

You have submitted Encumbrance Estimate No. 2404, in triplicate, which contains the certificate of the director of finance to the effect that there are unencumbered balances legally appropriated, in the aggregate sum of \$35,935.45, to cover the purchase of the premises heretofore indicated in numbers 1, 2, 3, 4 and 5. Said encumbrance estimate is herewith enclosed.

The deeds should be recorded in Scioto county and then filed with the abstracts in the office of the auditor of state.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

3221,

BIDS AND BIDDERS—PROPOSAL FORM USED BY COUNTY IN TAKING BIDS FOR ROAD IMPROVEMENT MAKES PROVISION FOR BOTH UNIT PRICES AND LUMP SUM PRICE—WHEN COUNTY COMMISSIONERS MAY AWARD CONTRACT TO ONE WHO SUBMITS LOWEST LUMP SUM OFFER OMITTING UNIT PRICE ON ONE SMALL ITEM.

*Where a proposal form used by a county in taking bids for a road improvement ( Secs. 6945 and 6948 G. C.) makes provision for both unit prices and a lump sum price, and states that comparison of bids will be made on the basis of estimated quantities and that the right is reserved to the county to increase or diminish quantities or omit items, the county commissioners may in their discretion award the contract to one who submits the lowest lump sum offer, notwithstanding that he has omitted to specify a unit price on one small item named in the specifications.*

COLUMBUS, OHIO, June 16, 1922.

HON. R. M. OSTRANDER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—You have requested the opinion of this office as to the following:

“Our county commissioners are now in a controversy with a contractor regarding the sufficiency of a bid. The county commissioners advertised for bids as provided in section 6945. The county engineer uses the enclosed proposal blank.

It seems the plans and specifications called for the removing of five trees which the lowest contractor neglected to bid on. The lowest bidder, however, filled out item No. 39 which was a lump sum bid on the whole work. The county commissioners awarded this contract to him. The next lowest bidder complained that the lowest bidder's bid was not sufficient in law.

My contention is under section 6945 that the county commissioners may award this bid either upon the basis of a unit price bid or on the lump sum bid and that they have within their discretion the right to award the contract to any bidder who fills out item No. 39 of the enclosed proposal blank, even though he neglects to fill out the other items.

The county surveyor tells me that the county commissioners awarded the contract upon the basis of a lump sum bid but called for unit price bids in order to ascertain as near as possible upon what basis the bidder

figures his contract, in other words, to aid the county commissioners in ascertaining under the statute if the lowest bid is the best bid."

With your letter you enclose the printed form of proposal blank mentioned in your letter. The blank is too long for insertion here. In brief, however, it consists of several parts as follows:

- (1) Descriptive heading.
- (2) "Instructions to Bidders"—containing among others, the provisions following:

"Bids will be compared on the basis of the engineer's estimate of the quantities of work to be done and the materials to be furnished, which, though the result of careful measurements and computations and stated with as much accuracy as is possible in advance, are approximate only. The right is expressly reserved to increase or diminish the quantities or altogether omit any items that in the judgment of the engineer and board of county commissioners may be deemed advisable."

- (3) "Proposal" which in substance is as follows:

"PAINESVILLE, OHIO,

----- 19----

*To the Board of County Commissioners, Lake County, Ohio.*

GENTLEMEN:—The undersigned propose to do all the work and furnish all the materials, appliances, tools and labor required for the above named improvement in accordance with the form of contract and with the specifications and plans of said improvement now on file in the office of the county surveyor and of the county auditor of said Lake county, and bind themselves upon the acceptance of this proposal to enter into and execute a contract in the form of said specifications and contract for the execution of said work.

Unit prices as follows, to-wit: (Here follows a blank for the insertion of unit prices.)

The undersigned, having carefully examined the site, plans, profiles, and specifications for the improvement known as ----- Road, in ----- Township, Lake County, Ohio, propose to furnish all materials, all the tools and do all the work necessary for said improvement in accordance with said plans, profiles and specifications for the following price:

For the sum of (in ink) ----- Dollars (\$-----)"

It is to be noted that the unit prices are not to be entered as a lump sum for each item, but that the mere unit price itself is to be entered; that is, for instance, the price per yard of excavation; or the price per lineal foot of drain tile, etc.

You state that the bids now in question were taken under the provisions of section 6945 G. C. The only part of that section which is now in point reads as follows:

" \* \* \* The county commissioners may let the work as a whole or in convenient sections as they may determine. They shall award the contract to the lowest and best bidder. The contract shall be let upon the

basis of lump sum bids, unless the commissioners order that the same be let upon the basis of unit price bids, in which event it shall be let upon such basis."

