Purchasing / Economic Considerations
Purchasing & Foreign Bidders
Foreign Bidders

5 MRSA 1816-7
5 MRSA 1812

STATE OF MAINE

Inter-Departmental Memorandum Date May 19, 1977

To Joseph Stephenson, Purchasing Agent Dept. Purchases

From Donald G. Alexander, Deputy Dept. Attorney General

Subject Purchasing Considerations Relating to Economy and Foreign Bidders

This responds to your request for advice regarding two questions which you have raised regarding considerations incident to awards of bids. The first question is whether the references to "greatest possible economy" and "ultimate cost" which appear in 5 M.R.S.A. § 1812 and 5 M.R.S.A. § 1816 - 7 require consideration of the economic impact of the purchases or solely the consideration of the cost of the purchase.

5 M.R.S.A. §1812 provides, in pertinent part:

> "It is the intent and purpose of this chapter, that the State Purchasing Agent shall purchase collectively all services, supplies, materials and equipment for the state or any department or agency thereof in a manner that will best secure the greatest possible economy consistent with the grade or quality of services, supplies, materials and equipment best adapted for the purpose for which they are needed."

5 M.R.S.A. § 1816-7 contains similar language and in addition provides that one of the considerations in reaching a determination as to the lowest bid shall be:

> "ultimate cost thereof to the State."

The "greatest possible economy" language was originally adopted, basically in its present form, by P.L. 1931, Chapter 216, Article II, Section 19. Chapter 216 was a comprehensive administrative reorganization of state government of which the reference to purchasing was only a minor part. Thus, legislative history relating to this requirement is sparce. However, a reading of the statute indicates an intent to focus attention on economies of cost, not extrinsic economic factors such as job creation or generation of tax revenues. Thus, the term "greatest possible economy" appears in a sentence which generally appears intended to require the Bureau of Purchases to review direct cost factors such as the grade or quality of material to be purchased and the adaptability of that material to the particular job for which it is intended. For example, in purchasing automobiles for the State regular and cheaper springs might be required for normal use but heavy duty and more costly springs might be required for cars with heavy use such as state police vehicles. Alternatively, both the "greatest possible economy" and the "ultimate cost" language appear designed to permit the State to buy a more expensive but more durable product rather than simply requiring adherence to the lowest possible bid in all circumstances. Thus, under these provisions, the State would be allowed to purchase one snow plow that was twice as expensive as another snowplow in a situation where the more expensive plow had proved itself twice or three times more durable than the cheaper model.

Other provisions of the statute also confirm this interpretation focusing on costs to the State rather than on extrinsic economic factors. Thus, 5 M.R.S.A. § 1816-8 specifies that in cases of tie bids instate bidders are to be favored. If the above captioned sections relating to economics and costs were to be interpreted to consider extrinsic economic factors affecting the state, this section favoring instate bidders in cases of tie bids would be unnecessary, as the consideration of extrinsic economic factors would, in almost all circumstances, create such an economically favored position. Further, it should be noted that the statutory mandate for the Bureau of Purchases does not provide for the Bureau to develop the expertise necessary to make the sometimes sophisticated economic judgments which would have to be arrived at were the statute to be interpreted to require consideration of extrinsic economic factors. Consideration of such factors would impose a considerable additional judgmental burden on the making of purchasing decisions and would tend to move markedly away from the "lowest responsible bidder" standard now established by law. Accordingly, 5 M.R.S.A. § 1812 and 5 M.R.S.A. § 1816-7 cannot be interpreted to require the Bureau of Purchases to consider extrinsic economic factors in reaching purchasing decisions.

Your second question was whether the provisions of paragraph 9 of the Standard Condition and Instruction to Bidders grant the Bureau of Purchases the authority and the absolute discretion to reject bids received on articles or products of foreign origin.

Paragraph 9 provides:

> "The Bureau of Purchases reserves the right to reject bids on articles or products of foreign origin or manufacture when such articles are offered in direct competition with articles or products originating in or manufactures in the United States . . ."

5 M.R.S.A. § 1813 grants the State Purchasing Agent authority to develop rules and regulations for implementation of the purchasing laws. Such delegations of authority to an administrative agency to publish rules and regulations must, however, be strictly construed to limit the authority to that granted by statute and that which necessarily follows from the statute. Our review of the purchasing laws discloses no provision of the statutes which authorizes the discretion to reject foreign bids specified in paragraph 9 of the Conditions and Instruction to Bidders. By previous opinion dated June 24, 1976, we have advised the Bureau of Purchases that acceptance of foreign bids was allowed. Additionally we note here that we find no statutory authority to reject foreign bidders who are properly qualified and can assure adequate servicing of the bid items where their bid qualifies as the lowest responsible bid.

We would note, that there are some situations, such as where federal funds are involved, where additional rules, outside of the purchasing statutes (5 M.R.S.A. Chapter 155) may apply. We do not have sufficient facts to determine the precise situations in which such other rules might arise.

I hope this information is helpful.

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