

DIRECTOR OF PUBLIC SAFETY OF A CITY WITHOUT AUTHORITY TO DEVIATE FROM ORDINANCE SPECIFICATION IN ADVERTISEMENT FOR BIDS FOR PURCHASE OF FIRE DEPARTMENT APPARATUS WHEN SPECIFICATIONS INCLUDED IN ORDINANCE. §737.03, R.C.

SYLLABUS:

When the legislative authority of a city, acting pursuant to Section 737.03, Revised Code, authorizes and directs the director of public safety to obligate the city in excess of one thousand dollars for the purchase of apparatus necessary for the fire department and includes specifications for such apparatus in the ordinance, it is unlawful for the director of public safety to deviate substantially from the ordinance specifications in his advertisement for bids for such apparatus.

Columbus, Ohio, November 16, 1959

Hon. E. Raymond Morehart, Prosecuting Attorney
Fairfield County, Lancaster, Ohio

Dear Sir:

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

“At the request of the Solicitor of the City of Lancaster, Ohio, I respectfully request your opinion on the following issue confronting the city and arising out of the proposed purchase by the Board of Control of an aerial ladder truck.

“Basically, the question is this:

‘Is the Board of Control of a city legally bound to advertise and let a contract based upon specifications submitted to and approved by City Council and incorporated into an amending ordinance re-authorizing and re-directing its purchase?’

or stated another way:

‘Is a contract for the purchase of fire apparatus invalid if it does not conform to the specifications incorporated into an ordinance re-authorizing and re-directing that the Director of Public Safety advertise for bids and to enter into a contract?’

‘Does council have the authority to authorize and direct the purchase of fire equipment according to certain specifica-

tions or is this left to the discretion of the Director of Public Safety?’

“The issue of the purchase of an aerial ladder truck for the City of Lancaster has been the center of a heated and stormy controversy in and around city hall since 1953, when the City Council voted to issue bonds within the 10 mill limitation for construction of a fire sub-station, and for fire apparatus and equipment. The bonds were sold, the sub-station built and opened in 1957. On June 8, 1953, City Council, in ordinance No. 35-53, authorized the Safety-Service Director to advertise for bids and to enter into a contract for the purchase of an aerial ladder truck, at a cost not to exceed \$35,000.00. The Safety-Service Director serving at that time, advertised for bids based on specifications which he had prepared, and after receiving several bids, rejected them all, for one reason or another. A new administration took office in 1954, and no action was taken by the new Safety-Service Director in advertising for bids, or letting a contract, and a dispute ensued between the city administration on one side, and council and the Fire Department on the other side, as to the type of fire apparatus needed for the city.

“In February 1957, City Council requested the Safety-Service Director to have the Fire Chief prepare a set of specifications for an aerial ladder truck which were then approved by council on February 20, 1957, and incorporated into ordinance No. 20-57, which amended the previous ordinance No. 35-53, authorizing and directing the Safety-Service Director to advertise for bids and to contract for a truck according to the council-approved specifications. This ordinance was vetoed by the Mayor and passed over his veto. The Safety-Service Director steadfastly refused to advertise for bids and the controversy raged on.

“On July 29, 1959, the Safety-Service Director prepared a new set of specifications for an aerial ladder truck, significantly at variance with those approved by council. Whereas, the council-approved specifications called for a tractor-drawn 85’ steel aerial ladder truck with wood hand ladders, the Safety-Service Director’s specifications requested bids for a ‘metal’ ladder and call for all aluminum hand ladders. Other major and minor discrepancies can be found between the two sets of specifications.

“Bids were received on August 17, 1959 with four major apparatus manufacturers supplying bids. A large variety and combinations of bids on alternates were received. After due deliberation, the Board of Control, has awarded the contract to the Peter Pirsch Co. for a 75’ steel ladder truck with pumper unit (Quintuple type).

“The issue of the validity of the contract awarded by the Board of Control must be considered in light of the provisions of

R.C. 735.05 which recites that 'the director shall make a written contract with the lowest and best bidder (after advertising), when so authorized and directed.' The director was authorized and directed to contract for the equipment in 1953, and again in 1957 with prescribed limitations as to the type of apparatus to be purchased.