The complaint which has now arisen, as set forth in your letter, is only the natural outgrowth of the fact that the proposal form is faulty. The form fails to make clear to prospective bidders whether the county commissioners will award the work on the basis of lump sum bids and enter into a contract accordingly, or will, on the other hand, make their award upon the basis of unit price bids and enter into a contract on that basis. Quite true, if the bidding blank is completely and logically filled out, the lump sum will equal the total of the unit prices when those unit prices are multiplied by the respective estimated quantities; but the fact remains that there might be a substantial difference in payments to the contractor if the contract price were to be figured on unit prices or upon lump sum, due to the fact that there might be changes in the quantities obtained in the actual doing of the work as compared with the surveyor's estimated quantities. The last paragraph quoted from your letter above indicates the surveyor's construction of the proposal blank; but the point is that there should be no doubt left from a reading of the proposal blank itself as to how it is to be construed.

However, notwithstanding these observations, there is a paragraph in the proposal which is sufficiently definite in the opinion of this department to dispose of your present inquiry; and that is the last paragraph quoted from the proposal. In that paragraph, the bidder clearly proposes to do all of the work called for in the specifications for a lump sum price; and therefore the bidder has put himself in a position where the county commissioners can hold him for the doing of the entire work at that price even if the bidder has failed to take into account all of the items called for in the plans, profiles and specifications. Hence, the fact that the bidder omitted the item for the removal of trees in setting out his unit prices will not relieve him from including that item of work in the carrying out of his contract.

This being the case, it is the conclusion of this department that the county commissioners might, as they did, in the exercise of their discretion, waive the point that the bidder did not make a technically correct proposal, in that he omitted the unit price for the removal of the trees.

Consideration will now be given to several objections which may possibly be urged against the conclusion stated.

*First:* That the provision in the proposal blank

"Bids will be compared on the basis of the engineer's estimate of the quantities of work to be done and the materials to be furnished", etc.

cannot operate unless the bidder includes all items in his proposal, and that accordingly the low bid described in your letter is not such a bid as is entitled to any consideration; and that if it be admitted that a bidder may omit the unit price for one item, he may by parity of reasoning omit the unit prices on all items.

This objection might be well taken if there were not a lump sum proposal included in the present bid. As already pointed out, the low bidder is not in position to take advantage of his omission. He has omitted but one item; and if effect must be given to the provision last above quoted, there is room to do so in the light of the lump sum bid. In other words, a comparison may be made on the basis of the estimated quantities because the bidder has in effect agreed to remove the five trees without pay, except as his pay may be reflected in his lump sum bid for the entire work.

The further objection suggested that under this reasoning the bidder might entirely omit filling out the unit prices leaves out of consideration the element of sound discretion on the part of the county commissioners. It is to be presumed that acting in the public interest they would reject a bid which was so informal in character as to entirely ignore what the commissioners might consider a vital part of the proposal.

In the case of the State ex rel. Eberhardt vs. Cincinnati, 1, O. N. P. 377; 3 O. D. 48, one who claimed to be the lowest responsible bidder brought an action in mandamus to compel the award to him. The court refused the writ upon the ground that the relator had omitted an item from his bid. The ground of the refusal of the writ of mandamus was that relator was not entitled to be treated as the lowest responsible bidder or in fact to be treated as a bidder at all. Two points, however, are worthy of note: (1) That the facts stated in the opinion do not show that a lump sum proposal had been called for or offered; and (2) that the court expressly reserved the question whether the board whose duty it was to make the award might in its discretion waive the informality and treat a bid such as relator's as being the lowest responsible bid.

In this latter connection it is to be borne in mind that the Ohio rule is:

"Laws which provide that public contracts shall be made with the lowest and best bidders, with or without the right on the part of the awarding officer or board to reject any and all bids, or which contain kindred provisions, are enacted for the benefit of property holders and taxpayers and not for the benefit of or to enrich bidders, and are to be executed with sole reference to the public interest."

Wood Preserving Co. vs. Sundmaker, 186 Fed. 678; 110 C. C. A. 224; 9 O. L. R. 389, 397.

It is but proper to say here that the provision last above quoted from the proposal is misleading and out of place in the presence of a lump sum bid.

*Second:* That the further provision in the proposal blank

"The right is expressly reserved to increase or diminish the quantities or altogether omit any items that in the judgment of the engineer and board of county commissioners may be deemed advisable",

makes necessary the naming of unit prices for all items, and in the light of section 6948 G. C. causes a bid to be wholly invalid unless a unit price is specified for each and every item.

