

**OPINION 65-223**

**Syllabus:**

The awarding party of a public contract cannot waive a time limitation on the submission of bids, and therefore a board of education may not accept a bid which was submitted four minutes late.

-----

**To: Lowell S. Petersen, Ottawa County Pros. Atty., Port Clinton, Ohio**  
**By: William B. Saxbe, Attorney General, December 16, 1965**

Your recent letter requesting the opinion of this office reads as follows:

"I respectfully request your opinion of the interpretation of the following provision of Revised Code Section 3313.46:

"'(B) The sealed bids must be filed by twelve noon of the last day stated in the advertisement.'

as applied to the following facts:

"1. The Danbury Township School Board met at 12:00 noon on the last day stated for acceptance of bids in an advertisement for the building and enlarging of a schoolhouse under the provisions of Section 3313.46.

"2. At 4 minutes after 12:00 noon and before any of the bids had been opened,

an additional bid was delivered in person by a representative of an additional contractor.

"The Board thereupon received said late bid and opened all of the bids. The bid of the contractor which was submitted at 12:04 P.M. was substantially lower than any of the other bids submitted for that particular segment of the project, and the Board subsequently awarded the contract for that portion of the project to the said late bidder, subject to the approval of my office.

"Formal objections have been received from unsuccessful bidders for this portion of the project. The School Board must commence construction under other integrated contracts in order not to be very seriously handicapped by approaching cold weather.

"Can a School Board award a contract to a bidder whose bid is 4 minutes late when other bids have not yet been opened without violating the provisions of Ohio Revised Code Section 3313.46?"

In a decision relating specifically to the question of late-arriving bids, the court held as follows:

"The refusal by the Director of Public Service of Columbus to accept a bid for construction of an incinerator because filed five minutes after the time expressly fixed by the charter of the city, and by the advertisement for the opening of bids, is not an abuse of the discretion imposed on him, even though the bids had not actually been opened prior to receipt of such bid."  
State ex rel. Nye Odorless Incinerator Co. v. Lucks, 18 Ohio Law Abs., 225.

In the above case, the advertisement required that the bids would be received "until 12:00 o'clock noon." It could be argued that based upon a reading of the dicta in the Nye case, supra, an inference would arise that the Court was of the opinion that the awarding authority had discretion either to refuse or accept a bid filed after the expiration of the time fixed for filing. However, I do not feel that such an inference based upon dicta is compelling authority for the conclusion that such discretion exists. I also note that late bid was not accepted, and the Court upheld this position.

The matter of "discretion" was also considered in the case of Ohio ex rel. Mathis Brothers Company v. Board of Education, 6 C.C. R (N.S.) 345. In this case, it was held as follows:

"Where bids for public work received in response to advertisement are ignored, and a contract is awarded upon a bid based upon conditions not contained in the original specifications and received subsequent to

the time designated in the advertisement,  
the award is wholly unauthorized and il-  
legal, and upon application to a court of  
competent jurisdiction may be enjoined."  
(Emphasis added)

The "discretion" in the above case related to bids re-  
ceived in pursuance of the advertisement and not to a bid re-  
ceived too late.

Citing the Nye case, supra, one of my predecessors has  
also ruled, in Opinion No. 115, Opinions of the Attorney  
General for 1939, at page 138, that proposals received subse-  
quent to the time of receipt specified in the notice may not  
be considered in awarding the contract. The then Attorney  
General stated in such opinion that the court in the Nye case  
"did not permit a waiver of the rule relating to time for  
receipt of bids." Also in Opinion No. 115, supra, my prede-  
cessor cites Opinion No. 126, Opinions of the Attorney General  
for 1929, page 189, which also declared that bids received subse-  
quent to a fixed time may not be considered by the awarding  
party.

It was the apparent intent of the Legislature in enacting  
Section 3313.46 to give equal opportunity to all bidders.  
Recognizing the obvious advantage of even a few minutes to a  
computer of bids, the Legislature established a definite dead-  
line for such bids to be submitted. Waiving such deadline  
would in my opinion prejudice the rights of other bidders by  
denying them equal protection of the law.

Therefore, I must concur with the conclusions of the  
opinions cited above, and advise you as follows:

The awarding party of a public contract cannot waive a  
time limitation on the submission of bids, and therefore a  
board of education may not accept a bid which was submitted  
four minutes late.