

387.

BOARD OF EDUCATION—ERECTION OF SCHOOL BUILDING
—GRANT OF FEDERAL FUNDS—RECEIPT OF BIDS—STA-
TUS WHERE PRESIDENT OF CORPORATION DID NOT
SIGN BID—SPECIFIC CASE.

SYLLABUS:

Receipt of bids for the construction of a school building by a board of education discussed.

Specific case considered.

COLUMBUS, OHIO, April 5, 1939.

HON. A. C. L. BARTHELMEH, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR: Acknowledgment is hereby made of the receipt of your request for my opinion in which you state:

“The Board of Education of Sugarcreek Township Rural School District, Stark County, Ohio, having determined to erect a new school building and having secured the approval of a grant of federal funds for the same, and having in all respects complied with the law, advertised for bids for the erection of said school building. The advertising was duly and legally had and various bids were filed with the Clerk of the Board, all in due time and in compliance with the provisions of General Code Section 7623. After the bids were opened it was found that “X” Construction, Inc. had submitted the lowest bid by some \$1,400, but upon examination of the bids a question was raised by the school board, the architect and the other bidders as to the validity of the bid of “X” Construction, Inc. by reason of the following facts:

All bids, including the one of “X” Construction, Inc., were submitted on forms of proposal prepared by the architect and the proposal of “X” Construction, Inc. is set forth for your convenience, as follows: * * *”

Then follows a copy of the pertinent parts of the Form of Proposal as filled out and submitted by “X” Construction, Inc., the legality of whose bid is being questioned.

It appears that in the body of the Proposal in the proper blank spaces therefor there was filled in the name of the bidder and, it being a corporation, the names of its President and Secretary. In the blank space provided for signature there is typewritten the name of the cor-

poration bidding, followed by, "By, President." The space provided for the president to sign is left blank. You state further:

"Along with this proposal and attached to it was a certified check in the amount of \$2,500 based upon the total bid of \$49,464.00.

The question raised is then, must a bid be signed? As you will notice, this bid was not signed by any one, the name of the company and two names representing the president and secretary being typed thereon. We call your attention to the fact that the company is a corporation, which tends to complicate the situation and we respectfully request that in passing hereon that you include in your ruling your opinion of the law of an unsigned bid by a corporation, an individual and a partnership.

Specifically, our request is for your opinion as to whether or not the board of education herein named is entitled to consider the bid of "X" Construction, Inc. as submitted in form as hereinabove set forth, or, in other words, under the law, is this bid a valid, legal bid?"

I am advised that since the opening of the bids "X" Construction, Inc. assert that the failure of the president to sign the bid was an oversight, and that the preparation of the bid and the filing of it with the board of education was duly authorized and that it was intended by the company and its proper officials that the bid should be considered as submitted and that the company is now willing that its president should sign the bid if necessary and is desirous to enter into a contract in pursuance of the bid as filed.

No question is made as to the form and sufficiency of the security deposited as a guarantee that the bidder will enter into a contract if the award is made to it nor that there is any variance in the bid from the specifications nor that the bid is not in all respects in compliance with the proposal. We assume, therefore, for the purposes of this opinion that the bid is regular in every respect except that the typewritten name of the bidder is not followed by the name of the president, written by him, or by anyone else at his direction, and that nothing affirmatively appears in the bid itself that he or any other authorized official of the company approved or sanctioned the bid as made.

In line with the general rule with respect to such matters, the proceedings with respect to the making of a contract by a board of education for the erection, alteration or repair of a school building are governed by statutory provisions among which provisions are those requiring that such contracts, if they involve the expenditure of more than \$3,000 in city districts or of more than \$1,500 in other school districts must be made under competitive bidding after due advertisement there-

for and let to the lowest responsible bidder. It has been held that if such contracts are not let under competitive bidding in accordance with the statutory provisions provided therefor, the contracts are void. *Mulcahy vs. Board of Education*, 25 O. App., 492; *Landis vs. Board of Education*, 16 O. L. Ab., 190.

The controlling statute in such cases is Section 7623, General Code, which sets forth certain requisites of the bid which must be submitted before a board of education is authorized to enter into a contract, among which requisites are that the bid must contain the name of every person interested therein, and shall be accompanied by a bid bond or by a certified check on a solvent bank as the board may require, payable to the order of the treasurer of the board of education in an amount to be fixed by the board of education or by an officer designated for such purpose by the board, that if the bid be accepted a contract will be entered into and the performance of it properly secured. The statute also provides that the bids, duly sealed up, must be filed with the clerk by 12 o'clock noon on the last day stated in the advertisement.

