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February 21, 1986

Honorable Hugh K. Leatherman, Sr.
Chairman, South Carolina Procurement Review Panel
512 Gressette Building
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Leatherman:

You have requested an opinion as to whether the reading of a bid at a public bid opening acts as a waiver of irregularities in that bid and as an acceptance of the bid such that if it is later determined that a bid which was read has no bid bond as required by the specifications to bidders, that defect as to bid bond has been waived. It is our opinion that there is no automatic waiver of irregularities by virtue of reading the bid.

It is a matter of general law that a public entity may reserve the right to waive irregularities or requirements as to the form of bids. Coleman ex rel State vs. Munger, 83 N.E.2d 809, 811 (Oh. 1948). You did not indicate whether that right was specifically reserved in the bid documents involved in your case. However, such a reservation is frequently found in bid documents for public procurement contracts in this State. Courts have consistently permitted a public entity to waive irregularities which do not affect or destroy competitive bidding. Id. Specifically, courts have held that a public entity was permitted to waive a defective bid bond and lawfully enter into a contract with a bidder even in the absence of a proper bid bond which should have accompanied that bidder's bid. See Aultschul vs. Springfield, 193 N.E. 788, 791 (Oh. 1933). By the same token courts have also held that a public entity was permitted to reject a bid because of an irregularity in the bid bond. Menke vs. Board of Education, 211 N.W.2d 601, 607 (Io. 1973); Marvec Allstate, Inc. vs. Gray and Fear, Inc., 372 A.2d 1156, 1161 (N.J.App. 1977). In general, waivers of irregularities have been upheld when it has been determined by the public entity that the waiver does not give one bidder a competitive advantage over another.

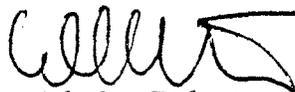
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Marvec Allstate, Inc. vs. Gray and Fear, Inc., supra; Menke vs. Board of Education, supra.

We can find no case, however, which holds that a mere reading of a bid at a public bid opening constitutes a waiver by the public entity of a requirement in the bid specifications as to a bid bond. In fact other courts have upheld a rejection of a bid because of a defective bid bond when the determination of improper bid bond was made after the bids were opened and publicly read. Menke vs. Board of Education, supra. This is consistent with the general law that a waiver is an "intentional relinquishment of a known right." (emphasis added) Davis vs. Milady, 91 S.E. 135, 142, 75 S.E. 363 (1912); 28 Am.Jur.2d "Estoppel and Waiver" § 154. Therefore, a determination as to whether a particular requirement of a bid specification had been waived or not waived must be based on the facts indicating whether or not the public entity was intending to excuse compliance with the stated requirements in the bid specifications. In light of the fact, furthermore, that an irregularity in the bid form may not be waived if the irregularity places one bidder in a position of competitive advantage over another, it would seem clear that a public entity must make a conscious determination to waive such a requirement. This conclusion is strengthened by the fact that the law of estoppel and waiver is not applied, as a rule, against a governmental entity when public revenues are involved or if application of the doctrine would thwart public policy. 28 Am.Jur.2d, Estoppel and Waiver, § 122, citing Heyward v. South Carolina Tax Commission, 240 S.C. 347, 126 S.E.2d 15 (1963).

For the foregoing reasons, it is our opinion that the mere reading of a bid at a public bid opening would not by itself constitute a waiver of irregularities as to the form of the bid, or more specifically the lack of a bid bond. Any such waiver must be by an intentional act of the public entity.

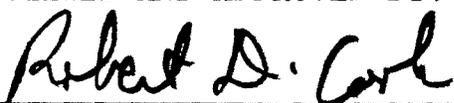
Sincerely yours,



David C. Eckstrom
Assistant Attorney General

DCE/cr

REVIEWED AND APPROVED BY:



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