

PURCHASING AGENT: PURCHASE OF
PUBLIC PRINTING AND OTHER SUPPLIES:

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State Purchasing Agent must follow procedure set out in Sections 34.170; 34.200; 34.210; 34.230, RSMo 1949, in purchasing all state printing. "Notice of Change of Purchase Order" not authorized therein cannot be used by him to effect increase or decrease of amount bid for printing or other supplies subsequently to execution of contract by successful bidder and Purchasing Agent. Upon successful completion, delivery and approval of printing or other supplies, bidder entitled to receive only amount of bid, and state not liable for any other sums.

April 10, 1951

4-16-51

Honorable Leo J. Clavin
State Purchasing Agent
Division of Procurement
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"Certain questions have arisen concerning purchase of various items. Stating a hypothetical case as follows:

"The Office of the State Purchasing Agent advertises for bids on certain commodities or services as required by the statutes. The case cited has to do with printing and the figures which will be given are approximate. A bid is received in the amount of \$16000.00 on a certain printing job, the bidder to furnish all necessary papers and binding materials. This bidder did not insert in his bid an escalator clause, but the bid was considerable lower than all others submitted, and was based on the cost of papers and binding materials at the time his bid was submitted. A period of approximately sixty days elapsed between the time contract was awarded and the time paper was shipped from the mills to the bidder. During this period the mills increased the paper cost in the amount of seven per cent of the total bid or approximately \$1100.00. The successful bidder put this job

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in completion in his plant, advising us of the increase cost of papers to him. Upon receipt of this information from the bidder we issued a Change of Purchase Order authorizing this bidder to increase his cost approximately \$1100.00. A copy of this Change of Purchase Order was furnished the department for whom the work was being done, a copy was sent to the bidder, the Comptroller's was furnished with a copy for the purpose of increasing the encumbrance and a copy was retained in this office. It has been a trade practice in the printing industry for a number of years that an overrun or an underrun not in excess of ten percent or less than ten per cent of the original quantity is acceptable by all puyers of printing.

"The question is, 'Are we authorized to issue a Change of Purchase Order instructing to either increase or decrease the amount of his original bid, which ever the case may be and when a Change of Purchase Order is issued and everyone concerned furnished with a copy of the Change of Purchase Order, is the Department for whom the merchandise or services being purchased, authorized to acknowledge and accept this increase, when invoice is rendered to them by the bidder, or can they disregard such Change of Purchase Order and pay only the amount of the original bid?'

"We thank you for your consideration of this question and would appreciate your opinion for our future guidance, at your convenience."

We are also in receipt of your later letter in reply to our inquiry of the meaning of the term "Change of Purchase Order" referred to in the opinion request. This letter gives no definition as was hoped, but gives an example in which it was believed the use of the "Change of Purchase Order" was properly made. A copy of "Change of Purchase Order" or "Notice of Change of Purchase Order," together with a copy of "Short Form Contract (Supplies)" were enclosed, and it is noted that these forms have been in use by your department for years.

The sections of the 1949 statutes to which we refer, are as follows:

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Section 34.170, provides:

"The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all books, documents and records which are now in the hands of the commissioners of public printing and the secretary of state relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The purchasing agent may authorize any state penal, eleemosynary or educational institution to procure all or any part of its own printing and binding."

Section 34.200, provides:

"The state purchasing agent shall prepare specifications for all printing to be contracted for and shall invite all bids and let all contracts upon such specifications which shall be a part of each contract and shall not be changed or modified after the contract is awarded. Such specifications prepared by the purchasing agent shall state clearly and distinctly the kind and character of the work to be done, the quality of paper desired, the number of copies to be furnished, and wherever possible shall have attached a sample of previous issues of the publication or form. Copies of such specifications shall be made available to all bona fide applicants therefor."

Section 34.210, provides:

"The state purchasing agent shall have the public printing of the state executed upon competitive bids, and shall award the contract to the lowest responsible bidder and shall in all instances reserve the right to reject any and all bids; provided, that printing jobs of less value than fifty dollars may be purchased on the open market if approved by the comptroller. The purchasing agent may combine orders or subdivide individual jobs

for the purpose of advertising and contracting as shall be to the best interests of the state. The purchasing agent shall exercise diligence in soliciting bids from all printing firms in the state that might reasonably be expected to be interested in bidding on any particular item and shall at all times endeavor to maximize competition among potential bidders. Bonds satisfactory to the purchasing agent shall be given by the parties to whom contracts are awarded, to secure the faithful performance of such contracts."

Section 34.230, provides:

"All accounts accruing under this law shall be submitted by the vendor to the purchasing agent who shall examine such accounts to ascertain if the printing delivered by the contractor complies in all ways with the specifications and the contract governing the same, after which said accounts shall be presented to the officer for whose department the work was done who shall likewise examine the account before submitting it to the comptroller for payment. The purchasing agent shall keep a record of the cost of printing and binding and a copy of each document shall be duly filed and preserved by him, with the number of copies ordered and delivered and the cost endorsed thereon. The cost of all printing and binding, including annual reports, shall be charged to the appropriation of each agency ordering the same."

Section 34.210, supra, authorizes the purchasing agent to offer each job of public printing for competitive bids, with the right to reject any and all bids left to his discretion, and to award the contract to the lowest responsible bidder. In order to assure the faithful performance of the contract, he is authorized to require a bond from such bidder, which shall be acceptable to the purchasing agent. It is noted that the provisions of this section are applicable to all state printing jobs, except those where the value of same is fifty dollars or less, in which latter instance the purchasing agent is not required to receive bids, and let the contract to the lowest responsible bidder, but may purchase the printing on the open market.

