307.

BIDS—PROPOSAL FORM—CONTRACT — WHEN TELEGRAM DELIVERED BEFORE TIME FOR OPENING BIDS, WHICH MODIFIES PROPOSAL—NOT INVALIDATED BY CONSIDERATION AND ACCEPTANCE OF TELEGRAM—STATUS, ORIGINAL PROPOSAL, TELEGRAM—EXCEPTION—OPPORTUNITY FOR FRAUD OR PREJUDICE—RIGHTS OF PUBLIC.

SYLLABUS:

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.

COLUMBUS, OHIO, March 15, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Ohio Departments Bldg., Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

> "On December 15, 1938, bids were received for heating plant addition and equipment at Kent State University.
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> Among the items included in equipment was the item of stokers. The "X" Company submitted a bid on the regular proposal form. About two hours before the bids were to be opened they sent in a wire lowering the figure they had submitted on the regular proposal. The reduction in the wire made them the low bidders for this item.
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> Can the wire be accepted as a regular bid or must the award go to the next lowest bidder."

The provisions of law relative to the question presented by your inquiry are contained in Section 2317 of the General Code of Ohio, which section reads as follows:

> "Section 2317. When and how proposals shall be received; form of proposals. After the proceedings required by sections 2314 and 2315 have been complied with, such owner shall give public notice of the time and place when and where proposals will be received for performing the labor and furnishing the materials of such construction, improvement, alteration, addition or installation, and a contract or contracts therefor awarded, except for materials manufactured by the state or labor supplied by the Ohio board of administration that may enter into the same. 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. Bidders may be permitted to bid upon all the branches of work and materials to be furnished and supplied, or upon any thereof, or alternately upon all or any thereof."

The state building commission referred to in the above section has, by the terms of Section 154-40, General Code, been superseded by the Department of Public Works.

You state in your letter that the telegraphic modification referred to therein was received about two hours before the time set for the opening of said bids and I assume, therefore, that no question arises in regard to the time said telegram was received. The sole question for my consideration is, therefore, whether or not, telegraphic modification would constitute a change, alteration, or addition within the contemplation of the above section, so as to make the proposal invalid.

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.

The construction to be placed upon the words "change, alteration and addition", as the same appear in Section 2317 supra, was discussed by the then attorney general in an opinion rendered on January 11, 1928, and reported in 1928 O. A. G., Page 86. At page 88 it is stated.

> "As stated above, the purpose of the law pertaining to public buildings is to make mandatory the awarding of contracts for the erection or construction of such buildings to the lowest bidder or bidders, after bids have been received on a strictly competitive basis. The legislature intended to and did provide safeguards with the view to securing the benefit and advantage of fair and just competition between the bidders and at

> the same time close every avenue to favoritism and fraud to insure the accomplishment of the work at the lowest price by subjecting the contract for it to public competition.
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> It seems clear therefore that when the legislature provided in Section 2317, General Code, that a bid or proposal shall be invalid and not considered, unless the form approved by the State Building Commission is used without change, alteration or addition, it had in contemplation such changes, alterations or additions which would destroy the competitive feature of the proposal. In other words, in my opinion Section 2317, General Code, makes invalid proposals containing such changes, alterations or additions as will constitute the proposal a bid on a building or structure different, in some respect at least, from the building or structure covered by the plans and specifications."

While, of course, it is true that the intention of the legislature, enacting a statute, must be determined primarily from the language of the statute itself, yet under the rule that statutes dealing with the same subject matter are to be construed together, recourse may be had to the several statutes for the purpose of arriving at a correct interpretation of any particular one.

