



# 2014-011

STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Honorable Jim Byard, Jr., Director  
Alabama Department of Economic  
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Competitive Bid Law – Bonds –  
Economic and Community Affairs  
Department

The Water Works and Sewer  
Authority Board of the City of  
Anniston (“Board”) may permit the  
lowest responsible bidder to correct  
a technical deficiency in a bid bond  
if the Board determines that it is in  
the best interest of the Board to do  
so and that such determination is not  
arbitrary or capricious.

Dear Mr. Byard:

This opinion of the Attorney General is issued in response to your  
request.

### QUESTION

May an awarding authority allow an  
otherwise qualified bidder to modify the bid  
package after sealed bids are opened to cure a  
defect in the bid bond submitted with the bid  
materials?

### FACTS AND ANALYSIS

The Water Works and Sewer Authority Board of the City of  
Anniston advertised for bids seeking a supplier of pipes, fittings, and

other materials to be used in the Honda Water Transmission Main, Talladega County project. The project is to be funded, in part, by a grant from the Appalachian Regional Commission and Community Block Grant. The Alabama Department of Economic and Community Affairs (“ADECA”) administers the federal funds from the Community Development Block Grant for the project. The notice to bidders stated that bidders should furnish a bid bond, irrevocable letter of credit, or a cashier’s check drawn on an Alabama Bank in the amount of five percent (5%) of the total bid amount. The notice to bidders also provided that the Board reserves the right to reject any and all bids and to waive any formality in any bid and that the Board further reserves the right to award the bid in a manner deemed to be in the best interest of the Board at the sole discretion of the Board.

The bid package submitted by the lowest bidder included a bid bond that was properly issued and signed by the surety. The bid bond, however, was not signed by the principal. The principal/low bidder has expressed the desire to cure the deficiency by immediately signing the bid bond, rendering it fully enforceable.

The contract at issue is subject to the competitive bidding requirements found in section 41-16-50, *et seq.*, of the Code of Alabama. ALA. CODE §§ 41-16-50 to 41-16-63 (Supp. 2012). Section 41-16-50(c) of the Code permits, but does not require, awarding authorities to require bidders to furnish a bid bond. ALA. CODE § 41-16-50(c) (Supp. 2012). According to your request, to comply with federal regulations requiring that a bid guarantee accompany the bid, the Board included in the solicitation for bids that bidders “should furnish a bid bond, . . . irrevocable letter of credit, or a cashier’s check drawn on an Alabama Bank in the amount of five percent (5%) of the total bid amount.” *Advertisement for Bids, Project: Honda Water Transmission Main, Talladega County.* Thus, as required by federal law, the Board’s solicitation for bids required potential bidders to submit a bid bond accompanying the bid.

“The purpose of the statutory bond requirement is to guarantee that successful bidders honor the terms of their bids. That purpose can be accomplished only if the bidder is the principal on the bond, as the surety’s liability is measured by that of the principal.” *Steeley v. Nolen*, 578 So. 2d 1278, 1280 (Ala. 1991). In the absence of the signature of the principal, a bond may, or may not, be enforceable against the surety. *Birmingham News Co. v. Moseley*, 225 Ala. 45, 141 So. 689, 692 (Ala. 1932).

Nonetheless, the Alabama Supreme Court has specifically determined that an awarding authority may waive the requirement of a bid bond. In the case of *McCord Contract Floors, Inc., v. City of Dothan*, the Court stated the following:

McCord also contends that the City of Dothan ignored its general instructions to bidders by not requiring a bid bond from Stokes or a surety bond, but instead accepting an irrevocable commercial letter of credit. The specific provision in question is 4(b)(1), which provides as follows:

“Bid bonds for repairs to or construction of public works having a value in excess of \$1,000 must be replaced by a performance bond in the amount of 100% of the bid price and a surety bond in the amount of 50% of the contract price upon award of the contract (purchase order). These bonds will remain in effect until completion of the contract.”

To answer this contention we need only further examine the provisions of the general instructions to bidders. The general instructions at 5(a)(1) provide as follows:

“The City of Dothan reserves the right to:

“Reject any or all bids and to waive technicalities when, in the opinion of the City, the best interest of the City will be served.”

Pursuant to this provision the City of Dothan was within its authority to waive the requirements set out at 4(b)(1) of the instructions. *The city acted within its authority in deciding that the letter of credit was a sufficient substitute for a bond and that it was*

***in the best interest of the city to waive the technical requirement of a bond.***

492 So. 2d 996, 997-98 (Ala. 1986) (emphasis added).

Similar to the language in *McCord*, the Notice to Bidders issued by the Board contained the language, “the Board reserves the right to reject any and all bids, and to waive any formality in any bid” and that “the Board further reserves the right to award the bid in a manner deemed to be in the best interest of the Board at the sole discretion of the Board.” *Advertisement for Bids, Project: Honda Water Transmission Main, Talladega County*. Accordingly, the Board may waive the technical requirement of a bid bond.

Additionally, the Alabama Competitive Bid Law does not expressly prohibit the correction of a bid after it has been unsealed. *See, generally*, opinion to Honorable Lawrence M. Wettermark, Attorney at Law, dated October 24, 1989, A.G. No. 90-00015 (provision in the competitive bid law applicable to public works “does not in and of itself preclude a county from waiving or correcting a technical error contained in a unit price of a bid”). The Alabama Supreme Court has recognized that the application of this statute necessarily entails discretion by the awarding board. *White v. McDonald Ford Tractor Co.*, 248 So. 2d 121, 129 (Ala. 1971) (“authorities should have discretion in determining who is the lowest responsible bidder”). “This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence.” *Id.* Rather than focus on technicalities, “[t]he single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law.” *Id.*

Relying on this discretion, the Alabama Supreme Court has upheld the ability of a letting authority to permit curative actions by bidders after the unsealing of bids under the Competitive Bid Law, as long as the decision was not “arbitrary or capricious or the result of improper influence.” *See Horne Wrecker Serv., Inc. v. City of Florence*, 567 So. 2d 1285, 1286-87 (Ala. 1990) (“because neither party met the specifications when the bids were opened, the city council’s allowance of additional time for both parties to meet the specifications was not arbitrary or capricious or the result of improper influence”). Therefore, as long as the authorities are acting in good faith and not in an arbitrary or capricious manner, the Board retains the ability to waive any informality in a bid,

Honorable Jim Byard, Jr.  
Page 5

including the requirement that the bid bond be signed by the principal at the time the bid is initially submitted, by permitting the lowest bidder to cure the deficiency.

CONCLUSION

The Water Works and Sewer Authority Board of the City of Anniston may permit the lowest responsible bidder to correct a technical deficiency in a bid bond if the Board determines that it is in the best interest of the Board to do so and that such determination is not arbitrary or capricious.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE  
Attorney General

By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH  
Chief, Opinions Division

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