

PUBLIC BUILDINGS:

A contract for public work may be let to a foreign corporation not licensed to transact business in the state, such not coming within the term "Transact business."



February 24, 1953

Honorable Ralph McSweeney
Director
Division of Public Buildings
Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"I will appreciate having your opinion on whether or not the Director of Public Buildings may legally award a contract to a low bidder whose corporations' place of business is in another state and who are not registered with the Secretary of State of Missouri."

Section 8.250, RSMo 1949, relating to the letting of public contracts after a solicitation of bids reads as follows:

"No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of

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which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

This office has previously held, in an opinion directed to you February 3, 1953, that the purpose of this provision is to prevent favoritism, collusion and fraud in the letting of such contracts in the interests of economy to the state and that such contracts shall be let to the lowest bidder if the best interests of the state will be served thereby.

You now inquire whether you may let a contract to a corporation which is not registered with the secretary of state as licensed to do business within the state. The law relating to licensing of foreign corporations to do business in this state is found in Chapter 351, Sections 351.570 to 351.655, RSMo 1949. Section 351.570 declares: "A foreign corporation organized for profit, before it transacts business in this state, shall procure a certificate of authority so to do from the secretary of state." etc. Section 351.635 imposes a penalty for failure to comply with this chapter, a fine of not less than one thousand dollars and disability to maintain a suit in any court of this state.

The precise question to which you inquire is resolved in whether entering into a contract for public works let by your office is doing business as is prohibited by the above noted provisions.

In this regard we direct your attention to the case of Hogan v. City of St. Louis, 176 Mo. 149, decided by the Missouri Supreme Court. In that case the city advertised for bids for a contract to light a part of the city. A bid was submitted, by a corporation

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organized under the laws of a foreign state, which was by the city accepted and a contract was entered into. As pointed out in the opinion, it does not appear whether the contract was in fact and in law entered into within this state or without. After the contract was executed and before the corporation entered into its performance, a license to do business was obtained. Plaintiff sought to enjoin the city and the contracting corporation from carrying out the contract on the ground that the contract was void because the corporation had not first procured a license to do business. Reviewing first, statutes substantially similar to those noted above, the court, in its opinion said:

"It does not appear on the face of the petition where the contract was entered into, whether the Kern Company sent an agent to St. Louis and entered into the contract there, or the city sent an agent to New York and entered into the contract there. The contract filed as an exhibit seems to indicate that it was executed, on the part of the Kern Company at least, in New York. If that is the case, then even taking plaintiff's interpretation of the term, the corporation did not 'transact that business' in this State, and if it was a lawful contract where it was made, the statute of Missouri would have no influence upon it, until the party should come to this state to perform it. Then the corporation would be in the act of transacting or attempting to transact business here, and before it could lawfully do so it would have to comply with our laws. But we do not consider it material whether the contract was made in St. Louis or in New York; we refer to the fact merely to illustrate the difference (in relation to the term 'transact business') between entering into a contract to do an act and the performance of the act. The one may be lawful per se and the other lawful only on condition. Of course, a contract can not be lawfully made to do an unlawful act, but a contract may be lawfully made to do an act which the contracting party can lawfully do only when he shall have complied with conditions or satisfied other demands, and his unconditional contract to do it carries with it the obligation to comply with those conditions or satisfy those demands; he assumes the risk of being able to do so. Therefore, when the Kern Company entered into this contract, although it could not lawfully perform it without conforming to the conditions of the Missouri statutes, yet the contract carried by implication

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the obligation on the part of the company that it would conform to those conditions, and a neglect to do so, resulting in a failure to perform, would have been a breach of the contract.

"Now, when our statutes say that a foreign corporation shall not 'transact business' here until it establishes a public office in this State where books are kept and process may be served, and until it pays its quasi-incorporation tax and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Does our law mean that when advertisements inviting bids on public or private works in this State are read by foreign corporations they are to understand that they have not the right to bid and have their bids accepted unless they shall have already complied with the terms of our statute to enable them to transact business here? No, that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts; foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the State; it is not bound to establish itself here before it can obtain such a contract.

"Entering into a contract like the one in question undoubtedly is 'transacting business' within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used it means carrying on the work for which the corporation was organized and in its application to the facts of this case it means performing the work called for by the contract.

"The Kern Company under the conditions stated in the petition had the right to enter into the contract in question and we hold it to be a legal and valid contract."

You will note the distinction drawn by the court between entering into a contract to do an act and the performance of the act

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in interpreting the term "transact business." Entering into a contract, said the court, is transacting business within the broadest sense of the term but not within the term as used in our statutes.

Referring to the Hogan case, the Supreme Court of Missouri, in the case of Tri-State Amus. Co. v. Amusement Co., 192 Mo. 404, l.c. 416, said:

"* * *This court, speaking through VALLIANT, J., drew a distinction between submitting a bid and entering into a contract, and transacting business in this State, * * *. It was further held that entering into a contract to transact business was, in the unlimited meaning of the term, 'transacting business,' but that such was not the meaning of the term 'transacting business,' used in the statute. Accordingly, it was held that the contract entered into by the city with the foreign corporation pursuant to the bid of that corporation, and under which no other business had been transacted by the foreign corporation, was not within the prohibition of the statute."

Under the foregoing cited authority, we are of the opinion that a contract entered into with a foreign corporation is not prohibited by the corporation laws of this state, although as stated in the Hogan case, such a contract once executed carries by implication the obligation on the part of the corporation that it would conform to the conditions imposed by our statutes and a failure to so do prior to entering into performance would result in a breach of the contract. We find no other provision prohibiting the State of Missouri from letting a contract to a foreign corporation not licensed to do business in this state under the facts stated.

CONCLUSION

Therefore, it is the opinion of this office that, the Director of Public Buildings is not prohibited under the laws of this state from awarding a contract to a low bidder which is a corporation organized under the laws of a foreign state and which has not procured a license to transact business in this state.

The foregoing opinion, which I hereby approved, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON
Attorney General