

Public Contracts—Competitive Bidding.

The letting of a contract for the construction of a bridge or road upon a cost plus basis is not permissible under our laws providing for the letting of public contracts upon competitive bidding.

Nov. 12, 1918.

State Highway Commission,
Helena, Montana.

Gentlemen:

You have requested my opinion upon the question of whether or not the State Highway Commission or a Board of County Commissioners may let a contract for the construction of a bridge or for the construction of a highway upon a cost plus basis rather than upon a contract specifying a definite sum of money to be paid the contractor for the construction of the proposed public improvement.

On account of the fluctuation in the cost of materials and the cost and availability of labor, it appears that contractors are now adding to their bids a considerable percentage to the ordinary cost of the construction of such public improvement, in order not to suffer a loss upon such contract. It therefore follows that in most instances the county or city constructing such public improvement is compelled to pay for the same greatly in excess of the actual cost, and that therefore doubtless in many cases the city or county or the State Highway Commission may save considerable sums of money by letting a contract for the construction of a road or a bridge upon the basis of the actual cost of the labor, materials and freight, and a definite sum to be paid the contractor for superintendence and management. In such cases you propose to advertise for bids for the construction of such a public improvement either upon the regular basis of a definite fixed sum or for the actual cost of labor, materials and freight, plus a definite sum for superintendence and management, and a per diem charge for equipment used. Then upon receipt of the various bids, the State Highway Commission or Board of County Commissioners will determine which in their judgment would be the best bid for the Highway Commission or the County and then enter into a contract accordingly.

Section 7 (a) of Chapter 170 of the 1917 Session Laws provides as follows:

"All contracts for work upon State Highways shall be let by the Executive Committee. Where the estimated cost of any piece of work upon the State Highways exceeds One Thousand Dollars (\$1,000.00), it shall be the duty of the Executive Committee to let such contract by *competitive bidding* upon such notices and upon such terms as the Committee may by its rules and regulations prescribe, providing, however, that this shall not apply to work by convict labor. A contractor upon being awarded a contract for construction, improvement or maintenance work upon a State Highway, and

before entering upon such work, shall execute to the State of Montana a bond to be approved by the President and to be conditioned for the faithful discharge of his duties under such contract."

By Section 11 of Chapter IV of Chapter 172 of the 1917 Session Laws, when a highway is to be opened, constructed, altered or widened and when the estimated cost of the same exceeds \$200, "the work may, in the discretion of the County Commissioners, be let by contract; and if such estimated cost exceeds the sum of Five Hundred Dollars, such work may be let by contract unless the Board shall find that such work may be otherwise done at less cost; but before any contract shall be let, as provided herein, the Board of County Commissioners shall advertise for bids therefor at least once a week for two successive weeks in a newspaper of general circulation in the county, and the contract shall then be awarded to the lowest responsible bidder who shall, before entering upon the performance of the work, execute and deliver to the Board of County Commissioners an *undertaking* with two or more sureties, to be approved by the Board of County Commissioners, *in a sum not less than equal the amount for which the contract is awarded* and conditioned for the prompt, faithful and efficient performance of such work; provided, however, the Board of County Commissioners may reserve the right to reject any and all bids."

Section 1413 of the Revised Codes as amended by Chapter 9 of the 1909 Session Laws is as follows:

"No bridge, the cost of construction or repairs of which exceeds the sum of Four Hundred Dollars, must be constructed or repaired except on the order of the Board of County Commissioners; and when ordered to be constructed or repaired it shall be done by contract. Before any contract shall be let as provided herein the Board of County Commissioners shall advertise for bids therefor at least once a week for two successive weeks in a newspaper of general circulation in the county, and a contract shall then be awarded to the lowest responsible bidder. The successful bidder shall, before entering into the performance of the work, execute and deliver to the Board of County Commissioners, an *undertaking*, with at least two or more sureties, to be approved by the Board, *in a sum not less than one-half the amount for which the contract is awarded*, provided, however, that no such undertaking shall be for a less sum than Five Hundred Dollars."

And by Section 1414, "all bids must be sealed, opened at the time specified in the notices, and a contract awarded to the lowest responsible bidder. The Board of County Commissioners may, however, reject any and all bids."

The following quotation is from *O'Brien vs. Drinkenberg*, 41 Mont 538 at 549, 111 Pac. 137:

"In *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57. Pac. 1092, this court said: 'It is the general rule that, when the authorities of a municipality are required by statute to let

contracts to the lowest bidder, a contract not so awarded is illegal. (Tiedeman on Municipal Corporations, Sec. 172.) Bids need not be called for unless the statute requires it; but, if notice, advertising and similar preliminaries are required, a contract entered into without attention to these preliminaries will be held invalid.'

