

1967 O. A. G.

OFFICIAL OPINION NO. 33

September 14, 1967

**SCHOOLS AND SCHOOL CORPORATIONS—STATE
BOARD OF ACCOUNTS—Non-collusion Affidavit
as Necessary When Submitting Bid for
Construction Contract.**

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

I am in receipt of your letter requesting my opinion on the following questions:

“1. Is a bidder in submitting a bid with a school corporation on a construction project required to execute and submit with his bid the non-collusion affidavit provided for on Bid Form No. 96 prescribed by the State Board of Accounts?

“2. If your answer to Question No. 1 is in the affirmative and the non-collusion affidavit is not executed and submitted with the bid, would it be permissible for the bidder to execute and file the non-collusion affidavit after the opening of his bid?”

The statutory requirements and procedures to be followed by a school corporation in letting a contract for a public work are found in Acts 1947, ch. 306, as amended, the same being Burns §§ 53-108 through 53-110, as follows:

Section 1; Burns § 53-108:

“When any public building or any other public work or improvement of any character whatsoever is to be constructed, erected, altered or repaired at the expense

OPINION 33

of the State or at the expense of any county, city, town, township, school corporation, public utility owned or operated by any city of the second, third, fourth or fifth class or by any town, or other political subdivision, or commission created by law, excepting the State Highway Department of Indiana, and when the costs of such work or improvement will be two thousand dollars (\$2,000) or more, it shall be the duty of the board, commission, trustee, officer or agent acting on behalf of the state, county, city, town, township, school corporation, public utility owned or operated by any city of the second, third, fourth or fifth class or by any town, or other political subdivision or commission created by law, excepting the state highway department, to adopt plans and specifications and award a contract for such public work or improvement to the lowest and best bidder who submits a bid for the performance thereof: Provided, That whenever the cost of any such public work shall be estimated to be less than two thousand dollars (\$2,000), the officer or agent acting on behalf of the state, or on behalf of any county, city, town, township, school corporation, public utility owned or operated by any city of the second, third, fourth or fifth class or by any town, or other political subdivision or commission, having authority to employ workmen, own, rent or lease equipment, may purchase materials in the manner provided by law and perform such work by means of its own workmen and owned or leased equipment without awarding a construction contract therefor: Provided, however, That no construction or alteration of any public building, the estimated cost of which is more than two thousand dollars (\$2,000) shall be undertaken by any officer or agent hereinbefore mentioned or referred to except pursuant to and in compliance with plans and specifications therefor approved by a duly licensed architect or engineer: Provided further, That said requirement as to compliance with plans and specifications therefor to be approved by a duly licensed architect or engineer shall apply to the construction or alteration of a

1967 O. A. G.

public school building only when the estimated cost of such construction or alteration is more than two thousand dollars (\$2,000). Except as herein otherwise provided, for the purpose of securing such bids and/or for the purpose of causing the work to be done in the desired manner, the state, county, city, town, township, school corporation, public utility owned or operated by any city of the second, third, fourth or fifth class or by any town, or other political subdivision or commission created by law, excepting the state highway department, shall cause to be prepared and placed on file in the office of said unit of government, complete and detailed plans and specifications including full and complete drawings of the building or public improvements sought to be constructed, erected, altered or repaired.

“Nothing in this act shall prevent any officer or agent acting on behalf of any public utility owned or operated by any city of the second, third, fourth or fifth class or by any town from maintaining, extending and installing services of such public utility without adopting plans and specifications and without awarding a contract therefor if such work is done by the employees of such public utility: Provided, however, That notwithstanding any other provisions of law, the board of county commissioners, acting on behalf of any county, may purchase materials in the manner provided by law and perform any work by means of its own workmen and owned or leased equipment, in the construction, maintenance and repair of any highway, bridge, or culvert, without awarding a contract therefor, whenever the cost of such work shall be estimated to be less than eight thousand dollars (\$8,000).”
(As last amended by Acts 1961, ch. 121, § 1.)

