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CERTIFIED CHECK TO ACCOMPANY BID — DIRECTOR OF HIGHWAYS — MAY REQUIRE SUCH CHECK — NOT MANDATORY REQUIREMENT — WHERE NOTICE REQUIRES SUCH CHECK — BIDDER FAILS TO FURNISH SAME — RECEIVES AWARD, SIGNS CONTRACT AND GIVES BOND — DISCRETION OF DIRECTOR TO WAIVE REQUIREMENT AS TO CHECK — WHERE NO FRAUD OR COLLUSION, COURTS WILL NOT DISTURB WHEN ACTION FOR PUBLIC INTEREST — SECTION 1226-2 G. C.

SYLLABUS:

1. *The Director of Highways, acting under the provisions of Section 1226-2 of the General Code, may require a certified check to accompany a bid, but such requirement is not mandatory.*

2. *In the event the bidder does not furnish such a check where required so to do in the notice, but receives the award, signs a contract and gives bond to perform the contract, the discretion of the Director in waiving the requirement as to the check, will not be disturbed by the courts in the absence of fraud or collusion, when such action is for the public interest.*

°Columbus, Ohio, April 18, 1940.

Hon. Robert S. Beightler, Director of Highways,
Columbus, Ohio.

Dear Sir:

Acknowledgment is made of your recent communication which reads:

“Under Sec. 1226-1 of the General Code of Ohio, the Director of highways is authorized to purchase machinery, materials, supplies, or other articles. Where the expenditure is more than Five Hundred Dollars (\$500.00), the Director shall give notice, by posting, for not less than ten days, a written, typed, or printed invitation to bidders, on a bulletin board posted in the offices of the Department.

Under Sec. 1226-2 of the General Code, the Director may require bids to be accompanied by a certified check, payable to him, in an amount fixed by him and stated in the invitation to bidders.

Under this section it has been the policy of the Director to furnish forms to the bidders, said forms containing a statement which requires the bids to be accompanied by a certified check. The question arises, where the bidder has submitted his bid but failed to furnish a certified check required by the form or notice. The statutes state that the Director may require a certified check. This brings up the question, is the Director entitled to waive this requirement in case the low bidder fails to accompany his bid by a certified check? If, in the event that the award is made to the lowest bidder, who fails to comply with furnishing a certified check, is the Director correct, legally, in waiving this failure to furnish a certified check where, in the opinion of the Director, a savings would result to the Department?"

In a supplemental communication it appears that in the particular case which you have in mind, among the bids submitted was one not accompanied by a certified check. It further appears that said bid was the lowest, and in view of the quantity purchased, a saving of approximately \$500.00 resulted in the awarding of this contract to such bidder.

It has further been learned that the award was made to such bidder who furnished a bond to secure his performance of the contract, which was made by the issuance of a purchase order and the acceptance thereof.

It is well established by the courts of Ohio, as in the courts of most other states, that statutes relating to the letting of public contracts are strictly construed against the bidder and in favor of the public. That is to say, where the statutes expressly provide for a given procedure, such as advertising, furnishing bid bonds and the like, these statutes must be followed irrespective of the results. However, where the statutes are silent and rules and regulations have been adopted by the awarding authority, it has frequently been held that such requirements may be waived, if such waiver is in the interest of the public and no fraud or collusion intervenes. However, it must be kept in mind that such actions on the part of an awarding authority must not have the effect of stifling competition or of presenting an opportunity for fraud.

In the case of *State, ex rel., v. Building Commission*, 22 C. C. (n. s.) 321, it was held, as disclosed by the third branch of the headnotes, that:

"The fact that a bidder for the construction of a public building wrote one proposition on the proposal sheet, which he did not find in the printed form, is a defect which the building commission has power to waive, and where its waiver has the effect of saving money for the people it will not be condemned by the courts."

