SPECIFICATIONS FOR PUBLIC CONTRACTS: A CRITIQUE OF COMPETITIVE BIDDING

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Competitive bidding for public contracts, a requirement which dates back at least to the middle of the last century,[1] is at present common at all levels of government.[2] With the many changes which have been wrought in this country's economy since then, it should be of interest to examine the various specifications alleged to be restrictive of free bidding, which are used in advertisements for bids. In reviewing the decisions of courts which have passed on these specifications it should be possible to determine the effectiveness of competitive bidding in the light of its professed objects, and its validity as viewed against the pattern of today's social and economic organization.

The starting-place, then, is to determine the object of competitive bidding. Some courts have stated it to be the stimulation of competition,[3] some the prevention of fraud and favoritism in the awarding of contracts.[4] More often than not both objects

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1. A competitive bidding provision was first inserted in the New York City Charter in 1853, Brady v. Mayor, 20 N.Y. 312 (1859). No case has been found involving a competitive bidding provision of an earlier date.

Competitive bidding for public works has been dated from 1845, *The Contract System in Public Works*, 20 The Nation 324 (1875).

2. A recent discussion of the extent of competitive bidding, together with a summary of statutory and charter provisions in the United States is contained in JAMES, THE PROTECTION OF THE PUBLIC INTERESTS IN PUBLIC CONTRACTS (1946). The pamphlet discusses several of the problems raised in this article.

3. City Improvement Co. v. Kroh, 158 Cal. 308, 110 Pac. 933 (1910); Detroit Free Press Co. v. Board of State Auditors, 47 Mich. 135, 10 N.W. 171 (1881); Coller v. Saint Paul, 223 Minn. 376, 26 N.W.2d 835 (1947); Weinacht v. Board of Chosen Freeholders, 3 N.J. 330, 70 A.2d 69 (1949).

Sometimes the court adds that the purpose, in addition, is to prevent monopolies, Stites v. Norton, 125 Ky. 672, 101 S.W. 1189 (1907). Is this aim best achieved by securing competition for the job at hand? See Cleveland Trinidad Paving Company v. Lord, 145 Mo. App. 141, 145, 130 S.W. 371, 372 (1910) ("Encouragement of open competition is corresponding discouragement to monopoly").

4. Fetters v. Mayor, 72 A.2d 626 (Del. Ch. 1950); Attorney General v. Public Lighting Commission, 155 Mich. 207, 118 N.W. 935 (1908) (prevent favoritism, corruption, extravagance and improvidence). Some of these expressions are difficult to classify. In the case last cited, for example, if the prevention of extravagance is the aim, isn't that best obtained through free and unrestricted competition?

are stated in the conjunctive, as a double standard.[5] Usually there is very little discussion of the precise meaning of these standards, and the two might, at first glance, seem to be somewhat dissimilar. The adoption of the one would appear to require an examination of the specifications in the light of the opportunities they present to the public authorities to play favorites. The other would require an approach from the other side of the contractual picture, an examination of the specifications to determine the extent of bidding obtained among the interested bidders.

Actually, the one goal includes the other. The only way to prevent favoritism is to insure unrestricted competition. If the specifications are drawn so that no one who desires to bid is excluded, there is no opportunity for favoritism. As the Iowa court stated in *Miller v. Des Moines:*[6]

> When the oportunity to compete is fairly and openly offered, and contracts are fairly awarded, there is ordinarily no room for official or private graft at public expense. But just in proportion as competition is restricted . . . public rights are imperiled and public interests are sacrificed.

Another factor is suggested by the Iowa court. Specifications may be drawn free of objection, but the beneficial results of competitive bidding may be thwarted if the contract is not fairly awarded. Great latitude is given public authorities in awarding contracts after the bids are in, and ordinarily the award will not

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5. United States v. Brookridge Farm, 111 F.2d 461 (10th Cir. 1940); Inge v. Board of Public Works, 135 Ala. 187, 33 So. 678 (1903); Iowa Electric Co. v. Cascade, 227 Iowa 480, 288 N.W. 633 (1939); Bennett v. Emmettsburg, 138 Iowa 67, 115 N.W. 582 (1908); Hillig v. St. Louis, 337 Mo. 291, 85 S.W.2d 91 (1935); Cleveland Trinidad Paving Co. v. Lord, 145 Mo. App. 141, 130 S.W. 371 (1910); Best v. Omaha, 138 Neb. 325, 293 N.W. 116 (1940); Fairbanks, Morse & Co. v. North Bend, 68 Neb. 560, 94 N.W. 537 (1903); Grave v. Fobes, 64 Misc. 130, 118 N.Y. Supp. 1062 (Sup. Ct. 1909); Corcoran v. Philadelphia, 363 Pa. 606, 70 A.2d 621 (1950). *Cf.* Carson Cadillac Corp. v. Birmingham, 232 Ala. 312, 167 So. 794 (1936) (to secure economy and prevent favoritism); Rankin v. Board of Education, 135 N.J.L. 299, 51 A.2d 194 (1947) (same); Commonwealth v. Zang, 142 Pa. Super. 566, 16 A.2d 741 (1941) (to prevent dishonesty and collusion and to get materials at best possible price). It would seem that "economy" and the "best possible price" are the results of price competition. See 10 MCQUILLIN, MUNICIPAL CORPORATIONS 266, 267 (3rd ed. 1950).

6. 143 Iowa 409, 420, 122 N.W. 226, 230 (1909). *Accord:* Mullen v. Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945). The Iowa court has elsewhere adopted the twofold standard, Iowa Electric Co. v. Cascade, 227 Iowa 480, 288 N.W. 633 (1939). See Note, *Municipal Corporation—Competitive Bidding—Patented Articles,* 12 So. CALIF. L. REV. 210 (1939)

be upset if it was made in good faith.[7] The bid lowest in price need not necessarily be accepted,[8] and courts have refused to upset rejection of low bids on grounds which, if inserted in the specifications, might have been invalid as restrictive of competition.[9]

It is not the purpose of this article to examine the problem of official discretion in making awards. The official, like the buyer in the market place, ought to have some discretion. It should be enough that the choices available are the result of competition, and it may be that this is all that can be obtained. This, at least, is one inference to be drawn from the Iowa court's statement.

Simply deciding that competition is the aim of bidding requirements is not enough, however. Before the examination of particular specifications it is necessary to determine what the courts consider the function and purposes of competition to be. As a guide for comparison it might be helpful to start first with a discussion of competition as it is usually conceived by students of economics.

COMPETITION EXPLAINED[10]

Competition, in the pure sense of the word, is considered to be a function of price. If the demand for any given commodity exceeds the supply, consumers will tend to bid the price up. Higher prices will attract new producers. As a result, supply will eventually overbalance demand, and producers will have to cut prices in an attempt to attract a larger market. Soon the less efficient producers will have to drop out, and demand will over-

7. Culpepper v. Moore, 40 So.2d 366 (Fla 1949); Baskett v. Davis, 311 Ky. 13, 223 S.W.2d 168 (1949). See 10 MCQUILLIN, MUNICIPAL CORPORATIONS 348 (3rd ed. 1950); Note, 38 L.R.A. (N.S.) 653 (1912).

8. Berghage v. Grand Rapids, 261 Mich. 176, 246 N.W. 55 (1933); Martin Epstein Co. v. City of New York, 100 N.Y.S.2d 326 (Sup. Ct. 1950). See 10 MCQUILLIN, MUNICIPAL CORPORATIONS 350 (3rd ed. 1950).

