

In *Risley, Auditor v. Rumble* (1924), 81 Ind. App. 573, 144 N. E. 568, with respect to interpretation of tax laws, the court said:

“There is a general rule founded on sound reason and principle which requires that when construing a tax law all those provisions which are intended to secure methodical procedure shall be regarded as merely directory, and that only those provisions which are necessary to the protection of the citizen shall be regarded as mandatory.”

Since the intent of the statute concerning persons who are due money from the State is apparent, then time is not of the essence as to the list of such persons compiled by the county auditor and sent to the state auditor. The Supreme Court of Indiana has held that the legislative intent when ascertained will control the strict letter of the statute or the literal import of particular terms or phrases, where to adhere to the strict letter or literal import of terms would lead to injustice or absurdity or would contradict such intention. *Woodring et al. v. McCaslin et al.* (1914), 182 Ind. 134, 104 N. E. 759. See also the discussion in 1945 O. A. G. at page 498.

In view of the above, it is my opinion that it is your duty to comply with the provisions of Burns' Indiana Statutes 64-1506a, even though you have received the county auditor's list after the first day of December.

OFFICIAL OPINION NO. 6

January 9, 1953.

Mr. Walter Koch, Chairman,
Indiana State Toll Bridge Commission,
International Steel Company,
Evansville, Indiana.

Dear Mr. Koch:

On November 22, 1952, Mr. Joseph B. Minor, the attorney for your Commission, requested an official opinion of this office respecting the validity of certain bids which it has received on the Indiana-Kentucky Memorial Bridge at Lawrenceburg.

OPINION 6

I complied with this request and issued my official opinion, seven pages in length, on November 24, 1952. On December 9, 1952, Mr. Minor again requested the opinion of this office with respect to the awarding of contracts on this bridge and more particularly posed this question:

“Can the Commission accept the Bates and Rogers Construction Corporation’s bid on Contract I and the Mt. Vernon Bridge Company’s bid on Contract II and readvertise for bids on Contract III, or will it be necessary to re-advertise for bids on all three contracts if the Traylor Bros., Inc. bid on the Contracts I and III is rejected?”

An answer to this question was issued on December 15, 1952. The opinion was advisory only for the reason that the Commission had not met or passed any resolution for the awarding of bids.

I have had before me in the past few days requests to approve certain supplemental contracts between the states of Illinois and Kentucky and the State of Indiana relating to the business of your Commission, some of the contracts being integrally connected with the Lawrenceburg project. Your attorney, Mr. Minor, has informed me that a quorum of the Commission met on January 6, 1953, and passed a resolution for the awarding of the Lawrenceburg bridge contract to Bates and Rogers Construction Corporation. In view of the two opinions already issued and the action of the Commission, and in view of my statutory responsibility requiring that all contracts shall be approved as to form and legality by the Attorney General (See Sec. 60-1814 Burns’ Ind. Stat. Ann.) it becomes my responsibility, especially in the light of the conversation had with you on the telephone and with Mr. Minor, to confirm and elaborate the views heretofore expressed by this office.

For the purposes of this opinion reference is made to our Official Opinion No. 71 and the opinion dated December 15, 1952, as though they were included herein and we approach the precise question posed by the fact that the Commission now proposes to award the contract for the sub-structure (herein called Contract I) to Bates and Rogers Construction Corporation. Since there is no restricting statute, there is no

doubt that the Commission had discretionary power to solicit bids on a unit basis, a separate basis, by single contracts, or by combination contracts, and there is, likewise, no doubt that the Commission and their consulting engineers had the right to divide this project or any other project into such parts or items as they saw fit. The language of the proposal in this case (see par. 5, p. A-7) indicates that combination bids were actually invited. Thus it follows, that bidders wishing to file combination bids were making bids responsive to the advertisement.

No single bid was received for Contract III. The bid of Bates and Rogers for Contract I was beneath the engineers' estimate and that of Traylor Bros., for their combination bid on Contracts I and III was likewise beneath the engineers' estimate. It appearing that both bids were valid under the proposal, we go immediately to the question of the Commission's power to make awards on contracts not comprising the totality of the contracts advertised for.

