

**Opinion No. 222.**

**Counties—Printing, Period of Contract—County Commissioners, Discretion—Mandamus—Offices and Officers.**

**HELD:** 1. While mandamus may

be invoked to compel the exercise of discretion of public officers, it cannot compel such discretion to be exercised in a particular way.

2. The Board of County Commissioners has the right to fix the period of the printing contract for such time, not over two years, which the board deems for the best interests of the county and it cannot be compelled in a mandamus action, against its better judgment and will, to let a contract for the maximum of two years.

January 8, 1936.

Mr. Carl Lindquist  
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You have submitted the question whether the Board of County Commissioners of Daniels County, is compelled to enter into a contract for the county printing for a period of two years, or whether the board has discretion to make a contract for a lesser period.

The essential facts are substantially and briefly as follows:

No contract for the county printing now exists. The Daniels County Leader is the only newspaper in the county which has "been printed and published continuously in the county for at least one year preceding the awarding of the contract," and hence at the present time, is the only eligible bidder for the county printing. The Daniels County Free Press, another newspaper, was established last October and cannot become eligible to bid until one year has expired. The commissioners have offered to let a contract to the Leader for ten months, or one year. The Leader, however, has refused to offer any bids or to make any contract for such period but has bid, or has offered to contract for not less than two years. It contends that its bid or offer must be accepted and that the county is required to enter into a contract for a period of two full years.

Evidently the county commissioners desire to make a contract only for the time intervening before the Free Press shall also become eligible to bid, which will be in October, 1936. The board will then be free to enter

into a contract with either newspaper upon competitive bids being submitted. On the other hand, it is evident that the Leader desires to have a contract for the longest possible time so that it will not be required to enter into competitive bidding for the county printing until 1938.

The question submitted involves the construction of Section 4482, R. C. M. 1921, as amended by Chapter 10, Laws of 1929, which reads:

"It is hereby made the duty of the county commissioners of the several counties of the State of Montana to contract with some newspaper, printed and published at least once a week, and of general circulation, printed and published within the county, and having been printed and published continuously in such county at least one year immediately preceding the awarding of such contract, to do and perform all the printing for which said counties may be chargeable \* \* \* at not more than the following prices: (Here follows list of maximum prices.)

"The contract shall be let to the newspaper that in the judgment of the county commissioners shall be most suitable for performing said work, \* \* \*. No such contract for printing shall extend for a period of more than two years. \* \* \*"

The Leader relies upon *Woare v. Board of County Commissioners*, 70 Mont. 252, 225 Pac. 389. In that case the Supreme Court had before it a case where price instead of the time, or the period of the contract, was involved. There were two newspapers in the county, one eligible to bid and the other ineligible because it had not been printed and published in the county continuously for one year. The eligible newspaper made a bid which was higher than the bid of the ineligible newspaper. In a mandamus action against the board, the court held that the county commissioners were required to accept the higher bid of the eligible newspaper and to award the contract to it.

It is contended on behalf of the Leader that since the county commissioners have no discretion in regard to price that likewise they have no discretion in regard to time, or the

period the contract has to run. This argument is based on the theory that both price and time are subject to competitive bidding and that if a newspaper, in the absence of competition, can force the county to accept the maximum as to price, in the absence of competition it can likewise force the county to accept the maximum as to time.

In this contention we are unable to agree. The matter of price is the subject of competitive bidding but the matter of time is not. In regard to price, the commissioners have no discretion. They must accept the lowest bid of the eligible bidders, as was held in the *Woare* case. This is only a ministerial duty. (*Stange v. Esval*, 67 Mont. 301, 215 Pac. 807.) In the *Woare* case the commissioners called for bids on a contract, the time limit of which was previously fixed by the commissioners. The newspapers thereupon submitted bids. Nothing remained for the commissioners but to determine what papers were eligible to bid and the lowest bidder. These were questions of fact not requiring the exercise of any judgment or discretion, since such discretion as they possessed had already been exercised when they called for bids on a contract for a definite period.

