and seventy-six cents ($9.76) on said inlot, which is due and payable in June, 1930.

Touching the question of the authority of The Volunteers of America to sell the property here in question to the State of Ohio, it is noted that on January 10, 1928, said corporation filed its petition in the Common Pleas Court of Franklin County, Ohio, for authority to sell the property here in question and to encumber by mortgage inlot 113, likewise owned by it as the result of its action against Fred S. Spring and H. W. Acker and others above noted. It appears further that on February 9, 1928, after notice of said petition had been published in the manner required by law, said Common Pleas Court, by an order and decree, on said date made and entered, authorized The Volunteers of America to encumber said inlot 113 by mortgage in the sum of thirty-two thousand five hundred dollars ($32,500.00), and with respect to the property here in question which was the second parcel described in plaintiff's petition in said case, said entry and decree provided as follows:

> "It is further ordered that said The Volunteers of America be and hereby is authorized to sell the second parcel of said real estate as described in said petition and that it ascertain to whom, for what amount, and upon what terms and conditions said sale may be made and likewise report the same to this court."

It thus appears from the provisions of said decree and entry that before The Volunteers of America will be authorized to execute a deed for the property here under investigation to the State of Ohio it will have to report said sale to the court, stating in said report the name of the proposed purchaser, the amount of the purchase price and any other terms and conditions upon which the sale is to be made. Upon filing this report an order of the court authorizing the execution of a deed to the State of Ohio for the purchase price therein reported will have to be secured before such deed can be executed.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1954.

STATE OFFICE BUILDING—SPECIFICATIONS—STANDARDS SET UP ACCOMPANIED BY WORDS "OR EQUAL" LEGAL—GENERAL DISCUSSION.

SYLLABUS:

So long as specifications upon which public bids are to be predicated merely establish a standard of quality and practicability for the articles and materials to be furnished and permit bidders to bid on any article or material equal to the standard so established in such a way as to secure real competition on articles and materials of a specified standard, the selection of the particular article or material may lawfully be left to the owner or architect, and in the absence of an abuse of discretion on the part of the owner or architect in the selection of the particular article or material, a contract entered into after receiving bids on specifications of that kind for the article or material selected, will be a legal contract if the contract so made meets all legal requirements in other respects.

COLUMBUS, OHIO, June 6, 1930.

HON. HARRY HAKE, *Chief Architect, The Ohio State Office Building Commission, Cincinnati, Ohio.*

MY DEAR MR. HAKE:—I am in receipt of your inquiry with reference to the proposed specifications for the new state office building which reads as follows:

"As I am about to start on working drawings and specifications for the new Ohio State Office Building I am anxious that the specifications be drawn up in the best form possible and so that they will meet with the legal requirements of the State of Ohio. I anticipate the Building Commission will want a strong specification which will insure material of the highest quality and at the same time will permit as many manufacturers and material men as possible to figure upon the work.

On public work especially, specifications throughout the country have been open to criticism that they are either too 'tight' or are so loosely drawn up as to permit the introduction of inferior materials.

I am enclosing herewith a suggested article to head each branch of the specifications, titled 'Manufactured Articles,' bearing upon materials to be used in the building construction, together with our own comments upon the same. After some experience on public work we are now using this form of specification on Hamilton County Tuberculosis Hospital work and we find it satisfactory in all respects, especially to the owner, with the exception that a number of material men object to the fact that their materials are not mentioned. Our answer to this objection is that it is not necessary to mention their materials if they can prevail upon the bidders to mention their materials in their bids. It seems impossible to draw up the specifications so as to satisfy everyone and under such circumstances it seems important to at least satisfy the owner and the public who pay for the building.

Will you kindly read over the article and comments in question, and let me have your opinion in regard to the same?"

The suggested heading for each branch of the specifications entitled "Manufactured Articles," which you enclose with your inquiry, reads as follows:

"*MANUFACTURED ARTICLES:* Wherever in these specifications certain named materials or manufactured products are called for, such names are specified to establish a standard of quality and it will be presumed, unless specifically excepted, that the base bid includes the materials or articles so named, and that the Contractor's proposal, if accepted, will constitute a contractual obligation to furnish the standard named materials or articles and no other.

Contractors are invited to bid upon the use of other materials or articles that they consider equal to the standard specified.

If contractors bid upon the use of other materials or articles which they consider equal, they must state in their bid the proposed substitute, and state difference in cost, if any, between the proposed substitute and the material or article included in the base bid as standard. The determination as to whether or not such substitutes bid upon equal the 'standard' specified, shall rest solely with the Owner and Architect."

It is proposed that the above article, under the subheading "Manufactured Articles," appear at the beginning of each branch of the specifications. Conjointly with this article one name of a desired manufactured article or material would be mentioned in the main body of the specifications to establish a standard for each respective item so that bidders may know the standard of quality and practicability to be met when other makes are bid upon. You state with reference to this suggested arrangement that, while it unquestionably creates a very strong specification insuring the quality of installation, it is subject to the following criticism, viz.:

"Bidders, in actual practice, according to our experience, do not sub-

mit substitute bids unless alternate estimates are requested, the specifications naming alternate materials on which estimates are wanted. As a result other makes than those mentioned are almost surely automatically barred from consideration because the general clause prohibits the consideration of substitute materials after bids are received."

