

1947

BID—WHERE BIDDER ON PROJECT TO BE LET BY DEPARTMENT OF HIGHWAYS SUBMITS BID IN EXCESS OF AMOUNT FOR WHICH HE WAS PREVIOUSLY QUALIFIED—SECTION 1178-53 ET SEQ., G. C.—DIRECTOR REQUIRED TO REJECT BID EVEN THOUGH IT APPEARS FINANCIAL STATUS OF BIDDER HAS IMPROVED SINCE TIME OF CERTIFICATE OF PRE-QUALIFICATION WAS ISSUED.

SYLLABUS:

Where a bidder on a project to be let by the Department of Highways submits a bid in excess of the amount for which he has been previously qualified under the provisions of Section 1178-53 et seq., General Code, the Director of Highways is required to reject such bid, even though the Director is of the opinion that the financial status of the bidder has improved since the time of his certificate of pre-qualification was issued.

Columbus, Ohio, June 6, 1947

Hon. Murray D. Shaffer, Director of Highways  
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“On the 3rd day of June, 1947 this Department, pursuant to advertisements, opened bids for a certain highway improvement.

‘H’ bid on said project and was the lowest bidder. Mr. H. had previously been pre-qualified as a bidder on highway work for the sum of \$75,000.00. His low bid on the project under consideration was in the sum of \$87,088.54, which was under the estimate.

At the time he was pre-qualified, of course under the provisions of Section 1178-55 of the General Code, he was required to have net current assets or working capital in the sum of \$7,500.00 or ten per cent of the aggregate amount of work set forth in his certificate of qualification.

It appears from an investigation that the financial status of this particular contractor has improved since the time of his pre-qualification. It follows that if he were being pre-qualified today, that he could qualify for the amount of the bid under consideration.

The next lowest bidder bid the sum of \$96,814.53, which was above the estimate.

Mr. H. has a good record as a contractor and if this particular contract could be awarded to him under the circumstances, it would result in a substantial saving to the State of Ohio.

In view of the foregoing statement of facts, your opinion is respectfully requested as to whether or not the Director of Highways is required to reject the bid of Mr. H. under the provisions of Section 1178-59 of the General Code or any related section. In other words, may the Director of Highways legally award the contract under consideration to Mr. H.?"

The procedure outlined in Section 1178-53 et seq., General Code, for the qualification of bidders, as enacted in 121 O. L. 454, is not new. It follows very closely the procedure prescribed in former Section 1206-1 et seq., General Code, which was enacted in 115 O.L. 526. Section 1178-53 reads as follows:

"The provisions of Sections 1178-53 to 1178-60, both inclusive, shall govern the qualification and classification of all bidders desiring to offer bids for the performance of contracts proposed to be awarded by the director, and *all contracts attempted to be awarded to any other person than a bidder previously qualified in compliance with the provisions of this act shall be illegal and void.* The director shall cause to be prepared the rules and regulations hereinafter authorized by him to be made, together with all printed forms for applications for qualification and statements of prospective bidders, and shall cause copies of the same to be posted on a bulletin board in the offices of the department of highways, which bulletin board shall be located in a place in the offices assigned to said department and open to the public during business hours. All applications, statements and other forms which applicants for qualification may be required to use shall be furnished by the director to any person on request." (Emphasis added.)

Section 1178-54, General Code, provides that any prospective bidder shall apply to the Director of Highways for qualification at least ten days before submitting any bid. It is further provided that the Director shall act upon such application within ten days after its receipt, and that after making an examination of the statements contained in the application and inquiring into the competency of the applicant and his financial resources, he shall, if he finds him possessing the qualifications prescribed by law, issue a certificate of qualification, which shall contain a

statement "fixing the aggregate amount of work for any or all owners which the applicant may have under construction and uncompleted at any one time."

Section 1178-55, General Code, provides in part as follows:

*"No bidder shall be given a certificate of qualification unless his financial statement and the investigation made by the director show that he possesses net current assets or working capital sufficient in the judgment of the director to render it probable that he can satisfactorily execute his contracts and meet his obligations therein incurred, which net current assets or working capital shall in no case be less than ten per cent of the aggregate amount of work set forth in his certificate of qualification." \* \* \**  
(Emphasis added.)

Section 1178-56, General Code, authorizes the Director to promulgate rules and regulations for the qualification of bidders "For the purpose of carrying into effect the provisions of Sections 1178-53 to 1178-60, both inclusive." By the same section the Director is authorized, in his discretion, to make public from time to time a list of qualified bidders, which lists, however, are to be general in character and not indicate the size of the contract or character of work with respect to which such bidders have been qualified.

Section 1178-59, General Code, reads as follows:

*"The director shall not be authorized to consider any bid filed with him by any person who has not been qualified to bid. Bids from unqualified bidders discovered by the director prior to the reading thereof to be from such persons shall be returned without being read. If the director finds subsequent to the opening of bids that facts exist which would disqualify the lowest bidder, or that such bidder is not competent and responsible, the director shall reject such bid, despite the fact of prior qualification of such bidder. It shall be unlawful to award any contract to any bidder not qualified to bid thereon at the time fixed for receiving bids."*  
Emphasis added.

The language of the statutes which I have quoted is peremptory and mandatory and leaves no room for variance from their requirements.

It will be noted in Section 1178-53 that "all contracts attempted to be awarded to any other person than a bidder previously qualified in compliance with the provisions of this act shall be *illegal and void*." Fur-

thermore, the provisions of Section 1178-59 give emphasis to the same mandate and it is stated in the concluding sentence that it shall be unlawful to award any contract to any bidder not qualified to bid at the time of receiving bids.

The bidder in question was found by the Director of Highways to be qualified to bid on highway work up to the sum of \$75,000 and as a part of that qualification he was found to have net current assets or working capital in the sum of \$7,500. Whether there was time prior to the bidding in question for him to have made a further or supplemental application for higher qualification by reason of betterment of his financial condition does not appear. I assume, however, from your letter that he did not apply for or receive any supplementary or additional certificate of qualification for a higher amount than his original certificate called for.

While it is true that the Director is authorized to promulgate rules and regulations for qualification of bidders, the authority to make such rules does not in any way authorize a waiver of the strict provisions of the statute.

Accordingly it is my opinion, and you are advised that where a bidder on a project to be let by the Department of Highways submits a bid in excess of the amount for which he has been previously qualified under the provisions of Section 1178-53 et seq., General Code, the Director of Highways is required to reject such bid, even though the Director is of the opinion that the financial status of the bidder has improved since the time of his certificate of prequalification was issued.

Respectfully,

HUGH S. JENKINS,  
Attorney General.