

Opinion No. 68-101

October 8, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Ed Hartman Executive Secretary State Board of Finance Legislative-Executive Building Santa Fe, New Mexico

QUESTION

FACTS

The State Board of Finance met in Santa Fe, New Mexico on October 8, 1968. The board's purpose in meeting was to accept bids on various severance tax bonds. The prospective bidders included both domestic and foreign firms.

These bonds comprised three different series. Series A 1968 Severance Tax Bonds were offered in the amount of \$ 1,000,000.00 A firm offer was accepted as to this series. This opinion is not concerned with the Series A bonds.

The Series B Severance Tax Bonds were offered in the amount of \$ 2,500,000.00. The Series C Severance Tax Bonds were offered in the amount of \$ 840,000.00. The rate of the accrued interest from the date of issuance to the date of delivery was four percent (4%). Section 72-18-40, N.M.S.A., 1953 Compilation.

No unconditional bids were made as to the Series B and C Severance Tax Bonds. When this lack of an unconditional bid was apparent, a group of prospective buyers, acting jointly, offered a conditional bid as to the Series B and C Severance Tax Bonds. These prospective buyers included:

1. Stern Brothers and Company, Albuquerque, New Mexico and Kansas City, Missouri.
2. Quinn and Company, Albuquerque, New Mexico.
3. Bosworth Sullivan and Company, Denver, Colorado.
4. Goodbody and Company, Albuquerque, New Mexico and New York City, New York.
5. Zahner and Company, Kansas City, Missouri.

The condition was: (1) That the bidder should have until 12:00 Noon on Friday, October 11, 1968 to confirm the bids. If the bidders were unable to confirm the bids on October 11, 1968, the bids would be withdrawn.

Prior to October 8, 1968, approximately two hundred prospective buyers of bonds were notified of the sale. This notification satisfied the requirements of Section 72-18-42, N.M.S.A., 1953 Compilation. The prospective buyers who were notified included both domestic and foreign business entities. Further, every bank then doing business in New Mexico was notified.

QUESTION

Under the facts set out in this opinion, may the Board of Finance accept a conditional bid as a legal bid under Section 72-18-42, N.M.S.A., 1953 Compilation?

CONCLUSION

Yes.

OPINION

{*157} ANALYSIS

The difficulty arises because of language in the Board's Notice of Sale. The language is:

"All bids must be unconditional and, together with the bidder's check, must be enclosed in a sealed envelope addressed to the State Auditor and Secretary of the State Board of Finance, Governor's Office, Santa Fe, New Mexico, and endorsed "Proposal for State of New Mexico Severance Tax Bonds."

All prospective bidders were accordingly notified that the only acceptable bids were those which were made unconditionally. However, as stated above, no bids were made unconditionally as to the Series Bond C Severance Tax Bonds. Indeed, the only buyer interested enough to attend the sale was the group mentioned above. The group's conditional bid was made only after it became apparent that no unconditional bids were to be made by any buyer or buyers as to the Series B and C Severance Tax Bonds.

What authority does the Board have to accept conditional bids under the above circumstances? Section 72-18-40, N.M.S.A., 1953 Compilation, provides:

"72-18-40. Form of bonds. -- **The state board of finance, except as otherwise specifically provided in this Severance {*158} Tax Bonding Act [72-18-29 to 72-18-51], shall determine at its discretion the terms, covenants and conditions of severance tax bonds, including but not limited to: date of issue, denominations, maturities, coupon rate or rates, call features, call premiums, registration, refundability, and other covenants covering the general and technical aspects of the issuance of said bonds.** Provided, however, that said bonds shall be dated and payable either January 1 or July 1 and interest shall be payable semiannually at a rate not in excess of four per cent [4%] per annum. (Emphasis supplied).

Section 72-18-42, supra, provides, in pertinent part:

"Procedure for sale of bonds. -- Severance Tax bonds shall be sold by the state board of finance at such times and in such manner as said board, commission or agency which is the recipient or recipients of the bond money, to the highest bidder for each at not less than par and accrued interest" (sic).

It is the opinion of this office that the Board of Finance may accept a conditional bid for the Series B and C Severance Tax Bonds on the basis of the above authority and because: (1) Notice of the Sale was given to at least two hundred different prospective buyers; (2) Of those so notified, only one group attended the October 8, 1968 sale; (3) The conditional bid was made only after it became obvious that no unconditional bid would be made.

By: Donald W. Miller

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