

3162.

BID—FOR REWIRING COUNTY COURTHOUSE—WORDS “IN ACCORDANCE WITH PLANS AND SPECIFICATIONS” OMITTED—LEGAL.

SYLLABUS:

Legality of bid for re-wiring of Warren County Court House discussed.

COLUMBUS, OHIO, April 18, 1931.

HON. C. DONALD DILATUSH, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

“Enclosed herewith please find copy of ‘Notice to Contractors’ and of bid submitted by the Standard Electric Service of Middletown, Ohio, as a result of said notice.

Numerous bids were received by the Board of County Commissioners yesterday, for the re-wiring of the Warren County Court House at Lebanon, Ohio; and the bid, a copy of which is enclosed, was low. Several other bidders then raised the contention that this enclosed bid was not legal because it did not say in substance ‘in accordance with plans and specifications.’

I realize the wording may be a little peculiar, but gave as my opinion that the same was legal.

Due to the intense rivalry between the bidders and the possibility of the filing of an injunction, I am enclosing the same and respectfully request your opinion as to whether or not it is a legal bid under the laws of Ohio.”

A copy of “Notice to Contractors” which you enclosed with your communication provides:

“NOTICE TO CONTRACTORS

Sealed bids will be received by the Board of County Commissioners of Warren County, Ohio, at their office in the Court House at Lebanon, Ohio, until ten o'clock in the forenoon of Friday, April 10, 1931, for the furnishing of materials and performing the labor necessary to the re-wiring of the Warren County Court House, in accordance with plans, specifications and estimates for such project now on file in the office of the Auditor of Warren County, Ohio.

Each bid shall be accompanied by a certified check or bond in the sum of ONE HUNDRED DOLLARS (\$100.00) conditioned that the successful bidder shall enter into a contract for the furnishing of material and the performing of the labor necessary to the proper construction thereof in accordance with the terms of said contract.

The Board reserves the right to reject any or all bids.

BY ORDER OF THE BOARD OF COMMISSIONERS OF WARREN COUNTY, OHIO.

W. D. Corwin,
Carl J. Miller,
E. J. Beedle,

Commissioners

Will R. Lewis, Auditor-Clerk.”

The bid of the Standard Electric Service of Middletown, Ohio, a copy of which you also enclosed with your letter, is as follows:

"STANDARD ELECTRIC SERVICE
OFFICE OF ENGINEERING DEPT.

Middletown, Ohio
April 10, 1931

Board of County Commissioners,
Warren County, Ohio.

Gentlemen:

Having examined premises and plans and specifications for new wiring system for Warren County Court house, we propose to furnish labor and material to complete same for the sum of \$1590.00.

As the linoleum on second floor is much worn and will not stand handling, we propose to add to above the sum of \$150.00 to be expended as directed by your board in replacing linoleum, making total proposal—\$1740.00.

Very truly yours

STANDARD ELECTRIC SERVICE
By Stanley Powell"

Plans and specifications are the basis for competitive bids on public work. In this connection, section 2343, General Code, provides that when county commissioners decide to make an alteration to a public building, they shall cause to be made by an architect or engineer

"full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof."

It is to be observed from the above section and the following sections of the Code that no form of bidding proposal need be prepared by the architect or engineer for use of the bidders. I assume that none was prepared in the case at hand. However, there can be no question but that the bids in whatever form submitted, must conform to the specifications, for otherwise there would be no competition. See Dillon "Municipal Corporations," 5th Ed. Vol. II, page 1214; Opinions of the Attorney General, 1906, page 127, citing *Pease v. Ryan*, 7 O. C. C., 50; McQuillan on Municipal Corporations, 2nd Ed. Vol. III, Section 1322, citing *Andrews v. Detroit*, 233 Mich. 79, 206 N. W., 514.

In view of the fact that plans and specifications are the basis for competitive bids, it results that there is a presumption that a bidder makes his bid in accordance with plans and specifications. Accordingly, unless there is language in the form of proposal which would negative this presumption, it would seem that the incorporation of the words in said proposal, such as "in accordance with plans and specifications," is not absolutely essential. With this observation in mind, it is necessary to analyze the language of the bid in the present instance.

The first sentence of the bid states in substance that the bidder has carefully observed the plans and specifications for the project and that said project will be completed for a definite sum of money. The language used is clearly indicative of an intent to do the work according to the plans and specifications prepared for the job. Nowhere is there any language used to negative this intention.

