

115.

PUBLIC CONTRACT — BID — PUBLIC NOTICE — PROPOSALS  
RECEIVED SUBSEQUENT TO SPECIFIED TIME FOR RE-  
CEIPT NOT TO BE CONSIDERED—PROVISIONS OF SEC-  
TION 2317 G. C. MANDATORY.

*SYLLABUS:*

1. *The provisions of Section 2317, General Code, relating to the giving of public notice of the time and place when and where proposals will be received, are mandatory.*

2. *The terms of such notice given pursuant to the provisions of said section are mandatory upon the awarding officer and proposals received subsequent to the time for receipt thereof, specified in said notice, may not be considered in awarding a public contract.*

COLUMBUS, OHIO, February 7, 1939.

MR. JOHN P. SCHOOLEY, *State Architect and Engineer, Department of Public Works, 705 Ohio Departments Building, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter of January 23rd which reads, insofar as it is pertinent to your inquiry, as follows:

“We should like to receive an Attorney General’s opinion as to whether it is possible for us to consider a bid received after the time advertised for opening of the bid. This request is occasioned by the two following cases.

“On January 12, 1939, bids were received on the revised general contract for the Addition to Men’s and Women’s Dormitories, Ohio University, Athens, Ohio. The bids were opened as per the specified date and time of 2:00 P. M. At 3:15 P. M. an additional bid was received in this office from the G-C O. Company, which bid was postmarked received in the local Post Office at 2:30 and delivered here at 3:15 P. M. Due to this fact the bid was not opened and I am holding same pending your opinion.

"The other case concerns the awarding of the electrical contract on the readvertisement of the mechanical branches of McGillvrey Hall, Kent State University, Kent, Ohio, opened December 30, 1938 at 10:30 A. M. These bids were opened as per the advertised time and date. At approximately one and one half hours after the advertised opening time six more bids were delivered by special messenger to this office. We did not open these bids and they were sent back to the Post Office. We were then called by an assistant Post Master stating that these bids should have been delivered to this office by 9:00 A. M. but due to the fact that a newly assigned special delivery messenger was carrying this mail, the bids were delivered last in the order of the delivery.

" \* \* \* \* The P. W. A. now request us to get a written opinion from you in regard to both these instances before they will formally approve either award."

It is generally recognized that statutes dealing with competitive bidding in connection with the letting of public contracts are enacted for the benefit and protection of the public and not in the interest of the bidders. (See cases cited in 25 O. J., 1074, n-11.)

Section 2317, General Code, reads as follows:

"After the proceedings required by sections 2314 and 2315 have been complied with, such owner shall give public notice of the time and place, when and where proposals will be received for performing the labor and furnishing the materials of such construction, improvement, alteration, addition or installation, and a contract or contracts therefor awarded, except for materials manufactured by the state or labor supplied by the Ohio Board of administration that may enter into the same. The form of proposal approved by the state building commission shall be used, and a proposal shall be invalid and not considered unless such form is used without change, alteration or addition. Bidders may be permitted to bid upon all the branches of work and materials to be furnished and supplied, or upon any thereof, or alternately upon all or any thereof."

In the particular instances to which you refer in your letter, definite hours for receipt of proposals were set in the advertisements by the commission. It therefore must be determined whether the commission so setting the time may waive specific compliance. Such waiver is permissible providing in so doing there is no violation of mandatory provision of general law. (33 O. J., 694.)

The provision of Section 2317, General Code, relating to receipt of

proposals is mandatory and demands specific compliances. It requires the notice to contain the time and place when and where proposals will be received. That statute, however, does not state the particular time of day proposals shall be received. Such time is left to the discretion of the awarding party. Once such party has fixed the time and given due notice, it then may be considered a part of Section 2317, General Code, and as such becomes a mandatory provision of general law with which the awarding party must comply.

In the case of *State ex Nye Odorless Incinerator Company vs. Lucks*, 18 Abs. 225, the Court in its syllabus held as follows:

“Refusal by the Director of Public Service of Columbus to accept a bid for construction of an incinerator because filed five minutes after the time expressly fixed by the charter of the city, and by the advertisement, for the opening of bids, is not an abuse of the discretion imposed on him, even though the bids had not actually been opened prior to receipt of such bid.”

In that case the City Charter of Columbus contained the specific time at which proposals must be filed and opened, and so notified prospective bidders. That provision of the Charter was mandatory and consequently the Court did not permit a waiver. In like manner, when the awarding party fixes the time for receipt of proposals and gives notice thereof, in conformity with Section 2317, General Code, such time becomes part of the mandatory provisions of Section 2317, General Code, and can not be waived.

In conclusion, I direct your attention to an opinion of a former Attorney General cited in 1929 O. A. G., 189, wherein is discussed a problem very similar to yours. The syllabus of that opinion follows:

“When the Division of Purchases and Printing specifies in a notice mailed pursuant to Section 196-7, General Code, that bids will be received at the office of the Superintendent of Purchases and Printing on a certain date at a certain hour, proposals received subsequent to such fixed time may not be considered in awarding a contract, notwithstanding the fact that such proposals may have been mailed on the day preceding such time for the opening of bids.”

Section 196-7, General Code, referred to in the above opinion requires that the “notice shall state the time and place where bids will be received.” In like manner, Section 2317, General Code, provides that “such owner shall give public notice of the time and place when and where proposals will be received.” The language of those statutes is substantially the same, and I am therefore inclined to the view that the

rule set forth in the 1929 opinion should be followed in the instant case.

It is therefore my opinion that proposals received subsequent to the time of receipt specified in the notice required by Section 2317, General Code, may not be considered in awarding a public contract.

Very truly yours,

THOMAS J. HERBERT,  
*Attorney General.*