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COMPETITIVE BIDDING—BOND ISSUE—BIDS MAY BE WITHDRAWN PRIOR TO OPENING WHEN MADE IN GOOD FAITH.

SYLLABUS:

A bid on an issue of bonds may be withdrawn prior to the time fixed for the opening of bids when such withdrawal is made in good faith without any evidence of collusion.

COLUMBUS, OHIO, September 20, 1932.

HON. JESSE K. GEORGE, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your request for my opinion upon the following facts:

County bonds were advertised pursuant to law, fixing a definite day and hour for the opening of bids, at which time the bonds were to be sold. Two sealed bids were submitted prior to the time fixed, both of which were withdrawn, the sealed bids having been returned unopened to the bidders prior to the time so fixed. You inquire as to whether or not under these circumstances bonds may be sold at private sale under Section 2293-29, General Code.

Section 2293-29, General Code, provides as follows:

> "No bonds or notes shall be sold for less than the face value thereof with accrued interest. The highest bid, or if bids are received based upon a different rate of interest than specified in the advertisement the highest bid based upon the lowest rate of interest, presented by a responsible bidder, shall be accepted by the taxing authority, or in the case of a municipal corporation by the fiscal officer thereof. But in case a bid is accepted based upon a rate of interest other than that provided for in the ordinance or resolution adopted under section 2293-26, such acceptance before taking effect must be approved by resolution of the taxing authority, which resolution shall be certified to the county auditor; in such case bonds may be issued bearing the rate of interest provided for in such accepted bid without further amendment of the bond ordinance or resolution. When bonds have been once advertised and offered at public sale, as provided by law and they or any part thereof remain unsold for want of bidders, those unsold may be sold at private sale at not less than their par value and accrued interest thereon bearing the rate of interest provided in the resolution or ordinance under the provisions of section 2293-26. * * *."

Your inquiry, of course, resolves itself into a determination of whether or not bids which are submitted prior to the time for the opening of bids may be withdrawn prior to such time. If the answer to this question is in the affirmative, there were obviously no bids received and Section 2293-29, supra, clearly authorizes the sale of such bonds at private sale without further advertisement. The detailed statement of facts which you have submitted discloses no collusion between the bidders and the county authorities. It appears that the withdrawals were made in good faith by all parties concerned, and my opinion is predicated upon such facts.

While perhaps a serious question may be raised as to the authority to sell the bonds at private sale in view of a number of conflicting authorities in other jurisdictions as will be hereinafter shown, I believe the issue is settled in Ohio. Your attention is directed to the case of *Vadakin* vs. *Crilly, et al.*, 7 O. C. C. (N. S.) 341, affirmed by the Supreme Court without opinion 73 O. S. 380. The second branch of the syllabus is as follows:

> "Municipal officers charged with the duty of selling municipal bonds for the building of water works, advertise the sale of said bonds according to law. At the time fixed for the sale they receive bids for the same pursuant to the advertisement. Said officers are willing and ready to sell said bonds pursuant to the offer to sell the same. After bids are received and before an award of sale is made, an injunction, procured by the city solicitor, is served upon said officers, enjoining them from selling said bonds upon that day. Thereupon all bids are withdrawn by the persons offering them. The next day an entry is put upon the journal of the court by agreement of the city solicitor and the attorney for the defendants in said injunction suit, without the intervention of the court, sustaining a demurrer to the petition therein and entering judgment upon said demurrer. Thereupon, the officers charged with the sale of said bonds sold the same at private sale for a fair price, without collusion, and in good faith on their part, and as they thought in the interest of the municipality.
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> *Held:* Said bonds had been once offered according to law and 'remained unsold' within the provisions of Section 97, Municipal Code, and such private sale is legal, and should be sustained."

