



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**WAGGONER CARR  
ATTORNEY GENERAL**

December 9, 1966

Mr. John L. David  
County Attorney  
Dallam County  
Dalhart, Texas

Opinion No. C-788

Re: Questions relating to the authority of a county commissioners court to include certain provisions in the bid proposal and purchase agreement in purchasing road machinery.

Dear Mr. David:

In a recent letter to this office you enclosed copies of the Guaranteed Bid Proposal and Purchase Agreement which the Commissioner's Court of Dallam County desires to use in connection with the purchase of road machinery by the county. You have requested our opinion as to the legality of Items 4 and 6 of the Guaranteed Bid Proposal.

We are setting out in full such Guaranteed Bid Proposal.

DALLAM COUNTY

GUARANTEED BID PROPOSAL

Bid Opening Date

FOR \_\_\_\_\_

ITEM # 1 \_\_\_\_\_ complete as  
per attached specifications dated \_\_\_\_\_ \$ \_\_\_\_\_

ITEM # 2 Allowance on trade-in of \_\_\_\_\_ \$ \_\_\_\_\_  
Model \_\_\_\_\_  
\_\_\_\_\_ (subtract)

ITEM # 3 Difference \$ \_\_\_\_\_

ITEM # 4 Guaranteed repurchase price at end of 10,000  
hours or 5 years, whichever comes first (subtract)  
(outright cash purchase - not trade-in allowance on  
new machine) \$ \_\_\_\_\_

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ITEM # 5	Difference	\$ _____
ITEM # 6	"Guaranteed Total Cost of Parts" for 10,000 hours or 5 years of operation, which- ever comes first, per attached specifi- cations will not exceed (add)	\$ _____
ITEM # 7	Total cost to Dallam County (Item 5 plus Item 6)	\$ _____

Bidder shall quote on all items. Dallam County will pay only amount of Item # 3.

The Bidder shall be required to furnish a performance bond, before the awarding of the bid, that shall be equal to the sum that appears in Item # 4 above, plus twenty-five percent (25%) of the sum that appears in Item # 1 above. Said bond shall be made in favor of Dallam County and shall be conditioned for the benefit of Dallam County. This bond shall be for the use and benefit of Dallam County should the bidder fail to repurchase the equipment if so requested, and/or should the cost of the parts exceed the amount that appears in Item # 6 above and should the bidder fail in this performance.

The machine performance will be subject to Dallam County approval and acceptance at the time of delivery.

Dallam County reserves the right to reject any or all bids, or to accept the low bid that meets all specifications and requirements stipulated in the "Notice of Receiving Bids" and "Instructions to Bidders."

DEALER \_\_\_\_\_

BY \_\_\_\_\_

TITLE \_\_\_\_\_

DATE \_\_\_\_\_

This "Guaranteed Bid Proposal" is and shall be considered a part of the "Notice of Receiving Bids."

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In determining the legality of Items 4 and 6 above mentioned we must look to Section 2b of Article 2368a, Vernon's Civil Statutes, which provides as follows:

"Sec. 2b. Contracts for the purchase of machinery for the construction and/or maintenance of roads and/or streets, may be made by the governing bodies of all counties and cities within the State in accordance with the provisions of this Section. The order for purchase and notice for bids shall provide full specification of the machinery desired and contracts for the purchase thereof shall be let to the lowest and best bidder."

This statute clearly provides that contracts for the purchase of road machinery shall be let to the bidder submitting the lowest and best bid for the machinery itself. It must therefore be determined whether the sums which may be submitted by the bidder on Item 4 and Item 6 may legitimately be allowed to affect the final determination as to the lowest and best bid. It is noted in the Guaranteed Bid Proposal that "Bidder shall quote on all items. Dallam County will pay only amount of Item # 3."

In Sterrett v. Bell, 240 S.W.2d 516 (Tex.Civ.App., 1951, no history), the court made the following observation regarding competitive bidding at page 520:

"Its purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers and property owners. There can be no competitive bidding in a legal sense where the terms of the letting of the contract prevent or restrict competition, favor a contractor or materialman, or increase the cost of the work or of the material or other item going into the project."

In Haralson v. City of Dallas, 14 S.W.2d 345 (Tex. Civ.App., 1929, error dism.), it was held that the governing body advertising for bids had the authority to specify materials best suited to the use required; the court stated at page 347-348:

"The trial court found, with ample evidence to sustain the finding that the chemical analysis test did not stifle competition, that the success-

ful bidder was not the only manufacturer in the United States that was able and willing to perform the work and furnish pipe in accordance with the specifications, and this is conclusively established by the fact that there were six bids for the entire job that contemplated the use of cast-iron pipe fulfilling the chemical analysis test. The object of the authorities in prescribing this test was to secure a high grade of cast iron, absolutely necessary, in view of the purpose and use to be served. It was imperative that iron pipe of minimum brittleness be used to guard against sudden breaks and resultant breakdowns of water supply, and the requirement was made only after a thorough investigation of the subject by the city engineer. He consulted scientific works, engineers, and waterworks men, north and east, including army engineers, the Bureau of Water Supply for Washington, D.C., and engineers of other cities, notably, of Providence, Rhode Island, New York, Boston, Baltimore, and Milwaukee, these cities having prescribed the same chemical test for cast-iron pipes for their water supply.

"The city authorities were, under the law, charged with the duty of securing the kind and character of pipes and material best suited for this project, and, having acted in good faith, it is not for this court, or any other court, to substitute its opinion for theirs in determining such a matter." (Emphasis added)

In construing the provisions of Article 2368a, it was held in Attorney General's Opinion V-1565 (1962):

"Article 2368a 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 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 Motor Company, 235

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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. 2d 412 (1942)."

In view of the foregoing authorities, it is our opinion that the commissioners court, in the exercise of its discretion, has the authority to determine the quality and type of machinery which is best suited to the particular use for which it is to be purchased. Therefore, such specifications may be placed in the bid proposal as will insure the submission of bids upon the quality and type of machinery desired. When it comes to the award of the contract to the lowest and best bidder, the commissioners court may take into consideration the ability, capacity and efficiency of the bidder.

Considering the bid proposal before us as a whole, it cannot be said as a matter of law that the Commissioners Court of Dallam County has abused its discretion in requiring that the bidders specify a guaranteed repurchase price and maximum parts replacement cost. The inclusion of this information in the bid proposal would, in our opinion, be relevant to the determination of the quality and performance of the machine to be purchased, as well as the ability, experience and integrity of the bidder. Thus, it is our opinion that the inclusion of Items 4 and 6 in the specifications quoted above is for the determination of the commissioners court, and if the court determines that the inclusion of such items will be advantageous to the interests of the county in securing the desired machinery, and such determination is made in good faith and not for the purpose of restricting competition, the commissioners court has acted within its authority.

#### S U M M A R Y

Pursuant to the provisions of Article 2368a, Vernon's Civil Statutes, the commissioners court may require bidders on the purchase of road machinery to submit as a part of their bid, a guaranteed repurchase price and a guaranteed maximum cost of parts, provided the commissioners court in the exercise of its discretion determines that such specifications is for the best interest of the county in securing the machinery desired, and is not made for the purpose of restricting competition.

Yours very truly,

WAGGONER CARR  
Attorney General of Texas

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By:

John Reeves  
Assistant Attorney General

JR:mh

APPROVED:  
OPINION COMMITTEE

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