4433.

APPROVAL, LEASE TO LAND IN MONROE TOWNSHIP, PUTNAM COUNTY, OHIO, FOR STATE GAME REFUGE PURPOSES—NEW YORK, CHICAGO AND ST. LOUIS RAILROAD CO.

COLUMBUS, OHIO, July 18, 1935.

HON. L. WOODDELL, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain lease No. 2293, executed by the New York, Chicago and St. Louis Railroad Company, to the state of Ohio, on a parcel of land in Monroe Township, Putnam County, Ohio, as described in said lease. By this lease, which is one for a term of one year, this land is leased and demised to the state solely for state game refuge purposes; and it is noted in this connection that acting under the provisions of section 1435-1 and other related sections of the General Code, the Conservation Council, acting through you as Conservation Commissioner, has set this property aside as a state game and bird refuge during the term of said lease.

Upon examination of this lease, I find that the same has been properly executed and acknowledged by said lessor and by the Conservation Council acting on behalf of the state through you as Commissioner. I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate copy thereof, both of which are herewith returned.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4434.

CONTRACT—CITY MAY RESCIND AWARD OF CONTRACT WHERE BIDDER HAS FAILED TO COMPLY WITH SPECIFICATIONS.

SYLLABUS:

1. *Where a bidder submits a proposal for the lease of hog farm property of a city and the purchase of garbage of such city, and after stating in the proposal the price for rental of the property and garbage, adds a sentence to the*

effect that the city is to make all repairs on the property, and the specifications make no reference relative to repairs to the property, such proposal is illegal, and a contract may not be entered into by the city based on said proposal.

2. *The awarding authorities of a city may rescind an award made to the highest bidder submitting a proposal such as is set out in syllabus* 1, *and award the contract to the next highest bidder, providing such proposal meets specifications, the bidder returns his certified check guaranteeing the proposal, and a reasonable time has not elapsed since the date of the opening of the bids.*

3. *The awarding authorities of a city may rescind the award made to a bidder submitting a proposal as set out in syllabus* 1, *reject all other bids and readvertise, in their discretion.*

COLUMBUS, OHIO, July 19, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent communication reads as follows:

> "We are inclosing letter, together with certain inclosures, from Mr. Theodore B. Ochs, City Solicitor of Marion, Ohio, and in accordance with his request, kindly ask that you give us an opinion on the questions contained in the letter.
>
> The contract which is to be superceded by the one under discussion in this letter, has expired, and therefore, we should very much appreciate an early consideration of these questions."

The letter of the City Solicitor, enclosed with your communication, states:

> "I would appreciate very much your obtaining from the Attorney General, a written opinion relative to a certain matter which has arisen in connection with the Board of Control of the City of Marion.
>
> The facts concerning this matter, briefly, are these: The Director of Public Service was authorized by Resolution to advertise for bids for the leasing of the Marion Hog Farm and the purchase of garbage from the City of Marion, Ohio. At the time designated as per advertisement, the bids were opened. Six bids were received, copies of which are enclosed herewith. These bids were read and discussed and finally the bid of T.R.M. of $101.99 per month for garbage and rental was accepted by a unanimous vote of the Board of Control and a contract awarded him for a period of two years. Mr. M. was notified that contract was awarded him on his bid and the remaining unsuccessful bidders were handed back their respective checks deposited with their bids.

The Terminal Service Company of Cincinnati, Ohio, one of the bidders, but not the next highest bidder, made objections to the Board of Control granting the award to M. claiming the bid of M. to be irregular because it had contained therein the clause 'The City of Marion to make all necessary repairs on the Hog Farm property.' This objection was made after the Board of Control awarded the bid to M. The specifications on which bids were made, a copy of which is hereto attached, contained no clause referring to repairs of the property to be leased. Upon this objection, the writer was called in as City Solicitor for an opinion as to the legality of the bid of M. and rendered an opinion holding that the bid of M. was illegal in that it did not conform to the specifications, and that by reason thereof, the action of the Board of Control in awarding the contract to Mr. M. should be rescinded. It was further decided by the writer that all bids should be rejected and readvertised. Accordingly, the Board of Control rescinded its action in awarding the contract to Mr. M. and rejected all bids, as is set forth in the Minutes of the Board of Control meeting held June 27, 1935, a copy of which is hereto attached. Mr. M. was accordingly notified of the action taken, and in conference had with the Board of Control, advised them he would be willing to enter into a contract with the City of Marion leaving out any clause relative to repairs. However, the Board of Control refused to follow this procedure.

Questions to be submitted:

1. Is the bid of M. so irregular that same could not be legally accepted and a valid contract entered into between him and the City of Marion?

2. If question one is answered in the negative, could the Board of Control rescind all action taken so far, and reconsider all bids and if in its discretion believed M's bid to be the best bid, award a contract to him, leaving out matter of necessary repairs, or must there be another advertisement for bids?"

Taking up the first question raised by the solicitor, it may be stated that it is a general rule of law that bids submitted in connection with a public contract must substantially comply with all requirements of specifications to be considered legal bids. *McQuillan on Municipal Corporations,* 2nd Ed., Vol. 3, Section 1322; *Dillon on Municipal Corporations,* 5th Ed., Vol. 2, page 1214.

In the case of *Pease* vs. *Ryan,* 7 C. C. 44, it is stated by the court at page 50:

"It is familiar in the law governing contracts by public officers,

that proposals must respond to the advertisement by which they are invited, for otherwise there would be no competition."

In *Opinions of the Attorney General for* 1934, Vol. II, page 1242, it is stated:

"It has been held, however, that the insertion of a condition in a bid that was not contained in the advertisement for bids renders the bid invalid."

