

*"Nothing in this act (G. C. Secs. 1390 to 1454) shall prevent the Secretary of Agriculture, his agents and employes from taking fish at any time or place or in any manner for the maintenance or cultivation of fish in hatcheries or for the purpose of stocking ponds, lakes, or rivers, or from exterminating carp in any waters. * * **" (Italics the writer's.)

By the terms of this section, authority is vested in the Director of Agriculture, his agents or employes, to exterminate carp in *any* waters of this state. The manner and means so to do is left entirely to the good judgment and sound discretion of the Director of Agriculture. I am of the opinion, therefore, that the Director of Agriculture may authorize any person to act as his agent to carry on such work under his supervision and control. In other words, if the Director of Agriculture chooses to use or employ the officers of the East Bay Sporting Club as agents, to exterminate carp in the waters in question, he has authority so to do. Such work, of course, should be done under the supervision and control of the Director of Agriculture.

The case of *The East Bay Sporting Club vs. Miller, et al.*, supra, in no wise affects the provisions of this section.

Answering your question specifically, it is my opinion that, by the terms of Section 1447, General Code, authority is vested in the Director of Agriculture, his agents and employes to exterminate carp in any waters of the State. The manner and means of so doing is within the discretion and sound judgment of the Director of Agriculture.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2048.

BOARD OF EDUCATION—PURCHASE OF FURNISHINGS FOR SCHOOL DISTRICTS—IN CITY DISTRICTS—OTHER DISTRICTS—RULE AS TO COMPETITIVE BIDDING.

SYLLABUS:

1. *When a board of education determines to furnish a school house and the aggregate cost of the furnishings will, in a city district, exceed \$3,000, and in any other district \$1,000, the purchases must be made upon competitive bidding after due advertisement as provided by Section 7623, General Code, even though such furnishings consist of several types or classes of furnishings each of which will cost less than \$3,000 or \$1,000, as the case may be. This must be done regardless of whether or not all the different types or classes of furnishings may be purchased from one dealer or manufacturer, or whether they must necessarily be purchased from different dealers or manufacturers, and whether or not the board desires to provide the furnishings all at one time or at different times.*

2. *In securing bids for furnishings for a school building boards of education are not required to submit to bidders, specifications in minute detail, but may receive bids on specifications general in their nature, setting forth the purpose which the furnishings are intended to serve; and thereafter contracts may be let to the lowest responsible bidder by comparison of the amount of the bids in the light of the quality and utility of the articles upon which the bids are based.*

COLUMBUS, OHIO, May 2, 1928.

HON. WILLIAM B. JAMES, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, as follows:

"The board of education of the Montgomery township rural school district is erecting a school building which is to be used as a centralized school.

Section 7623 of the General Code, in the first paragraph thereof, provides as follows:

'When a board of education determines to build, repair, enlarge or furnish a school house or schoolhouses, or make any improvement or repair provided in this chapter, the cost of which will exceed in city districts three thousand dollars and in other districts one thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:'

The next paragraph of the statute then provides that in the cases above noted, the board shall advertise for bids for a period of four weeks and details the proceedings which shall be followed by the board in receiving and accepting bids and entering into a contract.

The furnishing and equipment for this school building, including the gymnasium and auditorium, will probably cost in the neighborhood of Ten Thousand Dollars. The furnishing and equipment will be of a varied character. In most instances furniture or equipment of any one class will cost less than one thousand dollars, but some kinds of property furnished, as, for example, seats for the auditorium, will cost more than one thousand dollars.

The board desires to know whether, under this section, it is necessary to advertise for bids for the purchase of these various classes of equipment; and if it is necessary in any case, is it required that the board advertise to purchase any one class of material, the cost of which is less than one thousand dollars?

One of the difficulties that arises is the fact that no one bidder would be prepared to bid on, or furnish, all of this equipment, and the board will desire to buy it at different times.

Paragraph 6 of the above cited section also presents a difficulty. This paragraph reads as follows:

'None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bids, or accept any bid for both labor and material for such improvement or repair which is the lowest in the aggregate.'

If specifications for seats in the auditorium are set forth in the advertisement, or specifications for any other line of equipment, unless they are the specifications followed by some one manufacturer, it may be that it will require a special construction, which would be more expensive than if the ordinary construction is used; and if the specifications of any one manufacturer should be used in the advertisement, then no other manufacturer could bid.

