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1. CONTRACT FOR IMPROVEMENT—BOARD OF EDUCATION—REQUIRED TO BE LET PURSUANT TO ADVERTISEMENT FOR BIDS—BOARD NOT AUTHORIZED TO LET CONTRACT ON BASIS OF COST PLUS AGREED PERCENTAGE.

2. BIDS MAY BE RECEIVED AND CONTRACT LET ON BASIS OF BIDS OF A DEFINITE SUM—STIPULATION, IF FINAL ASCERTAINED COST PLUS CERTAIN FIXED PERCENTAGE OR FEE, DETERMINED BY BOARD IN ADVANCE, IS LESS THAN SAID DEFINITE SUM, LESSER AMOUNT SHALL BE PAID AND RECEIVED AS FULL COMPENSATION FOR IMPROVEMENT—SECTION 4834-18 G. C.

SYLLABUS:

Where a contract for an improvement contemplated by a board of education is required by Section 4834-18, General Code, to be let pursuant to advertisement for bids, such board is not authorized to let such contract on the basis of cost plus an agreed percentage. However, it may receive bids and let such contract on the basis of bids of a definite sum with a stipulation that if the final ascertained cost plus a certain fixed percentage or fee, determined by the board in advance, is less than said definite sum, such lesser amount shall be paid and received as full compensation for such improvement.

Columbus, Ohio, April 22, 1946

Honorable Seabury H. Ford, Prosecuting Attorney
Ravenna, Ohio

Dear Sir :

I have before me your communication in which you request my opinion, reading as follows :

“At the request of the Board of Education of the Aurora Local School District in this County, and at the suggestion of the President of said Board, John W. Morrison, I am writing you to inquire if it would be legal for the Board to advertise for bids on the school improvement and then issue a contract on the basis of the cost of material, labor and an agreed percentage to the contractor, in other words, a cost plus basis. The contract would also be drawn on the accepted bid and whichever amount turned out to be lesser would be paid upon completion of the contract.

In other words, the Board has already advertised for bids which were so greatly in excess of the money available for the specifications required, that all bids were rejected. Present conditions are making it impossible for any contractor to do otherwise than to completely protect himself because of the sharp fluctuation in material and labor prices and are prohibiting any building except on a basis of materials and labor, plus a percentage.

I will appreciate it if you can recommend or suggest any procedure along this line which would be legal and proper.”

Boards of education are strictly limited in exercising their powers of contracting, to the procedure set forth in the statute. This procedure as set forth in Section 4834-18, General Code, reads as follows :

“When the board of education determine to build, repair, enlarge or furnish a schoolhouse or schoolhouses, or make any improvements or repairs, the cost of which will exceed in city districts, three thousand dollars, and in other districts one thousand dollars, except in cases of urgent necessity, or for the security, and protection of school property, it must proceed as follows :

1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of proceedings of the board.

2. The bids, duly sealed, must be filed with the clerk by twelve o'clock noon, of the last day stated in the advertisement.

3. The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board; provided, that the board of education may by resolution provide for the public opening and reading of such bids by the clerk, immediately after the time for filing such bids has expired, at the usual place of meeting of the board, and for the tabulation of such bids and a report thereof to the board at its next meeting.

4. Each bid must contain the name of every person interested therein, and shall be accompanied by a bid bond or by a certified check upon a solvent bank, as the board may require, payable to the order of the treasurer of the board of education, in an amount to be fixed by the board of education or by an officer designated for such purpose by the board, said bond or check to be in no case less than five per cent of the amount of the bid and conditioned that if the bid be accepted, a contract will be entered into, and the performance of it properly secured.

5. When both labor and materials are embraced in the work bid for, the board may require that each be separately stated in the bid, with the price thereof, or may require that bids be submitted without such separation.

6. None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

7. The contract must be between the board of education and the bidders. The board shall pay the contract price for the work, when it is completed, in cash, and may pay monthly estimates as the work progresses.