9. Pallas v. Johnson, 100 Colo. 449, 68 P.2d 559 (1937) (low bidder non-union); Gillette v. Peabody, 19 Colo. App. 356, 75 Pac. 18 (1904) (same); Seventh Day Adventist Publishing Assn. v. Board, 166 Mich. 672, 75 N.W. 95 (1898) (low bidder too far from state capital); Pugh Printing Co. v. Yeatman, 22 Ohio Cir.Ct.R. 584, 12 Ohio Cir.Dec. 477 (1901) (low bidder non-union). But *cf.* Miller v. Des Moines, 143 Iowa 409, 122 N.W. 226 (1909); State v. Louisiana State Board of Agriculture and Immigration, 122 La. 677, 48 So. 148 (1909) But see Note, 110 A.L.R. 1406 (1937.) For a current illustration of this problem see *Drive on Pentagon,* Business Week, October 21, 1950, 114.

10. The following dicussion is adapted from SAMUELSON, ECONOMICS 35-41, 457-463, 491-493 (1st ed. 1948).

balance supply. Then the cycle will begin again, with an equilibrium between supply and demand as a theoretical optimum.

Only if there is ideal competition, then, will consumers be able to buy at the lowest possible prices. If one producer could corner the market, thereby obtaining complete monopoly, he could raise the price to maximize his profits to the fullest extent, regardless of consumer need or demand. Actually, the greater part of economic activity today is of a mixed variety, termed monopolistic competition. Each producer of any particular commodity is large enough to exercise some control over prices and so is able to increase his prices somewhat without losing any appreciable market. As a result, the supply and demand cycle is minimized, and price competition may be negligible. Competition instead centers around quality differences emphasized through advertising.

What form of competition do competitive bidding provisions embody? Whatever inferences can be drawn from judicial expressions of general purpose seem usually to be in the direction of price competition.[11] Whether or not court decisions, in passing on specifications, predicate a standard of price competition is another thing. In examining particular specifications, however, this standard will be used as a frame of reference.

Before the specifications themselves are discussed, a word seems to be in order concerning the context in which these cases are presented. The conflict between bidding requirements and allegedly restrictive clauses presents itself in many ways. Bidding requirements may be placed in municipal ordinances or charters, or in state or federal statutes, or may result from judicial public policy. Although a restrictive clause may be drawn for a particular contract, it may be written expressly or impliedly into the advertisement as a result of some ordinance, statute or charter provision. A myriad of conflict situations is possible. But if the bidding requirement and the restrictive clause are of equal dignity, both, for example, contained in statutes, is a court justified in preferring the restrictive clause

11. Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906); Weiss v. Woodbine, 228 Iowa 1, 289 N.W. 469 (1940); Iowa Electric Power Co. v. Grand Junction, 216 Iowa 1301, 250 N.W. 136 (1933); J. Weinstein Building Corp. v. Scoville, 141 Misc. 902, 254 N.Y.Supp. 384 (Sup. Ct. 1931); Grace v. Fobes, 64 Misc. 130, 118 N.Y.Supp. 1062 (Sup.Ct. 1909). *Contra:* Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943); Milwaukee v. Raulf, 164 Wis. 172, 159 N.W. 819 (1916).

out of deference to legislative intent, without more analysis? Of course, there may be a clear legislative waiver of competitive bidding with respect to a particular restrictive clause.[12]

PROTECTIONIST CLAUSES

Some clauses seem to be aimed at keeping the fruits of the public contract at home and for that reason may be considered protectionist. Home may be the city, county, state or even the nation in which the contract is to be performed.

For example, several cases decided in the early 1900's involved specifications prohibiting the hiring of aliens, or requiring a preference for citizens.[13] There were dicta from which it might have been inferred that the provision was invalid only if it increased the actual cost of the work.[14] The courts which passed on the question directly held, without further analysis, that the clause was invalid because it naturally tended to increase cost,[15] one court indicating that proof of an actual increase was difficult, if not impossible.[16] Since it has been claimed that alien labor in competition with native labor tends to drive down the cost of the latter,[17] the conclusion reached by the courts appears to be sound. Proof that the cost of any one project has been increased by excluding alien labor could be made, it would seem, only by producing aliens enough to get the job done who would testify that they would work for less than their fellow American citizens, truly an impossible task.

Other social considerations in connection with alien labor have been ignored by the courts. If aliens will work for less, should the government sanction their exploitation by contractors for

12. See IOWA CODE §73.2 (1950) (Iowa products preferred).

13. Sometimes aliens who had declared their intentions to become citizens were not excluded, Glover v. People, 201 Ill. 545, 66 N.E. 820 (1903). The constitutionality of the requirement has been sustained, Crane v. State of New York, 239 U.S. 195 (1915).

14. City Improvement Co. v. Kroh, 158 Cal. 308, 326, 110 Pac. 933, 941 (1910); Treat v. People, 195 Ill. 196, 200, 62 N.E. 891, 892 (1902). *See* Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932) (concurring opinion of Straup, J.).

15. Inge v. Board of Public Works, 135 Ala. 187, 33 So. 678 (1903); Glover v. People, 201 Ill. 545, 66 N.E. 820 (1903). *See* McChesney v. People, 200 Ill. 146, 150, 65 N. E. 626, 627 (1902).

16. McChesney v. People, 200 Ill. 146, 150, 65 N.E. 626, 627 (1902).

17. ABBOTT, HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM 288-296 (1926). WAITE AND CASSADY, THE CONSUMER AND THE ECONOMIC ORDER 395-400 (2nd ed. 1949);

government jobs? On the other hand, considering the benevolent purposes implied in the Displaced Persons Act of 1950,[18] allowing increased numbers of refugees to settle in this country, ought we to exclude aliens from public jobs? If alien printers, for example, cannot do public printing, they may find it difficult to get work at all, since prospective employers, by hiring them, would disqualify themselves from bidding for public jobs. Perhaps employment of aliens can be allowed and exploitation prevented if other safeguards are adopted, minimum wage laws, for example. But if it is a fact that excluding aliens does increase the cost, should not the inquiry end there, the competitive bidding requirement having been satisfied? An examination of judicial treatment of other clauses may provide an answer.

Similar to clauses excluding aliens are those requiring bidders to "buy local." For example, specifications for a municipal contract may require them to use the products of the state where the work is to be done, or to do all the work in that state, whether or not some or all of it could be done more cheaply elsewhere. Similar in nature are clauses requiring the use of local labor.[19] Sometimes the bidders may be restricted to the particular municipality.

Most courts which have passed on clauses of this type have held them valid unless it could be shown that they actually increased the cost,[20] although this was proved in only two cases.[21]

18. 62 STAT. 1009 (1948), 50 U.S.C.APP. §§1951 *et seq.* (Supp. 1949), as amended 50 U.S.C.APP. §§ 1951 *et seq.* (Supp. 1951). See Sen.Rep. No. 950, 80th Cong., 2nd Sess. (1948), printed in U.S. Code Congressional Service, 80th Cong., 2nd Sess., 2028.

19. The requirement may amount only to a preference if outside labor and materials can be utilized when nothing is available locally, Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932). The federal statutes require a preference for United States products, 47 STAT. 1520 (1933), 41 U.S.C. §§10a-c (1946), as amended, 63 STAT. 1024 (1949), 41 U.S.C. §10d (Supp. 1950).

