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1. BID—SUBMITTED TO DEPARTMENT OF HIGHWAYS OF OHIO—RESPONSE TO ADVERTISEMENT—ACCOMPANIED BY CERTIFIED CHECK FOR FIVE PER CENT OF ESTIMATED COST OF PROJECT, TOGETHER WITH “NON-COLLUSION AFFIDAVIT” MAY BE CONSIDERED BY DIRECTOR, NOTWITHSTANDING FACT BID PROPOSAL WAS NOT SIGNED AT END BY BIDDER.
2. FORMAL DEFECT MAY BE WAIVED AND IF BIDDER IS LOWEST COMPETENT RESPONSIBLE BIDDER, DIRECTOR MAY AWARD PROJECT THEREUNDER.

## SYLLABUS:

1. A bid submitted to the Department of Highways of Ohio, in response to an advertisement by the Director, accompanied by a certified check for five per cent of the estimated cost of the project, together with a "Non-collusion Affidavit", may be considered by the Director, notwithstanding the fact that said bid proposal was not signed at the end by the bidder.

2. Such formal defect may be waived, and if said bidder is the lowest competent responsible bidder, the Director may award the project thereunder.

Columbus, Ohio, June 26, 1945

Hon. Perry T. Ford, Director Department of Highways  
Columbus, Ohio

Dear Sir:

Your letter of recent date requesting my opinion is at hand, which request reads as follows:

"On May 29, bids were received and opened publicly, for the construction projects listed below:

Project No. 64, Butler County  
Bituminous Treatment, Item T-31  
Total estimated cost \$37,003.18

Project No. 65, Butler, Montgomery, Preble Counties  
Bituminous Treatment, Item T-31  
Total estimated cost \$25,528.56

Two bids were received on each project, and in each instance W. L. Follmer, Hamilton, Ohio, submitted the low bid, as noted below:

Project No. 64  
W. L. Follmer, Hamilton, Ohio.....\$33,523.41  
L. P. Cavett, Lockland, Ohio..... 34,367.87

Project No. 65  
W. L. Follmer, Hamilton, Ohio..... 24,059.70  
L. P. Cavett, Lockland, Ohio..... 24,969.88

In each instance, Mr. Follmer failed to sign the bidding proposal. However, he did complete all other necessary requirements, such as, the submission of certified checks and the signed non-collusion affidavits properly notarized.

On the first listed project, it should be noted that Mr. Follmer's bid is \$3,479.77 under the estimated cost, and is \$844.46

under the bid submitted by Mr. Cavett. On the second listed project you will find Mr. Follmer's bid to be \$1,468.86 under the estimated cost, and is \$910.18 under the bid submitted by Mr. Cavett.

The total amount bid by Mr. Follmer for the two projects, amounts to \$57,583.11 and is \$4,948.63 under the estimated cost, whereas the total amount bid by Mr. Cavett is \$59,337.75, being \$3,193.99 below the total estimated cost, and \$1,754.64 higher than the total amount bid by Mr. Follmer.

Upon the evidence as herewith set forth would the Director be within his legal limitations in awarding the projects to the low bidder and subsequently entering into a contract with him, in spite of the fact that the bids submitted were unsigned.

Your formal opinion in this matter is hereby respectfully requested, and its early submission to the department will be appreciated."

The statutory provisions governing the subject of your inquiry are found in section 1206 of the General Code of Ohio, which reads in part as follows:

"Before entering into a contract the director shall advertise for bids for two consecutive weeks in two newspapers of general circulation and of the two dominant political parties published in the county or counties in which the improvement, or some part thereof is located, if there be any such papers published in said counties, but if there be no such papers published in said counties then in two newspapers having general circulation in said counties, and such director shall also have authority to advertise for bids in such other publications as he may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the office of such director and the resident district deputy director of the district in which such improvement, or some part thereof, is located, and the time within which bids therefor will be received.

*Each bidder shall be required to file with his bid a certified check for an amount equal to five per cent of the estimated cost, but in no event more than ten thousand dollars, payable to the director, which check shall be forthwith returned to him in case the contract is awarded to another bidder, or in case of a successful bidder when he has entered into a contract and furnished bond as required by law. \* \* \**

*The director shall award the contract to the lowest competent and responsible bidder qualified to bid in accordance with the terms of this act. \* \* \**

(Emphasis added.)

Webster's New International Dictionary defines "bid":

"To offer to take a certain price as for work to be done under a contract."

You will note therefore that a bid is an offer on the part of a contractor to do certain things and provide certain materials for a stated and ascertainable consideration. It is not a contract.

Reference to section 1206, General Code, will disclose that no statutory form of bid has been prescribed by the Legislature and this being so, the public authority has the right to establish one. 33 O. Jur., 690. Likewise, the public authority, in this case the Director of Highways, has the right of waiving irregularities so long as such waivers do not permit the public to be defrauded or damaged. Donnelly on the Law of Public Contracts, page 191. In the same section of the same work we also find this comment:

"It (bid) is not invalid because not signed, if the statutes only require verification and the bid is verified."

It is not difficult from this rule to bring forth the conclusion that if no particular form of bid is required by the statute, any indication from a bidder which is sufficiently clear to enable the public authority to understand the nature and import of the bid can be accepted by such authority. The duty of construing bids rests primarily on the contracting authority, in this case the Director of Highways. 33 O. Jur., page 692.

In my consideration of this question, I have examined the bidding forms used in the instant case and find that on page 11 of the proposal, in both of the projects, appears what is called "non collusion affidavit". This instrument is bound into and is an integral part of the proposal and contains the following language:

"\_\_\_\_\_ being first duly sworn says that he is (sole owner, partner, president, etc.) of \_\_\_\_\_, the party making the foregoing proposal or bid; that such bid is genuine and not collusive or sham, etc."

This affidavit must be signed and sworn to before a Notary Public or other competent officer. I understand from your request that this affidavit in both projects was executed by Mr. Follmer of Hamilton, Ohio. From

the nature of the language employed he recognized the bid and certified to its genuineness. Therefore, the failure of Mr. Follmer to sign at the end of the proposal can only be considered a formal defect and as such can be waived by the public authority. In 33 O. Jur., page 694, it is stated :

“In general, formal defects not affecting the competitive character of a bid may be disregarded, and it has been declared that such defects should be disregarded in the lowest bid where the statute directs the contract to be let to the lowest bidder \* \* \*. The rule has been expressed that a board may waive defects in a bid where such waiver works no prejudice to the rights of the public.”

On pages 665 and 666 of the same work the following appears :

“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.”

It would therefore follow that since the law contemplates that the system of obtaining bids for public work should be interpreted and operated in the interests of the public and to encourage competition, the Director not only has the authority, but should waive formal defects in bidding where such waiver has the effect of securing the performance of the contract at a lower price.

In the face of the foregoing and specifically answering your question, it is my opinion that notwithstanding the failure of Mr. Follmer to sign at the end of the proposal, in the cases herein considered, you have the authority to accept these bids.

Respectfully,

HUGH S. JENKINS

Attorney General