Therefore, in order to determine whether the modified bid in the matter before me is valid, reference should be made to the statutes which provide for the approval of plans, specifications, etc. which are to be used as a basis for public contracts. As an aid to the construction of the language in question, used in Section 2317 supra, the provisions contained in Section 154-40 of the General Code, appear to be helpful. Said section, insofar as the same is pertinent, reads as follows:

> "* * * In addition to the powers so transferred to it, the department of public works shall have the following powers:
>
> (1) To prepare, or cause to be prepared, general plans, specifications, bills of materials, and estimates of cost for the public buildings to be erected by the state departments, offices and institutions. * * *"

Also important to consider in connection therewith is Section 2315 of the General Code, which reads as follows:

> "Submission of plans, details, etc., to commission for approval. The plans, details, bills of material, specifications of work, estimates of cost in detail and in the aggregate, form of bidding proposal and bond of bidder and other data that may be required shall be prepared on such material and in such manner and form as may be prescribed by the state building

commission, and shall be submitted to such commission for its approval. If so approved the same shall be deposited and safely kept in the office of the auditor of state as the property of the state."

A reading of the last quoted section, in light of the provisions contained in Section 154-40 supra, leads to the inevitable conclusion that the essentials of the form of proposal referred to in Sections 2315 and 2317 supra, are the plans, details, bills of material, specifications and estimates of costs, and that a departure from these vital parts of the form of proposal, by way of change, alteration, and addition thereto, would render the proposal invalid.

Therefore, conversely, I am constrained to the view that unless the change, alteration, or addition affects the essentials of the form of proposal, such change, alteration or addition will not render the proposal invalid.

With reference to the question of modification of bid, we find the following in Donnelly on The Law of Public Contracts, at Page 193:

> "* * * The public authorities have power to accept or reject bids as submitted, but they possess no power to permit material changes or amendment to be made in the *terms* or *conditions* of the bid. Modification of a bid before it is accepted or acted on, but after the time limited for submission of bids, is not permissible for like reasons. Such a bid can be regarded in no other light than as a new bid, and as one made after all other competitors are led to believe no further bids will be received. Bidders would not be bidding upon equal terms or even upon the same proposition if this were allowed. But of course all bidders have the right previous to the opening of sealed proposals to modify their bids by letter or telegram. Before acceptance of his bid there is no valid or binding contract, and so long as there is no valid contract a bidder has the right to change his bid and insist that his bid when opened shall only be considered as modified. He may do this without sacrificing the deposit which he has been compelled to make as a condition of bidding.
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> When a bid is thus modified, it may be accepted as modified and a binding contract will result." (Italics the writer's).

Furthermore, it might well be said that in the instant case the substance of the original bid was set out on the required form and that subsequently thereto the substance theretofore submitted on the approved form was amended and that the information contained in the telegram, if applied to the original proposal, in no way changed or altered the form of proposal originally submitted.

As stated above, the manifest purpose of statutes relating to competitive bidding is the protection of public interests. The prime and sole object of all rules of construction is the carrying out of the legislative intention. If in any case the giving of its literal meaning to language contained in the statute will result in defeating the manifest intention of the legislature, such interpretation may not be used. In other words, if the legislative intention can only be accomplished by departure from the literal interpretation of the language employed, such departure must be made. On this point, it is stated in 37 Ohio Jurisprudence, Page 548:

> "The manifest purpose and intent of the legislature will prevail over the literal import of the words. Hence, the courts are not always confined to the literal or strict meaning of statutory terminology—especially where there is also a more comprehensive sense in which the term is used. The letter of a law is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. Indeed, it is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter is not within the statute unless it is within the intention of the makers. Every statute, it has been said, should be expounded, not according to the letter, but according to the meaning, for he who considers merely the letter of an instrument goes but skin deep into its meaning."

It would, therefore, appear that the application of the above stated rules of statutory construction to the case at hand would lead to the conclusion that the proposal in question is not invalidated by the subsequent telegraphic modification.

Of course, if the acceptance of such proposal, as amended by the telegram, would present an opportunity for fraud or prejudice the rights of the public, such proposal must obviously be rejected.

Therefore, in specific answer to your question, it is my opinion that the telegram sent by the "X" Company in connection with the original bid of said company should, unless the consideration and acceptance thereof would prejudice the rights of the public, be considered and accepted and if said bid, as modified by the telegram, is low the award should be made to the "X" Company.

Very truly yours,

THOMAS J. HERBERT,

Attorney General.