

I N D E X

| | PAGE |
|---|------|
| Writ of Certiorari..... | 1 |
| PROSECUTOR'S TESTIMONY: | |
| Charles H. Fay—Direct..... | 7 |
| Cross..... | 11 |
| Re-direct..... | 20 |
| Ambrose J. Walsh—Direct..... | 21 |
| Cross..... | 24 |
| RESPONDENT'S TESTIMONY: | |
| Walter W. Cook—Direct..... | 29 |
| Cross..... | 36 |
| Alexander H. Nelson—Direct..... | 40 |
| Cross..... | 41 |
| Anne M. Delaney—Direct..... | 43 |
| Exhibit P5, Specifications..... | 45 |
| Exhibit P6, Minutes of Board of Commissioners and Specifications | 55 |
| Exhibit P8, Minutes of Board of Commissioners and Prices | 64 |
| Exhibit P9, Minutes of Board of Commissioners and Prices | 70 |
| Exhibit P10, Resolution..... | 73 |
| Reasons..... | 75 |
| Opinion..... | 76 |
| Judgment..... | 79 |
| Notice of Appeal..... | 81 |
| Grounds of Appeal..... | 82 |

WRIT OF CERTIORARI.

NEW JERSEY, to wit:

The State of New Jersey to the Board of Commissioners of the City of Atlantic
(Seal) City, Greeting: We, being willing, for certain reasons, to be certified of a certain resolution passed by the Board of 10
Commissioners of the City of Atlantic City, in the County of Atlantic at a meeting thereof held on January 20, 1927, awarding to Riggs, Distler & Company, Inc., the contract for the installation of a heating and ventilating system in Convention Hall now in the course of erection and construction on lands purchased by said City for that purpose together with an ordinance of said City passed and approved October 18, 1923, entitled "An ordinance providing for the purchase of lands and premises 20
within the limits of the City of Atlantic City to be used as and for a site for the erection of a Convention Hall, building or buildings, and providing for the preparation of plans and specifications and advertisement for bids for the erection and construction of the Convention Hall, building or buildings, and providing the necessary cost thereof, and for the submission of the entire question of this ordinance to a referendum," and all subsequent ordinances and resolutions with the reasons and minutes 30
of the meetings at which the same were passed or adopted and all things touching and concerning the same including the specifications prepared by the architects and engineers for the erection and construction of said Convention Hall, the advertisement for bids and the bids submitted for the work of in-

stalling the said heating and ventilating system as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the ninth day of February, A. D. 1927, you certify and send, together with this writ, that therein may be done what, and according to the laws of this State, should be done.

Witness, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court, at Trenton, this 10 eighteenth day of January, A. D. 1927.
EDWARD J. RELLELIN,
Clerk.

EMERSON RICHARDS,
Attorney.

I allow this writ. Let it be sealed.
Each party to take depositions January 20 18, 1927.

By the Court
Chas. C. Black,
Justice of the Supreme Court.

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

MARIE T. SMITH,
Prosecutor,
v.
CITY OF ATLANTIC CITY,
Respondent.

On Certiorari.
Depositions.

10

Depositions taken before C. W. Myrose, Supreme Court Examiner, in the city solicitor's office, City Hall, Atlantic City, New Jersey, on Friday, February 20 eleventh, 1927, at one o'clock in the afternoon, in the presence of John C. Reed, Esq., appearing for Hon. Emerson L. Richards, attorney for the prosecutor, and Hon. Joseph B. Perskie, city solicitor of Atlantic City.

It is stipulated and agreed by and between Emerson L. Richards, attorney for the prosecutor, and Joseph B. Perskie, city solicitor for the City of Atlantic City, that the following facts shall constitute the return to be made by the City in the above entitled cause and shall also be used as part of the facts in the state of the case, and formal proof thereof is waived: 30

1. That the City of Atlantic City is a municipal corporation, and that Marie T .Smith is a citizen and resident thereof and a taxpayer therein.

2. That on May sixth, 1902, the City of Atlantic City, by popular vote, adopted the provisions of an act entitled, "An act relating to, regulating and providing for the government of cities," approved April third, 1902, and the various supplements and
10 amendments thereto.

3. That it thereafter adopted and is now governed by the provisions of an act of the Legislature approved April fifth, 1911, commonly called the Walsh Act.

4. That on October eighteenth, 1923, the City of Atlantic City adopted the provisions of an ordinance entitled, "An ordinance providing for the purchase
20 of lands and premises within the limits of the City of Atlantic City to be used as and for a site for the erection of a convention hall, building or buildings, and providing for the preparation of plans and specifications and advertisement for bids for the erection and construction of the Convention Hall, building or buildings, and providing for the preparation of plans and specifications and advertisement for bids for the erection and construction of the Convention Hall, building or buildings, and providing the necessary cost thereof, and for the sub-
30 mission of the entire question and of this ordinance to a referendum," a copy of which ordinance is attached to the return and marked Exhibit P1.

4. That in pursuance to the ordinance aforesaid, an election was duly had in the City of Atlantic

City, with the following result; that the voters, by vote of majority, approved 5802 and disapproved 2135.

5. That on December twentieth, 1923, the City of Atlantic City regularly adopted an ordinance entitled "An ordinance to authorize the acquirement of lands to be used for convention building or buildings, convention purposes and facilities, exhibitions, entertainments, receptions, lectures, addresses, as-
10 semblages and other like purposes," a copy of which ordinance is attached to the return and marked Exhibit P2.

6. That in pursuance to the ordinance last mentioned and marked Exhibit P2, the City did legally acquire the lands and premises referred to in said ordinance.

7. That on the seventh day of May, 1925, the City
20 of Atlantic City regularly adopted an ordinance entitled, "An ordinance authorizing the issuance of seventy-five thousand dollars (\$75,000) temporary bonds of the City of Atlantic City for the purpose of providing funds wherewith to defray the necessary costs and expenses for architects and engineers for the preparation of proper plans, specifications, drawings and details for the erection and construction of a Convention Hall, building or buildings on the site recently purchased by the City of Atlantic
30 City, and known as Rendezvous Park," a copy of which ordinance is attached to the return and marked Exhibit P3.

8. That thereafter, on the twenty-third day of December, 1926, the City of Atlantic City regularly

adopted the provisions of an ordinance entitled, "An ordinance authorizing the issuance of temporary bonds of the City of Atlantic City in the amount of six million, three hundred and thirty thousand dollars (\$6,330,000) for the purpose of temporarily financing a further portion of the cost of erecting and constructing a Convention Hall building in and for said City," a copy of which ordinance is attached to the return and marked Exhibit P4.

9. That thereafter the Board of Commissioners of the City of Atlantic City advertised and invited the submission of bids for the erection, construction, equipment and completion of said Convention Hall, and for separate divisions of the work included therein and among other divisions of said work for which bids were invited was the work of installing a system of heating and ventilating, including the labor and materials necessary to complete the installation thereof in accordance with the plans and specifications prepared by the architects and engineers aforesaid.

10. That in pursuance to legal authority the City of Atlantic City advertised for bids for the construction of the superstructure of the Convention Hall, which bids were to be returned on November fourth, 1926.

11. That all bids received on November fourth, 1926, were rejected.

12. That thereafter there was a re-advertisement and bids were received by the City Commissioners for the various branches of the work necessary for

the superstructure of the Convention Hall on December second, 1926.