Section 2; Burns § 53-109:

“Whenever the aggregate costs of any work or improvement will be five thousand dollars (\$5,000) or more, for the purpose of enabling such board, com-

OPINION 33

mission, trustee, officer or agent to ascertain and determine which of the bidders submitting bids for the performance of any such public work is, in the judgment of such board, commission, trustee, officer or agent, the lowest and/or best bidder and to exercise intelligently the discretion hereby conferred on such board, commission, trustee, officer or agent *each bidder shall be required to submit under oath with and as a part of his bid a statement of his experience, his proposed plan for performing such work and the equipment which he has available for the performance of such work and a financial statement*: Provided, That no such financial statement shall be required if such improvement is being performed under the direction and supervision of the Division of Public Works of the Department of Administration of Indiana if the cost of such improvement is twenty thousand dollars (\$20,000) or more. *The statements hereby required shall be submitted on forms which shall be prescribed by the State Board of Accounts. The forms so prescribed shall be designated, respectively, as the experience questionnaire, the plan and equipment questionnaire and the contractor's financial statement, and shall be based, so far as applicable, on the standard questionnaires and financial statements for bidders as approved and recommended by the joint conference on construction practices, for use in investigating the qualifications of bidders on public construction work, and the forms so prescribed are hereby prescribed as the forms which shall hereafter be used by all such boards, commissions, trustees, officers and agents in obtaining the information which is required in the administration of this act. If the information submitted by any bidder on the forms herein prescribed is found, on examination, to be unsatisfactory, the bid submitted by such bidder shall not be considered.*" (Emphasis added.) (As amended by Acts 1965, ch. 251, § 1. The proviso of this section was amended by the 1967 General Assembly in a manner not pertinent to this opinion.)

Section 3; Burns § 53-110:

“Upon the filing of said plans, specifications and drawings in the office of the board, commission, trustee, officer or agent, said aforementioned officer shall cause a notice to be published twice in the two (2) leading newspapers as now provided by law that drawings, plans and specifications are on file at said office and calling for sealed proposals for such work by a day fixed in said publication. The time to lapse between the date of publication and the date of receiving bids shall be governed by the size of the contemplated project in the discretion of the board, commission, trustee, officer or agent causing the notice to be published but in no event shall the lapsed time be more than six (6) weeks: Provided, however, if any public building or any other public work or improvement as hereinbefore provided shall be estimated to cost less than two thousand dollars (\$2,000), and a contract is to be awarded therefor, the awarding officer, commission or agent shall cause publication to be made as hereinbefore provided or shall cause bids to be invited from not less than three (3) persons, firms or corporations, known to do or deal in the class of work proposed to be done, by mailing a notice therefor, not less than three days before the time fixed for receiving bids that plans and specifications are on file in a certain office.” (As last amended by Acts 1949, ch. 136, § 2.)

A non-collusion affidavit is not required by any of the statutes above. The second section of the Act, Burns § 53-109, requires only an experience questionnaire, a plan and equipment questionnaire, and a contractor's financial statement. This is in contrast to other public works situations, in which a non-collusion affidavit is required. Such an affidavit must be submitted to boards of county commissioners by the terms of Acts 1907, ch. 271, § 5, Burns § 26-2005; to county officers by Acts 1899, ch. 154, § 42, Burns § 26-542; to city boards of public works by Acts 1905, ch. 129, § 95, Burns § 48-1904; and to boards of flood control commissioners by

OPINION 33

Acts 1939, ch. 23, § 12, Burns § 48-4940, which incorporates the statute cited in reference to boards of public works. While there might be questions concerning the interrelation of these earlier Acts and the 1947 Act set out above, the complete lack of any similar statutes pertaining to school corporations leaves no doubt that the 1947 Act is fully controlling in that area, and that Act does not require a non-collusion affidavit.

