

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

I do not think that at the present time there is such a vacancy in the office of coroner as could be filled by appointment. Whether after August 1, 1927, when the amendment to Section 2829 of the General Code becomes effective, there would be such a vacancy as might be filled by appointment by the county commissioners, I do not deem it necessary to decide in order to answer your question.

Specifically answering your question, I am of the opinion that the coroner serving prior to the last election is coroner until his successor is elected or appointed and qualified. Provided, however, that said officer does not serve more than four (4) years, including the two (2) for which he was elected.

As no county officer can serve more than four (4) years under a single election, this office will become vacant at the end of such four (4) year period.

See *State ex rel. vs. Brewster*, 44 O. S. 589; *State ex rel. vs. Thrall*, 59 O. S. 368; *State ex rel. vs. Baldwin*, 101 O. S. 65; (In this last mentioned case the statute applicable specifically declared a vacancy) *Opinions of the Attorney General for 1917*, page 1476.

Respectfully,
EDWARD C. TURNER,
Attorney General.

670.

CONTRACT—WHERE BONA FIDE BIDDER FOR STATE CONTRACT SUBMITS A BID WHICH IS BASED ON MISTAKE IN CALCULATION HE CANNOT BE COMPELLED TO EXECUTE THE PROPOSED CONTRACT—BID SHOULD BE REJECTED AND ANOTHER ACCEPTED.

SYLLABUS:

1. *Where a bona fide bidder for a contract for the construction of a building for the use of the state or an institution supported in whole or in part by the state in good faith submits a bid which is based on a mistake in calculation which would involve him in serious financial loss were he compelled to perform the work for the amount of the bid he cannot be compelled to execute the proposed contract.*

2. *The proper course to be pursued in such case is to reject the bid and accept another bid as provided in Section 2320 of the General Code.*

COLUMBUS, OHIO, June 28, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication under date of June 24, 1927, in which you request my opinion as to the procedure to be followed in awarding the contract for the general contract work on a cottage to be constructed at the Orient Institution for Feeble Minded, Orient, Ohio. The following statement of facts and questions are quoted from your letter:

FIRST—Statement of Facts.

(1) The 86th General Assembly of Ohio, 1925, appropriated \$450,000.00 for cottages at Orient. Under this appropriation we propose to construct one cottage.

(2) Herbert B. Briggs, State Architect and Engineer, prepared drawings and specifications and other required documents for the construction of the building, secured approvals thereon from the Department of Public Welfare, filed all documents, with the Auditor of State, and advertised in the Ohio State Journal under dates of May 24th and 31st, and June 7th and 14th, 1927, for bids to be received at 10 a. m. June 23rd, eastern standard time, at the Department of Public Welfare.

(3) Bids were received and opened under the provisions of advertisement.

(4) The lowest bid received on the general contract work was the bid submitted by George H. Moor, Columbus, Ohio, under Item 1 of his proposal for general contract for cottage "H" including tunnel, exclusive of plumbing, heating, electrical, and sewer contracts, for the sum of \$99,496.00.

(5) The next lowest bid on Item 1 was submitted by B. F. Smith Company in the amount of \$126,900.00. To this must be added the sum of \$900.00 for the installation of soft tile drain as mentioned in the substitution sheet of this company's proposal, making a total bid of \$127,800.00 for the B. F. Smith Company.

(6) The third lowest bid submitted on Item 1 of the proposal is that presented by the Albert B. Isabel Company in the amount of \$127,466.00. This bid is the second lowest bid providing the soft tile drain around building is installed.

(7) A short time after bids were received Mr. George H. Moor advised the Department of Public Welfare that he had made an error in compiling his quotation.

(8) Mr. George H. Moor called at the office of the State Architect and Engineer the morning of the 24th of June and explained that in totaling the various items of his bid a mistake was made on the item for brick work of \$21,600.00, Mr. Moor showing his original computation on the brick work and the original figures as inserted in the adding machine.

(9) Due to the error claimed by Mr. Moor to have been made, he has requested by letter, copy of which is attached, that he be permitted to withdraw his bid of June 23rd and in the award of this contract his bid not be considered.

(10) The bond accompanying Mr. Moor's quotation is in the amount of \$103,000.00, with the Globe Indemnity Company of the State of New York acting as surety. The bond accompanying the B. F. Smith Company's quotation is in the amount of \$145,000.00, with the Globe Indemnity Company of the State of New York acting as surety. The bond accompanying the Albert B. Isabel Company's bid is in the amount of \$140,000.00, with the Royal Indemnity Company of the State of New York acting as surety.

SECOND—Questions.

Based on the foregoing statements an opinion is asked in answer to the following questions:

(1) Can a contract be awarded to Mr. George H. Moor in amount in excess of his quotation of June 23rd?

(2) Inasmuch as Mr. Moor has stated a mistake was made in preparing his quotation, can the state compel Mr. Moor to enter into contract?

