

2097.

VILLAGES—SAID OFFICIALS WITHOUT AUTHORITY TO REQUIRE A STIPULATION IN CONTRACTOR'S PROPOSAL REQUIRING SAID CONTRACTOR TO ACCEPT IMPROVEMENT BONDS IN LIEU OF CASH—SEE SECTION 4222 G. C.

Village officials are without legal authority to require a stipulation in a contractor's proposal requiring said contractor to accept improvement bonds in lieu of cash. Section 4222 G. C. stipulates that payments are to be made in cash, and such provision is for the protection of the public and it is against public policy for village officials to collude with contractors in a manner which virtually operates as a discounting of said bonds.

COLUMBUS, OHIO, May 24, 1921.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your recent communication, which reads as follows:

“We are respectfully requesting your written opinion upon the following matter:

In the first place we beg to advise that the work of our examiners in the field bears out great indication that in certain districts of the state, owing to the financial conditions, bond markets and laws of the state relative to the sale of bonds, that certain contractors and certain public officers have an understanding when bids are let that the contractor is to accept the bonds in place of cash and the prices of the bid are based upon the additional charge, which will cover the contractor's losses when he sells such bonds at a discount.

We are enclosing you herewith copy of a bid from the village of Bedford, Ohio, on the second page of which you will note the following:

‘The undersigned further agrees that if awarded the contract, he (or they) will accept village improvement bonds, in lieu of cash, at par and accrued interest, in case the municipality, or party of the first part, has not disposed of said bonds by the date of this proposal.’

QUESTION: May such a provision be legally considered by municipal officers in awarding and carrying out contracts?”

You also furnish this department with copy of advertising giving notice to contractors relating to the case you have in mind, which contains the following provision:

“Bidders are required to use the printed forms which will be furnished upon application.”

You also furnish information to the effect that all of the bids received in the case under consideration contained the provision requiring the acceptance of bonds in lieu of cash. This indicates, of course, that the city officials required the said contractors to make the stipulation in question in order to qualify as bidders.

Sections 4221 and 4222 G. C., which relate to the method of procedure to be followed by the village officials in connection with the letting of contracts, read:

“Section 4221. All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by

the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

"Section 4222. Each such bid shall contain the full name 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 council may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. When a bonus is offered for completion of contract prior to a specified date, the council may exact a prorated penalty in like sum for each day of delay beyond the specified date. When there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected."

Consideration of the above statutes does not disclose any provision authorizing the officers of the village to make the requirement which evidently was made as disclosed by the facts presented. On the other hand the legislature in the latter section above quoted, in the use of the language "the contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash" would seem to have inhibited such action. The significance of this provision becomes apparent upon consideration of the history of this legislation. The section which now contains said provision was originally a part of section 2303, Bates' Revised Statutes (see 3d edition). This section was repealed in 96 O. L., page 96, but re-enacted in practically its present form. The same language relative to the provision that the contract should be made between the corporation and the bidder and requiring the contract price to be paid in cash existed in said original section as quoted herein. However, this provision was modified by the following exception: "Provided, however, that the contract price may be paid in assessments, as the council, in its discretion, may have previously determined; and suits to recover or enforce such assessments may be brought in the name of the corporation."

It is believed that the history of the law discloses a purpose in the mind of the legislature in eliminating the exception in the law in reference to payment in cash. It is further believed that this provision was not made for the benefit of the bidder alone, but rather for the protection of the public. It would seem that the practice of paying contractors in assessments was not satisfactory in the mind of the legislature or it would not have been discontinued. In view of the history of this law it is apparent that the legislature had fully considered the effect of the requirement that such obligation should be paid in cash. In fact, it might have been the intention to prevent the very practice which your letter describes.

Section 3927 G. C. prescribes that bonds of this character may not be sold for less than par and accrued interest, and it will be seen that if the practice referred to operates as to virtually discount the bonds this will bring about indirectly that which is forbidden to be done by the officers of the village directly, which is clearly in violation of law.

While we may speculate as to the purpose of the legislature in this enactment, the supreme court in the case of *Brewing Co. vs. Schultz, Treas.*, 96 O. S. 27, has furnished a guide which it is believed is applicable to the present provision of the statute being interpreted, as follows:

"If the language of a statute is ambiguous and its meaning doubtful, a court in construing such statute will endeavor to ascertain and give effect to the intent of the lawmaking body which enacted it; but when the language employed is clear, unambiguous, and free from doubt, it is the duty of the court to determine the meaning of that which the legislature did enact, and not what it may have intended to enact * * *."

In view of the above expression of the court it must be concluded that the law means what it says, that is, that the contract price must be paid in *cash*.

Also, in an opinion of the Attorney-General found in Annual Report of the Attorney-General, 1912, page 190, the then Attorney-General in construing a similar statute (section 4330 G. C., which contains the same provision as section 4221 G. C., but applies to cities) said :

"By virtue of this section the contract price must be paid in cash. This provision for payment in cash would preclude the city from advertising for alternative bids after proper resolution of council, that bidders should submit bids for payment in cash and also bids for part payment in cash and part payment by taking the old Hupmobile."

Webster's Dictionary has defined "cash" to be "money ; ready money." Also , "cash" has been defined in 11 Corpus Juris, 21, as follows :

"Money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money and not on credit."

It is believed that by no process of reasoning can we logically conclude that *village improvement bonds* are to be regarded as *cash*. It follows that the officers of a village are without authority to make such a requirement in the proposal, and such a stipulation cannot properly be considered by the council in awarding the contract.

While it may be argued that the provision of the law requiring payment in cash may be waived by the contractor, if he so desires, as heretofore pointed out it is believed that this provision was not enacted for the sole benefit of the contractor, but rather the protection of the public was the paramount purpose in the mind of the legislature in making this requirement. Especially would this be true when the procedure operates so as to discount the bonds. The officers of the municipality cannot collude with the contractors to do indirectly that which is prohibited directly.

In view of your statement of facts and the foregoing citations and discussions, it is the opinion of this department that the practice which your letter describes is against public policy and without authority of law.

Respectfully,

JOHN G. PRICE,

Attorney-General.