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DEPARTMENT OF FINANCE—DIVISION OF PURCHASES AND PRINTING—WHEN PROPOSALS INVITED ON SPECIFICATIONS—LOWEST BIDDER ENTITLED TO CONTRACT.

*When the Division of Purchases and Printing, Department of Finance, invites proposals on specifications, the bidder who offers to furnish articles conforming to such specifications at the lowest price is entitled to any contract that may be entered into.*

COLUMBUS, OHIO, February 8, 1922.

*Department of Finance, HON. W. ALBERT DAVIS, Director, Columbus, Ohio.*

DEAR SIR:—You requested the opinion of this department on the following question:

“O. L. 109, p. 502:—

‘Section 6. If the order and invoice drawn against any appropriation herein is made for labor and material furnished or for commodities purchased, it shall show that the same was furnished or purchased pursuant to competitive bidding and that the lowest bidder was awarded the contract, \* \* \*.’

The following is a sample of a requisition received by the Superintendent of Purchases and Printing requesting the purchase of ‘Two dozen pairs of black leather driving gloves.’ In compliance with said requisition, requests were sent out to various dealers for quotations on same and various prices were submitted according to the grade of material, etc., ranging from \$3.75 to \$18.00 per dozen.

QUESTION. Has the Superintendent of Purchases and Printing the authority to take into consideration the grade and true value of the article as well as the price submitted, or must he award the contract to the lowest bidder?”

This question cannot be answered without certain preliminary assumptions. In the first place, if the purchase in question is one of those governed by Section 196-1 and succeeding sections of the General Code, then section 196-11 of that group of statutes applies, insofar as it is not inconsistent with the appropriation bill as quoted by you. That section provides as follows:

— “The contract shall be awarded to the lowest and best bidder on each item, and the state purchasing agent may accept or reject any or all bids in whole or by items.”

In the same connection see section 196-9, which provides as follows:

The state purchasing agent may prescribe such conditions under which bids will be received and terms of the proposed purchase as he deems necessary, provided, however, that all such conditions and terms shall be reasonable and shall not unreasonably restrict competition, and further provided that bidders may bid upon all or any item of the supplies and equipment listed in such notice.”

Still assuming that the purchase is one that is governed by these sections, we have first to consider how far the discretion reposed in the Purchasing Department by the sections above quoted, is taken away by the appropriation bill which commands that the lowest bidder shall be awarded the contract. It is clear that the appropriation bill goes further than the sections quoted in limiting the award to the lowest bidder instead of the "lowest and best bidder" as authorized by section 196-11. Insofar therefore, as any discretion may be deemed to be conferred upon the Purchasing Department by the words "and best," found in section 196-11, that discretion is withdrawn by the appropriation bill as to expenditures of funds thereby appropriated. We have left then the question as to whether the expressed power to reject "any or all bids" remains in the department by virtue of section 196-11.

In the opinion of this department the Superintendent of Purchases and Printing still retains the power to reject bids, provided that the exercise of such power does not unreasonably restrict or destroy competition. In the first place, the appropriation bill is a temporary law and should be construed as far as possible harmoniously with the permanent law which governs. In the second place, a requirement that the contract be let to the lowest bidder is not inconsistent with the power to reject bids. In section 196-11, for example, the requirement that the contract be awarded to the lowest and best bidder is coupled with the power to reject bids. This shows an intention to vest in the department, by the use of the words "may accept or reject all or any bids" some discretion beyond the scope of that described by the words "lowest and best." A statute substantially like 196-11 is construed in *The State vs. The Board of Public Service*, 81 O. S. 218. In that case the contracting board in opening bids adopted a resolution finding that a certain bid was the lowest and best bid. Subsequently this action was rescinded and the work was ordered re-advertised over the protest of the successful bidder. The court in sustaining the action of the board called particular attention to the power to reject any and all bids.

But the power to reject must be exercised with reasonable discretion. It is a power that co-exists with a duty to let the contract to the lowest bidder. Therefore, a bid which is in fact lowest can be rejected only on some ground going to its validity as a bid, or on some ground justifying the purchasing department in the exercise of reasonable business judgment in declining to enter into a contract and complete the purchase. Without undertaking to cover all the possibilities, it is sufficient at this time to state that the mere fact that goods of better quality and higher intrinsic value may be offered at higher prices would not justify the rejection of the lowest bid if the lowest bid itself was responsive to the state's invitation for proposals.

At this point we may vary the assumption by supposing that the purchase is governed by section 1849 of the General Code, i. e., is for the support and maintenance of the institutions under the control of the Department of Public Welfare. That section provides in part as follows:

"\* \* \* The contract shall be awarded to the lowest responsible bidder, preference shall be given to bidders in localities wherein such institution is located, if the price is fair and reasonable and not greater than the usual price; but bids not meeting the specifications shall be rejected. The board may require such security as it may deem proper to accompany the bids and shall fix the security to be given by the contractor. It may reject any or all bids and secure new bids, \* \* \*."

