

of conflict with a statute, the rule prevails. "[The Rule] supersede[s] any legislative enactment governing practice and procedure to the extent that the statute and the rule may be inconsistent." *Jaworski v. City of Opa-Locka*, 147 So.2d 33 (Fla. 1963). *See also* *Fort v. Fort*, 104 So.2d 69 (1 D.C.A. Fla., 1958); 8 Fla. Jur. *Courts* §193. Therefore, it would seem that a person under twenty-one years of age cannot serve a subpoena under the language of Rule 1.410(c), RCP—"or by any other person who is not a party and who is not less than twenty-one years of age"—or under Rule 8.090(f)(2), R.J.P., unless and until the Supreme Court changes its rules to conform to the statute.

According to the language of Rules 1.410(c) and 1.070(b), RCP, any person or any officer may serve process or a subpoena if so authorized by law. Under these provisions, persons eighteen to twenty years of age may, in appropriate circumstances, serve process or subpoenas. Section 48.021, F. S., says that "[a]ll process shall be served by the sheriff of the county where the person to be served is found, but witness subpoenas may also be served by any person authorized by rules of procedure." Sheriffs also have the power to execute all process of the courts of this state under §30.15, F. S. Accordingly, if there had been an age requirement of twenty-one years in order to be sheriff, which under Ch. 73-21, *supra*, became a requirement of eighteen years, then a person eighteen years of age or older, if such person is a sheriff, may serve process or witness subpoenas. If a person eighteen years of age or older is not a sheriff, then under Rule 1.410(c), he may not serve a subpoena unless he is twenty-one. But a person eighteen or older may serve process if appointed by a court under Rule 1.070(b).

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COUNTIES

COMPETITIVE BIDDING ON TOTAL COST CONCEPT

To: Hal Y. Maines, Union County Attorney, Lake Butler

Prepared by: Jerry E. Oxner, Assistant Attorney General

QUESTIONS:

1. May a board of county commissioners consider bids which are submitted on the total cost concept of purchasing when such a concept is not stated in the specifications or request for bids?
2. May such board request and accept bids based on the total cost concept of purchasing?

SUMMARY:

The "total cost purchasing" concept of bidding may not be used when such bids are unresponsive to the invitation to bid.

Counties may opt for inviting bids under the "total cost purchasing" concept if adequate safeguards are provided to prevent fraud and insure competition.

The first question is answered negatively. Assuming that your invitation for bids made no reference to buy-back provisions and maintenance, any bid based upon the total cost of purchasing concept as defined herein would not be responsive to the invitation and would not be in the best public interest due to the absence of true competition.

Your second question is answered with a qualified affirmative. Assuming that there is no special or local law or county ordinance that would operate to inhibit such a system of letting bids and assuming that the county commission determines to use the total cost method of soliciting, receiving, and awarding bids, and

assuming that the invitation for bids is released clearly demonstrating that expectation, bids so offered may be accepted so long as the system does not result in favoritism or an absence of competition and the public interest is in every respect safeguarded.

State and local governments are often required by law to utilize competitive bidding procedures. These procedures require officials procuring supplies, equipment, and services to advertise publicly the specifications thereof and to receive all bids which respond to the specifications. [See] 10 McQuillin, *The Law of Municipal Corporations*, §29.29 (3d Ed. 1966). After bids are received, the procurement contract is awarded based upon those bids. As a rule, bids are required to be let to the lowest responsible bidder who can meet the minimum specifications.

Your inquiry mentions the purchase of heavy equipment. Machine A, which initially cost less than Machine B, could, due to maintenance cost and poor resale value over the life of the machine, cost the county more than Machine B. The practice has arisen in this state and around the country of considering the total cost of a piece of machinery. Obviously, all other things being equal, buying on the basis of the lower initial cost would not be in the best interest of the county. Therefore, the invitation for bids might ask not only for the initial cost, but the cost of maintenance and repair and the price at which the seller will repurchase the machine at the end of a specified period. The system of bidding which takes into account not only the initial cost and salvage value, but the cost of maintenance and resale value as well is referred to as the total cost concept—the subject of your inquiry.

