

**OPINION NO. 81-104****Syllabus:**

The Director of the Department of Natural Resources, in evaluating what constitutes the "best bid received" for a contract for the operation of a public service facility under R.C. 1501.091, may consider the quality of the performance of the bidders at other facilities they have previously operated.

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**To: Robert W. Teater, Director, Department of Natural Resources, Columbus, Ohio**  
**By: William J. Brown, Attorney General, December 22, 1981**

I have before me your request for my opinion upon several questions involving what criteria may be considered by the Director of the Department of Natural Resources in evaluating what constitutes the "best bid received" for a contract for the operation of a public service facility, such as Salt Fork Lodge, under R.C. 1501.091. Although your letter of request asks a number of questions relative to R.C. 1501.091, you have indicated to my staff that the only question that you wish to have addressed at this time is whether the quality of a bidder's previous history as a concessionaire for the Department may be considered in evaluating what constitutes the "best bid received" for purposes of R.C. 1501.091.

The statute which governs contracts for the operation of facilities owned by the Department, R.C. 1501.091, states, in pertinent part:

Contracts for the operation of public service facilities shall be made in writing by the director of natural resources with the person, firm, partnership, association, or corporation whose bid, in consideration of the public interest, is determined by the director to be the best bid received. . . .

It is apparent then that a contract "shall be made" with the party "whose bid, in consideration of the public interest, is determined by the director to be the best bid received." The determination of whether the Director may consider the quality of prior performance on the part of a bidder at a facility that the bidder has previously operated necessitates an analysis of what constitutes "the best bid received."

The only case of which I am aware which has construed the "best bid received" language of R.C. 1501.091 is the case of State ex rel. Trumble v. Morr, No. 72 AP-16 (Ct. App. Franklin County May 9, 1972) (1972 Decisions 1469). The case challenged R.C. 1501.091 on constitutional grounds as "an unlawful delegation of legislative responsibility to a state administrative department, as it authorizes the director to award the best bid without a fixed and determinable standard." Id. at 1471. The court upheld R.C. 1501.091, stating that "[t]he purpose of the section is to allow the director flexibility to utilize expertise in the field." Id. at 1476. The court further remarked that "limiting awards to the best bid, rather than either 'highest and best bid' or 'lowest and best bid,' permits greater flexibility in contracting." Id. at 1475.

It is well settled in Ohio that a statutory provision directing that a contract

be let to the "highest and best bidder" or to the "lowest and best bidder" vests public boards and officials with wide discretion as to which bid should be accepted. State ex rel. Walton v. Herrman, 63 Ohio St. 440, 59 N.E. 104 (1900); State ex rel. Roger J. Au & Son, Inc. v. Studebaker, 120 Ohio App. 68, 201 N.E.2d 230 (1963), aff'd, 175 Ohio St. 222, 193 N.E.2d 84; Hudson v. Board of Education, 41 Ohio App. 402, 179 N.E. 701 (1931); see 45 Ohio Jur. 2d Public Works and Contracts §75 (1960). The award of such a contract will not be interfered with by the courts without a showing of abuse of discretion. State ex rel. Roger J. Au & Son, Inc., supra.<sup>1</sup>

In Hudson v. Board of Education, 41 Ohio App. 402, 179 N.E. 701 (1931), the court upheld the decision of a board of education awarding a contract to one other than the lowest bidder, holding that the board had the right, under a statute that required it to let contracts to the "lowest responsible bidder," to consider the quality of work previously done by such bidder on other contracts performed for the same board. The court stated: "Such a statute. . .invests the [awarding] 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." Id. at 406, 179 N.E. at 703. In particular, the court found that the board was within its rights to consider "the quality of work previously done by [the lowest bidder]," and finding that the board had evidence that the lowest bidder's past performance had been less than adequate, sustained the board's determination. Id. at 407, 179 N.E. at 703.

