

PUBLIC BUILDINGS: In the construction and repair of public buildings Missouri products must be used if obtainable at reasonable market prices.
UNIVERSITY: Discretionary with officers awarding the contract.

May 15, 1950



Honorable Roscoe Anderson
Member
Board of Curators of the
University of Missouri
705 Olive Street
St. Louis 1, Missouri

Dear Mr. Anderson:

This is in reply to your request for an official opinion which reads as follows:

"The Board of Curators of the University of Missouri request your opinion as to the following matter.

"Pursuant to the appropriation of \$600,000.00 for the construction and equipment of a Classroom Building, which was made by Section 9.060 of House Bill 436, passed by the 65th General Assembly, bids for the construction of a Classroom Building for the University of Missouri have been invited, opened and considered by the Board of Curators. The specifications and bid forms provided for base proposals calling for the use by the contractor of Missouri Carthage limestone for cut stone trim and for an alternate proposal calling for the use of Bedford, Indiana, limestone for cut stone trim. The Board is not purchasing any materials, but is letting a contract for the completed building.

"The bids are in. The lowest and best bid for the completed building is \$461,897.00 if Missouri Carthage limestone for the cut stone trim is used, and \$16,202.00 less,

to-wit, \$445,695.00 if Bedford, Indiana limestone is used for the cut stone trim. The stones are equally suitable for the purposes intended, to-wit, trims.

"In view of the provisions of Chapter 108, R.S. Mo. 1939, and particularly of Section 14,618, is it permissible for the Board to accept the lower bid and thereby save the taxpayers of Missouri \$16,202.00?"

Section 14618, R.S. Mo. 1939, is as follows:

"Every commission, board, committee, officer or other governing body of the state, charged with the construction or repair of public buildings, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body of the state, shall purchase and use only the products of the mines, forests, and quarries of the state of Missouri, when they are found in marketable quantities in the state, and all such materials contracted for shall be of the best quality and preference shall be given to such Missouri materials and labor where same are of a suitable character and can be obtained at reasonable market prices. Any contract or contracts for materials made in violation of the provisions of this section shall be void and in the event of the construction or repair of public buildings where products of mines, forests and quarries other than as enumerated above are used, the state auditor shall not audit nor the state treasurer pay any warrants issued in payment for said construction."

You will note that Section 14618 makes it mandatory to use Missouri materials where same are of a suitable character and can be obtained at reasonable market prices. In the case now before us you indicate that the cost of the building will be less if the Board uses Bedford, Indiana limestone

instead of Missouri Carthage limestone for cut stone trim.

Section 14616, R.S. Mo. 1939, is a similar provision concerning the purchase of Missouri products by certain officials. However, in Section 14616 the Legislature provided for the use thereof when they could "be secured without additional cost over foreign products or products of other states. . .". The Legislature has not seen fit to place this limitation in Section 14618. We have been unable to find any decisions which directly interpret this Act or similar statutes in the other States. There have been cases which hold that such provisions do not violate various clauses of the Federal Constitution. (See 43 Am. Jur., page 747; State vs. Senatobia Blank Book & Stationery Co., 76 So. 258, and Ex parte Gemmill, 119 Pac. 298.)

Therefore, we now have for interpretation a statute duly enacted by the Legislature which declares the public policy of this State to be that Missouri products shall be used in the construction and repair of public buildings. The only limitations on this policy is that the same must be found in marketable quantities and be obtained at reasonable market prices. Since there is no absolute method of determining these questions in every instance, it must be assumed that the Legislature intended to vest in officers letting contracts for public works, discretion to determine the existence of these factors.

Therefore, we must look to the general rule of law concerning the exercise of discretion by officers in the awarding of contracts. In 43 Am. Jur., page 101, the rule is expressed as follows:

"In accordance with the rule that courts will not in general attempt to interfere with or control the exercise of discretionary powers, where discretion is conferred on an officer, or board of officers, to enter into contracts on behalf of their government, and that discretion has been exercised, the courts will not inquire into the wisdom or skill which may have accompanied the exercise of the discretion. But the courts will interfere when it appears that officers have acted arbitrarily, dishonestly, or beyond the reasonable limits of the discretion conferred upon them."

And, again, in 43 Am. Jur. at page 78, the text is:

"Every public officer is bound to perform the duties of his office honestly, faithfully, and to the best of his ability, in such a manner as to be above suspicion of irregularities, and to act primarily for the benefit of the public. * * * ."

Thus, it has been made the duty of certain officers to exercise their discretion to determine whether or not Missouri products for use in the construction and repair of public buildings can be obtained at reasonable market prices.

The word "reasonable" is defined in Webster's New International Dictionary, Second Edition, Definition 2, as follows:

"In accordance with reason; of men, acting, speaking, or thinking, under the guidance of reason; just; fair-minded; of their acts, thoughts, etc., agreeable to reason; not beyond the bounds of reason, logic, probability, etc.; as, a reasonable assumption, decision."

In Black's Law Dictionary "market price" has been defined as:

"The actual price at which the given commodity is currently sold, or has recently been sold, in the open market, that is, not at a forced sale, but in the usual and ordinary course of trade and competition, between sellers and buyers equally free to bargain, as established by records of late sales."

Keeping in mind the admonition that words and phrases used in statutes shall be taken in their plain or ordinary and usual sense we believe that the above definitions may be useful in assisting the Board in determining whether or not the Missouri products can be obtained at reasonable market prices. At the same time, however, the Board must carry out

the public policy as stated by the Legislature. There are many cogent reasons for this policy of using Missouri products in the construction and repair of public buildings. The manufacturers pay taxes to the State and other political subdivisions, and they employ Missouri citizens, thus keeping in Missouri a great part of the purchase price of the materials, thereby enhancing the public interest of the people of the State of Missouri. In view of all the above we do not believe that it can be declared as a matter of law that the Board of Curators would be acting arbitrarily or beyond the limits of the discretion conferred upon them by making use of the Carthage limestone in the building. At the same time we believe that it would be permissible to use the other product, since it is discretionary with the Board to determine the reasonableness of the price.

It seems to us therefore that, if the Board of Curators, in the exercise of its discretion, determines that the Carthage limestone can be obtained at reasonable market prices it must accept the same. If a contrary decision is reached it is permissible to accept the lower bid and effect a saving thereby.

CONCLUSION

Therefore, it is the opinion of this Department that, if the Board of Curators determines that Missouri materials can be obtained at reasonable market prices it must use the same in the construction or repair of public buildings. If the Board determines that Missouri materials cannot be obtained at reasonable market prices the Board may use the products of another State.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General