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STATE BOARD OF EDUCATION—CONTRACTS; BIDS—CANNOT ENTER INTO SINGLE CONTRACTS FOR MORE THAN ONE CATEGORY UNDER SECTION 153.03, R.C.—§§153.02, 153.03, 3318.10, R.C.

SYLLABUS:

1. The provisions of Sections 153.02 and 153.03, Revised Code, are applicable to construction projects engaged in by the State Board of Education.

2. Section 153.03, Revised Code, requires separate contracts based on separate bids for heating, plumbing and electrical work, and the State Board of Education cannot enter into a single contract for more than one of these categories in awarding contracts pursuant to Section 3318.10, Revised Code.

Columbus, Ohio, August 7, 1959

Hon. E. E. Holt, Superintendent of Public Instruction  
Department of Education, Columbus, Ohio

Dear Sir:

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

“A problem has arisen concerning our school building assistance program under the provisions of Section 3318.10 of the Revised Code which is causing considerable confusion and delay in the progress of this program. Section 3318.10 states that: ‘The provisions of Sections 153.50 to 153.99, inclusive, of the Revised Code shall apply to construction contracts for the project.’ The problem is in the interpretation of Section 153.51 of the General Code. The State Board of Education has been strictly following the provisions of Section 153.50 in requiring that separate and distinct proposals be made for furnishing labor. In other words, in each project separate and distinct bid proposals are required on each of the following:

- (1) General Construction Contract
- (2) Plumbing Contract
- (3) Heating & Ventilating Contract
- (4) Electrical Contract

“The contracts are awarded on the basis of the lowest responsible bidder separately in each of the above mentioned divisions.

“Several contractors have requested permission to submit a combination bid based on some combination of two of the above mentioned divisions. The State Board has taken the position that combination bids cannot be considered as a basis for determining the lowest responsible bidder for the purpose of awarding contracts. However, the State Board has been following a policy, that if the contractor bids separately on the plumbing and separately on the heating and is low in each of his separate proposals, that he may offer the State a combined bid which is lower than the total of the two low bids which he has already submitted. This combined bid in no way determines the lowest responsible bidder.

“An example of how this operates is shown in the plumbing and heating bidding for the Holland High School Addition, Springfield Township, Holland, Ohio, Project Number 01-314-0201, four contractors submitted separate bids each on plumbing and on the heating as follows:

“Plumbing Contract:

Dunbar Brothers .....	\$55,140.00
Wm. Farrel, Inc. ....	\$53,575.00
Bushdiecker Plumbing & Heating Co.....	\$63,977.00
Johnson Plumbing & Heating Co. ....	\$59,900.00

“Heating Contract:

Dunbar Brothers .....	\$72,650.00
Wm. Farrel, Inc. ....	\$68,966.00
Bushdiecker Plumbing & Heating Co. ....	\$82,977.00
Johnson Plumbing & Heating Co.....	\$79,975.00

“In addition to the above bids, the Wm. Farrel, Inc. stated that if he were awarded both contracts, he would make the total price for both plumbing and heating \$120,541.00.

“Wm. Farrel, Inc. was the low bidder on the plumbing bid with a bid of \$53,575.00 and he was the low bidder on his separate heating bid of \$68,966.00 for a total of \$122,541.00. Now the question is: Is there any reason why the State cannot enter into a contract with Farrel, Inc. for the performance of the two contracts awarded on the basis of his low separate bids under a combined contract for a savings of \$2,000.00 to the State of Ohio, since the combined bid was not a basis for determining the low bidder for the purpose of awarding contracts?

“A further example is in the case of the Triad Local School District, School Building Project Number 01-314-0021 for the plumbing contract. There were two bidders as follows:

“Plumbing Contract:

T. C. Vanica Company, Inc. ....	\$31,148.00
Terry P. Smith, Inc. ....	\$69,800.00

“Heating Contract :

T. C. Vanica Company, Inc. ....	\$38,106.00
Terry P. Smith, Inc. ....	\$69,800.00

“The T. C. Vanica Company, Inc. was determined to be the low bidder in the plumbing and in the heating. The total of his two low bids was \$69,254.00. The T. C. Vanica Company, Inc., also, offered that if they were awarded both bids, they would do both the heating and the plumbing for a total of \$67,500.00. This is a savings of \$1,754.00, if it is permitted to accept the offer of the T. C. Vanica Company, Inc. After he has been awarded the individual contracts on the basis of being low in each division.