At the time of the rendition of this decision, the statute provided that after advertisement bonds remaining unsold may be sold at private sale, instead of providing as it now does, that those bonds remaining unsold for want of bidders may be so sold. Nevertheless the court expressly held that the bonds were unsold for that reason. The language at pp. 346, 347, is as follows:

> "There is no question but that, at any time before the acceptance of the bid, the person who makes a bid may withdraw it. So that the effect of it all is that, notwithstanding the advertisement, there were absolutely no bids at the time the officers were called upon to award the bonds to the highest and best bidder. The people who had made those bids, for purposes satisfactory to themselves, and serving their own interests, as they had a right to do, had withdrawn their bids. The purpose of the deposit of the money is to insure that the bonds will be taken when the bid is accepted, and not that it shall remain there for weeks or months waiting the pleasure of the board having charge of the sale of the bonds. They were withdrawn as a matter of right, and that left the officers without a bid to act upon. True, their hands were tied for a time, by an injunction, but that was not important. A suspension of the act on the part of the board from the time the injunction was served until the injunction was dissolved would not affect their right to accept the bids had the bids remained. They were entitled to accept any bid that had been received, but there were none there to accept. So that the advertisement was made, there were no offers received as contemplated in the statute, no propositions were left in the hands of the board for them to accept, either at the time they were authorized under

the advertisement to accept them, or later, when the injunction was dissolved and they might act without being in contempt of court.

If they had conspired to that result in any degree whatever, the whole cause would have been attributable to them, and there would have been no offer to sell at competitive bidding. But they were absolutely without fault or blame for any of the conditions that existed. If they had been culpable in the least degree, that would perhaps charge them with all the wrongs, and would show an unfairness on their part, and a desire not to sell at competitive bidding but to sell at private sale in the interest of their friends or against the interests of the city. But up to that time, so far as this record discloses, they were absolutely without fault. They had advertised the bonds, as required by the statute; they were there ready for competitive bids; there were no bids; the bonds, in the language of the statute, 'remained unsold'; and that was all that was necessary to authorize them to sell at private sale."

As hereinabove stated, the authorities outside of Ohio are not in harmony. Some of these should be pointed out.

The general principle with respect to the withdrawal of bids in the case of the award of a contract pursuant to competitive bidding is set forth in 44 C. J. p. 108, as follows:

"A bidder has no right at law, nor have municipal officers power to permit him, to withdraw his bid. But where there is no meeting of minds, as in the case of mistake in the making of the bid, the rule against the allowance of a withdrawal does not apply."

In McQuillin on Municipal Corporations, second edition, Vol. 3, these same principles are set forth on pp. 903, 904 in the following language:

"Inadvertent mistakes in a bid usually warrant the withdrawal of same before the bid is acted upon. Accordingly if a bidder has submitted a mistaken bid he may maintain a bill in equity for a reformation thereof, provided he files the same within a reasonable time. Aside from such a remedy, it is held that a bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it."

In support of the foregoing principle, there is cited the case of *Kimball* vs. *Hewitt,* 2 N. Y. S. 697, affirmed in 15 Daly 124, 3 N. Y. S. 756. The first branch of the syllabus of this case is as follows:

"Under a statute requiring municipal contracts to be let to the lowest bidder, and forfeiting to the city the certified check deposited with such bid in case the bidder refuses to sign the contract within five days, the city officers have no right to allow a bidder to withdraw his bid, even before the bids are opened."

In arriving at the foregoing conclusion, the common pleas court of New York City said:

"Had the defendants been acting in their own private business, there is no doubt that they could have permitted the offer made by the

Electric Construction Company to be withdrawn, but, acting as public officers, they could not lawfully forego the right that the city had acquired to insist that the company should either carry out its offer or forfeit the amount that it had deposited as security. When the bid of the Electric Company, with the certified check that accompanied it, passed into the hands of the commissioner of public works, the statute prescribed the disposition that should be made of the one and the other. The bid was to be publicly opened by the officers, who are the defendants in this action, and the contract was to be awarded to the lowest bidder. If the lowest bidder should refuse to execute, that is to say, sign the contract within five days after notice that it had been awarded to him, the amount of the certified check that he had deposited as security was to be forfeited, and retained by the city as liquidated damages, and paid into the sinking fund. No other disposition of the bid and the check was lawful. It has been decided that where the statute requires a public officer to award a contract for public work to the lowest bidder, he may be restrained by injunction from giving it to any one else, (2 High, Inj. Secs. 1251, 1252,) and principle requires that the highest bidder should not be made the lowest bidder by the withdrawal of the lower bids. It matters not how honestly the officials acted, (and no one questions the absolute integrity of the distinguished gentlemen who are the defendants,) their consent to the withdrawal of the bid was in conflict with the statute."

