

**LETTER OPINION  
2005-L-39**

October 27, 2005

Mr. Wade Enget  
Mountrail County State's Attorney  
PO Box 369  
Stanley, ND 58784-0369

Dear Mr. Enget:

Thank you for requesting my opinion on several issues relating to a county's annual sale by auction of property acquired by the county because of a tax lien foreclosure. It is my opinion that an agent, in the agent's representative capacity, may be the successful bidder at a county tax sale even if the agent personally would otherwise be disqualified by N.D.C.C. § 57-28-15(7), provided that the agent's principal is eligible to be the successful bidder. Because a county's remedies against a successful bidder it later determines is disqualified pursuant to N.D.C.C. § 57-28-15(7) depends on the applicable facts, I cannot opine on that issue although the remedy of rescission may be available. It is my further opinion that the successful bidder at a tax sale cannot direct the county auditor to place the name of any other party on the resulting county deed.

**ANALYSES**

Your first question involves the following hypothetical:

Joe wants to bid on real property for sale at the county's annual tax sale. Joe gives power of attorney to Jack to bid on his behalf at the tax sale. Included in this power of attorney is the language that allows Jack to raise the bid if necessary. Jack owes delinquent taxes to the County, and the Auditor knows this at the time of the sale. Is Jack, the bidder on behalf of Joe, disqualified from being a bidder at the tax sale pursuant to [N.D.C.C.] Section 57-28-15(7)?

Section 57-28-15(7), N.D.C.C., states the following: "A person is unqualified to be the highest bidder for property if the person owes delinquent taxes to any county." If "Jack" in your hypothetical attempted to bid on his own behalf, N.D.C.C. § 57-28-15(7) would prohibit him from being the highest bidder.

In your hypothetical, however, Jack is acting as Joe's agent for purposes of bidding on a parcel of property. Joe does not owe delinquent taxes to the county (or, presumably, any county in North Dakota), and therefore is eligible to be the highest bidder at the sale. Section 3-02-01, N.D.C.C., states that "[e]very act which legally may be done by or to any person may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears." Accordingly, it is my opinion that an agent, in the agent's representative capacity, may be the successful bidder at a county tax sale even if the agent personally would otherwise be disqualified by N.D.C.C. § 57-28-15(7), provided that the agent's principal is eligible to be the successful bidder. Of course, the agent would need to prove to the county prior to the sale that the person is an eligible principal's agent, or the county would be correct in refusing to allow the agent to bid.<sup>1</sup>

You next ask what remedy a county has when it discovers after a tax sale that a successful bidder owes delinquent taxes to another county, and was therefore unqualified to be the successful bidder pursuant to N.D.C.C. § 57-28-15(7). In the same act that disqualified delinquent taxpayers from being successful bidders at tax sales, the Legislative Assembly provided a mechanism for counties to share information regarding delinquent taxpayers.<sup>2</sup> Counties may now submit that information to the secretary of state to place in the state's central indexing system.<sup>3</sup> While that system may help reduce the frequency of delinquent taxpayers being the highest bidders at county tax sales, its efficacy is completely dependent on the counties' voluntary participation. Thus, the possibility remains that a delinquent taxpayer may be the apparent successful bidder at a county tax sale.

Sales by auction result in the formation of a contract between the seller and the buyer.<sup>4</sup> Sales of real property, including county tax sales of real property, must be represented by a written contract signed by both parties.<sup>5</sup> Auctioneers are statutorily authorized to bind the seller and buyer by a written memorandum of the contract if required to make a valid contract of sale.<sup>6</sup> Under N.D.C.C. § 57-28-15(3), county tax sales to be paid in installments must be evidenced by a written contract for deed in a form prescribed by the State Tax Commissioner.

---

<sup>1</sup> See N.D.C.C. § 9-06-04(3) (authority of agent in a real property sale must be evidenced in a signed writing).

<sup>2</sup> 2003 N.D. Sess. Laws ch. 520, §§ 1, 3.

<sup>3</sup> N.D.C.C. §§ 54-09-09(1), 57-28-29.

<sup>4</sup> See N.D.C.C. § 3-05-02 (giving the auctioneer the authority to bind the seller and buyer by contract).

<sup>5</sup> N.D.C.C. § 9-06-04(3).

<sup>6</sup> N.D.C.C. § 3-05-02.

But in order to have a valid contract, there must be at least two parties capable of entering into a contract.<sup>7</sup> Individuals who owe delinquent taxes to any county are statutorily unqualified to be the highest bidder at a county tax sale, and are therefore incapable of entering into the sale contract.<sup>8</sup> If the successful bidder at a county tax sale is statutorily incapable of entering into the contract for sale of the land, there is no valid contract.

The county's options at that point depend on the facts of each circumstance. While N.D.C.C. § 32-18-01 would not apply,<sup>9</sup> some type of legal proceeding may be necessary, especially if the agreement has been recorded. The remedy of rescission under N.D.C.C. §§ 32-04-21 or 9-09-01 *et seq.* may be available. However, in order to reduce the probability of ineligible bidders participating in the tax sale, and to improve the county's chances of a favorable outcome if later legal proceedings become necessary, a county may want to require potential bidders to pre-register before the sale. As part of the pre-registration process, a county may want to provide a document to all potential participants stating that N.D.C.C. § 57-28-15(7) prohibits a delinquent taxpayer from being the highest bidder, and requiring all potential participants to affirm in writing that they are not delinquent taxpayers in any North Dakota county.

Your final question is "whether the successful bidder at a tax sale can direct the Auditor to place the name of a third party, other than the successful bidder, on the County Deed?" "When a tract of land has been struck off to the highest bidder . . . , the sale has been completed."<sup>10</sup> Any sale at a county tax sale must be to the highest qualified bidder,<sup>11</sup> and the county must execute and deliver the resulting county deed to the purchaser after the payment of the purchase price.<sup>12</sup> Nothing in state law allows the successful bidder to direct the county to place the name of anyone other than the successful bidder on the county deed at the time of the sale.<sup>13</sup> Accordingly, it is my opinion that the successful bidder at a tax sale cannot direct the county auditor to place the name of any other party on the resulting county deed. This is especially true if the third party in your question is ineligible to bid because that person owes delinquent taxes to any county and the

---

<sup>7</sup> N.D.C.C. §9-01-02(1). Minors are also statutorily prohibited from entering into a contract to purchase real property. N.D.C.C. § 14-10-09.

<sup>8</sup> See N.D.C.C. § 57-28-15(7).

<sup>9</sup> Section 32-18-01, N.D.C.C., which provides the procedures to follow when seeking to cancel a land purchase agreement, only applies if there is an operative and binding contract. Gerhardt v. Fleck, 256 N.W.2d 547, 551 (N.D. 1977).

<sup>10</sup> N.D.A.G. Letter (April 5, 1945).

<sup>11</sup> N.D.C.C. § 57-28-15(1).

<sup>12</sup> N.D.C.C. §§ 57-28-15(5) and 57-28-16. See, also, Kopplin v. Burleigh County, 47 N.W.2d 137, 139 (N.D. 1951) (stating the statutory form of county deed "is the only form of deed the county is authorized to use in conveying lands acquired by it for non-payment of taxes.")

<sup>13</sup> See N.D.C.C. § 57-28-15(5).

LETTER OPINION 2005-L-39  
October 27, 2005  
Page 4

request to place that person's name on the deed is an attempt to evade N.D.C.C. § 57-28-15(7). "[T]he law does not permit by indirection what cannot be accomplished directly."<sup>14</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

sam/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

---

<sup>14</sup> Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982).