Although the non-collusion affidavit is not required by statute there is the possibility that the State Board of Accounts has the authority to prescribe such an affidavit. The State Board of Accounts was created by Acts 1909, ch. 55, as amended, Burns §§ 60-201 through 60-225a, and its powers were examined in the case of *State ex rel. Licking Township v. Clamme*, 80 Ind. App. 147, 164, 134 N.E. 676, 682 (1922) in which the Appellate Court concluded that:

“. . . The powers and duties of the state board of accounts are so clearly defined by the express provisions of the statute that there is no occasion for a discussion of them. Those duties are of such a character that they may be discharged fully and completely without the aid of any implied power; and there is no intimation or suggestion in the statute that the legislature intended to grant that board any power whatsoever by implication.

“The department of inspection and supervision of public offices [now the state board of accounts] was created for the purpose of examining the accounts of such public officers as handle public funds. From the legislation relating to that department, it clearly appears that its powers and duties are limited to the subject of accounting and reporting. . . .”

The second section of the 1947 Act concerning public buildings, Burns § 53-109, quoted above, gives the State Board of Accounts a power and duty additional to those it possessed when the above language was written. That new duty, however, is clearly and expressly defined. The Board is to prepare forms on which the statements required by that Act are

to be submitted. Further, the name to be given each individual form is specified in the Act. The Act neither requires a non-collusion affidavit nor specifies a form to be designated a non-collusion affidavit. The State Board of Accounts clearly is not given the authority by this statute to require any forms not specifically required therein.

The general power of the State Board of Accounts should also be considered. Acts 1909, ch. 55, § 22, the same being Burns § 60-224, reads as follows:

“It is hereby made the duty of the various officers of the state and its institutions and municipalities to adopt and use the books, forms, records and systems of accounting and reporting that shall be adopted by the board of accounts when directed so to do by said board, and all forms, books, and records necessary thereto shall be purchased by said officers and in the manner now provided by law. Any officer or person who shall refuse to provide such books, forms or records, or who shall fail or refuse to use them, or who shall fail or refuse to keep the accounts of his office as directed by said board as provided herein, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than one hundred dollars (\$100.00) and removed from such office.”

This provision has been interpreted to mean that the State Board of Accounts has the power to prescribe the forms which a governmental unit uses with respect to its accounting system but not with respect to the forms used in the operational functions of the department. 1958 O.A.G., p. 164.

In view of the foregoing, it is my opinion that a bidder submitting a bid to a school corporation on a construction project is not required by law to submit with his bid a non-collusion affidavit such as provided for on Bid Form No. 96 prescribed by the State Board of Accounts.

However, this is not to say that the school corporation either cannot or should not require a non-collusion affidavit to be submitted with the bid. The statutes set out above require certain statements to accompany a bid, but they in no way

OPINION 33

indicate a legislative intent to prohibit the school corporation from requiring further and additional information. Indeed, the specific language of Burns § 53-109, *supra*, ("for the purpose of enabling such board . . . to ascertain and determine which of the bidders submitting bids for the performance of any such public work is . . . the lowest and/or best bidder and to exercise intelligently the discretion hereby conferred on such board . . .) not only appears to indicate a contrary intent but also seems to actively encourage the seeking out of such further information as the school board may deem proper. Such an interpretation of that language is consistent with the public policy expressed in the many statutes concerning specific public works situations cited but not set out above.

A school corporation like any other party soliciting offers or bids on a contract has the right to determine the form and character such offers or bids must take, provided that the form so required is not inconsistent with law. The corporation may make a non-collusion affidavit a prerequisite to consideration of a bid, or it may make the execution of a non-collusion affidavit by the lowest bidder a prerequisite to the acceptance of the lowest bid, or it may not require a non-collusion affidavit at any time (even though I do not believe that a choice of this alternative would be consistent with the school board's duty to the public), or it may treat a non-collusion affidavit in some other manner. Similarly, the State Board of Accounts can recommend forms for such affidavits and the school corporations may use either the recommended form or a form of their own devising.

The answer to your first question makes any answer to your second question unnecessary. The effect of the bidder's failure to include a non-collusion affidavit with his bid is a question of contract law rather than statutory law. The answer in any given instance would depend upon the facts peculiar to that instance, and could best be obtained from the attorney for the school corporation.