13. That on November twelfth, 1926, the City of Atlantic City adopted revised plans and specifications for the construction of the superstructure of the Convention Hall, and authorized the advertising for bids made returnable December second, 1926, a copy of which revised plans and specifications is attached to and made part hereof, marked Exhibit P6. Also attached to and made part hereof is a copy of the first notice to the contractors, specifications, and so forth, marked Exhibit P5. Attached to and made part hereof is a copy of the base bid and addenda of Riggs, Distler and Company, and the base bid and addenda of John H. Cooney, Incorporated, marked Exhibits P8 and P9, respectively. Attached to and made part hereof is a copy of the resolution awarding the contract in question to Riggs, Distler and Company, marked Exhibit P10, passed on January twentieth, 1927. This resolution was presented January sixth, 1927, and passed final reading on January twentieth, 1927.

CHARLES H. FAY, SWORN.

Direct examination.

By Mr. Reed:

Q. Where do you reside, Mr. Fay?

A. Newark, New Jersey.

Q. What is your business?

A. Heating and ventilating contracting.

Q. How long have you been in that business?

A. About thirty years.

Q. Had any experience in public work?

A. Do it exclusively for the last twenty years.

Q. Are you familiar with documents, such as specifications and so forth, for heating and ventilating as put out by the Boards of Education in the cities and the counties?

A. Yes, sir.

10 Q. I hand you what purports to be a copy of the revised specification for the heating and ventilating of the Convention Hall in Atlantic City, Exhibit P6, and ask you to examine the clause which has to do with the type of traps to be used by the bidder and read that clause.

Mr. Perskie: I object to that.

Q. Read it privately and then I will ask you what
20 I want.

A. Under this paragraph number two?

Q. That is the one, I think.

A. Under the vacuum heating system. Addendum number three, under date of November twelfth, 1926, heating and ventilating specifications, Convention Hall, Atlantic City, New Jersey. Under paragraph two, "Under the vacuum heating system necessary apparatus, specialties and valves as manufactured by Dunham Company, Barnes and Jones,
30 or other approved standard makes, shall be considered as equal to Warren and Webster specialties, valves, traps, and so forth."

Q. Are you familiar with the Barnes and Jones, Dunham and Company and Warren and Webster specialties, valves and traps, and so forth?

A. Yes, sir.

Q. What sort of a trap do Dunham and Company make?

Mr. Perskie: That is objected to as immaterial and irrelevant.

Q. What sort of a trap is made by Dunham and Company?

A. A single diaphragm type.

Q. What sort of a trap is made by Barnes and Jones? 10

A. A single diaphragm type.

Q. How many types of trap do Warren and Webster make?

Mr. Perskie: I object to this entire line of questioning.

A. Two.

Q. What type of valves and traps, in your opinion, manufactured by Warren and Webster, is equal to Barnes and Jones' and Dunham Company's traps? 20

Mr. Perskie: That is objected to.

A. Their single diaphragm type.

Q. Have you read these specifications?

A. Parts of them, yes.

Q. Have you read enough of them that have to do with the instructions to bidders to be able to say whether or not there is any notice in these specifications that any one of the bidders would be permitted to deduct from his base bid any sum if Dunham Company traps, specialties and valves were used, or Barnes and Jones' valves and traps were used? Is there any notice? 30

Mr. Perskie: I object that he is not qualified. He admits that he has not read the specifications in their entirety and I object to it on the further ground that it is immaterial and irrelevant.

Q. Have you read all of the specifications that have to do with addenda, deductions, and so forth, and notice to bidders and general instructions to bidders?

10

Mr. Perskie: I make the same objection to that line of questioning.

A. Yes.

Q. Is there anything in the entire specifications, instructions to bidders, and so forth, that you have read, that would give all of the bidders notice that they could deduct if Barnes and Jones' valves were used or Dunham's valves were used?

20

A. No, there is not.

Q. In tendering a bid under these specifications, from your experience would you bid on the type of specialties, valves and traps manufactured by Warren and Webster equal to or of the same type as manufactured by Dunham Company and Barnes and Jones?

A. I would bid on the equal type, the same type.

Q. And that is what type?

A. That would be their number seven single diaphragm type.

30

Cross-examination.

By Mr. Perskie:

Q. What relation, if any, do you occupy with the Cooney Company?

A. None.

Q. Are you in any wise interested with reference to this particular award that was made in this case?

10

A. No, sir.

Q. Where are you employed at the present time?

A. I am secretary and treasurer of the John H. Nelles Company, heating contractors.

Q. Doing business where?

A. Irvington, New Jersey.

Q. And you are here at the instance of the Cooney Company to testify for them?

A. Yes, sir.

Q. You don't know this Marie T. Smith, do you? 20

A. I do not.

Q. Never met her?

A. No.

Q. Never heard tell of her?

A. No.

Q. Mr. Fay, you haven't read all of these plans and specifications, have you?

A. Haven't read all of them, no.

Q. You have only read so much of them as you concluded you thought you ought to read; is that 30 it?

A. No, no. I read as much of them as would be necessary to give me a clear understanding of what I would have bid on had I been bidding.

Q. Can you intelligently say that without knowing what was in that portion of the proposals or

specifications which you have not read, that that may or may not have affected your judgment in the matter?

A. It wouldn't have affected my judgment, because I read all that applies to that portion of the work.

Q. Did you read the plans and specifications on the original set of notice to bidders and plans and proposals which were returnable in November of 1926?

10 A. Only that section that applied to the addenda.

Q. Will you say that there was an addenda in the original plans and specifications?

A. No. That applies to this specification. That is correct.

Q. You say there was no addenda, then, to the original plans and specifications?

A. I wouldn't say that. That applies to this one here.

20 Q. You say the addenda as applied to the original. Do you now want to change that any—say there was no addenda to the original plans and specifications?

A. No, I won't say whether there was an addenda to the original or not.

Q. You don't know, do you?

A. I don't know.

30 Q. From your twenty or thirty years' experience that you have had, would you say that Warren and Webster specialties and Dunham Company's specialties and Barnes and Jones' specialties, as to these traps, were of equal value?

A. Yes, I would say they would be, of the same type.

Q. When you say of equal value, do you mean equal value from the standpoint of the service to which you subject these valves?

A. Yes.

Q. You don't necessarily mean the same value from the standpoint of cost, do you?

A. No.

Q. You know, as a matter of fact, that there is a difference in cost between Dunham Company, Barnes and Jones and Webster Company, don't you?

A. Well, they always vary, yes, but you don't know who is going to be high and low.

Q. So when the expression is used, "Will be regarded of equal value," you, as an engineer, draw the conclusion that the expression is used as of value for the purpose to which you intend to subject those valves; isn't that right? 10

A. Absolutely.

Q. Supposing you were hired by the City as an expert in a case just like this to determine who was the low bidder on a set of plans and specifications for heating and ventilating — 20

Mr. Reed: I make an objection to the supposition in this case and the speculation that the City Solicitor asks this witness to indulge in, on the ground that it is irrelevant, immaterial and incompetent, and tell the witness that he is not obliged to answer unless he is employed as an expert by the City.

(Question repeated.)

Q. —and supposing the proposed contractor, 30 without any obligation on his part at all in the premises, said that if you used any one of three valves, namely, either Warren and Webster, Dunham Company or Barnes and Jones, and you had reached the conclusion that for the service to which you were to subject them, they were of equal value, and you

could get any one of the three cheaper, which would you recommend?

