3201

MUNICIPAL CORPORATIONS — CONTRACTS, BIDDING — BIDDER, QUALIFICATION—SURETY.

SYLLABUS:

A municipal corporation, in advertising for and awarding a contract for an improvement, is without authority to make a requirement that the surety company whose bond is offered by the successful bidder, must have a representative or agent living in the city making such contract.

Columbus, Ohio, January 6, 1959

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"In the city of C. an advertisement soliciting bids for a municipal project contained the proviso that the successful bidder was to furnish a surety bond to cover the performance of the work to be done in an amount set forth in the proposal.

"It was further conditioned that such a surety bond be furnished by an authorized bonding company which had a representative or agent in the city of C.

"The apparent low bidder agreed to furnish as surety a bonding company licensed to do business in the State of Ohio whose agent, however, did not reside in the city of C., but did have an established agency within the State of Ohio.

"The awarding authority of the city of C. declines to make an award to the low bidder unless the surety on the performance bond, even though the surety company is licensed in Ohio and lawfully entitled to business therein, has an agent within the corporate limits of the city of C.

"A formal opinion is respectfully requested as to:

"(a) Whether or not the awarding authority may lawfully refuse to make such an award, unless the surety has a local agent in the city of C.

"(b) Whether the insertion of such a proviso is legally binding upon a bidder who is the lowest and best bidder."

The statutes relative to contracts by municipalities for public improvements do not contain any very explicit provisions relative to the requirement of bonds of the contractor for faithful performance of the contract; however, in Section 735.06, Revised Code, relating to contracts made by the department of public service, we find this provision:

> "Each bid shall contain the full name of each person or company interested in it, and shall be accompanied by a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into *and its performance properly secured.*" (Emphasis added)

This general language as to securing the performance of the contract evidently leaves to the Director of Public Service a wide discretion in determining that the performance of the contract is properly secured. It is a prevailing practice to offer a bond signed by an authorized surety company in an amount which has been fixed by the director and stated in the advertisement or specifications.

The question is how far may the contracting authorities of a city go in attaching conditions and special requirements to the performance bonds which they require. In a case arising in the city of Cincinnati, to-wit, *Moore* v. *Cincinnati,* 15 Weekly Law Bulletin, 196, it was held by the Superior Court:

> "2. The Board of Public Works has no authority to require from bidders, in addition to the guaranty required by R. S., 2303, that they will enter into the contract and properly secure its performance, a written statement by resident freeholders that they are qualified to and will become such sureties, and to reject a bid for failure to comply with such requirement."

Section 2303, Revised Statutes, which was under consideration in that case, required that every bid "be accompanied by a sufficient guaranty of some disinterested person that if the bid be accepted a contract will be entered into and the performance of it properly secured."

In the case of *State ex rel., Hippard* v. *Commissioners of Franklin County,* 1 C.C. 194, the county commissioners, in seeking for bids for the building of the court house, established a rule that the contractor to whom the award was to be made should furnish a bond for the performance of his contract in a sum equal to the contract price of his work, "with sureties owning unencumbered *real estate in Franklin County*

equal to one-third the amount of the bid, such value to be shown by the auditor's duplicate." (Emphasis added)

The court, in commenting on the bid of the lowest bidder and the bond offered by him, said:

> "The professed object of the rule is to enable the board to be advised in advance whether the sureties which are to be given after the contract is awarded, are satisfactory. But it is not concerned with this in receiving bids, and it seems to us an unreasonable restriction upon bidders. A bidder may be better able to secure sureties after the contract is awarded to him, and having given the guaranty required by the statute that he will at the proper time furnish proper security for the performance of the contract, he is entitled to such further time to procure it."

The first paragraph of the headnote in this case indicates the view of the court and reads as follows:

> "1. Although the commissioners of a county have a wide discretion in fixing the amount and determining the sufficiency of a bond to be given by the lowest bidder for any branch of the work in the construction of a court house, the abuse of that discretion will be prevented by the courts."

In the case of *Boren and Guckes* v. *Commissioners of Darke County,* 21 Ohio St., 311, it was held, as shown by the first branch of the syllabus:

> "1. Under the act of April 27, 1869, (66 O.L. 52,) authorizing county commissioners to erect county buildings, and vesting in them a discretionary power as to the acceptance of the bond required to be given by the contractor for the faithful performance of his contract, it is not an abuse of such discretion to require that the sureties on the bond shall be residents of this State; and, when a bidder for a contract under said act refuses to give a bond with such sureties, the commissioners may refuse to award him the contract, although he offers to erect the buildings at the lowest price; and they may award it to the next lowest bidder."

The statute under which the contract was made in that case provided that:

> "Such contract shall be awarded to, and made with, the person or persons who shall offer to perform the labor and furnish the materials at the lowest price, and give good and sufficient bond to the acceptance of the commissioners for the faithful performance of their contracts."

The low bidder offered a bond to which the only objection was that the sureties therein resided *in the State of Indiana.* The court in the course of the opinion said that the refusal of the commissioner to award him the contract was justified and that they were within their proper discretion in insisting that the sureties should be residents of the state; otherwise the commissioners would be compelled to resort to foreign litigation to enforce the bond.

In the case you present, it appears that the municipal authority went beyond the reason of the rule just stated in requiring that the bonding company which might be offered as security must have a *representative or agent living in the city.* It is manifest that the statute requiring a surety company to be authorized under the provision of the law to do business in the State, would have to be observed in the acceptance of a bond. Any surety company not authorized under the provisions of Chapter 3929., Revised Code, to execute bonds in the State of Ohio, would of course be unacceptable. But that such surety company should have a representative or agent living in the city in question, would appear to be wholly arbitrary and beyond the power of the municipal authorities to require. The residence of such agent would add nothing to the security afforded by the bond.

Accordingly, in specific answer to your question, it is my opinion that a municipal corporation, in advertising for and awarding a contract for an improvement, is without authority to make a requirement that the surety company whose bond is offered by the successful bidder, must have a representative or agent living in the city making such contract.

Respectfully,
WILLIAM SAXBE
Attorney General