20. St. John v. King, 130 Cal.App. 356, 20 P.2d 123 (1933); Ebbeson v. Board of Public Education, 18 Del.Ch. 37, 156 Atl. 286 (Ch. 1931); Diver v. Keokuk Savings Bank, 126 Iowa 691, 102 N.W. 542 (1905); Allen v. Labsap, 188 Mo. 692, 87 S.W. 926 (1905); Pasche v. South St. Joseph Town-site Co., 190 S.W. 30 (1916); St. Louis Quarry & Construction Co. v. Frost, 90 Mo.App. 677 (1901); St. Louis Quarry & Construction Co. v. Von Versen, 81 Mo.App. 519 (1899); Kingston Bituminous Products Co. v. Trenton, 134 N.J.L. 389, 48 A.2d 197 (Sup. Ct. 1946); Taylor v. Philadelphia, 261 Pa. 458, 104 Atl. 766 (1918). *Cf.* Daugherty v. Folk, 70 Ohio App. 304, 46 N.E.2d 307 (1941) (clause attacked as indefinite); Dunleavy v. City of Coatesville, 4 Chest. 262 (Pa., Common Pleas 1932). *See* Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1933) (concurring opinion of Straup, J.).

21. St. Louis Quarry & Construction Co. v. Von Versen, 81 Mo.App. 519 (1899); Taylor v. Philadelphia, 261 Pa. 458, 104 Atl. 766 (1918).

There have been some judicial expressions from which could be drawn an inference, admittedly tenuous, that the clause is not compatible with competitive bidding irrespective of actual effect on cost.[22]

Again the obstacles to proof of actual increase in cost seem insurmountable. In one of the cases proof was ready-made because the bidders were required to indicate the amount that would be deducted if the work in question were done outside the municipality involved. Otherwise the complainant would have the expense of securing effective testimony from outside the area involved.

Aside from these objections, clauses of this type, as applied to non-local products and services, would seem to arbitrarily exclude many producers and thus, by limiting the number of producers in competition, create an artificial situation conducive to monopolistic competition, with its ultimate minimizations of price competition. Even if only the materials cost were to be affected, part of the public contract, at least, would be subject to diminished competition. Since these effects would not evidence themselves until after a court-sanctioned "buy local" clause had been in effect for a considerable time, it may in fact be impossible to show proof of increased cost in the test case. By requiring such proof the courts seem to miss the point.

As for local labor clauses, they would seem to inhibit price competition only to the extent that they require a period of residency, in addition to residency itself, as a prerequisite to obtaining public work.[23] In that case they would tend to exclude the migratory workers, who ordinarily exercise a depressing effect on the labor market.[24] Excluding migratory workers from public jobs would thus tend to minimize the competition for the

22. Ebbeson v. Board of Public Education, 18 Del.Ch. 37, 156 Atl. 286 (Ch. 1931); Diver v. Keokuk Savings Bank, 126 Iowa 691, 102 N.W. 542 (1926). *Cf.* State v. Louisiana State Board of Agriculture and Immigration, 122 La. 677, 48 So. 148 (1909) (refusal of award to low bidder because too far away from place where work to be performed; courts upsets on grounds that this would restrict bidding to the given locality only).

23. See Capo v. Kane, 28 Pa.D.&C. 535 (Common Pleas 1937) (ninety days). The migratory worker cannot settle down, even for a short period of time, to get residency, since without work he and his family cannot eat.

24. Since migratory workers have a lower standard of living, they can afford to work for less. See WAITE AND CASSADY, THE CONSUMER AND THE ECONOMIC ORDER 395-400 (2nd ed. 1949).

labor part of the contract. Removing the ban, however, while it might decrease the cost, would sanction their exploitation. On the other hand, assuming other adequate safeguards, such as minimum wage laws, should any one community be entitled to isolate itself from a problem which is really a concern of the national community as a whole?[25]

Once more, considerations other than the maintenance of price competition have intruded themselves. Two cases, in fact, predicated rejection or acceptance of this type of clause, at least in part, on grounds unrelated to price competition. The test seemed to be rather whether the clause in question could reasonably have been considered an aid to the quality of the work performed.[26]

WELFARE CLAUSES

Some clauses inserted in the specifications deal with the welfare of the individuals who work on or bid for public contracts. Typical of clauses of this type are minimum wages, maximum hours and "Union Only" clauses.

Courts are divided on the validity of minimum wage and maximum hours clauses. Several theories have been advanced by courts which have held these clauses invalid. One explanation is that such requirements remove an item of the contract from competition.[27] Under this approach no proof of actual increase of cost is required.

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25. See Edwards v. California, 314 U.S. 160 (1941), which held invalid on constitutional grounds a California statute making it a crime to assist a nonresident "indigent person" in entering the state. The law was aimed at the migrant invasion engendered by drought and depression.

In striking down the law the Court quoted from Mr. Justice Cardozo: "The Constitution . . . was founded upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division," Baldwin v. Seelig, 294 U.S. 511, 523 (1935).

26. In Kingston Bituminous Products Co. v. Trenton, 134 N.J.L. 389, 48 A.2d 197 (Sup.Ct. 1946), the clause required the successful bidder for a road contract to own or have available for use within the city limits an asphalt mixing plant. Sustaining the clause against attack the court said in part that it was not unreasonable since asphalt must be laid at high temperatures.

Bidding was restricted to local freeholders in Waszen v. Atlaintic City, 1 N.J. 272, 63 A.2d 255 (1949). The court held the clause invalid, commenting that local residents, though not freeholders, were just as efficient. The same comment could be made about residents as compared with nonresidents. The statement may have been influenced by the fact that the specifications were drawn to exclude all but one favored bidder.

27. State *ex rel.* Bramley v. Norton, 7 Ohio Dec. 354 (Common Pleas 1897) (wages and hours); Frame v. Felix, 167 Pa. 47, 31 Atl. 375 (1895)

Another court, in passing on a minimum wage clause only, required proof of an actual increase in cost,[28] whereas another held that, even without such proof, an eight-hour clause was invalid because it tended naturally to decrease competition.[29] This latter test was utilized by the Supreme Court of Missouri in finding a minimum wage clause invalid.[30] The decision also pointed out that no improvement in the quality of the work resulted from a clause of this type,[31] the court not recognizing the departure from the price competition standard implicit in the latter statement.

However, the Missouri Supreme Court has upheld a maximum hours clause on the ground that the ordinance requiring it was valid, and that therefore it was a proper basis for bidding. The court also commented that because the workers were not paid on a daily basis, the clause did not increase the cost of the work.[32] Eight-hour clauses have been sustained elsewhere on the former theory.[33]

In other cases the courts have recognized that wages and hours clauses increased the cost of public work, but have sustained them on other grounds. Some of these involved depression relief public works projects financed in part with government funds,

(wages only). In the *Felix* case the requirement was included by specification and the court hinted that a different answer might have been reached had it been required by ordinance. It is hard to see why, since the competitive bidding requirement was statutory, unless the court places more weight on a legislative rather than a bureaucratic policy division. In the *Norton* case the fact that the requirement was contained in a municipal ordinance did not save the day.

28. Gerlach v. Spokane, 68 Wash. 589, 124 Pac. 121 (1912) (wages). *See* Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932) (concurring opinion of Straup, J.).

29. Glover v. People, 201 Ill. 545, 66 N.E. 820 (1903). *See* McChesney v. People, 200 Ill. 146, 150, 65 N.E. 626, 627 (1902). An Illinois state minimum wage law was declared invalid on similar grounds, Reid v. Smith, 375 Ill. 147, 30 N.E.2d 908 (1940). No competitive bidding provision was involved, the court apparently holding that the statute would lead to a waste of public funds.

30. Hillig v. St. Louis, 337 Mo. 291, 85 S.W.2d 91 (1935).

31. For a similar comment with reference to a minimum wage clause see the concurring opinion of Straup, J. in Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932).

32. Curtice v. Schmidt, 202 Mo. 703, 101 S.W. 61 (1907). A lower Missouri court based its decision sustaining an identical clause solely on the last argument, St. Louis Quarry & Construction Co. v. Frost, 90 Mo. App. 677 (1901).