In State ex rel. John H. McGowan Company v. Village of St. Bernard, 10 Ohio C.C. 74 (C.P. Hamilton County 1894), the village, operating under a statute that required it to let contracts to the "lowest and best" bidder, selected the next to lowest bidder because of its excellent previous performance in building the type of machines called for by the bid. The court, although clearly troubled by the factual basis on which the village officials had predicated their decision, upheld the village's decision, stating:

[Where the trustees of the water works of a city, acting under the provisions of sections 2415 and 2419, Revised Statutes,] took proper and reasonable care to advise themselves whether one of the bidders for the pumping engines for the village could be depended on to do the work bid for with ability, promptitude and fidelity, and on the knowledge thus obtained, in good faith came to the conclusion that he was not, . . .the court ought not, even if satisfied that such opinion was incorrect, to interfere with their subsequent action in awarding the contract to the next lowest bidder. . . .

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<sup>1</sup>This analysis of such statutory language conforms with the views of other jurisdictions. American Jurisprudence provides the following comparison. With respect to such standards as "lowest responsible bidder" and "lowest and best bidder":

[T]here is but little dissent from the general rule that in determining who is such "lowest responsible bidder," "lowest and best bidder," etc., public boards and officials are vested with wide discretion, and their decision, when based upon an honest exercise of the discretion thus vested in them, will not be interfered with by the courts, even if erroneous. . . .

Where contracts are to be let on terms most advantageous to or to the best interests of the state or other public body, the discretion in making the award is particularly broad, and will not be interfered with by the courts if exercised on a rational basis, without fraud or palpable abuse.

64 Am. Jur. 2d Public Works and Contracts §68 (1972), at 925 (footnotes omitted; emphasis added).

Id. at 75.

This principle was reiterated in State ex rel. Buehler Printing Co. v. French, 6 Ohio L. Abs. 606 (Ct. App. Cuyahoga County 1928), where the court stated:

There can be no question but that the "lowest responsible bid" means "not only the bid by the one whose pecuniary ability to perform the contract is best, but the one in point of skill, ability and integrity who is most likely to do faithful, conscientious work and fulfill the contract promptly according to its letter and spirit."

Id. at 606. Finding, however, that the awarding authority had not made a proper and reasonable effort to ascertain the qualifications of the lowest bidder, and finding further that the lowest bidder was fully qualified, the court enjoined the awarding authority from entering into a contract with the bidder it had selected.

In accord is Dalton v. Kunde, 31 Ohio Misc. 75, 286 N.E.2d 483 (C.P. Montgomery County 1971), where the City of Dayton was mandated by ordinance to choose the "lowest and best bid," which was to be determined in part by the Affirmative Action Assurance Plan submitted by each bidder. The court sustained the decision of the City of Dayton to award a street construction contract to the next lowest bidder because of the lowest bidder's less than satisfactory past performance in hiring minorities.

In the case of Leonard v. Village of Mayfield Heights, 6 Ohio L. Abs. 739 (Ct. App. Cuyahoga County 1928), plaintiff brought a taxpayer's suit to enjoin the village from entering into and carrying out two contracts with the plaintiff construction company. The plaintiff argued that the village council had abused its discretion in determining the plaintiff construction company to be the best and lowest bidder. The court held that while the company to which the contract was awarded was not the lowest bidder, the low bidder had done other work for the village that the village was not satisfied with, and hence the village council did not consider the low bidder a good bidder for the work. It was conceded by all parties that:

the village officers were not bound to award the contract to the lowest bidder, that the bid must be the best as well as the lowest and that no standard is fixed by the statute for ascertaining what is the best bid. . . . [W]hat is the best bid is confided to the discretion of the council and. . . the judgment of the latter is conclusive unless it be shown that those possessing the discretion have abused their power.

Id. at 740.

Thus, since public authorities in Ohio have been allowed to consider a bidder's past performance in awarding a contract under statutes that constrained them to award it to the bidder who submitted the "lowest and best bid" or "lowest responsible bid," that criterion may be considered by the Director under R.C. 1501.091. Such an interpretation of bidding provisions is consonant with the goal of providing the lowest possible cost or greatest possible benefit to the state or its subdivisions, yet ensuring that the bidder perform the contract with skill, ability, and integrity.

Therefore, it is my opinion, and you are advised, that the Director of the Department of Natural Resources, in evaluating what constitutes the "best bid received" for a contract for the operation of a public service facility under R.C. 1501.091, may consider the quality of the performance of the bidders at other facilities they have previously operated.