The total cost concept should never be applied when all bidders are not made aware of the commission's desire through the initial invitation for bids or specifications. When low initial cost is the only matter to be considered, this should be made known from the beginning. Thus, the commissioners control, and should control, the use of the system. To invite bids on the basis of initial cost and then accept a bid based upon the total cost concept would not be fair to the other bidders and, in fact, would be anticompetitive. After bids have been made upon the basis of one set of specifications prepared by public authorities and given to all interested bidders, no material change in the terms of such specifications will be allowed without a new advertisement giving all bidders the opportunity to bid under the new plan. The bids must be responsive to the invitation. *Lassiter & Co. v. Taylor*, 128 So. 14 (Fla. 1930); 114 A.L.R. 1437; 65 A.L.R. 835; 69 A.L.R. 697, 64 Am. Jur. 2d *Public Works and Contracts* §66. Otherwise, opportunities for favoritism may creep in, whether favoritism is actually practiced or not. *Wester v. Belote*, 138 So. 721 (Fla. 1931). Unless all bidders know what is expected in advance and submit their bids in like terms, an exact comparison of the bids will be impossible. *Clark v. Melson*, 89 So. 495 (Fla. 1921).

I have earlier ruled that nonchartered counties or nonchartered governments are no longer required to purchase on the basis of competitive bids. They are allowed to provide, by home rule ordinance, for the procedure to be followed in purchasing materials, equipment, and supplies for county use. The county is not required to provide a procedure by ordinance but may deal with each contract or purchase by bids or by negotiation—with or without bids. Attorney General Opinion 071-366. The statute that formerly required counties to purchase goods, supplies, and materials by competitive bidding (§125.08, F. S.) was repealed by Ch. 71-14, Laws of Florida, amending §125.01, F. S., implementing the home rule provision of Art. VIII, §1, State Const. Each county may now provide for the procedure to be used in that county in purchasing materials, equipment, and supplies for county use. Absent a rule, regulation, statute, or ordinance so requiring, a public body is not required unqualifiedly to award a contract to the lowest bidder. *William A. Berbusse Jr., Inc. v. North Broward Hosp. Dis.*, 117 So.2d 550 (2 D.C.A. Fla., 1960). In the absence of a statutory or charter requirement, if the county adopts a policy of advertising for bids, it need not let the bid to the lowest

bidder. *Armco Drainage and Metal Products, Inc. v. County of Pinellas*, 137 So.2d 234 (2 D.C.A. Fla., 1962).

The Florida Constitution and §125.01, F. S., in effect say the county commissioners have the power to and shall govern the county and legislate for the citizens of the county. Complete discretion and power for such purposes are vested in the county commissioners, limited only by the important charge that their discretion not be abused or arbitrarily or illegally exercised. In the event the county has, or should in the future adopt, an ordinance providing for county purchasing and contracting by competitive bidding which does not demand the standard bid specification, acceptance, and award requirements that the bid be let to lowest bidder, or best and lowest bidder, or lowest and most responsible bidder, but which would allow for the total cost method of purchasing as described herein, then consideration should be given to certain factors, rules of law, and guidelines which follow. In other words, once the county commissioners have affirmatively decided that they will adopt a bidding procedure that allows for, and determines that they will request, competitive bids upon a total cost basis, then they should be guided by the considerations and standards discussed herein.

The usual challenge that is made upon the total cost bidding concept is that it violates a competitive bidding statute or ordinance. Even when competitive bidding statutes require letting bids to the lowest responsible bidder, the courts have generally allowed the exercise of sound discretion to consider the quality of the thing to be supplied. *West v. City of Oakland*, 159 P. 202 (1 D.C.A. Cal. 1916).