33. Norris v. Lawton, 47 Okla. 213, 148 Pac. 123 (1915) (court felt that requirement might increase cost if workers paid by daily rate). *Cf.* Gamma Alpha Building Assn. v. City of Eugene, 94 Ore. 80, 184 Pac. 973 (same holding, but no objection made on competitive bidding grounds).

the clauses being required by the federal agency in question.[34] Construction of an electrical plant by a municipality was involved in one of these cases, and the Iowa Supreme Court admitted that the minimum wage requirement under attack would tend to increase the cost of the work. This was held to be no objection, since the federal grant was twice the entire labor cost of the project including the increase resulting from the requirement.[35] As the grant was not an absolute sum but only a percentage of the total cost, it would seem that a portion of the increased cost resulting from the minimum wage provision would have to be borne by the municipality. That the federal grant was more than twice the labor cost would seem to be irrelevant unless the court felt that cost was a relative matter, and that the locality would be worse off without the grant.

Pennsylvania had previously held a minimum wage provision incompatible with competitive bidding,[36] but, when faced with a wages and hours requirement in a situation similar to that in the Iowa case just discussed, it reached an opposite result.[37] It based its holding on a statute which authorized municipal corporations to accept grants from the federal government on such terms as were deemed necessary. Wage and hour provisions were considered to be necessary terms. In effect the court held that this statute was a waiver of the competitive bidding statute. The evidence as to legislative intent does not convince. At best there was a conflict between the two statutes which the court failed to resolve.[38]

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34. If the court were to invalidate the contract in this situation it would place itself in the unenviable position of refusing much-needed federal aid. See Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Capo v. Kane, 28 Pa.D.&C. 535 (Common Pleas 1937).

35. Iowa Electric Co. v. Cascade, 227 Iowa 480, 288 N.W. 633 (1939). For a similar holding, in a case not involving a competitive bidding requirement see Arkansas-Missouri Power Corp. v. Kennett, 348 Mo. 1108, 156 S.W.2d 913 (1941).

36. See note 27 *supra*.

37. Campbell v. School District, 328 Pa. 197, 195 Atl. 53 (1937). The same conclusion was reached with reference to a similar agreement with the federal government aimed at giving unemployment relief. It contained minimum wage, citizen preference and other similar clauses, including one designed to maximize the use of hand labor, Tranter v. Alleghany County, 316 Pa. 65, 173 Atl. 289 (1934).

38. *Cf.* Wright v. Hoctor, 95 Neb. 342, 145 N.W. 704, *explained on rehearing* 146 N.W. 997 (1914).

In another similar case the Kentucky court simply decided, without explanation, that to hold the wages and hours requirement invalid was contrary to the purpose of the competitive bidding act. The court seemed also to be influenced by state statutes allowing municipalities to accept federal aid.[39]

The Wisconsin court, in cases decided before the recent depression, also admitted that wages and hours requirements increased the cost of public work.[40] But the court explicitly rejected the price competition standard, holding that the purpose of the competitive bidding requirement was not frustrated, although the effect of the specifications was to prevent the work from being done at the lowest possible cost. It was competent for the locality to prefer a higher rather than a lower grade of labor, the decided implication being that better work was the result of a higher wage rate.

Without an attempt to harmonize the conflicting decisions in this area, it would appear that if the price competition standard is adhered to, a minimum wage provision at least is incompatible with competitive bidding. Price competition is impossible with respect to an item of the contract if a floor is placed under its price, and that is what a minimum wage provision does. Courts which take this view appear to be on sound ground, and any discussion of actual or possible effect on cost seems irrelevant.[41]

With the price competition standard as a guide, the maximum hours question is more difficult. However, the distinction attempted by the Missouri court, upholding the hours clause while striking down the wages provision, does not seem tenable on closer inspection. The hours clauses involved in these cases

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39. Spahn v. Stewart, 268 Ky. 97, 103 S.W.2d 651 (1937).

40. Wagner v. Milwaukee, 180 Wis. 640, 192 N.W. 994 (1923), *cert. denied*, 266 U.S. 585 (1924); Milwaukee v. Raulf, 164 Wis. 172, 159 N.W. 819 (1916.) For similar holdings see Wilson v. Atlanta, 164 Ga. 560, 139 S.E. 148 (1927) (dissenting opinion, competitive bidding not involved); Arkansas-Missouri Power Corp. v. Kennett, 348 Mo. 1108, 156 S.W.2d 913 (1941) (competitive bidding not involved); Dougherty v. Folk, 70 Ohio App. 304, 46 N.E.2d 307 (1941) (clause attacked as indefinite).

41. For a discussion of the effects of the federal statutes requiring minimum wages and maximum hours see Ballaine, *How Government Purchasing Procedures Strengthen Monopoly Elements*, 51 JOURNAL OF POLITICAL ECONOMY 538, 542-544 (1943).

were eight-hour clauses, and the reduction in hours they bring about does not ordinarily result in a corresponding reduction in pay.[42] For this reason a clause of this type would tend to bring about an increase in prices. On this analysis, which, as indicated, has received some judicial acceptance, the clause would be incompatible with competitive bidding.

Whatever the explanations advanced by the decisions sustaining clauses of this type, it would seem that such a conclusion could be reached only if the price competition standard is abandoned. This was the approach adopted by the Wisconsin court, and the standard substituted required that the clause be found to have improved the quality of the work. Here, also, larger considerations are involved.

Clauses of this type were classified as welfare clauses because they advanced the standard of living of workers employed on public jobs. As a result, do benefits redound to the community as a whole which are more important than securing the job at hand at the lowest possible cost? An examination of clauses requiring the exclusive use of union labor on public works may provide an answer to this question.

Several courts, at the turn of and in the early years of this century, held such clauses invalid. One court did so on the ground that the provision tended to increase cost.[43] It also stated that union membership was no indication of increased competency, thereby implying a standard more concerned with quality than with price. Other courts held, without discussion, that the clause in question created a monopoly in a single class and restricted competition.[44]

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42. STEIN, DAVIS, BERMAN, MACDONALD, DAVID, RAUSHENBUSH, AND WARNE, LABOR PROBLEMS IN AMERICA 92-94 (1940).

43. Elliott v. Pittsburgh, 6 Pa.Dist. 455 (Common Pleas 1897).

44. Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 Pac. 659 (1915) (union labor requirement "inconsistent" with competitive bidding); Lewis v. Board, 139 Mich. 306, 102 N.W. 756 (1905); Marshall & Bruce Co. v. Nashville, 109 Tenn. 495, 71 S.W. 815 (1903). This seems to be the import of the rather confusing opinion in Wright v. Hoctor, 95 Neb. 342, 145 N.W. 704, *explained on rehearing*, 146 N.W. 997 (1914) (clause excludes common labor). *See* State *ex rel.* Robert Mitchell Furniture Co. v. Toole, 26 Mont. 22, 34, 66 Pac. 496, 501 (1901).

For similar statements in cases not involving competitive bidding requirements see Atlanta v. Stein, 111 Ga. 789, 36 S.E. 932 (1900); Adams v. Brenan, 177 Ill. 194, 52 N.E. 314 (1898); State v. Mayor, 66 N.J.L. 129, 48 Atl. 589 (1901); People *ex rel.* John Single Paper Co. v. Edgcomb, 112 App.Div. 604, 98 N.Y.Supp. 965 (4th Dept. 1906).

If price competition is the aim of competitive bidding, no doubt a "Union Only" clause is invalid. It restricts competition because non-union laborers are not allowed to compete for the labor item of the contract. A more basic objection is that the clause in effect puts a floor under the price of wages and so has the same effect as a minimum wage provision. All employers hiring union labor must adhere to the union scale, which in effect, is a minimum wage.