A. Well, if I were the city engineer, employed as an expert, and had written the specifications, I would have written —

Q. I didn't ask you how you would have written them. Please answer my question.

A. Well, if I was employed by him to give him my advice as to the merits of the three of them, and they had been so specified, I would say take any of them.

Q. And if you could get any one of them cheaper than either one of the other two, you would feel morally and legally bound to recommend that they take the cheaper one, wouldn't you?

A. Well, I think you are going into a matter that is beyond my province to answer.

Q. You are not now partisan. You are now speaking as an expert.

A. If I were the contractor, I would naturally figure on using the one whose quotation to me was the lowest. That is competition. If they were so specified. If they weren't specified, I wouldn't use them.

Q. Is that your answer to my question, Mr. Fay? Is that all you want to say about it?

A. I think so, if I understood your question right.

Q. I don't want any misunderstanding about my question. My question to you is, having determined that type A, B and C valves, in this instance Warren and Webster, Dunham and Company and Barnes and Jones, were of equal value for the purpose to which they were to be subjected, and you could get a bid on any one of those three types of valves cheaper than the other two, wouldn't you be morally and legally bound to recommend the cheaper one, if they are all of the same value?

A. Well, I think you are asking me a question that is a little beyond my province to answer. It would put me in a hypothetical position that I wouldn't assume unless I was employed for that purpose.

Q. In other words, if we paid you to answer that way, you would answer it?

A. No, absolutely not.

Q. Then what do you mean by that answer?

A. From your statement there you tell me that I would answer for a price any question any way you would ask me, which is absolutely —

Q. I want to give you every opportunity in the world to answer intelligently, and I don't want by my form of question to mislead you. I am going to repeat it once more that if you conclude that type Warren and Webster valve, Dunham valve and Barnes and Jones are of equal value for the purpose to which you subject them, and you can get any one of the three cheaper than any of the two others, and they are of the same value for the purposes for which you are going to use them, why wouldn't you select the cheaper one?

A. From one standpoint I would.

Q. From what standpoint wouldn't you?

A. Well, that would depend on what position they were placed in. I would be assuming a position—in answering your questions I would be assuming the position of your architect, your designer.

Q. And your refusal to answer is because you have a feeling morally that you were brought down here for Cooney, as a witness for him, and don't want to testify to anything that might benefit the other side; is that right?

Mr. Reed: I object to that question.

A. No, sir.

Q. Did you look over the form of the bid submitted by Cooney Company?

A. Yes, as presented in that.

Q. Did you notice in that bid any statement that if you want Warren Webster valves add two thousand to the basic bid?

Mr. Reed: I object to the statement of what is in this bid because it is in evidence and that is the
10 best evidence.

A. I did.

Q. From your twenty years of experience, what does that statement mean?

A. Well, I shouldn't have made it myself.

Q. What do you think it means as it was made?

A. If my statement of opinion is of any value, I would think that inasmuch as there was two valves
20 manufactured by the same company, that the contractor who submitted that was trying to clarify the situation.

Q. What type of trap or valve do you draw the conclusion from that that Cooney did bid on?

A. He naturally bid on the number seven, the single diaphragm trap, that condition being set by your addenda.

Q. On what was the two thousand additional based?

A. Based on the number five.

30 Q. Also Warren and Webster?

A. Yes.

Q. And he concluded if they wanted that he would add two thousand dollars to his basic bid?

A. Yes.

Q. What was his basic bid, do you know?

A. Not from memory. I have seen it, but I couldn't tell you.

Mr. Reed: It appears to be \$510,800.

Q. And if he included the Warren and Webster trap that he had in mind, it would be \$512,800, wouldn't it?

A. No, I don't think so. The one he had in mind was the specified valve as near as he could incorporate it, I presume.

Q. He bid on that \$510,800, and if we wanted a Warren and Webster type, to add two thousand? 10

A. If he wanted a sylphon type.

Q. He didn't say so in the specification, did he?

A. No.

Q. He said, "If you want Warren and Webster, add two thousand?"

A. No, he didn't say that. He said, "If you want Warren and Webster number five, add two thousand."

Q. So that if we wanted a Warren and Webster type of valve, his basic bid was increased two thousand dollars, wasn't it? 20

A. No; if he wanted a Warren and Webster sylphon type, number five type.

Q. I show you what has been marked in evidence here as a copy of his bid, which says Warren and Webster Company number five traps. Where do you get sylphon there?

A. Well, that is the figure number of that type of valve.

Q. If you wanted that type of valve you would
30 have to add two thousand dollars to his basic bid?

A. Yes, sure.

Q. Did you see the bid of Riggs-Distler?

A. Yes.

Q. And the basic bid of that is \$512,000, isn't it?

A. I can't tell you from memory.

Q. Assuming that to be a fact —

A. Yes.

Q. And he said if we wanted to use Dunham valves we were to deduct three thousand dollars?

A. Yes. Some amount of deduction.

Q. And if that be a fact you deduct the three thousand from the five hundred and twelve and the basic bid would be five hundred and nine?

A. No, I wouldn't take it that way at all.

10 Q. I didn't ask you that. Isn't that a fact, if you deduct three thousand from five hundred and twelve, his basic bid would be five hundred and nine?

Mr. Reed: I object to that question, and if Mr. Perskie wants to testify, let him testify.

A. Well, if you deduct three thousand from that amount, that is what it would be, those figures.

20 Q. You won't even admit if you deduct three thousand from five hundred and twelve it equals five hundred and nine, will you?

Mr. Reed: I object to the form of the question as being improper.

A. That is what I say, if that is the way you deduct it, and that is the figure, all right, but I won't say anything about whether the traps had anything to do with it or not.

30 Q. If Cooney Company's basic bid was five hundred and ten thousand, eight hundred dollars, and if Cooney put a provision in his proposal that if we wanted a certain Warren and Webster type valve, add two thousand dollars, and the City concluded to use that type of valve, certainly that basic bid would be \$512,800, wouldn't it?

A. The two figures added together would probably be that, but they don't have to take that.

Q. I didn't ask you that. I said if they took it?

A. If they took it they would have to pay for it, surely.

Q. If in the Riggs-Distler bid the basic bid was \$512,000 and the City concluded to use Dunham valves and were given the privilege of deducting \$3000, wouldn't their basic bid be \$509,000? 10

A. If you deduct those two figures it might be.

Q. Can you offer any evidence which will show any combination of any type of valves to be used in this case which will make the bid less than \$509,000?

Mr. Reed: I object to the form of the question as being improper cross-examination and an improper question.

A. Well, I didn't look over them for combinations, but the three types of valves were mentioned in the specification. From the contractors' standpoint, the contractor would use any one of the three. I don't see where you ask him to give you separate bids on those three valves. If I were the contractor, unless you asked for bids on those valves, I wouldn't consider I had any legal right to bid on them. 20

Q. You are now speaking as a contractor?

A. As a contractor.

Q. I am speaking to you as an expert heating man, and I want you, if you can, to explain how you can take either the Warren and Webster valve or the Dunham valve or the Barnes-Jones valve or any combination of the three under the plans and specifications, and reach a final result which will make the basic bid less than \$509,000. 30

Mr. Reed: I object to the question as being improper cross-examination.

A. Well, I don't know whether I ought to be testifying as an architect or engineer. I am a licensed engineer, and I am not brought here to testify as to my opinions as to what this situation might be as far as the right to deduct or add.