In the case under consideration, it must be kept in mind that the statute does not require the Director to take a certified check with a bid, this being left to his discretion. Clearly, the statute is not mandatory because Section 1206 of the General Code, which relates to the Director's duties in awarding contracts covering road improvements generally, provides that the bids "shall" be accompanied by a certified check. In construing these two sections together, in connection with the Director's power, it is clear that under the section to which you refer, it is permissible as to whether or not the Director will require a certified check.

In 33 O. J. at page 694 there is found a discussion upon the subject of the waiver of defects in bids. In this text it is indicated that formal defects, not affecting competition in bidding, may be and should be disregarded where the contract is required to be let to the lowest bidder. Among other things, the following is stated in said text:

"So, the mandatory provisions of statute not being violated, a board may waive compliance with its own requirements as to the forms of bids, * * *"

In said text it is further stated:

"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."

Also attention is directed to Donnelly's *The Law of Public Contracts* at Section 116, wherein, among other things, it is stated:

"Irregularities in the form of bid may justify rejection by the public authorities, but they may waive regulations made for their protection, unless such act of waiver will permit the public body to be defrauded or damaged".

In the present situation it may be argued that the action taken may tend to stifle competition for the reason that had it been known that a certified check was not absolutely required, others would have bid who did not do so. However, it is not believed such argument is sound, for the reason that the Director could have completely dispensed with any requirement as to a certified check and it could be argued that his requirement as to the submission of a certified check was an abuse of discretion in that it might exclude bidders who are able to perform the contract but unable to furnish a certified check.

From a practical standpoint it is believed to be so evident that one who is able to perform a contract is usually able to furnish a certified check; that any slight interference with competition for such reason is too far-fetched to be given serious consideration.

In the case of *Altschul v. City of Springfield*, 48 O. A., at page 356, it was held, as disclosed by the third branch of the syllabus:

“Where bond for completion of the work has been furnished, the contract has been signed by the successful bidder and the city has delayed signing such contract only by reason of the instant litigation, an irregularity in the bid bond will not necessarily vitiate the contract since its purpose is only to guarantee the entering into such contract and the giving of the bond for the performance of such contract by the successful bidder.”

The case last above mentioned is important for the reason that Section 4329 of the General Code, which was one of the sections under consideration, expressly provided in part:

“Each bid * * * shall be accompanied by a sufficient bond or certified check on a solvent bank and if the bid is accepted, a contract will be entered into and the performance of it properly secured.”

It will be observed that notwithstanding the statutes contained a mandatory provision with reference to the furnishing of a bond or certified check, in the case last above mentioned the Court found that where a contract had been entered into that the same would not be vitiated by reason of the failure to furnish such check or bond. In the body of the opinion of said case it is stated:

“* * * The purpose of a bid bond is to guarantee the entering into of a contract and the giving of a bond for the performance of the work by the successful bidder. That is the purpose of the bid bond, and the record shows that the contracts in question have been signed by Caffrey, Griffin & Bahin, Inc., and that bond for the completion of the work has been furnished by Caffrey, Griffin & Bahin, Inc. It is only because of the plaintiff bringing this suit that the city has delayed signing the contracts in question.”

From the above it is clear that it is not necessary to go so far to sustain the legality of the award which you mention, as the Court went in sustaining the contract in the *Altschul* case, *supra*, for the reason that the requirement with reference to the submission of a certified check is not mandatory

under Section 1226-2 of the General Code, but on the other hand is the rule adopted by the Director in pursuance to a permissive statute on the subject.

In considering such questions as are now before us, it is necessary to keep in mind that the statutes governing public contracts are not enacted for the benefit of the bidders but rather in the interests of the public. Furthermore, when the interest of the public will be served by the saving of public funds, rules and regulations made by the awarding authority, as contradistinguished from mandatory provisions in the statute, may be waived in the absence of fraud or collusion.

In view of the facts considered herein, and based upon the foregoing citations of authority, the conclusion is irresistible that the contract to which you refer will not be disturbed by reason of the fact that the requirement in the notice as to the furnishing of a certified check, was waived.

Respectfully,

THOMAS J. HERBERT,
Attorney General.