Without repeating the reasoning embodied in the foregoing discussion as to the relation between the appropriation bill and section 196-11 of the General Code, the following statements may be made as to the like relation between the appropriation bill and section 1849 of the General Code.

The words "and best" in section 1849 must be eliminated from consideration in dealing with the expenditure of moneys apportioned by the appropriation bill; and the authority to reject bids "if for any reason it is deemed for the best interest of the state to do so" is limited by the appropriation bill in such fashion as that the reasons for which bids may be rejected must be of the character above indicated.

In short, all the provisions of law which might govern purchases of either of the two classes hereinbefore dealt with can be amalgamated into the statement that fair competition must be afforded; and the contract of purchase, if entered into at all, must be entered into with the lowest bidder whose proposal fairly meets the invitation for bids issued by the division of purchase. The lowest bidder is not of right entitled to the contract as against the department of purchase in either of these classes because of the reserved power to reject bids, which, under the decision above cited, exists even after an award is made. But the lowest bidder has the right to have the contract if any contract is awarded provided that his bid satisfies the requirements suggested.

Coming now to deal with the third class of purchases coming within the jurisdiction of the Division of Purchases and Printing, it must be observed that no permanent statutory requirement governs such purchases. Section 6 of the appropriation bill is therefore the only law which applies. It seems to require that the lowest bidder be awarded the contract without any reservation of the power to reject bids. Whether this power exists, especially whether it may be expressly reserved in the invitation or advertisement for bids is a question which need not be answered at the present time. Insofar as the right of the lowest bidder whose proposal conforms to the invitation for bids, to have any contract that is entered into is concerned, it would seem that such right is the same in purchases of this class as it has been defined to be in purchases of the other two classes.

The foregoing observations clear the way for the specific question which is submitted. This question involves consideration of what is required in order to secure the competition which all the statutes and acts of the assembly which have been referred to clearly require. The following principles may be regarded as settled by the overwhelming weight of authority:

Under statutes requiring competitive bidding and specifying that the lowest bidder must be awarded the contract, the competition which the law requires can be obtained only by inviting bids on specifications, or with reference to standards, that are reasonably definite. Thus under such statutes it is not lawful to invite proposals on specifications to be furnished by the bidders:

Packard vs. Hays, 94 Maryland 233.

Montague-O'Reilly Company vs. Milwaukee, 193 Pacific 694.

McGovern vs. Trenton, 84 N. J. L. 237.

Be be sure, bids may be invited on alternative specifications, the public authority reserving the right to choose which standard of specifications it will adopt after the bids are in:

Baltimore vs. Flack, 104 Maryland 107.  
 Attorney General vs. Detroit, 26 Mich. 263.  
 Schuck vs. Reading, 186 Pa. St. 248.

This is because there is competition as to each type or grade or specifications.

When, therefore, proposals are invited on very broad or open specifications, any proposal that offers to furnish commodities or do work that fairly answers the description in the invitation for bids must be considered; and if the price bid is the lowest, then under such a statute as we are dealing with, such a bidder becomes the lowest bidder, though his goods may be inferior in quality to those of another bidder whose price is higher, and even though relatively speaking the higher bid in price may represent a greater bargain. To be specific, an invitation to submit bids for "two dozen pairs of black driving gloves" opens competition to all who will agree to furnish that number of gloves which are suitable for driving, which are made of leather and which are black in color; and the bid which conforms to these requirements and offers the lowest price is the lowest bid.

The only way in which the department of purchase can secure competition in quality as well as in price and stay within the law is to invite alternative bids on definite, specified qualities if the goods corresponding to such qualities can be fairly described; if they cannot be described in words, a permissible method is to require that the quality of the goods bid on shall conform to samples on file in the office of the department. But so long as the department has not seen fit to require that the goods be of any particular quality other than that they answer the description of "black leather driving gloves," a bid for a higher quality of such driving gloves cannot be preferred to one of a lower quality at a lower price.

Note has been taken of certain lower court decisions in Ohio which contain intimations contrary to conclusions reached in this opinion. See—

State vs. Board, 4 C. C. 76.  
 Herrmann vs. State, 11 C. C., 504.  
 State vs. St. Bernard, 10 C. C. 74.

The first of these cases is not considered with great care; the second of them really supports conclusions of this opinion by holding that where the lowest bidder in price offered an article which did not conform to the standards required by the invitation for bids, his bid could not be considered and it would be a violation of the law to award him the contract under an understanding that he would reform his bid so as to comply with the specifications. The third is not opposed to the reasoning of this opinion.

Specifically then, you are advised that under the circumstances described in your letter, and regardless of which class of purchases the proposed contract represents, the lowest bidder in price is entitled to the award and to the contract if any is entered into.

If the purchase comes within either of the first two classes above named, and the division of purchases and printing is unwilling to let the contract to the lowest bidder, all bids may be rejected and new proposals invited. If the purchase comes within the third class and no express reservation of the right to reject bids has been made in the invitation for bids, it is very doubtful whether this procedure can be followed; but if such express reservation has been made, it is believed that all the bids may be rejected.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*