

N.D.A.G. Letter to Collins (March 26, 1991)

March 26, 1991

Mr. Sparb Collins
Executive Director
North Dakota Public
Employees Retirement System
Norwest Bank Building
P.O. Box 1214
Bismarck ND 58502

Dear Mr. Collins:

Recently Blue Cross/Blue Shield of North Dakota offered to lower its bid price for the contract for fully insured insurance with the Public Employees Retirement System (PERS). You have asked whether it is permissible for PERS and Blue Cross/Blue Shield to engage in post-bid negotiations to consider this offer.

N.D.C.C. §§ 54-52.1-04 and 54-52.1-02 require the PERS board, when soliciting bids for fully-insured and self-insured programs, to do so through public bidding. This mechanism, like similar mechanisms in other state bidding statutes, is to promote competition, "honesty, economy, and above-board dealing in the letting of public contracts." Coller v. City of St. Paul, 26 N.W.2d 835, 841 (Minn. 1947). (Cited with approval in Danzl v. City of Bismarck, 451 N.W.2d 127 (N.D. 1990)). In addition, an object of public bidding statutes is to secure the best price for the government. Danzl, supra at 130.

For purposes of this letter, post-bid discussions can be grouped into two categories. The first category would include those situations where the bid specifications are changed as a result of post-bid negotiations. Recently, the North Dakota Supreme Court addressed such a situation in the Danzl case. In that case, the North Dakota Supreme Court held that post-bid negotiations where "low bidders were able to reach agreements with Bismarck on the basis of specifications not available to other bidders" were not permitted under North Dakota's competitive bidding statutes. Id at 131.

The second category of post-bid discussions involve those situations where the public agency obtains cost concessions as a result of post-bid negotiations with the lowest bidder. In the second category, if there has been no departure from the original specifications, concessions are not made to the bidder, the public entity does not improperly coerce the low bidder and the ultimate price is fair, courts have tended to uphold the action of the public entity. See Fischbach and Moore, Inc. v. New York City Transit Authority, 435 N.Y.S.2d 984 (N.Y. App.Div. 1981) (Post-bid negotiations between public entity and private bidder upheld where specifications did not change and ultimate cost to public was lower.); City of Lakeland v. Union Oil Company of California, 352 F. Supp. 758 (D.C. Fl. 1973).

The North Dakota Supreme Court has not specifically addressed this issue. However, it has indicated that its decision would have been different in the Danzl case if the public entity had not obtained cost concessions from the lowest responsible bidder because of changes to bid specifications. Facts the court would have considered are whether there was a "departure from the original specifications," whether "concessions [were] made to the bidder, [whether] the municipality . . . improperly coerce[d] the low bidder to make unfair and unwarranted concessions, and [if] the ultimate price was fair." Danzl v. City of Bismarck, 451 N.W.2d 127, 131 n. 1 (N.D. 1990)

In this instance, the PERS board has requested bids for fully-insured and self-insured plans on two separate occasions. Each time, Blue Cross/Blue Shield was the sole bidder on the fully-insured plan. The bids have not been accepted, however, because the bid amount exceeds the funding available to the PERS board. Several attempts have been made by Blue Cross/Blue Shield to reduce the cost of the bid by changing bid specifications. Recently, however, Blue Cross/Blue Shield's tactic has changed. Consequently, Blue Cross/ Blue Shield has decreased the total cost of the fully-insured plan without changing any bid specifications. It is my opinion that the board may accept this recent offer from Blue Cross/Blue Shield if the four requirements set forth in the Danzl case are met. Whether Blue Cross/ Blue Shield's most recent efforts meet those requirements is a question of fact which the board must determine. However, if those facts are present I believe post-bid negotiations with Blue Cross/Blue Shield, the sole and lowest bidder for fully-insured health insurance, is not prohibited by the public bidding statutes applicable to PERS.

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

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