More recently, however, a New York supreme court, in *Amalithone Realty Co. v. City of New York*,[45] held such a provision valid. The basis of its opinion is apparent from the following quotation:

> Even though the immediate cost in dollars and cents to the city may be higher than the cost of sweatshop products, we have now come to recognize the greater ultimate cost to the people as a whole which results from low wages, overlong hours and unsanitary working conditions. The presence of the union label may reasonably be considered as a fair assurance that the products have been manufactured under conditions in accord with our present-day social consciousness. In these days, when much of the effort of government is directed toward securing decent standards of pay and work for labor . . . it would certainly be strange to say that the city or state itself may not insist that its own products be made according to fair standards.[46]

Minimum wage and maximum hours clauses may be similarly justified.[47]

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45. 162 Misc. 715, 295 N.Y.Supp. 423 (Sup.Ct. 1937); *aff'd.*, 251 App.Div. 450, 297 N.Y.Supp. 262 (1st Dept. 1937).

46. *Id.* at 716, 295 N.Y.Supp. at 425. The quoted statement could be considered dictum to the case, since the question involved was whether a specification could exclude one union and not another, and not whether union labor could be specified. The case was approved in Burland Printing Co. v. La Guardia, 9 N.Y.S.2d 616 (Sup.Ct. 1938).

47. A similar approach was taken by a Pennsylvania trial court in Capo v. Kane, 28 Pa.D.&C. 535 (Common Pleas 1937). Involved was a depression period contract providing for grants from the federal government for a local works project. Minimum wages, maximum hours, and preference to persons on relief, especially those who had lived in the state for ninety days, were among the requirements in the specifications. Though the minimum wage clause had specifically been declared invalid by the state supreme court, see note 27, *supra*, the contract was upheld on grounds of "public policy." "Since the primary purpose was to put men to work, the Federal Government wisely retained a certain control over the employment of the men required in order to see that this object was accomplished." *Id.* at 546.

For an unfavorable decision dealing with similar clauses see Bohn v.

A similar approach was taken by the United States Supreme Court in *Penn Dairies v. Milk Control Commission.*[48] A federal statute required competitive bidding for milk, the product in question. The price of milk was governed by a Pennsylvania minimum price law aimed at stabilizing the market in the interest of milk producers. In finding the Pennsylvania law not inconsistent with the federal statute, the court explicitly rejected cost as the only consideration in the letting of government contracts. Reference was made to other federal statutes requiring the inclusion of "Buy American," eight hour, anti-child labor and similar clauses which bring about an increase in cost. But the Court pointed out:

> Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser.[49]

Justice Douglas dissented[50] on the ground that it was the plain policy of the competitive bidding statute to secure to the government the benefits of price competition. From that approach the Pennsylvania statute would have to give way, since competition is hardly obtainable when a floor is placed under prices.

Clauses Relating to the Quality of the Job and the Efficiency of its Execution

While some courts have treated some of the clauses already discussed as having a bearing on the quality or efficiency of the work, for the most part they have been considered to embody other purposes. The group of clauses next to be discussed, however, fall clearly into the former classification.

When a large project is to be undertaken, it may be advantageous to let the entire work to one contractor. It would appear that a unit bid of this type would result in lower costs through

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Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932) (competitive bidding not involved).

48. 318 U.S. 261 (1943).

49. *Id.* at 274. It also found a lack of clear-cut Congressional intent in the matter as a result of the co-existence, without explanation, of seemingly contradictory statutory provisions.

In his concurring opinion, Justice Murphy felt that the "larger interests" of the nation as a whole would not suffer from the observance of the Pennsylvania requirement, *id.* at 280, 281.

50. *Id.* at 282, 283.

better coordination of the work and mass purchasing. In any event a better job will probably result when responsibility for supervising and integrating the work is placed in one concern.

Unit bidding may restrict competition, however, since it would exclude those smaller concerns which could not afford to bid on the entire job. One court held that in the absence of evidence that competition was restricted, unit bidding was a matter for the contracting authority's discretion.[51] It added that requiring bidding on a part rather than on the whole might be equally as exclusive of the larger contractors. This approach appears sound. Another court placed no limits on the locality's discretion in the matter.[52]

To expedite financing of a public project the specifications may require the successful bidder to take his compensation in bonds of the locality. One court criticized the provision on the grounds that it confined the bidding to persons of substantial means. If the successful bidder was not in a favorable financial position, the court pointed out, it would have to sell the bonds immediately, perhaps at a discount, and this would raise the amount of its bid.[53] A bidder of means, on the other hand, could hold the bonds until a more favorable time for disposal. Yet the court indicated it would sustain the contract unless it could be proved that the specification actually increased the cost.

Two other courts found the provision valid, one on the theory

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51. Davies v. Madelia, 205 Minn. 526, 287 N.W. 1 (1939). *Cf.* Peeples v. Byrd, 98 Ga. 688, 25 S.E. 677 (1896) (award to print several volumes of the official state reports sustained against claim of abuse of discretion); Detroit Free Press Co. v. Board of State Auditors, 47 Mich. 135, 10 N.W. 171 (1881) (unrelated items of printing specified, all may be awarded to one printer).

Absent competitive bidding objections, calling for an entire bid has generally been sustained, Note, 123 A.L.R. 577 (1939).

52. Interstate Power Co. v. McGregor, 230 Iowa 42, 296 N.W. 770 (1941). Under the statute involved the contract need not have been let to the lowest bidder. However, the Iowa court has held that the statute does require competitive bidding, Iowa Electric Co. v. Cascade, 227 Iowa 480, 288 N.W. 633 (1939).

53. Ledwith v. City of Lincoln, 110 Neb. 425, 193 N.W. 763 (1923). The point was reserved in Rice v. Board of Trustees, 107 Cal. 398, 40 Pac. 551 (1895) (clause not shown to have increased the cost or deterred any bidders).

In Hirsch v. Mayor, 141 Miss. 827, 105 So. 492 (1924) the specifications provided that the city could withhold payment of the contract price for from six to nine months after completion. The court held that this clause did not destroy competition since it was for the city's advantage. The decision would seem to be open to the same objections as those justifying payment in bonds of the locality.

that it was simply an indication of financial responsibility, a requirement which the contracting authority had the right to insist on.[54] In the other case the provision was required by statute, and the court apparently considered this to be a waiver of the competitive bidding requirement, which was also statutory.[55]

The effect of the clause would in fact appear to be the exclusion of newcomers and of poorer bidders since the resulting increase in their bids would put them out of the running. If they tried to cut their bids to meet competition, the job might be too unprofitable. Spared the trouble of meeting new and possibly more virile competition, older firms may safely be able to raise prices. Conditions conducive to monopolistic competition may result.

Proof of an actual increase in cost would not seem necessary and would be difficult, as it would involve an appraisal of such intangibles as the condition of the market for the bonds in question and the financial situation of each actual and prospective bidder. Although the requirement has been defended as a guarantee of responsibility, it is to be questioned whether this justification should be accepted. It seems rather to be an aid to the financing of the project. Should this gain to the locality outweigh the desirability of price competition?

Another technique of insuring responsible work is to require the bidders to prequalify with respect to such matters as fitness of product, satisfactory previous experience and adequate financial resources. Prequalification has been sustained as a reasonable method of excluding the irresponsible and the inferior.[56]

54. Shields v. Loveland, 74 Colo. 27, 218 Pac. 913 (1923). *Cf.* Davies v. Madelia, 205 Minn. 526, 287 N.W. 1 (1939) (contractor to be paid from net earnings of plant; upheld as reasonable).

