DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

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TIMES PUBLISHING CO. *v.* CITY OF EVERETT.[1] SUPREME COURT OF WASHINGTON.

The general statutes, § 130 of the State of Washington, provide that in cities of the third-class the council shall annually, at a stated time, contract for doing all city printing and advertising, which contract shall be let to the lowest bidder. At the proper time two bids were presented to the defendant city and the council awarded the contract to B, whose bid was at $1 per inch for solid nonpareil for the first and 50 cents for each subsequent insertion, while appellant's bid was at 25 and 15 cents respectively for the same, the council declaring by resolution that B was the lowest and best bidder. *Held*, that a city will not be compelled by mandamus to award a contract to the lowest bidder for city work required by statute to be let to the lowest bidder.

OPINION OF THE COURT.

STILES, J. "The generally accepted rule is that the courts will not by mandamus compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder in a competition of this kind."

MANDAMUS AND THE LOWEST BIDDER.

The rule as stated by STILES, J., like all general rules, is not without its qualifications and like most applications of the common law to statutory law is subject to varying refinements in different States. Our labor will not be lost if we make clear the grounds on which the decisions have been based.

[1] Reported in 37 Pac. Rep. 695 [1894].

It has been well said that a mandamus will lie where there is (*a*) a clear legal right in the relator, (*b*) a corresponding duty in the defendant, and (*c*) a want of any other adequate and specific remedy: *Commonwealth* v. *Councils of Pittsburg*, 34 Pa. 496; and a mandamus has been refused to the lowest bidder for a city contract, because either one or all of these three essentials have, in the opinion of the learned court, been lacking. The grounds for the refusal of the writ may for our purpose be arranged, however, in a more convenient order as follows: 1. The duties of the proper authorities in such a case are discretionary and not ministerial simply; 2. It would be against public policy to cancel a contract and award it to another where the work has already been entered upon or completed and expenses incurred; 3. Such statutes are for the benefit of the State and not for individual bidders, and, therefore, the relator has no clear legal right. We will consider these three heads separately as much as may be.

1. It was on the first ground that the decision in the principal case was rested rather than on the second. For, as the petition prayed both for an injunction to restrain the city and B from carrying out the contract and also for a mandamus to compel the awarding of the contract to the petitioner, the court reversed the judgment of the court below for defendant on demurrer, and though the contract had been awarded, they remanded the cause with instructions to overrule the demurrer and proceed upon the cause of action sustained. It was sought to distinguish this from *Baum* v. *Sweeney*, 5 Wash. 712; S. C., 32 Pac. Rep. 778 [1893], on the ground that that was an appeal from the commissioners to the superior court direct. That case arose under the same statute, which required the public printing to be awarded to the lowest bidding newspaper, which must have been published in the county for six months prior, and the county commissioners awarded the contract to a paper which had not been published for six months. It was held that it was proper to direct the commissioners to relet the contract as provided by law, although this was a virtual mandamus to let it to the only other bidder, for under the facts as there was only one legal bid, the commissioners had no

discretion. But it is hard to see a very marked distinction between a mandamus on an appeal direct from the award and a mandamus in a suit separate and apart from an appeal.

The rule as stated in the principal case seems to be firmly established in Pennsylvania. The case of *Commonwealth ex rel.* v. *Mitchell et al.*, 82 Pa. 343 [1876], in construing the Act of May 23, 1874, which requires that "all work and materials required by the city . . . shall be performed under contract to be given to the lowest responsible bidder," held that the word responsible was not limited in its meaning to pecuniary responsibility, but in contracts whose execution required judgment and skill as well as pecuniary ability, the statute imposes duties and powers which are deliberative and discretionary, and, therefore, where the city authorities have exercised a discretion, mandamus will not lie to compel them to modify their decision, even though their action was erroneous (as in this case), in the absence of clear proof of fraud or bad faith. This decision was affirmed in *Douglass* v. *Commonwealth*, 108 Pa. 559 [1885].

