

Opinion No. 54-5959

May 26, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Victor C. Breen District Attorney Tenth Judicial District Tucumcari, New Mexico

{*416} You have requested the opinion of this office as to whether a school board may, without readvertising for bids, accept a bid other than the lowest bid by virtue of consideration of circumstances other than price, such as operating expense, where the board has kept records concerning such expenses over a period of years.

{*417} § 6-404, 1941 Compilation, provides in part as follows:

"The bid of the lowest responsible bidder in either of the above cases shall be accepted, except where the specifications of goods offered do not meet the specifications of the purchaser, the lowest bid which does meet such specifications shall be accepted, provided, however, a purchaser may reject all bids."

§ 55-807, insofar as material, provides:

"Contracts involving the expenditure of more than two hundred dollars (\$ 200) shall be in writing. Contracts involving the expenditure of five hundred dollars (\$ 500) or more shall be in writing, and upon sealed competitive bids, after notice and advertisement of such bids shall have been published once a week for four (4) consecutive weeks in some legal newspaper of general circulation in the county; provided notices and advertisement shall not apply to teacher's (teachers') salaries. When plans and specifications for the erection of school buildings shall have been changed, altered or revised after advertisement of bids for the construction thereof, the governing boards shall be required to readvertise for bids to cover minor alterations or changes in plans required to correct errors or omissions in the original specifications."

There is some question as to which section is applicable to county boards of education, § 6-404 being expressly made applicable to such boards by virtue of Section 1, Ch. 98, Laws 1943, and § 55-807 being made applicable by virtue of Section 1, Ch. 70, Laws 1945. If § 55-807 is applicable, a county board of education is not required to accept the lowest bid but may make such contract as in its judgment will be for the best interests of the public. A contract so made cannot be interfered with absent a showing of bad faith or abuse of discretion. *Doyle vs. Waldrop*, 37 N.M. 48, 17 P 2d 939. If § 6-404 is applicable, it is our opinion that the board, if it has accurate figures at its disposal showing the lowest bid not to be the best bid because of such matters as operating expense, may award the contract to the higher bidder. It is, of course, better practice to provide specifications which will include the element of operating costs, if at all possible.

This has been the administrative interpretation of § 6-404 since its adoption in 1939. As you know, it is a well established rule that courts will give effect to administrative interpretation especially where it is of long standing and has not been questioned, as is the situation here. This is not to say that if § 6-404 is applicable, the board of education would have a free hand in awarding bids. Good reason with proof supporting it is required to deviate from the normal practice of accepting the bid of the lowest responsible bidder.

By: Walter R. Kegel

Assist. Attorney General