After an exhaustive search, I am unable to find any Ohio case involving the exact situation such as is here presented. I do, however, find a case outside of Ohio, which appears to bear directly on the matter. I refer to the case of *Over-shiner v. Jones*, 66 Ind. 452, where it was stated in the fifth paragraph of the syllabus:

"An acceptance of a bid which contains no agreement by the contractor to perform the work according to the specifications, is not a valid contract."

However, an examination of the facts in said case discloses that the bidder made no reference whatever to the specifications which had been adopted by the board of trustees of the town for the improvement of a street. On the other hand, in the case here under consideration, the Standard Electric Service did refer to the plans and specifications in its bid. It is undoubtedly true that it is customary for bidders to use language such as "I propose to furnish all material and labor necessary for the completion of according to plans and specifications on file in for the sum of" However, as heretofore pointed out, it is not essential that this set form of words be used, so long as the language used shows no indication that the bid is not based on the specifications.

In the case of *State ex rel. Ross v. Board of Education*, 42 O. S., 374, it was stated in the third paragraph of the syllabus that:

"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."

This principle is the weight of authority throughout the United States. The authorities on this subject are reviewed extensively in an annotation beginning on page 838 of Volume 65, American Law Reports Annotated.

It may be appropos here to consider the legal effect of the second paragraph of the bid under consideration. Subsequent to the receipt of your letter enclosing the notice to contractors and bid, a copy of the specifications for the re-wiring of the Warren County Court House was sent to me at my request. After careful examination, I find nothing therein relating to the linoleum on the second floor of the courthouse. Therefore it appears to me that the second paragraph of the bid under discussion must be regarded as mere surplusage and not such an addition to the proposal, as would destroy the competitive feature of the same.

In this connection, it may be pointed out that Section 2317, General Code, provides for a form of proposal to be prepared by the State Department of Public Works for use of bidders on state work, and further states that a "proposal shall be invalid and not considered unless such form is used without change, alteration or addition." In an opinion appearing in Opinions of the Attorney General for 1928, Volume I, page 86, it was stated in the syllabus:

"A proposal or bid submitted by a contractor for the erection or construction of a building or structure for the use of the State which contains an additional or informatory bid outside of the work covered by the

approved form of the proposal, but which can be eliminated without affecting in any way the competitive character thereof, is not invalid because of such addition, within the contemplation of Section 2317, General Code."

In the case of a county as heretofore pointed out, there is no requirement that a form of proposal be prepared, by the county commissioners, and also no provision making any change, alteration or addition to a proposal illegal. Consequently, it would appear to me to be a much stronger case here for the validity of the bid than the case involved in the 1928 Opinion above, in which it was held that a similar bid to the one involved here, was legal, despite the fact that an addition was there made to the approved form of proposal.

Based on the foregoing discussion, I am of the opinion that the bid submitted by the Standard Electric Service of Middletown, Ohio, is a legal bid under the laws of Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3163.

APPROVAL, LEASE TO LANDS OF K. E. MITCHELL AND L. J. MITCHELL IN MERCER COUNTY, OHIO, FOR GAME REFUGE PURPOSES.

COLUMBUS, OHIO, April 20, 1931.

HON. JOHN W. THOMPSON, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval as to form, a lease wherein K. E. Mitchell and L. J. Mitchell grant to the State 211.49 acres situated in Franklin Township, Mercer County, Ohio, to be used for State Game Refuge purposes under the provisions of Section 1435, of the General Code. Said lease is for the term of three years.

Upon examination, I have found said lease to be in proper legal form and have accordingly endorsed my approval thereon, and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3164.

INSTITUTIONS OF LEARNING—WHEN RIGHT TO GRANT DEGREES MAY BE RESCINDED BY SUPERINTENDENT OF PUBLIC INSTRUCTION.

SYLLABUS:

1. *The Superintendent of Public Instruction, upon being advised that an institution of learning, which had previously been furnished a certificate that its course of study had been filed in the office of the Superintendent of Public Instruction and that its equipment as to faculty and other facilities for carrying out that course are proportionate to its property and the number of students in actual attendance so as to warrant the issuing of degrees by the trustees thereof, in accordance with Section 9923, General Code, is not maintaining its course of study and the facilities for carrying out that course, so as to warrant it conferring degrees, should cancel*