

**OPINION
71-272**

March 12, 1971 (OPINION)

Mr. Corliss F. Nelson
Superintendent of Construction
Secretary of State's Office

RE: Public Buildings - Bids - Alterations

This is in response to your letter in which you ask for an opinion on the following questions:

1. Can a contractor bidding on a state or public project submit his bid and bid security by telegram, assuming the information and requirements are received at the place designated for the opening of bids, and in advance of the time set for opening?
2. Can a formal bid on state or public projects meeting all the requirements set forth by law be adjusted by wire or telephone?
3. Can a contractor who has submitted a bid withdraw his bid by telephone or telegram prior to the time set for opening of bids?"

From the nature of your questions and your position, we presume that you are referring to bids mentioned in section 44-08-01.1 and chapter 48-02, as well as section 43-07-12.

While there are many rules of law which apply to contracts where there is no specific statute governing same (see 17 Am. Jur.2d. 392 and 393), we are in this instance concerned only with statutory provisions regulating governmental agencies which need to be construed. It would be of no significance to go into any discussion of the various practices and procedures that are accepted in making contracts between individuals.

Section 44-08-01.1 specifically provides that governmental bodies shall accept only "sealed bids" whenever they are required to call for, advertise or solicit bids. It also requires that there be a designated time and place for the opening of such bids. The statutory provisions in themselves do not provide that these bids must be in writing, but it would be impossible to seal a telephone conversation and to open it at a designated time and place. The term "seal" we believe is used to designate that the bid is enclosed rather than having the bid impressed with a seal. Section 43-07-12 in this respect is more specific and provides that the bids shall be submitted in a "sealed envelope." It further provides that certain information be contained on the envelope, such as, class of license held by the bidder, the number of the bidder's license, the name of the firm or corporation submitting the bid, and the date the license was issued or renewed. This section further provides that any bid received without this information on the envelope shall not be considered and shall be returned to the bidder.

It has been customary practice to submit bids in writing and enclosing same in an envelope which is sealed. We must assume that the legislature was aware of this custom and in enacting the statutory provisions to which reference has been made, had in mind written bids when they used the term "sealed bids." We are not prepared to say that the legislature did not envision any other methods to be employed, but we are satisfied that the legislature did not contemplate any procedures other than those which were contemporary with the enactment of the statutes.

Bids or offers submitted by telephone are fraught with many dangers and many evidentiary factors need to be considered and resolved. A telephone bid does not fit into any pattern established by the statutes, and it is impossible to satisfy the legal requirements of the statutes with a telephonic bid. Many of the problems which exist with a telephonic bid such as identifying the voice and person, misunderstanding, identification of project, items, etc., are also to a degree present in bids submitted by telegram. Under conditions which are not governed by statute, bids by telephone or telegram conceivably could be made and could be accepted the same as contracts can be entered into by telephone or telegram. This would be a subject matter to be resolved between the parties contracting. However, in the specific situation pertaining to governmental bodies, the legislature has designated certain procedures to be followed.

In answer to question No. 1, it is our opinion that the statutes which govern the manner in which bids shall be submitted to and received by governmental bodies do not contemplate the use of telephonic or bids communicated by telegram.

Be cognizant of the attending problems and difficulties with a bid submitted by telephone or by telegram, we believe the legislature would have spelled out the procedures that should be employed if such methods of transmission or submission were to be permissive.

In answer to question No. 2, it is our further opinion that bids may not be adjusted by wire or telephone.

In answer to question No. 3, it is our opinion that a bid may not be withdrawn by telephone or telegram directly to the officer or officers in possession of the bid. The bidder may not impose the relationship of agency upon the officers, and neither are the officers in a position to act as agent for the bidder. However, if the bidder were to instruct some other person to withdraw the bid either by telephone or telegram and if such person wishes to act as agent for the bidder, we would be of the opinion that the bidder could withdraw his bid in such a manner. The net effect in this described procedure is that the agent of the bidder would be withdrawing the bid. We would not be concerned with the manner in which the wishes of the bidder are communicated to the agent.

HELGI JOHANNESON

Attorney General