“Section 153.51 states: ‘Contract may not be awarded for entire work. When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or *the bids for the whole or for two or more kinds of work or materials are lower than the separate bids \* \* \* in the aggregate. \* \* \**

“A further question is, that if a contractor submits separate and individual proposals on each of two or more of the divisions of the contract and is awarded the contract on the basis of being low individually in two or more of the divisions, can these two awards be incorporated into one contract which itemizes that the plumbing contract is for \$60,000.00, the heating contract is for \$40,000.00 and the total contract is in the amount of \$100,000.00?

“Section 153.52 reads as follows: ‘Each contract shall be for only one class of labor or material; exceptions. The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment, or business, or for the furnishing of materials therefor, or both, shall be awarded by \* \* \* the office, board, or other authority referred to in Section 153.50 of the Revised Code, in its discretion, to the lowest and best separate bidder therefor, and shall be made directly with him or them in the manner and upon the terms, conditions, and limitations as to giving bond with security and otherwise as prescribed by law, unless it is let as a whole, *or to bidders for more than one kind of work or materials. \* \* \** Sections 153.50 to 153.52, inclusive, of the Revised Code do not apply to the erection of buildings and other structures \* \* \* which cost less than ten thousand dollars, except as provided in Sections \* \* \* 153.02 and 153.03 of the Revised Code.’

.. “Your opinion and interpretation of the above Sections of the Code are respectfully requested.”

As stated in your request, Section 3318.10, Revised Code, expressly provides that Sections 153.50 to 153.99, inclusive, of the Revised Code, are applicable to construction contracts executed by the State Board of Education in accordance with the provisions of Chapter 3318., Revised Code. In addition, I believe, that the comprehensive language employed in Sections 153.02 and 153.03, Revised Code, make the State Board of Education amenable to the provisions of those sections.

Sections 153.02 and 153.03, Revised Code, read as follows:

Section 153.02:

*“Every department, board, bureau, commission, body, or person charged with the duty of preparing plans, specifications, and blueprints for the erection, alteration, or repair of any building in the state, by the state, and every officer or person designated by such department, board, bureau, commission, or body to act for it, and charged with the duty of preparing such plans, specifications, and blueprints, which provide for the installation of plumbing and gas fitting, steam and hot-water heating, ventilating apparatus, steam power plant, or the electrical equipment, and all work kindred thereto, shall, when the entire cost of the erection, alteration, or repair, or the plumbing and gas fitting, the steam and hotwater heating, ventilating apparatus, steam-power plant, or the electrical equipment and all work kindred thereto, is to extend one thousand dollars, prepare separate plans, specifications, and blueprints for each of the following branches or classes of the work to be performed and all work kindred thereto:*

- (A) Plumbing and gas fittings;
- (B) Steam and hot-water heating, ventilating apparatus, and steam-power plant;
- (C) Electrical equipment.

*“Such plans, specifications, and blueprints must be so prepared and drawn as to permit separate and independent proposals and bids upon each of the classes of work set forth in divisions (A), (B), and (C) of this section.” (Emphasis added)*

Section 153.03:

*“Every department, board, bureau, commission, body, or person charged with the duty of awarding or entering into contracts for the erection, alteration, or repair of any building in the state, by the state, and every officer or person designated by such department, board, bureau, commission, or body to act for it, and charged with the duty and empowered to award and enter into such contracts, which provide for the installation of plumbing and gas fitting, steam and hot-water heating, ventilating appara-*

tus, steam-power plant, or the electrical equipment, and all work kindred thereto, *shall*, when entire cost of the erection, alteration, or repair of the plumbing and gas fitting, steam and hot-water heating, ventilating apparatus, steam-power plant, or the electrical equipment, and all work kindred thereto, is to exceed one thousand dollars, *award the respective work specified in divisions (A), (B), and (C), of Section 153.02 of the Revised Code separately to responsible and reliable individuals, firms, or corporations.*" (Emphasis added.)

Although Chapter 3318., Revised Code, does not provide that the provisions of Sections 153.02 and 153.03, Revised Code, are applicable to construction projects carried on by the State Board of Education, I cannot escape the conclusion that they are applicable to the State Board of Education because of the broad language used in those sections.

