



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

November 28, 2023

Bryan H. Callaway, Esq.
Attorney, City of Natchez
Post Office Box 21
Natchez, Mississippi 39121

Re: Negotiations with Sole Bidder

Dear Mr. Callaway:

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

OFFICIAL OPINION

Background

According to your request, the city of Natchez (“City”) is seeking to obtain a contractor to construct a roadway. The estimated costs and funds allocation is in excess of \$75,000, and the City requested bids pursuant to Mississippi Code Annotated Section 31-7-13(c). All of the initial bids for construction were in excess of the funds allocated for the project by more than ten percent. The Board of Aldermen rejected the bids and agreed to advertise and request bids a second time. Only one contractor bid on the project following the second request for bids, but that bid also exceeded the funds allocated by more than ten percent.

Question Presented

May the City negotiate with a contractor that is the sole bidder even though the bid is in excess of ten percent of the funds allocated?

Brief Response

The City may only negotiate with the lowest and best bidder if the bid is not more than ten percent above the amount of funds allocated for the project.

Applicable Law and Discussion

Section 31-7-13(d)(iv) provides:

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If the lowest and best bid is not more than ten percent (10%) above the amount of funds allocated for a public construction or renovation project, then the agency or governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the funds allocated.

(emphasis added.) The state supreme court has held that this subsection “is unambiguous. In its plainest terms, the statute provides that an agency or governing authority (here, the City) shall be permitted to ‘negotiate . . . to enter into a contract’ if the ‘bid is not more than ten percent (10%) above the amount of funds allocated’ for the project.” *Hemphill Constr. Co., Inc. v. City of Clarksdale*, 250 So. 3d 1258, 1263 (Miss. 2018). In *Hemphill*, the city of Clarksdale received two bids, both of which exceeded the project’s allocated funds by more than ten percent. *Id.* at 1260. Clarksdale conditionally awarded the contract to the lower bidder dependent upon the city’s obtaining additional funds to match the bid. *Id.* The Court held that “[b]ecause both bids exceeded ten percent of the funds allocated, the City had no authority to ‘negotiate . . . to enter into a contract’ with either bidder.” *Id.* at 1264.

Your request suggests that the City could potentially use Section 31-7-13(d)(iv) to negotiate with a bidder if the bid is more than ten percent above the amount of funds allocated, but the parties are able to negotiate to less than ten percent of the funds allocated. However, that is not what the statute provides. Section 31-7-13(d)(iv) only applies if the lowest and best bid is not more than ten percent above the funds allocated for the project. Further, the number of bidders is irrelevant to the applicability of the provision. Based on the plain language of Section 31-7-13(d)(iv) and in accordance with the holding in *Hemphill*, the Board may only negotiate with the lowest bidder if the bid is “not more than ten percent above the amount of funds allocated.”

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