

3796.

COMPETITIVE BIDDING—STATE OFFICE BUILDING COMMISSION
NOT REQUIRED TO ADVERTISE FOR BIDS FOR MURAL
PAINTINGS IN NEW STATE OFFICE BUILDING—SPECIFIC
CASE.

SYLLABUS:

The State Office Building Commission is not required to advertise for competitive bids in contracting for the furnishing of mural paintings for the interior of the new state office building, since work of this character is wholly dependent for its acceptability upon the talent of the individual.

COLUMBUS, OHIO, December 1, 1931.

HON. F. W. MOWREY, *Executive Secretary, The State Office Building Commission, Columbus, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent inquiry which reads as follows:

“The State Office Building Commission is contemplating mural paintings inside of the new state office building, the cost of which will be \$60,000 or more.

It is the thought of the Commission that this work is so personal and unique that it will not be necessary to advertise for bids.

The Commission would appreciate an early opinion on the two following questions:

First: Whether or not it is necessary to advertise for competitive bidding on this work as called for in sections 2314, et seq. of the General Code of Ohio.

Second: If advertising is compulsory, may the Commission use its judgment in awarding of contract even though the award goes to a person who is not low bidder.

The Commission would like to begin this phase of its interior work as soon as possible and would appreciate an early opinion.”

As indicated by you in your communication, the State Office Building Commission is to be governed by section 2314, et seq., in the letting of contracts for the erection of the state office building. See Section 7 of the Act passed by the legislature on April 17, 1925 (111 O. L. 475, 477).

Without undertaking to quote these sections in detail, it is sufficient for the purposes of this opinion to state that said sections call for competitive bidding where the amount involved exceeds three thousand dollars (\$3,000.00).

However, as you suggest in your letter, where the nature of public work to be performed involves services which are of a personal, skillful and artistic quality, competitive bidding is not required, and statutes on such subject are not applicable.

While the Supreme Court of Ohio has not passed on the exact point which you present, yet there have been some lower court decisions agreeing with the above principle.

In the case of *State ex rel Scobie v. Edson A. Cass, et al.*, 13 C. C. (N. S.)

449, 22 O. C. D. 208, it was held that a contract entered into by a county building commission for the painting and decorating of the walls of a court house and supplying mural paintings for various rooms therein without competitive bidding was legal. The court in this case said at pages 219, 220 and 221:

"This conclusion necessarily disposes of the case, but we deem it proper to pass upon the other question here raised, namely, whether the interior decoration of this courthouse provided for in this contract is so essentially noncompetitive in character that the commission is not required to submit the work therefor to competitive bidding, assuming that otherwise the statute requires it to do so.

The contention of the plaintiff is that where a statute requires work to be submitted to competitive bidding and a contract to be made only with the lowest and best bidder, that then no construction is permissible which undertakes to read into the statute any exception, and that in such a case the evident design and purpose of the law-making power is to restrict all work to that kind and character which can be in its nature the subject of competitive bidding. Upon the other hand, the contention is that the purpose of the law is to protect the public against unwise and injudicious contracts resulting from favoritism, dishonesty, and to secure for the public the construction of any public work upon the best terms and to the best advantage and at the lowest possible cost, and that the only sure way of securing this is by open public competition; but it is further contended that while this is true, it was no part of the purpose of the lawmaking power thereby to prevent the public from having those things which are essentially noncompetitive, where they subserve a useful if not necessary purpose which otherwise could not be obtained, and that it is not inimical at all to the purpose of these statutes to limit the public bidding required to those things about which there may be competition. Naturally the things which are noncompetitive in their nature are few as compared with the number of things that are competitive. So here. Here is a great public building, erected at great cost, intended not only for the present but many future generations; imposing in appearance, beautiful in design, monumental in character, *whose walls it is proposed to decorate* in harmony with the style and structure of the building itself, in a manner at once to add to its dignity and its beauty, exhibiting those elements of taste, feeling and harmony corresponding to the highest aesthetic taste of present day culture. *This work, we find, is of a character that requires in him who undertakes to do it the idealism and imagination of an artist, the skill of the painter, the sentiment and feeling of the poet.* That it may be done to harmonize with the building itself, with the mural paintings proposed to be placed upon its walls and in the manner herein described, requires the commission should select the man fitted to do the work and not to submit the work to any man who might bid upon it, whether he is fitted to do it or not. It seems to us that it is not doing violence to the intention of the law-makers nor the evils against which the statute is directed to construe it to be limited to work that is in its nature competitive and not otherwise."

The court then went on to state that the case of *State v. McKenzie*, 29 O. C. C. 115, C. C. (N. S.) 105, had arrived at the same conclusion, and that numerous authorities from other states supported the principle.

There were two legal points involved in the Scobie case, one of which is the point presented by your communication. The Supreme Court of Ohio in a journal entry opinion (see 84 O. S. 443, 334) affirmed the judgment of the Circuit Court on the point not involved in this opinion, but stated in the last paragraph of the journal entry:

"Whether the work of interior decoration was or not competitive work is not passed upon."

From the above language, it cannot be said that the Supreme Court of Ohio intimated that the holding of the Circuit Court, that the furnishing of mural paintings was non-competitive, was incorrect.

The Scobie case is cited as a leading case on the question involved in your communication in an annotation found in 44 American Law Reports Annotated 1150 to 1158, entitled "Contract for services as within requirement of submission of bids as condition of public contract." Dillon on Municipal Corporations (1911), page 1199, section 802, and two Opinions of the Attorney General reported in Annual Report of the Attorney General for 1912, Vol. I, Page 412, and in Opinions of the Attorney General for 1923, page 758, respectively, also support the principle announced in the Scobie case.

I feel that the views expressed in the cases referred to and in the opinions of my predecessors are sound. It is inconceivable that plans and specifications could be so drawn for mural decorations and like works of art as to provide a proper basis for the receipt of bids. Work of this character is solely dependent upon the talent of the individual artist for its merit, and, while doubtless there may be an element of competition enter into the determination of the Commission by the submission of designs or sketches, such competition could not be in strict compliance with the statutory provisions for competitive bidding, but would only serve as an aid to the Commission in passing upon the real merit of the individual artist. The public interest can best be subserved in matters of this kind by the exercise of a sound judgment on the part of the Commission, based upon adequate knowledge of the character of the work of the individual artist.

In view of the above discussion, I am of the opinion, in answer to your first question, that it is not necessary for the Commission to advertise for competitive bidding for the mural paintings for the state office building. Since the answer to your first question is that competitive bidding is not required, a discussion of your second question is unnecessary.

Respectfully,

GILBERT BETTMAN,
Attorney General.