

**LETTER OPINION
2007-L-15**

November 5, 2007

The Honorable George J. Keiser
State Representative
422 Toronto Dr
Bismarck, ND 58503-0276

Dear Representative Keiser:

Thank you for your letter of September 13, 2007, inquiring whether a public entity may advertise a public improvement construction project ("project") as one project but request bids for multiple specialized portions of a project beyond the general, electrical and mechanical portions; and whether a bidder for a project estimated to cost in excess of \$100,000 is exempt from the requirement of including bid security with a bid if the bid is for a specialized portion of a project and is for less than \$100,000. For the reasons indicated below, it is my opinion that the law does not prevent a governing body from soliciting bids for specialized portions of a project beyond the general, electrical and mechanical portions. It is my further opinion that if the construction of a project is estimated to cost in excess of \$100,000, a governing body must require that each bid, regardless of the bid amount, be accompanied by bid security equal to five percent of the full amount of the bid and in the form of a bidder's bond. These conclusions, however, may not apply to certain home rule cities and counties because a home rule city or county may have the authority in its home rule charter to pass ordinances that supersede the bidding requirements in state law.

ANALYSIS

Competitive bidding statutes require that a governing body advertise for bids if a project is estimated to cost in excess of \$100,000.¹ Additionally, portions of a project must be bid

¹ N.D.C.C. § 48-01.2-04(1). Certain statutes have more stringent bidding requirements. Section 11-11-26, N.D.C.C., requires the board of county commissioners to advertise for bids when the amount to be paid in any one year for county buildings exceeds \$10,000. Section 40-49-14, N.D.C.C., requires the board of park commissioners to advertise all contracts exceeding \$10,000.

separately if estimates for those portions meet certain monetary thresholds.² For instance, multiple prime bids for the general, electrical and mechanical portions of a project are required in a project where the general, electrical, or mechanical portions or any combination of individual contracts is in excess of \$100,000.³ But “[i]f a general, mechanical, or electrical contract is estimated to be less than twenty-five thousand dollars, the contract may be included in one of the other prime contracts.”⁴

Your question, however, concerns whether a governing body may solicit bids for other “specialized portions” of a project, beyond general, electrical, and mechanical. The law provides that a governing body may “allow submission of a single prime bid for the complete project or bids for other specialized portions of the project.”⁵

The primary objective in construing a statute is to ascertain the Legislature's intent by looking at the statutory language itself and giving it its plain, ordinary, and commonly understood meaning.⁶ In determining the Legislature's intent, statutes must be construed as a whole.⁷ Each provision must be harmonized with the others to give full force and effect to each if possible; and each word, phrase, clause, and sentence must be given meaning.⁸ Statutory words may not generally be considered useless rhetoric or surplusage.⁹ Although courts may resort to extrinsic aids, such as the legislative history to interpret a statute if it is ambiguous, if the language is clear and unambiguous the legislative intent is presumed clear from the face of the statute.¹⁰

Section 48-01.2-06, N.D.C.C., specifically names the three prime bids which are general, electrical and mechanical. But the law is silent on potential portions into which a project may be split for the purposes of bidding. “It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say.”¹¹ A plain reading of the directive in section 48-01.2-06 indicates that there are no limitations on the number of portions or components into which a project may be split for the purposes of bidding.¹²

² N.D.C.C. § 48-01.2-06.

³ Id.

⁴ Id.

⁵ Id.

⁶ North Dakota v. Norman, 2003 ND 66, ¶14, 660 N.W.2d 549.

⁷ Matter of Estate of Opatz, 554 N.W.2d 813, 815 (N.D. 1996).

⁸ Id.

⁹ State v. Nordquist, 309 N.W.2d 109, 115 (N.D. 1981).

¹⁰ Norman, 2003 ND at ¶14.

¹¹ City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940).

¹² N.D.C.C. § 48-01.2-06.

The breakdown of a project into specialized portions, however, cannot be done for the purpose of avoiding bidding statutes. Although there are no North Dakota cases in which this precise question is addressed, courts and attorneys general¹³ in other jurisdictions have generally held that contract splitting is impermissible if it is apparent that the work was split for the purpose of evading the competitive bidding statutes. For example, the Iowa Supreme Court determined that splitting the construction of an addition to a school into 26 contracts, with eight of those contracts being less than the amount set out in the competitive bidding law, was done to avoid statutory requirements.¹⁴ The Iowa Court held that the school addition was in reality one project of which the total cost exceeded the competitive bidding requirement.¹⁵ Therefore, all twenty-six of the contracts for the school addition were subject to competitive bidding requirements because each was a part of one public improvement which cost in excess of the statutory requirements.¹⁶ In another Iowa case, a city water system repair project was broken down into ten contracts, with each contract under the competitive bidding requirement.¹⁷ The Iowa Supreme Court again explained that the total cost of the project is the controlling factor, and “fragmenting” a project “in order to produce a spawn of little contracts” effectively nullifies the competitive bidding laws.¹⁸ If this practice were sanctioned, “[e]ven the most complex project could be broken down into contractual components small enough to avoid the bidding requirement.”¹⁹

