

June 22, 1966



OPINION NO. 357
OPINION NO. 35
Answered by Letter -
Wilson

Honorable James E. Schaffner
Acting State Purchasing Agent
Office of State Purchasing Agent
State of Missouri
Jefferson City, Missouri

Dear Mr. Schaffner:

We have your opinion request, which states as follows:

"Since I have taken office in February we have opened twenty bids on rock salt, of which fifteen were tie bids, and five we could buy on low bid. As you are probably aware, the State Highway Department has investigated identical bids because of violation of anti-trust laws. In our case we report all such tie bids of \$2,000 or more to the Federal Attorney General, however, the bulk of ours, such as listed above, are of smaller dollar value and are not reported.

"We respectively request an opinion as to be advised if we should continually give awards to the same bidder in the event of tie bids, or secondly, should we rotate among the various bidders."

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Thus, the question presented is whether on identical bids for supplies of less than \$2,000 should the purchasing agent award the contract to the same bidder, or rotate the selection among the various identical bidders.

Section 34.040, RSMo 1959, provides in part:

"All purchases shall be based on competitive bids. . . 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 . . . 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. . . 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.* * *"

Thus, this section provides an answer to the matter under inquiry. It gives you "the right to reject any or all bids and advertise for new bids. . ." Under this portion of the statute, we are of the view that you may determine in your discretion whether to continually contract with the same identical bidder, or rotate among bidders, or to reject all bids.

The topic of identical bidding is one which has recently been the subject of much discussion. The Department of Justice has made an analysis of its effects on public procurement, as well as the manners in which the different state and federal agencies have dealt with the problem. This report states:

"Identical bidding affects advertised public procurement most seriously when the identical bidders are in contention for the award of a contract. In this circumstance the purchasing agency is forced to resort to non-price criteria in making awards. . . In 1964, fifteen (\$15)

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million or thirty-five (35) percent of public purchases affected by identical bidding were awarded by lottery or by the use of criteria other than price.

"Federal agencies used non-price criteria to resolve tie bids in thirty percent of public purchases while State and local governments used such criteria in forty-nine percent of their purchases. Lottery, which was used by Federal agencies in eleven percent of tie bid procurements, was the most common method of resolving tie bid procurements. In addition, the Federal Government utilized other non-price tests to resolve 8.7 percent of its identical bid procurements. These criteria are designed to aid small business and to overcome labor surpluses.

"At the State and local levels lottery continues to be one of the principal methods used to resolve tie bids. Other methods, such as the split award whereby the procurement is divided equally among the tie bidders, or award to a different identical low bidder in each successive contract period on a rotational basis are used. Many of these techniques tend to foster the practice of identical bidding since the bidders are assured an equal or reasonable share of the public agency's business. In some instances agencies go so far as to permit identical bidders to decide among themselves which firm shall receive the contract."

Identical Bidding in Public Procurement, Fourth Report of the Attorney General under Executive Order 10936, October, 1965, p.15.

As the report indicates, many of these techniques tend to foster the practice of identical bidding. In an effort to combat this tendency, we submit for your consideration the suggestions contained in an earlier United States Attorney General's report, and recommended by the Anti-Trust Committee, National Association of Attorneys General and the Committee on Competition in Governmental purchasing, National Association of State Purchasing Officials.

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This report states:

"The United States Attorney General in his report on identical bidding in public procurement urged that greater flexibility be introduced into procedures for resolving equal low bids. Procurement officers should be encouraged to use their ingenuity to find the best methods for discouraging identical bidding where it exhibits a persistent pattern. The report suggests several procedures which have been used with some success:

- (a) where identical low bids include the cost of delivery, award the contract to the identical bidder farthest from the point of delivery;
- (b) award the contract to the identical bidder who received the previous award and continue to award succeeding contracts to the same bidder so long as all low bids are identical;
- (c) empower procurement officers to reject all bids and utilize negotiated procurement when identical low bids are submitted under sealed bidding procedure;
- (d) where identical bids result from resale price maintenance, combine within a single invitation both price controlled and non-price controlled items;
- (e) in the procurement of office and related equipment through dealers whose resale prices are frequently controlled by the manufacturers, require the bidders to offer allowances for old equipment to be traded as part of the transaction.

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"In addition to the above procedures, the following have proved of value in a number of cases:

- (f) if purchases by public agencies are subject to a Fair Trade law, endeavor to have the law amended to provide exemption;
- (g) include statements in bid invitations (1) regarding the inapplicability of the Robinson-Patman Act and, if so, the Fair Trade Laws, and (2) advising that identical bids will be reported to the Justice Department in accordance with the President's Executive Order 10936, and also to the State Attorney General;
- (h) reject all bids and seek to negotiate an agreement based upon issuing a 'blanket' type order for a large quantity (of estimated requirements) to be delivered when and as needed;
- (i) prevail upon bidders to seek relief from resale price maintenance policies which might stem from the central or main offices of their companies, and follow up by direct contact with their main offices;
- (j) give publicity to the matter where local producers or firms are involved.

* * *

"Where identical prices cannot be broken, the following factors should be considered in de-

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termining the successful bidder; differences in product qualities; differences in delivery promises; differences in distribution and service facilities of the bidders; differences in past performances of the bidding firms; preferences which can be given to local or in-state firms and products."

Handbook for State Procurement Officials on Impediments to Competitive Bidding, the Council of State Governments, October, 1963, pp. 20-1.

As noted previously, we are of the view that you presently have the authority, suggested in "(c)" above, to reject all bids when identical low bids are submitted. And, with the approval of the Governor, you may purchase the required supplies on the open market if they can be purchased at a better price.

Of course, the suggestions under "(f)" and "(g)" above regarding Fair Trade laws have no application in Missouri.

In the event information comes to you indicating the existence of an agreement or understanding by the bidders to submit identical bids, this would be evidence of a conspiracy to violate the Missouri Anti-Trust Laws, ch. 416, RSMo 1959. Therefore, we request that you report any such information to this office for our evaluation.

In addition, we submit for your consideration an "Affidavit of Non-collusion." This affidavit requires the bidder to swear or affirm, under penalty, that he has reached the submitted bid unilaterally. Under the last quoted portion of Section 34.040, you are given the authority to make certain rules, governing purchasing.

Section 34.050, RSMo 1959, provides:

"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. * * *"

We are of the opinion, that under these sections, you are authorized to promulgate a regulation requiring that an affidavit

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of non-collusion accompany all competitive bids.

We trust these suggestions will be of some assistance in enabling you to discourage these continued impediments to competitive bidding.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

DRW:fb

OFFICE OF STATE PURCHASING AGENT

AFFIDAVIT OF NON-COLLUSION

I hereby swear (or affirm) under the penalty for perjury:

(1) That I am the bidder (if the bidder is an individual), a partner in the bidder (if the bidder is a partnership), or an officer or employee of the bidding corporation having authority to sign on its behalf (if the bidder is a corporation);

(2) That the attached bid or bids have been arrived at by the bidder independently, and have been submitted without collusion with, and without any agreement, understanding, or planned common course of action with, any other vendor of materials, supplies, equipment or services described in the invitation to bid, designed to limit independent bidding or competition;

(3) That the contents of the bid or bids have not been communicated by the bidder or its employees or agents to any person not an employee or agent of the bidder or its surety on any bond furnished with the bid or bids, and will not be communicated to any such person prior to the official opening of the bid or bids; and

(4) That I have fully informed myself regarding the accuracy of the statements made in this affidavit.

Signed _____

Firm Name _____

Subscribed and sworn to before me
this _____ day of _____, 196__.

Notary Public
My commission expires _____, 196__.