Q. That is your answer to that question?

10 A. That is a function outside of my province, I believe. You are asking me to determine legal questions.

Q. May I ask you, in order that I may not have any misunderstanding, just what you do intend to testify, or just what you think you are to testify to in this case?

Mr. Reed: I object to the question because the gentleman has already testified.

20 A. That is the way I would have answered it. I testified on direct examination.

Re-direct examination.

By Mr. Reed:

Q. The Barnes and Jones valve and trap, and the Dunham trap valve, and the Warren and Webster number seven are all diaphragm traps; is that right?

30 A. Single diaphragm trap.

Q. A sylphon trap is an entirely different valve, is it not?

A. It is a trap composed of several members. Instead of one member, it is several members, five, six, four.

Q. So that Cooney's base bid would be based upon Warren and Webster's number seven, Dunham and Barnes and Jones; is that right?

A. Yes.

By Mr. Perskie:

Q. When you say they made their bid on a certain type do you testify to that from your own knowledge or from what some representative of 10 Cooney told you?

A. Well, that is basing my knowledge on what would be the common, accepted custom and what I would do as a contractor.

Q. And you assume that because you would do that, that Cooney did it; is that right?

A. Well, I presume that is a fair statement.

Q. Do you answer yes or no?

A. Yes.

20

AMBROSE J. WALSH, SWORN.

Direct examination.

By Mr. Reed:

Q. Where do you live, Mr. Walsh?

A. South Orange, New Jersey.

Q. What is your business?

A. Heating and ventilating contractor.

Q. With whom do you work?

A. John H. Cooney, Incorporated.

Q. Are you an officer in that company?

A. Vice-president and secretary.

30

Q. As such officer of the Cooney Company did you examine the specifications, revised, Exhibit P5, for this ventilating and heating system at the Convention Hall?

A. I did.

Q. How long have you been in this business?

A. Seventeen years.

Q. Is it your special province to make the bids in answer to municipal tenders?

10 A. We do.

Q. Did you read all of the revised specifications in this case?

A. I did.

Q. Is there anything in the revised specifications or in the advertisements issued by Atlantic City that advises the bidders for the heating and ventilating contract that if the City decides to use Dunham valves and traps, Barnes and Jones valves and traps, that they could deduct any sum from the base bid that might be made?

20

A. No.

Q. Are you familiar with the type of valves manufactured by Barnes and Jones?

A. I am.

Q. What type do they manufacture?

A. Diaphragm type.

Q. Are you familiar with the type of valves and traps manufactured by Dunham and Company?

A. Yes.

30 Q. What kind of traps and valves do they make?

A. Diaphragm type.

Q. Are you familiar with the type of traps and valves manufactured by Webster?

A. I am.

Q. What type of valve does Webster manufacture that is equal in construction to Dunham valves and traps and Barnes and Jones valves and traps?

A. Webster number seven.

Q. What other type of valves and traps does Webster manufacture?

A. Number five, designated as the sylphon type.

Q. In what way is that different from the Dunham type and Barnes and Jones type and Webster number seven. Just explain wherein the sylphon type differs from these other valves that are specified in this tender.

A. The sylphon type is an entirely different construction from the diaphragm type. It has several members and is unique in construction. 10

Q. From the specifications put out by the City of Atlantic City, and contrasted with your experience during the past seventeen years, what type of valve and trap under this specification number two would you say the City wanted you to bid on?

Mr. Perskie: That is objected to as irrelevant and immaterial. 20

A. Number seven.

Q. Webster?

A. Inasmuch as there was nothing in the specifications for the contractor to be advised otherwise.

Q. You say that from these specifications as they now appear in evidence in this case, that Warren and Webster trap number seven would be equal and the same style of operation as Dunham and Company and Barnes and Jones trap? 30

A. I would.

Cross-examination.

By Mr. Perskie:

Q. You say you have had considerable experience in this type of work?

A. I do.

Q. Reading specifications and the like?

A. I do.

10 Q. You have heard of Lockwood, Greene and Company, the architects and engineers in this case, haven't you, before?

A. I have.

Q. You know them to be a reputable firm, don't you?

A. Yes.

Q. If in the preparation of your proposal—I understand you prepared it; is that right?

A. Yes.

20 Q. You understood that all the City was looking for was, if it wanted a Warren and Webster valve, number seven, why did you put in your bid a Warren and Webster number five?

A. Because the engineer suggested substitutions.

Q. How did you get that suggestion?

A. It emanated from my own mind.

Q. Sir?

A. The specifications gave the contractor the right to make such suggestions.

30 Q. And it was in pursuance to that suggestion that you put in this Warren and Webster number five; is that right?

A. Yes.

Q. Did you bid on Dunham valves in this thing?

A. I bid on the specifications.

Q. Did you bid on the Dunham type of valve in this case?

A. I bid on what was specified.

Q. There were three specified. It was specified that you could use Warren and Webster, that you could use Dunham and that you could use Barnes and Jones. What type of valve did you calculate on when you made your proposal?

A. I calculated on using any one of the three.

Q. So it is justifiable to reach the conclusion that you were calculating on Dunham valves, too; isn't that right? 10

A. No such thing.

Q. If you were bidding on any one of the three, why isn't that so?

A. I could use any one of the three that were specified.

Q. I didn't ask you what you could use. I asked you what valve you were calculating on when you made up your figures as a result of which you put in your bid.

A. I don't remember. 20

Q. How many proposals have you made since you made this particular one?

A. I suppose about fifty.

Q. Of the magnitude of half a million dollars and more?

A. Some almost equal, yes.

Q. And you don't know now on what type of valve you bid, whether it was the Warren and Webster, Dunham or Barnes and Jones; is that right?

A. You want to know what quotation I used in making up our proposal; is that right? 30

Q. No, sir. I wanted you to tell me what type of valve you were calculating on when you made up your figures as a result of which you put in your bid.

Mr. Reed: I object to that question because the

witness has already said that he bid on the specifications, which included the use of Barnes and Jones, Dunham and Warren and Webster. He has already answered the question.

(Question repeated.)

A. I don't remember what price we calculated in our estimate. That is three months ago.

10 Q. I didn't ask you what price. I asked you what type valve?

A. I don't remember.

Q. You knew you were going to come to testify in this case?

A. I did.

Q. You remember that, don't you?

A. I certainly do.

Q. And you remember that you lost out in this contract, at least, so far?

20 Mr. Reed: I object to that. It is no part of this issue.

A. I do.

Q. And knowing that you were coming here to testify in this case, you are not even prepared to say what type of valve you were calculating on when you made up your bid?

30 Mr. Reed: I object to that on the ground that the witness has already fully answered the question.

A. It is of no consequence as to what we may have calculated on using in our proposal. We had the privilege of selecting any one of the three.

Q. And you might have selected Dunham valves?

A. It is possible.

Q. If you selected Dunham valves, your basic bid of \$510,800 would have remained the same, wouldn't it?

A. Absolutely.

Q. And the bid of Riggs-Distler under Dunham would have been \$509,000, wouldn't it?

A. I don't say their bid would be that at all.

Q. They said that their basic bid was \$512,000, 10 didn't they?

A. Yes.

Q. They said if we wanted to use Dunham valves, deduct three thousand dollars. Wouldn't that make their basic bid \$509,000 if they used Dunham valves and that was accepted by the City?