55. Weiss v. Woodbine, 229 Iowa 978, 295 N.W. 873 (1941).

56. United States v. Brookridge Farm, 111 F.2d 461 (10th Cir. 1940) (bidders must have passed inspection test within one month of bidding); Berghoffen v. City of New York, 31 Misc. 205, 64 N.Y.Supp. 1082 (Sup. Ct. 1900) (previous experience); Eckerle v. Ferris, 175 Okla. 107, 51 P.2d 766 (1935) (use test); Corcoran v. Philadelphia, 363 Pa. 606, 70 A.2d 621 (1950); Harris v. Philadelphia, 299 Pa. 473, 149 Atl. 722 (1930); Dunleavy v. City of Coatesville, 4 Chest. 262 (Pa. Common Pleas 1932). *Cf.* Redersheimer v. Flower, 52 La.Ann. 2089, 28 So. 299 (1900) (five-year use test for paving surface invalid in light of two-year use test for materials and evidence indicating five-year period too long); Knowles v. City of New York, 176 N.Y. 430, 68 N.E. 860 (1903) (previous experience, competitive bidding not involved); J. Weinstein Building Corp. v. Scoville, 141 Misc. 902, 254 N.Y.Supp. 384 (Sup.Ct. 1931) (financial prequalification restrictive of competition unless authorized by statute).

Where the effect of prequalification is to restrict the bidding to one

Clauses of this type cannot be justified on the theory that the contracting authority can reject a bid on the same grounds after the bids are in.[57] Exclusion from the bidding itself for these reasons does not amount to the same thing. Such a scheme will definitely place the less wealthy and the newcomers at a disadvantage. If the scheme were rigidly executed it would exclude them from bidding altogether with the reduction in competition and upward pull in price that have already been described.[58]

Another requirement aimed at getting good quality is that the contractor must guarantee his work for a period of time.[59] These provisions have been sustained, even though their inclusion would probably force the contractor to increase his bid. The taxpayer is receiving something of equivalent value in return, a promise that the work will be kept in a satisfactory condition for a period of time and an assurance that the job will be well-done at the outset.[60] Price competition has been sacrificed for improved quality.

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bidder, it has been rejected, Rankin v. Board of Education, 135 N.J.L. 299, 51 A.2d 194 (1947); International Meters v. City of New York, 101 N.Y.S. 2d 208 (Sup.Ct. 1950); Finigan v. Zuber, 156 Misc. 479, 281 N.Y.Supp. 930 (Sup.Ct. 1934).

57. See 10 MCQUILLIN, MUNICIPAL CORPORATIONS 352, 360, 361 (3rd ed. 1950). For a list of factors to be considered in awarding bids see Rosenbaum, *Tested Criteria for "Lowest Responsible Bidder,"* American City, February, 1943, 37.

58. For an exposition of this argument see Boswell, *Is Prequalification of Contractors Necessary and Constitutional,* American City, November 1929, 150. For a contrary position see Field, *Why Prequalification Should Be Required of All Bidders on Public Works,* American City, April, 1929, 160, and *In Defense of the Pre-qualifications of Contractors,* American City, January, 1930, 175.

59. For a recent survey of the use of maintenance guarantees, see *Pavement Maintenance Guarantees,* American City, June, 1939, 44.

60. Diver v. Keokuk Savings Bank, 126 Iowa 691, 102 N.W. 542 (1905); Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 73 S.W. 1106 (1903). In the latter case the contractor had to maintain a permanent plant in the city during the guaranty period. This was sustained as a reasonable adjunct to the guaranty provision. Since the repair work had to be done properly and promptly, having the plant available would relieve the city from the expense of litigation to enforce the guaranty, and the cost of the plant was held to be small as compared with the amount of the contract. No figures were given, however. The explanation gives the court away. A guaranty is a court-enforceable promise. If something is to be required in addition, it should be justified on its own. The practical effect of requiring a local plant is to exclude nonresidents.

In some states repairs to a road must come out of the general fund and cannot be assessed againt the abutting property owners. A guaranty to make needed repairs for five years and a deposit to secure the guaranty equal to ten per cent of the contract price was held to violate that rule

A similar justification can be made for the requirement that bidders post a performance bond,[61] or, what amounts to the same thing, make a good faith advance deposit by certified check. The former requirement has not been challenged as restrictive of bidding. Although the latter has, it has been sustained as reasonable.[62] Both clauses may tend to exclude new or poorer firms. A larger bond premium may be required, money may have to be borrowed to make the advance deposit, and interest has to be paid on borrowed money. As a result, increased costs may exclude them from competition. Yet a performance bond or ad-

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since the result was an increase in the bid, Fehler v. Gosnell, 99 Ky. 380, 35 S.W. 1125 (1896). However, the equivalence argument was used to sustain similar clauses in cases involving an application of the above rule, Allen v. Labsap, 188 Mo. 692, 87 S.W. 926 (1905); Dillingham v. Mayor, 75 S.C. 549, 56 S.E. 381 (1907).

When the contractor is required to guarantee to pay damages for which he would have been liable in any event the guaranty has been held valid, Diver v. Keokuk Savings Bank, 126 Iowa 691, 102 N.W. 542 (1905). This seems to have been the basis for the decision in City Improvement Co. v. Kroh, 158 Cal. 308, 110 Pac. 933 (1910) (bidder to submit bond against loss from patent infringement suits). *Cf.* McQuiddy v. Worswick Street Paving Co., 160 Cal. 9, 116 Pac. 67 (1911) (competitive bidding not involved). No increase in cost results since the cost of meeting the liability will be included in the bid in any event.

When the guaranty relates to damages for which the bidder would not have been liable a contrary result has been reached, Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906). *Cf.* Stansbury v. Poindexter, 154 Cal. 709, 99 Pac. 182 (1908) (competitive bidding not involved). Since in this case nothing of benefit to the job in question has been secured, the result seems correct. If the municipality would have been liable without the guaranty, responsibility has simply been shifted from the general fund to the funds earmarked for the particular project, hardly a gain.

61. Requiring a bond for faithful performance is quite common, see JAMES, THE PROTECTION OF THE PUBLIC INTERESTS IN PUBLIC CONTRACTS 11 (1946). When the bond requirement is part of the law requiring competitive bidding any objection that bidding has been restricted should be foreclosed, see City Improvement Co. v. Kroh, 158 Cal. 308, 110 Pac. 933 (1910).

62. St. Louis Quarry & Construction Co. v. Frost, 90 Mo.App. 677 (1901); State v. Mayor, 42 Atl. 845 (N.J.Sup.Ct. 1899) (cost of improvement $7,995,000, deposit $100,000). The implication is that the requirement would be unreasonable if the deposit were too high in relation to the cost of the improvement. *Cf.* Del Balso Construction Corp. v. Gillespie, 225 App.Div. 42, 232 N.Y.Supp. 261 (1st Dept. 1928), *aff'd.*, 250 N.Y. 584, 166 N.E. 333 (1929) (competitive bidding not involved); Helwig v. Gloversville, 158 N.Y.Supp. 475 (Sup.Ct. 1916) ($10,000 deposit for $3200 job held to be restrictive of bidding).

However, in Weiss v. Woodbine, 228 Iowa 1, 289 N.W. 469 (1940) the cumulative effect of the following provisions was held to be restrictive of bidding though the court pointed out that each one taken alone would not be restrictive: only bid on entire project allowed; contractor to be compensated in bonds of locality; contractor to advance $8,000 by certified check, cost of project $115,000. The case is commented on in Comment, *Municipal Corporations—Competitive Bidding on Public Works—Unreasonable Restrictions by Several Valid Stipulations*, 25 IOWA L. REV. 828 (1940).

vance deposit is certainly an assurance that the work will be carefully done, a guarantee of satisfactory quality.

