STATE PRINTING COMMISSION: Has the authority to set aside order of July 11, 1940, rejecting all bids. May now make new contracts as to binding and printing.

September 12, 1941

9-15

Honorable Dwight H. Brown
Chairman
Commissioners of Public Printing
Jefferson City, Missouri

FILE

Dear Mr. Brown:

You submit to this Department for official opinion questions which have arisen with reference to State printing and binding contracts as a result of mandamus suits by taxpayers against the Commission. We shall quote the first portion of your letter and then answer your questions in their numerical order.

> "The Commissioners of Public Printing are informed that the two suits in mandamus instituted in the Supreme Court of Missouri by certain taxpayers against the Commission, with respect to which you are fully advised, will shortly be dismissed with prejudice. If such action is taken it will be incumbent upon the Commission to let contracts for state printing for the remainder of the statutory two year term which began July 1, 1940. Assuming, therefore, that the above facts are true, we desire your opinion on the following legal questions:

I

> "1. Has the Commission the legal right, if it deems such action otherwise advisable, to set aside its order of July 11, 1940, rejecting all bids for the

State Printing contracts for the two year term above mentioned, when the mandamus suits are actually dismissed?

"2. Has the Commission the legal authority, upon the dismissal of said suits, to reinstate the bids made for State Printing which were rejected on July 11, 1940, and to award the contracts for State Printing thereon for the remainder of the two year term, expiring June 30, 1942?"

In the mandamus actions which were filed in the Supreme Court, and you refer to the fact that this Department is fully advised as to the contents of the same, the answer to the alternative writ filed on behalf of the commission alleged that all bids were rejected, in effect, because they were not the lowest and best bidders obtainable within the meaning of Section 14977, R. S. Mo. 1939. We assume that whatever objections the Commission may have raised as to the lowest and best bidders for the State printing contracts, have now been removed, hence, the reason for the Commission desiring to know whether it can legally set aside its order of July 11, 1940, rejecting all bids.

Reviewing the pertinent provisions of Section 14977, supra, it will be seen that it is the duty of the Commission to enter into contract with a responsible person or persons for printing certain classes of matter for a period of two years. The Commission shall give notice by advertisement for at least thirty days in two newspapers, stating the date and the hour in which the bids are to be opened. The contracts are to be let to the lowest and best bidder or bidders. The Commission is further invested with the authority to reject any and all bids. The mere fact that a bid or bidder may have the lowest bid from a pecuniary standpoint does not necessarily mean that he shall be awarded the contract. The term "the lowest and best bidder" includes other elements such as the ability, the standing of the bidder, equipment, convenience, or other elements which the Commission may deem or think expedient in carrying out the contract. (State v. Herman, 59 N. E. 104, 63 Ohio St. 440.)

We are not attempting to settle or give an opinion with respect to the legal questions which were involved in the mandamus suits, except in so far as the Commission's action in rejecting all bids is concerned. As the matter now stands, granting that the mandamus suits are to be or will be dismissed with prejudice, the Commission, in effect, has made no contract for the biennium and has not completed its duties under Section 14977, supra, the situation now being the same as when the Commission rejected all bids.

In the decision of Garfield v. United States ex rel. Goldsby, 30 App. Cases (D. C.) 177, l. c. 183, we find this principle of law:

> "It is * * well settled **, when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him."

But, has the Commission completely exercised its discretion in the performance of its specific duty? The ultimate duty of the Commission is to follow the precedure as set forth in Section 14977, supra, and award a contract to the lowest and best bidder. This, the Commission has not done. Having not performed its full function, its desire to set aside the order of July 11, 1940, does not contravene the principle as set forth in the above quoted decision. Its acts would probably be beyond recall or review if the contract had been awarded and their duties fully performed under said section.

From the case of Cress v. State, 152 N. E. 822, the same being an Indiana decision, we quote the following statement:

> "And power to undo an act once done will not be implied from the mere grant of power, in the exercise of a sound discretion, to do the act."

The same principle is enunciated in Throop's Public Officers, Section 564, page 534. But, as stated above, the acts of the Commission with reference to the printing contract have not been completely exercised in the performance of their duty, to-wit, the consummation and the completion of a contract for two years under the provisions of Section 14977, supra.

There is a further reason why this action of the Commissioners would be proper in the instant case. We are aware of the general rule as stated in 46 C. J., page 1033, that:

> "When the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes the determination discretionary."

