

STATE BUILDING COMMISSION: Circumstances under which contracts
may be let on a fee basis.

May 10, 1944



Honorable Forrest C. Donnell
Ex-officio Chairman
State Building Commission
Jefferson City, Missouri

Dear Governor Donnell:

We are in receipt of your letter of May 4, 1944, as follows:

"Enclosed is copy of letter of April 26 from Keene and Simpson to myself. I request your opinion as to whether the work can legally be done by the employment of a responsible contractor on a fee basis."

The enclosure dated April 26, 1944, to which you refer, states as follows:

"Enclosed, two copies of an Agreement, providing for professional services to be rendered by us in connection with Repairs to the Psychiatric Clinic Building, State Hospital No. 4, Farmington, Missouri. This is drawn on the same basis and is similar in form to our agreement for professional services for repairs to the Custodial Buildings at Marshall, Missouri.

"At the meeting of the Commission on April 10, 1944, Mr. Keene explained the problems involved in specifying exact limitations of the extent of the work to be done in making repairs, and inquired if the work could legally be done by the employment of a responsible contractor on a fee basis. The work under such an arrangement would be considered as building repairs.

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"He is of the opinion that there was an expression by one member of the Commission that such a contract might be legally made. Is this correct? The method of letting a contract will determine the requirement of plans, specifications and other documents."

The question presented is whether the State Building Commission may employ a responsible contractor to make repairs to one of the eleemosynary institutions on a fee basis.

Section 6, Laws of Missouri, Extra Session, 1933-1934, page 110, provides the manner in which contracts shall be made by the State Building Commission for repairs to any one of the eleemosynary or penal institutions, in part, as follows:

"The commission is authorized and directed in the name of the State, by said commission, to make and execute, after said plan or plans shall have been adopted and approved as aforesaid, a contract or contracts in writing for the construction of said repairs, remodeling, rebuilding or construction of each of the improvements or additions to be made to any one of the said eleemosynary or penal institutions. A separate contract or contracts, in the discretion of the commission, may be made for the improvements of or additions to each of said institutions; or the commission may divide the work into appropriate classes and make separate contracts as to either of them, as it may deem most advisable and for the best interests of the State, and all contracts for the construction of any of said improvements, or additions, or for designated classes of the work thereof, shall be let to the lowest and best bidders therefor; but no contract or contracts shall be let to an amount in excess of the funds available therefor and any contract in excess of available funds shall be void. No work exceeding in amount the sum of One Thousand Dollars (\$1,000) shall be let unless sealed bids therefor be advertised in

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two daily newspapers of general circulation in this State, the first publication thereof to be not less than thirty (30) days before the day on which the bids are to be opened; all bids received by the commission may be rejected by it. * * * "

The above statute is silent as to the type of construction contract that may be used in awarding a contract for repairs. It does state, however, that a contract must be let to the "lowest and best bidders."

In considering the purpose of this latter phrase, the Kentucky Court of Appeals in the case of R. G. Wilmott Coal Co. v. State Purchasing Commission, 54 S. W. (2d) 634, 1. c. 635, said:

"A study of this statute discloses that its underlying purpose is to encourage competitive bidding to the end that supplies for departments and institutions of the government may be secured at the most favorable prices. Obviously in enacting it, the Legislature had in mind the welfare of the public and not that of the individual seeking to sell supplies to the state."

In the case of Spitecaufsky v. State Highway Commission, 159 S. W. (2d) 647, 1. c. 651, the Supreme Court of Missouri, in construing a provision requiring a contract to be let to the lowest responsible bidder, said:

" * * * As stated in the Diamond case (89 Minn. 48, 93 N. W. 912, 61 L. R. A. 448),: 'The law is well settled that where, as in this case, municipal authorities can only let a contract for public work to the lowest responsible bidder, the proposals and specifications therefor must be so framed as to permit free and full competition. Nor can they enter into a contract * * * containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited. The contract must be the contract offered to the lowest responsible bidder by advertisement.' This is not new doctrine in Missouri.

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See United Construction Co. v. St. Louis,
334 Mo. 1006, 1020, 1021, 69 S. W. 2d 639,
646 (6)."

The purpose of the above statute is obviously to encourage public bidding so that the work may be done with the least possible expenditure of public funds.

To award the contract for repairs on a fee basis purely and eliminate competitive bidding for the work would be clearly violative of the purpose and the clear terms of the statute.

This should not be construed, however, as prohibiting the use of such common types of building contracts as "Cost--Plus" or "Cost--Plus--A--Fixed--Fee" contracts where the contractor is reimbursed for the costs of labor, materials, etc., by the owner and receives a fixed fee as his profit or gain. The determining factor is whether the contract provides for competitive bidding within the terms of the statute.

The statute further provides that "no contract or contracts shall be let to an amount in excess of the funds available therefor and any contract in excess of available funds shall be void."

To award a contract on a fee basis, without regard to the funds available, would also be directly violative of the terms of the above statute.

We are not advised as to the proposed amount to be spent for repairs, but we desire also to call attention to the fact that no work in excess of \$1000 may, under the statute, be let without advertisement.

CONCLUSION

From the foregoing, we are of the opinion that the State Building Commission may not employ a contractor to make repairs to one of the eleemosynary institutions on a purely fee basis unless (1) said fee to be charged by the contractor has first been determined by competitive bidding as being the lowest and

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best bid and (2) the cost to the State will not be in excess of the funds available.

Respectfully submitted

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APPROVED:

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