



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

January 24, 2023

Renetha L. Frieson, Esq.
Attorney, Town of Tutwiler
Post Office Box 1811
Greenville, Mississippi 39702-1811

Re: Consultant Selecting Contractor for Town Construction Project

Dear Ms. Frieson:

The Office of the Attorney General has received your request for an official opinion.

Background

Your request provides the facts as follows: The town of Tutwiler is in the process of constructing a park that is anticipated to cost more than \$75,000.00. In accordance with Section 31-7-13(c) of the Mississippi Code, the town clerk advertised for competitive bids; however, no bids were received in response to the advertisement. The design consultant for the project requested permission to extend “private invitations” to potential qualified contractors, to select a contractor from the top three bidders of the potential qualified contractors, and to recommend the contractor he selects to the Board of Supervisors for approval.

Questions Presented

1. Can the Board of Aldermen authorize a design consultant to extend “private invitations” to potential qualified contractors for competitive bids when no bids were received after publishing for competitive bids in the local newspaper under Section 31-7-13(c)?
2. Would allowing the design consultant to extend “private invitations” for competitive bids violate Section 31-7-13(c) when no bids were received after publishing for competitive bids in the local newspaper under Section 31-7-13(c)?
3. If the Board of Aldermen is permitted to authorize the design consultant to extend “private invitations” to potential qualified contractors, can the Board of Aldermen allow the design consultant to select and recommend a contractor from the top three bidders resulting from the design consultant’s private invitation?

Brief Response

1. No. Issuing private invitations to select contractors does not comply with the publication or notice requirements in Section 31-7-13(c) for purchases over \$75,000. If the publication and notice deadlines have passed, and no bids were received, the procedure set out in Section 31-7-13 must start anew.
2. Our response to your first question renders this question moot.
3. Our response to your first question renders this question moot.

Applicable Law and Discussion

As an initial matter, the Office of the Attorney General is authorized to issue official opinions for prospective use only and cannot validate or invalidate past actions. *See* Miss. Code Ann. § 7-5-25.

In response to your first question, Section 31-7-13(c)(i), which outlines the mandatory bidding procedure for purchases over \$75,000.00 provides, in relevant part:

Purchases which involve an expenditure of more than Seventy-five Thousand Dollars (\$75,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder after advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located.

* * * * *

The date as published for the bid opening shall not be less than seven (7) working days after the last published notice; however, if the purchase involves a construction project in which the estimated cost is in excess of Seventy-five Thousand Dollars (\$75,000.00), such bids shall not be opened in less than fifteen (15) working days after the last notice is published and the notice for the purchase of such construction shall be published once each week for two (2) consecutive weeks. . . . The notice of intention to let contracts or purchase equipment shall state the time and place at which bids shall be received, list the contracts to be made or types of equipment or supplies to be purchased, and, if all plans and/or specifications are not published, refer to the plans and/or specifications on file. If there is no newspaper published in the county or municipality, then such notice shall be given by posting same at the courthouse, or for municipalities at the city hall, and at two (2) other public places in the county or municipality, and also by publication once each week for two (2) consecutive weeks in some newspaper having a general circulation in the county or municipality in the above-provided manner. . . .

Miss. Code Ann. § 31-7-13(c)(i)1, 3.

The municipality must also comply with the requirements for determining the lowest and best bid in Section 31-7-13(d)(i), which specifically provides:

If any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid. No agency or governing authority shall accept a bid based on items not included in the specifications.

The above quoted sections do not provide for issuing private invitations for bids in lieu of the mandatory publication and notice procedures as described in your request. Further, allowing a third party to select and recommend a contractor from a limited pool of bidders who respond to the private invitation does not comply with the procedure for selecting the lowest and best bid. The Mississippi Supreme Court has held that county supervisors “may act and authorize bids and contracts only by orders and resolves formally adopted and entered on the minutes.” *Richardson v. Canton Farm Equipment, Inc.*, 608 So. 2d 1240, 1246 (Miss. 1992). This is true for a municipal board of aldermen as well. Interpreting Section 31-7-13, this office has previously opined that there is “no authority which would permit the board to consider a bid for which there was no authorized advertisement.” MS AG Op., *Evans* at *1 (Aug. 16, 1995). While the town could contact potential contractors in addition to publication to let them know about the project so that they may submit bids in accordance with the procedure set forth in Section 31-7-13, doing such in lieu of the statutory bidding procedure is not authorized by the statute. Accordingly, it is the opinion of this office that Tutwiler must comply with the publication and notice deadlines and the procedure for selecting the lowest and best bid in Section 31-7-13(d)(i), which does not contemplate or allow for private invitations for bids in lieu of the competitive bid procedure. If the publication and notice deadlines have passed, and no bids were received, the procedure set out in Section 31-7-13 must start anew.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Beebe Garrard

Beebe Garrard
Special Assistant Attorney General