Public authorities are without power to reserve in advance of the letting the power to make exceptions, releases and modifications, nor do they have power to execute a contract except to the lowest responsible bidder under the proposal. (43 Am. Jur., Public Works and Contracts, Section 35 *et seq.*) This means in effect, as translated to the circumstances of this particular case, that the Commission could not accept bids on one part of two parts of the work while rejecting the remainder. It is true, and our previous opinions have so stated, that the Commission has inherent power to reject all bids. While there may be moral objection to the conduct of a Commission in rejecting all bids when the bids are under the engineers' estimate, yet the cases hold that there can be no legal attack attendant upon such conduct. Absent a rejection of all bids and absent any proper cause for rejection and present the fact that all bids are under the engineers' estimate, it would appear that the Commission is under a duty to let contracts to the lowest and best bidder (see Sec. 36-112 Burns' Ind. Stat. Ann. quoted on p. 5 of Official Opinion No. 71). These statutory requirements place a limit upon the discretion of the Commission and necessarily confine the category of the lowest and best bid or bids to those which, when taken in combination, will provide a contractual base pursu-

OPINION 6

ant to and in keeping with the project as stated in the notice, advertisement or proposal therefor. It is scarcely necessary to comment on the question of whether or not Contract III with the same or different specifications can be re-advertised since we have said that the Commission is not authorized to accept bids for less than the totality of the project; that is to say Contracts I and II may not be awarded and Contract III re-advertised.

Like all other contracts, to effect a valid contract for the constructing of public works, there must be a meeting of the minds of the contracting parties. *Northeast Construction Co. v. Winston-Salem* (CCA 4th), 83 Fed. (2d) 57. In other words, to the extent that valid bids under the proposal are made, the proposal itself becomes an offer and the Commission, in the role of offeror, is bound by the usual tenets of contract law just as any other party who makes an offer. It is true that in the case of public bodies this offer, either by its terms or by statutory provision, is sometimes made contingent, as in this very case, with respect to the proviso for the rejection of all bids. And since, as in this case and as is required by law, this is a public letting with competitive bidding, the offeror cannot entertain a counter proposal by any bidder or bidders, but must award upon the basis of the proposal and the nature of the total contract.

There is not a great deal of case law on the subject in Indiana, but there is a competent discussion of some of the features of this question, in the annotation in 123 ALR at p. 577. Perhaps the closest case in point is *Hawaiian Contracting Co. v. E. J. Lord* (1929), 30 Haw. 966, where for the purposes of bidding a proposed sewer system had been divided into sections and items and advertisement for bids invited separate bids for each item; but the terms of the proposal were such as to lead bidders to believe that the contract would be let upon a total bid. It was there held that the contract must be let as one unit to the one making the lowest aggregate bid for the work determined upon and that separate contracts should not be entered into with those whose bids were lowest on the particular items in their contracts. This case is almost directly in point since the proposal invited combination bids covering two or three of the parts into which the project was divided.

Again in *Daugherty v. Hitchcock* (1868), 35 Calif. 512, a contract awarded to the lowest bidder for the grading of one portion only of the proposed improvement, where the advertisement was for the whole project, was wholly unauthorized. See also *Bye v. Atlantic City* (1906), 73 N. J. L. 402, 64 A. 1056, where the Court rejected a contention that separate contracts should have been let for various features of a paving job on the ground that bids had been filed for some of the work in the proposal at a less rate than the successful bidder who had bid for the whole work.

In *Haralson v. Dallas* (1929), Tex. Civ. App., 14 S. W. (2d) 345, the Court in commenting on the form of advertisement, said that no bidder was confused and no bidder suffered injury because split or combination bids were invited. "On the contrary the advertisement produced a very liberal response as two bids were filed to furnish material only, six were for the work only and fifteen proposed to furnish material and labor and complete a turnkey job. In situations such as this, where every bidder has an equal opportunity to bid on the same alternatives, an invitation for split or combination bids instead of being condemned, is rather, commended."

