PUBLIC BUILDINGS: A contract for public works entered into, through mistake, with a party not the low bidder is void; contract may be let with low bidder notwithstanding.

February 3, 1953 2-3-53

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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:

> "On December 16, 1952 at 10:30 A.M. bids were opened and read aloud in my office for furnishing and installing a New Elevator in the old infirmary building at State Hospital No. 3, Nevada, Missouri.
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> "Four proposals were received for this project, namely: Sheppard Elevator Company, Cincinnati, Ohio, Montgomery Elevator and Service Company, Kansas City, Missouri, Otis Elevator Company, St. Louis, Missouri and the Montgomery Elevator Company, Moline, Illinois.
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> "The Montgomery Elevator Company of Moline, Illinois submitted the low bid of $15,697.00 and the Montgomery Elevator Service Company of Kansas City, Missouri was the next low bidder at $17,700.00. The intention of this office was to award the Contract to the Montgomery Elevator Company of Moline, Illinois who was the low bidder, but due to a confusion of names, the low bidder and the

> next low bidder both being Montgomery Elevator Companies, the Contract was awarded on December 31, 1952 to the Montgomery Elevator Service Company of Kansas City, Missouri. The Contract was signed by all parties to the contract before the error was discovered by this office.
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> "I will appreciate a written opinion from your office in reference to whether or not the Contract with the Elevator Service Company of Kansas City may be cancelled and the contract awarded to the Montgomery Elevator Company of Moline, Illinois, the low bidder."

We first direct your attention to Section 8.250, RSMo 1949, providing that no contract shall be made by any officer of this state for the erection or construction of any building, improvement, alteration or repair of existing buildings until unrestricted public bids are requested or solicited by proper notice. Said section reads as follows:

> "No contract shall be made by any 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 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."

The purpose of such a provision is to secure competitive bidding on the part of the intending contractor, and prevent favoritism, collusion and fraud in the letting of such contract to the detriment of the public. Discussing such a statutory requirement, it is stated in 43 Am. Jur., Public Works and Contracts, Section 26, page 767, that:

> "The purposes of the provisions so generally found in Constitutions, statutes, city charters, and ordinances requiring that contracts with public authorities be let only after competitive bidding are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies, to protect the public from collusive contracts, to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions, and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers. * * *"
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> (Emphasis ours.)

Having noted that the purpose of such a provision is predicated upon public economy, we are of the opinion that the officer or agent charged with the duty of letting a public contract, must, after competitive bidding, let the contract to the lowest bidder if such bidder is responsible and the best interests of the public will be served thereby. To hold otherwise would only serve to precipitate the evil which was sought to be eliminated. That such a construction is proper is indicated by the following found in 43 Am. Jur. Public Works and Contracts, Section 26, page 768:

> "Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public

> contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold. * * *"

You state that a contract has been signed, through mistake, with one not the low bidder and inquire whether such contract may be cancelled and awarded to the low bidder. It is implied, and we assume, for the purpose of this opinion, that there is no question as to the responsibility of the low bidder or that the best interests of the public will be served if the contract is let to such party.

We are of the opinion that the contract which has been signed, under the facts presented, is void and imposes no obligation or liability upon the state, since it was let in violation of the spirit and purpose of the competitive bidding statute and beyond the authority of the officer signing in behalf of the state. This rule is stated in 43 Am. Jur., Public Works and Contracts, Section 30, page 771, as follows:

> "A contract for public work or for a public improvement made in violation or defiance of constitutional or statutory provisions or ordinances requiring such contracts to be awarded to the low bidders only after advertisement and competitive bidding is illegal and void, and imposes no obligation or liability upon the public body. Provisions of this kind are a limitation, so to speak, upon the general power of the municipality to make contracts for such improvements. Contracts let in violation thereof are not merely voidable, but are void, and although the contractor has performed the contract according to its terms, he cannot hold the public authorities either for the contract price, or upon implied contract for the reasonable value of the services performed and materials furnished pursuant to the contract. No rights can be acquired thereunder by the contracting party. * * *"

In the case of People ex rel. Coughlin v. Gleason, 121 N. Y. 631, the Court of Appeals of New York had under consideration a

similar contract. In that case the City of Long Island advertised for bids for certain work and five bids were received. After consideration of the bids, the common council, by resolution directed the mayor to enter into a contract for the work with the second highest bidder. The resolution was vetoed by the mayor on the ground that the contractor's bid was higher than that of another perfectly responsible party. Subsequently, the contract was entered into over the mayor's veto and the case was appealed. Discussing a provision similar to our competitive bidding statute, the court in its opinion stated:

> "This provision was inserted in the charter undoubtedly to prevent favoritism, corruption, extravagance and improvidence in the procurement of work and supplies for the city, and it should be so administered and construed as fairly and reasonably to accomplish this purpose. If contracts for work and supplies can be arbitrarily let, subject to no inquiry or impeachment, to the highest instead of the lowest bidder, under such a provision as is found in this charter, and substantially in the charters of all the other cities of the state, then the provision can always be nullified and will serve no useful purpose. If there were nothing in this record showing that the relator was not the lowest responsible bidder, it would have to be assumed that he was, and that the members of the common council had discharged their duty and had so determined. But here it appears that the relator's bid was next to the highest, and that there was no question or objection at any time that the lower bids were not formal and regular and made by responsible persons. It appears beyond doubt or cavil that the common council arbitrarily rejected the lower bids and accepted the relator's. That under such circumstances the relator's contract was illegal and void, and that he cannot recover for his work is settled beyond controversy by authorities in this state. (Brady v. Mayor, etc., 20 N.Y. 312; Mc Donald v. Mayor, etc., 68 id. 23; Dickinson v. City of Poughkeepsie, 75 id. 65.)"
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> (Emphasis ours.)

The Kansas City Court of Appeals adopted this rule and cited the Gleason case in the case of Clapton v. Taylor, 49 Mo. App. 117, l.c. 123, in the following language:

> "* * *If the charter or ordinance of a municipality provide that the contract shall be let to the lowest bidder, a violation of this

> command of the law would be against the substantial rights of the taxpayer and would render a contract void which was let to one not the lowest bidder, in any case where such rejection of the lowest bid was an exercise of an arbitrary will on the part of the city authorities, without any showing that such authorities exercised their jurisdiction in that respect, by determining that the rejected bid was not the lowest and best bid. People ex rel. v. Gleason, 121 N.Y. 631. * * *"

CONCLUSION

Therefore, in the premises, it is the opinion of this office that under the foregoing cited cases and authorities, a contract for public work entered into through mistake with a party who is not the low bidder is void and imposes no obligation or liability upon the state.

We are further of the opinion that the state, by its duly authorized representative, lawfully acting, may enter into a contract with the low bidder notwithstanding.

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

Yours very truly,

JOHN M. DALTON
Attorney General

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