You suggest certain modifications in the proposed provision with reference to manufactured articles, and request my opinion with reference to those modifications.

The suggested modifications and your comments with reference to the same are as follows:

"Modifications might be made in the above article making the general clause more flexible, permitting the Owner and Architect to consider substitute materials not actually mentioned in bids up to the time of closing contracts. This arrangement would probably not be legal. This is the usual course pursued on private work.

The words 'or equal' can be inserted after all named articles, without detriment, but it does not seem that this arrangement would open up the specifications as they would still be restricted by the general clause. The general clause, however, could be changed, removing all restrictions by simply mentioning the fact that the names in the specifications are given for standard of quality and following this with an interpretation as to who shall be judge of what is equal and remaining silent as to when substitute materials may be suggested by the contractor and when a decision shall be made by the Owner and Architect. However, this seems to weaken the specifications to an extent which will make the same undesirable and open to criticism.

Instead of mentioning one manufacturer in each instance, three or four might be named. This is open to several criticisms, viz.; It would show discrimination against those manufacturers whose articles are not named and it would still bar almost as many manufacturers as the first arrangement. Furthermore, the contractor becomes the sole judge of which of the materials named shall be used. He obtains the most favorable prices after receiving the contract and invariably awards contract on the lowest priced article. In some instances three names of manufacturers can not be named who might have exactly equal products.

Should alternate estimates be requested on specifically named substitute materials, the bid form becomes unduly lengthened and the tabulation of bids is apt to become involved.

The U. S. Government method of specification writing, specifying articles in detail without naming manufacturers as standards, creates too lengthy a specification and too much time is lost in laboratory tests, investigations, etc."

In the act of 1925, creating a State Office Building Commission with authority to construct a state office building, it is provided in Section 7 (111 O. L. 477), which is still in force, that:

"* * * The commission may award the contract or any part thereof to the lowest and best bidder or may arrange to perform some of the construction work by force account in co-operation with the department of public welfare. The construction of such building shall be governed by the provisions of Section 2314 to 2332 of the General Code, relative to the erection of state buildings except that the excavating and work of a like nature may be performed by prisoners from the penitentiary. * * *"

Section 2314, General Code, provides that whenever any building or structure for the use of the State or any institution supported in whole or in part by the State is to be constructed, the officer, board or other authority upon whom devolves the duty of constructing said building, shall make or cause to be made by an architect or engineer "full and accurate plans suitable for the use of mechanics and other builders in such construction, * * * definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; * * *"

It has been held that provisions in statutes requiring that detailed plans and specifications be provided in all cases where public work is to be let upon competitive bids, are mandatory and absolutely essential to furnish a basis of competition, and that such plans and specifications must be of sufficient definiteness to require competition on every material item, and that they must state the quantity of work as definitely as is practicable. *Yaryan* vs. *City of Toledo*, 28 O. C. C. 278; affirmed by the Supreme Court without opinion, 76 O. S. 584.

While it is often said that the purpose of requiring contracts to be let upon competitive bidding is to preclude favoritism and procure for the public the best possible price for the objects sought, that is not the entire purpose of such competitive letting of contracts. In the case of *Perkins* vs. *Bright*, 109 O. S. 14, at page 17, it is said with reference to certain provisions of law which require the letting of contracts for the construction of school buildings to be done upon competitive bidding:

> "The purpose of the statute is doubtless to enable school boards to have school houses and other structures under their control erected and maintained at the lowest cost to the public *consistent with the best material and workmanship.*" Italics the writer's.

In the case of *Ampt* vs. *Cincinnati*, 17 O. C. C. 516, it is said:

> "The first object of the law was to afford to the people who were to pay the cost of this work the assurance that it should be done for the least amount of money and these provisions were placed there to bring about that result. Of course, the law is founded upon the theory that the people are to get work which is the best possible to be had."

Undoubtedly, the purpose of requiring definite plans and specifications as the basis for public bids when public contracts are to be let on competitive bidding is not only to enable the bidders to make intelligent bids but as well to insure competition by making the requirements of the proposed improvement definite and certain and to insure to the public the best possible material and construction for the price paid. To this end the specifications must be sufficiently definite and certain that all bidders may know what each is bidding upon, and that any bidder who secures the contract may be compelled to perform it in a way to procure the kind, grade and character of improvement desired, and liability upon his bond will result from his failure to do so.

The law demands that the request for bids must invite and not restrict competition. Therefore, ordinarily the specifications should not be so drawn as to confine the bidding to one company, firm or individual where others are engaged in the same business, or to the product of one manufacturer where others produce articles of equal quality and practicability.

Manufactured articles of the same grade and quality must be granted equal standing in invitations for public bids, and bidders must be granted the opportunity to bid for the furnishing of manufactured articles of equal grade on the same basis of competition.

