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65101

October 20, 1978

OPINION LETTER NO. 187

Mr. Stephen C. Bradford
Commissioner of Administration
Office of Administration
State Capitol Building
Jefferson City, MO 65101



Dear Mr. Bradford:

You have requested an opinion as follows:

"May an agency of the State of Missouri requesting bids pursuant to Section 34.040, RSMo 1969, accept only the lowest bid or is the agency required to accept the lowest and best bid?"

In response to such request we enclose a copy of Attorney General's Opinion No. 28, dated August 28, 1941, which we believe answers your question. In addition, we enclose herewith a copy of Section 34.040, with the pertinent language underlined.

If we may be of any further assistance please let us know.

Yours very truly,

JOHN ASHCROFT
Attorney General

Enclosure

STATE PURCHASING AGENT

When two or more bidders tie in amounts bid, the State Purchasing Agent may declare one the lowest and best bidder.

August 28, 1941



Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Mr. Ferguson:

This department is in receipt of your letter wherein you request an opinion based on the following question:

"At your earliest convenience, will you please render this office an opinion as to what procedure we should follow in the awarding of contracts when the lowest and best bid is a tie between two or more vendors."

"For your own information, this matter has been discussed with one of your Assistants, Mr. Creech."

The Purchasing Act was enacted in 1933 and is now Chapter 104, Sections 14589 to 14602, inclusive, R.S.Mo. 1939. Section 14591 relates to purchases on competitive bids. As two or more bidders have submitted bids for the same sum, or in other words, the bids are identical, the question arises as to the meaning of the sentence "The contract shall be let to the lowest and best bidder."

It was held in *State vs. Herman*, 59 N.E. 104, 63 Ohio State 440, that public officers had a certain discretion in awarding contracts and could not be mandamus-ed even though it was their duty to award the contracts to the lowest and best bidders. The phrase "lowest and best bidder" was under construction in the case of *Wilmott Coal Company vs. State Purchasing Commission*, 54 S.W. (2d) 634. It was held in that decision that the State Purchasing Commission of Kentucky should consider not only the amount of the bid, but also possible judgment, capability, skill and responsibility of the bidder and the quality of the good which was proposed to be furnished. In the decision of *Altschul vs. the City of*

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Springfield, 193 N.E. 788, the words lowest and best bidder were construed not to be the lowest dollar bidder but that the city authorities had discretion in determining what was, under all the circumstances, the lowest and best bid for the work involved.

Therefore, taking into consideration the meaning of the expression lowest and best bidder, along with the other terms of the statute which give the purchasing agent the right to refuse any or all bids, and advertise for new bids, or, with the approval of the Governor, to purchase the required supplies in the open market, we are of the opinion that you have the authority to determine yourself who of the two or more persons submitting equal bids is the lowest and best bidder, taking into consideration the quality of the goods or merchandise, responsibility of the bidder, and other elements which the above authorities indicate should be taken into consideration. The other alternative is that you could refuse the bids if you decide that none of the lowest are the best bidders and readvertise for new bids, or purchase the required supplies on the open market with the approval of the Governor.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

of Entry, Use and Occupancy" type of lease, and the execution of such an instrument would not jeopardize the title of the state to such property. Op. Atty. Gen. No. 81, Sheppard, 8-20-52.

4. Actions

A state officer was a real party to action against state purchasing agent, in his official capacity as such, steward of a state hospital and Board of Managers of State Eleemosynary Institutions for breach of a lease agreement executed by purchasing agent's predecessor in office so as to give Supreme Court jurisdiction on direct appeal. *White v. Jones* (1944) 177 S.W.2d 603, 352 Mo. 354.

The Board of Managers of State Eleemosynary Institutions was liable to suit without consent of state for breach of lease of land for state hospital, since a "proprietary" matter was involved. *Id.*

5. Approval necessary

The present State Purchasing Agent was required to approve departmental direct purchase orders placed upon the verbal permission of his predecessor in office and involving purchases of an emergency or technical nature where immediate delivery was necessary. Op. Atty. Gen. No. 66, Nelson, 5-26-53.

34.040. Purchases to be made on competitive bids—standard specifications

All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars or over, the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchases are to be opened. On purchases where the estimated expenditure is less than two thousand dollars, bids shall be secured without advertising. In all cases, the purchasing agent shall post a notice of the proposed purchase on a bulletin board in his office. He shall also, on all purchases estimated to exceed two thousand dollars, solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the purchasing agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the purchasing agent as provided in section 34.050. The purchasing agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be submitted, examined, approved and paid. He shall determine the amount of bond or deposit and the character thereof which

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shall accompany bids. (R.S.1939, § 14591, as amended L.1945, p. 1428 § 65)

Historical Note

Prior Laws and Revisions:

Mo.R.S.A. § 11008.65.
L.1933, p. 410, § 2.

Cross References

United States, contracts with, excepted from statutory requirements, see § 34.110.

Law Review Commentaries

Specifications for public contracts: Daniel R. Mandelker, 1951 Wash.U.L. Q. 513 (Dec.).

Library References

States ⇨9S.

C.J.S. States § 116.

Notes of Decisions

1. Construction and application

This section did not govern the purchase of a typewriter by the newly created Board of Registration of Architects and Professional Engineers which was required to function immediately, since such section could have no application to newly created board which had no appropriation. State ex rel. Averill v. Smith (1944) 175 S.W.2d 831, 352 Mo. 23.

Claim for materials furnished to state highway commission and used in construction of supplementary state highway held not within operative effect of this act, entitling claimant to warrant from state auditor in payment of claim, although purchase of materials was not made or approved by state purchasing agent. State ex rel. R. Newton McDowell, Inc. v. Smith (1934) 67 S. W.2d 50, 334 Mo. 653.

Purchases of used equipment had to be made by the state purchasing

agent on competitive bids, however, if such supplies could be purchased at a better price on the open market he could make such purchases with the approval of the Governor. Op. Atty.Gen. No. 35, State Park Board, 12-14-53.

Purchasing agent has discretion to determine in what two newspapers of state he will advertise for bids pursuant to this section within limitation that the newspaper selected be dailies of general circulation and be published in places which are most likely to reach prospective bidders at least five days before bids for the purchases are to be opened. Op. Atty.Gen. No. 17, Clarin, 4-19-50.

Determination as to what newspapers come within requirement of this section lies within Purchasing Agent's discretion, and his decision is final. Id.

34.050. To make regulations for purchase of supplies

The purchasing agent shall make and adopt such rules and regulations, not contrary to the provisions of this chapter, for the purchase of supplies and prescribing the purchasing policy of the state as may be necessary. He shall classify the require-