Sections 153.02 and 153.03, Revised Code, are not contradictory to Sections 153.50 to 153.99, inclusive, of the Revised Code, but rather are supplementary. In the case of *The Columbus Building and Construction Trades Council v. Moyer*, 163 Ohio St., 189, Matthias, J. said at page 199:

"\* \* \*

"The court has taken into consideration Sections 2317, 2319, 2362, 2363 and 2364, General Code (Sections 153.06, 153.08, 153.50, 153.51 and 153.52, Revised Code), and finds them to be general statutory provisions which cover other subjects as well as the specific subject matter with which we are concerned.

"\* \* \*

Sections 153.02 and 153.03, Revised Code, then are specific in nature and apply only to the types of work mentioned therein. Sections 153.50, Revised Code, *et seq.*, are more general in nature and require separate proposals and contracts for each distinct class of labor or trade other than the specific classes of work or trades mentioned in Sections 153.02 and 153.03, Revised Code.

The first paragraphs of the syllabus in the *Trades Council* case, *supra*, reads as follows:

"1. Sections 2314-1 and 2314-2, General Code (Sections 153.02 and 153.03, Revised Code), are special statutory provisions, apply to specific subject matter and clearly and unambiguously require that every department, board, bureau, commission, body or person charged with the duty of awarding or entering into contracts for the erection, alteration or repair of state build-

ings, by the state, shall prepare separate plans, specifications and blueprints and *make separate contracts based on separate bids for*

(a) plumbing and gas fitting and all work kindred thereto where the entire cost thereof exceeds one thousand dollars,

(b) steam and hot-water heating, ventilating apparatus and steam power plants and all work kindred thereto where the entire cost thereof exceeds one thousand dollars, and

(c) electrical equipment and all work kindred thereto where the entire cost thereof exceeds one thousand dollars.”  
(Emphasis added)

Since both the Legislature and the Supreme Court have spoken on the matter, I think there can be no doubt but that your department must make separate contracts based on separate bids for each of the three classes of work mentioned in Sections 153.02 and 153.03, Revised Code.

This office was asked to interpret Sections 153.02 and 153.03, Revised Code, shortly after their enactment in 1933. In Opinion No. 1940, Opinions of the Attorney General for 1933, it was recognized that the requirements of the sections in question might result in the state having to pay more for the improvement than if combined bids could be received and combined contracts could be awarded. In the course of the 1933 Opinion, *supra*, the writer said at page 1843:

“\* \* \* While it is true that such a requirement of separate contracting for each trade might oftentimes result in the State having to pay more for the improvement than if combined bids for two or three trades were accepted, which result would be contrary to the public interest, yet the legislature seems to have clearly so provided and its mandate must be followed by the courts. It is stated in the fourth paragraph of the syllabus of the case of *State ex rel. vs. Bushnell*, 95 O. S. 203:

‘4. When the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself which must be made by legislative enactment and not by judicial construction.’”

When Sections 153.02 and 153.03 were enacted they were known as 2314-1, General Code and 2314-2, General Code, respectively. They were enacted by House Bill No. 162, (See 85 Ohio Laws, page 406) and in the preamble as well as in Section I of the Bill, it was stated that the purpose was to amend Section 2364, General Code.

Section 2364, General Code, which has since become Section 153.52, Revised Code, was originally enacted in 1877 and is found in its original form in 74 Ohio Laws, page 186. The preamble to the original act reads as follows:

“To regulate the letting of contracts for the doing of public work and the better protection of mechanics.”

It would appear that the foremost motive of the Legislature in enacting the statutes in question here was not the saving of money for the State of Ohio. We cannot, therefore, construe Sections 153.02 and 153.03, Revised Code, so as to permit either combined bids or combined contracts so as to affect a saving for the state in view of the clarity of the statutes in question and the pronouncement of the Supreme Court.

It is, therefore, my conclusion, and you are hereby advised:

1. The provisions of Sections 153.02 and 153.03, Revised Code, are applicable to construction projects engaged in by the State Board of Education.

2. Section 153.03, Revised Code, requires separate contracts based on separate bids for heating, plumbing and electrical work, and the State Board of Education cannot enter into a single contract for more than one of these categories in awarding contracts pursuant to Section 3318.10, Revised Code.

Respectfully,  
MARK MCELROY  
Attorney General