



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Hon. Peyton Burke
County Auditor
Falls County
Marlin, Texas

Dear Sir:

Opinion No. 0-770

Re: Approval by county auditor of
payment of sum in excess of
maximum amount set out in
"Notice to Bidders".

This will acknowledge receipt of your letter
of June 22nd, from which we quote the following:

"On May 31, 1939 the Commissioners' Court of Falls County instructed the County Auditor to advertise for bids for one maintainer with certain specifications and to give notice that same would be paid for in cash not to exceed \$4,000 f.o.b. Lott, Texas. None of the equipment called for in the specifications was optional.

"I am attaching a copy of our 'Notice to Bidders' as it actually appeared in the Marlin Democrat on June 6th and June 13th.

"When the bids were opened on June 21, 1939, R. B. George Machinery Co. was found to have a net bid of \$3,874.20 and Lewis-Patten Co. a bid of \$4,160.30. The court accepted the bid of Lewis-Patten Co. for \$4,160.30.

"The question that I would like to have answered at this time is this: Can I, as

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County Auditor, legally approve for payment to Lewis-Patten Co. a sum that exceeds the maximum amount set out in our 'Notice to Bidders'? If this is answered in the negative, can the Commissioners' Court legally leave off some of the extra equipment called for in the specifications in order to make the net cost to Falls County not exceed \$4,000?"

The notice you enclosed reads as follows:

"NOTICE TO BIDDERS"

"Sealed proposals will be received until 10 o'clock a. m. June 21, 1939, by Peyton Burke, County Auditor, for furnishing Falls County with one maintainer. Notice is given that the total cost to Falls County shall not exceed \$4,000 f.o.b. Lott, Texas.

"Terms: Cash on delivery.

"Specifications may be had at the office of the County Auditor.

"Usual rights reserved.

"Peyton Burke
COUNTY AUDITOR
Falls County"

The above notice was apparently intended to come within the terms of Article 1639, R. C. S. 1925, as follows:

"Bids for material - Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments, or institutions must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners court, has

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submitted the lowest and best bid. The county auditor shall advertise for a period of two weeks in at least one daily newspaper, published and circulated in the county, for such supplies and material according to specifications, giving in detail what is needed. Such advertisements shall state where the specifications are to be found, and shall give the time and place for receiving such bids. All such competitive bids shall be kept on file by the county auditor as a part of the records of his office, and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the county auditor to the county judge and to the commissioners court; and when the bids received are not satisfactory to the said judge or county commissioners, the auditor shall reject said bids and re-advertise for new bids. In cases of emergency, purchases not in excess of one hundred and fifty dollars may be made upon requisition to be approved by the commissioners court, without advertising for competitive bids."

In Article 1661, R. C. S. 1925, we find the following command to the county auditor:

"He shall not audit or approve any such claim unless it has been contracted as provided by law...."

From the above and foregoing statutes appears a clear legislative intent to declare the public policy of this state to require competitive bids when purchases are made such as we here consider. One of the objects of the statutes is to secure fair competition upon equal terms to all bidders; to secure the best values for the county at the least expense and to afford an equal advantage to all desiring to do business with the county by

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affording an opportunity for an exact comparison of bids. See the cases of Wyatt Metal & Boiler Works vs. Fannin County (Tex. Civ. App.) 111 SW 2nd 787; Wester vs. Belote (Sup. Ct. Fla.) 138 So. 721; Poyner vs. Whiddon, (Sup. Ct. Ala.) 174 So. 507.

The advertisement, or "Notice to Bidders", quoted above, was an integral and essential part of the process required by the plain terms of Article 1659, supra. Clearly, the court would not be authorized to purchase the maintainer without seeking competitive bids, according to specifications on file with the auditor. In seeking the competitive bids the court followed the method prescribed by the statutes and advertised in the newspaper. Any who desired to do so had the legal right to submit a bid. In the same notice soliciting bids was the unqualified and unconditional assertion that the total cost to Falls County should not exceed \$4,000.00, f.o.b. Lott, Texas. We submit that while the commissioners' court was clearly not required by statute to place the limitation as to price at any figure, having done so and the advertisement being published in compliance with the order of the court giving notice to the world and to all who might desire to enter a bid for the specified maintainer that the total cost to Falls County should not exceed a stated amount, to permit the county to enter into the contract mentioned and to violate the very terms of the notice would effectively serve as a throttle to the competition which is the aim and object of the statute.

We therefore respectfully answer your first question in the negative, and you are advised that it is our opinion the claim submitted to you was not contracted as provided by law in contemplation of Article 1661, supra, and should therefore be rejected.

Your second question is answered in the following quotation from the case of Wester vs. Belote, supra, where the principle of law applicable is succinctly stated:

"It has been generally recognized and held by the courts that it is the duty of public officers charged with the responsibility

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of letting contracts under the statute to adopt, in advance of calling for bids, reasonably definite plans or specifications, as a basis on which bids may be received. Such officers, in view of such requirement, are without power to reserve in the plans or specifications so prepared in advance of the letting the power to make exceptions, releases, and modifications in the contract after it is let, which will afford opportunities for favoritism, whether any favoritism is actually practiced or not. Neither can they include other reservations which by their necessary effect will render it impossible to make an exact comparison of bids. Clark vs. Nelson, 82 Fla. 230, 89 So. 495; Dillon, Municipal Corp., para. 807, page 1211; 15 C. J. 550; 19 R. C. L. 1070; 3 McQuillan on Municipal Corp. (2nd ed.) pages 885, 886."

We therefore likewise answer your second question in the negative and you are advised the commissioners' court is without legal authority to permit change in the specifications after an attempted letting of the contract.

We exceedingly regret the circumstances which prevented our answering your opinion request at an earlier date.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Benjamin Woodall

Benjamin Woodall
Assistant

BT:AW

[Handwritten signature]

WRK