

VOLUME NO. 36

Opinion No. 93

CITIES AND TOWNS — Special Improvement Districts; CONTRACTS — Special Improvement Districts; Sections 11-2209, 11-2214, Revised Codes of Montana 1947.

HELD: A city council, in its sound discretion, may combine two or more improvement districts into a single contract, provided the competition of bidders is not suppressed thereby.

July 15, 1976

John McKeon, City Attorney
155 South First Avenue East
Malta, Montana 59538

Dear Mr. McKeon:

You recently requested my opinion on the following question:

Where the city council finds it more equitable for assessment purposes to create more than one special improvement district to lay curb, gutter and pavement in more than one area of the city, can said city council, without violating the competitive bidding requirements under Section

11-2209(2), Revised Codes of Montana, 1947, advertise for bids indicating that a single contract for the entire work connected with the special improvement districts will be awarded to the bidder whose total of itemized bids for all these districts was the lowest or must the city council award a separate contract for the work connected with each district to the lowest responsible bidder for that district?

It is my understanding that the city of Malta has five noncontiguous areas in which it would like to lay curb and gutters and pave the streets. Due to the layout of these areas it is more feasible to assess some areas on the lineal foot basis and some areas on the total land area basis as provided by section 11-2214, R.C.M. 1947. I further understand that a single special improvement district was initially proposed for all five areas. This initial proposal was dropped, however, on the advice of the city's bonding companies.

The city of Malta is now faced with five realtively small special improvement districts. Due to the size of the individual districts it is questionable whether contractors will bid each district individually, with the chance of being awarded only one district. It also appears obvious that a bid based on all five districts would be lower than a bid based on individual districts. Contractors will be more inclined to bid on the project if all five were included in one contract. Your question is essentially whether section 11-2209(2), R.C.M. 1947 prohibits the city from awarding five different special improvement districts in a single contract. If the districts can be combined in one contract, it is clear that the lowest responsible bidder for the total contract should be awarded the contract.

Section 11-2209(2), *supra*, reads in pertinent part:

...The city council may reject any and all proposals or bids should it deem this for the public good, and also the bid of any party who has been delinquent or unfaithful in any former contract with the municipality, and shall reject all proposals or bids other than the lowest regular proposal or bid of any responsible bidder, and may award the contract for said work or improvement to the lowest responsible bidder at the process named in his bid.

This statute does not directly speak to the question of whether more than one improvement district may be included in a single contract. It does set forth the normal criteria of public works contracts, i.e. lowest responsible bidder. While it has been held in Montana that this type of provision is exclusive and not merely directory, **Missoula St. Ry. Co. v. City of Missoula**, 47 Mont. 85, 130 P. 771 (1913), there is ample authority that municipal authorities have broad discretion in contracting to protect the public interest. **State ex rel. Eaves v. Rickards**, 16 Mont. 145, 40 P. 210 (1895); **Koich v. Cvar et al.**, 111 Mont. 463, 110 P.2d 964 (1941).

Courts which have had the opportunity to examine this question have held that whether there can be more than one improvement project in a single contract is up to the discretion of the municipality. In **City of Albany v. Spragin**, 208 Ala., 122, 93 So. 803 (1922) the court stated at 808:

Whether there shall be one contract for each street under each ordinance, or one contract for all the streets under all the respective ordinances, rests largely in the sound discretion of the municipal authorities, when there is no statute or ordinance to the contrary, as in this case, when it is severable and divisible as hereinbefore stated, and when no fraud or collusion is shown between the parties and one person has the contract for all the streets. (cites omitted)

In **Bana Electric Corp. v. Board of Education**, 194 N.Y.S. 2d 657 (1959), the court noted that "...there is no legal impediment to the combination of two or more public works projects of the same municipality into one contract (Matter of Ingraham, 64 N.Y. 310)." In Montana there is no statute which prohibits combining two or more projects in a single contract. The Montana Supreme Court has specifically held that in awarding contracts, municipal authorities are more than mere ministerial agents and must exercise discretion to protect the public interest. The public interest involved here is to "...promote the economy and to protect the taxpayers from fraud and favoritism on the part of the council or the officers of the city." **Missoula St. Ry.**, *supra* at 96.

In the situation you have described, it appears that it would be in the best public interest to award one contract for the five districts in question. Since there is no statute prohibiting this, the weight of authorities hold that it is within the discretion of the municipal authorities. Of course, all of the requirements of Chapter 22, Title 11, R.C.M. 1947, must be followed in calling for and awarding the contract.

THEREFORE, IT IS MY OPINION:

A city council, in its sound discretion, may combine two or more improvement districts into a single contract, provided the competition of bidders is not suppressed thereby.

Very truly yours,
ROBERT L. WOODAHL
Attorney General