

## **Opinion No. 61-110**

October 30, 1961

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

**TO:** Honorable Vance Mauney, County Commissioner, Bernalillo County, Albuquerque, New Mexico

### **QUESTION**

#### QUESTION

May counties and other local governing bodies purchase materials from bidders under circumstances where the lowest bid is not accepted, and another bid is considered to be the best bid in view of other considerations?

#### CONCLUSION

See analysis.

### **OPINION**

#### ANALYSIS

Under the facts as pointed out in your letter dated October 11, 1961, in certain instances the quality of materials to be purchased by bid is such that the local governing authority would be in a better position if it would buy the higher priced material which would last longer, give less difficulty as far as maintenance is concerned, and be of better quality in other particulars.

The applicable statutory provision, to your question posed above, is Section 6-5-4, N.M.S.A., 1953 Compilation (P.S.), which provides a pertinent part as follows:

"A. Purchases, or contracts for materials or labor, or both materials and labor to be furnished or performed, made at any one [1] time, which involve the expenditure of more than five hundred dollars (\$ 500) but less than one thousand dollars (\$ 1,000) shall only be made or entered into after obtaining at least three [3] bona fide written bids. Where goods are to be purchased, such bids shall be from regular dealers in the commodity being purchased.

B. Purchases, or contracts for the construction, repair or improvement of buildings, or for materials or labor to be furnished or performed, which involve the expenditure at any one [1] time of more than one thousand dollars (\$ 1,000), shall only be made or entered into after notice that sealed bids will be received at a time and place designated in the

notice has been published for at least once each week for two [2] consecutive weeks in a newspaper of general circulation in the county in which the purchaser is located. When plans and specifications for the erection of buildings are changed, altered or revised after advertisement of bids for construction, there must be a readvertisement, provided that it shall not be necessary to readvertise for bids to cover minor alterations or changes in plans correcting errors or omissions in the original specifications.

C. The bid of the lowest responsible bidder in either of the above cases shall be accepted, except where the specifications of the goods offered does 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. . . ."

Under the above section, a Board of County Commissioners is required by law to accept the bid of the "lowest responsible bidder" for contracts involving material and labor, where such contracts involve an expenditure of public funds within the amounts specified. The law also contemplates that in certain instances the public authority may reject all bids submitted.

It has been generally held that public officers entrusted with the authority to award a public contract may properly consider in connection with such contract the character and quality of materials or work to be furnished by individual bidders, where a statute provides that a bid for public material or labor be awarded to the "lowest responsible bidder". **Hodgeman v. San Diego**, 128 P. 2d 412, 53 Cal. App. 2d 610; **Mitchell v. Walden Motor Co.**, 177 So. 151, 235 Ala. 34; **Eggart v. Westmark**, 45 So. 2d 505; **Stuewe v. Hindson**, 120 P. 485, 44 Mont. 429; **Culpepper v. Moore**, 40 So. 2d 366; **Leavy v. Jackson**, 226 N.W. 214, 247 Mich. 447.

The rule is stated in 27 A.L.R. 2d, Section V at page 926, as follows:

"Where a constitutional or legislative provision requires that a public contract be awarded to the "lowest responsible bidder," or the "lowest and best bidder," or to a similarly designated bidder, it is generally held that the awarding officials may take into consideration the differences or variations in the character or quality of the materials, articles, or work proposed to be furnished by the respective bidders, in determining who should be awarded the contract."

The discretion vested in a public authority to consider in addition to the lowest dollars and cents bid, the materials, articles or work, under a statutory requirement that a bid be let to the lowest responsible bidder, contemplates that the awarding officers may choose between the respective types of materials, articles, or work to be given by the bidders, and award the bid for the kind they honestly believe to be of better quality or more suitable for the intended purpose, than another although offered at a lower amount.

The law requiring public bids to be awarded to "the lowest responsible bidder" implies that the awarding officials possess some latitude and discretion in choosing among the bids submitted. As stated in **Culpepper v. Moore** (1949) 40 So. 2d 366,

". . . While the discretion vested in a public agency in respect to letting public contracts may not be exercised arbitrarily or capriciously, but that its judgments must be bottomed upon facts reasonably tending to support its conclusions, no mandatory obligation is imposed upon such an agency to consider the lowest dollars and cents bid as being the "lowest responsible bid" in every case, to the exclusion of all other pertinent factors which may well support a reasonable decision to award the contract to a contractor filing a higher bid. So long as such public agency acts in good faith, even though they may reach a conclusion on facts upon which reasonable men may differ, the courts will not generally interfere with their judgment. . . ."

The Supreme Court in New Mexico, has recognized that the statutory language "lowest responsible bidder" contemplates that a governing authority may in good faith and under proper circumstances refuse a lower bid and award the contract to a higher bidder, where in their best judgment important factors warrant such action. In **Doyal v. Waldrop**, 37 N.M. 48, 17 P. 2d 939, it was held that:

"Where the legislative direction is that the contract shall be let to "the lowest responsible bidder," the function is regarded as judicial in character and the courts will not interfere unless there has been an abuse of discretion."

Thus, in answer to your question above, it is implicit that the statutory provision requiring bids to be awarded to the "lowest responsible bidder", permits the applicable public authority certain discretion as to the manner in which the power shall be employed, and that generally the courts will not interfere with this discretion. As stated in **Doyal v. Waldrop**, supra, **Nohl v. Board of Education**, 27 N.M. 232, 199 P. 373, and **Oliver v. Board of Trustees of Town of Alamogordo**, 35 N.M. 477, 1 P. 2d 116, the absence of a showing of fraud or arbitrary conduct, and such discretion, if honest, will not be set aside by the courts on review.

The discretion exercised by the public authority will necessarily vary depending upon the fact situation in each particular instance; however, it is the opinion of this office that a low bid complying ostensibly with prescribed specifications and standards may not be rejected by the public authority summarily. If the bid is not awarded to the lowest bidder, the public officers selecting the "lowest responsible bidder", in order to make a record of the transaction and to properly protect itself should make a formal finding of fact in such cases, that the lowest bid is not the lowest responsible bid, and set out in such finding the basis for their finding generally.