[W]here bids are received on items of equipment which are not capable of precise or exact specifications, a municipality may exercise a reasonable discretion in determining who is the lowest responsible bidder and in so doing, may consider, in addition to the bid price, the quality, suitability, and adaptability of the article to be purchased for the use for which it is intended. In so doing, the discretion exercised must be reasonable and must be based upon some substantial difference in quality or adaptability. [*Otter Tail Power Co. v. Village of Elbow Lake*, 49 N.W.2d 197, 201 (Minn. 1951).]

Since there is no longer a requirement of competitive bidding imposed by statute upon the counties, this challenge need not concern the county commissioners absent an ordinance or charter provision limiting their discretion.

The second attack which has been made upon the total cost concept of bidding is that the specifications are so restrictive as to preclude competition. Specifications which restrict free and open competition are valid only if required or designed to meet reasonable public needs. If the restrictions unduly restrict or hinder participation, they are invalid as anticompetitive. See *Sulphur Springs Valley Elec. Coop., Inc. v. City of Tombstone*, 401 P.2d 753 (Ct. App. Ariz. 1965); *Waszen v. City of Atlantic City*, 63 A.2d 255 (N.J. 1959); *Gerzof v. Sweeney*, 211 N.E.2d 826, (N.Y. 1965).

The dictates of public policy require that all responsible bidders shall have the opportunity to compete, and accordingly devices or unreasonable actions by authorities which are designed or tend to limit the list of qualified bidders are presumed to be injurious to the taxpayer and are illegal. All parties having the ability to perform the advertised contract should be allowed to compete freely without any unreasonable restrictions. [Citing *Opa-Locka v. Trustees of Plumbing Industry Promotion Fund*, Fla. 193 So.2d 29 (3 D.C.A. Fla. 1966).]

Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or disregard and thus to estimate his bid on a basis different from that afforded the other contenders, a common

standard by which all bidders are to be measured being implied by the bidding law. At the time, the corporate authorities may, without violating the rule requiring freedom of competition, insert proper conditions in their proposals for bids, and the bidders are bound to observe them. Thus, they may make restrictions as to the kind and quality of the material to be used without infringing such rule. They are not required to prepare specifications so that every manufacturer of the type of equipment involved can meet the competitive price of every other manufacturer. [10 McQuillin §29.44 (other citations omitted).]

My predecessor in office recognized this danger when he qualifiedly approved the total cost concept of bidding for the old State Road Department.

However, where the effect of "total [cost] purchasing" is to eliminate competitive bidding on commodities, such as where the specifications for repair or maintenance are such that only one bid is received, then it would appear that the clear intent of Chapter 287 has not been implemented and the better practice would be to request new bids without employing "total cost purchasing." So long as the plan actually results in competitive bidding, there is no problem. [Unpublished and unnumbered letter opinion to the resident attorney, Florida State Road Department, January 24, 1968.]

The Arkansas Supreme Court decided that, when the invitation to bid on a tractor, providing that the successful bidder must guarantee that the maximum cost of repairs for five years would not exceed an amount specified in the bidding requirements and that the successful bidder must repurchase, produced only one response, the specifications were so uncertain as to stifle competition in derogation of the public interest. The trial court decision enjoining the town from awarding the contract under the invitation to bid was affirmed. *Douthit v. Allen*, 426 S.W.2d 812 (Ark. 1968). These anticompetitive effects can be avoided by properly structuring the invitation for bids and by the commissioners' insuring that there is competition in fact. This is particularly available to the commissioners due to the absence of a mandatory competitive bidding requirement.

Specifically, if the invitation provides that, in addition to the initial cost, the bidder guarantee the cost of repair in a fixed dollar amount and state the guaranteed buy-back amount in a firm amount, and a bond adequately covering these items is required, the temptation to understate repair costs and overstate salvage value will be significantly reduced. So long as the specifications do in fact result in competition, the public interest is served and, in my opinion, the system would be legal under the circumstances and existing law.