Clauses which increase the cost would seem to be incompatible with price competition, even though they improve the quality of the work. This problem is presented most clearly by specifications dealing with the materials or product to be used. In an attempt to secure the best that is available, patented articles or brand-name products marketed by only one manufacturer may be specified. Courts are divided on the validity of such clauses,[63] but whatever the reasoning used by courts that justify them, such decisions absolutely prohibit price competition. Monopoly is its very antithesis. Such clauses, where upheld, can best be classified as a judicial exception to competitive bidding, motivated by a desire to secure the best products obtainable.

At the other extreme, if the specifications are too indefinite, courts will disapprove them because no ascertainable standard

63. The subject of specifications of patented articles has been treated in several articles. See Note, *Municipal Corporations: Paving Contracts: Contracts With a Patentee*, 16 CORNELL L.Q. 240 (1931); Recent Case, *Municipal Corporations—Letting Contracts to Lowest Bidder* 19 MICH. L.REV. 570 (1921); Note, *Municipal Contracts for Patented or Proprietary Paving*, 6 MICH.L.REV. 493 (1908).

Brand name articles or limitation to one source. Valid: Springfield v. Haydon, 216 Ky. 483, 288 S.W. 337 (1926); Kingston Bituminous Products Co. v. Long Branch, 124 N.J.L. 472, 12 A.2d 237 (1940). Invalid: Raynor v. Commissioners, 220 N.C. 348, 17 S.E.2d 495 (1941). See 10 MCQUILLIN, MUNICIPAL CORPORATIONS, 304-307 (3rd ed. 1950); Note, 77 A.L.R. 702 (1932).

Sometimes an attempt has been made to specify a standard product of one concern by so drawing the specifications as to exclude all but the product desired. In this way the risk involved in naming the product outright is sought to be avoided. Courts are divided on the validity of specifications of this type. Valid: Eckerle v. Ferris, 175 Okla. 107, 51 P.2d 766 (1935); Rote v. Bexar County Water Control and Improvement District, 91 S.W.2d 1095 (Tex.Civ.App. 1936); Invalid: Grace v. Fobes, 64 Misc. 130, 118 N.Y.Supp. 1062 (Sup.Ct. 1909); Fischer Auto & Service Co. v. Cincinnati, 16 Nisi Prius n.s. 369, 26 Ohio Dec. 103 (1914).

Specifications of this type are open to the same objection as specifications of a patented or brand name product. It could be argued that since the article specified is not patented any concern could produce it at will and compete in the bidding. *Cf.* Hopkins v. Hanna, 135 Misc. 750, 239 N.Y.Supp. 489 (Sup.Ct. 1930). This contention was convincingly refuted in Fischer Auto & Service Co. v. Cincinnati, *supra*. There a specification for a police chief's car was drawn so as to exclude all but one particular make. The court pointed out that while parts could be obtained in the open market to assemble an identical car it could not enter into commercial competition with a car coming from a plant organized and equipped solely for its production. Competition was held to be present in name only. *Cf.* American La France & Foamite Corp. v. City of New York, 156 Misc. 2, 281 N.Y.Supp. 519 (Sup.Ct. 1935), *aff'd.*, 246 App.Div. 699, 283 N.Y.Supp. 899 (1st Dept. 1935).

is presented for competitive bidding and the bidders cannot be sure they are bidding on the same thing.[64] Yet if the specifications are too specific they are always open to the challenge that they have been drawn to exclude all but one bidder, though he is not listed by name.[65] Where should the line be drawn?

So long as the above objections are not present, most courts have allowed specification of materials or products on the basis of quality. There is little agreement, however, as to the circumstances under which this may be done. Some of the decisions seem to place no limit on the discretion of the contracting authority.[66] Other courts require a stronger showing, that the specified article be substantially different,[67] or that the specification be made in good faith.[68] In another case the specification of a particular product was disallowed in the absence of a clear showing of its superiority.[69]

Yet specifications simply describing the product desired without giving details as to quality or make-up have also been sustained.[70] These cases involved manufactured items, and it was

64. Bennett v. Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908); Hannan v. Board of Education, 25 Okla. 372, 107 Pac. 646 (1909); Ricketson v. Milwaukee, 105 Wis. 591, 81 N.W. 864 (1900). See 10 McQUILLIN, MUNICIPAL CORPORATIONS 313 (3rd ed. 1950); Note, 30 L.R.A. (N.S.) 214 (1911).

65. International Meters v. City of New York, 101 N.Y.S.2d 208 Sup.Ct. 1950); Gage v. Connor, 142 App.Div. 228, 126 N.Y.Supp. 1041 (4th Dept. 1911).

66. Fox v. Cincinnati, 22 Ohio Law Abstract 290 (Common Pleas 1936). *Cf.* Rhodes v. Board of Public Works, 10 Colo.App. 99, 49 Pac. 430 (1897). *See* Fischer Auto & Service Co. v. Cincinnati, 16 Nisi Pruis n.s. 369, 377, 378, 26 Ohio Dec. 103, 111 (1914); Hannan v. Board of Education, 25 Okla. 372, 391, 107 Pac. 646, 654 (1909).

67. Cleveland Trinidad Paving Co. v. Lord, 145 Mo.App. 141, 130 S.W. 371 (1910). The court did not seem to require much of a showing that the specified material was different. *Cf.* Diamond v. Mankato, 89 Minn. 48, 93 N.W. 911 (1903) (specification of one type of asphalt invalid since other types just as good).

68. Hopkins v. Hanna, 135 Misc. 750, 239 N.Y.Supp. 489 (Sup.Ct. 1930); Eckerle v. Ferris, 175 Okla. 107, 51 P.2d 766 (1935). Of course, the competitive bidding provision may permit the specification of material by quality, Rhodes v. Board of Public Works, 10 Colo.App. 99, 49 Pac. 430 (1897).

69. American La France & Foamite Corp. v. City of New York, 156 Misc. 2, 281 N.Y. Supp. 519 (Sup. Ct. 1935), *aff'd.*, 246 App. Div. 699, 283 N.Y. Supp. 899 (1st Dept. 1935). See Hillig v. St. Louis, 337 Mo. 291, 296, 85 S.W.2d 91, 93 (1935). In Hastings Pavement Co. v. Cromwell, 67 Misc. 212, 124 N.Y. Supp. 388 (Sup.Ct. 1910), *aff'd.*, 143 App. Div. 942, 127 N.Y.Supp. 1124 (2nd Dept. 1911), the court found that a certain type of pavement could be excluded from the specifications because, on the facts, it was inadequate for the job to be done.

70. Brutsche v. Coon Rapids, 223 Iowa 487, 272 N.W. 624 (1937) (diesel engine); Patterson v. Zanesville, 42 Ohio App. 428, 182 N.E. 352 (1932)

rightly pointed out that detailed specification would be impossible without preferring one or a group of manufacturers over another.

Under the point of view just discussed, both price competition and monopolistic or quality competiton would be possible. But if quality can be specified, both are impossible. This is true whether quality is specified directly or whether this is achieved through a clause requiring the bidder to put up a performance bond, or through a requirement that a minimum wage be paid, or through any other indirect means.

CONCLUSION

Whatever the avowed purpose of competitive bidding, the decisions fall far short of insuring either price or quality competition. While consistent patterns of interpretation have often failed to emerge, nonetheless if "Buy Local," minimum wage and "Union Only" clauses are sustained, the goal of price competition has not been achieved. And if the quality of the product is specified, directly or indirectly, monopolistic competition is not possible.

