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EDUCATION, BOARD OF—ADVERTISED FOR BIDS TO SELL PROPERTY HELD THROUGH ITS CORPORATE CAPACITY—STIPULATION, RIGHT RESERVED TO REJECT ANY AND ALL BIDS—BOARD AT NEXT REGULAR MEETING REJECTED BIDS—NO CONTRACTUAL OBLIGATION AROSE AGAINST BOARD—SUCH PROPERTY MAY BE DEVOTED TO PROPER USES FOR SCHOOL PURPOSES.

SYLLABUS:

When a board of education has determined to sell property held by it in its corporate capacity and has advertised for bids therefor, stipulating in such advertisement that it reserves the right to reject any and all bids, and pursuant to such advertisement bids are received, and the board at its next regular meeting, a quorum being present, by a majority vote of those present, rejects the bids, and no action is taken by said board accepting any bid, no contractual obligation arises against the board, and it may devote such property to such uses for school purposes as it deems proper.

Columbus, Ohio, July 27, 1945

Hon. Robert M. Betz, Prosecuting Attorney
Gallipolis, Ohio

Dear Sir :

Your request for my opinion reads as follows :

"The Ohio Local Board of Education has requested me to ask your opinion as to the effect of their action, based upon the following state of facts :

On December 6, 1943, the Board adopted a resolution which provided for 'closing Pine Grove School until such time as sufficient scholars moved in the district to justify school.' At the regular meeting of the Board held on February 5, 1945—three members being present—a motion was made to annul the resolution just referred to. All three members voting in the affirmative, another resolution was proposed 'that the Ohio Board of Education proceed to advertise Pine Grove School House for sale and to sell at the front door of the Court House, at Gallipolis, Ohio, on the 5th day of March, 1945, at 10:00 a. m. EWT,' which motion was received with the affirmative votes of all three members present also.

As will be noted, no motion was made as to the value of the property, although there seemed to be no question but that the school house was *less* than \$300.00. Pursuant to the above resolution a notice was inserted in the Gallipolis Daily Tribune, stating the time and place of sale, and reserving to the Board the right to reject any and all bids.

On March 5, the clerk offered the property, and it was bid in for \$136.75. At the next regular meeting of the Board—three members being present—a motion was made to reject the bid and on the roll call two members voted to reject, and one voted against the motion. This meeting was held some thirty days after the date of the sale.

At the meeting held on May 7, 1945, the Board instructed the clerk to return the check which the purchaser had given in payment for the building.

While the purchaser refused to take his check back, the Board on June 23, 1945, at a called meeting, passed a resolution as follows :

'Resolved; that the Board of Education proceed to open Pine Grove School, as there has been a petition

with the names of parents of twelve (12) scholars presented to the Board for the opening of the school.'

Will you please advise me at your very earliest convenience, as to whether or not, under this more or less involved state of facts, a sale was made on March 5th, and whether or not the Board had the right to rescind that sale at a later date."

Section 4834, General Code, reads as follows:

"The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing *and disposing of real and personal property*, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred upon it by law."

(Emphasis added.)

It would appear from this section that unless restricted by some other provision of law, a board of education would have the authority to sell any real or personal property of the district without any advertisement or invitation for bids, and in such manner as it deemed proper.

Section 4834-13, General Code, provides:

"When a board of education decides to dispose of real or personal property, held by it in its corporate capacity, exceeding in value three hundred dollars, it shall sell such property at public auction after giving at least thirty days' notice thereof by publication in a newspaper of general circulation or by posting notices thereof in five of the most public places in the district in which such property is situated. When the board has twice so offered a tract of real estate for sale at public auction and it is not sold, the board may sell it at a private sale, either as an entire tract or in parcels, as the board deems best. Provided, however, that in case the board of education decides to dispose of such real property, it may sell and convey the same to any municipality or board of trustees of the school district library in which such real estate is situated upon such terms and conditions as may be agreed upon. The president and the clerk of the board shall execute and deliver deeds necessary to complete the sale or transfer provided for by this section."

There seems to be no occasion to invoke the statute last above quoted, since by your own statement and judging from the amount bid for the

property in question it appears that the value was much less than three hundred dollars. However, I deem it wholly immaterial whether the property in question was of a value of more or less than three hundred dollars.

By the terms of Section 4832, General Code, the board of the local school district in question consisted of five members. Section 4834-1, General Code, provides in part, as follows:

“A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution authorizing the *purchase or sale of real or personal property* or to employ a superintendent or teacher, janitor or other employee or to elect or appoint an officer or to pay any debt or claim or to adopt any text book, the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting ‘aye’ and the names of those voting ‘no’. If a majority of all of the members of the board vote aye, the president shall declare the motion carried. * * *.” (Emphasis added.)

It appears from your letter that at the meeting wherein it was resolved to sell the property in question, three members of the board were present and constituted a quorum, and the three being a majority of all the members, voted in favor of the resolution.