The Illinois rule is the same, where the charter of the city of Chicago contained this provision: "All contracts shall be awarded by said board to the lowest reliable and responsible bidder or bidders who shall have complied with the above requisition, and who will sufficiently guarantee to the satisfaction of said board the performance of said work," and the Board of Public Works advertised for sealed proposals for the construction of a new "lake tunnel" of the estimated value of $400,000, reserving the right to reject any bid not in accordance with the conditions of the advertisement or to reject all bids, it was held no mandamus would issue at the suit of one whose bid was $4,000 less than the one accepted. The court said "Whenever the act sought to have done requires the exercise of discretion, this remedy will not lie:" *Kelly* v. *City of Chicago*, 62 Ill. 279 [1871].

In Missouri, in a case arising under a statute similar to that in the principal case requiring the contract for printing to be awarded the lowest responsible bidder, the court refused to interfere, because the statute gave the board discretionary

power: *State ex rel.* v. *McGrath et al., Commissioners of Public Printing*, 91 Mo. 386 [1886].

2. In New York State the rule seems to be that where the contract has been entered into and expense incurred mandamus will not be issued. The case of *People* v. *Canal Board*, 13 Barb. 432 [1852], is hardly in point, for under the facts of the case the board had undoubtedly much greater discretion than in the cases we are considering, where the statute requires the contract to be awarded to the lowest responsible bidder. In this case the canal board resolved to award the contracts "to such parties as shall propose to perform the work on terms most safe and advantageous to the State, having due regard to price, the ability of the parties and the security offered," and a mandamus to compel the board to approve of a contract entered into by the State engineer was refused on the ground that the mandamus was really an action against the State, and further that the relator had shown no clear legal right. But in the *People ex rel. Belden* v. *Contracting Board*, 27 N. Y. 378 [1863], the law required the canal contracting board to award all contracts for repairs to "the lowest bidder who will give adequate security," and the proposals for a contract required a certificate of deposit of $4,000 in cash to accompany the bid. Belden's bid was accompanied by the required certificate, save that the words "in cash" did not appear, and the board, for this reason, refused to award the contract to him. The Supreme Court criticized this technical objection, but refused to issue a mandamus to cancel the contract already awarded and enter into one with the relator. EMOTT, J., adverted to the principle that wherever the act requires the exercise of discretion the remedy by mandamus will not lie, but based his decision on the ground that the contract was already awarded. "The Supreme Court ought not to have compelled the board by mandamus to reverse their action or to make a contract with relator, after they had already made another contract with another person." SELDEN, J., dissented on the ground that the statute made it the absolute duty of the board to award the contract to the lowest bidder. This decision was con-

siderably shaken in *People ex rel. Vickman* v. *Contracting Board*, 46 Barb. 254 [1865], where the proposals called for a certificate of deposit to the order of the auditor, and relator filed one to his own order, but endorsed to the order of the auditor, and for this reason the bid was rejected, though he was the lowest bidder. *Held*, that the board had no discretion in the matter, but should give the contract to relator. It was distinguished from *People ex rel. Belden* v. *Board*, *supra*, on the ground that there the contract had already been entered into with another. It was also pointed out that but four of the judges concurred with the opinion of EMOTT, J., in that case which was not a majority, and they only concurred generally. See also *People ex rel. Lumey* v. *Campbell*, 72 N. Y. 496 [1878]; *People* v. *Wendell*, 57 Hun. 362 [1890].

Michigan follows the New York rule: *Detroit Free Press* v. *Board of Auditors*, 47 Mich. 135 [1881].

In *Talbot Paving Co.* v. *Common Council*, 51 N. W. Rep. 933 [Supreme Court Michigan, 1892], the contract had been performed by another, and the court in its discretion refused to grant a writ of mandamus. This was on the ground that the city would have to pay twice for the work, if the mandamus was issued.

3. Such statutes are for the benefit of the State and not for individual bidders, and therefore the relators have no clear legal right. This is the rule adopted by Wisconsin. Where the charter of the city required the work on a school-house to be let out to "the lowest responsible bidder," and relators showed that they were the lowest bidder and that they were responsible, PAINE, J., held that in such a case "the lowest bidder has no such fixed absolute right that he is entitled to a mandamus to compel the letting of the contract to him, after his bid has been in fact rejected and the contract awarded to another. The statutory provision requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public and not of the bidder:" *State ex rel.* v. *Board of Education*, 24 Wis. 683 [1869]; see, also, *Kelly* v. *City of Chicago*, 62 Ill. 279 [1871]. The Supreme Court of Maryland in refusing a mandamus where

the work had already been entered upon said: "It is of much more importance that a public contract like the one in question should be promptly awarded and speedily executed with due regard to economy than that any particular bidder should get the contract:" *Madison* v. *Harbor Board of Baltimore*, 25 Atl. Rep. 337 [1892].