A. No, it wouldn't make their basic bid \$509,000.

Q. Why do you say that?

A. The specifications called for certain prices which would be the basic bid. Outside of that there 20 is no basic bid.

Q. That is your answer to that question?

A. It is.

Q. You said a while ago that there was nothing in the proposals or the specifications which called upon you to make either additions or deductions; is that right?

Mr. Reed: I object to that question on the ground that it does not correctly state the answer that the 30 witness gave.

Q. Did you say that as a result of having read these proposals and specifications that you reached the conclusion that you were not called upon in making your bid to make any deductions or additions?

Mr. Reed: I object to that question because it is not in accordance with what the question was or what the witness testified to.

A. I refer to the bids.

Q. That is your answer to that question?

A. Yes.

10 Q. But whatever conclusion you reached, you don't deny that you put in your proposal, that if the City wanted Warren and Webster number five, they should add two thousand dollars to your basic bid of \$510,800, do you?

Mr. Reed: Don't answer that. I object to that question because it is not the best evidence of what his bid was, and his bid is in evidence and it is the best evidence, and he is under no legal obligation to answer it.

20 (Question repeated.)

(No answer.)

Q. Why don't you answer?

A. I refer to the specifications that are in evidence. Why should I testify about something that is already in evidence?

30 Mr. Reed: Do you refer to this bid?

A. I presume that is what he is referring to, yes.

Mr. Reed: See whether that is what you are referring to.

A. I refer to the bid.

Mr. Reed: That speaks for itself.

PROSECUTOR RESTS.

RESPONDENT'S TESTIMONY.

10 WALTER W. COOK, sworn.

Direct examination.

By Mr. Perskie:

Q. What is your name?

A. Walter W. Cook.

Q. What is your occupation or profession?

A. Architect.

Q. With whom are you associated?

A. Lockwood, Greene and Company.

Q. Who are they?

A. Lockwood, Greene and Company are engineers of Boston, Mass.

Q. How long have they been in the architect and engineering business?

A. Over eighty years.

Q. They do work all over the country?

A. Yes.

Q. Do you hold any official position with them?

A. I am their chief architect.

Q. You are the chief architect of Lockwood, Greene and Company?

A. Yes.

Q. Did you have supervision of the plans and

specifications with reference to the superstructure of the Convention Hall of Atlantic City?

A. Yes, sir.

Q. Did you prepare or cause to be prepared the specifications for the heating and ventilating of the superstructure of the Convention Hall?

A. Yes, sir.

Q. The first plans and specifications which were approved by the City and on which bids were invited to be returned were on November fourth, 1926?

A. Yes, sir.

Q. Those bids were all thrown out, weren't they, rejected by the City?

A. Yes, sir.

Q. And there was a re-advertisement for the construction of the superstructure; is that right?

A. Yes, sir.

Q. Is the copy which has been offered here in evidence, bids on which were invited to be returned on December second, 1926, the document containing the specifications for the heating and ventilating for the superstructure of the Convention Hall?

A. Yes, sir.

Q. How did the plans and specifications differ? How did the documents containing the specifications for the heating and ventilating of the Convention Hall as adopted by the City for the bids received on November second, 1926, differ from those on which bids were invited on November fourth, 1926?

A. By the addition of addendum number three.

Q. Is that the addendum now attached to this particular specification under date of November twelfth, 1926?

A. It is.

Q. Do you know how that came about?

A. Yes, sir.

Q. Will you please explain it?

Mr. Reed: I object on the ground that it has no materiality to the issue.

A. It was issued to get further information on the bids and reduce the cost of the work to the City, and we particularly mentioned definitely articles which we would accept which were not mentioned before.

Mr. Reed: I move that the answer be stricken because it is not material to the issue. 10

Q. Directing your attention particularly to the vacuum heating system with reference to the type of specialty valves to be used, what type was provided for in the original specifications?

A. This Warren Webster type was the only type mentioned.

Q. In addendum number three you enlarged it so that one bidder could use either Warren Webster, Dunham Company or Barnes and Jones Company?

A. Correct.

Q. When you used the expression "Shall be considered as equal to Warren Webster specialties," and so forth, just what did you mean by that?

Mr. Reed: I object on the ground that that is a matter of law and this witness cannot testify as to what he meant. It is for the Court to say.

A. It was written to open up competition to the other two types covered, in order to reduce the cost. 30

Mr. Reed: I move that the answer be stricken, as an attempt to construe the written specifications, which is the province of the Court.

Q. Was the expression "Of equal value" based on the use to which the valve would be subjected or on the cost of the valve?

Mr. Reed: I object on the ground that it is an attempt to construe a perfectly plain written instrument, and that is in the province of the Court.

10 A. Equal as to service.

Mr. Reed: I move to strike the answer on the same ground.

Q. Mr. Cook, do you know how many bidders there were altogether with relation to the heating and ventilating for the Convention Hall?

A. Four that submitted figures.

Q. Do you recall their names?

20 A. I think I can name them all.

Mr. Reed: I object on the ground it is not material to the issue.

A. H. E. Crook Company, the Riggs-Distler Company, John Cooney and the Shevlin Engineering Company.

30 Q. Are you in a position at this time to say with referring to the records, approximately what was the difference on the basic bid between the low and high among those four bidders?

Mr. Reed: I object on the ground it is immaterial. The only material bids are in evidence in this case.

A. I only remember the two low bidders as to actual figures.

Q. You can't give us approximately the difference between the highest and the lowest among the four?

A. Would only be guessing.

Q. Did you make an analysis of those bids?

A. Yes, sir.

Q. Did you make a recommendation to the Commissioners as to the result of your analysis?

A. I did.

Q. How long have you been an architect your self? 10

A. Over twenty years.

Q. How much experience have you had with heating and ventilating?

A. Well, I think I have had more than the average, as my work extends all over the United States.

Q. During how many years did you say you have been with Lockwood and Greene?

A. I have been with Lockwood and Greene over eight years.

Q. During that time have you had many contracts 20 of this type, of heating and ventilating?

A. Yes, sir.

Q. Thoroughly familiar with that type of work?

A. Yes, sir, I consider I am.

Q. How did you reach the conclusion that —

Mr. Reed: Are you going to put him on as an expert now?

Mr. Perskie: Yes. 30

Mr. Reed: I would like to cross-examine him first.

By Mr. Reed:

Q. How many municipal convention halls has the

Lockwood-Greene Company prepared the plans for and supervised the erection thereof?

A. We have never had a municipal convention hall before. In fact, there are very few in the country.

Q. How many municipal buildings of any kind?

A. We have had considerable.

Q. How many? Name them.

A. I can name the high school of Spartansburg, 10 South Carolina.

Q. What was the cost of that building?

A. That building cost about \$200,000.

Q. There is quite some difference between that and a ten-million-dollar concern, isn't there?

A. It is a small job, that particular one.

Q. What other municipal contract has Lockwood, Greene and Company ever had?

A. We haven't had any large municipal contracts.

Q. Your business is a purely private business.

A. No, sir, we accept all kinds. 20

Q. I know, but you have largely been engaged in private business, haven't you?

A. The majority of our business has been that, yes, sir.

Q. You are not an engineer, are you?

A. I am inasmuch as an architect is.

Q. No, but you are not an engineer? You are an architect?

A. I am an architect.

Q. Isn't there a difference between an engineer and an architect? 30

A. Yes, sir.

Q. What are you going to testify here as, an architect or as an engineer?

A. As an architect in charge of this work.

Q. Isn't the heating business, ventilating business, a science in itself?

A. We have specialized engineers for each department.

Q. Where is your specialized engineer for this heating and ventilating business?

A. He is in Boston.

Q. Is he here?

A. No, he isn't here.

Q. You are just pinch-hitting for him?

A. No; I have charge of his work. I supervise his work. 10

Q. How could you supervise his work if it is a special business?

A. I supervise it. I am in charge of the whole job.

Q. You don't design it and say what shall be done with it, do you?

A. I have a good deal to do with it, yes, sir.

Q. Do you do it?

A. Yes, sir.

Q. What do you employ him for? 20

A. He works out the details and he is a specialist in that particular line.

Q. And you are not?

A. No, sir.

By Mr. Perskie:

Q. From your experience in this type of work I want you to tell how you reached the conclusion that Riggs-Distler Company was the lowest bidder. 30

Mr. Reed: I object to that on the ground that that is for the Court to determine under the law of this case and the law of this State, that this man has no right, by reason either of his qualifications as an expert or his employment by the City, to make such determination.

