

OPINION
47-23

September 3, 1947 (OPINION)

BONDS

RE: Open Bidding for - When

Your letter of August 28th, 1947, addressed to the attorney general, requesting an interpretation of section 21-0327 N.D.R.C. 1943, has come to my desk for attention.

Your request requires an interpretation of the above section, and, as the matter is of particular interest to the Bank of North Dakota, the bank officials have orally joined in your request. As the matter is of considerable importance, we have had an office conference on the subject and have given some considerable time to a study of the matter, and are all agreed upon the interpretation which follows.

This section provides, with reference to the opening of bids for municipal bonds:

"At the time and place specified, the governing board of the taxing district shall be represented by one of its officials, or by the county auditor or by some other person acting at the request of the board, who shall receive competitive bids, whether submitted orally or in writing. When the bids are received at his office, the county auditor shall enter in a permanent record the amount and rate of interest of each bid and the name and address of the bidder. If the bids are not received at the office of the county auditor, the auditor, clerk or secretary of the municipality shall make a similar record."

It will be noted that no part of the applicable statute requires sealed bids. Section 21-0326 provides:

"Such notice may be in any form but shall specify the amount of bonds offered for sale, and the date of the maturity thereof." And section 21-0327 provides that: "The notice shall specify the time and place at which bids will be received." The statute, section 21-0327, gives due notice to all bidders that competitive bids, whether submitted orally or in writing will be received. McQuillin says:

"The person or company making a bid, or entering into a contract with a municipality, acts at his peril. He is supposed to know the law--a very violent presumption it may be, but none the less effective. He is persona non grata with the courts, which must look to "the protection of the public."

3 McQuillin, Mun. Corp. 856, Sec. 285.

Our statutes, above cited, clearly require that municipal bonds be sold only on competitive bids. "Such requirements are for the purpose of inviting competition, to guard against favoritism,

improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable."

3 McQuillin, Mun. Corp. 858, Sec. 1286.

And further, the same author says:

"In order to attain competitive bidding in its true sense, proposals for bids must be invited under circumstances which afford a fair and reasonable opportunity for competition. Consequently, it is essential that the bidders, so far as possible, be put on terms of perfect equality, so that they may bid on substantially the same proposition, and on equal terms."

3 McQuillin, Mun. Corp. 886, section 1309.

The statute here in question clearly informs all bidders that at a certain time and place bids, either oral or written, will be received for certain time and place bids, either oral or written, will be received for the bonds to be sold. These bids are to be competitive in order that the bonds may be sold on the best possible terms for the municipality. clearly all bidders may appear in person and make their bids orally, and any bidder desiring to do so may submit a written bid. If a bidder appears in person and wishes to make a competitive bid, it is difficult to understand how he can compete with written bids without knowing what these bids are. If there are no written bids filed, then all bids must be oral. Surely these oral bids are made in competition between the oral bidders present, each bid being openly made so that all competing bidders may know with what bid they are competing.

There is certainly nothing in the statute to indicate that the oral bids are to be made and received in secret. There is certainly nothing in the statute to indicate that the oral bids are to be made and received in secret. There is no need to define the words "competition" or "competitive." They import rivalry between the bidders, and there can be no rivalry unless each knows what the bid of his rival is. If all bids are oral bids, there is true competitive bidding. Can this rivalry be cut off by the filing of one or more bids in writing? These statutes do not provide for bids to be submitted only in writing and the awarding of the contract of sale to the best bidder. If such were the case, no oral bids could be received, and there would be no true competitive bidding, for each bidder would bid blindly, not knowing what any other bidder had offered.

Search has failed to find any adjudicated case interpreting a similar statute. Our interpretation must be reasoned from applicable principles of law. These we have indicated hereinbefore.

It is our opinion:

1. That both written and oral bids may be received for these bonds.
2. That oral bidders are entitled to know what the written

bids are before they make their oral bids.

3. That oral bidders may make successive oral bids in open competition with each other.
4. That any bidder who has filed a written bid may enter into competition with the oral bidders and bid on an equal footing with them.
5. That the recording officer in charge of the receipt of bids must make a permanent written record of each bid received, as provided by section 21-0327, and each bidder must complete his final bid by making the deposit required of those filing written bids.

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Attorney General