

1590.

APPROVAL, BONDS OF SANDUSKY COUNTY—\$56,907.97.

COLUMBUS, OHIO, March 5, 1930.

Industrial Commission of Ohio, Columbus, Ohio.

1591.

COUNTY COMMISSIONERS—INVITING BIDS ON OTHER PLANS THAN THOSE PREPARED BY SURVEYOR FOR BRIDGE CONSTRUCTION—WHEN AWARDING OF CONTRACT ON A PATENTED PLAN AUTHORIZED.

SYLLABUS:

Under the provisions of Section 2345 and its related sections of the General Code, county commissioners, when they have invited bids on other plans than those prepared by the county surveyor, and such plans and specifications have been duly filed fifteen days prior to the date of receiving bids, may legally award a contract on a patented plan and specifications for the construction of a bridge, if in the judgment and discretion of said board of county commissioners the proposal accepted is the lowest and best bid.

COLUMBUS, OHIO, March 6, 1930.

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

GENTLEMEN:—Acknowledgment is made of your recent communication requesting my opinion upon a question submitted to you by one of your examiners, as discussed by the letter which you enclose. Said letter reads:

“The ----- Company of -----, has constructed all bridges in this county (23 in number) during the period covered by my examination and the county is now planning the construction of five more bridges which they will no doubt build.

Three of these bridges and four extra contracts on bridges were constructed without any contract. The plan followed is for the surveyor to make plans and specifications for steel bridges which they have no intention to construct and advertise for bids on such plans. The ----- Company, furnish their own plans and specifications for concrete bridges which plans and specifications are patented and the county commissioners, surveyor and auditor find that their bid regardless of amount is the lowest and best and award the contract to them.

A provision in the specifications of the ----- Company is as follows:

The bridge construction required by these plans is of ----- design, and includes improvements, devices, features of design, methods of construction, inventions and copyrights owned by -----, Designing and

Consulting Engineer of -----, -----; and the said plans and specifications must be strictly adhered to in every respect. Each bidder upon these plans and specifications is directed to include in his bid, and to pay to said ----- at -----, ----- promptly upon award of contract the sum of one thousand four hundred and forty-four dollars and seventy-six cents (\$1,444.76) for the use of said design ----- etc.

This particular specification applied to a bridge costing \$4, 330.00. In other specifications the amount of royalty was 10% and in still another a lump sum considerably more than 10%.

I wish to know if the county commissioners can legally award a contract on patented plans and specifications for bridge construction when such specifications include a provision designed to exclude all competition in bidding on such work."

Important sections of the General Code, relating to your inquiry are as follows:

Sec. 2344. "When it becomes necessary to erect a bridge, the county commissioners shall determine the length and width of the superstructure, whether it shall be single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. The commissioners shall cause to be prepared, plans, descriptions and specifications for such superstructure, which shall be kept on file in the auditor's office for inspection by bidders and persons interested, for a period of fifteen days prior to the date for receiving bids, and invite bids or proposals in accordance therewith."

Sec. 2345. "The county commissioners may also invite, receive and consider proposals on any other plan at the option of bidders, and shall require that any such plan together with specifications shall be filed in the office of the county auditor for a period of fifteen days prior to the date for receiving bids. Such plans and specifications shall show the number of spans, the length of each, the nature, quality and size of the materials to be used, the length of the structure when completed, and whether there is any patent on the proposed plan, or on any, and if any, what part thereof."

In connection with the sections above quoted, you are referred to Section 2343, General Code, which relates to the erection of public buildings and superstructures of bridges and requires detailed plans, etc., to be prepared. The concluding paragraph of said section reads:

"Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

It is believed apparent, from an analysis of the sections above quoted, that county commissioners are fully authorized to invite and receive proposals on any other plan at the option of bidders than the plan which they have caused to be prepared and filed for the purpose.

The statute further seems to recognize that a patented system must be considered because Section 2345, General Code, expressly requires the bidder to state whether there is any patent on the proposed plan. If a given plan is patented it naturally follows that the rights of the holder thereof would have to be protected and the specifications submitted setting forth the conditions thereof undoubtedly would be binding upon all parties connected therewith. The statute permits the

commissioners to accept bids upon the special plans of any number of bidders, which in theory at least, should make for much keener competition and result in a saving to the county. When such bids are submitted, in pursuance to proper notices, the commissioners are required to award the contract for the erection of such a superstructure to the person "who is the lowest or best bidder or bidders, considering the price, plan, materials and methods of construction."

From the foregoing, it will appear to be clear that the discretion of who is the lowest and best bidder is primarily vested in the county commissioners and such discretion will not be disturbed in the absence of facts showing an abuse thereof.

In the case of *State ex rel. Gillespie vs. Board of County Commissioners*, 111 O. S. 1, it was held:

"1. The county commissioners are authorized under Section 2343 et seq., General Code, to receive proposals on plans submitted by bidders for the erection of bridge substructures and superstructures, and may adopt plans covering either or both as an entirety. Where the plan adopted embraces both substructure and superstructure, composing an entire monolithic unit, not susceptible of division into separate units, a lump sum may be bid for such bridge as an entirety, which the commissioners may accept, providing such sum is the lowest proposal under the adopted plan and does not exceed the estimates required under Section 2358, General Code.

2. Where a bidder submits a proposal to erect the substructure under a plan furnished by the county surveyor, but the commissioners award a contract for the construction of an entire bridge as a monolithic unit to another bidder under his plan, the first-named bidder has not established a clear legal right to have a contract awarded to him. (*State, ex rel. Ross, vs. Board of Education*, 42 Ohio St., 374, followed.)"

While the communication which you submit contains statements to the effect that the commissioners of the county in question have no intention of constructing or considering bids on the plans approved by the surveyor, I suspect that this is a mere conclusion, as there is no evidence before me to substantiate the statement other than the general conclusion stated therein.

It is well settled proposition of law that any collusion on the part of the awarding authorities and the successful bidder vitiates the contract. Whether or not such a condition exists is a question of fact to be determined before a proper court in which a suit should be instituted to enjoin the carrying out of such a contract.

In answer to the specific question propounded, it is my opinion that under the provisions of Section 2345 and its related sections of the General Code, county commissioners, when they have invited bids on other plans than those prepared by the county surveyor, and such plans and specifications have been duly filed fifteen days prior to the date of receiving bids, may legally award a contract on a patented plan and specifications for the construction of a bridge, if in the judgment and discretion of said board of county commissioners the proposal accepted is the lowest and best bid.

Respectfully,
GILBERT BETTMAN,
Attorney General.