business and Labor Comm., 51st N.D. Leg. (March 8, 1989) (Statements of Tom Tupa, NECA, NDAPHC; and Greg Dockter).

The city's proposal complies with part of the requirements of N.D.C.C. ? 48-02-05.1 by soliciting separate prime bids for the general, electrical and mechanical contracts and by awarding the contract to the lowest and best bidder for each of the required multiple prime bids. The third step of the proposed bidding process in which the electrical and mechanical contracts are assigned to the general contractor is, in my opinion, inconsistent with the bidding requirements of N.D.C.C. ?? 48-02-05.1 and 48-02-06.

N.D.C.C. ? 48-02-06 requires that the governing board "award the contract, subject to section 48-02-05.1, to the lowest and best bidder." "Award" is defined by one source as "[t]o grant, concede, or adjudge to." BLACK'S LAW DICTIONARY 125 (5th ed. 1979). "An assignment is the transfer or making over to another of any property in possession or in action, or any right therein." Rheault v. Tenefos Construction Co., 189 N.W.2d 626, 629 (N.D. 1971). See also Industrial Indem. Co. v.

Anderson, 692 F. Supp. 1532 (D.N.D. 1988) (Assignment of an instrument vests in the transferee the same rights that the transferor had therein.). Requiring the successful electrical and mechanical contractors to assign their contracts to the general contractor is in design diametric to the requirement that the successful bidder be awarded the contract.

The better way to proceed would be to incorporate notice in the bidding specifications that the contracts will require the successful mechanical and electrical contractors to be supervised by the general contractor. In this fashion, the city's intent is accomplished without being inconsistent with the bidding process under N.D.C.C. ch. 48-02.

I trust this answers your concerns.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec/krb