We believe the sections of the statutes quoted above provide every step of the procedure by which the purchasing agent is to

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purchase all public printing for the state, and that said statutes appear to be complete in every detail, and leave nothing to conjecture, and that if they are carefully followed, the purchasing agent may rest assured that he will have done his duty in his effort to secure the state printing and that contracts relating to same will be legal insofar as such statutes are concerned. We also add that in view of the fact that the procedure set forth in these statutes is the only one by which the state may obtain printing, that in the absence of express provisions therein, the purchasing agent has no right or legal authority to change the procedure in any manner, or to substitute customs or practices of his own in purchasing such printing. However, he may legally adopt those reasonable rules or regulations found to be useful or necessary to facilitate the efficient handling of all work of his department, so long as they do not conflict with any provisions of the statutes. It seems that he has been given some discretion in the operation of his department, and in the purchasing of supplies for the various state departments generally, under the provisions of Chapter 34, RSMo 1949. The example given in such letter (and we take it that this example has frequently been followed) illustrates a practice often followed by the purchasing agent in purchasing supplies for various departments, boards or bureaus of the state government. While it appears that your inquiry pertains to the legality of the practice described by you as applied to the purchase of any kind of supplies needed by the state, you have, nevertheless, illustrated the practice in question by particular reference to the purchase of printing. We shall therefore endeavor to answer your inquiry by considering the illustration presented by you and we therefore find it appropriate to cite and quote certain statutes pertaining to the purchase of state printing.

It is our thought that by issuing the alleged "Change of Purchase Order," or that by the use of any other method the purchasing agent could not allow a successful bidder of certain state printing to increase the amount of his bid after the contract had been awarded, and the execution of same was had and that such procedure is not a reasonable rule or regulation that might be adopted by the purchasing agent for the efficient operation of his department; and that such procedure is, not only not authorized by any Missouri statutes, but is directly in conflict with those quoted above providing the exclusive method of purchasing public printing, particularly Section 34.210.

Under these sections, the contract is awarded to the lowest responsible bidder, and upon satisfactory completion and delivery

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of the work, such bidder is to receive no more or no less than the amount of his bid, and only for this amount is the state obligated to pay him under the contract. It is obvious that the intention of the legislature in the enactment of these statutes was that the state would be assured of receiving all necessary and adequate printing at the lowest possible cost to the state, and that no one was to have the right at any time to increase or decrease the amount of any bid on any job of printing contracted for by the purchasing agent.

While it is unfortunate that the contractor in the instant case finds himself in a difficult situation and may suffer financial loss if required to furnish the printing at the contract price, yet it does not appear that the legislature intended that one in such a position should be released from his contractual obligations for such reasons, and that the greater interests of the state should be allowed to suffer because of the financial loss sustained by the contractor by reason of his inability to perform his part of the contract without such loss. It seems the requirement that the purchasing agent must secure a sufficient bond from the successful bidder, was meant to cover such unfortunate occurrences as that related in your letter, and assure the delivery of the printing ordered regardless of the financial loss or other inability of the contractor to fulfill his obligation.

Therefore, in answer to your inquiry, for the reasons given above, the "Change of Purchase Order," or the "Notice of Change of Purchase Order" not having any legal existence, the purchasing agent lacks the power and may not resort to the use of the alleged instrument as a method by which the price of printing may be increased or decreased and thereby change from the amount of the bid of the successful bidder inserted in the contract awarded to such bidder by the purchasing agent, subsequent to the execution of the contract. We are of the opinion that if the procedure for purchasing printing as set out in the above statutes is followed, the contract referred to in the hypothetical statement of facts is binding, and upon completion, delivery, and approval of the printing by the head of the department for which the printing was ordered, and the approval of the purchasing agent, the successful bidder will be entitled to receive only the amount of his bid expressed in the contract, as compensation for his work, and the state shall not be obligated to pay him any other sum of money for such printing.

CONCLUSION

In view of the foregoing, it is the opinion of this department that in purchasing all supplies for the State of Missouri, as required

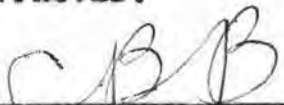
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of him by law, it shall be the duty of the state purchasing agent to follow that procedure authorized by the provisions of the particular statutes applying to the purchase involved; and that in the absence of a specific grant therein contained, the purchasing agent has no power to promulgate rules or regulations different from the provisions of said statutes, or to follow any other procedure in purchasing for the State of Missouri than that contained in said statutes. Since the law does not define or provide for the issuing of a "Notice of Change of Purchase Order," referred to in the opinion request, the purchasing agent lacks the power and may not adopt same as a method by which to allow a successful bidder, to whom a contract to furnish certain services or supplies has been let, to increase or decrease the amount of his bid subsequently to the execution of the contract and we are of the opinion that in such instance where it appears that the amount of such bid has been written into the contract; upon completion and delivery of the services or supplies of the department for which it was ordered, and upon the approval of same by the head of that department, as well as that of the purchasing agent, the successful bidder is entitled to receive as compensation for his services the amount of his bid, and the State of Missouri shall not be obligated to pay any other or different amount to him for said services.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

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