

OPINION
46-137

November 1, 1946 (OPINION)

HIGHWAYS

RE: Lowest Bidder - Bidders Bond

This will acknowledge your letter of October 31, 1946, in which you seek an opinion of this office concerning the application of section 24-0221 of the North Dakota Revised Code of 1943 to a bid received in your office for the construction of a grade separation project near Kurtz, North Dakota.

The facts as I understand them are as follows:

The low bidder offered a bid of \$160,033.53. Accompanying this bid for the construction of the grade separation project near Kurtz was a certified check on a solvent North Dakota bank in the amount of \$8,000.00. This certified check was short \$1.67. The exact amount of the certified check at five percent should have been \$8,001.67. The lowest bidder was \$26,332.47 under the next lowest bid. In other words, the low bid, if accepted by the state highway department and a contract consummated, would result in a substantial saving to the department.

The question that arises is whether or not the terms of section 24-0221 of the North Dakota Revised Code of 1943 bar the acceptance of the bid by the state highway department, so as to necessitate the rejection of all bids with the result that it would become necessary for the department to again request bids for the construction of the project involved.

It is true that section 24-0221 of the North Dakota Revised Code of 1943 requires a certified check to accompany a bid in an amount equal to five percent of the bid drawn on some solvent bank in the state of North Dakota. While the statute uses the word "shall" in referring to the certified check, it is our opinion that in the particular case involved there has been a substantial compliance with the statute and that the department should accept the bid involved, and that it has a legal authority to do so. It is apparent that failure to make the check of the low bidder in the exact amount of five percent of the bid is an error, and in view of the fact that the failure to do so would result in no substantial or material loss to the state in case of a forfeiture of the certified check, it is our opinion that the department may properly accept the lowest bid for the construction of this grade separation project, and that a contract should be awarded to the low bidder.

While we have found no case exactly in point, we have found authority which substantiates our opinion.

A requirement that bids shall be accompanied by security to be furnished by the successful bidder for failure to enter into the contract is for the protection of the city, and failure of the city to require it affords no ground of objection to the

contract by a taxpayer." (McQuillin Mun. Corp. Rev. 3, 1224, sec. 1323)

In California, a bidder accompanied his bid by a bond conditioned for execution of a contract. The amount of the bond required was ten percent of the amount of the contract. This amount could be determined only upon the determination of the city council of the amount of electric current to be used. Hence, the bond being for an amount certain was less than the actual amount of the requirements when the amount of current and of the contract was ascertained. The court held that the city was justified in awarding the contract, saying the bond was for the benefit of the city. (Cady v. City of San Bernadino, 153 Cal. 24, 94 Pac. 242)

And where security is required, it is held that, in absence of a showing of fraud or collusion, an injunction will not lie to prohibit the awarding of the contract to a bidder, who has failed to give security." (McQuillin Mu. Corp. Id.)

In New York, the sureties on a bidder's bond were not worth the amount of the bond. It appeared that the letting of the contract would benefit the city. Held that as the requirements were for the benefit of the city, it might waive the irregularities. (McCord v. Lauterbach, 86 N.Y. Supp. 503, 91 App. Div. 315)

Our statute states:

Such check shall be forfeited to the state highway fund should the bidder fail to effect a contract within ten days after a notice of an award."

We believe that the maxim: "De minimus non curat lex" applies to this situation, the law does not concern itself about trifles. It is apparent that the deficiency in the amount of the certified check must be sufficient to subject the public body to a substantial loss if the contract be awarded and the bidder refuses to enter into the same. The security is for the benefit of the public department, and it is our opinion that it may waive a slight irregularity, such as is involved here, where even though there was a forfeiture of the amount of the certified check there would be no substantial or material loss to the department. Surely, in a situation such as confronts your department, the department should have the right to waive the same in order to secure the benefit to the highway department of this low bid, and the saving that will be procured under it.

NELS G. JOHNSON

Attorney General