

ATTORNEY GENERAL

of the State Constitution. *N.J. Const.* (1947), Art. VIII, § II, par. 3.

Very truly yours,

WILLIAM F. HYLAND

*Attorney General*

BY: RICHARD M. CONLEY

*Deputy Attorney General*

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September 17, 1975

HONORABLE RICHARD C. LEONE

*State Treasurer*

State House

Trenton, New Jersey 08625

FORMAL OPINION NO. 24—1975

Dear Treasurer Leone:

You have asked for an opinion on questions dealing with the discretion of the Director of the Division of Building and Construction (Director) to reject the lowest bidder on a public construction project solely on the basis that the bidder employs nonunion affiliated labor, and to award the contract to the next lowest bidder who employs only union affiliated labor.

In order to determine the correctness of this form of administrative decision making, it is necessary to consider the controlling legislative standard which bears on the discretion of a contracting officer in his award of a contract for the construction or repair of State public buildings. The relevant statutory provision in this instance is N.J.S.A. 52:32-2 which provides as follows:

“When the entire cost of the erection, construction, alteration or repair by the State of any public buildings in this State will exceed \$2,000,00, the person preparing the plans and specifications for such work shall prepare separate plans and specifications for the plumbing and gas fitting and all work kindred thereto, the steam and hot water heating and ventilating apparatus, steam power plants and all work kindred thereto, and electrical work, structural steel and ornamental iron work, and all other work and materials required for the completion of the project.

“The board, body or person authorized by law to award contracts for such work shall advertise for, in the manner provided by law, and receive (a) separate bids for each of said branches of the work and (b) bids for all the work and materials required to complete the project to be included in a single over-all contract, in which case there shall be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in (a)

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above, each of which subcontractors shall be qualified in accordance with chapter 35 of Title 52 of the Revised Statutes.

“If the sum total of the amounts bid by the lowest responsible bidder for each such branch is less than the amount bid by the lowest responsible bidder for all of the work and materials, the board, body or person authorized to award contracts for such work shall award separate contracts for each of such branches to the lowest responsible bidder therefor, but if the sum total of the amount bid by the lowest responsible bidder for each such branch is not less than the amount bid by the lowest responsible bidder for all the work and materials, the board, body or person authorized to award the contract shall award a single overall contract to the lowest responsible bidder for all of such work and materials.”

It is apparent that whether an award is made in a single overall contract or in separate contracts for each branch of work on a construction project, the statutory criteria mandate in unequivocal terms an award to the “lowest responsible bidder.”

This statutory directive appears to be determinative of the resolution of the issue. Wherever the Legislature has chosen to mandate competitive bidding for state contracts, it has either authorized an award to the “lowest responsible bidder,” N.J.S.A. 52:32-2; N.J.S.A. 24:7-30, or, in the alternative, has vested in the government contracting officer the significantly broader discretion to accept the bid of “that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the state, price and other factors considered.” N.J.S.A. 52:34-12. *Trap Rock Industries, Inc. v. Kohl*, 59 N.J. 471, 479 (1971); *Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539, 548 (1966). In the case of public construction contracts, the legislative standard imposed upon the Director by N.J.S.A. 52:32-2 is set forth in more restrictive terms and the wide latitude granted to the State Treasurer and the Director of the Division of Purchase and Property by N.J.S.A. 52:34-12 in their award of state contracts would not be applicable.\* The government contracting officer in this situation does not enjoy the same freedom of action to evaluate “that responsible bidder whose bid, ... will be most advantageous to the state, price and other factors considered.” Nor may he reject a bid solely on the basis that it may be in his judgment in the public interest to do so. His discretion is exclusively circumscribed by an award to the “lowest responsible bidder.” *Commercial Cleaning Corp.*, *supra*, at 549.

The phrase “lowest responsible bidder” has acquired a meaning by judicial construction over the years. It is settled that, by virtue of such statutory language, the lowest bidder acquires a status which may not be rejected in the absence of “facts which would justify a belief on the part of fair minded and reasonable men that he was so lacking in experience, financial ability, machinery, employees and necessary facilities as to be unable to perform the contract.” *Commercial Cleaning Corp.*, *supra*, at 547; *Sellitto v. Cedar Grove Township*, 132 N.J.L. 29, 32, 33 (S. Ct. 1944); *Paterson Contracting Co. v. Hackensack*, 99 N.J.L. 260, 263 (E. & A. 1923). *Cf. Trap Rock Industries, supra*. These criteria, including moral integrity and responsibility, have been established as the exclusive standards under which the judgment of a government contracting officer should be exercised. There is no express or implicit legislative authorization to allow for the consideration of “labor unrest” in the evaluation of the capacity of a bidder to satisfactorily perform the services required by government specifications.

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Although there does not appear to be any specific judicial consideration of this issue in New Jersey, the decision of the Supreme Court of Ohio in *State ex rel. United District Heating, Inc. v. Office Building Commission*, 181 N.E. 129 (1932), is analogous. In that case, the court was squarely confronted with the issue of whether a public construction contract may be permissibly denied to the lowest bidder solely on the ground of his failure to employ union labor. The court held that the state's refusal to award the contract to the lowest bidder was an arbitrary abuse of its discretion. The court also directed its attention to the likelihood of labor unrest and the delays in the construction of the project and commented as follows:

“The claim is made that costly delays and added expenses may occur because of possible trouble if this contract be not awarded to the bidder employing union labor. This claim assumes that a great state cannot control its laws requiring public bidding; cannot protect its citizens from unconstitutional discrimination. If such discrimination be permitted, all the laws controlling public bidding and requiring awards to be made to the lowest bidder have no potency. The state would be helpless.”

This conclusion is all the more compelling in an instance where the exertion of labor influence in the form of disruptive labor activities may constitute unlawful unfair labor practices specifically enjoined under section 8 of the National Labor Relations Act, 29 U.S.C. § 158.\*\*

In *Keyes Elec. Service v. Freeholders of Cumberland County*, 15 N.J. Super. 178 (Law Div. 1951), a New Jersey court held that the rejection of *all* bids and the issuance of an amended specification to the effect that there be no dissension between trades and all labor shall conform to local labor union practices was found neither an arbitrary nor capricious act on the part of the Freeholders. However, the court was careful to point out that the amended specification did not exclude the lowest bidder from becoming the lowest responsible bidder in his submission of bids to the second advertisement. More significantly, the court recognized that had the plaintiff been the lowest bidder on the second advertisement of proposals for bids and had been refused the award of a contract, his claim for redress would have been granted.

It is clear, therefore, that there is no legal justification under the standard established by the Legislature in N.J.S.A. 52:32-2 for the Director of Building and Construction to reject the bid of the lowest responsible bidder solely on the basis that his employment practices do not include the hiring of union labor and to award the contract to the next lowest bidder who hires only union affiliated labor.

Very truly yours,  
WILLIAM F. HYLAND  
*Attorney General*

BY THEODORE A. WINARD  
*Assistant Attorney General*

\* It must be emphasized that N.J.S.A. 52:32-2 is designed to deal with the award of contracts for the construction or repair of public buildings. It would not apply by its terms to contracts awarded by the Director of the Division of Building and Construction for other purposes which, by virtue of N.J.S.A. 52:18A-153, would be governed by the broader standard set forth in N.J.S.A. 52:34-12.

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