You state that the clerk offered the property on the day ordered by the board, “and it was bid in at \$136.75.” By this I infer that the clerk announced the sale to the party who offered that bid. There is no suggestion in your letter that the board took any action on the day of the sale, and I am assuming that none was taken except as stated in your communication.

It further appears that at the next regular meeting following the offering of the property for sale and the receipt of the bid in question, three members were present, and on the motion to reject the bid two members voted to reject and one voted against the motion. The question then arises whether this motion was duly passed, having received the vote not of a majority of all the members of the board but merely a majority of the quorum which was present.

The question thus raised was before the court in the case of *State, ex rel. v. Evans*, 90 O. S., 243, where the court was considering the provisions of what was known as the Jung small school board law, under which the board of education was required to determine the number of members that the board should thereafter have. In the case there presented the board took action by a majority of the quorum which was not a majority of the entire board. The court quoted Section 4752 of the General Code then in force, which contained substantially the same language as Section 4834-1, General Code, hereinabove quoted. The court then said at page 251 of the opinion:

“The statute having provided that in certain cases a majority of the entire membership is necessary to pass certain motions or resolutions, the inference is very clear that as to all matters, motions or resolutions other than those specially mentioned in the statute a majority of the quorum is sufficient. Indeed, this is an elementary rule of parliamentary law. The agreed facts admit that there was a majority of the quorum voting for the resolution providing for a membership of seven for the small board.”

The court concluded its finding as follows:

“But in this case there can be no doubt from the record that the meeting held on August 30, 1913, at 8 o'clock, was regularly called, that proper notice was given to each and every member of the board, agreeably to the statute, and that the action of such board with reference to fixing the membership of the new or small school board was regular and legal.”

We must therefore conclude that the action of the board in the case you present, in rejecting the high bid was effective, and the bid was properly rejected. In taking that action the board was only exercising the right which it had reserved to itself when it authorized bids to be received for the sale of the school building.

The provisions of Section 4834-13 hereinabove quoted providing for the sale of school property, were formerly contained in Section 4756, General Code. That section was under consideration by several of my predecessors. In an opinion found in 1912 Opinions Attorney General, page 493, it was held:

“Section 4756, General Code, providing for the sale of real estate valued in excess of \$300 at auction does not compel the

board of education to dispose of the property to the highest bidder and the board in its notice of sale may reserve the right to reject any and all bids."

Again, in 1915 Opinions Attorney General, page 877, it was held that where the value of the property to be sold is less than \$300, the provisions of Section 4756, General Code, do not have to be complied with and the property may be sold at private sale.

In 1921 Opinions Attorney General, page 481, the two opinions last referred to were reviewed, and it was held:

"A board of education desiring to dispose of real estate valued in excess of three hundred dollars at public auction under the provisions of Section 4756, G. C., is not compelled to dispose of the property offered to the highest bidder, and the board of education in its notice of sale may reserve the right to reject any or all bids."

Section 8401, General Code, provides:

"(1) When goods are put up for sale in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid, and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) When notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall be unlawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take a bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer."

That section is a part of the uniform sales act enacted in 1908. On its face, the above quoted provision might suggest that where a public sale is held such as that here under consideration, the advertisement for bids is an offer and the high bid is the acceptance and the contract be-

comes binding on the drop of the auctioneer's hammer. However, it must be borne in mind that the sales act is intended to govern commercial transactions only, and is manifestly not intended to affect governmental agencies in the execution of their statutory powers. As said by Johnson, J., in *Milling Co. v. Baking Co.*, 95 O. S., 180:

"It was passed in response to a general desire for substantial uniformity in the legislation of the different states on all branches of commercial law."

The above quoted statute adopts the common law conception of an auction sale in commercial transactions. If there were any doubt as to the non-applicability of that statute to a sale such as the one we are considering, it will certainly be removed when we observe that the school board expressly reserved the right to reject any and all bids, which of necessity implied that some further action on the part of the board was required before a bidder could know that his bid would be accepted.

No contractual obligation is created by the mere advertisement by a public body for bids and the receipt of bids pursuant thereto. Speaking of public contracts, it is said in 43 Am. Jur., page 782:

"No obligation is created by an offer until it is accepted according to the terms upon which it is made. * * * On the other hand, acceptance by the proper public authorities of a bid submitted pursuant to a proposal or advertisement for bids for a contract for public work * * * converts the offer into a binding contract, even though a formal bidders' contract has not been executed."

The only "proper public authority" in this case would be the board of education, and it must act as a board. No action by individual members or even by all the members of the board acting informally could create any legal obligation against the board. As stated in 36 O. Jur., page 191:

"The members comprising the board of education have no power to act as a board except when together in session, and then as a body or unit, by resolution duly entered on the minutes." Citing *McCastle v. Bates*, 29 O. S., 419.

Specifically answering your question, it is my opinion that under the circumstances stated in your communication no sale of the property in

question was made, and no obligation was incurred by the board of education. The board reserved the right to reject any and all bids, and it exercised that right. The subsequent action of the board determining to reopen the school in question would appear to amount to a revocation of its previous action looking to the sale of the school building.

Respectfully,

HUGH S. JENKINS

Attorney General