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PURCHASES, SUPPLIES FOR STATE INSTITUTIONS — WHERE MADE UNDER DIRECTION, STATE BOARD OF ADMINISTRATION ON JUNE 29, 1917 — GOVERNED BY SECTION 1849 G. C. — UNDER SECTION 154-37 G. C. SHOULD BE MADE BY DEPARTMENT OF FINANCE, PURSUANT TO REQUIREMENTS OF APPLICABLE APPROPRIATION ACT.

SYLLABUS:

Purchases of supplies for state institutions which were under the direction of the State Board of Administration on the 29th day of June, 1917, are governed by the provisions of Section 1849, General Code, and should be made by the Department of Finance pursuant to the terms of Section 154-37, General Code, and all requirements contained in the applicable appropriation act.

Columbus, Ohio, January 19, 1940.

Hon. Joseph T. Ferguson, Auditor of State,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your communication relative to Voucher No. 842 of the E. B. Hostetter Company of Richwood, Ohio, in the amount of seven hundred dollars as presented by the Massillon State Hos-

pital. With your communication you enclose a copy of a special examination made by your examiners with reference to this matter.

It appears from this report that on the 22nd day of April, 1939, the Superintendent of Purchases and Printing issued notices that on or before the 28th day of April, 1939, at ten o'clock A. M. bids would be received at his office for the furnishing of 10,300 lbs. of Evaporated Sweet Corn, "Nunso" or equal, to be delivered as follows:

"10,300 lbs. for delivery at once as follows:
 1,000 lbs. Institution for Feeble-Minded, Orient, Ohio
 300 lbs. Institution for Feeble-Minded, Apple Creek, Ohio
 3,000 lbs. Longview State Hospital, Carthage, Ohio
 6,000 lbs. Massillon State Hospital, Massillon, Ohio"

The notices also invited bids to be made at the same time and place for the furnishing of 40,000 lbs. of Evaporated Sweet Corn, "Nunso" or equal, "to be delivered over a period of several months as destination and amount are specified."

It further appears from the report made by your examiners that The E. B. Hostetter Company made a bid of 14 $\frac{1}{4}$ c per lb. to supply the 10,300 lbs. and a bid of 14c per lb. to supply the 40,000 lbs. It does not appear from the report that any other person, firm or corporation made lower bids, although the report shows that there were at least three other bidders.

The Superintendent of Purchases and Printing awarded the contracts to The E. B. Hostetter Company on its aforesaid bids, and the report shows that at the time of said report it had supplied 8,050 lbs. of the 40,000 lbs. as follows:

"May 17 Ohio Hospital for Epileptics 1800 lbs.
 May 17 Columbus State Hospital 500 lbs.
 June 2 Boys Industrial School 750 lbs.
 June 19 Massillon State Hospital 5,000 lbs."

No suggestion or claim is made, either in your communication or in the report of your examiners, that the contract prices are exorbitant or unreasonable, or that any fraud or collusion intervened in the awarding of these contracts or in any of the negotiations therefor. A report furnished me by the Division of Purchases and Printing in connection with these transactions discloses that at no time in recent years has the State purchased Evaporated Sweet Corn at a lower price and that during the years 1937 and 1938 the prices paid by this state for this article were at

times materially higher than the prices provided in the contracts in question. In fact, several of those purchases of Evaporated Corn were made at a price of 21c per lb. and although some sixteen purchases of Evaporated Sweet Corn, each in excess of \$500.00, aggregating \$11,293.25, during the years 1937 and 1938 were made without even a semblance of competitive bidding, vouchers therefor were approved by you and warrants drawn and issued in payment thereof in spite of the fact that Section 7 of Amended Senate Bill No. 369 of the Ninety-second General Assembly (General Appropriation Act) provided in part as follows:

“If any order and/or invoice drawn against any appropriation or rotary fund herein made is for labor and materials furnished, the aggregate cost of which exceeds five hundred dollars (\$500.00) or for commodities purchased, it shall show that the same was furnished or purchased *pursuant to competitive bidding* and that the lowest and/or best bidder was awarded the contract, unless the controlling board shall have authorized the furnishing of such labor or material or the purchase of such commodities without competitive bidding, provided, however, that the controlling board shall authorize the furnishing of such labor or material or the purchase of such commodities without competitive bidding only after it has been determined that an emergency exists requiring such action.”

(Emphasis mine.)

In addition, Section 1849, General Code, which is hereinafter discussed, required competitive bidding in those purchases.

