
923

CONTRACT—IMPROVEMENT CONTEMPLATED BY BOARD OF EDUCATION—MAY BE AWARDED PURSUANT TO BIDS RECEIVED ON FORMS PRESCRIBED WHICH CONTAIN STATED PRICE, WITH PROVISION FOR PRICE ADJUSTMENT, BASED ON CHANGES IN COSTS OF LABOR AND MATERIALS—UP TO FIXED MAXIMUM PERCENTAGE—DEPARTMENT OF PUBLIC WORKS—SECTION 2319 G. C.

SYLLABUS:

A contract may be awarded by the department of public works under Section 2319 of the General Code pursuant to bids received on forms prescribed which contain a stated price with provision for price adjustment based on changes in costs of labor and materials, up to a fixed maximum percentage.

Honorable Frank L. Raschig, Director, Department of Public Works
Columbus, Ohio

Columbus, Ohio, May 6, 1946

Dear Sir:

Your request for my opinion reads as follows:

"Bids were received by the Ohio State University for the construction of one 4000 Kw Turbine Generator. Two bids were received, one of which was unsigned. The other bid from the General Electric Company for \$101,200, has attached to it a price adjustment clause as part of the bid. On the reverse side of the price adjustment clause appears the following language:

'In no event shall the adjustment in price as determined on the reverse side of this sheet be more than 35% of the original bid price of \$101,200.00.'

We attach a copy of the price adjustment clause. You will note it carries a basis for adjusting the price, that is, labor represents 40% of their bid and taking the difference between the labor index of the U. S. Department of Labor for the electrical equipment manufacturing industry at the time of the awarding of the contract and the average of the monthly labor index figures for the period from the date of acceptance to the date of completion of shipment which is multiplied by the amount of money represented by the 40% would give the amount of adjustment to be made for labor.

The material is accepted as 30% of the bid. Taking the difference between the material index compiled by the U. S. Department of Labor, 'Group 4, Metal and Metal Products' at the time of the award of the contract and the average of the monthly material index figures from the date of contract to the date of completion of shipment using this difference to multiply the amount of money represented by the 30% would give the amount of the adjustment of the material.

Will you kindly advise us if a contract may be awarded to the lowest and best bidder with the price adjustment clause as part of the contract to be entered into with the bidder."

The purpose of all laws requiring competitive bids as a condition precedent to letting contracts by public authorities is to afford an open and equal opportunity for bidding to those who desire to bid and also to

secure for the benefit of the public the lowest qualified bid. The Department of Public Works is by the provisions of Section 154-40, General Code, given all of the powers and made subject to all of the duties vested by law in the state building commission. The statutes relating to the powers, duties and procedure of the state building commission are found in Sections 2314 to 2332, inclusive, of the General Code.

Section 2315, General Code, reads as follows:

“The plans, details, bills of material, specifications of work, estimates of cost in detail and in the aggregate, *form of bidding proposal* and bond of bidder and other data that may be required shall be prepared on such material and in such manner and form as may be prescribed by the state building commission, and shall be submitted to such commission for its approval. If so approved the same shall be deposited and safely kept in the office of the auditor of state as the property of the state.”

(Emphasis supplied.)

Section 2317, General Code, provides 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.”

(Emphasis supplied.)

It will be noted from the language of Section 2317, *supra*, that the form of proposal approved by the building commission shall be used, “and a proposal shall be invalid and not considered unless such form is used without change, alternation or addition.” This provision is intended to make it certain that all the bids shall be on the same basis, and be capable of comparison, so that it can be determined who is the lowest bidder.

Section 2319, General Code, relates to the opening and tabulation of bids and award of contract and reads as follows:

“On the day and at the place named in the notice, such owner shall open the proposals, and shall publicly, with the assistance of the architect, or engineer, immediately proceed to tabulate the bids upon triplicate sheets, one of which shall be filed with the auditor of state. A proposal shall be invalid and not considered unless a bond, in the form approved by the state building commission, with sufficient sureties, in a sum equal to the total sum of the proposal, is filed with such proposal, nor unless such proposal and bond are filed in one sealed envelope. After investigation which shall be completed within thirty days, the contract shall be awarded by such owner to the lowest bidder, or bidders.”

I infer from your letter that the bid received in the case you present, wherein the bidder attached the price adjustment clause qualifying his bid, was merely the voluntary action of the bidder and was not contemplated by you in advertising for bids nor included in the form of bid prescribed. Accordingly, the bid to which you refer in your letter would not meet the requirements of the law and could not be accepted as a basis for the contract.

I note that the price adjustment clause which was attached to the bid to which you refer, and a copy of which you enclosed with your letter, calls for an adjustment either upward or downward, depending on possible changes either in labor costs or material costs, with certain standards by which these changes are to be measured. It contains also a statement that “in no event shall the adjustment in price as determined on the reverse side of this sheet be more than 35% of the original price of \$101,200.”

It would appear that if this plan of adjustment were incorporated in the bid form which you are required to prescribe and approve in advance, with a stipulated maximum percent of increase, bids might be received which would be capable of comparison and be within the law. In such case the real amount of the bid would be the sum named plus the amount arrived at by adding the maximum percentage of increase. The price actually to be paid for performance of the contract would be this maximum sum less whatever amount might be saved by reason of the failure of cost increases to materialize or increases in a lesser amount than

the maximum percentage named; reduction of costs might result in payment of an amount less than the flat price bid.

It will be noted that Section 2315 above quoted provides for an estimate of cost in advance of advertisement for bids, and Section 2323, General Code, provides that "no contract shall be entered into pursuant to Section 2317 at a price in excess of the entire estimate thereof." Consequently, the maximum possible price to be paid under the form of bidding here under consideration must be kept within the estimate. The net result of this form of bidding would be substantially the same as that under consideration in an opinion which I rendered on April 22, 1946, being No. 879, wherein it was held:

"Where a contract for an improvement contemplated by a board of education is required by Section 4834-18, General Code, to be let pursuant to advertisement for bids, such board is not authorized to let such contract on the basis of cost plus an agreed percentage. However, it may receive bids and let such contract on the basis of bids of a definite sum with a stipulation that if the final ascertained cost plus a certain fixed percentage or fee, determined by the board in advance, is less than said definite sum, such lesser amount shall be paid and received as full compensation for such improvement."

It is evident that in the present state of uncertainty and fluctuating costs of labor and material it is difficult to secure a flat bid unless the bid is heavily loaded to cover these contingencies. The plan proposed as well as the one under consideration in the opinion just referred to, does not afford any certainty that costs will fail to rise, as anticipated, and that the public will save money thereby, but it does at least afford a possibility that such saving may be realized. In my opinion they are both consistent with the purpose and plan of competitive bidding as outlined in the statutes here under consideration and in other statutes of similar character.

Specifically answering your question, it is my opinion that a contract may be awarded by the department of public works under Section 2319 of the General Code pursuant to bids received on forms prescribed which contain a stated price with provision for price adjustment based on changes in costs of labor and materials, up to a fixed maximum percentage.

Respectfully

HUGH S. JENKINS

Attorney General