It has been universally held by the courts that the requirements of competitive bidding in the letting of public contracts as fixed by statute such as Section 7623, General Code, are mandatory and jurisdictional and their non-observance will render the contract void and unenforceable. It has been held in this state that the provisions of the statute are mandatory and must be strictly construed. *State ex rel. Brice Furnace Company vs. Board of Education*, 4 O. N. P., 44, affirmed in 14 O. C. C., p. 15. The purpose of these requirements is to protect the public and secure for them the best service for the least expenditure of public funds. This rule is well stated in *McQuillin on Municipal Corporations*, Second Edition, Section 1286, where it is stated:

“Generally there are charter or statutory provisions requiring proposals for bids for certain municipal contracts to be advertised and the contract let to the lowest and best, or lowest responsible bidder. Such requirements are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. These provisions are strictly construed by the courts, and will not be extended beyond their reasonable purport.”

The bid of “X” Construction, Inc., here under consideration, conforms in all respects so far as I have been informed, with the express

provisions of Section 7623, General Code. It contains the names of all persons interested in the bid as that particular provision of the statute has always been understood. It, of course, does not contain all the names of the stockholders of the corporation, but it has never been understood that the statute required that. It was properly filed and was properly sealed up, and was accompanied by a certified check in accordance with the statute. It will be observed that the statute does not expressly set up the requirement that the bid must be signed, and I do not think it can be said that such requirement is implied from the language of the statute. It might, of course, fairly be said that the bid must necessarily be in writing, inasmuch as the statute provides that it must be sealed up, and of course, there would be implied that the bid must be definitely identified. This bid meets both such requirements, and the omission of the formal or official signature of the corporation is, in my opinion, a mere irregularity which may be waived, especially in view of the fact that the bidder insists that it was the intent of the managing officials of the company to file the bid and to have it considered as a bid, and are now willing to enter into a contract in pursuance of the bid. It has sometimes been said that a bid must be in such form and the security be such that if the bidder should refuse to enter into a contract in pursuance of the bid he could be held for damages for failure to do so. Should this bid be accepted as it is, and "X" Construction, Inc., refuse to enter into a contract based on the bid, would the certified check deposited as a guaranty that they will meet the requirements of its bid be forfeited? I think it would. In view of the facts as stated, that the bid contain the name of the corporation and of its president and secretary and that the signature was filled out to the extent of the corporate name having been typewritten, it clearly identifies the bid, and this was all done at the instance of the duly authorized managing officials of the company with the intent that the bid should be filed for the purposes mentioned, all of which is now admitted by these officials, I can not see how the company could successfully contest the forfeiture of the certified check deposited as security if it should now refuse to enter into a contract after an award was made to it on the bid.

It is generally held by the courts that a board of education or other public authority may upon receipt of bids for public work, waive mere irregularities of the bids. It is stated in *Corpus Juris*, Vol. 56, p. 490:

"Any irregularities or informalities which do not go to the essence of the principle of competitive bidding may be disregarded, provided such a course is in the interest of the school, and is in good faith."

In *Ohio Jurisprudence*, Vol. 36, p. 234, it is said with respect to a board of education:

“The board may waive defects in the form of a bid when such waiver works no prejudice to the right of the public for whom the board acts.”

There is cited in support of the text the case of *State ex rel. Ross*, 42 O. S., 374, the third branch of the syllabus of which case reads:

“The board may waive defects in the form of a bid, where such waiver works no prejudice to the rights of the public for whom the board acts.”

To waive the irregularity of this bid and award the contract to “X” Construction, Inc. would do no violence to the fundamental principle which is the basis of the purpose of requiring public officials to let public contracts under competitive bidding. It could not be said to be the encouragement of favoritism, improvidence, extravagance, fraud and corruption and it clearly would be in the public interest and to the benefit of property owners and taxpayers as the bid is the lowest bid received by approximately \$1,400.

I am therefore of the opinion that the Board of Education of Sugar-creek Township Rural School District may lawfully award the contract for the school building in question to “X” Construction, Inc. upon its bid as submitted to the said board of education.

Respectfully,

THOMAS J. HERBERT,
Attorney General.