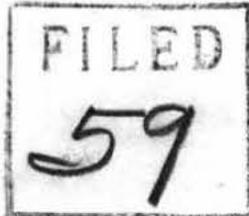


PUBLIC BUILDINGS: Mere informalities in a bid proposal on
BIDS: public improvements may be waived when in
the best interest of the state.



December 31, 1952

Mr. Ralph McSweeney, Director
Division of Public Buildings
Department of Revenue
Jefferson City, Missouri

Dear Sir:

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

"On December 2, 1952, bids were opened for
Completion of Infirmary and Reconstruction
of Gardner Cottage at State Hospital No. 4,
Farmington, Missouri. The low bidder was
the Swan Construction Company of St. Louis,
Missouri, with a combined base bid of
\$182,000.00. The next low bidder was the
John B. Gutmann Construction Company of
St. Louis, Missouri, with a combined base
bid of \$189,400.00.

"The low bidder failed to submit the
Bidder's Qualifications which was called
for in the specifications. As a part of
the specifications, it is provided that
'Failure to comply with this instruction
may be regarded as justification for re-
jecting the contractor's proposal'. The
low bidder also failed to indicate whether
or not the amount bid on Alternate No. 3
was for a deduction or for an addition.
The low bidder was immediately contacted
by telephone, and the Architect was informed
that the amount bid was an addition. How-
ever, even with this amount being an addi-
tion, the low bidder is still several thousand
dollars below the next low bidder.

"In the Advertisement for Bids, it is provided
that 'The State reserves the right to reject
any and all bids, and to waive all informal-
ities in bids'. Also in the Instructions to
Bidders, there is contained the following:

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'The Owner, however, reserves the right to reject any and all bids and to waive all informalities in bids received whenever such rejection or waiver is in its interest'.

"In order to take advantage of the low bid submitted by the Swan Construction Company, may the above discrepancies be considered as informalities which may be waived by the State?"

It will be seen that the provision requiring the submission of a form setting forth the Bidder's Qualifications does not state that failure to include the same will absolutely result in the rejection of a bid. It is further to be noted that the specifications forbid the withdrawal of any proposal for a period of 30 days after the specified time for receiving bids has passed. Therefore, it becomes clear that granting permission to the low bidder to furnish the Bidder's Qualifications form after the time for the opening of bids does not injure the State in any manner, and this is clearly so because if the low bidder is unable to qualify, the other bids are still in effect and the State is permitted under the specifications to accept one of the other proposals. We do not believe that this is a substantial variance which should automatically result in the rejection of the bid.

It is to be noted that the low bidder also failed to indicate whether or not the amount bid on an alternate was for a deduction or for an addition. In the particular set of facts now before us, we believe it was permissible to immediately correct this defect by immediate inquiry of the bidder as to his intention. It is obvious from the work stated under the alternate in question that the sum would have to be an addition in view of the substantial amounts bid by the other contractors. It is also to be noted, and we believe this very important in a consideration of this matter, that under no possible combination could any other bidder be lower than the Swan Construction Company.

In the specifications, there is a provision that the owner reserves the right to reject any and all bids and to waive any and all formalities in bids whenever such rejection or waiver is in its interest. The general rule on this subject is contained in 43 Am. Jur. at page 781, 782, and is as follows:

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"Generally, before a variation from the specifications will be deemed to destroy the competitive character of a bid for a public contract, the variation must be substantial, that is, it must affect the amount of the bid. It is sufficient if the bid conforms substantially to the advertisement. A slight or immaterial variance from the specifications and advertisements for bids for a public contract does not destroy the competitive character of the bid so as to require its rejection. A variation from the advertised specifications does not destroy the competitive character of a bid unless it affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders. There is no dispute about the rule itself; the practical question in the cases is whether there was substantial conformity or a material variance, and this is determined largely with reference to whether the bidder's proposal gives him an advantage or benefit which is not enjoyed by other bidders.

* * * * *

"A distinction may be made between the question whether a bid is so irresponsible to the proposal that the public authorities may properly refuse to consider it, and the question whether it is so defective that they may not legally award the contract to the bidder; in other words, the discretion of such authorities is a matter which may be important on these questions, and it would seem that a board having power to award contracts for public improvements may have power to make an award to one whose bid is informal or fails in some particular to comply with the proposal, while, if it refuses to consider the bid, it may not owe any duty to accept the same which the bidder can enforce."

Under the particular facts which are set forth in this case, we believe that the irregularities contained in the bid

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of the Swan Construction Company may be regarded as informalities and may be waived since such waiver is in the interest of the State of Missouri.

CONCLUSION

Therefore, it is the opinion of this department that mere informalities contained in a bid for public improvement may be waived when the specifications contain such a waiver provision and when it is clearly to the best interest of the owner and is not detrimental to the spirit of the law providing for competitive bidding.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. Taylor

J. E. TAYLOR
Attorney General

JRB:VLB