2020.

ADVERTISEMENT—FOR LETTING OF CONTRACT—MAY NOT LAWFULLY CONTAIN REQUIREMENTS THAT WORK SHALL BE PERFORMED BY HOME LABOR.

SYLLABUS:

In the advertisement of the letting of contracts for the construction of public improvements the object is to procure the lowest and best bid, and this result may not be obtained if the specifications and requirement be made that the work thereon be performed by home labor. The specifications for a valid contract for the construction of public improvements, therefore, may not lawfully contain the requirement that the work thereon shall be performed by home labor.

COLUMBUS, OHIO, April 26, 1928.

HON. LYNN B. GRIFFITH, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

> "A delegation from the Union Labor Council of this county called upon the board of county commissioners last Monday, and made the specific inquiry as to whether or not the county commissioners may include, in the specifications for a county contract, that the work shall be performed by home labor.
>
> The county contemplates constructing two large bridges during the summer and other like improvements, and if the specifications may include this provision I am inclined to believe that the board of county commissioners would like to insert it in the specifications, and make it a part of the contract when awarded.
>
> One of the members of the delegation informed me that he understood that you had rendered an opinion on this matter, holding that such a limitation was legal. I am unable to find any law on the matter."

At the outset it is readily apparent some difficulty will be encountered in determining what is meant by home labor. In the case of *Claude C. Connally, Commissioner of Labor of the State of Oklahoma; Howard S. Wilson, County Attorney of Kay County, Oklahoma, et al., Appellants,* vs. *General Construction Company,* decided by the Supreme Court of the United States, January 4, 1926, 269 U. S. 385, which was an appeal from the District Court of the United States for the Western District of Oklahoma, the Court in the course of its decision said:

> "In the second place, additional obscurity is imparted to the statute by the use of the qualifying word 'locality'. Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the state supreme court on rehearing in *State* vs. *Tibbetts*, 205 Pac. 776, 779. But all the court did there was to define the word 'locality' as meaning 'place,' 'near the place,' 'vicinity,' or 'neighborhood.' Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of un-

certainties. The word 'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt* vs. *Kansas City Distilling Co.*, 90 Mo. 284, 296; *Woods* vs. *Cochrane and Smith*, 38 Iowa 484, 485; *State ex rel. Christie* vs. *Meek*, 26 Wash. 405, 407–408; *Millville Imp. Co.* vs. *Pitman, etc., Gas Co.*, 75 N. J. Law 410, 412; *Thomas* vs. *Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term 'neighborhood' was not sufficiently certain to identify the grantees. * * * Certainly, the expression 'near the place' leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, 'how near?' And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

Section 2343, General Code, provides for the plans and specifications of the work to be performed in the erection of a public building or the substructure for a bridge with such directions as will enable a competent builder to carry them out and afford to bidders all needful information.

Section 2346, General Code, providing for advertisement of this character of work is as follows:

"In their advertisement, the commissioners shall invite bidders to make proposals for furnishing all the materials and performing all the work, or for such parts thereof as bidders deem proper, and state the time when and the place where bids will be opened and contract awarded. At such time and place, or at a time to which they shall publicly adjourn the consideration thereof, they shall publicly open, read and examine the proposals made, and award the contract for furnishing the material and for the erection of such superstructure to the person or persons giving security as required by the provisions of this chapter, who is the lowest or best bidder or bidders, considering price, plan, material and method of construction."

In Page on the Law of Contracts, Vol. 3, Section 1949, the following language is used:

"Provisions which restrict free competition of labor violate the spirit of the statute requiring bids to be let to the lowest bidder. A resolution of a municipality to exclude from competition all persons except those of a specified class, is void. A provision that no alien or convict labor is to be employed, or that only citizen labor shall be used and that eight hours shall constitute a day's work, invalidates a contract if increasing or tending to increase the contract price. So a city can not require a union label upon all printing done for it where competitive bidding is necessary, or that only union labor shall be used on public works."

However laudable may be the attempt to provide employment for "home labor" in the matter of the construction of improvements or other public works, we are never-

theless confronted with the total lack of lawful provisions therefor. I have been unable to find any specific authority for this provision as an embodiment in a valid contract. The entire theory surrounding the legal advertisement for bidders before the letting of the contract is to secure by competitive bidding the lowest and best bid for the work in question. This theory of securing the lowest and best bid would be rendered nugatory in many cases if the requirement were to be had that the labor to be employed in the construction of the work was to be performed by a certain class of labor or the labor only of a given community.

It is therefore my opinion that the specifications for a valid county contract could not lawfully contain the requirement that the work shall be performed by home labor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2021.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE SPOHN HEATING AND VENTILATING COMPANY, CLEVELAND, OHIO, FOR THE CONSTRUCTION OF HEATING AND VENTILATING WORK FOR NEW COTTAGE, CLEVELAND STATE HOSPITAL, CLEVELAND, OHIO, AT AN EXPENDITURE OF $5,995.00—SURETY BOND EXECUTED BY THE AETNA CASUALTY AND SURETY COMPANY.

COLUMBUS, OHIO, April 26, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a contract between The Spohn Heating and Ventilating Company of Cleveland, Ohio, and the State of Ohio, acting by the Department of Public Works, for and on behalf of the Department of Public Welfare. This contract covers the construction and completion of Heating and Ventilating Contract (exclusive of plumbing contract) for New Cottage, Cleveland State Hospital, Cleveland, Ohio, and calls for an expenditure of Five Thousand Nine Hundred and Ninety-five Dollars ($5,995.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate from the Controlling Board, signed by the Secretary thereof, that in accordance with Section 12 of House Bill No. 502, 87th General Assembly, said board has properly consented to and approved the expenditure of moneys appropriated by the 87th General Assembly for the purpose covered by this contract.

In addition, you have submitted a contract bond upon which The Aetna Casualty and Surety Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies have been complied with.

You have not submitted a certificate of the Industrial Commission showing that the contractor has paid the premium required by the workmen's compensation act. However, your letter states that this certificate has not been furnished for the reason that the amount of premium for The Spohn Heating and Ventilating Company has