

N.D.A.G. Letter to Larson (Feb. 3, 1992)

February 3, 1992

Honorable Rod Larson
State Representative
36 Park Drive
West Fargo, ND 58078

Dear Representative Larson:

Thank you for your December 23, 1991, letter regarding the awarding of a contract for employee group health insurance by the city of Fargo.

You state in your letter that "the contract was not awarded to the lowest and best bidder as required by N.D.C.C. Section 44-08-01.1." N.D.C.C. § 44-08-01.1 is restricted to bids solicited for the purchase of personal property and equipment. Letter from Attorney General Nicholas J. Spaeth to Mr. Gerald S. Paulson, city attorney (January 2, 1986). See also Letter from Assistant Attorney General Gerald W. VandeWalle to Honorable M.F. Peterson, Superintendent, Department of Public Instruction (May 4, 1967) (personal property and equipment considered to be in the same category except when equipment is permanently attached to real property). I concluded in the January 2, 1986, opinion that N.D.C.C. § 44-08-01.1 is not applicable to a city's purchase of a contract for snow removal services. Similarly, it is my opinion that N.D.C.C. § 44-08-01.1 does not apply to a city's purchase of a contract for employee group health insurance coverage. Both a contract for snow removal services and a contract for employee group health insurance coverage are service contracts to which the terms of N.D.C.C. § 44-08-01.1 do not apply.

Even if N.D.C.C. § 44-08-01.1 did apply, that section states "[i]f all of the bids are not rejected, the purchase shall be made from the bidder submitting the lowest and best bid meeting or exceeding the specifications called for." N.D.C.C. § 44-08-01.1. Determining whether a bid is the lowest and best bid allows for the consideration of numerous things. Although the North Dakota Supreme Court has never expounded on the meaning of "lowest and best bid," it has had an opportunity to elaborate on the meaning of "lowest responsible bid." In this regard, the North Dakota Supreme Court has stated that "a responsible bid involves the elements of the ability, capacity, reputation, experience, and efficiency of the bidders." Chaffee v. Crowley, 190 N.W. 308, 308 (N.D. 1922). It is of course up to the governing body of the city soliciting the bids to determine what constitutes the lowest and best bid for the city because that determination is a question of fact.

A city may require, by ordinance, the bidding of particular contracts that are not required to be bid by state law. In addition, a home rule city may, if permitted by its city charter, adopt ordinances which supersede state law. A city charter may give a home rule city the power to control the city's finances and fiscal affairs as described in N.D.C.C. §

40-05.1-06(2). If such power is stated in Fargo's home rule charter, the city of Fargo may implement ordinances regarding the city's finances and fiscal affairs which supersede state law.

Fargo's home rule charter states:

Article 3 - Powers of City

The city shall have all powers granted to municipal corporations by the constitution and the laws of this state together with all the implied powers necessary to execute such powers. In addition thereto, the city shall have the following powers, which may be implemented by ordinance:

. . . .

To control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; to contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; to establish charges for any city or other services, and to establish debt and mill levy limitations, . . .

Fargo Home Rule Charter art. 3. Thus, the governing body of the city of Fargo may enact an ordinance regarding the purchase of a contract for employee group health insurance coverage, that may supersede state law.

It is argued that a particular Fargo city ordinance applies to the purchase of the contract at issue and that this ordinance requires the award of the contract to the lowest bidder in this situation. The ordinance requires the solicitation by the city of sealed bids for "any purchase or construction project [which] is [in the amount of] \$15,000 or more." Fargo City Code § 3-0101. This ordinance further provides that "[t]he board of city commissioners may award the contract to the lowest or best bidder, or may reject all bids." Fargo City Code § 3-0101. If this ordinance applies, the city could not only turn down the lowest bid, but it could award the bid to the highest bidder if the city governing body determined that that bid was the best bid.

When no statutes or ordinances govern a city's letting of a particular contract, the general principles outlined in Price v. City of Fargo, 139 N.W. 1054 (N.D. 1913) would apply:

It is well established that, in the absence of charter or statutory requirement, municipal contracts need not be let under competitive bidding. In such cases the corporate authorities are only required to act in good faith and to the best interests of the municipality.

. . . .

Where bids are requested, but there is no law requiring competitive bidding, nor that the contract shall be let to the lowest bidder, such contract need not be let to the lowest bidder, and, where it is awarded to a higher bidder, a taxpayer cannot have the contract set aside where there is no proof of fraud.

Price at 1058.

You have asked for my opinion on three specific issues. First, you ask whether a political subdivision may couch a bid request as a "request for proposals" and thereby avoid rules or regulations regarding competitive bidding. When a state statute requires a political subdivision to seek competitive bids, the political subdivision must do so unless it is a home rule city which has enacted an ordinance concerning this issue. Calling for a request for proposals under such circumstances would not enable a city to circumvent the state bidding requirements.

Second, you ask whether a political subdivision that advertises for bids must, if all bids are not rejected, accept the lowest and best bid. If state law or city ordinance requires such acceptance, then the city must comply. It must be kept in mind, however, that when a city governing body determines what bid is the lowest and best bid for the city, it may consider numerous things in making its decision.

Third, you ask whether the procurement by a political subdivision of administrative services for an employee group health plan, utilization review services, and stop-loss insurance coverage constitutes a "purchase" under North Dakota law. I presume you refer to "purchase" as it is used in N.D.C.C. § 44-08-01.1. N.D.C.C. § 44-08-01.1 only applies to the purchase of personal property and equipment. It is my opinion that N.D.C.C. § 44-08-01.1 does not apply to contracts for the purchase of services. Thus, entering into a contract to provide for employee group health insurance coverage does not constitute the "purchase of personal property and equipment" referred to in N.D.C.C. § 44-08-01.1.

I trust I have responded to your questions and concerns.

Sincerely,

Nicholas J. Spaeth

krb

Enclosure

cc: Mark Thelen, City of Fargo

Mike Hamerlik, Blue Cross Blue Shield of North Dakota