

2128.

TOWNSHIP TRUSTEES — TO DETERMINE “LOWEST RESPONSIBLE BIDDER” CONSIDER ELEMENTS: QUALIFICATION AND RESPONSIBILITY OF BIDDER, PRICE, QUALITY AND EFFICIENCY OF MACHINERY — SPECIFICATIONS UNDER SECTION 3373 G. C.—MAY NOT BE REDUCED TO FINAL ANALYSIS, RESULT OF WHICH WILL STIFLE COMPETITION — ADVERTISEMENTS — SALE OR PURCHASE OF MACHINERY UNDER SECTIONS 3281, 3373 G. C.—MAY NOT BE COMBINED.

SYLLABUS:

The determination as to the “lowest responsible bidder” under the terms of Section 3373, General Code, should be made by taking into consideration the quality and efficiency of the machinery to be purchased, the qualifications and responsibility of the bidder, together with the price of the machinery.

In setting up specifications for the purchase of machinery under Section 3373, General Code, supra, the township trustees may not so reduce the details to a final analysis, the direct result of which will stifle competition.

Township trustees may not combine advertisements for the sale of machinery under Section 3281, General Code, and for the purchase of machinery under Section 3373, General Code.

Columbus, Ohio, April 3, 1940.

Hon. D. Harland Jackman, Prosecuting Attorney,
25-1/2 South Main Street,
London, Ohio.

Dear Sir:

I am in receipt of your request for my opinion on the following subject:

"We are running into considerable difficulty in our county in connection with purchases of motor patrol graders by township trustees.

This involves, in particular, an interpretation of General Code Section 3373 providing that these purchases must be made from the lowest responsible bidder after advertisement as therein provided for.

The first question concerning us is to what extent the township trustees are permitted to set up specifications in their advertisement for a motor patrol grader. In other words, can they specify whether the control shall be mechanical or hydraulic; or can they specify the horsepower, name and number of cylinders of motor to be used in grader? Can they specify tire sizes, wheel types, scarifier types, gross weight, and other matters of this kind which have a tendency generally to reduce the number of competitive bids?

What is the correct interpretation of "lowest, responsible bidder"? Does that language mean that the trustees are required to buy from the bidder having the lowest dollar bid, even though that machine may not contain all of the devices and equipment, which the trustees feel should be available?

There is also a general practice in Ohio for the trustees to advertise in the same publication that they will trade in a motor patrol grader, or other machinery, as a part of the purchase price on the new purchase. Under Ohio law, this is apparently not provided for, but the statutes do apply to certain circumstances under which chattel property can be sold to the highest bidder when no longer needed by the townships. Would it be lawful to combine the advertisement for sale and the advertisement for purchase of the new equipment in one advertisement, setting the date the same in each and permitting each of the prospective bidders to submit a conditional bid for the used equipment. The condition being that they not be required to purchase the old grader, unless they are awarded the contract for the new.

Your opinion on these questions will be very much appreciated."

Section 3373, General Code, referred to in your communication, reads as follows:

"In the maintenance and repair of roads the township trustees may proceed either by contract or force account. When they proceed by contract the contract shall, in case the amount involved exceeds two hundred dollars, be let by the township trustees to the lowest responsible bidder after advertisement for bids once not later than two weeks prior to the date fixed for letting of such contract, in a newspaper published in the county and of general circulation within such township, if there be any such paper published in the county, but if there be no such paper published in the county, then in a newspaper having general circulation in said township. If the amount involved is two hundred dollars or less the contract may be let without competitive bidding. Such contract shall be performed under the supervision of a member of the board of township trustees or the township highway superintendent.

Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. The township trustees shall provide suitable places for housing and storing machinery and tools owned by the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for carrying into effect the provisions of this section or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. All payments on account of machinery, tools, material, labor and teams shall be made from the township road fund as provided by law. All purchases of materials, machinery, and tools, shall, where the amount involved exceeds five hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner hereinbefore provided. All force account work shall be done under the direction of a member of the board of township trustees or of the township highway superintendent."

In the case of *Yargan v. City of Toledo*, reported in 8 O. C. C. (n.s.), the Court stated at page 20 that the following elements should be considered by the awarding authorities in the letting of contracts:

"1st. The quality of the thing, the feasibility of the plan, the efficiency of the thing to be furnished, etc.

2nd. The quality of the bidder, his qualifications, responsibilities, etc.

3rd. The price in view of all other considerations."

and immediately following the above statement, the Court made this observation:

"So that in determining which is the 'lowest and best bidder' the board may in its discretion determine, substantially, which is the best proposition, all things considered. This is a wide departure from the law requiring the letting to the lowest bidder."

In the case of *State, ex rel Buehler Printing Company v. French*, reported in 6. O. L. A., p. 606, the Court had the following to say:

“There can be no question but that the ‘lowest responsible bid’ means not only the bid by one whose pecuniary ability to perform is best, but the one in point of skill, ability and integrity who is most likely to do faithful, conscientious work and fulfill the contract promptly according to its letter and spirit.”

The Court of Appeals for the then Sixth Judicial Circuit in the case of *State of Ohio, ex rel The Bryce Furnace Company v. The Board of Education of Toledo, Ohio*, 14 O. C. C., p. 25, discussed the question of price as an element of a bid as follows:

“The question of price, manifestly, might have some influence with the Board of Education in determining which one it would accept, if all of them, or two, or three of them are substantially equal in merit, but it would not be binding on the board to accept one because it was the lowest bid. Although they may consider it, it still has the right, which the law has given it, to reserve the determination of the particular system it will adopt, until all bids are opened, especially where these systems are largely covered with patents; and we fail to see any way in which the law controls that discretion in the board of education.”