A. It was made after consultation with our engineer and from our past experience in the award of contracts.

Q. What reasoning did you go through to reach that result?

A. Very careful study of the figures and the materials and the specifications, and in our judgment the award was the only one that could be made.

10 Q. Is there any combination of the three types of valves Warren and Webster, Dunham or Barnes and Jones, that you could use which would make a lower net result than \$509,000?

Mr. Reed: I object because of the fact that the witness' answer calls for his conclusion and that it is not in his province, either as an architect or as some one batting for the specialist, to make any such conclusion. It is a matter for the City Commissioners to determine. It is a matter of law.

20 A. No, sir, there is not, after careful analysis.

Q. Did you receive any complaint from Cooney Company or from any other of the bidders that they did not in any wise understand the plans and specifications on which they were invited to bid?

A. No, sir, not from any of them. No questions asked.

Cross-examination.

30 By Mr. Reed:

Q. You are the proud author of these specifications; is that right, Mr. Cook?

A. I had general supervision.

Q. Are you the author or are you not? Did you draw them?

A. I supervised them.

Q. What does that mean?

A. It means the usual method of an architect supervising specifications.

Q. Will you please explain that to me?

A. It is quite a long story. It means going into all classes of work, the type boilers, the type radiators, how they are hung, the type valves, and while I am not an engineer, I am familiar with it.

Q. Did you draw these specifications? 10

A. Not myself. I supervised the writing and they were not written until I approved them.

Q. You did approve them and tell them to write them and they were written under your direction; is that right?

A. They were written under my direction and accepted under my approval.

Q. You approved them?

A. Yes, sir.

Q. Is there anything in these specifications at any 20 point that advises all persons who might bid that if they used the Dunham valves and traps that they might make a deduction from their base bid? Is there any notice to all of them to that effect?

A. An addenda is a notice of that kind.

Q. Is there any notice in these addenda that you prepared?

A. That is what an addenda is issued for.

Q. Show me where it is.

A. An addenda itself, without any detail. 30

Q. Where is it?

A. That is an addenda you have your hand on.

Q. Show me where in your addenda there is any notice.

A. An addenda is always issued to a contractor to allow him to give additional prices and information to get that result.

Q. Is there anything in this addenda that you gave to the contractors advising them that if Dunham valves and traps were used they might make a deduction?

A. That is the reason it was issued.

Q. Is there anything in there?

A. It speaks for itself.

Q. Read it and say whether there is or not.

A. The whole addenda speaks for itself for itself.

10 Q. Is there any notice in there that they might

Mr. Perskie: I object to any argument between you and the witness.

Q. Is there any notice in the specifications, then? Can you show that to me?

A. I claim that is the notice, the addenda is the notice.

20 Q. Where is it?

A. The addenda itself.

Q. Where in this addenda do you see that they might deduct from their base bid any sum if they use Dunham valves?

A. It calls for it right there, for additional prices.

Q. Where is it?

A. All through here. It says, "Alternate prices on boilers, boiler settings and vacuum pumps, submitted in proposal, will be given full consideration in awarding the contract."

30 Q. Where does it says anything about Dunham valves and traps?

A. We open up the specification, which invites a bid.

Q. We understood that, but where does it say that anybody who might bid—

A. An addenda is an invitation to bid.

Q. I am asking you where in this addenda they are notified that if Dunham valves are used the City will permit a reduction in the basic bid?

A. I can't change my answer.

Q. Is there anything in it which says so?

A. I refuse to answer except that the addenda speaks for that. That is an invitation.

Q. I will read the addenda and ask you to point out to me wherein they have a right to deduct. This is all of the addenda, is it? Your claim is, as I understand it, Mr. Cook, that this addenda marked number three contains in itself notice to the people who might bid that they can deduct from their basic bid any sum in case Dunham valves are used rather than Barnes and Jones or Warren and Webster; is that right? 10

A. Yes, sir; it is required.

Q. That is all I want you to say.

A. Being part of the specifications. 20

By Mr. Perskie:

Q. And you say that because you say there is another provision in the specifications?

A. It is required in the specifications and it ties the two together.

Q. Where is there an provision in the specifications which requires that?

A. On page two, the general description of the work it says, "If the substitutions of material 30 equally as good are offered at the time the bids are submitted they will be considered, and in the event of the owner wishing to accept the substitute, arrangements will be made for the change before a contract is entered into."

ALEXANDER H. NELSON, sworn.

Direct examination.

By Mr. Perskie:

Q. What is your name?

A. Alexander H. Nelson.

10 Q. What is your occupation?

A. Civil engineer.

Q. How long have you been an engineer?

A. Thirty years.

Q. What is your present employment?

A. Engineer for Atlantic County and associated engineer with Lockwood, Greene and Company.

Q. Are you familiar with the plans and specifications for the heating and ventilating of the Convention Hall as finally adopted by the City?

20 A. I am.

Q. Directing your attention to addenda number three, issued under date of November twelfth, 1926, as to the type of valves or traps, is there any one combination of either Dunham Company, Barnes and Jones or Warren and Webster specialty valves that you can make up from the bids of either Riggs, Distler and Company or John Cooney Company Incorporated, and get a lower net figure than \$509,000?

30

Mr. Reed: I object to the question on the ground that it calls for this witness' conclusion as to a matter of fact, and that is a matter of law for the Court to decide from what appears were before the Commission and the evidence in this case.

A. There is no such combination.

Q. In other words, \$509,000, according to your judgment, represents the lowest bid from all the figures submitted by any of the contractors on this particular phase of the work?

A. It does.

Cross-examination.

By Mr. Reed:

10

Q. Are you familiar with these specifications?

A. Yes.

Q. Are you familiar with addenda three?

A. Yes.

Q. By the way, you are not a mechanical engineer, are you?

A. No, civil engineer.

Q. A heating engineer is more or less a mechanical engineer, isn't he?

A. I am not qualifying as a mechanical engineer. 20

Q. You are not a mechanical engineer or heating engineer?

A. I am only qualifying on knowing what the plans and specifications show.

Q. In addenda number three do you find any notice to people who might bid, all of the public, that if the City decided to use Dunham and Company valves, the basic bid could be reduced?

A. Yes.

Q. Where do you find that in addenda three? I am asking you about addenda three, not page 2. I am asking you about addenda three. 30

A. Well, you can't take a —

Q. There isn't anything in there, is there?

Mr. Perskie: Let him answer.

