

STATE PURCHASING AGENT:
PURCHASE OF SUPPLIES ON
OPEN MARKET:
APPROVAL OF GOVERNOR:

Purchasing agent should have the approval of the Governor before purchasing supplies on the open market and such approval should be had for each and every transaction.

June 16, 1938



Mr. George Blowers,
State Purchasing Agent,
Jefferson City, Missouri.

Dear Sir:

This is in reply to yours of June 13, requesting an official opinion based upon the following letter:

"Will you please give this Department an opinion covering Section 3, Page 411 of the State Purchasing Agent's Act of 1933 as to whether or not the Governor could approve the policy of the State Purchasing Agent buying on the open market without his approval on each and every transaction.

Also, please advise regarding Section 5, Page 412 of this same Act, if the Purchasing Agent authorizes the Institutions or Departments to buy direct on an emergency purchase, whether the orders approved by this office after being purchased by the Institution or Departments, would come within the law if there were no bids attached to the order."

On the question submitted in the second paragraph of your letter I find that this office on August 28, 1933, rendered an official opinion to your department covering this question. I am enclosing a copy of this opinion for your information in case the other opinion has been misplaced.

As to the first paragraph of your request I find that Section 3, page 411, Laws of Missouri, 1933 is applicable and provides as follows:

"All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the Purchasing Agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchase are to be opened. On purchases where the estimated expenditure is less than two thousand dollars (\$2,000.00) bids shall be secured without advertising. In all cases, the Purchasing Agent shall post a notice of the proposed purchase on a bulletin board in his office. He shall also on all purchases estimated to exceed two thousand dollars (\$2,000.00) solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the Purchasing Agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The Purchasing Agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the Governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the Purchasing Agent as hereinafter provided. The Purchasing Agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be

submitted, examined, approved and paid. He shall determine the amount of bond or deposit and the character thereof which shall accompany bids."

This section requires the purchasing agent to solicit bids for all supplies which he purchases for the state. All contracts let by him for the purchase of such supplies are to be let to the lowest and best bidder unless the purchasing agent rejects all such bids, and with the approval of the Governor purchases these supplies on an open market at a better price than that offered by the bids made on the contract for the sale of such supplies.

Said Section 3 provides that contracts for purchase shall be let to the lowest and best bidder, the purchasing agent may exercise his discretion in determining which is the lowest and best bidder. In the case of State ex rel. v. McGrath, 91 Mo. 387, l.c. 393, the court said:

"The decided weight of authority on these questions, to which we have been cited, and to which we have had access, is to the effect following:

High's Extraordinary Legal Remedies, section 92, treating of the duties of public officers entrusted with the letting of contracts for public work, uses this language: 'The better doctrine, however, as to all such cases of this nature, and one which has the support of an almost uniform current of authority, is, that the duties of officers, entrusted with the letting of contracts for works of public improvements to the lowest bidder, are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus.'"

And in State ex rel. v. Meier, 142 Mo. App. 309, l.c. 310, the court said:

"Contracts for public work in St. Joseph are awarded under the provisions of section 9 of the charter (Laws 1903, p. 63). That part of the section bearing on this controversy reads as follows: 'All contracts relating to any improvements herein contemplated shall be made by said board, and shall be awarded to the lowest and best bidder, but such board shall have, at all times, the power to reject any and all bids.'

Relator's petition states his bid was the lowest and best and his compliance with all provisions of the law and his readiness to enter into all proper contracts required, and asks that the board be compelled to award him the contract.

We do not see any merit in relator's view of the case. The petition for the writ must be interpreted with the law under which it is drawn. The charter above quoted leaves to the discretion of the board the decision of which is the best bid. And, furthermore, the board is given, in terms, the authority to reject all bids. No authority is cited by relator in support of his claim, and we are not impressed with the suggestions he makes. The trial court properly interpreted the charter. (Clopton v. Taylor, 49 Mo. App. 117.) Under the law the board has such authority and discretion as will place it beyond control by mandamus."

While the lawmakers, by said Section 3, have conferred discretionary powers upon the purchasing agent by permitting him to determine who is the lowest and best

bidder on a contract or the power to reject bids and advertise for new bids, yet for the purpose of having a check on this discretionary power they provided that the Governor should approve any purchase of supplies on the open market, if they can be purchased at a better price than the bids were on the same.

The Governor, in giving his approval for a purchase on the open market, as a matter of course, will inquire as to what was the lowest and best bid made for the sale of said supplies, and as to why the bids were rejected, and why it would not be to the best interest of the state to readvertise for bids. All of these things the Governor would inquire into in determining whether the agent had properly exercised his discretion in the premises. Different facts and circumstances would surround each case and different elements may enter into the question of who is the lowest and best bidder and for that reason it would seem that the purchasing agent would be required to have the approval of the Governor on each transaction in which he has received and rejected bids for the purchase of supplies and in which he desires to purchase supplies on the open market.

CONCLUSION

It is, therefore, the opinion of this office that when the purchasing agent desires to purchase supplies on the open market after having received bids thereon and rejected same, he should obtain the approval of the Governor to purchase such supplies for each and every contract.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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