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HIGHWAYS, DIRECTOR OF—AUTHORITY—REJECTION OF ALL BIDS — READVERTISE FOR BIDS — LIMIT OF GOOD FAITH—5513.01 and 5513.02 RC.

SYLLABUS:

Under the provisions of Sections 5513.01 and 5513.02, Revised Code, the director of highways may lawfully reject all bids for the purchase of road materials submitted pursuant to his invitation therefor, and re-advertise for bids for such materials, provided such rejection is made in good faith and for the public benefit.

Columbus, Ohio, April 19, 1957

Mr. George J. Thormyer, Acting Director
Department of Highways, Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion which reads as follows:

“We are enclosing herewith the entire files of our Purchasing Department on Invitations to Bid for the furnishing of

Aggregate, Numbers 24-B, 25-B, and 26-B. A perusal of the bids furnished in response to this invitation discloses that the aggregate can be purchased by this Department much cheaper by accepting the bid providing for delivery by truck. Since the Invitations to Bid stated that delivery was to be by rail, we are inquiring and request your informal opinion as to whether or not all bids received may be rejected, and a subsequent second Invitation to Bid on the basis of truck delivery may be issued."

In Sections 5513.01 and 5513.02, Revised Code, provision is made for the purchase of machinery, materials and supplies by the Director of Highways pursuant to invitations for competitive bidding. In Section 5513.02, Revised Code, there is found the following provision :

"All purchases shall be made by the director from the lowest responsible bidder able to meet the specifications and conditions prescribed by the director * * *."

Here it is proper to note initially that there is no positive requirement in this language that the director proceed with the purchase of materials, etc., by awarding the contract to the lowest responsible bidder. There is, on the contrary, merely the requirement that such purchases as are made shall be made from the lowest responsible bidder, for this language does not preclude the notion that the direction may elect to reject all bids, either because he chooses not to proceed with the work in question, or because he elects to re-advertise for further bids.

It is quite generally established that constitutional or statutory provisions authorizing public authorities to reject any and all bids for public work or contracts are valid. 31 A. L. R. 2d, 471. As to the right of public authorities to reject all bids and re-advertise in a situation where the statute does not confer the authority to do so, I am unable to find any Ohio decisions squarely in point. In an annotation in 31 A. L. R. 2d, 475, however, there appears this statement :

"In the absence of, or without mentioning, a constitutional or legislative provision expressly reserving the right to reject all bids for public work or contract, the courts have recognized that the public authorities have the right to reject all bids."

In 43 American Jurisprudence, 788, Section 45, we find this statement :

"Under a statute requiring that all contracts shall be awarded to the lowest bidder, the authorities charged with awarding the contract, acting in good faith, may refuse so to award the contract

if they deem it for the best interest of the city to do so, and may reject all of the bids and readvertise. * * *"

In State, *ex rel.* Clough and Co., v. Commissioners of Shelby County, 36 Ohio St., 326, the court was concerned with a situation in which two bids were made for the construction of a bridge. The commissioners accepted the lower of the two bids, but that bidder failed to tender a good and sufficient bond. Thereupon, the higher bidder sought a writ of mandamus to compel the commissioners to award the contract to him. The court refused to allow the writ and permitted the commissioners to re-advertise for bids. In the course of the opinion by Judge Boynton it was said, page 330:

"It is not however improper to remark, that in thus holding, we do not wish to be understood as implying that the commissioners under the act of 1869, were not authorized to re-advertise for further proposals, where, for any valid reason, the contract was not made with the person offering to do the work and furnish the materials at the lowest price, or that they were bound at all events to let the contract to him; nor do the cases from Darke county, *supra*, so decide. The principle of those cases is, that the commissioners, having determined not to re-advertise for further proposals, were bound to award the contract to the bidder offering to do the work and furnish the materials at the next lowest price, where the lowest bidder failed to comply with the statute by entering into the contract and executing the requisite bond * * *"

It seems to be well established, however, that a public agency may exercise the right to reject all bids only when acting in good faith and for the public benefit. 31 A. L. R. 2d, 483.

In the instant case, it seems clear that the decision to reject all bids and re-advertise will promote the public good by enabling the state to secure a more advantageous price by changing its specifications as to delivery, and I am unable to see that this constitutes a breach of good faith on the part of the director.

In any event, it must be remembered that a bid in a case of this sort constitutes an offer, and that there is no contract brought into being until such bid is accepted. In order to conclude that there is a mandatory duty to accept one of the bids submitted in the course of competitive bidding, it is necessary to find that mandate in the statute. In the case at hand, I do not find that mandate, but merely requirement that where

it is decided to make a purchase that purchase "shall be made by the director from the lowest responsible bidder."

Accordingly, in specific answer to your inquiry, it is my opinion that under the provisions of Sections 5513.01 and 5513.02, Revised Code, the director of highways may lawfully reject all bids for the purchase of road materials submitted pursuant to his invitation therefor, and re-advertise for bids for such materials, provided such rejection is made in good faith and for the public benefit.

Respectfully,
WILLIAM SAXBE
Attorney General