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RQNM Malcolm Jones

SUBJ Public Purchases

SBCD 280

Mr. Malcolm F. Jones, Esq. City Attorney, City of Pass Christian Post Office Drawer 368 Pass Christian, Mississippi 39571

Re: Non resident Bidder Preference

Dear Mr. Jones:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response. Your letter inquires, and reads, as follows: Recently, we have received bids for a public works construction project and the lowest apparent bidder is a nonresident contractor. The next lowest bidder is a Mississippi contractor. The foreign state statute appears to favor its resident bidders under similar circumstances. If the nonresident contractor fails to include a copy of the foreign statute regarding preference of bidders with his bid package as required by MCA Section 31-3-21, as amended, would the City be required to reject the bid of the foreign bidder?

Also, is the City required to reject the lowest foreign bid (that does not include the foreign preference statute) when the two lowest bids are "equal or substantially equal"? I have reviewed your previous opinion letters on this subject dated April 4, 1989, Brown, dated August 17, 2001, and Dye, dated May 19, 2006. Please clarify the conflict, if any, between these three opinions. Can the Dye opinion be distinguished from the two earlier opinions because the two lowest bidders were both nonresident contractors from the same State?

In response to your inquiry, Mississippi Code Annotated Section 31-3- 21(3) requires that a non-resident bidder attach a copy of his resident state's current law pertaining to the treatment of non-

resident contractors when submitting a bid for a public project. We have previously opined that the failure to do so prior to the time of award should result in rejection of his bid as his bid is not in compliance with the statutory requirement and such requirement cannot be waived. MS AG Op., Brown (August 17, 2001); MS AG Op., Zebert (April 4, 1989); MS AG Op., Walls (April 25, 1989). With respect to the application of Section 31-3-21(3), the preference is triggered when the public body is considering two apparent low bids that are "equal or substantially equal" and involve the submission of at least one bid from a non-resident contractor. Thus, if the non-resident bidder's state treats non-residents the same as provided in Section 31-3-21(3) and if the bids are "equal or substantially equal," then preference should be given to the Mississippi bidder. MS AG Op., Brown (August 17, 2001). You ask in your request whether our previous opinions can be distinguished from one another. Our previous position in the Zebert and Brown opinions are consistent in that we opined that the statutory requirement imposed by Section 31-3-21(3) may not be waived and that the preference granted by the statute applies "only when the public body is considering bids that are equal or substantially equal..." The Dye opinion merely supplements our position in that it addressed a very fact-specific scenario and provided that, when the apparent low and second low bidders are both non-resident bidders, the failure to include the preference statute of one bidder will not result in the rejection of the bid. MS AG Op., Dye (May 19, 2006). The rationale for this position was simply that the intent of Section 31-3-21(3) is to protect resident contractors of our state and to give them preference over non-resident contractors when the bids are "equal or substantially equal." A copy of the above referenced opinions have been provided for your review. If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: Leigh Triche Janous

Special Assistant Attorney General