Said section 6948 G. C. reads as follows:

"In case of an unforeseen contingency not contemplated by the contract, allowances for extra work may be made by the county commissioners, but they must first enter into a new contract in writing for such extra work. In all cases where the amount of the original contract price is less than ten thousand dollars, and the amount of the estimate for such extra work exceeds five hundred dollars, the preceding sections relating to advertising for bids shall apply to the letting of contracts for such extra work. If the amount of the original contract price is ten thousand dollars or more, the preceding sections relating to advertising for bids shall apply to all cases where the estimate for such extra work exceeds five per cent of the original contract price for such work. If the estimate for such

extra work is less than five hundred dollars, in all cases where the amount of the original contract price is less than ten thousand dollars, or if the estimate of such extra work is less than five per cent of the original contract price in all cases where the original contract price is ten thousand dollars or more, the contract for such extra work may be let by the county commissioners at private contract without publication or notice, but no contract shall be awarded for such extra work at any price in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with such contract. In case of any new class or kind of work the county commissioners and contractor shall agree as to the price to be paid. The contractor shall submit his bid in writing, and if accepted by the commissioners they shall immediately enter their acceptance on the journal. The costs and expenses of such extra work shall be paid by the county commissioners out of any funds available therefor, and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement."

Said section was the subject of an opinion of this office under date December 3, 1915 (Opinions, Attorney-General, Vol. III, page 2330), wherein the view was expressed that said section when read with the then form of section 6945 did not permit of the awarding of contracts on a unit price basis. It will have been noted that since the rendition of said opinion section 6945 has been amended so as expressly to permit of the making of contracts upon the unit price basis.

It is quite true that cases might arise in practice where a county would be faced with a serious situation when the provision last quoted from the proposal blank is read in the light of section 6948 G. C. if all or a substantial part of the unit prices had not been specified. That is to say, it is possible that the county could not call for any extra work at all in connection with the original contract because no limitation had been set up in the original contract upon prices for extra work. However, the question that might thus arise in an extreme case is not believed to be involved in your inquiry, and is not passed upon, for that in the present instance only one item has been omitted from the unit price schedule. Of course, it may be said that in the doing of the work it may become necessary to remove more than five trees, and that there is no price and consequently no limitation of amount named for that contingency. But item 16 of the proposal blank relating to the removal of trees, reads:

"For each tree removed, *as specified*, the sum of \_\_\_\_\_."

Therefore, this item must be treated as relating to the removal of five specific trees and could not in any event be used as a limitation for prices on the removal of additional trees. In this situation it follows that the removal of additional trees would come within the sentence of section 6948 reading:

"In case of any new class or kind of work the county commissioners and contractor shall agree as to the price to be paid."

This provision is subject to the other limitations of section 6948 requiring competitive bids in case the proposed extra work exceeds certain amounts.

Likewise on the score of the reservation of the right in the county commissioners to diminish quantities or omit items: If such reservation has been effectively made in the light of the acceptance of the lump sum bid, the reservation is not, in the case at hand, impaired by the omission of the one item in question. If all, or a

part, of the work involved in the removal of the five trees is ordered omitted, that fact will prove immaterial to the county, since, as already pointed out, that work is being done without cost to the county.

Upon the whole, then, notwithstanding the objections indicated, we get back to the proposition that in the present instance the commissioners were within the exercise of a sound discretion in treating as the lowest and best bid, the lowest lump sum bid submitted.

Since the foregoing was dictated, you have, in a personal call at this office, stated that the difference between the lowest bid submitted, on which the award has been made, and the next higher bid, is about sixteen hundred dollars; while the estimated cost of the removal of the five trees is about fifty dollars. These facts strengthen the conclusion which this office has above stated.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

3222.

“PUBLIC MONEY” AS DEFINED IN SECTION 286 G. C. PASSED UPON  
 —THE TERMS “REWARD”, “GRATUITY” AND “COLOR OF OFFICE”  
 CONSIDERED—PAYMENT OF \$2,500 BY OWNER OF STOLEN  
 PROPERTY UPON RECOVERY TO DEPUTY SHERIFF.

1. *Whether or not the payment of the sum of \$2,500 by the owner of stolen property, upon recovery and return, to a deputy sheriff, whose services have been instrumental in the return of the property to the owner, may be considered as a “reward”, “gratuity” or as “public money” in the hands of the officer under the provisions of section 286 G. C., are questions of mixed law and fact to be determined from a consideration of all the surrounding circumstances.*

2. *Definitions of terms “reward”, “gratuity” and “color of office” briefly considered in their significance and application to the acts of public officials.*

COLUMBUS, OHIO, June 16, 1922.

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

GENTLEMEN:—Receipt is acknowledged of your letter of recent date which reads as follows:

“We respectfully request you to render your opinion upon the following matter:

Two truck loads of whisky were being transported from Lynchburg, Ohio, to New York City when in the neighborhood of Elyria, Ohio, the drivers and those in charge of the trucks were held up and trucks and whisky taken from them. The owner of the whisky was with one of the trucks and he immediately reported the hold-up to the sheriff of Lorain county and police of the city of Elyria. The sheriff and the police attempted to locate the trucks the same night in which the hold-up took place but were unable to do so. Sometime during the night the owner of the whisky, who had gone on to Cleveland, called up either the sheriff or the police department and stated that he had information that the trucks