"It is the opinion of the solicitor that a contract which does not comply with the specifications under which the advertising and letting was authorized is an ultra vires contract and invalid. Due to the considerable conflict of opinion arising out of this situation, it is now deemed advisable and in the best interest that the issue be resolved at this time by an opinion, thereby saving possible litigation on this controversy."

The duty of municipal corporations to establish and maintain police and fire departments is found in Section 715.05, Revised Code, which says:

"All municipal corporations may organize and maintain police and fire departments, erect the necessary buildings, and purchase and hold all implements and apparatus required therefor."

The means of procuring fire fighting equipment appears to be somewhat conflicting. Section 737.24, Revised Code, says:

"The legislative authority of a municipal corporation may purchase the necessary fire engines and such other equipment as is necessary for the extinguishment of fires, and may establish lines of fire alarm telegraph within the limits of the municipal corporation."

This section was enacted in substantially its present language in 1869 (66 O.L. p. 24 Section 327). In the case of *City of Akron v. Dobson*, 81 Ohio St., 66, 76 it was said:

"Prior to the adoption of the municipal code of 1902, the city council was an administrative, as well as a legislative body, and one of the reforms contemplated by the adoption of the new code was to make its powers legislative only. * * *"

The above statement is borne out by Section 731.05, Revised Code, which provides in part:

"The powers of the legislative authority of a city shall be legislative only, it shall perform no administrative duties, * * * All contracts requiring the authority of the legislative authority for their execution shall be entered into and conducted to per-

formance by the board or officers, having charge of the matters to which they relate. After the authority to make such contracts has been given and the necessary appropriation made, the legislative authority shall take no further action thereon."

The above sections may and should be harmoniously interpreted to mean that the purchase of fire engines and such other equipment as is necessary for the extinguishing of fires, costing in excess of \$1000.00, shall be initiated and set in motion by action of the council. The details of purchasing such equipment, however, have now been delegated to the director of public safety. The director of public safety is the executive head of the fire department and is directed to make all contracts for the purchase of supplies therefor. This is evidenced by Section 737.02, Revised Code, which reads in part:

"Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments * * *

"Such director shall make all contracts in the name of the city with reference to the management of such departments, for the erection or repair of all buildings or improvements in connection therewith, and for the purchase of all supplies necessary for such departments."

The above section is amplified by Section 737.03, Revised Code, the pertinent portions of which read:

"The director of public safety shall manage, and make all contracts with reference to the police stations, fire houses, * * *

"Such director may make all contracts and expenditures of money * * * for the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments, * * * but no obligation involving an expenditure of more than one thousand dollars shall be created unless first authorized and directed by ordinance. In making, altering, or modifying such contracts, the director shall be governed by sections 735.05 to 735.09, inclusive, of the Revised Code, except that all bids shall be filed with and opened by such director. * * *"

Sections 735.05 to 735.09, inclusive, of the Revised Code, deal with the making of public contracts by the director of public service. Section 735.05, Revised Code, says that when a contract for over \$1000.00 has been authorized and directed by the legislative authority, the director

"* * * may make any contract, purchase supplies or material, or provide labor for any work under the supervision

of the department of public service involving not more than one thousand dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds one thousand dollars, such expenditure shall first be authorized and directed by ordinance of the legislative authority of the city. When so authorized and directed, the director shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Bids are to be opened by the director of public safety assisted by the city auditor or his chief deputy. Sections 735.05 and 733.19, Revised Code. The award should be made by the director of public safety to the lowest and best bidder after approval of the board of control consisting of the mayor, the director of public service and the director of public safety. Sections 737.02, 735.05, 733.21 and 733.22, Revised Code.

Your inquiry indicates that the above steps have been taken, but there are the added facts that the council included specifications as a part of its ordinance authorizing the purchase of the equipment and that in the advertisement for bids, council's specifications were disregarded and new specifications used in substitution. Since the proposed expenditure was in excess of \$1000.00, no obligation could be created against the city "unless first authorized and directed by ordinance." Section 737.02, Revised Code. The authorization and direction of council was by an ordinance which limited the amount to be expended and specified the type of equipment to be purchased.

