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BIDS—LOWEST AND BEST BIDDER—CONTRACT CAN NOT BE LAWFULLY SPLIT BETWEEN RIVAL BIDDERS—THERE CAN NOT BE TWO “LOWEST RESPONSIBLE BIDDERS” OR TWO “LOWEST OR BEST BIDDERS”—DIRECTOR OF HIGHWAYS MAY WITHIN HIS DISCRETION PURCHASE CERTAIN PRODUCTS OF DIFFERENT CHEMICAL COMPOSITION FROM DIFFERENT BIDDERS FOR ROAD REPAIR OR ROAD CONSTRUCTION—WHERE PURCHASES ARE REGULAR AND IN ACCORDANCE WITH LAW, AUDITOR OF STATE SHOULD ISSUE WARRANTS IN PAYMENT OF PURCHASE PRICE—SECTION 1226-2 G. C.

Columbus, Ohio, September 12, 1945

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio:

Dear Sir:

This will acknowledge receipt of your communication, which reads as follows:

“I respectfully seek your opinion as to the following set of facts:

On November 21, 1944, the Ohio State Highway Department advertised for bids for one carload, approximately 96 drums Nostrip or Kotal. ‘These compounds are to be used experimentally in bituminous mixes with various aggregates in order to determine their value in facilitating the coating of wet aggregate with bituminous materials and the prevention of moisture from stripping the coating of bituminous materials from the aggregate.’

Bids were received from the Kotal Company of New York and from Maguire Industries, Inc. The former company bid 26½ cents per lb., in drum lots. The latter company bid 21 cents per lb. in drum lots of one to ten drums, 15½ cents per lb. in drum lots of more than ten drums and less than a carload, and 13 cents per lb. in carload lots.

Upon receipt of these bids, the State Highway Department issued purchase orders to the Kotal Company for 20,400 lbs. of Kotal at 26½ cents per lb. They also issued a purchase order

to Maguire Industries, Inc., for 19,200 lbs. of Nostrip at 15½ cents per lb. It is evident from the acts of the Highway Department that it was their desire to split this order between the two bidders.

The statute provides that purchases of commodities in excess of \$500.00 shall be made pursuant to competitive bidding and that the LOWEST OR BEST BIDDER be awarded such contract.

I respectfully seek your opinion as to whether the Highway Department could legally split this order between two bidders, inasmuch as the statute provides that the LOWEST OR BEST bidder be granted this contract. In other words, inasmuch as the Highway Department is purchasing material from the lower bidder, could they also make purchase of similar material from the higher bidder?"

The provisions of law pertinent to your inquiry are set out in Section 1226-2 of the General Code, and in the Biennial Appropriation Act in effect at the time the purchases in question were made. In Section 1226-2 it is provided:

"* * * All purchases shall be made by the director from the lowest responsible bidder able to meet the specifications and conditions prescribed by the department, saving that in the purchase of machinery or equipment or supplies for which fixed and definite specifications cannot be prepared, the director shall be authorized to purchase the article or articles meeting the general specifications prescribed and which he finds are most suitable for the uses intended."

The Biennial Appropriation Act for the years 1943 and 1944 (House Bill No. 227 of the 95th General Assembly) provides in section 8 thereof, as follows:

"If any order or invoice drawn against any appropriation or rotary fund herein made is for labor and materials furnished, the aggregate cost of which exceeds five hundred dollars (\$500.00) or for commodities purchased, at a cost in excess of five hundred dollars (\$500.00), it shall show that the same was furnished or purchased pursuant to competitive bidding and that the lowest or best bidder was awarded the contract. * * *"

You state in your letter that it is evident that it was the desire of the Highway Department to split the order between the two bidders. In light of the above provisions, it is obvious that a contract or purchase

cannot lawfully be split between rival bidders for there certainly cannot be two "lowest responsible bidders" or two "lowest or best bidders".

However, an examination of the invitation to bid and the vouchers issued by the Director of Highways to the Auditor of State, which you no doubt examined, discloses a pertinent fact which you failed to recite in your letter. Bids were advertised for both "Kotal" and "Nostrip". It appears that these compounds, which are of a different chemical composition were, as stated in your letter "to be used experimentally in bituminous mixes with various aggregates in order to determine their value in facilitating the coating of wet aggregate with bituminous materials and the prevention of moisture from stripping the coating of bituminous materials from the aggregate."

I have been advised that Kotal and Nostrip are chemicals, which when added to bituminous materials in certain amounts, will cause wet stone or gravel to be coated and the mixed material to be laid on damp surfaces, and that a different process is employed in connection with the use of each of the said products. I have also been informed that under certain conditions there are advantages to the use of one of such products, and under other conditions the other product is more practical.

Since there was only one bid received with respect to the sale of Kotal and only one with respect to the sale of Nostrip, obviously, the bid received in each case by the Director of Highways was the lowest bid for the particular product bid on. In other words, the bid of the Kotal Company was on a different product than that bid on by the Maguire Industries, Inc. Therefore, the two companies were not competing or rival bidders, and consequently there was no "splitting of bids".

If the Director of Highways should determine that a certain product to be used in connection with road construction or road repair is superior to another, it is certainly within his discretion to purchase such product. Similarly, if in his judgment both of such products should be purchased for experimental purposes in order to ascertain the advantages of using one or the other under different conditions, his authority to do so cannot be questioned.

From the facts submitted, this is just what was done. The Director of Highways, in accordance with the provisions of law which require that purchases be made pursuant to competitive bidding, invited bids for Kotal

in carload lots or less, and at the same time asked for bids for Nostrip in carload lots or less. In each case the award was made to the single bidder for the purchase of the particular product bid on by such bidder.

Furthermore, it will be noted that Section 1226-2, *supra*, contains an exception to the provisions thereof requiring purchases to be made from the lowest responsible bidder. Said section provides that when supplies for which fixed and definite specifications cannot be prepared, are to be purchased, the Director may purchase such supplies meeting the general specifications, which he finds most suitable for the uses intended.

This clearly appears to authorize the purchases in question. Having determined that the two products purchased were the most suitable for the use to which they were to be put, the Director, under the aforesaid provisions of the statute, would certainly have authority to proceed with the purchase thereof regardless of the prices quoted in the bids.

In making the above statement, I am not unmindful of the provisions of House Bill No. 227, above quoted. In regard thereto, it must be borne in mind that such provisions are general in their terms and application, while those contained in Section 1226-2 deal only with purchases made by the Director of Highways. It is a fundamental principle of statutory construction that general provisions of a statute are to be considered as applying only in such cases as are not covered by special provision. In other words, when special provisions dealing with a particular subject exist in the law, general statutory provisions must yield thereto in cases falling within the subject covered by such special provisions.

Relative thereto, it is stated in 37 O. Jur., pages 409 to 412 :

“As a general rule, general statutory provisions do not control, or interfere with, specific provisions. To the contrary, to the extent of any irreconcilable conflict, the special provision generally operates as an exception to the general provision, which, accordingly, must yield to the former. The special provision has been declared to modify, qualify, limit, restrict, exclude, supersede, control, govern, and prevail over the general provision, although the words of the general act, standing alone, would be broad enough to include, the subject to which the more particular provisions relate. The general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.”

In view of the above, it would appear, and it is consequently my opinion that the purchases in question are regular and in accordance with law in all respects, and warrants in payment of the purchase price in each case should be issued by you.

Respectfully,

HUGH S. JENKINS

Attorney General