

Opinion No. 68-42

April 17, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: C. R. Sebastian Legislative Auditor Executive-Legislative Building Santa Fe, New Mexico

QUESTIONS

FACTS

Section 6-5-32, N.M.S.A., 1953 Compilation (Chapter 72, Laws of 1968) gives certain bidders a preference when selling materials and services to the State. This opinion request is concerned only with the sale of materials to the State and its political subdivisions. Section 6-5-32A, provides a 5% preference to bidders who offer materials grown, processed or manufactured wholly in the State and Section 6-5-32B, provides a 5% preference to a "resident dealer" of this State.

May a bidder who offers materials grown, processed or manufactured in this State claim both the manufacturer's 5% preference and the resident dealer's 5% preference against an out-of-state supplier, giving the instate supplier a 10% preference?

CONCLUSION

No.

OPINION

{*73} ANALYSIS

Section 6-5-32 provides in part as follows:

A. In awarding contract[s] for furnishing materials to a state agency or any local public body, bidders who offer materials grown, processed or manufactured wholly in the state shall be awarded the contract in preference to any competing bidder who offers materials not grown, processed or manufactured wholly in the state, whenever the bid of the competing bidder is five percent or less lower.

B. In awarding contracts for furnishing materials to a state agency or any local public body, the contract shall be awarded to the bidder who is a resident dealer in preference to any competing bidder who is not a resident dealer, whenever the bid of the competing bidder is five percent or less lower.

For the purpose of this subsection, "resident dealer" means a person or organization engaging in the business of selling tangible personal property in the state, who is a resident of the state and who has paid ad valorem taxes on a stock of materials held for sale in the ordinary course of business, which stock is of the general type offered and which stock is reasonably sufficient in quantity to {*74} meet the ordinary requirements of customers.

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D. No bidder shall receive more than a five percent preference on any one bid.

We interpret subsection A of Section 6-5-32, supra, to mean that one who sells materials to a state agency or any local public body which materials are grown, processed or manufactured wholly in the state of New Mexico, is to be given a 5% preference over any other bidder. This includes a "resident dealer" of this state selling materials grown, processed or manufactured out-of-state. Thus, between the "resident dealer" selling materials grown, processed or manufactured outside the boundaries of this state and a bidder selling materials grown, processed or manufactured wholly in the state of New Mexico, the bidder selling the New Mexico materials is to be given a preference whenever his bid is not more than 5% higher than the bid of the resident dealer selling materials manufactured out-of-state.

Section 6-5-32B, gives a resident dealer, as defined above, a preference over out-of-state dealers selling materials in this state, which materials were not grown, processed or manufactured wholly in this state. We believe that a hypothetical example will help simplify the problem.

If the State Purchasing Agent or a central purchasing office of a local public body wishes to purchase widgets and there are four bidders, one out-of-state dealer selling widgets manufactured in New Mexico, one resident dealer selling widgets manufactured in New Mexico, one out-of-state bidder selling widgets manufactured out-of-state, and one resident dealer selling widgets manufacturer out-of-state, the following preferences are to be given:

(1) As between the out-of-state dealer selling widgets manufactured in New Mexico and the resident dealer selling widgets manufactured in New Mexico, the New Mexico resident dealer will receive a 5% resident dealer preference over the out-of-state dealer. As between each other, neither bidder can take advantage of the preference provided for in Section 6-5-32A, since both are selling materials manufactured in this state.

(2) As between the out-of-state dealer selling widgets manufactured in New Mexico and the resident dealer selling widgets manufactured oua-of-state, the out-of-state dealer selling New Mexico widgets will be given a 5% preference over the resident dealer. Subsection A of Section 6-5-32 provides that the product is to receive a 5% preference over any competing bidder.

(3) As between the resident dealer selling widgets manufactured in New Mexico and the resident dealer selling widgets manufactured out-of-state, the resident dealer selling widgets manufactured in New Mexico is to be given a 5% preference under Section 6-5-32A for the product sold. As between these bidders no preference is to be given under Section 6-5-32B, since both are resident dealers.

(4) As between the out-of-state dealer selling widgets manufactured out - of - state and the resident dealer selling widgets manufactured out-of-state, the resident dealer will receive a Section 6-5-32B 5% preference over the out-of-state dealer.

In no event will any of the above bidders receive more than a five percent preference on any one bid. Section 6-5-32D, supra.

Last of all, it should be pointed {^{*75}} out that the above preference do not apply when the purchase involves the expenditure of federal funds. See Section 6-5-32E, N.M.S.A., 1953 Compilation.

By: Gary O'Dowd

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