In the year 1929 the then Attorney General had under consideration a similar question propounded to him in regard to the setting up of detailed specifications for the purchase of road machinery and the following statement is contained in Volume I of the Opinions of the Attorney General for the year 1929 at page 622:

“As suggested in the 1923 opinion, competitive bidding is one of the established principles of this state governing all purchases for the state or the subdivisions thereof, and may not be dispensed with except under circumstances where the application of this principle is impossible. Undoubtedly, it is within the power of the board of township trustees, in adopting the specifications for which bids are asked, to indicate the character of truck it desires. That is to say, it may require certain features which it is believed necessary and essential to its use in connection with the work for which it is purchased. However, from a practical standpoint, it is apparent that in view of the numerous makes of road machinery existing, it would be difficult for the township trustees to determine that there is but one particular make of truck which contains the features that are desired. Furthermore, it is possible for township trustees to specify generally the character of truck desired, and in determining which is the lowest and best bid, such board may take into consideration the various features of such truck as are bid upon by the respective bidders.”

What has been said in the foregoing opinion in reference to a motor truck may be true in a great many respects with regard to a motor patrol grader as it would appear from the very nature of the work to be done by such a machine that it would admit of many deviations in the form of construction and in the class of material.

In setting up specifications in such great detail, the authorities will eventually find themselves bidding upon a monopolistic machine and such practices have been condemned by the Court in the case of Pohlhauser v. Board of Education of Cleveland, 21 O. C. C., p. 259.

In 33 O. J., p. 677, the following statement is made:

"It is generally held that the exclusive specification of patented or otherwise exclusively controlled materials, devices, etc. is destructive of competition and not permissible in any case where competition is actually required. Accordingly, specifications which require the use of material within the control of one concern, are ordinarily regarded as illegal, as are specifications which are intentionally so drawn as to be capable of fulfillment by one manufacturer."

In the case of Fischer Auto and Service Company v. City of Cincinnati, et al., reported in 16 O. N. P. (n.s.), p. 369, the Court enjoined the carrying out of a contract where the specifications were so drawn as to prevent compliance therewith, except by one concern.

The Court in the case of Mog v. City of Cleveland, et al., in 18 O. N. P. (n.s.) p. 149 stated:

"The adoption of plans and specifications for a public improvement which restrains free competitive bidding by requiring the exclusive use of any article which is controlled by a single person, firm or corporation, is prohibited."

The principle of competitive bidding must be strictly pursued and there must be an opportunity afforded for bona fide competition whenever possible; otherwise, the law becomes a dead letter.

In considering the question of the sale of the present motor patrol grader, the township trustees are to be guided by Section 3281, General Code, which section in part reads as follows:

" * * * When the township has property which the trustees by resolution find it does not need, the trustees may sell and convey the same. Such sale must be by *public auction* and upon notice thereof published once a week for three weeks in a newspaper published, or

of general circulation in such township, the last of said publications to be at least five days before date of sale. * * * ”

(Emphasis the writer's.)

Since the words “public auction” appear in the above section, it is necessary to determine what constitutes a public auction. In connection therewith your attention is directed to Section 5871, General Code, wherein it is provided:

“Property sold by auction shall be sold to the highest bidder. * * * ”

In the case of *Andrews v. Watson*, found in 12 O. C. D., p. 693, the Court was considering a suit to recover damages for failure to accept and pay for certain shares sold at auction and in the course of the opinion, the Court used the following language:

“in the case where a sale is made by an auctioneer, there should be enough evidence to show a bid was made and the property was ‘knocked off’ as it is commonly termed to the bidder.”

From the facts as they appear in your communication, it would appear that instead of having open bidding at such auction, the authorities would have conditional offers, such offers depending entirely upon the bids being accepted in the proceedings under Section 3373, General Code. There would be no crying of a sale, no fall of the hammer and no money would change hands, the proceedings being merely to determine the possible debtor and creditor relationship of a bidder on a new machine. These proceedings might eventually have the effect of narrowing the scope of bidders merely to dealers in new machines and foreclose the rights of those persons who might in some instances desire to bid solely on the machine no longer needed by the township trustees.

It appears from an examination of Sections 3281 and 3373, *supra*, that they differ in several respects, namely, the former provides for three distinct publications while the latter provides for merely a single publication. In the event the township trustees combine these advertisements, they will be contracting for publications in excess of the number directed by the statute and it is my opinion that the case of *The Vindicator Printing Company v. The State of Ohio*, is dispositive of your question. The first syllabus of this case reported in 68 O. S., p. 362 reads as follows:

“1. Where the number of publications of a sheriff's election proclamation or other public notice, is fixed by statute, there is no authority in the board of county commissioners, or other county of-

ficer, to contract for publications in excess of the number directed by statute. The board is also without authority to allow a claim for such excessive publications, and the allowance of such claim does not bind the county. Nor is authority to adjudicate and allow such claim given by the fact that with the charge for unauthorized publications there is, on the same paper, a charge for a publication which is authorized by statute.

* * *

* * *

* * * "

Therefore, in specific answer to your question, I am of the opinion that in determining who is the lowest responsible bidder under Section 3375, General Code, the awarding authorities should take into consideration the quality and efficiency of the machine to be purchased, the qualifications and responsibility of the bidder, together with the price of the machinery.

In setting up specifications for the purchase of machinery under Section 3373, General Code, the township trustees may not so reduce the details to a final analysis, the direct result of which will stifle competition.

Township trustees may not combine advertisements for the sale of machinery under Section 3281, General Code, and for the purchase of machinery under Section 3373, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.