

2. Any dangerous or deadly weapon so seized is *in custodia legis* until the termination of the criminal action or actions against the person so arrested and may not be replevied by the owner. While in the custody of the law such weapon is held by the responsible officer as an agent of the court before whom the cause or causes are pending and such officer is required to use that degree of care for its safekeeping and preservation, which an ordinarily prudent man would use under the same or similar circumstances.

3. If the county prosecuting attorney requests that said weapons be turned over to him during the investigation or prosecution of the case, it is the duty of the state highway patrolman to deliver said weapons to such prosecuting attorney as the chief law enforcement officer of his county, who should give his receipt therefor.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1620.

CONTRACT—BASE AND ALTERNATE—AWARDING AUTHORITY MAY SELECT ALTERNATE BID WHEN SUCH BID IS LOWER THAN ESTIMATE FILED WITH AUDITOR OF STATE, EVEN THOUGH ALL BIDS ON BASE CONTRACT EXCEED ESTIMATE.

SYLLABUS:

Where the plans, specifications and details for a proposed project are accurate, full and complete, both as to the base and alternate contracts, and an estimate of costs on both the base and alternate contracts has been filed with the Auditor of State pursuant to Section 2325, General Code, the awarding authority may then select such alternate plans and specifications and award the alternate contract if the bid thereon is lower than the estimated cost thereof, even though all bids on the base contract exceed the estimated cost of such base contract.

COLUMBUS, OHIO, December 28, 1939.

HON. CARL E. STEEB, *Secretary, The Ohio State University, Columbus, Ohio.*

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

“On November 21, 1939, sealed proposals were received by the Ohio State University for construction of ‘B’ Addition to

Journalism Building (PWA Docket No. Ohio 1986-F), based on documents which had been approved by the Director of Public Works and filed with the Auditor of State.

These documents included full data on a base contract, and on four deductive alternates. Alternate No. 1 was based on the elimination of a portion of the building twenty-two feet in length. Of the bids received for the general construction of the base contract, none was below the amount of the estimate filed with the Auditor. Of the bids received for the project based on the acceptance of Alternate No. 1, the lowest bid for general construction is below the net estimate of the project on this basis filed with the Auditor of State.

Recommendation for award of the General Contract was therefore made on this basis, and this necessitated the recommendation of awards on the Heating, Plumbing and Electrical contracts on the same basis. These recommendations were approved by the Director of Public Works on November 22nd. The relevant figures, taken from the filed estimates and from the certified tabulation of bids received, are listed as follows:

"Base Contract—	<i>Architect's Estimate</i>	<i>Low Bids</i>
General Contract	\$20,849.93	\$24,171.00
Heating and Ventilating.....	2,325.00	2,220.00
Plumbing	2,469.12	2,180.00
Electric	1,355.95	1,240.00
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	\$27,000.00	\$29,811.00
Alternate No. 1—		
General Contract—		
deduct \$100.....net	\$20,749.93	net \$20,021.00
Heating and Ventilating—		
deduct \$10.....net	2,315.00	net 1,750.00
Plumbing—deduct \$15.....net	2,454.12	net 2,110.00
Electric—deduct \$5.....net	1,350.95	net 1,124.00
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	\$26,870.00	\$25,005.00

Will you kindly consider this matter and render an opinion concerning it at your convenience?"

Your inquiry in substance asks whether an awarding authority has the discretion of selecting an alternate minus bid in a case where all of the base bids have exceeded the estimate of cost, and the lowest alternate bid is less than the estimate of cost.

Section 2314 to Section 2332, inclusive, of the General Code, sets forth

the procedure to be followed in awarding contracts for the construction or alteration of public works, supported in whole or in part by the State of Ohio.

Section 2314 of the General Code, provides that for any proposed project, full and accurate plans shall be drawn, definite and complete specifications made, and an accurate estimate of cost along with other data shall be filed with the Auditor of State. All of the foregoing, with the exception of the estimate of cost, are available to all bidders.

It appears from an examination of the papers submitted in this connection that the procedural steps outlined in Section 2314, *supra*, were followed and so all of the bidders were fully aware and apprised of what they were bidding upon both as to the base and alternate plans and specifications and each and every bidder was afforded equal opportunity to bid on same.

In the instant case it is necessary to examine Section 2323 of the General Code of Ohio, which provides as follows:

“No contract shall be entered into pursuant to section 2317 at a price in excess of the entire estimate thereof. Nor shall the entire cost of the construction, improvement, alteration, addition or installation including changes and estimates of expenses for architects or engineers, exceed in the aggregate the amount authorized by law for the same.”

I find from the documents submitted to me that an estimate of cost was prepared and filed with the Auditor of State for the base plans and specifications, likewise, an estimate of cost was prepared and filed with the Auditor of State for the alternate plans and specifications, and while all bids submitted for the base plans and specifications exceeded the architect's estimate of cost, however, bids submitted for the alternate plans and specifications were lower than the architect's estimate of cost and the awarding authority, in selecting the lowest bid submitted in connection with the alternate plans and specifications, was thereupon entering into a contract the total cost of which was lower than the architect's estimate of cost of construction, and the contract was, in view of the foregoing facts, authorized by law.

It also appears from the files that the bids on the alternate plans and specifications were below the estimates of cost for each alternate.

I have been unable to find any statutory prohibition on alternative bidding, however, I have found judicial sanction for such bidding in the case of *State, ex rel. Waltz, vs. Green*, reported in 22 C. C. (N. S.) at page 1, wherein it is stated:

“Plans and specifications which provide in the alternative for different materials and methods of construction, and are full, ac-

curate and complete as to each alternative * * * and afford the opportunity for full competition as to each alternative, are valid ; and an award to the lowest bidder on such alternative as may be finally adopted, after the bids have been opened and considered, will be sustained."

The above noted case was quoted with approval by the court in the case of *Mulcahy vs. City of Akron*, found in Volume 27, Ohio Appellate Reports, at page 541.

In the case of *William Ampt vs. City of Cincinnati*, 17 O. C. C., 516, it is stated in the third branch of the syllabus :

"3. There can be no objection to the provisions in the contract as to alternative bidding, nor to the provisions thereof by which alterations and modifications in the contract are provided for. In practice such changes have always been found necessary and in the nature of things must be."

The decisions that may be found dealing with the enjoining of the use of alternative bids were based solely on the point that the alternates and amendments were made *after the bids were opened* and were therefore not within the contemplation of all bidders. See *Herman vs. State*, 11 C. C., 503; *Beaver vs. Institution for Blind*, 19 Ohio State, 97.

Therefore, it is my opinion that where the plans, specifications and details for a proposed project are accurate, full and complete, both as to the base and the alternate then, the awarding authority may select alternate plans and specifications when the alternate bid is lower than the estimate of cost, although all base bids exceed the estimate of cost.

Respectfully,

THOMAS J. HERBERT,
Attorney General.