

**OPINION NO. 70-105****Syllabus:**

1. A board of education may not refuse to award a purchase contract to the lowest bidder for the reason that it has not done business with that contractor before.

2. A board of education may not award a contract to any bidder they choose. The contract must be awarded to the lowest responsible bidder. The bid must be both lowest and responsible not either/or.

3. If a board of education elects not to award a contract to the lowest bidder, it may do so only following a determin-

ation that the low bidder was not responsible. The board is never obligated to reject all bids unless it has determined that all bidders are not responsible.

4. Any irregularity in the awarding of contracts for the purchase of school buses falls within the jurisdiction of the Bureau of Inspection and Supervision of Public Offices. The department of education is required to make subsidy monies available for the purchase of school buses in amounts provided in Section 3327.08, Revised Code.

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To: Martin W. Essex, Supt. of Public Instruction, Columbus, Ohio  
By: Paul W. Brown, Attorney General, August 14, 1970

Your request for my opinion relative to the purchase of school buses poses four questions which are to be considered in light of the provisions of Sections 3327.08 and 3313.46, Revised Code. Your questions read as follows:

"1. May a board of education refuse to award the purchase contract to the lowest bidder on the basis that they have never done business with the lowest bidder before?

"2. May a board of education who has elected not to award a purchase contract to the lowest bidder, award that purchase contract to any bidder they choose, or must they make the award to the bidder whose bid was next above the lowest?

"3. If the board of education elects not to award the purchase contract to the lowest bidder, are they obligated to reject all bids and ask for new bids?

"4. If the board of education does not award the purchase to the lowest bidder and fails to provide an explanation for such action, what is the position of the department of education in recommending the release of monies from the board of control for bus purchasing assistance when there may be a violation of the code?"

I quote the above mentioned Revised Code Sections in pertinent part:

Section 3327.08, Revised Code:

"The purchase of school buses shall be made only after competitive bidding in accordance with divisions (A), (B), (C), (D), (E), (F), (H), and (I) of section 3313.46 of the Revised Code. Separate and independent bids shall be received with respect to the chassis and body type, and shall state that the buses, when assembled and prior to delivery, comply with the safety regulations of the department of education adopted by and with the advice and consent of the director of highway safety pursuant to section 4511.76 of the Revised Code and all other pertinent provisions of law."

## Section 3313.46, Revised Code:

"(A) For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are two. If no newspaper has a general circulation in the district, then the board shall post such advertisement in three public places in the district. Such advertisement shall be entered in full by the clerk of the board of education, on the record of the proceedings of the board.

"(B) The sealed bids must be filed with the clerk by twelve noon of the last day stated in the advertisement.

"(C) The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board; provided that the board may by resolution provide for the public opening and reading of such bids by the clerk immediately after the time for filing such bids has expired, at the usual place of meeting of the board, and for the tabulation of such bids and a report thereof to the board at its next meeting.

"(D) Each bid must contain the name of every person interested therein, and shall be accompanied by a bid bond or by a certified check upon a solvent bank, as the board requires, payable to the order of the treasurer of the board of education, in an amount to be fixed by the board or by an officer designated for such purpose by the board, said bond or check to be in no less than five percent of the amount of the bid and conditioned that if the bid is accepted, a contract will be entered into, and the performance of it properly secured.

"(E) When both labor and materials are embraced in the work bid for, the board may require that each be separately stated in the bid, with the price thereof, or may require that bids be submitted without such separation.

"(F) None but the lowest responsible bid shall be accepted. The board may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

"\* \* \* \* \*

"(H) When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

"(I) When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected." (Emphasis added.)

The phrase "lowest responsible bidder" appear to be the crux of your inquiry. In making this determination, I quote from Hudson v. Board of Education, 41 Ohio App. 402, at page 406:

"\* \* \*The general rule is that laid down in 19 Ruling Case Law, 1070, as follows:

"When a statute requires municipal contracts to be awarded to "the lowest responsible bidder" it does not compel the municipality to award a contract to the lowest bidder who is financially responsible, or who is able to produce responsible sureties. What the public desires is a well constructed work, and a lawsuit against even a responsible defendant is a poor substitute. Such a statute, it is held, invest the municipal authorities with a discretionary power to pass upon the honesty, skill and competency of the respective bidders and the courts will not interfere with the exercise of this discretion. The determination of who is the lowest responsible bidder for a municipal contract does not, however, rest in the exercise of an arbitrary unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona fide judgment based upon facts tending reasonably to support such determination."  
(Emphasis added.)

The emphasized portion of this quotation is my answer to your first question.

Section 3313.46 (F), supra, requires that none but the lowest responsible bid shall be accepted except as is provided in paragraph (H). In the event equal low, responsible bids are received, either may be accepted and the other rejected. It follows that all bids are rejected except the one which is accepted. It also follows that only the low bid may be accepted, unless a determination is made that the low bidder is not responsible.

The answer to your second question is reasonably clear. The statute is unequivocal in requiring that only the lowest responsible bid be accepted. The only reason the board may reject the lowest bidder or any bidder unless all are rejected is that they have determined that any such bidder is not responsible, pursuant to the criteria as set out in Hudson v. Board of Education, supra.

Your third question, "If the board of education elects not to award the contract to the lowest bidder, are they obligated to reject all bids and ask for new bids?", must be answered in the affirmative, unless the lowest bidder is determined to be not responsible, pursuant to the aforementioned criteria, in which case, the next lowest responsible bid may be accepted.

In answer to your fourth question, I assume that the board is alleged to have awarded the contract to one other than the lowest bidder, without determining that the low bidder was not responsible. This irregularity is a matter to be questioned by the Auditor of State's Bureau of Inspection and Supervision of Public Offices. However, the subsidy to be allowed is governed

by the first paragraph of Section 3327.08, Revised Code, which reads, in part, as follows:

"Boards of education of city school districts, exempted village school districts, county school districts, local school districts, joint high school districts, and joint vocational school districts may purchase on individual contract school buses and other equipment used in transporting children to and from school and to other functions as authorized by the boards of education, or the boards may, at their discretion, purchase such buses and equipment through whatever system of centralized purchasing is established by the state department of education for such purpose, provided that state subsidy payments shall be based on the lowest price available to the boards by either method of purchase.\* \* \*" (Emphasis added.)

I conclude that the department of education may not substitute its judgment for that of a local board of education in the awarding of contracts for the purchase of school buses. The department of education is required to follow the above quoted section in making subsidy funds available to the local board.

It is therefore my opinion and you are advised that:

1. A board of education may not refuse to award a purchase contract to the lowest bidder for the reason that they have not done business with that contractor before.
2. A board of education may not award a contract to any bidder they choose. The contract must be awarded to the lowest responsible bidder. The bid must be both lowest and responsible, not either/or.
3. If a board of education elects not to award a contract to the lowest bidder, it may do so only following a determination that the low bidder was not responsible. The board is never obligated to reject all bids unless it has determined that all bidders are not responsible.
4. Any irregularity in the awarding of contracts for the purchase of school buses falls within the jurisdiction of the Bureau of Inspection and Supervision of Public Offices. The department of education is required to make subsidy monies available for the purchase of school buses in amounts provided in Section 3327.08, Revised Code.