It is stated in the report of your examiners that the State Fire Marshal is now, and was at the time these contracts were awarded, President of the E. B. Hostetter Company and one of three owners of such company, and your letter suggests that Sections 12910 and 12911 of the General Code were violated by awarding these contracts to said company. It is further suggested by you and your examiners that these transactions were not made in conformity to the provisions of Sections 196-7 and 196-10, General Code, which, it is claimed, govern these transactions. Although it is gratifying to observe that you are now insisting that the laws of this state governing the awarding of contracts for the purchase of supplies be strictly followed, I have reached the conclusion, after a careful and protracted examination of the statutes involved and for the reasons set forth hereinafter, that these two particular contracts which you now question did not violate any provision of law and that they are valid and binding obligations of the State of Ohio.

In the first place, Section 12910, General Code, has no application whatever to your question. This section reads as follows:

“Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

The office of State Fire Marshal was created by Section 154-6, General Code, and is within the Department of Commerce. The institutions for which this Evaporated Corn was purchased and to which it was furnished are by Sections 154-57 and 1835, General Code, under the control and direction of the Department of Public Welfare. The State Fire Marshal obviously is not “connected” with the Department of Public Welfare and Section 12910, General Code, therefore does not apply in any degree whatever to these contracts.

Section 12911, General Code, to which you and your examiners also refer, reads as follows:

“Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

It should be noted that two of my predecessors have stated that this section does not apply to purchases made for the use of the state itself as distinguished from its political subdivisions. See Annual Report of the Attorney General for 1913, Vol. I, page 363, at page 364, and Opinions of the Attorney General for 1917, Vol. II, page 1683, at page 1684. However, even if this section applied to these contracts, there would be no violation thereof, for they were “let on bids duly advertised as provided by law.” While your examiners state in their report that these contracts were subject to the provisions of Sections 196-7 and 196-10, General Code, I have reached the conclusion that they have no application thereto. These two sections respectively provide as follows:

Sec. 196-7, G. C.

"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."

Sec. 196-10, G. C.

"The state purchasing agent may require that all bids be accompanied by a bond in such sum and with such sureties as he may prescribe, payable to the state of Ohio, and conditioned that such bidder, if his bid is accepted, will faithfully execute the terms of the contract and promptly make deliveries of the supplies or equipment purchased. A sealed copy of each bid shall be filed in the office of the auditor of state prior to the opening of the bids, but shall not be opened by the auditor of state until after the opening of the bids by the state purchasing agent, and no bid shall be considered as a valid bid unless such copy has been filed with the auditor of state. All bids shall be publicly opened in the office of the secretary of state at the time specified in the notice."

Both of these sections were contained in an act entitled "To provide a state purchasing department and to amend sections 1846 and 1847 of the General Code" found in 107 O. L., 422. Section 4 of this act, which is codified as Section 196-4, General Code, reads as follows:

"The secretary of state and the auditor of state shall, on or before the first day of July, 1917, and thereafter whenever they deem it necessary, meet with the state purchasing agent and determine what supplies and equipment, required for the use and

maintenance of the departments and offices of all elective and appointive state officers, boards and commissions, shall be purchased and furnished by the state purchasing department. Provided, however, that supplies and equipment for boards of state supervisors and boards of state inspectors and supervisors of elections, for the courts of appeals, courts of common pleas and the supreme court, *for the institutions under the direction of the state board of administration*, for the maintenance of the Ohio National Guard, and for the agricultural experimental stations of the state, shall not be included in such lists of supplies to be purchased and furnished by the state purchasing department. Nor shall this act apply to or affect the educational institutions of the state or the commissioners of public printing."

(Emphasis mine.)

If, therefore, the institutions for whom these purchases were made were under the direction of the State Board of Administration at the time the act to provide a State Purchasing Department was enacted, the provisions of Sections 196-7 and 196-10, General Code, would have no application to the contracts in question. Section 1835, General Code, as it existed on the 29th day of June, 1917, at which time the act creating the Purchasing Department became effective, read as follows:

"The member holding the shortest term shall act as president. They shall appoint a fiscal supervisor, who shall also be the secretary of the board, and such other employes as may be deemed necessary for the efficient conduct of the business, prescribe their titles and duties and fix their compensation, except as otherwise provided herein.

The board shall assume its duties on August 15, 1911, and shall have full power to manage and govern the following institutions:

The Athens state hospital.
 The Cleveland state hospital.
 The Columbus state hospital.
 The Dayton state hospital.
 The Toledo state hospital.
 The Lima state hospital.
 The Massillon state hospital.
 The Ohio hospital for epileptics.

The institution for feeble-minded youth, which shall be known hereafter as

The institution for feeble-minded.
 The state school for the deaf.
 The state school for the blind.
 The Ohio soldiers' and sailors' home.

The home of Ohio soldiers, sailors, marines, their wives, mothers, and widows and army nurses, to be known hereafter as

The Madison home.
The boys' industrial school.
The girls' industrial home.
The Ohio state reformatory.
The Ohio penitentiary.
The Ohio state sanatorium."

