

OFFICERS: Public officers need not accept low
PUBLIC BUILDINGS: bid for a building when, in their
discretion, the low bid is not the
best bid.

February 24, 1949

ED
57

Hon. Samuel Marsh
Director Department of
Public Health and Welfare
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads
as follows:

"In a recent advertisement for bids on a certain
State project we did not state in the form of
advertisement for bids that the State reserves
the right to reject any or all bids, as we have
done in some former advertisements, but the fol-
lowing paragraph did appear in the advertisement:

'Plans and specifications, forms on which bids
must be made, conditions of bidding, informa-
tion regarding deposits, bid bond and statutory
preference for Missouri products may be obtained
at the office of John F. Powell, Director of
Public Buildings, Jefferson City, Missouri.'

"In the copy of the specifications which was given
to each bidder by the Director of the Division of
Public Buildings there appeared a proposal sheet
on which the contractors made out their estimates
and which they signed as their official bid. The last
paragraph of this proposal, which appeared above
the contractor's signature, was as follows:

'In submitting this bid it is understood that
the right to reject any and all bids has been
reserved and that this bid may not be with-
drawn for a period of thirty days from the
opening thereof.'

"After a careful check of the quality of work
turned out by the lowest and the next lowest
bidder we consider it to be in the interest of
the State to let the contract to the next low-
est bidder.

"Please advise whether we can legally let this
contract to the second lowest bidder."

The letting of contracts for the erection or construction of any building, improvement, alteration or repair, by public officials of the State of Missouri is governed by the provisions of Section 14939, R. S. Mo. 1939. That section provides, generally, that no contract shall be made for the purposes mentioned above without first advertising for bids in certain newspapers, and that the number of such public bids shall not be restricted or curtailed but shall be open to all persons complying with the terms upon which such bids are requested or solicited.

In your letter you state that you desire to reject the low bid on a certain project because your investigation has disclosed that the low bidder was not reliable. We feel that the rule as stated at length in 45 Am. Juris., dealing with Public Works and Contracts, fully answers the question. At page 784, ff., it is stated:

"Statutes and ordinances governing letting of public contracts by public authorities variously require such contracts to be awarded to the 'lowest bidder,' 'lowest and best bidder,' 'Lowest responsible bidder,' and the fact, therefore, that a bid is in terms of dollars and cents the lowest of those which have been submitted is not necessarily the determining factor in the letting of the contract. As a matter of fact, most statutes contemplate the letting of the contract to the lowest bidder only if he is a competent and responsible contractor having the facilities and the ability to execute the contract properly. Much litigation has arisen concerning the construction of these provisions relative to the bidder to whom the contract may or must be let and the discretion which may be exercised in awarding contracts. * * *

"* * * What the public desires is a well-constructed work, for which a lawsuit even against a responsible defendant is a poor substitute; and authorizations of this kind are held to invest public authorities with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract - - upon his skill and business judgment, his

experience and his facilities for carrying out the contract; previous conduct under other contracts; and the quality of previous work -- as well as his pecuniary ability, and when that discretion is properly exercised the courts will not interfere. All matters bearing upon the likelihood that the contract will be promptly and efficiently performed bear upon the question of responsibility of bidders and may and should be considered in determining who is the lowest responsible bidder. * * *

"Public authorities, when not compelled to award public contracts to the one offering the lowest pecuniary bid, but authorized to award contracts to the lowest responsible bidder, lowest and best bidder, etc., are not limited in their selection to the lowest pecuniary bid by reason of the fact the bidder has furnished a bond for the faithful performance of his contract, but as in other cases may take into consideration all other pertinent factors and elements, such as business judgment, capacity, skill, etc., of the bidder, exercising wise and honest judgment in determination of the question of responsibility. The public interest is better subserved and promoted by faithful performance by the contractor than by resort to indemnity, since in the very nature of things such remedy is inadequate and too often entails litigation, expensive delays, and damages which cannot be adequately measured or compensated.

"When the controlling statute or ordinance requires without qualification the letting of public contracts to the lowest bidder, the duty of awarding the contract is generally held to be ministerial and not judicial, and must be performed without exercise of discretion, that is to say, the contract must be awarded to the one whose bid is actually the lowest. Usually, however, as pointed out above, the contract is not required to be awarded to the lowest bidder,

without qualification, but is to be awarded to the 'lowest responsible bidder,' 'lowest and best bidder,' etc., and there is but little dissent from the general rule that in determining who is such 'lowest responsible bidder,' 'lowest and best bidder,' etc., public boards and officials are vested with wide discretion, and their decision, when based upon an honest exercise of the discretion thus vested in them, will not be interfered with by the courts, even if erroneous. * * *

"Where there is no statutory limitation upon the power to award public contracts, the whole subject matter is within the control of the public officers, provided they do not actually exceed their power or invade private rights, and they are left to their sense of official duty and responsibility; but they must act with due fidelity to the public and for the interest of the public, in good faith, with reasonable and ordinary care and diligence, and without fraud, collusion, corruption, or palpable abuse of discretion.

"The public authorities must always exercise a real discretion based upon facts reasonably tending to support their decision; the rule does not permit them to act arbitrarily. While an honest determination that a bidder's bid, though the lowest, is not the best, will ordinarily control, the law does not permit the arbitrary rejection of bids for public work nor arbitrary preference of one bid over another which is lower, or an arbitrary classification of bidders. The award must be made honestly and in good faith; public authorities may not fraudulently cast upon taxpayers a substantially larger burden than necessary, and when it appears that they have so acted, the courts will interfere. All else being equal, it is the duty of the public authorities to accept the bid involving the least expenditure of public funds.

* * * Frequently, either by statute or by the terms of the advertisement for bids, the right to reject any or all bids is reserved. Such a reservation is generally held to vest in the authorities a wide discretion as to who is the best as well as the lowest bidder, and this involves inquiry, investigation, comparison, deliberation, and decision, which are quasi-judicial functions, and, when honestly exercised, may not be reviewed by the courts. * * *"
(Underscoring ours.)

Since Section 14939, supra, does not require that public officials in the State of Missouri let a contract to the low bidder, we think that the authorized officials are vested with discretion as to the letting of contracts for public works in this state. However, it must be kept in mind that the officials must act with due fidelity to the public and for the interest of the public, in good faith, with reasonable and ordinary care and diligence, and without fraud, collusion, corruption, or palpable abuse of discretion.

The law does not permit the arbitrary rejection of bids for public works or arbitrary preference of one bid over another which is lower. All else being equal, it is the duty of the public officers to accept the bid involving the least expenditure of public funds.

Conclusion.

Therefore, it is the opinion of this department that public officers authorized to let contracts for public buildings may reject the lowest bidder upon a finding that the acceptance of such bid would not be in the best interest of the public. However, the public officers so acting must be in good faith, the award must be made honestly and without fraud, collusion, corruption, or palpable abuse of discretion.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General