Q. You can't find it in addenda three, but you do find another provision in the contract, at page two, which you say permits that deduction; is that right?

A. Yes.

Q. That is what you want to say? Let us see what that is. Is that your answer?

A. Yes. Addenda number three revised the main body of the specifications and refers to them.

10 Q. Your explanation you want to make is to call my attention to this?

A. Yes.

Q. Will you read it?

A. "The contractor must submit a bid covering every item that is specified, and should he wish to suggest any substitute that he considers equal in value and efficiency with the one specified, he shall state what the item suggested is, and what the difference in cost is, if any."

20 Q. That, you say, gives him the notice that he may deduct if the City decides to use the Dunham valve; is that right?

A. That gives him notice that he must name a price on any of these three valves that he proposes to use.

Q. That is your construction of that?

A. Yes, sir.

30

ANNE M. DELANEY, SWORN.

Direct examination.

By Mr. Perskie:

Q. Miss Delaney, what position do you hold in the City?

A. Assistant city clerk. 10

Q. Do you have the records of the proceedings of the City Commissioners before you?

A. Yes.

Q. Will you please direct your attention to the meeting of the Commissioners held under date of December second, 1926, and give us a detailed statement of the bids that were submitted for heating and ventilating for the superstructure of the Convention Hall?

A. Shall I read the bids? 20

Q. Give me the names of the firms and their basic price number one, and so on.

Mr. Reed: I object to reading it from the minutes. I have the originals here.

Mr. Perskie: This only refers to the bid of Riggs, Distler and the bid of John H. Cooney. I want the other two bids.

30 Q. In addition to the bids of Riggs, Distler and Company and John H. Cooney, Incorporated, how many other bidders were there?

Mr. Reed: I object on the ground it is not material to the issue.

- A. There are two others.
 Q. Who are they?
 A. H. E. Crook Company, Incorporated.
 Q. What was the price under item number one, the total lump sum?
 A. \$533,900.

Mr. Reed: I object to that answer and move it be stricken on the ground it is not material.

10

Q. What were the other prices mentioned by that concern?

A. Price number two?

Q. Yes.

A. None. Price number three, \$3570.

Q. Is that deduct or add?

A. Deduct. Price number four, \$40,400. Price number five, \$23,900. Price number six, \$114,850. Price number seven, \$33,700. Then there was some

20 more to that. Shall I read it?

Q. That is sufficient for the purpose I wanted. What was the next bid?

A. Shevlin Engineering Company.

Q. What was the total price under lump sum?

A. \$525,000.

Q. Then were there alternates?

A. Yes.

Q. Just read a few of those.

30 A. Price number two, \$7923. This is deduct. Number three, \$2979. Number four, \$35,370.

Q. And some more deductions in addition?

A. Yes.

It is stipulated and agreed by and between counsel for the respective parties that this record may be used on the argument of the rule to show cause why a mandamus should not go, as well as certiorari.

I hereby certify that the foregoing is a true and complete transcript of the depositions taken before me in the before-entitled cause. 10

C. W. MYROSE,

Supreme Court Examiner.

 EXHIBIT P5.

GENERAL DESCRIPTION OF WORK

The Boiler Plant occupies the depressed portion 20 of the basement near the corner of Pacific and Georgia Avenues. Fuel and supplies will be received directly from the sidetrack on Georgia Ave.

FUEL. Mexican fuel oil will be burned. This will be received in tank car lots and stored at the building in two steel tanks of approximately 23,500 gallons each. These tanks will be buried beneath the platforms and entirely outside the main building line. They will be cut off from the boiler room or other parts of the building by concrete walls and 30 other means satisfactory to the Fire Underwriters.

OIL BURNING SYSTEM. The oil pumps and heaters will be located in a room shut off from other parts of the basement and adjacent to the space occupied by the storage tanks. Oil will be supplied from the pumps and heaters to the boilers

with a return circulation pipe back to the storage tanks.

BOILERS. Three boilers will be installed, one of approximately 270 H. P. rated capacity and two of 610 H. P. each. The smaller boiler will supply all the steam required during the summer months and for the early fall and late spring seasons. The other boilers will be used at other times depending upon the weather and the use of the building. The full boiler capacity operating at high rating will be required when the building is used with a capacity audience in the main Auditorium in the winter time.

BOILER SETTINGS. The boiler settings will be built with solid walls, of fire brick lining inside and red brick outside. The floors of the furnaces will be air cooled in order to protect the waterproofing of the concrete floor underneath.

STACK AND FLUE. The smoke flue will be built of 3/16" steel plate with insulating covering and will connect from the boiler uptakes to the base of the stack.

BOILER AUXILIARIES. Three Duplex piston pattern boiler feed pumps are provided. These pumps vary in size to correspond to the boiler sizes. There are two large pumps 12" x 8" x 12" and one small pump 7½" x 5" x 6". Cast iron feed water heater will receive all the returns from the heating system and other points of the building together with the city water make-up. This water will be heated by the exhaust steam from the feed pumps and fed directly to the boilers. The heater is designed with an extra large storage capacity to prevent possible waste of the hot water returns in case they come in irregular quantities.

HEATING. The heating of the building is accomplished, throughout, by means of a two pipe vacuum system.

A high pressure main carrying approximately 100 lbs. pressure is run around the building in the Ground Story. Steam from this main is reduced at Boiler Room and at Pump Rooms No. 1 and No. 2 for the direct radiation and at other points as shown for the air tempering heaters. Separate heating mains with main valves are provided for Stores, Ball Rooms, Main Lobby, Stage and Dressing Rooms.

Low pressure condensation returns are piped to vacuum pumps in Pump Rooms No. 1, No. 2 and No. 4 and discharged to feed water heater.

A high pressure supply main is run along the sides of building in Ground Story with valved connections for Exhibition purposes. Returns are piped to Receiver Pumps in Pump Rooms No. 1 and No. 2 and returned to Feed Water Heater.

High pressure drips are piped to Receiver Pumps in Pump Rooms No. 1 and No. 2 and to feed water heater in Pump Room No. 4.

VENTILATION. Ventilation is provided by mechanical means for the Garage, Main Convention Hall, Ball Room and, to a lesser degree, for other parts of the building, the various systems being listed in the Ventilation section of this Specification.

Automatic control for the air tempering heaters and remote control of fan motors and dampers is provided for, the latter controls being, for the most part, in the Engineers' Room.

A remote temperature indicating system, with indicators principally in the Engineers' Room is provided under another contract.

DIMENSIONS AND DEFINITE LOCATIONS. The figures and writings upon the drawings showing or indicating dimensions shall be taken instead

of measurements of a drawing by scale, and no measurement of a drawing by scale shall be used as a dimension to work by.

The plans are not intended to show exact locations of piping, valves, etc. These locations must be determined at the building with due regard to piping of other trades, head room, building construction, equipment, electric wiring, lights, receptacles, etc., and run subject to the approval of the
10 Architect. The Contractor shall take all field measurements and shall be responsible therefor. Care must be taken with regard to expansion, vibration and proper pitching of mains. In long runs dripped relays shall be made where required or directed for maintaining desired head room.

• **GUARANTEE.** The Contractor shall guarantee that his work when finished, will form a complete and satisfactory system ready for successful operation by the Owner. If in the opinion of the Contractor there is any feature of the plans or specifications which if strictly followed out would prevent
20 him from giving such guarantee he shall at once notify the Architect, who will issue additional instructions as necessary.