In support of this statement the writer cites Garfield v. United States, ex rel. Goldsby, 30 App. Cases (D. C.) 177, l. c. 183; People v. Cantor, 180 N. Y. S. 153; and Cress v. State, 198 Ind. 323, 152 N. E. 822. However, a reading of those cases discloses that the facts therein are in no way analogous to the facts in the instant case. The Garfield decision involved a suit to restore an Indian to the rolls after his name had been stricken by the Indian Commission. The Cress case dealt with the selection of a school site; while the Cantor case involved a tax assessment.

The nearest case in point that we are able to find is that of Ross v. Stackhouse, 114 Ind. 200, which involved a bid to the City Council for the work of street improvement. The letting of the work was duly advertised and all the bids including one made by one Ross were by the Council rejected. Subsequently, the Council reconsidered its action and let the contract to Ross. It will be noted that the court in the first part of the opinion quoted below, recognized the general rule which has been stated above, but holds that it is not applicable

under the facts in the case. The court said (l. c. 203):

> "It is settled that where the act or decision of a common council, or other similar body, is done or made in pursuance of notice which the law requires, and is in its nature such as to adjudicate upon, or determine, or affect the substantial personal or property rights of those notified, a decision once rendered can not ordinarily be rescinded or set aside. City of Madison v. Smith, 83 Ind. 502. This rule has no application, however, to matters of a merely administrative or legislative character. Bodies having cognizance of such subjects may modify, repeal or reconsider their action in regard to matters of that nature, at any time, provided the vested rights of others are not thereby affected. Over such matters they exercise a continuing power. Welch v. Bowen, 103 Ind. 252; Board, etc., v. Fullen, 111 Ind. 410.
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> "The purpose of requiring the letting of contracts for street improvements to be advertised is to secure fair competition, and to enable the common council to let the contract upon the most advantageous terms. 1 Dill. Munic. Corp., section 468. The advertisement is not to give notice to the property-holders, nor does the letting of the contract adjudicate upon or determine in any degree their personal or property rights. The matter of accepting or rejecting bids, and of letting the contract, is purely administrative in character, depending entirely upon the discretion of the common council. Platter v. Board, etc., 103 Ind. 360."

This view is recognized in the case of Springfield v. Weaver, 137 Mo. 650, in which our Supreme Court said (l. c. 671):

> "The council had the undoubted power at a subsequent meeting to reconsider and rescind the order rejecting the bid of Reilly, and thereafter to accept his bid and let the contract to him. It had acquired jurisdiction over the parties interested and the subject-matter. The bids were before it; the bid of Reilly was within the estimate of the engineer; the acceptance or rejection of the bid and making the contract were mere matters of business detail intrusted to the council and over which it had power to act in such a manner as it might consider to be for the best interest of the city."

In view of the above authorities we are therefore of the opinion that the Commissioners of Public Printing, who have rejected all bids for the contract of public printing, may subsequently set aside such rejection. In answer to your second question, if you set aside your order of July 11, 1940, rejecting all bids for the state printing contracts for the two-year term ending June 30, 1942, such action, in effect, would automatically reinstate the bids. Upon their reinstatement, it is our opinion that you have the legal right to award the contracts for state printing thereon for the remainder of the two-year term expiring June 30, 1942, in the same manner and to the same extent that you had before the rejection of said bids. However, we point out that if you deem it advisable to exercise such right, the manner in which you exercise it and the persons, if any, to whom you award such contracts, are matters solely resting within the discretion of the commission.

II

> "On June 30, 1941, the Commission entered into a contract for state binding for a term expiring June 30, 1942, said contract containing a clause which gives the Commission the right to cancel same on thirty days' notice. If the Commission should deem it advisable to exercise its right to cancel such contract, with or without the consent of the holder of the same, would it then have the legal right to award a contract for binding for a period expiring June 30, 1942, without advertising for bids therefor?"

The duty of the Commissioners of Public Printing to provide for the necessary binding for the State is found under

the provisions of Section 14986, R. S. Mo. 1929. This section gives the Commissioners authority to make such a contract as they may deem best and upon such terms as shall be most advantageous to the State for a period not exceeding one year. By the provisions of the contract now in force the Commission has the authority to cancel the same with thirty days' notice. If the Commission exercises its right to cancel the contract according to the terms of the contract, then the effect will be that the State will not have a contract for binding.

We are of the opinion that under the provisions of Section 14986, supra, the Commissioners of Public Printing may then make a contract for binding for the period expiring June 30, 1942, as they deem best and most advantageous to the State, without the necessity of requiring bids because the statute does not require notice or advertisement for bids.

Respectfully submitted,

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APPROVED:

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