

File No. 46845 Continued

"Any material departure in the contract awarded from the terms and conditions upon which the bidding is had, renders the contract, in a sense, a private one. To permit such in the awarding of public contracts by public officers, would be to open wide the door for favoritism, and defeat the thing which the law intended to safeguard in requiring the contracts to be let upon bids made on advertised specifications. It is unimportant whether the additional stipulation contained in the contract awarded to one, who is not the lowest responsible bidder, be in itself an advantage to the City or not, if it constitutes a material change, and therefore, a departure from the basis of the bidding, and becomes an element of consideration in the determination of who is the lowest and best bidder, it will invalidate the contract entered into".

It is, therefore, abundantly clear that if the modification in question will make a material alteration so that it would have become "an element or consideration in the determination of who is the lowest and best bidder", it may not legally be done.

On the other hand, there is some authority for permitting slight and unimportant modifications. In 29 Cyc. page 683, it is said:

"Immaterial modifications may be made by the council, even of contracts let on biddings, although not without the assent of the contractor; nor may the price of such contract be increased".

See: *Ampt. vs. Cincinnati*, 8 Ohio Superior Common Pleas Decisions 624.

Compare: *Maryland Pavement Company vs. Mahool*, 110 Md. 397, 408, where it was said that a slight irregularity in a bid might be disregarded.

There is room for an intelligent difference of opinion as to whether the proposed modification of the present contract may be characterized as a material alteration or as an immaterial one. The practice of making modifications of any kind in such contracts is so dangerous that I believe before the modification is permitted it should be clearly demonstrated that the change proposed would be a more immaterial change and one which could not possibly have affected the bidders when they bid upon the contract. Therefore, in this case, I am of the opinion that under the law the modification should not be made.