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1. BIDS—PUBLIC IMPROVEMENT OR FOR PURCHASE OF SUPPLIES OR MATERIAL—CONDITIONS OF CONTRACT ADDED BY BIDDER TO FORM PRESCRIBED IN ADVANCE OF BIDDING, NOT BASIS OF VALID CONTRACT, NOT BINDING UPON CITY—DIRECTOR OF SERVICE.

2. CITY, AFTER ENTERING INTO UNIT PRICE CONTRACT, WITHOUT AUTHORITY TO PAY CONTRACTOR INCREASED PRICES ON STRENGTH OF ESCALATOR CLAUSE IN LETTER ACCOMPANYING BID AND SUBSEQUENTLY REFERRED TO IN EXECUTED AGREEMENT BY CITY AND BIDDER.

3. CITY WITHOUT LEGAL AUTHORITY OF ITS OWN VOLITION TO PROVIDE IN CONDITION OF CONTRACT, ESCALATOR CLAUSE WHEREBY CITY TO PAY UNIT PRICES TO BE SET BY CONTRACTOR AT TIME OF DELIVERY OR PERFORMANCE.

SYLLABUS:

1. Where the director of service of a city has advertised for bids for a public improvement or for the purchase of supplies or material, conditions of contract added by a bidder to the form of proposal or contract form prescribed in advance of bidding cannot be the basis of a valid contract and cannot be binding upon the city.

2. A city after entering into a unit price contract is without authority to pay increased prices to a contractor on the strength of an escalator clause contained in a letter accompanying a bid and subsequently referred to in the formal agreement executed by the city and the bidder.

3. 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.

Columbus, Ohio, August 26, 1946

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

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

"We are inclosing herewith a letter from the City Auditor of Lorain, in which inquiry similar to a number of other inquiries received by this office, is made, all relating to the inclusion of an escalator clause in city contracts that renders all base contract bids indefinite and non-conforming with standard bidding requirements.

We inclose also, a copy of the standard bidding requirements form in use by the City of Lorain.

Will you kindly examine the inclosures and give us your opinion in answer to the following questions?

Question 1. Do conditions of contract added by the contractor to the original contract documents become binding upon the City?

Question 2. Can the City, after entering a unit price contract, pay increased prices on the strength of an escalator clause contained in a letter accompanying a bid and subsequently referred to in the formal agreement executed by the City and the bidder?

Question 3. Can the City legally, on its volition, provide in its conditions of contract an escalator clause whereby the City agrees to pay unit prices set by the contractor at the time of delivery even though the prices paid are higher than those submitted in the original bid?"

Accompanying your letter I notice the letter from the city auditor of Lorain, and also the instructions to bidder and contract form used in the contract which gave rise to his inquiry. From the letter of the city auditor I quote the following:

"Recent bids taken by the City of Lorain for the furnishing of construction materials for post war projects have, by their apparent irregularity, raised a question as to the legality of the City entering into a contract based on certain conditions which the bidders are attempting to write into the contract. As one example, we will refer to contract documents now in our office properly executed by the bidder, the City of Lorain, by its Director of Public Service, certified correct as to form by the City Solicitor, but with the Auditor's certification awaiting definite ruling by your office.

Our standard agreement form contained in this contract provides for the listing of the various contract documents, and we note that an added reference has been made to a "letter of proposal" furnished by the bidder. The letter referred to is a

form letter evidently sent with all quotations of prices given by the bidder. The letter is as follows:

'Director of Public Service
City of Lorain
Lorain, Ohio

Dear Sir:

Great difficulty is being experienced in procuring the materials for the manufacture of most of our products, so it is not possible to make a definite shipping promise at this time. We hope, however, to be able to ship as indicated in our quotation, but in the light of uncertainty, we must ask your indulgence if conditions make this impossible.

Your order, which we solicit, will, if tendered us, be with the mutual understanding and agreement, that it will be invoiced at our prices in effect at the time of shipment. In fairness to all concerned, no cancellation of the order will be accepted if we are able to make shipment at prices quoted herein. In further fairness to all concerned, if we find it necessary to invoice the materials at a higher price, we will so advise you in advance of shipment, and you will have the privilege of cancelling the order at that time. Unless we hear from you within ten days after mailing such notice, it is mutually agreed that the new prices named are acceptable to you, and the materials will be invoiced at the higher prices.

Prices quoted herein are f. o. b. foundry with freight allowed to destination at traffic rates now in effect. Any increase or decrease in freight rates will be for the account of the buyer. Our quotation is subject also to conditions printed on reverse side of this letter.' "

It is evident that the questions here involved are common to the experience of public authorities throughout the state under present conditions of extreme fluctuation and rapid rise of prices and costs of construction, and the consequent difficulty in procuring firm bids from contractors. It must be recognized that public authorities generally never have had authority to enter into contracts with the freedom which belongs to private individuals or private organizations. The law has long recognized that certain safeguards must be thrown around public contracts in order to prevent abuse, favoritism and misuse of public funds. However great the temptation to do away with these safeguards in times of unnatural and distorted conditions such as the present, we are compelled to take the law as it is and to insist on compliance by public officials

regardless of the possible difficulties of procuring public contracts, and regardless of the seemingly unnecessary and extravagant cost.

Throughout all of the laws relating to public contracts whether by the state, municipalities or other political subdivisions, we find the principle well established that public improvements and purchases of materials by the public, if the cost amounts to a substantial sum, must be accomplished by competitive bidding and award of contracts to the lowest or in some cases to the lowest and best 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."