At the same time, authorities inviting public bidding may, without violating the

rule requiring freedom of competition, insert in the specifications or proposal for bids, restrictions as to the kind or quality of articles to be furnished by specifying a standard of quality requiring that bidders submit bids on materials or component units going into the proposed improvement that will measure up to the standard specified.

Such a standard may lawfully be set, in my opinion, by the naming of the article or class of material manufactured by a certain designated manufacturer, but the designation of the manufacturer must be for the purpose only of fixing a standard of quality and not be specified in such a manner as to restrict the bidding to bids on the article of that particular manufacturer. In Page on Contracts, Section 1948, it is said:

> "If the article is manufactured but not patented, specifications designating the manufacturer have been held invalid if other manufacturers produced as suitable an article."

My predecessor, in an opinion found in Opinions of the Attorney General for 1928, Vol. II, page 1122, held as follows:

> "Where specifications for a building, for use by an institution supported by the state, specify the products of certain manufacturers to the exclusion of all others, and without providing that where such products are specified bids will be received based upon such products or their equal, such specifications are illegal. Where, however, the purpose of specifying the products of certain manufacturers is to inform the bidders of the type, style or class of the articles desired, and permit bidding upon articles of equal quality and utility, such specifications are legal."

In the course of the opinion it was pointed out that where articles of a certain manufacturer were specified for the proposal provided that bids on similar articles of no other manufacturer would be considered, the particular manufacturer specified would have a distinct advantage over all other bidders and would have a virtual monopoly on that particular class of work. It was stated with reference thereto:

> "The obvious result of such provisions in the specifications is clearly to destroy all competition, would defeat the very purpose of the law, and such specifications are therefore illegal."

It was further stated:

> "In most of the specifications that have come to my attention, where the products of particular manufacturers are specified, the specifications also contain a general clause to the effect that where a particular product is specified bids will be received based upon furnishing that particular product or its equal. In other words, where the specifications permit bidding on equals, the purpose of specifying the product of a particular manufacturer is to inform the bidder of the type or style or class of the article desired rather than to limit the bids to that particular article. * * * If it appears that there is such a clause in the specifications and that the primary object in specifying the products of particular manufacturers is only to inform the bidders of the type, style or class of the articles to be furnished, then it is my opinion that such specifications are not illegal."

In your communication you suggest five different modifications of the proposed general clause relating to "manufactured articles." For convenience, I will refer to those proposed modifications as numbers 1, 2, 3, 4 and 5, respectively.

Addressing myself to each of the suggested modifications in the order named, I am of the opinion that suggested modification No. 1, will render the specifications illegal, for the reason that bidders would not know beforehand what materials were to be selected in the final award, and there would be no real basis of competition and no proper basis for a comparison of bids. To permit bidders to submit samples or substitute materials not mentioned in the bids, and allow the owner or architect to make a selection from these samples of substituted materials and make a final award on the selection made, would destroy competition and defeat the intent and purpose of the law. It furthermore would open the door to the possibility of showing favoritism and would no doubt be held by the courts to be illegal, although after considerable search, I have found no reported case involving the question.

As to modification No. 2; To insert the words "or equal" after each named article or class of material would not open up the specifications unless the general clause, as stated in your communication, were changed. To change the general clause by stating therein that the article or material named was simply for the purpose of fixing a standard of quality and that other materials or articles of equal merit might be bid on by name and the determination of whether or not the article or material so bid on was really of equal merit, should be left to the owner or architect, would not, in my opinion, be objectionable from a legal standpoint. Whether or not it would weaken the specifications to such an extent as to make them undesirable is a practical question which I could not decide.

Suggested modification No. 3, contemplates the naming of three or four manufacturers in each instance instead of one. If more than one manufacturer is named in each instance, and the bids are limited to the products of the manufacturers named, it would not only be open to considerable objection from a practical standpoint, but would, in my opinion, be illegal if any other manufacturers produced an article or material of equal quality and practicability to those named, which, in many instances, would be true, as it would be practically impossible in most cases to name all the manufacturers whose products are of equal quality. It would not open the specifications or help matters from a practical standpoint if more than one manufacturer of each article were to be named instead of one, and at the same time permit the bidder to submit bids on other named materials or articles, as is now permitted by the general clause, although such a course would no doubt be perfectly legal.

To modify the specifications in accordance with suggested modifications Nos. 4 and 5, would no doubt be legal. Whether or not the objections to specifications so drawn would, from a practical standpoint, be sufficient to render them undesirable, is not for me to say.

In conclusion, it may be stated that so long as specifications upon which public bids are to be predicated merely establish a standard of quality and practicability for the articles and materials to be furnished, and permit bidders to bid on any article or material equal to the standard so established in such a way as to secure real competition on articles and materials of a specified standard, the selection of the particular article or material may lawfully be left to the owner or architect, and in the absence of an abuse of discretion on the part of the owner or architect in the selection of the particular article or material, a contract entered into after receiving bids on specifications of that kind for the article or material selected, will be a legal contract if the contract so made meets all legal requirements in other respects.

Respectfully,

GILBERT BETTMAN,

Attorney General.