It should be observed that in the instant case the Ohio statute, Section 2293-28, General Code, requires that there shall be filed with each bid a bond or certified check in an amount specified in the advertisement but not less than one per cent of the amount of bonds to be sold, but there is no express provision for the forfeiture of such check nor is there any provision with respect to signing a contract within a certain number of days as in the Kimball case. Neither is there presented here a case whereby it is proposed to sell bonds to a lower bidder as a result of the withdrawal of the highest bid.

Another leading case cited in support of the principle that a bid may not be withdrawn after having been filed is the case of *Wheaton Building and Lumber Co.* vs. *City of Boston,* 90 N. E. 598, in which case the court held that withdrawal was not permitted and the statutory deposit should be forfeited, the withdrawal having been sought after the bids had been opened. This case is not, in my judgment, pertinent because the facts are not parallel with those here under considration.

The case of *Baltimore* vs. *J. L. Robinson Construction Co.,* reported in L. R. A. 1915 A, p. 225, should also be noted. The syllabus is as follows:

"A bidder for public works cannot withdraw his bid and recover his deposit before the opening of the bids, under a statute making all bids irrevocable, and requiring a deposit to accompany each bid, which shall be forfeited in case the depositor fails to execute the contract which is awarded to him."

In this case the court was confronted with a statute which expressly provided that "Bids when filed shall be irrevocable." The Ohio law with respect to the sale of bonds and notes by the various subdivisions contains no such provision and the case is not therefore in my judgment controlling.

There is another long line of decisions in which courts have permitted the

withdrawal of competitive bids before, as well as after, the same have been opened. It is pertinent to note a few of these.

In *R. O. Bromagin and Co.* vs. *City of Bloomington,* 84 N. E. 700 (234 Ill. 114), the low bidder for a contract was permitted to withdraw when an error had been made in good faith and the city notified of the error before the contract was executed. This case followed the general principle of contract law that an offer may be withdrawn before acceptance, there having been no meeting of the minds and consequently no contract.

To the same effect is *Northeastern Construction Co.* vs. *Town of North Hempstead,* 105 N. Y. S., 581.

The case of *W. F. Martens & Co.* vs. *City of Syracuse,* 171 N. Y. S. 87, held as set forth in the first two branches of the syllabus:

> "1. Where a wholly inadvertent error was made in a bid on public works for a city, the contractor should have been permitted to withdraw his bid, where he notified the board of the mistake and of his desire to withdraw the bid before the board had considered the bids, under Second Class Cities Law (Consol. Laws, c. 53) Sec. 121, relating to withdrawal of bids.
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> 2. Where city contractor had notified the city board of an inadvertent error in its bid before such board had passed on the bids, the court erred in holding such contractor to have forfeited a certified check, on account of expenses of a readvertisement and a higher bid, where there were other bids under the first advertisement, and the board refused to accept any of them, and sought to take advantage of plaintiff's honest mistake."

A case which appears to be in direct conflict with the Kimball case, supra, is *Gray Construction Co.* vs. *City of Sioux Falls* (S. D.), 179 N. W. 497, the syllabus of which is as follows:

> "Where plaintiff had submitted a bid to a municipal corporation for the construction of a fire station and library building, and had deposited a cashier's check as guaranty that the bidder would accept the contract in case same was awarded to it, and it appears that the bid of another party was accepted, but such party refused to enter into the contract, whereupon the city awarded the contract to plaintiff, who had theretofore demanded the return of the check, which was refused, a suit for the amount of the check would lie, since plaintiff had an absolute right to withdraw its offer contained in its bid before acceptance, which it had done by demanding a return of the check."

While some of these cases are based upon theories which might be said to be in conflict with the principles followed by the court of appeals in the Vadakin case, supra, it is observed that none of them are predicated upon facts which are paralled to those here under consideration.

It is my opinion that the Vadakin case is controlling and a bid on an issue of bonds may be withdrawn prior to the time fixed for the opening of bids when such withdrawal is made in good faith without any evidence of collusion.

It follows that the bonds in question may be legally sold at private sale.

Respectfully,

GILBERT BETTMAN,

Attorney General.