Referring specifically to municipal corporations, we note that by far the large proportion of municipal contracts for improvements and supplies fall within the jurisdiction of the director of public service in cities. In villages corresponding duties are imposed upon the council and board of public affairs where one is organized. As to matters falling within the domain of the director of public safety, he is by the provisions of Section 4371, General Code, required to exercise his powers of contract in the same manner as that prescribed for the director of public service.

Section 4328, General Code, provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein,

exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Section 4329, General Code, reads:

"The bids shall be opened at twelve o'clock noon, on the last day for filing them by the director of public service and publicly read by him. Each bid shall contain the full names of every person or company interested in it, and shall be accompanied by a sufficient bond or certified check on a solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated with the price thereof. The director may reject any and all bids. Where there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected."

It will be noted that these sections do not contain any specific requirement that specifications be prepared in advance on which the bids are to be based nor do they provide, as do the statutes relating to contracts in behalf of the state that the form of bidding proposal must be prescribed in advance. (See Sections 2315, 2317, General Code.) However, we do find provisions in the various statutes relating specifically to municipal improvements of many classes requiring such plans and specifications. See Sections 4029, 4044, 4340, 4345-1 as to municipal buildings; 3871, 3877 as to sewers; 3816 as to street improvements; 3842-3 as to street lighting; 4077 as to park improvements.

In order that there may be an honest competition in bidding and that the director may be able to determine what is the lowest and best bid it is absolutely necessary that all bidders should bid upon the same basis and pursuant to the same conditions whether contained in formal specifications or instructions to bidders or both.

It is true that a considerable latitude is allowed in the specifications for municipal improvements so that different materials or machinery or other articles involved may be offered so long as they meet the specifications as to general character and results to be attained. Thus it was held in the case of Yaryan v. Toledo, 8 O. C. C. (N. S.) 1:

> "Where the work is of the character involved in the building of an extensive municipal water works plant, it is not necessary that the specifications to be submitted to the bidders should go into any greater detail than is required to make the matter intelligent to persons competent to do the work and furnish the materials."

In Tucker v. Newark, 19 O. C. C., 1, it was held:

> "The advertisements for bids to construct a certain street improvement with bricks, which specify a particular manufacture of brick to be used, are illegal as excluding competition. The city council may resolve to improve a street with granite, or firebrick or asphalt, etc., and may advertise for bids with specifications providing for all these different characters of material, and when the bids are in, council may determine which of the different materials shall be used, but the contract must be given to the lowest bidder on the kind of material determined upon."

It appears to me however that in order that a city may have the benefit of competitive bidding and get the largest possible value for its money expended, it is absolutely necessary that when it has made its contract with the bidder who is found, in the sound discretion of the director, to be the lowest and best bidder, the obligations of both the contractor and the city must be definite and certain or capable from the terms of the contract itself of being made definite and certain and not left to the judgment or caprice of the contractor. Otherwise the city would be at the mercy of the contractor and the way would be open to extreme abuses at the hands of an unfaithful official or an unscrupulous contractor. Under the form which you submitted specifying the requirements for bidding and entering into a contract, the city very properly stipulated and informed its prospective bidders that all bids must be made on the proposal blank prepared and submitted by the city, and that "no alterations or additions not called for shall be made on the proposal." The letter of the bidder to the director is certainly a wide departure from the instruction to bidders, and would completely destroy the effect of a definite price named in the proposal.

The copy of the signed contract which you have submitted shows that it was agreed that the contract was to be performed in accordance with the proposal thereto attached *"and letter proposal of 6-11-46."* These quoted words were not a part of the printed contract form but were typed

in presumably at the time of execution by the director and the contractor. The "letter proposal" is that which I have quoted addressed to the director of public service in which the contractor frankly states that he will probably find it necessary to invoice the materials which he proposes to furnish at a higher price than that named in his bid, such price to be determined at the time of shipment. He also states that his quotation is subject to conditions printed on the reverse side of his letter, which conditions are not disclosed.

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 an opinion issued on May 16, 1946, being No. 923, I suggested a procedure whereby difficulties now prevalent in getting a firm bid on account of fluctuating costs might to a certain extent be met. In that opinion it was held:

> "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."

The idea underlying that opinion was inspired by the adjustment provisions proposed to be used in a contract for installation of a generator which contemplated a resort to the labor and material indexes of the United States Department of Labor and an agreement between the bidder and the public authority that in addition to the amount named by the bidder there might be added the actual increases found to have been caused by a rise in cost of material or labor as determined by the statistical reports of the United States Department of Labor above referred to, with

a certain ceiling by way of a fixed maximum percentage above the base bid. The base bid plus such fixed percentage would therefore become the actual amount upon which comparison of bids would be made.

I recognize that in some types of public contract this standard for determining an allowable increase in the contract price may be difficult of application, but it appears to me that in making a public contract such as the one which is the subject of your inquiry some definite basis might be arrived at in advance of bidding whereby certain increases would be allowed over the base bid up to a fixed maximum. Such increase should be based upon standards beyond the control or manipulation either of the public officer or the contractor and should offer an equal opportunity and advantage to every bidder who desired to enter a bid for the work.

In specific answer to your questions it is my opinion:

1. Where the director of service of a city has advertised for bids for a public improvement or for the purchase of supplies or material, conditions of contract added by a bidder to the form of proposal or contract form prescribed in advance of bidding cannot be the basis of a valid contract and cannot be binding upon the city.

2. A city after entering into a unit price contract is without authority to pay increased prices to a contractor on the strength of an escalator clause contained in a letter accompanying a bid and subsequently referred to in the formal agreement executed by the city and the bidder.

3. 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.

Respectfully,

HUGH S. JENKINS,
Attorney General.