

Based upon the foregoing and in specific answer to your inquiry, it is my opinion that where a county board of education enters into a contract with a county superintendent of schools whereby it agrees to pay a definite sum for his salary, which sum shall include his personal traveling expenses, such board is precluded from granting any further allowance to said superintendent for traveling expenses.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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2701.

CONTRACTS—CONSTRUCTION OF OHIO STATE OFFICE BUILDING—  
SUCCESSFUL CONTRACTORS MAY NOT USE SUBSTITUTE AR-  
TICLES OR MATERIALS WHEN.

*SYLLABUS:*

*The successful contractors for the construction of the Ohio State Office Building may not use substitute articles and materials which were not mentioned in the specifications or submitted by them as substitutions in their Forms of Proposal.*

COLUMBUS, OHIO, December 20, 1930.

HON. HARRY HAKE, *Chief Architect, The State Office Building Commission, Cincinnati, Ohio.*

MY DEAR MR. HAKE:—This acknowledges receipt of your recent communication which reads:

“I am writing you at the request of the State Office Building Commission for your formal decision pertaining to the use of substitute articles and materials which were not mentioned in the specifications or submitted as substitutes to the specifications by the successful contractor of the above building. Copies of your decision will be mailed to all members of the Commission and to all contractors on the building.”

Section 7 of the Act of the Legislature (111 O. L. 475, et seq.) concerning the State Office Building, reads in part:

“ \* \* \* The construction of such building shall be governed by the provisions of Section 2314 to 2332 of the General Code, relative to the erection of state buildings except that the excavating and work of a like nature may be performed by prisoners from the penitentiary. \* \* \* ”

From the above statutory provision, it is obvious that Sections 2314 to 2332, General Code, govern the construction of the State Office Building.

Section 2314, General Code, provides in part that when a building is to be erected for the use of the state at an expenditure exceeding three thousand dollars, there must be prepared “definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information.”

Pursuant to this mandate, your architectural firm was engaged by the State Office

Building Commission, and drew definite and complete specifications for the building.

At the beginning of the specifications there is a chapter (pages A-1 to A-4 inclusive) entitled "General Conditions of Specifications." At the bottom of page A-3 and top of page A-4, there are paragraphs entitled "Manufactured Articles", which provide as follows:

"Wherever in these specifications certain named materials or manufactured products are called for, such names are specified to establish a standard of quality and it will be presumed, unless specifically excepted, that the base bid includes the materials or articles so named, and that the contractor's proposal, if accepted, will constitute a contractual obligation to furnish the standard named materials or articles and no other.

Contractors are invited to bid upon the use of other materials or articles that they consider equal to the standard specified.

If contractors bid upon the use of other materials or articles which they consider equal, they must state in their bid the proposed substitute, and state difference in cost, if any, between the proposed substitute and the material or articles included in the base bid as standard. The determination as to whether or not such substitutes bid upon equal the 'standard' specified, shall rest solely with the owner and architect."

These paragraphs are incorporated by reference in the first line at the top of each subdivision of the work.

Moreover, starting with the subdivision "Concrete Work" there appears at the top of each subdivision of the work, directly under the line incorporating the general conditions, the same paragraphs entitled "Manufactured Articles", as quoted above.

From the above specifications, it is quite evident that standard articles and materials have been indicated throughout and that bidders are expected to furnish these standards unless they incorporate in their bids materials that they consider the equal of the standards.

The Form of Proposal drafted by your firm and approved by the State Office Building Commission under the terms of Section 2315, General Code, further illustrates the above conclusion. For instance, the following language appears just above the list of the items of the proposal:

"Having read the specifications and examined the drawings entitled 'Ohio State Office Building', Columbus, Ohio, prepared by Harry Hake, Architect, Cincinnati, Ohio; and having examined the site and conditions governing the construction of said project, *the undersigned hereby proposes and agrees to furnish all materials and perform all labor required by said specifications and drawings to complete such items of the work as are hereinafter designated, for the following sums of money:*"

It is also provided in Note "D" of said Form of Proposal:

"Bidders are cautioned to enter on the following 'Substitution Sheet' all MATERIALS which the bidder wishes to have considered as possible substitutions."

At the top of the "Substitution Sheet" it is said:

"All bids shall be based upon the 'Standards' specified. (See 'Standard Substitutions' provisions of specifications.)

Bidders desiring to make substitutions for 'standards' specified, shall list such proposed substitutions below; together with the amount to be added to, or to be deducted from, the amounts of their base bids.

Brand or Make Specified.....Proposed Substitution."

It should be here noted that the contracts of the successful bidders expressly incorporate by reference the specifications and forms of proposal.

In my Opinion No. 1954, rendered to you under date of June 6, 1930, I addressed myself to several suggested modifications in the specifications, which were in the course of preparation by you. Under Modification No. 1 you stated as follows:

"Modifications might be made in the above article making the general clause more flexible, permitting the owner and architect to consider substitute materials not actually mentioned in bids up to the time of closing contracts. This arrangement would probably not be legal. This is the usual course pursued on private work."

At page 10 of the Opinion, with respect to this modification, I said:

"Addressing myself to each of the suggested modifications in the order named, I am of the opinion that suggested modification No. 1, will render the specifications illegal, for the reason that bidders would not know beforehand what materials were to be selected in the final award, and there would be no real basis of competition and no proper basis for a comparison of bids. To permit bidders to submit samples or substitute materials not mentioned in the bids, and allow the owner or architect to make a selection from these samples or substituted materials and make a final award on the selection made, would destroy competition and defeat the intent and purpose of the law. It furthermore would open the door to the possibility of showing favoritism and would no doubt be held by the courts to be illegal, although after considerable search, I have found no reported case involving the question."

You will note that I stated in the aforementioned opinion that if bidders were allowed to submit substitute materials not mentioned in the bids the intent and purpose of the statutes would be defeated, inasmuch as such a practice would destroy competition and would open the door to a possibility of favoritism. As I also stated in said opinion, I have found no reported case directly in point. However, I do find the above principle set forth in Donnelly on the Law of Public Contracts, Section 118, which provides in part as follows:

"A bidder who submits a sealed bid for public work cannot change it after it is opened, nor may the public authorities who receive the bid permit a change in any material respect. To allow such a change after bids are opened violates the purpose and intent of the statutes regulating competitive bidding. It opens the door to favoritism and preference if not to jobbing and gross fraud. \* \* \* "

Based on the foregoing discussion, I am of the opinion that the successful contractors for the construction of the Ohio State Office Building may not use substitute articles and materials which were not mentioned in the specifications or submitted by them as substitutions in their Forms of Proposal.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*