8. When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

9. When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected."

It will be noted that this section applies only to improvements the cost of which will exceed in city districts \$3,000, and in other districts \$1,000. I am assuming for the purpose of this opinion that the situation which gives rise to your request involves an expenditure that brings the

proposed contract within the provisions of that section. The specific question which you present involves the legality of a cost plus contract.

It must be evident, without extended argument, that a cost plus contract could not be the subject of competitive bidding since the matter of cost could not be determined in advance, and therefore could not be stated in a bid. The fact that none but the lowest responsible bid can be accepted necessarily implies that the bids received shall be in definite sums which are capable of comparison. It is provided in paragraph 7 of the statute above quoted that "the board shall pay the *contract price* for the work." These words certainly contemplate a definite sum agreed upon as the "contract price." It is also provided that the bond or check to be submitted by the bidder shall in no case be less than 5% of the *amount* of the bid. It would, of course, be impossible to compute 5% on a sum which is wholly problematical.

There is further the provision of Section 5625-33, General Code, requiring every subdivision and taxing district, as a prerequisite to the making of any contract involving expenditure of money, to procure a certificate of the fiscal officer that the amount called for by the contract is in the treasury or in process of collection. Manifestly, this certificate cannot be given until the amount is determined.

A question quite similar to the one you present was submitted to one of my predecessors as shown by an opinion found in 1919 Opinions of Attorney General 1034, the syllabus of which is as follows:

"Boards of education are without authority to let contracts for the furnishing of labor on a school building at ten per cent of the cost of material, and all contracts exceeding fifteen hundred dollars in city districts and five hundred dollars in other districts, let by boards of education for such labor, must be by competitive bidding and in compliance with section 7623 G. C."

Section 7623 of the General Code then in force contained substantially the same provisions as are found in Section 4834-18, *supra*.

It is evident that if bids were asked for on a purely cost plus basis there could be no real competition. If the percentage to be added to cost were fixed in the advertisement, all of the bids would be identical, to-wit, cost of materials and labor plus the stipulated percentage. Even if bidders were asked to bid on the basis of cost of labor and materials plus a percentage to be supplied in the bid, there would still be no possible

means of determining which was the lowest bidder because the ascertained cost might vary so widely as to more than absorb the difference in the percentage allowed for overhead and profit. There is, therefore, no escape from the conclusion that a strictly cost plus basis of receiving bids for an improvement to be constructed by a board of education is entirely inconsistent with the law.

Your letter, however, contains a suggestion which is worthy of consideration, to-wit, that the contract might also be drawn on the basis of the accepted bid combined with a cost plus proposal, and whichever amount turned out to be the lesser should be the basis of payment on completion of the contract. I take this to mean that each bidder would be required to name a definite sum for which he agreed to complete the improvement, with a stipulation that in case the ascertained cost of labor and material upon completion plus a certain fixed percentage or fee determined in advance, for overhead and profit, should be less than the sum of the outright bid, then that lesser sum should be paid and accepted in full compensation for the construction of the improvement. If a provision of this character were embodied in the advertisement for bids accompanied by some practical method of determination on the part of the board of the actual cost of labor and material I cannot see that it would in any way conflict with the principle of competitive bidding or the duty of the board to let the contract to the lowest responsible bidder. Without undertaking to stipulate what this method of checking the cost should be, it may be suggested that it might be ascertained by an examination and audit by the board of the invoices for material and the receipted payrolls for labor.

Under such a plan the flat bid would be the ultimate amount which the contractor could receive. There would be no positive assurance that the ascertained cost plus the allowed percentage would be less than that amount, but under the present circumstances of fluctuating costs of both labor and material it might result in a saving. The alternative under existing conditions is that bidders would fix an exorbitant amount in arriving at their bids in order to protect themselves against contingencies that may not arise.

Respectfully,

HUGH S. JENKINS,
Attorney General