

1978 WL 34962 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 27, 1978

\*1 Dr. Jack S. Mullins  
Director  
Budget and Control Board  
Personnel Division  
1205 Pendleton Street  
Columbia, South Carolina 29201

Dear Dr. Mullins:

You requested an opinion from this office whether the State Budget and Control Board (the Board) is permitted to request clarifying information after a bid opening from any bidders, individually or collectively, to enable the Board to determine which bid is most advantageous to the State. In our opinion, the Board may request such information.

You also requested an opinion whether the Board is permitted to award a contract based both upon the bids as submitted and upon the additional information it has acquired from the bidders and the insurance consultant. It is our opinion that the Board may award a contract based on additional information received from a bidder only if the additional information does not change the bottom line of the bid. On the other hand, the Board may award the contract based upon any additional information received from the insurance consultant so long as that additional information is derived from his professional evaluation of the bids. Of course, this additional information may not have the effect of changing the bottom line of any bid. The additional information supplied by the insurance consultant should properly go only to determining whether the bid of the apparent low bidder is also most advantageous to the State. The additional information cannot be used to permit an alteration of a bid once it is submitted.

A determination as to the lowest bidder must be made from the original bids themselves and not from subsequently obtained information. Absent some deficiency in the bid documents, if a bottom line cannot be determined from an original bid alone the bid should be considered as unresponsive. The applicable regulations require the Board to award the contract bid ' . . . to the lowest responsible bidder who submits a responsive bid which is most advantageous to the State.' R 19-10, III 'Awarding the Contract,' State Budget and Control Board Regulations. (emphasis added) If a bottom line determination cannot be made from the original bids because of some defect in the bid documents, then all the bids should be rejected. See, 64 Am.Jur.2d § 51, Public Works and Contracts, p. 903 ff. However, if a bottom line cannot be determined as to a particular bid because that bid is not responsive to the bid documents, then that bid should not be considered. If an unresponsive bid were amplified with 'clarifying information' in order to permit a bottom line determination then to be made, such an amplification would be inconsistent with the requirements of a sealed bid procedure. The sealed bid procedure requires that the Board make its bottom line determination, as we have indicated, only from the original bid. Id.

Once the Board has determined which bid is the lowest, then it should determine whether that bid if accepted would be most advantageous to the State with respect to the other responsive bids. Although the Board would be permitted to consider a broad range of other factors outside the original bid itself, it should be hesitant to consider 'clarifying information' which it receives from any of the bidders, after the bid opening, because any such information could actually be used by a bidder to adjust his bid. In the facts of this case, the Board cannot be certain that the clarifying information received from one of the bidders was not based in some part on that bidder's analysis of the original bids. Since that bidder would know the difference, if any, between his bid and the otherwise apparent low bid, he would know how far

his clarifying information should go to make his bid appear more attractive in contrast to the other bid. At the very least the use of additional information would tend to convert the bid procedure into an auction.

\*2 If the Board should consider this 'clarifying information' and then based on that information award the contract to the second low bidder, it may be inviting a lawsuit by the low bidder against the Board. It would be more difficult, in our judgment, for the Board in that event to defend against a lawsuit brought against it by the actual low bidder than it would be to defend against a somewhat more unlikely suit brought by the second low bidder who was not awarded the contract in spite of the 'clarifying information.' Therefore, it is our opinion that the Board should not consider any clarifying information or additional information received from a bidder after the bids have been opened if it alters the original bid. If it chooses to look outside the bids themselves in determining which bidder would be most advantageous to the State, it should restrict itself only to that information which has been properly evaluated by the insurance consultant.

Sincerely yours,

David C. Eckstrom  
Staff Attorney

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