Courts in other jurisdictions have concluded that bidding requirements were inapplicable where there was evidence that the division of work was done for good reason. An Arizona court agreed that separating the landscaping work from the new school construction, with the landscaping then being less than the amount required by the competitive bidding

¹³ Gabriel, Jan. 28, 2005, Miss. A.G. Op. #2005-0012, 2005 WL 428019 (Miss. A.G.) (there is no prohibition against dividing the procurement and installation of a meter reading system for the city water department unless such contract splitting is done to avoid the public purchasing and contracting laws); 1997 Op. Att’y Gen. No. 97-006, 1997 WL 8996 (Ohio A.G.) (“The primary question is whether each purchase reasonably and in good faith constitutes a separate contract or whether the purchase has been split into separate contracts to avoid the requirements of competitive bidding.”); Ark. Op. Att’y Gen. 91-057, 1991 WL 334440 (Ark. A.G.) (splitting a large project into several smaller contracts, thereby making inapplicable the competitive bidding statutes, cannot be done if “[i]t is apparent that the work has been split up for the purpose of evading the competitive bidding statutes”).

¹⁴ Elview Constr. Co. v. North Scott Cmty. Sch. Dist., 373 N.W.2d 138 (Iowa 1985).

¹⁵ Id. at 142.

¹⁶ Id.

¹⁷ Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648 (Iowa 1984).

¹⁸ Id. at 655.

¹⁹ Id.

statutes, was not done in bad faith and was reasonable, in that school employees could provide much of the landscaping work for a cost savings to the district.²⁰ A Kentucky court concluded that separating a contract for the painting of schools from a contract for the purchase of bathroom fixtures and miscellaneous tools and equipment for the schools, with each contract under the competitive bidding requirements, was reasonable.²¹ “Public contracts must be reasonably adapted to the customs and channels of trade, and reason would not demand, nor good faith normally permit, that toilet bowls . . . be lumped with paint . . . under the same procurement contract.”²² A California court supported the school board’s separate and consecutive contracts for several school grounds improvement projects each costing less than the competitive bidding requirements.²³ The evidence showed no initial plan to undertake all projects, but rather, that each project came about separately and each project “was complete in itself and in no manner dependent upon any other.”²⁴

While contract splitting in and of itself is permissible it cannot be done with an intent to circumvent the competitive bidding statutes. The aggregate cost of the project and the reasonableness and good faith of dividing the project into smaller contracts must be carefully considered.

In answer to your second question, regardless of whether a project is bid in specified portions that are less than \$100,000 individually, if the total cost of a project exceeds \$100,000, it must be advertised pursuant to our competitive bidding statutes.²⁵ The total cost of the project is controlling and not the costs of individual components, phases, stages or jobs within the one large project. Each bid submitted to the advertising governing body “must be accompanied by a separate envelope containing the . . . bid security. The bid security must be in a sum equal to five percent of the full amount of the bid and must be in the form of a bidder’s bond.”²⁶ Again, a plain reading of this directive indicates that there is no exception to the bid security requirement.²⁷

²⁰ Secrist v. Diedrich, 430 P.2d 448, 451 (Ariz. Ct. App. 1967).

²¹ Bd. of Educ. v. Hall, 353 S.W.2d 194, 196 (Ky. 1962).

²² Id.

²³ Brown v. Bozeman, 32 P.2d 168, 169-171 (Cal. Ct. App. 1934).

²⁴ Id.

²⁵ N.D.C.C. § 48-01.2-04(1).

²⁶ N.D.C.C. § 48-01.2-05(4).

²⁷ A more stringent requirement is, again, set out for a county building project in that a bond is required regardless of the cost of the project, except that if the cost of a project is \$10,000 or less, a bidder may, in lieu of a bond, submit a certified or cashier’s check equal to five percent of the full amount of the bid. N.D.C.C. § 11-11-28.

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Thus, it is my opinion that the law does not prevent a governing body from soliciting bids for specialized portions of a project beyond the general, electrical and mechanical portions of a project. It is my further opinion that if the construction of a project is estimated to cost in excess of \$100,000, a governing body must require that each bid, regardless of the bid amount, be accompanied by bid security equal to five percent of the full amount of the bid and in the form of a bidder's bond. These conclusions may not apply to a home rule city or county, however, since a home rule city or county may have the authority in its home rule charter to pass ordinances that supersede the bidding requirements in state law.²⁸

Sincerely,

Wayne Stenehjem
Attorney General

cwg/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.²⁹

²⁸ See N.D.C.C. §§ 40-05.1-05 and 40-05.1-06 (relating to city home rule); N.D.C.C. §§ 11-09.1-04 and 11-09.1-05 (relating to county home rule). See also N.D.A.G. Letter to Larson (Feb. 3, 1992) (section 40-05.1-06(2), N.D.C.C., authorizes a home rule city to adopt ordinances that supersede state law with respect to bidding); accord N.D.A.G. 2002-L-33.

²⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355, 372 (N.D. 1946).