The board would like to have some definite policy outlined which is practical, and which it has a right to follow under this section, in purchasing the various lines of furnishing and equipment for this building."

Your inquiry suggests two questions which may be stated thus:

First: Is a board of education, which has determined to furnish and equip a schoolhouse the furnishing and equipping of which will in the aggregate exceed \$3,000 in a city school district and in a district other than a city district \$1,000, required to advertise for bids therefor before contracting for the purchase of such furnishings, even though it is desired to purchase the different classes of furnishings at different times and each class or kind of furnishings will cost less than \$3,000 or \$1,000, as the case may be, and may be more advantageously purchased from different dealers?

Second: When a board of education advertises for bids for furnishings for a school building, such as seats for an auditorium, is it necessary to provide detailed specifications upon which bidders must base their bids, or is it legal to receive bids on what are commonly called "open specifications" and thereafter to accept a bid submitted by a manufacturer or dealer based upon his own specifications?

Section 7623, General Code, reads in part as follows:

"When the board of education determines to build, repair, enlarge or furnish a schoolhouse, or schoolhouses or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, three thousand dollars, and in other districts one thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of proceedings of the board.

* * * * *

6. None but the lowest responsible bid shall be accepted. * * *
* * *"

It will be noted that the language of the statute is clear and is capable of but one construction and that is, that if the furnishings which the board determines to provide cost more than \$3,000 in city districts and \$1,000 in other districts, the purchases must be made upon competitive bidding. If the board of education of Montgomery Rural School District builds a new school building and determines to furnish it, and the furnishings will cost more than \$1,000, the board is required to advertise for bids. The statute does not say if one class of the furnishings, or part of the furnishings, cost more than \$1,000, bids shall be advertised for, but that if all of the furnishings cost more than \$1,000, bids must be received. Note the language—

"When the board of education determines to * * * furnish a school-house * * * the cost of which (meaning the furnishings) will exceed * * * one thousand dollars * * * except * * * it must proceed as follows: For the period of four weeks, the board shall advertise for bids. * * *"

It is apparent if the board expects to avail itself of a new school building it must determine to furnish the building, not a part of the building, or to furnish it with one class of necessary furnishings. The mere fact that it determines to purchase some part of the furnishings at one time, and later, as money is available, or for some other reason, to complete the furnishings or procure some other class of furnishings, does not lessen the board's necessary determination to furnish the building as a whole, and for the board to say that it did not intend to furnish but one class of furnishings which would cost less than \$1,000. in order to avoid making the purchase by competitive bidding, would simply be an evasion of the law and would render a contract for such furnishings void. Especially is this so when a new building is being furnished and it is apparent that the entire building needs furnishing.

It seems clear, therefore, that the limitation of \$1,000, purchases in excess of which must be done by competitive bidding, is based on the aggregate amount of furnishing-

ings which the board determines to provide and not on one item of furnishings or class or kind of furnishings.

The board can not evade the plain provisions of the law by determining to provide one class of furnishings and later another class, and so on, until the several kinds and classes of furnishings are all purchased, when it is apparent in the first instance that all the several kinds of furnishings are necessary in order to make of use the class or kind of furnishings the board may have determined to provide, as in a case of this kind when an entire new building is to be furnished.

To determine what is the aggregate cost of furnishings to be provided and whether or not the board of education is attempting to evade the law by determining to provide one class of furnishings in an amount costing less than \$1,000 and later more furnishings or another class, which in the aggregate would amount to more than \$1,000, and thus make separate purchases without competitive bidding, involves in each case a question of fact, not always of easy determination especially in cases where replacements of wornout furnishings are made.

In a situation, however, such as the one about which you inquire, there can be no question. If the furnishings in the aggregate exceed \$1,000 in cost, the purchases must be made by competitive bidding, after advertisements, as provided by the statute, although some or each of the different kinds or classes of furnishings will cost less than \$1,000 and it is not desired to purchase all the different classes of furnishings at one time.

When a statute such as Section 7623, *supra*, confers on a public officer the power to enter into a contract and requires the officer to advertise for bids before making the Contract, such advertising is a condition precedent to the exercise of the authority granted, and without the advertising there is no authority. Hence any contract not made through advertising for bids, when so required, is illegal and void.

