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1. BIDDERS, INFORMATION TO—PROVISION FOR PRICE ADJUSTMENT—NOT REQUIRED TO BE STATED IN NOTICE TO BIDDERS—PROVISO, INFORMATION AVAILABLE TO ALL BIDDERS WHEN THEY SECURE COPIES OF INFORMATION TO BIDDERS—PRICE ADJUSTMENT THEREIN PROVIDED.
2. WHERE CONTRACT AWARDED PURSUANT TO DULY PUBLISHED LEGAL NOTICE—CONTRACT DOCUMENTS PLACE ALL BIDDERS ON EQUAL BASIS—PAYMENT OF PUBLIC FUNDS PURSUANT TO CONTRACT ON PRICE ADJUSTMENT BASIS NOT ILLEGAL BECAUSE LEGAL ADVERTISEMENT CONTAINED NO SPECIFIC REFERENCE TO IT.

SYLLABUS:

1. The provision for price adjustment is not required to be stated in the notice to bidders if such information is available to all bidders upon securing copies of information to Bidders in which price adjustment is so provided.

2. Where a contract has been awarded pursuant to duly published legal notice, and where the contract documents place all bidders on an equal basis, the payment of public funds pursuant to such contract on a price adjustment basis will not be rendered illegal because the legal advertisement contained no specific reference thereto.

Columbus, Ohio, March 11, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

This will acknowledge receipt of your request for my opinion, which reads as follows :

“It has been disclosed in the examination of municipal contracts that the contract documents include what is designated as ‘Information to Bidders’, which in certain instances contains a provision authorizing the bidder to submit a proposal subject to price adjustment, to be determined in accordance with a fixed or agreed formula.

“Our attention was recently directed to a contract of this kind, by the officials of the City of Shelby, Ohio, in which case the ‘Notice to Bidders’ inserted in the local newspaper made no reference to the fact that bidders would be permitted to submit bids containing price adjustment provisions. Bids were requested in this case pursuant to authority of Section 4328, General Code.

“We are familiar with Attorney General’s Opinions No. 879, 923, and 1169, all of the year 1946, and pertaining to price adjustment provisions, in public contracts. Opinion No. 1169 of 1946 has reference to municipal contracts in particular and would seem to prohibit the inclusion of an ‘escalator clause’ or price adjustment provisions in any contract unless such provision was stated in the ‘Notice to Bidders’ published in the local newspaper as provided in Section 4328, General Code.

“We are enclosing herewith a copy of the letter received from Mr. G. W. D., Director of Law, City of Shelby, and one copy of the ‘Contract Documents’ involved in the current discussion as to the legality of a contract awarded in accordance therewith. Since the questions involved in the aforesaid case will occur frequently in many Ohio cities, and the answer thereto will be of state-wide interest, we respectfully request that you consider the enclosures and give us your formal opinion in answer to the following questions :

“1. When city council, in compliance with the provisions of Section 4328, General Code, has authorized the Director of Public Service to purchase equipment for the municipal light plant, and

the notice to bidders published in a local newspaper does not state that the bids to be submitted may include a provision for price adjustment but the 'Information for Bidders' made a part of the bid forms prescribed for use in submitting bids does contain instructions permitting the bidders to submit a bid containing price adjustment provisions, would a contract, awarded on the basis of a bid submitted in conformity therewith and containing such price adjustment provisions, be valid?

"2. Where a contract has been awarded in the manner described in question 1, and the work performed thereunder in the manner therein provided, may public funds legally be expended in payment of such contract in compliance with the price adjustment provisions made a part thereof?"

The questions, as I understand them, are: (1) Would the statement "Information to Bidders may be obtained at the Office of the Director of Service" in the "Notice to Bidders" be sufficient notice that a provision for price adjustment may be considered in submitting a bid? and (2) If a contract were awarded pursuant to the notice and work performed on the basis of a price adjustment provision, would this constitute a legal expenditure of public funds?

Municipal contracts for improvements and supplies, in the instant questions, fall within the jurisdiction of the Director of Public Service and, as such, he is required to exercise his power of contract in the manner prescribed by Section 4328, General Code, which section reads:

"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."

In the case of *Auto Car Company, et al. v. Zanesville, et al.*, 15 O. O. 104, the court was called upon to interpret Sections 4328 and 4371 of the General Code. In that case, after the opening of bids, certain of the bidders offered additional equipment "on condition that such offering com-

pany would be awarded the contract.” The court held that all of the bidders, by such action, “forfeited all right to a consideration of their bids” and that all said bids were void. The court cites with approval the following language from the case of *Fairbanks Morse & Co. v. City of North Bend*, 94 N. W. 537 (Neb.) :

“The object of that subdivision is to invite competition and to prevent favoritism and fraud; to attain that object it is essential that the bidders, so far as possible, be placed on equal footing, and be permitted to bid on substantially the same proposition and on the same terms.”

It is an underlying principle, in the letting of public contracts where advertisement and bids are required, the identical information be available to all bidders as to the nature, quality and quantity of articles or labor required. In 44 C. J. 103, under the heading of “Information to Bidders”, it is said :

“Bidders must be duly informed by the officer soliciting bids as to the nature, quality, and quantity of the article to be purchased or the work to be done for the municipality to the end that they may bid intelligently, and binding contracts may result therefrom. In order that there may be fair competition, the same information should be given to all. * * *”

Section 4328 of the General Code, quoted above, requiring advertising and receiving of bids, should be construed in light of Section 4329 of the General Code, which provides as follows :

“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.”

With your letter you have submitted a volume entitled “Contract Documents for Improvement of Municipal Light Plant, City of Shelby, Ohio, December, 1948”, etc., containing some 138 pages. In this docu-

ment, on pages one to three, inclusive, are set forth what is entitled "Advertisement for Bids for Improvement of Municipal Light Plant, City of Shelby, Ohio." I assume that this is the "Notice to Bidders" to which you refer and, in my opinion, this notice, together with the contract documents referred to therein, seeks to place all bidders on an equal footing and that so far as the "Advertisement of Bids" is concerned, it appears to be legally sufficient. It is further my opinion that there is no statutory requirement that such advertisement contain a specific reference to the method or basis by which the bid price will be computed.

Concerning your second question, I find that on May 16, 1946, the then Attorney General, in Opinion No. 923, 1946 O. A. G. 294, suggested a procedure whereby difficulties in getting a firm bid now prevalent and due to fluctuating costs might, to a certain extent, be met and overcome. In that opinion it was held as disclosed by the syllabus:

"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 provisions for price adjustment based on changes in costs of labor and materials, up to a fixed maximum percentage."

The holding in the above opinion was further considered in Opinion No. 1169, 1946 O. A. G. 631, in which, at page 637, it was said:

"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."

Let me point out that whether the bid be a fixed total price or, as stated above, where "certain increases would be allowed over the base bid up to a fixed maximum", in either event it is contemplated that the basis be arrived at "in advance of bidding."

The documents which you submitted with your letter are all of them in blank form; that is, they are not executed by any bidder and it is not required, in answering the questions that you propound, that we go further than to say that if the contract documents referred to in the public advertisement meet the requirements of law, a contract let on a valid bid will not be invalidated because the published legal advertisement does not contain a specific reference to the price adjustment provisions.

Respectfully,

HERBERT S. DUFFY,
Attorney General.