The same rule was applied in Vermont, where on the face of the petition the granting of the mandamus would be disadvantageous to the State, as the contract had already been awarded to one B at a figure $2,000 less than relator's bid, as the principal object of the law was to benefit the State: *Free Press* v. *Secretary of State*, 45 Vt. 7; also, *Welsh* v. *Board of Supervisors*, 23 Iowa, 203 [1867].

Where the Legislature has left the matter of placing contracts in the discretion of the proper authorities and have enacted no statute requiring contracts to be awarded to the lowest responsible bidder, the writ has been refused: *Mayo* v. *County Commissioners*, 141 Mass. 74 [1886]; *State ex rel. Huse* v. *Board, etc., Dixon County*, 24 Neb. 106 [1888]; *State ex rel. Bare* v. *Lincoln County*, 35 Neb. 346 [1892]; S. C., 53 N. W. Rep. 147.

The courts of Ohio and Nebraska have both decided that where the proper facts are shown a mandamus will lie to award the contract to the lowest bidder. Where the statute required the contract to be awarded to the person "who shall offer to perform the labor and furnish the materials at the lowest price and give good and sufficient bond," and the commissioners had awarded the contract to R for $13,000 more than B's bid, though it was claimed by the commissioners that R's bid included the brick which was not, however, named in the specifications submitted by the architect; *Held*, that a peremptory mandamus would issue in favor of B. "It is the obvious policy and intention of the statute to render such favoritism impossible. The commissioners are invested with no such discretion. On the contrary, it is the clear intent and policy of the statute to withhold it and thereby shut the door against all favoritism:" *Borcn & Guckes* v. *Commissioners of Darke County*, 21 Ohio, 311 [1871]. But the writ was refused

to one who had slept on his rights: *State* v. *Commissioners of Printing*, 18 Ohio, 386 [1868]; and the relator must show that his was actually the lowest bid: *State* v. *Commissioners of Hamilton County*, 20 Ohio, 425 [1870]; and that he has fully complied with the specifications: *American Clock Co.* v. *Commissioners of Licking County*, 30 Ohio, 415 [1877]. But where the award has been made to the lowest bidder, and he has failed to enter into the contract by giving sufficient security, the commissioners have the right to readvertise and will not be compelled by mandamus to give the contract to the next lowest bidder: *State* v. *Commissioners of Shelby County*, 36 Ohio, 326 [1881]. Where the trustees of an asylum had allowed B to change his bid and thus lower it after the proposals had been opened, on the ground that he had included an article not called for in the specifications, it was held a mandamus would lie to compel the awarding of the contract to the original bidder, as the trustees had no right to accept any but the original proposals. "The statute knows no other proposals or offers but these. The trustees are invested with no discretion in the matter; but, on the contrary, we are satisfied it is the intent and policy of the statute to withhold it and thereby shut the door against all favoritism on the part of the trustees on the one hand, and on the other to prevent such an excited intriguing, and perhaps ruinous scramble among bidders as would be not unlikely to ensue if the proceedings were assimilated to an open auction sale of contracts:" *Beaver & Butt* v. *Trustees of Blind Asylum*, 19 Ohio, 97 [1869].

In Nebraska, where the statute enacted that the county commissioners might let contracts to "the lowest competent bidder" it was held that this was mandatory on the commissioners, and, if they did not give the contract to the lowest bidder, mandamus would issue. As to the right to maintain this action the court say: "There is no doubt of the right of the lowest responsible bidder or of a tax-payer of the proper county in a proper case to maintain an action of this kind, and in no other way can the rights of bidders and the public be fully secured and enforced:" *People* v. *Commissioners of*

Buffalo County, 4 Neb. 150 [1875]. In its opinion the learned court quoted Judge Dillon as follows: "The cases sustain the doctrine that what public corporations or officers are empowered to do for others, and which is beneficial to them to have done, the law holds they ought to do. . . . The power, in such cases, is conferred for the benefit of others and the intent of the Legislature, which is the test in such cases ordinarily seems, under such circumstances, to be to impose a positive and absolute duty:" *Dillon on Municipal Corp.*, § 62. Here as in Ohio the relator must show that his bid conforms with the specifications: *State ex rel. Silver* v. *Kendall*, 15 Neb. 263 [1883]; *State ex rel.* v. *County Board of York County*, 17 Neb. 643 [1885].