It is also argued that the maximum-cost-of-repair clause places an undue burden of repair on the seller which might be prohibitive especially to the smaller and newer companies. Where parts and services are only available from the seller, he may be required to provide a repair shop and perform maintenance work. The alternative, however, would be an excessive amount of downtime for the equipment, resulting in an undue burden upon the public. Where parts are available from more than one source, providing alternate sources of parts and services, giving the seller an easy access to maintenance records, and requiring the purchasing officials to consult with the seller before repairs are performed which are estimated to exceed a certain amount could ease entry for the smaller and new companies. The final determination as to whether the provision is so restrictive as to preclude competition should be determined on a case-by-case basis rather than by a blanket condemnation of total cost bidding.

The bidder is not required to maintain and repair the equipment. Rather, he is required to estimate what he believes to be the reasonable cost of maintenance and repair for a given period of time. This estimate must then be guaranteed to insure purchasing officials for maintenance and repair costs only if his representations

concerning these expenses are inaccurate and could not, in the judgment of the county commission, be reasonably relied upon. This guarantee usually is in the form of a bond required of the successful bidder. The issue of whether the additional effort of preparing estimates of future expenses is restrictive of competitive bidding is a question of fact that should be determined on a case-by-case basis. Only in unusual situations, however, would this slight additional effort outweigh the benefits and protection that are received by the public. *See* Opinion Minnesota Attorney General, No. 707a-7, at 1 and 2 (January 2, 1968).

The argument that total cost requirements cause companies to stay in business as long as necessary to honor repair guarantees is sometimes made. However, warranties of the bidder under a conventional bidding concept would not be significantly different. Financial liability and responsibility on the seller's part is assured by the bonding requirement. Even when statutory or constitutional provisions mandate that contracts only be let to the lowest responsible bidder, the purchasing officials are required to insure that the bidder is indeed responsible to the extent that his financial resources are adequate. 10 McQuillin §29.73.

The objective then should be to require bidders to submit bids which accurately reflect the economic value of their equipment without stifling competition. So long as such discretion is appropriately exercised so as to insure fairness and competition and so as to avoid frauds upon the public, the system may be used by counties in the purchase of heavy equipment. Vickery, *Total Cost Bidding*, 58 Ia. L. Rev. 1, (1972).

When the safeguards fail and such a system actually results in an obvious absence of competition or a fraud upon the public, a remedy is available. If the bid has been let reserving the right to reject all bids, as is permissible where no competitive bidding statute requires, the commissioners have the authority to reject any and all bids (64 Am. Jur.2d *Public Works and Contracts* §67) so long as the rejection is not arbitrary. *Housing Authority of Opelousas v. Pittman Constr. Co.*, 264 F.2d 695 (5th Cir. 1959)—applying Louisiana law. The commissioners may reject all bids for the public benefit when the right to reject all bids has been expressly reserved. Such a rejection would appear to be appropriate where an absence of competition or favoritism has resulted. [See] 64 Am. Jur. 2d *Public Works and Contracts* §§75-77.

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SCHOOLS

TRANSPORTATION OF PUPILS—COUNTY BUSES; DELEGATION OF AUTHORITY TO BUS DRIVER

To: Michael B. Small, Palm Beach County Attorney, West Palm Beach

Prepared by: Paul W. Lambert, Assistant Attorney General

QUESTION:

1. May the Palm Beach County Board of Public Instruction enter into a contract under the provisions of Ch. 234, F. S., with the Palm Beach County Transportation Authority whereby said transportation authority would transport school children to school in county-owned and county-operated buses, rather than school buses, with the costs thereof to be paid by the board of public instruction?
2. May a principal delegate the authority provided in §§232.25 and 232.28, F. S., to bus drivers employed by the Palm Beach County Transportation Authority?
3. What is the effect on the contract set forth in the first question of