It must be admitted that in the first instance and before they called for bids and bids are submitted, the commissioners have the right to name, according to their best judgment, the period for which the contract shall extend and to call for bids or seek a contract in accordance therewith. When they have chosen such period, according to their best judgment, they have exercised their discretion and they cannot be required to choose some other period. That question has been finally disposed of unless, of their own volition and according to their best judgment, the commissioners choose to re-open it. If there are no bidders on the contract which the commissioners have decided to make, it is no fault of the commissioners as they have discharged their duty. The only eligible newspaper, by refusing to bid and enter into a contract, cannot force the commissioners, against their better judgment, to submit bids for a different contract over a longer period of time.

While mandamus may be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in a particular way. (38 C. J. 595.) See note 55 and the many cases cited therein, including many Montana cases. In *State v. District Court*, 89 Mont. 531, 300 Pac. 235, the court said: "Among these tests is the well-established rule that mandamus lies to compel action, but not to control discretion (*State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485; *State ex rel. Scollard v. Board of Examiners*, 52 Mont. 91, 156 Pac. 124), and, in its application, it is undoubtedly the general rule that a court has no power by writ of mandate to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a special question."

In the *Woare* case (1) the commissioners determined the question of time; (2) they called for bids; (3) bids were submitted; (4) the commissioners were required to accept bids made in accordance with their call, which, as we have said, was a ministerial act and involved no discretion. In this case the newspaper seeks to reverse the process by (1) ignoring the commissioners' call or offer to contract for ten months or a year; (2) the newspaper then proceeds to exercise the discretion vested in the county commissioners by deciding for what period of time the contract shall run; (3) it submits bids accordingly; and (4) it would force the county to accept its bid and make a contract according thereto. This procedure erroneously assumes that both the price and the time are subject to competitive bidding, whereas the statute gives to the commissioners the right and power to name the time.

Our construction of this statute has at least some support in the *Woare* case. The county on appeal there raised the question that the commissioners had a certain discretion as to the period to be covered by the contract and that the judgment of the lower court deprived them of such discretion. Counsel for the newspaper, in meeting this argument, did not deny that the commissioners had such

discretion as to time nor did the court hold the argument of the county invalid although it might have done so. The court, assuming rather that this was a valid argument, said the "record" before it did not disclose the time for which the call for bids was made.

We believe the construction we have placed upon the statute is in line with the intention of the legislature and is in the interest of the public welfare since it permits greater competition in county printing. This, we believe, is the purpose of the law. This interpretation gives effect to the sound and wholesome policy of requiring public officers to submit contracts for competitive bidding whenever it is possible to do so. It is reasonable to suppose, too, that the legislature, in requiring a newspaper to be printed and published at least one year continuously in the county before being eligible to bid, thus wisely securing the employment of local labor (*State v. Board of County Commissioners*, 77 Mont. 316, 250 Pac. 606), intended that where good judgment and public policy require it, the county commissioners should have power to fix the time of the contract so that it would not extend unreasonably beyond the period of ineligibility of a legitimately competitive newspaper.

It is conceivable, of course, that upon bidding for a shorter term, particularly where there is no competition, a newspaper might charge a great price. This possible disadvantage, however, is offset by the advantage of having actual competition at an earlier date in the future. It is within the discretion of the commissioners to determine which course would be the more advantageous to the county to pursue. In arriving at our conclusion in regard to the law, we must not be understood as expressing an opinion as to the wisdom of the action of the board as that is not a question within our province to determine. We are concerned only with the question of power vested in the county commissioners.

For the foregoing reasons, it is my opinion that the board of county commissioners has the right to fix the period of the printing contract for such time, not over two years, which

the board deems for the best interests of the county and that it cannot be compelled, in a mandamus action, against its better judgment and will, to let a contract for the maximum of two years.