

1921

SUPERINTENDENT OF PURCHASES AND PRINTING:

1. HAS AUTHORITY TO WAIVE DEFECTS IN FORM OF BID, SECTION 196-7 ET SEQ., G. C. WHEN NO PREJUDICE WILL RESULT TO RIGHT OF ANY OTHER BIDDER OR OF PUBLIC.
2. WHERE BIDS INVITED FOR CERTAIN SUPPLIES, SECTION 196-7 ET SEQ., G. C. AND FORM ISSUED CALLS FOR WRITTEN PROPOSALS ON FORM, SIGNED BY BIDDER, TELEGRAPHIC BID SUBMITTED WITHIN TIME LIMITED, CLEARLY REFERRING TO SPECIFICATIONS, MAY BE CONSIDERED TO DETERMINE LOWEST AND BEST BID.

SYLLABUS:

1. The superintendent of purchases and printing has authority to waive defects in the form of a bid received pursuant to Section 196-7 et seq., General Code, when no prejudice will result to the rights of any other bidder or of the public.

2. Where bids for certain supplies have been invited by the state superintendent of purchases and printing pursuant to the provisions of Section 196-7 et seq. of the General Code, and the form of bid issued by said superintendent calls for written proposals on said form, signed by the bidder, a telegraphic bid submitted within the time limited, clearly referring to the specifications, may be considered by said superintendent in determining the lowest and best bid.

Columbus, Ohio, May 26, 1947

Mr. John H. Harvey, Superintendent, Division of Purchases and Printing
Department of Finance, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“On April 15, 1947, we sent to various printing concerns our invitation to bid No. 81 on 3,500,000 sets Applications for 1948 Drivers License-Operators.

The bids were to be opened on or before 10 a.m., April 25, 1947. A copy of the bid invitation is attached hereto.

Bids were received by this office from a number of these companies on the forms which we submitted. One company sent us a telegraphic bid which was received prior to 10 a. m. on April 25, 1947. This telegraphic bid so happens to be the low bid.

On the morning of April 26, 1947 we received this Company's confirmation of their telegraphic bid on the form which we had originally submitted to them.

My question is:

Can the Division of Purchases & Printing legally accept the telegraphic bid, and award the business to this Company?”

Attached to your letter is a copy of your bidding form, which I understand was sent by you to prospective bidders, including the company who submitted the telegraphic bid, which form describes the matter on which bids were sought, the specifications as to printing and assembling of the applications, the method of packing and delivery, and a provision that the printer was to absorb the cost of delivery. There is also a statement as to the time when delivery must be made.

The form carries as its heading: “Req. No. 20-L Mot. Veh. Bid No. 81.” It is stated at the bottom of the form “Bids Must Be Signed,” and there is a space for date, and signature and address of the bidder. There is also a direction to the effect that the bid should be mailed direct to the superintendent of purchases and printing.

It is further stated on this bid form that "proposals will be received by the superintendent of purchases and printing on or before 10:00 A. M., April 25, 1947."

In response to this invitation several bids were received on the forms which you provided. The company who, by your statement, turned out to be the lowest bidder, responded by sending a telegram as follows:

"RXBA 385 PD—Cleveland, Ohio 25 933A State of Ohio,
Supt. of Purchases and Printing, Room 75, State House CLMBS.

Apr. 25 AM 9:41

We quote four hundred thousand bid eighty-two at \$4.50 per thousand three and half million bid eighty-one at \$4 per thousand five hundred thousand bid eighty-three at \$4.40 per thousand FOB Columbus, Ohio confirmation follows specifications as outlined in bids.

National Litho Forms Co."

This telegram was received prior to 10:00 A. M., April 25, 1947, and was followed by a confirmation through the mail on the regular bid form, which was dated April 25, but not received until April 26, 1947.

This procedure on your part appears to have been carried out pursuant to the provisions of Sections 196-7 et seq. of the General Code which relate to the purchase of supplies and equipment for various state officers, boards and commissions. Section 196-7 reads as follows:

"All supplies and equipment so authorized to be purchased and furnished by the state purchasing department shall be purchased by the state purchasing agent through competitive bidding, except where such supply or equipment is purchased pursuant to Section 1847 of the General Code, or where the amount of such purchase is less than one hundred fifty dollars. In cases where purchases are required to be made by competitive bidding, notice of the proposed purchase shall be given in the following manner: The state purchasing agent shall advertise such competitive bidding by notice sent by registered mail to competing persons, firms or corporations producing or dealing in such supplies or equipment. Such notice shall state the time and place where bids will be opened, the conditions under which bids will be received, the terms of the proposed purchase, and an itemized list of the supplies and equipment to be purchased and the estimated quantities thereof. The mailing of such notices shall be at least fifteen days preceding the day when such bids will be opened, and the postoffice receipts of the mailing of such notices shall be filed and preserved in the office of the state purchasing

agent. The state purchasing agent shall also maintain in a public place in his office a bulletin board upon which he shall post and maintain a copy of such notice for at least fifteen days preceding the day of the opening of such bids."

