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BIDS—WHERE ADVERTISEMENT FOR BIDS IS MADE FOR PURCHASE OF MATERIAL—SPECIFICATIONS PREPARED IN ADVANCE ON WHICH BIDS ARE TO BE BASED—BID SETTING FORTH BASE PRICE WITH CLAUSE “PRICES IN EFFECT AT TIME OF SHIPMENT WILL BE APPLICABLE” IS NOT A COMPETITIVE BID—CONTRACT ENTERED INTO ON SUCH BASIS WOULD BE ILLEGAL.

SYLLABUS :

Where advertisement for bids is made for purchase of material, and specifications are prepared in advance on which the bids are to be based, a bid setting forth a base price with a clause “Prices in effect at time of shipment will be applicable” is not a competitive bid, and a contract entered into on that basis would be illegal.

Columbus, Ohio, August 2, 1949

Hon. T. J. Kauer, Director
Department of Highways
Columbus, Ohio

Dear Sir :

I have before me your communication requesting my opinion and reading as follows :

“Bids for Bridge Steel were advertised by the State Highway Department and ten bids were received.

The low bid has attached to it the following clause: 'Prices in effect at time of shipment will be applicable'.

Will you kindly advise if a contract may be awarded to the low bidder, with the above price clause as part of the contract to be entered into with the bidder.

In 33 O. Jur., page 665, it is said :

"In general, all public contracts of major importance are let upon competitive bidding if the nature of the contract reasonably permits of that procedure—plans, specifications, estimates of cost, profiles, drawings and bills of material, so far as appropriate, being prepared and filed in advance for the information of bidders and for use as a basis of competition. * * * Bids, usually sealed, are submitted in writing upon prescribed forms and in accordance with such reasonable rules as are promulgated by the officers in charge, and they are without effect if they are submitted too late or do not comply with the mandatory provisions of statute or are irregular as to a matter of substance affecting competition. 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, not only as to prices, but, in appropriate cases, as to materials, plans, machinery, etc."

I am informed that in the instant case specifications were prepared in advance on which the bids were to be based, and that the form of bidding proposal was prescribed in advance. This is the procedure generally followed and is proper. If there is to be an honest competition in bidding and in order that the director may be able to determine what is the lowest and best bid, it is absolutely necessary that all bidders should be upon the same basis and pursuant to the same conditions whether contained in formal specifications, or instructions to bidders, or both.

The syllabus of Opinion No. 923, reported in Opinions of the Attorney General for 1946, page 294, reads as follows :

"A contract may be awarded by the department of public works under Section 2319 of the General Code pursuant to bids received on forms prescribed which contain a stated price with provision for price adjustment based on changes in costs of labor and materials, up to a fixed maximum percentage."

In the same volume of Opinions of the Attorney General, at page 276, being Opinion No. 879, the syllabus reads as follows :

"Where a contract for an improvement contemplated by a board of education is required by Section 4834-18, General Code,

to be let pursuant to advertisement for bids, such board is not authorized to let such contract on the basis of cost plus an agreed percentage. However, it may receive bids and let such contract on the basis of bids of a definite sum with a stipulation that if the final ascertained cost plus a certain fixed percentage or fee, determined by the board in advance, is less than said definite sum, such lesser amount shall be paid and received as full compensation for such improvement."

The Attorney General in the above two cited opinions arrived at his conclusions mainly on the proposition that there was a definite consideration which could be arrived at and held that "a valid contract could be entered into on the basis of such bids." However, in the same volume at page 631, Opinion No. 1169, the then Attorney General held in the third branch of the syllabus thereof as follows:

"A city is without legal authority of its own volition to provide in its conditions of contract an escalator clause whereby the city agrees to pay unit prices to be set by the contractor at the time of delivery or performance."

And in the body of that opinion at page 637, it was stated:

"In my opinion the contract entered into with the bidder subject to such increase of prices as he may find it necessary to exact at the time of shipment is wholly illegal and violates every principle that underlies the idea of competitive bidding. If the city should accept such conditions in the contract it would plainly allow a bidder to bid a low figure for the purpose of winning the award and then avail himself of the privilege reserved to him to gain an arbitrary profit. Under that arrangement the sky would be the limit of cost, and the contractor would be the sole judge as to the amount for which he should render his bill. I am not intending to impugn the integrity or good faith of the contractor referred to in your letter but such procedure would certainly open the way for great abuse."

in which statement I concur.

In the case which you have submitted the facts are very similar to those dealt with in the opinion last quoted from, but I am inclined to go farther in my analysis. Let us for the purpose of argument assume that the bidder in the case under consideration had bid one dollar as the base bid and added the clause "Prices in effect at time of shipment will be applicable." Could it be determined at the time the contract is entered into what the ultimate price would be? I think not. Could it be determined if a contract was let based on such a bid whether the bidder in

question gave the lowest bid or not? I think not. The bid in question is not a competitive bid whatsoever. The bid can not be computed in any maximum amount, and it is not possible to determine whether it is low, or, on the other hand, whether it would be otherwise than the lowest bid. Therefore, I consider it no competitive bid at all, and any contract entered into based on such a bid would be illegal.

Therefore, I am of the opinion that where advertisement for bids is made for purchase of material, and specifications are prepared in advance on which the bids are to be based, a bid setting forth a base price with a clause "Prices in effect at time of shipment will be applicable" is not a competitive bid, and a contract entered into on that basis would be illegal.

Respectfully,

HERBERT S. DUFFY,
Attorney General.