



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

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August 31, 1965

Honorable Wm. J. Burke
Executive Director
State Board of Control
Sam Houston Building
Austin, Texas 78711

Opinion No. C-496

Re: Various questions relating to rental of space for government agencies by the Board of Control.

Dear Mr. Burke:

Your request for an opinion on the above subject matter asks the following questions:

"Our question is - 'Are such factors now contained in the Bid Invitations such as size of rooms, location of the rooms within the building, the location of the rooms with relation to the ground surface, the availability of elevator service or the question of attended elevator service, heating, air conditioning, lighting, janitorial service and customer and employee parking, important elements that contribute to the ultimate determination of the "lowest and best bid" and therefore rightfully included in the Invitation to Bid?'

"Our second question is - 'When we receive bids which cannot be considered to be the "lowest and best bids" to serve the best interests of the intended occupant agency, are we within our legal rights under the Bid Invitation condition which provides that the Board may reject any or all bids to reject such unacceptable bids and to forthwith re-advertise for space in the given location or city in another attempt to obtain for the intended occupant state agency the quarters which will more fully serve its best interests and/or purposes.'"

Sections 1 and 2 of Article 666b, Vernon's Civil Statutes, provide:

"Section 1. Hereafter all departments and agencies of the State Government, when rental space is needed for carrying on the essential functions

of such agencies or departments of the State Government, shall submit to the State Board of Control a request therefor, giving the type, kind, and size of building needed, together with any other necessary description, and stating the purpose for which it will be used and the need therefor.

"Sec. 2. The State Board of Control, upon receipt of such request and if the money has been made available to pay the rental thereon, and if, in the discretion of the Board such space is needed, shall forthwith advertise in a newspaper, which has been regularly published and circulated in the city, or town, where such rental space is sought, for bids on such rental space, for the uses indicated and for a period of not to exceed two years. After such bids have been received by the State Board of Control at its principal office in Austin, Texas, and publicly opened, the award for such rental contract will be made to the lowest and best bidder, and upon such other terms as may be agreed upon. The terms of the contract, together with the notice of the award of the State Board of Control will be submitted to the Attorney General of Texas, who will cause to be prepared and executed in accordance with the terms of the agreement, such contract in quadruplicate; one of which will be kept by each party thereto, one by the State Board of Control, and one by the Attorney General of Texas. The parties to such contract will be the department or agency of the government using the space as lessee and the party renting the space as lessor." (Emphasis supplied)

In awarding contracts to bidders submitting the lowest and best bid, the awarding agency may take into consideration, in addition to price, the quality of the rental space, the adaptability to the particular use required, and the ability, capacity, experience, efficiency and integrity of the bidders, as well as their financial responsibility. Attorney General's Opinion V-1565 (1952). In Attorney General's Opinion V-1565 it was pointed out:

"Article 2368a Vernon's Civil Statutes requires that the contract be let 'to the lowest responsible bidder.' The phrase 'lowest responsible bidder' has a well defined meaning. For a collection of cases see 25 Words and Phrases (Perm. Ed. 1940) 714. In determining the lowest responsible bidder the commissioners' court is not performing a mere ministerial duty but is

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exercising a duty which is deliberative and discretionary. Att'y Gen. Op. V-1536 (1952). The commissioners' court may take into consideration the quality of the product, the adaptability to the particular use required, and the ability, capacity, experience, efficiency and integrity of the bidders as well as their financial responsibility. Mitchell v. Walden Moter Company, 235 Ala. 34, 177 So. 151 (1937); Kelling v. Edwards, 116 Minn. 484, 134 N.W. 221 (1912); People v. Kent, 160 Ill. 655, 43 N.E. 750 (1896); Picone v. City of New York, 29 N.Y.S.2d 539 (1941); Hodgeman v. City of San Diego, 53 Cal.App.2d 610, 128 P. 2 412 (1942)."

Thus, it was concluded that the commissioners' court had the authority to accept the higher of two bids on the purchase of a dump truck since the truck involved in Attorney General's Opinion V-1565 was better adapted to the particular use intended by the commissioners' court.

Additional cases defining "lowest and best bidder" and construing the discretion conferred on governmental agencies in awarding contracts are as follows: State v. Hermann, 59 N.E. 104, 63 Ohio St. 440 (1900); Wilmott Coal Co. v. State Purchasing Commission, 54 S.W.2d 634, 246 Ky. 115, 86 ALR 127 (1932); Altschul v. City of Springfield, 193 N.E. 788, 48 Ohio App. 356 (1933); Fetters v. Mayor and Council of Wilmington, 74 A.2d 470, 31 Del. Ch. 364 (1950); 27 ALR 2d. 925 (1951).

The underlined portion of Section 1 of Article 666b reveals that the principle of law announced in Attorney General's Opinion V-1565 is equally applicable to the authority of the Board of Control in awarding rental contracts for space for government agencies. It is noted that the request for space should give not only the type, kind and size of building needed, but should contain other necessary description as will afford the using agency acceptable space adaptable to the particular use required.

You are therefore advised that the bid invitation may contain specifications such as "size of rooms, location of the rooms within the building, the location of the rooms with relation to ground surface, the availability of elevator service or the question of attended elevator service, heating, air conditioning, lighting, janitorial service and customer and employee parking" and other important elements which will aid the Board of Control in making the ultimate determination as to who has submitted the lowest and best bid.

In answer to your second question, when the Board of Control receives bids which cannot be considered to serve the best interests of the intended occupant, the Board of Control

has the authority and it is its duty to reject such bids. Whenever the Board of Control deems it to be in the best interest of the State, it has the authority to reject all bids and re-advertise for space in the given location or city in another attempt to obtain suitable space for the intended occupant.

SUMMARY

In awarding a contract for rental space for government agencies to the lowest and best bidder, pursuant to the provisions of Article 666b, Vernon's Civil Statutes, the State Board of Control may consider the adaptability of the space to the particular use required by the intended occupant, and the bid invitations may contain such factors as size of rooms, location of the rooms within the building, the location of the rooms with relation to ground surface, the availability of elevator service or the question of attended elevator service, heating, air conditioning, lighting, janitorial service, and customer and employee parking.

Whenever the Board of Control receives bids which are not considered to serve the best interests of the intended occupant, the Board of Control has the authority to reject such bids.

Yours very truly,

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By 
John Reeves
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JR:mcn

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