"In State ex rel. Lambert v. Coad, above, this court quoted with approval from Dement v. Rikker, 126 Ill. 174, 19 N. E. 33, the following: 'Letting by contract to "the lowest responsible bidder" necessarily implies equal opportunity to, and freedom in, all whose interests or inclinations might thus impel them to compete at the bidding. No one may be compelled to bid at such a letting, but there must be entire fairness and freedom in competition. * * * The manifest purpose in requiring the contract to be let to "the lowest responsible bidder" is to protect the state against imposition and extortion.'"

The rule is stated in 7 Ruling Case Law, page 943-4, as follows:

"In awarding county contracts it is usually provided by statute that the work be given to the lowest bidder. This method embodies three vital principles—an offering to the public, an opportunity for competition, and a basis for an exact comparison of bids. Of course the provision that the contract be let to the lowest bidder implies the further requirement that such information shall be put within the reach of bidders as will enable them to understand the offering and bid intelligently and enable the representatives of the county to know who is the lowest bidder."

The above rule is taken from the case of Fones Bros. Hwd. Co. against Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353, in which it is also said:

"Any arrangement which excludes competition prevents a letting to the lowest bidder. And it does not matter that such an arrangement maintains the form of public letting; if it excludes the essential principle of competition, there can be no real public letting."

In Vol. 3 of McQuillan on Municipal Corporations, Section 1183 (pages 26-29) it is said:

"The preparation of the bid by those who desire to compete then follows and in order to receive consideration they must conform to the advertisement and specifications on file and be clear and definite so that the authorities can determine therefrom *exactly* what the bidder proposes to do and the *price*."

I therefore entertain serious doubts as to whether a cost plus contract as suggested by you is competitive bidding within the meaning of our statutes. A plan whereby the county pays the actual cost of the labor and materials and freight upon such materials, and then a sum for supervising and managing the construction is hardly a contract for the construction of the particular public improvement,

but is rather a contract with the supervising engineer to supervise and manage the construction. In such a contract the ability of the contractor would be the most important item to be considered, for one contractor bidding cost plus \$10,000 or cost plus 10% might be preferable and cheaper in the end than another contractor bidding cost plus \$5,000 or cost plus 5%. In letting such a contract upon bids submitted it is practically impossible to have a basis for an exact comparison of bids, as stated in 7 R. C. L. page 943 above. Also under such a contract it would be absolutely impossible for the authorities letting the same to determine exactly the price or cost of the improvement. It occurs to me that the essential principle of competition might be eliminated by such procedure.

There is another very serious objection to the letting of such a contract in case the proposed improvement is to be paid for out of the proceeds of a sale of bonds. For example, if a county issues bonds in the sum of \$200,000 for the construction of a particular bridge, the authority of the County Commissioners to spend money for such bridge is limited to the proceeds from the sale of such bonds, allowing, of course, a reasonable amount in excess, as it is practically impossible to determine in advance the exact cost of any public improvement. In case, as just suggested, a county has issued bonds for \$200,000 for a bridge and a contract is let upon a cost plus basis, the Board of County Commissioners has no assurance that the bridge can be constructed for the sum of money at its disposal. While if a contract is let for the construction of such bridge for a definite sum of money, the Board is then in a position to state that the proposed public improvement can be constructed with the funds available.

Also our laws for competitive bidding are based upon the idea of a contract for a public improvement being let at a definite fixed sum of money. I would call your attention to the above sections of our Codes and Session Laws and to the portions which I have underlined. You will notice Section 1413, as amended, provides that the contractor shall execute and deliver to the Board of County Commissioners an undertaking in a sum not less than one-half the amount for which the contract is awarded. Also by Section 11 of Chapter IV of the General Highway Law, the undertaking is in a sum not less than equal the amount for which the contract is awarded. Both of these sections contemplate the letting of the contract at a definite fixed sum of money and likewise the execution and delivery of the contractor's bond in a definite fixed sum of money.

I fully appreciate the present difficulty in the letting of public contracts on account of the fluctuations in the prices of labor and material and the availability of labor, but I do not believe that under our laws as they exist at the present time, cost plus contracts can be let for the construction of bridges or for the construction of highways unless the Board of County Commissioners finds under Section 11 of the General Highway Law, above mentioned, that such work and any opening, constructing, altering or widening of a highway may be otherwise done at less cost.

Respectfully, S. C. FORD,