

2984.

CONTRACT FOR CONSTRUCTION OF COUNTY SEWERS—BIDS—  
BLANK SPACES NOT TO BE FILLED AFTER OPENING OF BIDS—  
DISCRETION OF COUNTY COMMISSIONERS IN ACCEPTING OR  
REJECTING BIDS.

*SYLLABUS:*

1. *Where the proposal for the construction of a sewer for a county sewer district contains blank spaces, which the bidder is directed by the specifications to fill in, indicating the number of working days within which he will complete the work, and said bidder fails to make any indication therein, a reasonable time will be presumed. However, the failure to comply with the specifications in stating the time results in a defect in such bid, which the board of county commissioners may waive if it serves the public interest to do so; while on the other hand, if in the judgment of said board the public interest will be best served, it may reject said bid.*

2. *There is no legal authority for the filling in of blank spaces after the opening of the bid.*

3. *The board of commissioners may in its discretion take into consideration the time within which the bidder agrees to complete the work in determining which is the lowest and best bid, if in its sound judgment the element of time is essential under the existing conditions.*

COLUMBUS, OHIO, December 7, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads:

“We are enclosing herewith copy of a blank proposal used in the receiving of bids for the construction of a sanitary sewer in Stark County. You will note that the proposal contains blank space in which to insert the number of working days within which the contract will be completed.

You are respectfully requested to furnish this department your written opinion upon the following questions:

First. In the event that a bidder in using this blank fails to specify any time within which the work is to be completed, may such bid be considered irregular and thrown out?

Second. After opening the bids, may a bidder be permitted to insert the number of days within which the work is to be completed?

Third. Can the question of time within which the work is to be completed be taken into consideration in awarding the contract, that is to say, may a bidder who bids for a certain amount and agrees to complete the work in a certain number of days be awarded the contract against another bidder who agrees to do the work for a less amount but a greater number of days?”

The blank proposal to which you refer reads in part as follows:

“PROPOSAL.

To the Commissioners of Stark County, Ohio:

The undersigned hereby propose to furnish all the material and do all the work, or so much as may be awarded for constructing-----

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in -----

Sewer District No.-----

in accordance with the plans and specifications therefor on file in the County Sanitary Engineer’s Office, and to the acceptance of the County Commissioners and Engineer, and to complete the same in----- working days, for the price set opposite the several items respectively, which will be accepted as payment in full for labor done and all material furnished, namely: \* \* \*

Sections 6602-1, 6602-1a, 6602-2, 6602-3 and 6602-5, General Code, relating to county sewer districts, read in part as follows:

Sec. 6602-1. “For the purpose of preserving and promoting the public health and welfare, the boards of county commissioners of the several counties of this state may, by resolution, lay out, establish and maintain one or more sewer districts within their respective counties, outside of incorporated municipalities. \* \* \* No sewers or sewage treatment works shall be constructed in any county outside of incorporated municipalities by any person, firm or corporation, until the plans and specifications for the same shall have been approved by the board of county commissioners, and any such construction shall be done under the supervision of the county sanitary engineer. \* \* \*

Sec. 6602-1a. “Whenever duly authorized by the council of any incorporated municipality, the board of county commissioners may, by resolution, lay out, establish and maintain one or more sewer districts within their respective counties to include a part or all of the territory within such municipality as the whole or a part of such sewer district. Such authority shall be evidenced by an ordinance or resolution of the council of said municipality, entered upon its records.”

Sec. 6602-2. “After the establishment of any sewer district the county commissioners shall have prepared by the county sanitary engineer a general plan of sewerage and sewage disposal for such district as complete as can be made at that time. After such general plan has been approved by them they shall have prepared, by the county sanitary engineer, detailed plans, specifications and estimates of cost of such part or parts of the improvement as it is necessary to then construct, together with a tentative assessment of the cost based on such estimate. Such tentative assessment shall be for the information of property owners, and shall not be certified to the auditor for collection. Such detailed plans, specifications, estimates of cost and tentative assessment, as so prepared by the engineer and approved by the board, shall be carefully preserved in the office of the board of county commissioners or the county sanitary engineer and shall be open to inspection of all persons interested in such improvements. After approval of the detailed plans, specifications, estimates of cost and tentative assessment, the board of county commissioners shall adopt a resolution declaring that such improvement or improvements, describing the same and the loca-