The purpose of requiring public officials to let public contracts upon competitive bidding after due advertisement, as stated by a New York court in an early case, is to preclude favoritism on the part of public officials in whom authority to make contracts is vested and to whom supervision of the execution of contracts is entrusted. *Brady vs. New York*, 20 N. Y. 312. A more accurate statement, it seems to me, of the purpose of requiring competitive bidding as a prerequisite to the letting of public contracts, is that the requiring of public bidding is to procure for the public the best possible price for the object sought to be obtained. This is stated by the Supreme Court in *Perkins vs. Bright*, 109 O. S. 14, at page 17, as follows:

“The purpose of the statute is doubtless to enable school boards to have the schoolhouses and other structures under their control erected and maintained at the lowest cost to the public consistent with the best material and workmanship.”

The Circuit Court in the case of *Ampl vs. Cincinnati*, 17 O. C. C. 516, says with reference to the provisions of law contained in Section 7623, *supra*:

“The first object of the law was to afford to the people who were to pay the cost of this work the assurance that it should be done for the least amount of money and these provisions were placed there to bring about that result. Of course the law is founded upon the theory that the people are to get work which is the best possible to be had.”

In order to comply with the statute requiring competitive bidding and afford opportunity for proper competitive bidding, there must be afforded the opportunity for competition on equal terms. To do this requires the establishment in advance of a basis for exact comparison of bids so far as the subject matter will allow. This rule is stated in 19 R. C. L. 1070, in these words:

"To comply with a statute which requires competitive bidding for municipal contracts it is essential that plans and specifications be prepared in advance, and given out to all interested in the bidding sufficiently definite and explicit to enable them to prepare their bids intelligently on a common basis."

It was held in *Yaryan vs. Toledo*, 29 O. C. C. 259, affirmed without opinion by the Supreme Court in 76 O. S. 584, that:

"It is not necessary that plans in the sense of sketches and drawings be prepared, if the necessary information be given in written specifications."

In a general sense the plans and specifications must be prepared in advance as, stated in Ruling Case Law, above quoted, and each bidder bid on the same thing. The purpose of this is to establish a basis not only for bidders to prepare their bids but also for a proper comparison of bids after they have been submitted and thus secure real competition on the same thing. To do otherwise would destroy competition and defeat the purpose for which the law was enacted. This rule is stated in 19 R. C. L. 1070, as follows:

"The municipal authorities cannot lawfully ask each bidder to make his own plans and specifications and to base his bids thereon and then after the bids are received, adopt one of the offered plans with its specifications and accept the accompanying bid."

In applying these rules, considerable difficulty is experienced in determining how detailed specifications must be made in order to afford proper competition as is required by the statute. This is well illustrated in *Ampt ex rel. Cincinnati*, supra, affirmed without opinion by the Supreme Court in 60 O. S. 621. An able discussion of this question will be found in the opinion of the court in the above case. There a new pumping plant was desired for the city of Cincinnati, and the sufficiency of the plans and specifications of the pumps and engines was challenged. A statute provided that the commissioners having charge of the matter "shall, before entering into any contract, cause plans and specifications, detailed drawings, and forms of bids to be prepared and careful estimates of cost to be made."

The court said:

"To what extent were detailed drawings and specifications to go? Must it be the minutest detail in which every part of the machinery was to be drawn and specified, or was it sufficient to give specific and minute specifications as to what the machinery was to accomplish, the exact kinds of material to be used, the manner in which all the work should be done and the exact nature and kind of all the parts which were given, how all such machinery should be constructed, such as valves, riveting, bolts, etc.? The specifications of this class cover sixteen pages of printed matter, and as far as it goes it is as specific as it could well be. The detailed drawings and specifications, however, did not go to the extent of showing in detail every part and proportion of the work. What is called the 'working plans' of this machinery will cover more than a thousand pages. The question is: Did the law require that the specifications and drawings should go to this extent? Possibly to give the law a literal interpretation would require the detailed drawings and specifications to include each and every part of the machinery, and in doing this the trustees might have omitted to require that the machinery should perform certain work. * * *

Certainly what the trustees wanted to get for the city was engines and pumps that would pump a certain quantity of water in a given time. It was wholly immaterial to them where each nut, bolt, valve, and piece of material was to be located. All such details were nonessentials. It is to be borne in mind that these engines and pumps were to be made to do a certain work. In one sense, they were not inanimate, like a house or building, but they had a great work to perform, and it must be done in the most economical and approved way. What the trustees did was to leave out the nonessentials in their specifications and drawings, but all the essentials of the result desired, as to the capacity of the pumps to perform the work required, and the manner of the workmanship, and the materials to be used in their construction, are most specifically looked after and detailed.