In *Scola v. Board of Education* (1908), 77 N. J. L. 73, 71 A. 299, it was held that after the reception of bids it was not within the power of the Board of Education to modify the specifications by omissions and changes and award a contract to a former bidder, although the lowest, to execute the work according to the revised specifications, at a price less than the original bid. A leading treatise, 19 R. C. L., p. 1071, comments on this point as follows:

"The specifications cannot lawfully be altered after the bids have been made without a new advertisement, giving all bidders an opportunity to bid under the new conditions * * * the contract must be the contract offered to the lowest responsible bidder by advertisement."

And in *Stimson v. Hanley* (1907), 151 Calif. 379, 90 Pac. 945, a city council invited bids for certain street improvement work and it was held that a bid for the entire work had properly been accepted as against objection by property owners,

OPINION 6

although bids for certain parts of the work were less than those of the successful bidder on the whole. Among other things the Court said: "The sole contention of appellant is that the order of the council was erroneous and without warrant, because the Fairchild Company was not the lowest bidder; and that it was not the lowest bidder because of another person, who bid only on part. We do not think that this contention is maintainable. The purpose of the council was to improve Ninth Street, between the said terminal points, into a completed street, and to receive bids for the necessary work to accomplish that result. The resolution of intention and the invitation for bids speak of the things to be done as a 'work' or 'improvement'—in the singular—and evidently contemplate that this 'work' is to be dealt with as a unit. * * * the estimate of the cost of one part of the work was manifestly based upon the consideration that it was to do the whole work; * * * Moreover, the determination by the council that the work was of more than ordinary importance, calling for the creation of a distinct district, and the declaration that *bonds* should be *issued to represent the cost*, were evidently based on the improvements as one work, and would be inconsistent with a contemplation of several independent contracts with different contractors, to be followed by different assessments, warrants, series of bonds, etc." (Our italics). For other cases on the proposition that bids must be rejected and the lowest and best bid accepted which is responsive to the proposal see *Shields v. Seattle* (1914), 79 Washington 308, 140 Pac. 353.

Attention is called to the case of *Putnam v. Murden* (1933), 97 Ind. App. 313, 184 N. E. 796, which, though not in point on the facts, is a clear expression by an Indiana court of the principle that public bodies, in this case the State Highway Commission, cannot accept bids where the bids are not responsive to the proposal or where the proposal was not couched in language conforming to the statute. In this case, injunction was sought against the State Highway Commission for receiving bids for the construction of a highway on the theory that the Commission had failed to give notice that bids could be received for the construction of three "distinct types of highways" as required by law. First, the court held that any taxpayer could bring such an action; that the Highway Commission had not received bids on three distinct types of highways;

1953 O. A. G.

that not having received bids for three distinctive types of highways competitive bidding had not been assured and the statute had not been followed, the court then sustained the lower court in awarding of contracts contemplated by the Commission.

We are not advised as to whether or not any steps have been taken pursuant to the resolution of the Commission on January 6th, or if any contracts have been signed with the firm to which the contract was awarded. And we assume that this office has heretofore passed upon the purely formal parts of this or similar contracts. But the Attorney General is required to pass upon both the form and legality of contracts and it does not require argument to assert that a contract is illegal if any of the high contracting parties are without power and are not authorized to sign and execute a contract otherwise valid in all respects.

In view of the foregoing, it is my opinion that the Commission was not authorized to award Contract I to Bates and Rogers Construction Co. and that any contract or contracts implementing or attempting to consummate any such action of the Commission are illegal and void.

OFFICIAL OPINION NO. 7

February 5, 1953.

Hon. Otto K. Jensen,
State Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

I have before me your letter of December 8, 1952, which is as follows:

“A judge of a circuit court has asked that we request your official opinion upon the following:

“1. Which statute prevails, or are both statutes effective as to the appointment of an agent to return a person from another state charged with the commission of a crime in this state: