

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 35

NOTE - This Opinion Partially Overrules 37 Op. Att'y Gen. No. 59 (1977).

CONTRACTS - Applicability of resident bidder's preference to federally funded contracts;

UNITED STATES - Federal procurement regulations prohibiting restrictions on competitive bidding;

MONTANA CODE ANNOTATED - Sections 1-4-101, 18-1-102, 18-1-102(2)(b);

UNITED STATES CODE - 42 U.S.C. §§ 5301 to 5320;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 59 (1977).

HELD: 1. The federal circular A-102 (1981), incorporated into the regulations of the United States Department of Housing and Urban Development, and section 18-1-102(2)(b), MCA,

OPINIONS OF THE ATTORNEY GENERAL

prohibit restriction of the competitive bidding process by resident bidder's preference, for state and local contracts funded in part by grants-in-aid from that agency.

2. 37 Op. Att'y Gen. No. 59 (1977) is overruled insofar as it conflicts with the holding of this opinion.

9 November 1987

Richard M. Weddle
Local Government and
Assistance Division
Department of Commerce
Cogswell Building, Room C-211
Helena MT 59620

Dear Mr. Weddle:

You have requested my opinion on the following question:

Whether Montana's resident contractor bidder's preference must be applied to public works projects partially funded by the Department of Housing and Urban Development under the federal Housing and Community Development Act of 1974.

Your request is made in view of 37 Op. Att'y Gen. No. 59 at 230 (1977), which you have asked me to clarify.

In analyzing your request it is necessary to review the recent developments in the pertinent federal procurement requirements.

In 1974 Congress enacted the Housing and Community Development Act, Pub. L. No. 93-383 (codified at 42 U.S.C. §§ 5301 to 5320). The Act was administered by the Department of Housing and Urban Development (HUD) which, until 1981, directly administered the Community Development Block Grant (CDBG) "Small Cities" Program established by the Act. In 1981 Congress amended the Housing and Community Development Act so as to authorize the states, at their option, to administer the Small Cities portion of the Act. HUD then promulgated a regulation permitting the participating states "a great degree of flexibility to design their method of distributing funds and to establish the policies and procedures for their programs." 46 Fed. Reg. 57256 (1981) (not codified).

OPINIONS OF THE ATTORNEY GENERAL

This regulation provides in part: "[S]tates electing to follow the principles and procedures established under ... [Circular] A-102 will be considered in compliance with their accountability obligations under the Act." 46 Fed. Reg. 57256 (1981). Circular A-102 was published (in revised form) in 1981 by the federal Office of Management and Budget. It contains uniform administrative requirements for agencies participating in grants-in-aid programs with state and local governments. In its statement of purpose, it requires all federal agencies administering grants-in-aid to state, local, and federally recognized Indian tribal governments to comply with these requirements. The circular also expressly applies to the Community Development Block Grant Program. The State of Montana, Department of Commerce, adopted the provisions of Circular A-102 (1981) in order to be in full compliance with the Act.

Within Circular A-102 is a chapter on procurement standards, entitled "Attachment O." Section 2(b) of Attachment O provides: "Grantees [states] shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs conform to the standards set forth in this Attachment and applicable Federal law." (Emphasis added.) Section 10 of Attachment O provides in part:

All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, shall be conducted in a manner that provides maximum open and free competition consistent with this Attachment. Procurement procedures shall not restrict or eliminate competition. Examples of what is considered to be restrictive of competition include, but are not limited to: (1) placing unreasonable requirements on firms in order for them to qualify to do business; (2) noncompetitive practices between firms; (3) organizational conflicts of interest; and (4) unnecessary experience and bonding requirements. [Emphasis added.]

Section 11 of Attachment O provides in part:

b. In competitive sealed bids (formal advertising), sealed bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with

OPINIONS OF THE ATTORNEY GENERAL

all the material terms and conditions of the invitation for bids, is lowest in price.

....

(2) If formal advertising is used for a procurement under a grant the following requirements shall apply:

....

(d) A firm-fix-price [sic] contract award shall be made by written notice to that responsible bidder whose bid, conforming to the invitation for bids, is lowest. [Emphasis added.]

The requirements of competitive bidding contained in Circular A-102 (1981) make no allowance for bidder preferences; in fact, the language forbids any restriction of the competitive bidding process. Contracts may be awarded only to the lowest responsible bidder. In interpreting a statute or regulation, I am required to construe the plain and clear meaning of the language, and I may not insert matter that is not contained therein. § 1-4-101, MCA; Sutherland Statutory Construction § 31.06 (4th ed.).

Several federal agencies which are presently cosponsoring projects under Montana's CDBG program to develop and renovate domestic water supply and sewage disposal systems, have rejected the application of resident bidder's preferences. The United States Environmental Protection Agency, under its own rules as well as Circular A-102, is expressly prohibited from applying state and local bidder's preferences in its competitive bidding procedures for projects funded in whole or in part by that agency. 40 C.F.R. §§ 33.230(b)(4), 35.936-2(c) (1987). The United States Department of Agriculture, Farmers Home Administration, interprets its own regulations relating to procurement (the language of which is nearly identical to that of Circular A-102, Attachment O) to prohibit a resident bidder's preference as being restrictive to the required "open and free competition." 7 C.F.R. §§ 1942.18(J)(2), 1942.18(K)(2) (1987). Similarly, the federal Economic Development Administration, which also participates in CDBG projects, has advised your department that Circular A-102, Attachment O, prohibits the application of a resident bidder's preference to any project funded in part by that agency.

OPINIONS OF THE ATTORNEY GENERAL

Because of the plain meaning of the language in Circular A-102, interpretations given the language by various federal agencies, and similar regulations adopted by those agencies, I conclude that Circular A-102, adopted by HUD, expressly prohibits any restriction on competitive bidding, and therefore prohibits the application of a resident bidder's preference to competitive bidding for state and local contracts funded by that agency's grant-in-aid programs.

This conclusion does not conflict with state law. Section 18-1-102, MCA, establishes Montana's resident bidder's preference for public contracts, but it also provides in part:

(2) The [resident bidder's] preferences in this section apply:

(a) whether the law requires advertisement for bids or does not require advertisement for bids; and

(b) to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant thereto.
[Emphasis added.]

I have concluded that the federal Circular A-102 prohibits federal agencies from participating in contracts obtained through bidding procedures that involve resident bidder's preferences. Therefore, under section 18-1-102(2)(b), MCA, the Montana resident bidder's preference may not apply to contracts involving funds obtained from HUD's grant-in-aid programs.

In 1977, I issued an opinion in which I concluded that the Rosebud County Water and Sewer District was required to apply the resident bidder's preference to a contract which was to be funded in part by a grant from HUD. 37 Op. Att'y Gen. No. 59 at 230 (1977). However, that opinion was issued prior to 1981. As I have concluded in this opinion, the federal requirements presently prohibit restriction of competition in the bidding process by resident bidder's preference. Therefore, 37 Op. Att'y Gen. No. 59 is overruled insofar as it conflicts with the holding of this opinion.

THEREFORE, IT IS MY OPINION:

1. The federal circular A-102 (1981), incorporated into the regulations of the United States Department of Housing and Urban

OPINIONS OF THE ATTORNEY GENERAL

Development, and section 18-1-102(2)(b), MCA, prohibit restriction of the competitive bidding process by resident bidder's preference, for state and local contracts funded in part by grants-in-aid from that agency.

2. 37 Op. Att'y Gen. No. 59 (1977) is overruled insofar as it conflicts with the holding of this opinion.

Very truly yours,

MIKE GREELY
Attorney General