Section 196-8 authorizes any dealer to list his name and address together with a list of supplies or equipment which he is prepared to furnish with the state purchasing agent and the auditor of state and requires the purchasing agent to send notice to such dealer when it is desired to purchase goods which such dealer is prepared to furnish. It appears to be conceded that this provision was complied with and that the bidder in question duly received a copy of the invitation and form of bid.

Section 196-9 provides as follows:

"The state purchasing agent may prescribe such conditions under which bids will be received and terms of the proposed purchase as he deems necessary, provided, however, that all such conditions and terms shall be reasonable and shall not unreasonably restrict competition, and further provided that bidders may bid upon all or any item of the supplies and equipment listed in such notice."

Section 196-10 authorizes the purchasing agent, if he sees fit, to require a bond to be submitted with the bid but my information is that no bond was required of bidders in this case. The section further provides that a sealed copy of each bid shall be filed in the office of the auditor of state prior to the opening of bids. I understand that a copy of the confirmation was mailed to the auditor and received by him on the day following the date fixed for opening of bids.

Section 196-11 provides:

"The contract shall be awarded to the lowest and best bidder on each item, and the state purchasing agent may accept or reject any or all bids in whole or by items."

It will be noted that there is no explicit provision of the statute that the bids shall be in writing or sealed or signed by the bidder nor that the bids must be upon the form prescribed by the purchasing agent. It does appear plainly, however, that the purchasing agent in calling for these bids and prescribing a form did in effect stipulate that they should be in writing and bear the signature and address of the bidder. It appears clear to me that where the statute prescribes certain procedure in public

bidding the provisions of the statute must be substantially complied with although there is authority to the effect that even in such case defects in bids may be corrected when the data for the correction appears on the face of the bid. The general principles are set forth in the case of *Beaver & Butt v. Trustees*, 19 O. S. 97. Here the court was considering bids which had been received by the trustees of the state institution for the blind under a law which required them to advertise for sealed proposals to be filed within a day named and to award the contract to the lowest bidder. In the second paragraph of the syllabus it was said :

“In such case, after the day limited for the filing of proposals, and after the same have been opened, the trustees are invested with no discretion to permit an amendment or alteration of any such proposal on account of any alleged mistake therein, unless the fact of such mistake and the requisite data for correcting the same are apparent on the face of the proposals.”

In the course of the opinion at page 109 the court quoted in part from the statute, with the following comment :

“‘The contract or contracts *shall be awarded* to and made with the person or persons who shall offer to perform the labor and furnish the materials *at the lowest price.*’ How offer to perform and furnish? Through the medium of *written, sealed proposals, filed within the time limited in the advertisement. The statute knows no other proposals or offers but these.* The trustees are invested with no discretion in the matter ; but, on the contrary, we are satisfied it is the intent and policy of the statute to withhold it, and thereby shut the door against all favoritism on the part of the trustees on the one hand, and, on the other, to prevent such an excited, intriguing, and perhaps ruinous scramble among builders, as would be not unlikely to ensue if the proceeding were assimilated to an open auction sale of contracts.”
(Emphasis added.)

As indicating the attitude of the court toward corrections and amplifications that may be permitted, the court said in concluding its opinion :

“In what has thus far been said, however, we do not intend to be understood as holding that a mistake in a proposal may not be rectified in case the fact of mistake and the requisite data for its rectification are both apparent upon the face of the proposal ; as if, for instance, *Beaver & Butt* had expressly named in their proposal the items of hardware for doors and windows, with prices annexed, or if a mistake in their arithmetic was detected ; in all such cases we think the mistake may and ought to be rec-

tified. It would be but just to the bidder, and would in no way contravene the provisions or the policy of the law. * * *

A peremptory mandamus will be issued in favor of Griffith & Son for the awarding of the contract to them on the basis of their proposal, as it will be, after correcting the mistake in the extension of figures to the amount of \$140, apparent on its face."

In 33 O. Jur. 694, we find the following:

"The question as to what defects in a bid may be waived is to be determined from a construction of the statutes and a consideration of the essentials of competitive bidding. In general, *formal defects not affecting the competitive character of a bid may be disregarded*; and, it has been declared, *such defects should be disregarded, in the lowest bid, where the statute directs the contract to be let to the lowest bidder*. So, the mandatory provisions of statute not being violated, *a board may waive compliance with its own requirements as to the form of bids*, or, it seems, as to information to be supplied by bidders. On the other hand, a bid which, in particulars substantially affecting its competitive character, departs from the requirements of the statute, or of the plans or specifications, or the advertisement for bids cannot be considered. The rule has been expressed that a board may waive defects in a bid where such waiver works no prejudice to the rights of the public." (Emphasis added.)

