

OPINION
57-42

April 25, 1957 (OPINION)

COMPETITIVE BIDS

RE: Award of Contract - Lowest and Best Bid

This is in reply to your letter of April 23, 1957, enclosing a file of correspondence in regard to bids received on a seedhouse at the Casselton Agronomy Farm. Your question is stated as: "Do you believe that we have any choice except to award the General Contract to the low bidder, Steve De Vries of Valley City?"

The file discloses the following information we believe pertinent to this inquiry: A list of bids submitted indicating the low bidder submitted a bid in the amount of \$55,650.00. The second lowest bidder submitted a bid in the amount of \$56,647.00. Items of correspondence indicate that the signing of the contract has been delayed longer than it should. You suggest the hope that the seed house can be completed by harvest time. The file includes a letter of protest from a union official stating as far as here pertinent as follows:

"Our first objection, we believe this project was bid on union scale, including DeVries Construction Co. bid. Our second objection is if this job was bid on union scale and union wages are not paid, our people are the ones who as citizens of N.D. are being discriminated against. Our third objection is that the local contractors in this area are concerned as well as the * * (named union) * *."

Correspondence from state officials in the file states that "There is nothing in the specifications which refers to the use of union or non-union labor on this contract."

Section 48-0206 of the 1953 Supplement to the N.D.R.C. of 1943 provides as follows:

"48-0206. Opening Bids; Award of Contract; Bond required. At the time and place specified in the notice, the governing board shall open publicly and read aloud all bids received, and may reject all bids or award the contract to the lowest and best bidder. If the low bidder has not been a resident of this state for a least one year preceding the date of the filing of his bid, the contract shall be awarded to the lowest qualified bidder who has been a resident of the state for at least one year preceding the date of the filing of his bid, if such bid does not exceed the bid of the low bidder by more than two percent when the total amount of the bid or contract shall be less than two hundred thousand dollars, and, in the event such bid or contract shall exceed the sum of two hundred thousand dollars but less than five hundred thousand dollars, the preference shall be one and one-half percent for the entire and full amount of bid or contract; and, should such bid or

contract exceed five hundred thousand dollars, the preference shall be one per cent of the entire and full amount of the contract. The amount of the bid or contract shall be determined by a reference to the bid submitted by the lowest qualified bidder. The governing body concerned shall require of the contractor to whom the contract is awarded a bond complying with chapter 1 of this title. Such board shall have the power to reject any and all bids and may advertise anew in accordance herewith until a satisfactory bid is received."

We note from the statute that the only basis upon which the contract is to be awarded (except, of course, for the resident preference) is the "lowest and best" bid. While the supreme court of this state has not extensively considered the term "lowest responsible bidder" as used in similar statutes. (See for example Chaffee v. Crowley, 49 N.D. 111, 190 N.W. 308, and consideration therein of the discretion placed in such governing board. See also, Ellingson v. Cherry Lake School District, 55 N.D. 141, 212 N.W. 773, stating in part:

"* * The term 'responsible,' as used in the statute, means something more than mere financial responsibility. It means responsibility as regards the duty to be assumed by the contractor by the particular contract under consideration and includes all the various elements that bear on that question, such as the integrity of the bidder and his skill, ability and capacity to perform that particular work. * * *"

The term "lowest and best bidder" as used in this statute would in our opinion be at least as comprehensive as the term "lowest responsible bidder" as used in other statutes. (See: Wilmott v. State Purchasing Commission 246 Ky. 115, 54 N.W. 2d. 634, 86 A.L.R. 127, also State v. Hermann, 63 Ohio St. 440, 59 N.E. 104, Altschul v. City of Springfield, 193 N.E. 788, 48 Ohio App. 356). However, there is a great deal of authority to the effect that governmental officials are not justified in determining responsibility between contractors on the basis of employing organized labor or on the basis of employing unorganized labor. (See: Miller v. Des Moines, 143 Iowa 409, 122 N.W. 226, 23 L.R.A. (N.S.) 815, Holden v. Alton 179 Ill. 318, 53 N.E. 556. State ex rel, United Dist. Heating v. State Office Bldg. Comm., 125 Ohio St. 301, 181 N.E. 129, 80 A.L.R. 1379.

We do find the case of Pallas v. Johnson, 100 Colo. 449. 68 P. 2d. 559, 110 A.L.R. 1403, wherein the project was one where early completion was essential, where a contractor maintaining an open shop employing non-union labor bid the amount of \$17,400.00 and the next lowest bidder, employing union labor, bid the amount of \$17,700.00, where the board awarding the contract determined that if the work was given to the lowest bidder, difficulties would arise between the laborers engaged on the different projects with resultant strikes or walkouts and great delay in the completion of the projects and therefore awarded the contract to the bidder employing union labor. The court upheld this action under a statute requiring award to the lowest responsible bidder, taking into consideration the location of the institution or agency.

It is our opinion that under section 48-0206 of the 1953 Supplement to the N.D.R.C. of 1943 the Board would not be justified in

discriminating between contractors, solely on the basis of employment of union or non-union labor. It is further our opinion that the fact of such employment of union or non-union labor may be considered by the board as a factor in determining the ability of the contractor to properly and sufficiently complete the project within a practicable length of time and use such determination in arriving at the final decision as to which bid is both the "lowest" and "best" bid.

The factual information contained in the file does not in our opinion necessarily establish either a difference in quality of workmanship or in length of time for completion of the project between the bidders, although this, of course, is a factual question to be determined in the first instance by the board awarding the contract.

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