

OPINION
56-44

October 8, 1956 (OPINION)

COMPETITIVE BIDS

RE: Certified Check - Voiding Bid

This is in reply to your letter of October 2, 1956 requesting an opinion of this office in regard to competitive bidding on certain contracts to be awarded by your board.

You inform us that exits and fire escapes were to be constructed on a number of buildings at the State Hospital. The project was advertised for competitive bidding, such notice requesting in effect that Bid No. 1 be a separate bid to cover all of the work to be done on five buildings. Bids No. A, No. B and No. C each to cover an additional single building.

You inform us that the low bidder submitted a certified check for five percent of Bid No. 1. The second lowest bidder submitted a certified check covering five percent of the total of all four bids, i.e., Bid No. 1, Bid No. A, Bid No. B and Bid No. C. In so far as your board does not have sufficient funds, contracts will not be awarded on Bids No. A, No. B and No. C.

Your first question is whether a contract could be awarded to the low bidder above referred to, in view of the fact that his certified check is not large enough to cover five percent of the total of all four bids. Your attention is called to an opinion of this office of date May 23, 1952 at page 12 of Report of the Attorney General July 1, 1950 to June 30, 1952, holding in effect that submission of certified check of less than five percent does not void the bid. In this instance, of course, the amount submitted is sufficient to cover five percent of the bond on the contract that will be awarded, and it is therefore the opinion of this office that the bid is valid, and the contract may be awarded to the contractor submitting such low bid.

Your second question is stated as: "If there are not sufficient funds available to cover all the buildings in Bid No. 1, could this Board negotiate with the low bidder to eliminate one of the five buildings in said low bid so as to award a contract for the amount covered by the available funds without setting up new specifications and readvertising?"

The facts you submit are not in sufficient detail to inform us whether or not the difference between the total cost of the work to be done on four buildings out of five would be sufficient to require a differing qualification under our contractors' licensing statutes (chapter 43-07 N.D.R.C. 1943). If for example, the total amount of work to be done on the five buildings would cost an amount that would require the bidder to have a class C license, but the total amount of work to be done on four buildings would only require the bidder to have a class D license, it would clearly appear that all prospective

bidders were not given adequate opportunity to bid on the contract that is actually going to be awarded. Assuming, however, that the difference between the total cost of the work to be done on four of the five buildings and the total cost of the work to be done on the originally advertised five buildings is not great enough to require a different qualification under our contractor's licensing statutes, it is nevertheless our opinion that the board would not be justified in awarding a contract for a materially and substantially lesser amount work than was originally advertised, without readvertising, in so far as the total work to be done may have had a substantial and material effect on the amount of bids actually submitted and on the contractors who did choose and who did not choose to bid on the contract.

LESLIE R. BURGUM

Attorney General