(3) If Mr. Moor declines to accept the contract can the bonding company be held for the actual construction cost of the building?

(4) Can the next lowest bid be accepted and a contract be awarded to the next lowest bidder and Mr. Moor's bid be rejected?"

You have also submitted a letter from Mr. Moor to Mr. Schlesinger, as Director of Highways and Public Works, in which Mr. Moor points out the error made in calculation and withdraws his bid.

It appears from your letter and from a conference with Mr. Moor and Mr. Scott of the State Architect's office that the error in Mr. Moor's bid was purely an error in addition, that to force him to enter into or perform a contract based on his bid as submitted would entail serious financial loss to him, and that his request to be permitted to withdraw his bid is made in good faith.

The provisions of law relating to the construction of buildings or structures for the use of the state are found in Sections 2314 to 2332, General Code, both inclusive.

Section 2318, General Code, prescribes the manner in which publication shall be made of the time and place when and where proposals or bids will be received, and Section 2319, General Code, sets out the procedure to be followed in opening such bids and awarding the contract.

Section 2320, General Code, provides as follows:

"If in the opinion of such owner, the acceptance of the lowest bid or bids is not for the best interests of the state, with the written consent of the state building commission, they may accept, in their discretion, another proposal so opened or reject all proposals, and advertise for other bids, such advertisement to be for such time, in such form and in such newspaper or newspapers as may be directed by the state building commission. All contracts shall provide that such owner may make any change in work or materials on the conditions and in the manner hereinafter provided."

In the case of *The Ferro Concrete Construction Company vs. The Board of Education of Cincinnati*, reported in 11 O. N. P. (N.S.) 86, the facts were almost identical with those under consideration in this opinion. In that case the plaintiff had submitted a bid for certain concrete construction work in the erection of a school building. There were fifteen bids submitted and the plaintiff's bid was the lowest, being some twenty-five per cent below the next lowest bid. Upon discovering the great difference between his bid and that of the next lowest bidder the plaintiff investigated and found that its engineer had made certain errors in calculation of quantity and prices. The mistake amounted to some \$6,000.00, and because of it plaintiff, if compelled to enter into the contract, would not only make no profit but would suffer a substantial loss upon the cost of the work. As soon as the mistake was discovered and before the bid had been accepted plaintiff notified defendant of the mistake and asked leave to withdraw the bid or be relieved from it. The terms upon which the bid was submitted provided that it should not be withdrawn. The defendant declined to permit the plaintiff to withdraw and demanded that plaintiff execute a contract pursuant to its bid. Plaintiff brought the action to enjoin defendant from declaring plaintiff in default and from proceeding accordingly. The headnote of the case reads as follows:

"Where a bona fide bidder for public work in good faith submits a bid which is based on a mistake in measurements which would involve him in

serious financial loss were he to do the work for the amount named, the minds of the parties have not met, and he can not be compelled to execute the proposed contract, notwithstanding the terms upon which the bid was submitted provided that it should not be withdrawn; and injunction will lie on the petition of the bidder to restrain the board having charge of the contract from accepting the bid and insisting that he execute the contract or subject himself to an action for damages."

In the course of the opinion the court says on page 90:

"It is urged by counsel for defendant that to grant relief in case of mistake such as this, is to set a dangerous precedent which may be taken advantage of by unscrupulous bidders. No imputation is made against the plaintiffs in this case. Their good faith is not questioned. I think such consideration might well weigh with the board of education and incline them to submit any case to the determination of a court of equity upon evidence and with counsel, leaving it to the court to determine the right of the parties and the truth and justice of the case, each case under its own peculiar circumstances; but I do not think the court should hesitate to grant the relief where the facts are clearly proved and the justice of the case is apparent beyond any doubt. I do not think such course calculated to work injury or to encourage the unworthy."

In view of the holding in the above case and in view of the provisions of Section 2320, supra, I am of the opinion that the proper procedure to be followed is to reject the bid of Mr. George H. Moor on the ground that there was no meeting of the minds and that it is not for the best interest of the state to accept said bid and with the written consent of the Director of Highways and Public Works, in whom the powers and duties of the State Building Commission are now vested, to accept one of the other proposals.

This conclusion makes a specific answer to each of your questions unnecessary.

Respectfully,
EDWARD C. TURNER,
Attorney General.

671.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND HARRY I. DERR, WOOSTER, OHIO, TO CONSTRUCT PLUMBING, HEATING AND VENTILATING FOR AGRONOMY BUILDING, OHIO AGRICULTURAL EXPERIMENT STATION, WOOSTER, OHIO, AT AN EXPENDITURE OF \$6,385.00—SURETY BOND EXECUTED BY THE AETNA CASUALTY AND SURETY COMPANY.

COLUMBUS, OHIO, June 28, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works, for and on