In the case of *Cleveland Railway Co. v. Brescia*, 100 Ohio St., 267, the validity of a jury was questioned for the reason that the statutory requirements had been disregarded. On page 270 of the opinion it is said:

"* * * To hold that the selection of a jury as this jury was selected is a substantial compliance with the law is to nullify its every provision, for if the commission can ignore as many of its essential provisions as it here ignored it can ignore them all and inaugurate a system all its own."

By similar reasoning, to conclude that the advertising for bids with altered specifications was a substantial compliance with the ordinance would be to nullify its provisions. The director of public safety might as well have ignored the ordinance's maximum limit of \$35,000.00.

It is generally recognized that an ordinance may be invalid in part by reason of some provision being repugnant either to the constitution or statutes of the state, but valid as to the residue. To so conclude, however, it must be clear that the invalid portion is an independent provision not in its nature and connection essential to the other parts of the ordinance. See *State, ex rel. Greenwood Realty Co. v. Zangerle*, 135 Ohio St., 533, 540. The invalid portion must be so unrelated to the general purpose of the ordinance as to warrant the conclusion that the council would have adopted the ordinance even if the invalid portion had been stricken. *State, ex rel. Herbert v. Ferguson*, 142 Ohio St., 496. Nothing in your request indicates such severability. That the council did not intend the ordinance to be severable is shown by the fact that it did not merely re-enact the 1953 specification-free ordinance. In the 1957 ordinance it added specifications and passed this ordinance over the mayor's veto.

Although the powers of council are now legislative only, I know of no provision, either constitutional or statutory, prohibiting council from incorporating specifications in an ordinance. To the contrary, Section 727.20, Revised Code, says:

“If the legislative authority of the municipal corporation decides to proceed with a proposed improvement, an ordinance for the purpose shall be passed. Such ordinance shall specifically set forth the lots and lands to be assessed for the improvement and shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution passed for such improvement, under section 727.09 of the Revised Code, with date of its passage, and a statement of the intention of the legislative authority to proceed therewith in accordance with such resolutions and in accordance with the plans, specifications, estimates, and profiles provided for such improvement.”

Thus, in public improvement ordinances council is required to include a statement of the general nature of the improvements and the character of the materials to be used. In addition, it may, at least by reference, incorporate plans, specifications and profiles. In the situation you have outlined, the specifications were prepared by the fire chief and adopted by the council in its ordinance.

To assume that council lacked the power to include specifications in its ordinance would not clarify the situation. An ordinance may be invalid in part by reason of some provision being repugnant to the consti-

tution of the statutes and valid as to the residue only when it appears that the invalid part is an independent provision not in its nature or connection essential to the other parts of the ordinance. The invalid portions must not be so related to the general purpose of the ordinance as to warrant the conclusion that the legislative body would have refused to adopt the ordinance with the invalid portion stricken. If the 1957 ordinance cannot be severed and if the inclusion of specifications was beyond the powers of the legislative body and therefore invalid, then the entire ordinance must fail thereby leaving the director of public safety without authority to have advertised for bids.

I am not concerned with the merits of either of the conflicting specifications. They are matters to be determined in the first instance at least by the officials of the City of Lancaster. I merely say that neither the constitution nor the statutes prohibit the legislative authority of the city from including specifications in an ordinance authorizing the purchase of equipment necessary for the police and fire departments.

It is my opinion, under the facts set forth in your letter, that when the legislative authority of a city, acting pursuant to Section 737.03, Revised Code, authorizes and directs the director of public safety to obligate the city in excess of one thousand dollars for the purchase of apparatus necessary for the fire department and includes specifications for such apparatus in the ordinance, it is unlawful for the director of public safety to deviate substantially from the ordinance specifications in his advertisement for bids for such apparatus.

Respectfully,

MARK MCELROY

Attorney General