In support of this proposition the cases of *State ex rel. Winters* vs. *Barnes,* 35 O. S. 136 and *Kerlin Bros.* vs. *Toledo,* 20 C. C. 603, are cited.

While there is authority in Ohio for a public board to waive defects in form of bids (see *Ross* vs. *Board of Education,* 42 O. S. 374), where the irregularity in the proposal consists in some addition that would, if the bid is accepted, result in the destruction of the competitive feature of the bidding, such irregularity may not be waived. See *Opinions of the Attorney General for* 1928, Vol. I, page 86; 65 *American Law Reports, Annot.,* 833, and annotation beginning at page 835.

The question thus arises as to whether or not the sentence in Mr. M.'s bid, namely, the City of Marion is to make the necessary repairs on the hog farm property, is such that its effect can be said to destroy the competitive bidding by giving the bidder an advantage or benefit not enjoyed by other bidders.

The general rule of law in this state is that a lessor of real property is under no obligation to repair premises leased if he has not covenanted to do so.

In the case of *Grace* vs. *Williams,* 36 App., 569, 8 Abstract, 430, it is held in the second paragraph of the syllabus:

"2. Landlord is under no obligation to repair, unless covenanting to do so."

In the opinion, at page 571, it is stated:

"Two rules of law are involved: First, the landlord is under no obligation to repair premises, if he has not covenanted to do so. 16 Ruling Case Law, 1030, section 552; *Goodall* vs. *Deters,* 121 O. S. 432."

Hence, if the specifications for leasing of property do not contain a provision to the effect that the lessor will keep the property in repair, the obligation falls on the lessee to make any repairs that are necessary for an adequate use of the property.

Thus the provision of the bid of the highest bidder attempts to oppose the

specifications, since specifications being silent as to lessor (City of Marion) making repairs, under general rule, there was necessary implication that bidder was to make repairs. Undoubtedly, all other bidders than the highest bidder had the right to suppose that it was their duty to make repairs, and in determining the amount of their bid, took this fact into consideration. The highest bidder would thus have an advantage or benefit not enjoyed by other bidders, if his bid were to be held to be acceptable.

Hence, I am of the view, in answer to your first specific question, that the bid of M. is so irregular that same can not be legally accepted and a valid contract entered into between him and the City of Marion.

Coming now to the second question, it is stated in the case of *State* vs. *Board,* 81 O. S. 218, at pages 224 and 225, that the action of public boards in administrative matters is not always conclusive and beyond recall, but that they are possessed of inherent power to reconsider their action and adopt, if need be, the opposite course in all cases where no vested right of others has intervened.

In the case of *McClain* vs. *McKisson,* 15 C. C. 517, affirmed without opinion, 54 O. S. 673, it is stated at page 527:

> "Authorities, so far as we have seen any upon the subject, are that the council, after rejecting all bids, may reconsider that vote, and award the contract; or, if the contract is awarded to a bidder, and he refuses or fails to enter into the same, *the council may thereafter award the contract to another bidder.*"

The court cited with approval the case of *Kinsell* vs. *City of Auburn,* 7 N. Y. Supp. 317, wherein a contract was awarded to a bidder, and at the next meeting council reconsidered their action and awarded it to the next bidder.

It appears to me that there is no difference in principle from reconsidering an award that is made on an illegal bid and reconsidering an award that has been made to a bidder because he has refused or fails to enter into contract based on the bid, as in the authorities cited above. In each case there has not been given the bidder to whom the award was made an equitable right to compel the entering into of the contract.

It is a general rule of law that, in the absence of any definite time limit set forth in the statutes, a proposal of a bidder on a public contract is open for a reasonable time after the opening of bids. See *Mulcahy* vs. *Board of Education,* 25 App. 492, 495. From the date of the proposals enclosed, it would appear that a period of slightly over two weeks has elapsed since the date of opening the bids. Surely there has not at this date elapsed more than a reasonable time, and the bids can still be said to be open for consideration. While you state the certified checks have been returned to the bidders, yet if the next highest bidder will return his certified check at this time, I see no reason why,

under the authority heretofore cited, the Board of Control of Marion may not accept his bid, providing it meets specifications.

Section 3699, General Code, compels award of the lease to the highest bidder, and the highest bid being illegal, the next highest bidder has submitted the highest legal bid. Of course, the awarding authorities may, if they see fit, reconsider, reject all bids and readvertise. See 3699, *General Code.*

The highest bidder obtained no vested right when the contract was awarded to him, as his bid was illegal. No contract can be entered into with him based on his bid without the inclusion of the aforequoted sentence of his proposal, because the inclusion of such sentence destroyed the competitive feature of the bid and vitiated it so that there is no legal proposal of such bidder on which to base a contract.

I believe that the foregoing sufficiently answers the points raised in the second question of the Solicitor.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4435.

APPROVAL, TWO LEASES TO OFFICE ROOMS FOR USE OF EXCISE BEER BEVERAGE SECTION OF TAX COMMISSION, DEPARTMENT OF FINANCE AND DEPARTMENT OF AUDITOR OF STATE IN THE DIVISION OF AID FOR THE AGED—LUCAS INVESTMENTS, INC., OF TOLEDO AND BROAD—THIRD REALTY COMPANY, OF COLUMBUS, OHIO.

COLUMBUS, OHIO, July 19, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval two certain leases, as hereinafter set forth, granting to you, as Superintendent of Public Works, for the use of the excise beer, beverage section of the Tax Commission of Ohio, Department of Finance, and the Department of Auditor of State in the Division of Aid for the Aged, Department of Public Welfare, respectively, certain office rooms as follows:

> Lease from the Lucas Investments, Inc., of Toledo, Ohio, for room No. 416, on the fourth floor of the Produce Exchange Building, Toledo, Ohio. This lease is for a term of twenty (20) months,