

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

December 7, 2018

P. Scott Phillips, Esq.
Attorney, Washington County Board of Supervisors
Post Office Box 1856
Greenville, Mississippi 38702-1856

Re: Rescission of order accepting bid

Dear Mr. Phillips:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

You ask whether a municipality may rescind an order accepting a bid that contained an "honest mistake" or must it re-advertise. Specifically, you provide, in pertinent part, the following:

On or about March 10, 2018, the roof to a building owned by Washington County, Mississippi, was damaged in a hail storm. The building is under lease to one of the largest manufacturers in Washington County. On March 19, 2018, the Board entered an order authorizing temporary repairs on an emergency basis and instructed the County Engineer to proceed with advertising for bids for the replacement of the roof.

Advertisements for bids was accomplished and on September 27, 2018, bids were opened and taken under advisement. The Board received three bids in response to the advertisement. One of the bids did not meet specifications and was not considered, leaving bids from Mid-Western Commercial Roofers, Inc., in the amount of \$1,547,270.00 and the bid of E. Cornell Malone Corp. in the amount of \$1,098,750.00.

On October 15, 2018, the board entered an order accepting the bid of E. Cornell Malone Corp. ("Malone") and the County Engineer sent Malone a Notice of Award which was returned signed by Malone. The Notice of Award required that Malone executed a separate formal agreement and furnish a bid bond, as well as certificates of insurance within ten (10) days.

Notably, the execution of a separate formal agreement or contract was an express requirement under the bid specifications. Within the ten (10) days after executing the acceptance of Notice of Award, Malone notified the County that it made an honest mistake in the mathematical calculation of its bid amounting to \$284,392.88, excluding any overhead and profit. Malone requested that it be allowed to withdraw its bid and that the bid bond be released.

On November 5, 2018, Malone appeared at a regular meeting of the Board of Supervisors and further explained the mistake in the mathematical calculation of its bid and again requested that it be allowed to withdraw its bid. The Board of Supervisors took the matter under advisement pending a determination of the correct manner of proceeding forward.

For purposes of this request, please assume the following:

- (1) That Malone provided substantial evidence that the mathematical miscalculation was a result of an honest mistake which would justify rescission of a contract;
- (2) That the execution of a formal agreement or contract was a condition of the Board's acceptance of Malone's bid;
- (3) That because the County's insurer will pay the cost of the roof's replacement irrespective of which bid is accepted, the County will not have changed its position in reliance on Malone's bid if the board chooses to allow Malone to withdraw its bid or rescinds its order accepting such bid; and,
- (4) Malone will consent to a rescission of an order of October 15, 2018, accepting the Malone bid.

If the Washington County Board of Supervisors enters an order rescinding its October 15, 2018 order accepting the bid of Malone, *ab initio*, finding (1) that Malone's bid contained a mathematical miscalculation due to [an] honest mistake which would result in an unconscionable advantage to the County, and (2) that Malone did not enter the formal contract which was an express condition of the bid specifications, may the Board accept the next lowest and best bid of Mid-Western Commercial Roofers, Inc. in the amount of \$1,547,270.00; or, is the County required to re-advertise for bids?

Response

Pursuant to the provisions of Mississippi Code Annotated Section 7-5-25, official opinions of the Attorney General are limited to questions involving the determination solely on questions of state law. In addition, our office does not render legal opinions

on hypothetical questions.¹ Therefore, to the extent that your inquiries require this office to make determinations which exceed the limitations established in Section 7-5-25, we decline to respond by way of official opinion and provide the following for future guidance.

Ultimately, the determination at-hand, regardless of the specific assumptions you ask our office to make, is whether the county has actually entered into a contract with the low bidder via the acceptance of his bid. That determination is purely a factual one that may not be made by this office and must be made by the county itself, subject to review by a court of competent jurisdiction. See MS AG Op., Miller (March 6, 2015)(whether contract has been entered into is a factual determination). As you reference in your request, we previously opined in our Lawrence opinion that "once the appropriate municipal governing authorities accept a valid bid, it becomes an enforceable contract."² MS AG Op., Lawrence (October 9, 2009). See also MS AG Op., Miller (March 6, 2015)(once acceptance of the apparent low bid and award, with no contingencies, has been made, such acceptance and award would constitute a binding contract between the parties). Assuming that the county determines that it has, in fact, accepted the low bid and has entered into a contract with the low bidder, it would be required to re-advertise the project as its acceptance of the low bid manifested an intent to reject the other bids submitted. *Id.* See also MS AG Op., McCord (May 14 1999)(accepting the low bid and entering into a contract manifests an intent not to accept the second low bid and terminates the purchasing entity's power to accept the same). In the event that the county determines that it did not, in fact, enter into a contract with the low bidder, it could accept any other submitted bids provided that those bids are still valid.

If we may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Leigh Triche Janous
Special Assistant Attorney General

¹In our opinion to George Dale, dated December 21, 1982, we provided in regard to opining on a hypothetical inquiry as follows: "leaving aside the strictures of time, budget and personnel, which by themselves create the necessity for such a policy, a hypothetical question by its nature contains only the bones of a question and does not contain the flesh of surrounding facts and circumstances so often vital in the determination of a legal issue."

² In a prior opinion to Olen C. Bryant, dated December 6, 2002, this office was asked to opine on whether a board could rescind a prior order awarding a bid and re-advertise the project. Our response in that opinion was that "a governing authority has the right to reject all bids and re-advertise." While we did not answer the specific question concerning the board's authority to rescind its order, our answer may have created some confusion regarding the effect of the acceptance of a bid and award of a contract. To the extent that the Bryant opinion conflicts with the opinions referenced in this response, it is hereby modified.