Section 2034-6, General Code, as it then read and in its present form is as follows:

"Said property when rented or acquired by the state of Ohio shall be used and maintained as a hospital for the insane to be known as 'The Longview State Hospital' and the Ohio board of administration shall have all the powers with respect thereto conferred as to the institutions named in section 1835 of the General Code and by title 5, division 1, chapter 2 of the General Code."

Clearly, all of the institutions for which this corn was purchased and to which it was supplied were, at the time the act establishing the State Purchasing Department became effective, under the direction of the State Board of Administration, and the questioned contracts therefor would not be subject to the provisions of Sections 196-7 and 196-10, General Code. These purchases are governed by the provisions of Section 1849, General Code, which I quote as follows:

"The board is empowered and required to purchase all supplies needed for the proper support and maintenance of said institutions, by competitive bidding under such rules as the board may adopt. All bids shall be publicly opened on the day and hour and at the place specified in the advertisement. The contract shall be awarded to the lowest responsible bidder, preference shall be given to bidders in localities wherein such institution is located, if the price is fair and reasonable and not greater than the usual price; but bids not meeting the specifications shall be rejected. The board may require such security as it may deem proper to accompany the bids and shall fix the security to be given by the contractor. It may reject any or all bids and secure new bids, if for any reason it is deemed for the best interest of the state to do so, but it may authorize the managing officer of any institution to purchase perishable goods and supplies for use in cases of emergency, in which cases the managing officer of the institution requiring the same shall certify such fact in writing and the board shall record the reasons for such purchase."

This same conclusion was reached as to purchases for these institutions by one of my predecessors in the year 1921, and at page 940 of Volume II of the Opinions of the Attorney General for that year, he said concerning Section 1849, General Code:

“It will be observed that under this section there are no such detailed requirements as obtain under the other sections referred to. In purchasing supplies needed for the proper support and maintenance of the institutions under the control of the department of public welfare, the department of finance may establish its own rules; it need comply only with the following requirements:

- (1) Competitive bidding.
- (2) Public opening of bids on the day and hour and at the place specified in the advertisement.
- (3) Award of the contract to the lowest responsible bidder, preference being given to bidders in localities wherein such institution for which the purchase is made is located, if the price is fair and reasonable and not greater than the usual price.
- (4) Compliance of the bids with the specifications.

Special attention is called to the requirement that bids must be opened at the time and place specified in the advertisement. The statute does not require any particular kind of advertising, but this provision certainly implies that some advertising shall be had.”

It appears that the Department of Finance through its Division of Purchases and Printing complied with all of these requirements in advertising for bids and awarding these contracts.

At this point, it should be noted that while the functions formerly exercised by the State Board of Administration have in the main been transferred to the Department of Public Welfare, the function of purchasing supplies under Section 1849, General Code, has by Section 154-37, General Code, been transferred to the Department of Finance which exercises this power through its Division of Purchases and Printing.

I am not unmindful that your examiners state that the time stamp of the Superintendent of Purchases and Printing shows the times that the various bids for furnishing this corn were received by the Superintendent of Purchases and Printing and that apparently the bid of The E. B. Hostetter Company was opened prior to the time fixed in the advertisement for bids and prior to the opening of any other bids. This, in my opinion, does not

affect the validity of the contracts since the company to which the contract was awarded was the lowest bidder. In 33 O. Jur., 665, it is said:

“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.”

The obvious purpose of that part of Section 1849, General Code, which requires that the bids be opened on the day and hour and at the place specified in the advertisement is to prevent the disclosure of the amount of a bid to other bidders before the time limit for filing bids is expired and thereby enable such persons to obtain an unfair advantage over the person first filing his bid. However, in the instant case, no such unfair advantage was or could be claimed and competition could not have been stifled or hindered with respect to these bids.

It is therefore my conclusion that Sections 196-7, 196-10, 12910 and 12911, General Code, have no application to these specific contracts and that the provisions of Section 1849, General Code, which govern this transaction were followed by the Superintendent of Purchases and Printing. His action also complied with that part of Section 7 of House Bill No. 674 of the Ninety-third General Assembly which reads as follows:

“If any order and/or invoice drawn against any appropriation or rotary fund herein made is for labor and materials furnished, the aggregate cost of which exceeds five hundred dollars (\$500.-00) or for commodities purchased, it shall show that the same was furnished or purchased pursuant to competitive bidding and that the lowest and/or best bidder was awarded the contract, unless the controlling board shall have authorized the furnishing of such labor or material or the purchase of such commodities without competitive bidding, provided, however, that the controlling board shall authorize the furnishing of such labor or material or the purchase of such commodities without competitive bidding only after it has been determined that an emergency exists requiring such action.”

These contracts having been let on bids duly advertised as provided by law, you are therefore advised that they were made in full compliance with law and that you should draw your warrant in payment of the voucher issued thereon.

Respectfully,

THOMAS J. HERBERT,
Attorney General.