tion, route and termini thereof, are necessary for the preservation and promotion of public health and welfare, designating the character of the materials to be used, referring to the plans, specifications, estimates of cost and tentative assessment, stating the place where they are on file and may be examined, the estimated cost of the maintenance of such improvement for one year, what part of the cost will be paid by the county at large and what part will be specially assessed against the benefited property within the sewer district. Such resolution shall also contain a description of the boundaries of that part of the sewer district to be assessed, and shall designate a time and place, to be fixed by the board, when and where objections to the improvement, to the tentative assessment, or to the boundaries of the assessment district will be heard by the board. The date of such hearing shall be not less than twenty-four days after the date of the first publication of such resolution. The board of county commissioners shall cause such resolution to be published once a week for two consecutive weeks in a newspaper of general circulation within the county, and on or before the date of the second publication shall send by mail a notice of the time and place of such hearing to every owner of property to be assessed for such improvement whose address is known, and such notice shall state that the property of the addressee will be assessed for such improvement.

Notice of such hearing shall be mailed to the clerk of any municipality any part of which lies within the assessment district.

A hearing shall be granted by the board to all parties interested at the time and place fixed by such resolution and notice. Written objections to or endorsements of the proposed improvement, the character and termini thereof, the boundaries of the assessment district or the tentative assessment shall be received by the board for a period of five days after the hearing and no action shall be taken by the board in the matter until after such period shall have elapsed. The minutes of the hearing shall be entered on the journal of the commissioners, showing the persons who appear in person or by attorney and all written objections shall be preserved and filed in the office of the board."

Sec. 6602-3. "After the expiration of the period of five days provided for the filing of written objections, the board of county commissioners shall determine whether or not they will proceed with the construction of such improvement or improvements, and, if they shall decide to proceed therewith, the board shall ratify or amend the plans for the improvement, the character and termini thereof, the boundaries of the assessment district and the tentative assessment, and may cause such revision of plans, boundaries, or assessments as the board may consider necessary, to be made by the county sanitary engineer. If the boundaries of the assessment district are amended so as to include any property not included within the boundaries as established by the resolution of necessity, the owners of all such property shall be notified by mail if their addresses are known, and notice shall be published once a week for two consecutive weeks in a newspaper of general circulation within the county, that such amendments have been adopted and that a hearing will be given by the board at a time and place stated in such notice, at which all persons interested will be heard by the board. The date of such hearing shall be not less than twenty-four days after the first publication of such notice, and the hearing shall be conducted and records kept in the same manner as the first hear-

ing. Five days shall be allowed for the filing of written objections as hereinbefore provided for the first hearing and after the expiration of such five day period the board shall ratify the plans for the improvement, the character and termini thereof, the boundaries of the assessment district and the tentative assessment, or shall further amend the same. If the boundaries of the assessment district are amended so as to include any property not included in the assessment district as originally established or previously amended, further notice and hearing shall be given to the owners of such property in the same manner as for the first amendment of such boundaries, and the same procedure repeated until all property owners affected have been given an opportunity to be heard. Provided, however, that if the owners of all property added to an assessment district by amendment of the original boundaries thereof shall waive objection to such amendment in writing, no further notice or hearing shall be given. After the board shall have ratified the plans for the improvement, the character and termini thereof, the boundaries of the assessment district and the tentative assessment, either as originally presented or as amended, and if they shall decide to proceed therewith, a resolution, to be known as the improvement resolution, shall be adopted by such board. Said improvement resolution shall declare the determination of such board to proceed with the construction of the improvement or improvements provided for in the resolution of necessity, in accordance with the plans and specifications provided for such improvement or improvements as ratified or amended and whether bonds or certificates of indebtedness shall be issued in anticipation of the collection of special assessments, as herein-after provided, or that money in the county treasury unappropriated for any other purpose be appropriated to pay for said improvement or improvements."