As to the right of the lowest bidder to bring this action for mandamus in his own name instead of the attorney-general's the cases differ: *State* v. *Board of Education, supra; People* v. *Buffalo County, supra.* Michigan has adopted the same rule as Nebraska. In *Ayers* v. *State Auditors*, 42 Mich. 422 [1880], the court pertinently asks. "In as much then as the attorney-general refuses to appear and seek the enforcement of the statutory provision (to award to the lowest bidder) does his refusal preclude its enforcement? And, if not, is the relator authorized to bring the matter before this court?" And the court answers this in the affirmative by declaring that where as here the attorney-general had compromised himself as adviser of the State officers, and so would not petition for the writ and refused to appear and seek the enforcement of the statutory provision, then it was proper for one who, as here, had some interest in the matter, as one who was engaged in business, which made him a competent bidder, to petition for the writ. It has been decided in New York State that in all cases requiring redress and involving a matter in which the interests of the public at large are concerned, and in respect to which a mandamus is a proper remedy, it is competent for the courts to act upon the relation and motion of a private citizen of the State: *People* v. *Collier*, 19 Wend. 56 [1837]; *People* v. *Tracy Judge*, 1 Denio, 617 [1845]. This doctrine has been followed by the Supreme Court of Illinois:

Pike v. *State*, 11 Ill. 202; *Hall* v. *People*, 57 Ill. 312; *Village of Glencoe* v. *People*, 78 Ill. 390. This, however, seems to be opposed to the English rule, and Maine, Massachusetts and Pennsylvania have maintained a contrary doctrine, and hold that to entitle an individual citizen to be heard as relator, and on his own motion he must show that he has some individual interest in the subject-matter of complaint, which is not common to all the citizens of the State: *Commonwealth* v. *Mitchell*, 82 Pa. 343 [1876]; *Mayo* v. *County Commissioners*, 141 Mass. 74 [1886].

Where the specifications call for bids upon a patented article in the control of one company, as the Nicholson pavement, the courts again differ as to the legality of the contract. California and Wisconsin have declared such contracts illegal and void: *Nicholson Pavement Co.* v. *Painter*, 35 Cal. 699 [1868]; *Dean* v. *Charlton*, 23 Wis. 590 [1869]; also approved in New York, *Dolan* v. *Mayor*, 4 Abb. Pr. N. S. 397 [1868]; and in Louisiana, *Burgess* v. *Jefferson*, 21 La. An. 143 [1869]. The Michigan courts hold such contracts legal: *Hobart* v. *Detroit*, 17 Mich. 246 [1868].

The principal point to be determined before granting a mandamus in the cases we have been discussing, would seem to be the intention of the Legislature in enacting that all contracts should be given to "the lowest responsible bidder," or "the lowest bidder giving satisfactory security." If they meant to limit the discretion of the city or county authorities to the mere awarding of the contract to the lowest and most responsible bidder, then it would seem that the right to the award of the contract is complete as soon as the bids are opened and the lowest bidder appears, and it is difficult to see wherein the contracting official acts otherwise than as a ministerial officer. While, if the Legislature intended, as the Pennsylvania cases hold, to give the contracting officer full discretion in the awarding of contracts, it is hard to see why any restriction was placed on him at all. It has been well said that a provision in a city charter, that all contracts should "be given to the lowest responsible bidder giving adequate security, 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:" *People ex rel. Coughlin* v. *Gleason*, 25 N. E. Rep. 4 [N. Y. Ct. of App. 1890].

It is true that, as in the principal case, an injunction will sometimes be granted to restrain the proposed contract with a higher bidder: *Mazet* v. *Pittsburgh*, 137 Pa. 548 [1890]. But the injunction is a negative remedy, and it is a question whether the courts do not virtually nullify the statute and disregard the intention of the Legislature by refusing the writ of mandamus. CHARLES F. EGGLESTON.