Thus, in *Compton v. Johnson*, 9 O. C. C. 532, it was said that informalities in the lowest bid that do not go to the substance of the bid should be disregarded where the statute requires an award to the lowest bidder. See also *State, ex rel. Ayres v. Green*, 32 O. C. C. (N. S.) 321; *Ross v. Board of Education*, 42 O. S. 374; *Atlas Bank v. Cincinnati*, 8 O. N. P. 338.

The third syllabus of *Ross v. Board*, *supra*, reads as follows:

"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."

In *State, ex rel. Ayres v. Green*, *supra*, it was held:

"The fact that a bidder for the construction of a public building wrote one proposition on the proposal sheet, which he did not find in the printed form, is a defect which the building commission has power to waive, and where its waiver has the effect of saving money for the people it will not be condemned by the courts."

I have not been able to find any case directly dealing with a telegraphic bid where written or sealed bids were required. However, in 49 Am. Jur. 638, relative to contracts required by the statute of frauds to be in writing and signed by the party to be charged, it is said:

“A contract binding between the parties may be made or proved by telegrams, and a telegram signed by the party to be charged, if it contains the terms of the contract or is connected with other writing or telegrams, containing as a whole such terms, is a sufficient memorandum as regards the statute of frauds. A telegram may fulfil the requirement made by some statutes that an agreement employing an agent to sell real estate shall be in writing. As in other cases, the telegram sent by the party to be charged must contain in itself or by reference to other writing the essential terms of the contract.”

In the instant case the telegram in question contains sufficient reference to the subject matter of the letting and the specifications set out in the bidding form to leave no doubt as to the intention of the bidder to supply at his bid price the precise materials specified. From information which you have furnished I learn that in certain classes of purchases made by your office, it has been customary to receive bids by telegraph only, even where the proposal form which you have used in this case was employed and no direct invitation was extended for the receipt of telegraph bids. I understand that in certain classes of materials such as cotton, quotations are obtainable only in this manner.

Nothing appears in the case which you have presented to indicate that any fraud or misrepresentation on the part of the bidder is suspected or that any advantage has been taken of the other bidders or that any possible harm or loss can result to the public in case the telegraphic bid in question should be accepted. There is no question presented of a mistake in a bid which is sought to be corrected. The only defect is that there was not literal compliance with the form which you sent out to dealers or prospective contractors.

I am fortified in the conclusion I have reached in the present matter by an opinion rendered by my immediate predecessor, found in 1939 Opinions of the Attorney General, page 372. That opinion dealt with bids on contracts to be made by the department of public works, successor in authority to the state building commission, under Section 2314 et seq., General Code. There we find in Section 2315 that the commission in

preparation for making a contract for a public building was required to prepare and approve, among other details, a form of proposal, and Section 2317 contains this language:

“The form of proposal approved by the state building commission shall be used, and a *proposal shall be invalid and not considered unless such form is used without change, alteration or addition.*”
(Emphasis added.)

It appeared that a bidder, having submitted his proposal on the prescribed form, shortly before the hour set for opening the bids sent a telegram modifying its bid by lowering the price it had submitted on the regular form, so that it became the lowest bidder. The syllabus of the opinion reads as follows:

“1. A proposal submitted to the Department of Public Works on the form of proposal approved by said department, which is subsequently modified by a telegram delivered to said department before the time set for the opening of said bids, is not invalidated by the consideration and acceptance of said telegram.

2. Such original proposal, together with telegram, must be considered and accepted by the Department of Public Works, unless the consideration and acceptance thereof would present an opportunity for fraud or prejudice the rights of the public.”

The opinion pointed out convincingly the real principles underlying competitive bidding, as follows:

“At the outset, it must be borne in mind that statutes governing competitive bidding are enacted for the sole benefit of the public.

On this point it is stated in Ohio Jurisprudence, Volume 33, page 665:

‘The general policy of the courts is to construe the statutes relating to competitive bidding with sole reference to the public interests and in such manner as to encourage competition.’

It would, therefore, appear that in the application of the language contained in Section 2317 *supra*, to the facts before me, the one thing to consider is whether or not the modification contained in the telegram in any way destroyed the competitive bidding, or, in other words, were any competitive features of the bid destroyed or were any other bidders deprived of any opportunities afforded them under the law by the consideration of the telegram.

It is difficult to understand how, in any manner, the rights of other bidders were prejudiced by the telegraphic modification to the original bid of the 'X' Company. There is nothing contained in your letter which states or which would indicate that the original bid, together with the modification thereof were not responsive to the invitation to bid and to the specifications set out therein, nor does it appear that any other bidder was deprived of the same opportunity enjoyed by the 'X' Company by reasons of said modification."

That opinion was on a statute which contains very positive language forbidding any departure from the prescribed form, whereas, as already pointed out, the statute under which the proceeding with which we are here concerned contains no restrictions but leaves the entire matter to the discretion of the purchasing agent.

No provision of the applicable statute was violated, and I am of the opinion that it is within your authority to waive the irregularity in the form of the bid as submitted and to award the contract to the bidder whom you regard as the lowest and best.

Respectfully,

HUGH S. JENKINS,
Attorney General.