Sec. 6602-5. "After the issuance and sale of bonds or certificates of indebtedness, as provided in Sections 6602-1 to 6602-14, inclusive, of the General Code, the board of county commissioners shall enter into a written contract with the lowest and best bidder for the construction of such improvement or improvements, after advertising for sealed proposals for such construction not less than two nor more than four consecutive weeks in a newspaper published and of general circulation within the county. The bids shall be opened at 10:00 o'clock a. m. on the last day for filing the same, by the board of county commissioners and publicly read. Each bid shall contain the full name of each person or company interested in the same, and shall be accompanied by a bond or certified check on some solvent bank within the county, conditioned that, if the bid is accepted, a contract will be entered into and its performance properly secured, as shall be stated in the advertisements and proposals. In each bid the price of labor and materials shall be separately stated. Such board may reject any and all bids. The contract shall be between the board of county commissioners and the bidder, and the board shall pay the contract price in cash. Such payment may be made in proper installments as the work progresses. When there is reason to believe that there is collusion or combination among the bidders, the bids of those concerned therein shall be rejected. Whenever it becomes necessary, in the opinion of such board, in the prosecution of any such work or improvements, to make alterations or modifications in such contract, such alterations or modifications shall only be made by such board by resolution, and such resolution shall be of no effect until

the prices to be paid for work or material or both, caused by such alterations or modifications, shall have been agreed upon in writing, and signed by the contractor and said board, and no contractor for any such work shall be allowed to recover anything for additional work or materials required by any alterations or modifications nor for any other cause due to such alterations or modifications unless such contract is made as aforesaid, nor shall he in any event be allowed to recover for such work or materials, or other cause, more than the agreed price. The money derived from the lawfully authorized bonds or certificates of indebtedness sold as hereinbefore provided shall not thereafter be considered unappropriated until the county is fully discharged from such contract or contracts."

Under the provisions of the foregoing sections, county commissioners have authority to establish sanitary sewer districts and appoint a sanitary engineer to prepare detailed plans, specifications and estimates for said improvement, which must be approved by the board of county commissioners.

By the terms of Section 6602-5, supra, it is provided that the board of county commissioners shall, subsequent to the adoption of the resolution providing for the issuance of bonds, enter into a contract with the lowest and best bidder for the construction of such improvement, after advertising for sealed proposals for such construction not less than two nor more than four consecutive weeks in a newspaper published and of general circulation within the county. Said section also provides that the bids shall be opened by the board of county commissioners and publicly read on the last day for filing the same. It also provides that each bid shall contain the full name of each person or company interested in the same, shall be accompanied by a bond or certified check, conditioned that if the bid be accepted a contract will be entered into and duly executed, as shall be stated in the advertisements and proposals. It is further provided that the board may reject any or all bids and, finally, that if the commissioners have reason to believe that there is collusion or combination among the bidders, the bids of those concerned therein shall be rejected. Said section also contains the limitation that the contract may not be altered except by resolution of the board.

The bids submitted for the construction of said improvement are for the labor and materials necessary to complete said improvement in accordance with the plans and specifications therefor on file in the county sanitary engineer's office.

Ordinarily, the plans and specifications approved by the board of county commissioners contain the provisions that the construction of the improvement shall begin not later than a certain day and shall be completed on or before another specified day, and the bids submitted are made in accordance with said plans and specifications. As a rule, therefore, the item of time is not specifically mentioned in the bids.

However, in the specimen proposal submitted there is a blank space to be filled by the bidder, stating the number of working days in which he will complete the construction of said improvement, and the plans and specifications contain the provision that:

"Bids must be made on the blank proposal form which is attached hereto. All blank spaces in the proposal form must be properly filled in, and any proposal that contains any omissions, alterations or additions in writing of any condition, limitation or provision may be rejected."

The statute contains no limitations as to time, for the construction of such improvements, and it is therefore a matter of discretion with the board of county commissioners as to the time permitted for the beginning and completion of an improvement of the kind here involved. The commissioners may, and in the instant case do, reserve the right to reject any and all bids.

