

HEALTH : Under facts presented, public officials
: may not permit reformation of bid.
PUBLIC BUILDINGS:

10/11/49

October 10, 1949

FILED
57

Honorable Samuel Marsh
Director
Department of Public Health and Welfare
Jefferson City, Missouri

Dear Mr. Marsh:

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

"Today at 1:30 p.m. we opened bids for the construction of five staff residences to be built at State Hospital No. 1 at Fulton. There were two bidders, Koch-Schroeder Construction Company of St. Joseph was the high bidder and Roy A. Schepeler Construction Company of Jefferson City was the low bidder.

"The Schepeler Company in making up their proposal left the space blank where the base bid should have been entered. Following the space for the base bid were spaces for several separate items, which added to the base bid would produce the total contract price for all of the work to be done.

"The highest bid was opened first and read. When the low bid was opened and read, the contractor immediately called my attention to what apparently was an error in his bidding, the error which I have described in the foregoing paragraph. He claimed the amount in the total contract price space should have been \$115,456.

"The bid bond for the low bidder instead of stating the definite amount of the bid, recited the obligation was to be five per cent of the amount bid which further complicated the matter. Usually the bid bond

states the definite amount of the bid, but the contractor explained this by saying that the bond was made out for submission to him before he had prepared his bid.

"We would like to have your opinion as to whether we can let a legal contract on the basis of a total contract price or \$115,456 or for a lesser sum on the basis of certain deductions we would make from this price according to the alternates which were bid on to get the contract price within the amount of the appropriation which is approximately \$113,000."

In the proposal submitted by the Roy A. Scheperle Construction Company the line for the figure for architectural trades complete has been left blank, and the total contract price bid is Ninety-Two Thousand, Two Hundred and Fifty-Six Dollars (\$92,256.00).

The material part of the proposal is as follows:

"All architectural trades complete, except allowances, (The General Contractor shall verify with his sub-contractors and make sure that the following are in no way duplicated.)

Allowances under Section C, Article 17,	
Finishing Hardware - - - - -	\$1000.00
Allowances under Section C, Article 17,	
Toilet Accessories - - - - -	250.00
Allowances under Section C, Article 17,	
Light Fixtures - - - - -	1000.00
Electrical work complete - - - - -	4500.00
Plumbing, Sewer and Water- 12,500-	12,500.00
Heating complete - - - - -	3950.00

Total Contract Price (Bid)--Figures)-- \$92,256.00

WRITTEN PRICE Ninty two thousand two hundred

and fifty six dollars."

Thus, on its face, the bid of the Roy A. Scheperle Construction Company seems to call for a bid of \$92,256.00.

As you state in your request, and according to others present, when the above bid price was announced Mr. Scheperle immediately arose and claimed that a mistake had been made. The mistake claimed is that the price indicated as the total bid price should have been entered on the line provided for architectural trades complete and this figure added with certain allowances and separate items would make a total price of \$115,456.00.

On page 6 of the "Specifications for Architectural and Mechanical Trades for Six (6) Staff Residences for State of Missouri, State Hospital No. 1", there is found certain requirements to be followed by those bidding on the project. Among said requirements are the following:

"1. Sealed Proposals.

Sealed proposals in duplicate on the work described in the following specifications and shown by the accompanying drawings will be received at the office of the Director of Public Buildings, State of Missouri, Capitol Building, Jefferson City, Missouri, up to noon, Central Standard Time, on _____ 1949.

"2 Proposal Prices.

Proposals shall state prices in both writing and figures, lump-sum price, alternate prices, unit prices, and all prices shall be, clearly stated, or bids will be rejected. Proposals shall be signed personally by the bidder, or by a duly authorized officer for a corporation, and shall give the bidder's business address and telephone number, and such other information as may be requested. (See Sample Proposal sheets Page 4 to 5.)"

You will note that the above requirements call for sealed proposals to be submitted, and that said proposals shall state prices, in both writing and figures, and all prices shall be "clearly stated".

In 43 Am. Jur. at page 865 the rule is set out concerning relief which may be granted a bidder for a public contract who has made a material mistake of fact in the bid submitted. The rule is as follows:

"As a general rule, equitable relief will be granted a bidder for a public contract where he has made a material mistake of fact in the bid which he submitted, and upon the discovery of that mistake acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake, particularly where he does so before any formal contract is entered into. This rule is but a particular application of the general rule granting equitable relief by way of rescission from unilateral mistakes relating to material features of a contract which are of such grave consequences as to make enforcement of the contract unconscionable. The fact that the bidder does not seek relief in equity before the acceptance of his proposal by asking reformation or cancelation of his bid does not defeat his right to equitable relief, if, before the bids were opened, he informed public authorities of the fact that he had made a mistake in his bids, and the bidder has been held entitled to relief when the mistake was discovered after the bid was accepted but before he was informed of the award, and he made immediate effort to withdraw his bid. One may, however, forfeit his right to relief by his failure to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offers. Moreover, where mistakes are alleged, courts must, in order to prevent collusion and fraud by parties making the proposals, inquire carefully into the existence of the alleged mistake and are justified in refusing relief when there is good cause for believing that some other reason than the mere mistake is behind the bidder's unwillingness to perform the contract or his desire to withdraw from the bid. Relief may be denied on the ground that it did not clearly appear that the mistake was one of material fact as distinguished from an unwise, hasty, or careless statement of prices intended to be bid. If the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder he will be denied equitable relief."

While the quoted material and the cases indicate that a court of equity may grant relief in certain cases by way of reformation, we do not believe that a public official whose duty

it is to let contracts is thereby permitted to exercise equitable powers. "The powers and authority of public officers are fixed and determined by the law." (46 C.J., page 1031.)

In the situation now before us we do not believe it is possible to absolutely determine on the face of the proposal that a mistake has been made. In order to make such determination additional testimony is necessary, and the public officials responsible for the letting of this contract would be placed in a position of weighing evidence and making a decision properly within the province of a court of equity. To allow such a procedure in the letting of public contracts might well place the officers involved in a position where their actions would be open to a suspicion that the award is not being made honestly and in good faith.

It is the duty of public authorities to accept the bid involving the least expenditure of public funds, and public authorities may not cast upon the taxpayers a substantially larger burden than is necessary. In this case, public officials would be expending an amount \$23,100.00 greater than the stated bid price, if reformation should be permitted.

It must be considered that the bidder was aware of the requirements of bidding, and also aware of the consequences of his actions when he submitted his proposal. The mistake, if any, was unilateral, and we do not believe that it is within the province of the public officials to reform the bid so as to permit it to stand at the higher figure. In other instances where there have been irregularities, you have been advised to carefully follow prescribed procedures. We believe that the spirit as well as the letter of the law will be satisfied if all bidders are treated alike and kept on the same footing. It is a simple matter for bidders to follow the bidding requirements in the first instance and when this is done, it becomes a simple matter for public officials to make awards on a basis fair to all bidders and, at the same time, protect the paramount interest of the public.

CONCLUSION

Therefore, it is the opinion of this department that under the facts presented, public officials are without

Honorable Samuel Marsh -6-

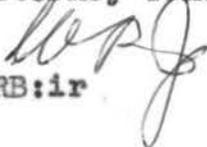
legal authority to let a legal contract on the basis of a total contract price of \$115,456, or the alternative of approximately \$113,000, because such sums are greater than the sum stated in the sealed written bid submitted.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General


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