In construing statutes it is a well known and valuable rule of the law that a thing may be within the law and yet not within the letter of the law, and a thing may be within the letter of the law, and still not within the law; and so it seems to us in this case that it is within the letter of the law that these specifications and detailed drawings mentioned in the statute should give every detail of every part of this great and complex machinery, but we do not believe it is within the meaning of the law that they should do so.

The first object of the law was to afford to the people who were to pay the cost of this work the assurance that it should be done for the least amount of money, and these provisions were placed there to bring about this result. * *

The machinery required for this work is only capable of being built by ten firms in the United States. * * * In this respect each builder has his own detailed plans, and no two are alike, and their tools and patterns are made to produce their own work after their own plans; therefore, if the detailed plan of this complicated work was to be given in all of its parts, the trustees were either compelled to adopt the plans of one of the concerns which had produced such work, or else get up a plan of the same kind of their own. It will be seen at once that the object of the law would be defeated if the board were to adopt the detailed plans of any one of the firms, for this would virtually destroy all bidding by firms other than the one whose plan was adopted, and place the trustees at the mercy of that firm. The price to the city would in all probability be much greater than it should be. This would destroy competition in bidding, the very thing the law was intended to bring about, and this must not be except from necessity. * * **

In most cases, where auditorium seats or similar furnishings are to be provided, it is not desired to provide articles different in detail from some one of those of standard manufacture. Each producer of auditorium seats provides seats of a type different in detail perhaps from those of all other manufacturers, but all serve the same purpose. If a board of education were to adopt a distinct type minute in all its details and manufactured by but one concern, all competition would be destroyed as manifestly the manufacture of that particular type would have a distinct advantage over other bidders. And if a board of education were to adopt some special type of seat, different from any that are on the market, the cost would be a great deal more than necessary.

It is recognized as advantageous and in the interests of the public welfare to receive bids on such furnishings as seats for an auditorium on specifications setting forth in a general way the type or kind of furnishings desired, and the general purpose for which the furnishings are desired and permit bidders to submit sample or detailed specifications with their bids. The particular type or kind of furnishings are selected after the bids are received upon taking into consideration the amount of the bids and the quality and utility of the articles upon which the bids were based. In my opinion this method is legal and meets with the requirements of the statute.

In specific answer to your questions, I am of the opinion that when a board of education determines to furnish a schoolhouse, the aggregate cost of which furnishings will in a city district exceed \$3,000 and any other district \$1,000, the purchase must be made upon competitive bidding after due advertisement, as provided by Section 7623, General Code, even though such furnishings consist of several types or classes of furnishings each of which costs less than \$3,000 or \$1,000, as the case may be. This must be done whether all the different types or classes of furnishings may be purchased from one dealer or manufacturer or whether they must necessarily be purchased from different dealers or manufacturers and whether or not the board desires to provide the furnishings all at one time or at different times.

In securing bids for furnishings for a school building, boards of education are not required to submit to bidders specifications in minute detail, but may receive bids on specifications general in their nature, setting forth the purpose which the furnishings are intended to serve; and thereafter contracts may be let to the lowest responsible bidder by comparison of the amount of the bids in the light of the quality and utility of the articles upon which the bids are based.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2049.

FEES—IN STATE CASES—MAYOR ENTITLED TO HOLD SAME IN HIS FAVOR.

SYLLABUS:

In all state cases, by the terms of Section 4270, General Code, the mayor of a city or village is entitled to hold the legal fees taxed in his favor.

COLUMBUS, OHIO, May 2, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your letter which reads:

“May the mayor of a village legally retain fees taxed and collected in state cases including prohibition cases?”

On April 5, 1927 (112 v. 141), the Legislature amended Section 4270, General Code, to read as follows:

“All fines and forfeitures in ordinance cases and all fees collected by the mayor, or which in any manner come into his hands, due such mayor or to a marshal, chief of police or other officer of the municipality and any other fees and expenses which have been advanced out of the municipal treasury, and all moneys received by such mayor for the use of the municipality, shall be by him paid into the treasury of the municipality on the first Monday of each month. At the first regular meeting of council in each and every month, he shall submit a full statement of all money received, from whom and for what purposes received and when paid into the treasury. Except as otherwise provided by law, all fines and forfeitures collected by him in state cases