It will be noted that there is a wide distinction between matters required by law to be placed in a proposal and matters that are placed therein in the discretion of the board. In the case of *State ex rel. vs. Green*, 22 O. C. C. (N. S.) 321, it was pointed out that where a bid was defective in that it did not comply with the instructions in the specifications and proposal, such defects could be waived by the awarding board, and where the waiver operates to save money for the people, it should not be condemned. In that case an alternate bid was written in, which was not printed on the form, and the instructions as to interlineations or erasures were violated. Undoubtedly, in the case you present, if no time were stated, a reasonable time would be presumed. It would, therefore, appear that the failure of the bidder to fill in the space relative to time would constitute such a defect or irregularity as the board of commissioners would be authorized to waive if in its discretion such action would be beneficial to the public. On the other hand, such irregularity would justify the said commissioners in rejecting said bid if such action in its judgment would best serve the public interest.

It will be further observed that in the execution of the contract the board of county commissioners could stipulate the time the work would be required to be completed, and if the bidder would accept the terms thereof he would be bound thereby. It must be kept in mind that the laws relative to competitive bidding are not for the benefit of the contractors but are for the benefit of the public. Hence, it has been held that a bidder has no vested interest until such time as a contract has been awarded to him. The *State ex rel. vs. The Board of Public Service of Columbus*, 81 O. S. 218.

While I find no authority which would authorize the correction of the bid after it is opened, inasmuch as, as heretofore stated, a reasonable time would be presumed, the board of commissioners may award the contract if in its discretion such bid is lowest and best, and if the bidder will bind himself by contract to complete the work within a time satisfactory to the commissioners.

A public board has a wide discretion in determining which bid is the lowest and best. In the case of *The City of Cleveland vs. Thomas, Director of Parks, et al.*, 15 O. A. R. 76, it was held, as disclosed by the headnote:

"Where by law authority is given to a city's board of control to let contracts to the lowest and best bidder, the discretion so conferred upon such board will not be interfered with by the courts in the absence of proof, by a preponderance of the evidence, that the board failed to exercise sound discretion or that there was an abuse of sound discretion."

There are numerous decisions of the same general import as the case last mentioned. Undoubtedly there are many instances wherein the element of time is very important, and such a matter would be entirely within the discretion of the board of commissioners to consider as a factor in determining which bid is "lowest and best."

Based upon the foregoing, and in specific answer to your inquiries, it is my opinion that:

1. Where the proposal for the construction of a sewer for a county sewer district contains blank spaces, which the bidder is directed by the specifications to fill in, indicating the number of working days within which he will complete the work, and said bidder fails to make any indication therein, a reasonable time will be presumed. However, the failure to comply with the specifications in stating the time results in a defect in such bid, which the board of county commissioners may waive if it serves the public interest to do so; while on the other hand, if in the judgment of said board the public interest will be best served, it may reject said bid.

2. There is no legal authority for the filling in of blank spaces after the opening of the bid.

3. The board of commissioners may in its discretion take into consideration the time within which the bidder agrees to complete the work in determining which is the lowest and best bid, if in its sound judgment the element of time is essential under the existing conditions.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2985.

BOND—PREMIUM ON BOND OF COUNTY OFFICER SIGNED BY SURETY COMPANY AFTER JULY 18, 1927—A PROPER CHARGE AGAINST THE COUNTY.

**SYLLABUS:**

*When the bond of a county officer is duly released and a new bond properly signed by a duly licensed surety company, the premium thereon is a proper charge against the county, if said bond was given after July 18, 1927.*

COLUMBUS, OHIO, December 7, 1928.

HON. JOHN W. DUGAN, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication, which reads:

“One of the officers of this county gave bond December 20, 1926, for a term of two years, with The American Guaranty Company as surety, renewable at the end of each year upon the payment of the annual premium.

This officer, at the first of this year 1928, asked that this bond be released and offered a new bond with the same guaranty company as surety, in order that he might come within the provisions of Sec. 9573-1 of the General Code, 112 Ohio Laws, page 135.

As I understand, some court in Cincinnati, although I have not been able to find it, has held that this section is unconstitutional.

In your opinion, would the premium for the above bond be a proper charge against the county?”

Your communication, in substance, presents two inquiries: First, as to whether an official bond may be given and the premium thereon paid from public funds during the term of office for which the official was elected or appointed to fill, and, second,