Interpretations of this type seem inescapable, however. Pure price competition is impossible, considering the fact, already noted, that it is not the rule in the major part of modern economy. Aside from this, the nature of the competitive bidding requirement makes it a less than effective tool to achieve such a goal. Price-cutting practices of monopolies and near monopolies to drive out weaker competitors are well-known.[71] If a giant firm underbids for a public contract with this end in mind, its bid would be accepted, all other factors being equal. Courts generally have not been concerned with the effects of monopolistic practices, thereby destroying competition in the long run by insisting on it for the particular contract at hand.[72]

(fire alarm box). In Hodgemen v. San Diego, 53 Cal.App.2d 610, 128 P.2d 412 (1942), the court held that competitive bidding for parking meters could be dispensed with because to specify one type would necessarily exclude the others, all types being patented. It would seem that a bid calling simply for parking meters would adequately inform the bidders of the nature of the product called for and would give free rein to quality competition. *Cf.* Hines v. Bellefontaine, 74 Ohio App. 393, 57 N.E.2d 164 (1943).

71. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE, 341, 342 (1951); WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 5, 6 (TNEC Monograph 21, 1941).

72. It has, in fact, been contended that practices of the federal govern-

But there are more basic objections. Perhaps a private individual may want to take a risk of poorer quality at cheaper cost. Government cannot afford to do this; it must insist on high quality.[73] For one thing safety and health factors are involved, especially in school, sewage disposal, road, and similar projects. For another, the inferior project may have to be replaced. If the contractor is insolvent, the public treasury must bear the loss. The resulting financial burden would be intolerable.

It should also be remembered that the role of government has changed considerably since competitive bidding provisions were first adopted. Not only has it expanded its activities but it has grown so in size, as compared with the remainder of the economy, as to constitute an important economic force capable of exerting considerable influence.[74] It is probably for this reason that government was soon recognized as an effective agency for the transmittal of desirable social policies.[75]

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ment in making purchases through competitive bidding have tended to lessen competition and to increase monopoly, Ballaine, *How Government Purchasing Procedures Strengthen Monopoly Elements*, 51 JOURNAL OF POLITICAL ECONOMY 538 (1943).

However, in Stites v. Norton, 125 Ky. 672, 101 S.W. 1189 (1907), bids were asked for a lighting franchise. The purpose was to secure a competitor for a company which already had a similar franchise. It was held permissable to exclude the company holding the existing franchise from the competition for the new one, prevention of monopolies and the encouragement of competition being considered of equal importance with securing the highest bidder.

While the exclusion of the existing franchise holder from the new competition might result in the new franchise going for a smaller sum than would otherwise have been the case, in the long run competition between two companies should benefit the municipality by insuring lower rates. It is conceivable that the existing franchise holder would have bid up the new franchise to preserve its monopoly. Attempts to secure competition in the public utilities field, of course, are now a thing of the past.

73. See *Quality, or Price in Public Buying?* American City, September, 1938, 5.

74. In 1950 federal, state and local governmental expenditures accounted for 15% of gross national expenditures, Survey of Current Business, United States Department of Commerce, Bureau of Foreign and Domestic Commerce, Office of Business Economics, February, 1951, 7. This amounted to $42,100,000,000 out of a total of $279,800,000,000, *id.* at 9. Of all new construction started in 1950, 25% was public, a total of $7,900,000,000 out of $29,600,000,000, *id.* at 18.

For an analysis adopting the position that attempts to influence economic life through the medium of governement purchasing are largely ineffectual see Denison, *The Influence of the Walsh-Healey Public Contracts Act Upon Labor Conditions*, 49 JOURNAL OF POLITICAL ECONOMY 225 (1941).

75. What social policies are desirable is another, and debatable, question. Competing policies in connection with clauses restricting aliens from public work, or requiring bidders to "Buy Local," were suggested as illustrative of the problems involved.

To require government contractors to pay a minimum wage or to recognize the union of its employees is to set the pace for the rest of the economy. To allow the government to get out of step with legislative social advance is not only unthinkable on humanistic grounds, but would undercut the success of these programs in the private sector of society.[76] Social policies of benefit to society as a whole certainly outrank the limited goal of price competition, especially since it is so difficult to achieve through the competitive bidding device.

In fact, it can be argued that laws such as minimum price legislation are an implied waiver of price competition. There cannot be full competition when a floor is set under an important cost of production. But that is just the point. All business is placed by statute on an equal footing as to one item of cost so that a more desirable social end can be achieved. These considerations seem to underlie those decisions that sustain requirements of this type as against competitive bidding objections, on broad social grounds.

Considering all these objections, it would seem best to abandon the attempt to secure price competition in bidding for public contracts. Fraud and favoritism still present a problem, but it is doubtful if it can be solved by the competitive bidding device, especially since there is so much room for official discretion in awarding the contract.[77] Official fraud is hard to prove.

Supposedly, legislative or official determinations as to what these policies should be represent the popular will. Reliance will have to be placed on the ballot box to correct those policies that are considered undesirable.

76. A case in point is fair employment practices legislation. Local ordinances and statutes of this type often require contractors with the city or state, as the case may be, to insert in their contracts a clause obligating them not to commit any of the unfair employment practices specified in the law. See N.M. STAT. ANN. §57-1205 (Supp. 1951); Chicago Mun. Code, c. 198.7A §3; Milwaukee Mun. Code, §106-25. Since the commission of a proscribed practice would constitute a breach of contract this provision is an effective weapon. Yet under laws of this type equal pay must be given to minorities, and eradication of any inequalities that were present before the adoption of the law would tend to increase the cost of the work.

Is fair employment practices legislation incompatible with competitive bidding for this reason? To hold that it is would result in the enforcement of one standard of morality for the community at large and another for the government. The bad example set would certainly weaken the enforcement of the law.

77. Discussion of possible solutions for this problem is beyond the scope of this article. Prohibiting officials from having an interest in public contracts is one device that has already been attempted. See Bay v. Davidson,

Advertisements for bids should still be required, so that the contracting authority will have as wide a field as possible from which to choose. But no limitations should be placed on specifications aimed at securing a benefit which appears to redound to the particular project in mind or to society as a whole.

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133 Iowa 688, 111 N.W. 25 (1907); Hill v. Baker, 309 Ky. 514, 218 S.W.2d 24 (1949); Note, 74 A.L.R. 792 (1931).

For details of fraud in public contracts in the latter part of the nineteenth century see *The Contract System in Public Works*, 20 The Nation 324 (1875). The writer argues that the ultimate elimination of fraud from public contracts depends primarily on an improved level of morals in government. For interesting tales of more recent vintage see a series of articles by Kaiser, *The $10,000 Gallon of Oil*, 155 Atlantic Monthly 17 (1935); *The $3,000 Snow Shovel*, 155 Atlantic Monthly 182 (1935); *Thirty-Eight Gondolas of Granite*, 155 Atlantic Monthly 357 (1935). For an even more recent statement see JAMES, THE PROTECTION OF THE PUBLIC INTERESTS IN PUBLIC CONTRACTS (1946).

Several fraudulent devices and suggestion for their elimination are discussed in a review of an article by Gillette, *Honesty in Public Contract Work*, 33 Engineering Magazine 795 (1907).

For a criticism of competitive bidding from a different approach see Nimmons, *The Evil Effects of Competitive Bidding on Building Contracts*, 23 Architectural Record 47 (1908). The author suggests the abandonment of competitive bidding.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1951 December, 1951 Number 4

Edited by the Undergraduates of Washington University School of Law, St. Louis. Published in the Winter, Spring, Summer and Fall at Washington University, St. Louis, Mo.

Subscription Price $4.00 Single Copies, $1.25

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