SPECIFICATIONS AND PLANS. A complete set of Architectural Plans are on file at the following offices:

- Lockwood, Greene & Co., Inc., 24 Federal Street, Boston.
- 30 Lockwood, Greene & Co., Inc., 100 East 42nd Street, New York.
- Alexander H. Nelson, Associated Engineer, 741 Guarantee Trust Building, Atlantic City, N. J.

The Heating and Ventilating Specifications, the plans listed herein and the Architect's plans, on

file as above, form the complete list of plans and specifications for the heating and ventilating contract.

CONTRACTOR'S PLANS. The Contractor will be required to make complete working plans of the piping and duct systems and of equipment such as smoke flue, fan supports, etc. These plans shall be submitted to the Architect for approval in accordance with the General Conditions. Equipment drawings shall also be submitted for all apparatus
10 and approval obtained before the apparatus is ordered.

APPROVAL OF MATERIALS. All materials and apparatus used on the work shall be subject to the approval, in writing, of the Architect, this approval being obtained before the contract is signed. Where two or more materials or makes of apparatus are specified, the Contractor shall state which material or make he proposes to use. The Contractor shall be required to use the particular materials approved
20 in this manner, without change, after the contract is signed.

OFFICE. Contractor shall provide and maintain on the premises an acceptable office space in which his plans can be displayed and kept in order. Suitable electric lighting shall be provided and maintained by arrangements with the General Contractor. Telephone connection shall be provided and maintained.

PROGRESS OF WORK. Contractor shall as far
30 as possible commence his work in the head house section and shall complete that portion of the work as soon as possible. Contractor shall make such progress with his work as will allow the General Contractor to complete the entire work on or before July 15, 1928.

ALTERNATE BIDS Every item mentioned in the following specifications is intended to represent the materials that will be demanded.

The Contractor must submit a bid covering every item that is specified, and should he wish to suggest any substitute that he considers equal in value and efficiency with the one specified, he shall state what the item suggested is, and what the difference in cost is, if any.

- 10 If the substitutions of material (equally good) are offered at the time the bids are submitted they will be considered; and in the event of the Owner wishing to accept the substitute, arrangements will be made for the change before a contract is entered into.

If no items are suggested as substitutes at the time the bids are submitted, then no deviations will be allowed from the materials specified.

20

CITY OF ATLANTIC CITY
BOARD OF COMMISSIONERS
INSTRUCTIONS TO BIDDERS
SEALED BIDS OR PROPOSALS FOR THE
HEATING AND VENTILATING

- For the Convention Hall in Atlantic City, N. J., as shown by accompanying plans and described by attached specifications, with the name of the person or corporation making the bid (which shall be submitted on printed blanks hereto annexed and enclosed in printed envelopes furnished with the plans and specifications) will be received by the Board of Commissioners when called for during a meeting of said Board to be held at its meeting place in the City Hall at the hour of 3.00 P. M., Thursday, November 4, 1926, and immediately thereafter, at said time and place during a session of said Commission-
- 30

ers, the bids will be publicly opened and read, and the award of the contract, if awarded, will be made by resolution of said Commissioners as soon thereafter as practicable.

The person or persons or body corporate to whom the contract may be awarded will be required to execute and deliver a bond in the form hereto annexed, with a surety or guaranty company that is authorized to do business in the State of New Jersey and that will meet the approval of the City Comptroller as surety for the faithful performance of the contract and for the payment of all lawful claims of sub-contractors, materialmen and laborers for labor performed and materials furnished in the carrying forward, performing and completing of said contract; said Bond to be in a penal sum equal to the contract price for the entire work as shown on plans and required by specifications; the execution of said Bond is to be approved by the City Solicitor. It will further be required to execute and deliver the Contract in the form hereto annexed and the said Bond, duly approved as aforesaid to the City Clerk of the City of Atlantic City, at his office in the City Hall, within ten days from the date of the service of a notice to the effect that the contract has been so awarded; and in case of failure or neglect so to do, he, they or it may be declared by the Board of Commissioners to have abandoned the contract and as in default to the City to the amount of the certified check accompanying the bid, as herein provided; and thereupon the work will be re-advertised and re-let, and so on until the contract be accepted and executed.

The Lump Sum Bid must be written and also stated in figures and, in case of variance, the written price shall govern; all proposals will be considered

as informal which do not contain unit prices for all items as required by the Proposal form.

Permission will not be given for the withdrawal of any bid or proposal.

The Board of Commissioners expressly reserves the right to require—after the bids are received and before a contract is awarded—any bidder to present to it promptly, the following:

- 10 (a) Evidence satisfactory to said Board that he has successfully performed work of the character proposed to be contracted for.
- (b) Evidence satisfactory to said Board that he is possessed of or able to command the necessary capital, materials and machinery to conduct the proposed work to its satisfaction and to complete the same within the time prescribed.
- (c) Information as to the sources of materials he proposes to use, places of manufacture and their manufacturers.
- 20 (d) Samples of such materials in quantities sufficient for testing purposes.

If the bidder, so required, fails to present the satisfactory evidence required by clauses "a" and "b" or either of them, or shall fail to give the information as to materials, required by clause "c" or if such information, when given, shall not be satisfactory to the said Board, or shall fail to submit samples as required by clause "d," which conform in every respect to the requirements of the annexed specifications, and are satisfactory in every respect to the said Board; then the bid of such bidder so failing (in the opinion of the said Board of Commissioners) will be rejected.

30 The Board of Commissioners further reserves the right to reject the bid of any bidder who, within the past ten years,

(a) shall have bid upon public work for any municipality in the State of New Jersey, and having been awarded a contract, shall have failed to comply with the terms of the bidding by refusing or neglecting to enter into the formal contract required, or shall have failed to furnish the required bond; or shall have forfeited the sum deposited with his bid; or

(b) shall have had any contract with any municipality of the State of New Jersey re- 10 voked by reason of his default thereon; or

(c) shall have defaulted upon any contract with any municipality in the State of New Jersey, to the extent of obliging his surety or the municipal authorities to complete said contract. The Board of Commissioners also reserves the right to reject all bids if it shall deem it for the public interest so to do.

Bidders shall state in their proposals their names and places of residence and if the bidder be a cor- 20 poration the proposal shall state the corporate name, the name of the State under whose laws it is incorporated, and if a New Jersey corporation, the location of its principal office in this State, and the name of the agent in charge of said office upon whom notice may be served.

No extra compensation, beyond the amount payable for the work actually performed, shall be payable.

No proposal will be received or considered unless 30 accompanied by Certificate of Surety made on the attached form, and by a certified check upon a National or State Bank or Trust Company, drawn to the order of the City Treasurer of Atlantic City in the sum of Twenty Thousand Dollars (\$20,000.00), the check must not be enclosed in the sealed envelope

containing the proposal, but must be attached to the outside thereof in such a manner as to be easily inspected; in case such check shall be found to be defective, such proposal shall not be received or opened.

All such deposits, except that of the successful bidder, will be returned to the person making the same upon application to the City Clerk, after the contract is awarded or after the rejection of the
10 bids.

If the successful bidder shall refuse or neglect, within ten days after notice that the contract has been awarded to him, to execute and deliver the same, together with the required Bond, he shall be adjudged in default, and the amount of the deposit made by him shall be forfeited to and retained by the City of Atlantic City as liquidated damages for such neglect or refusal, but if such bidder shall execute and deliver the contract and bond in the manner and within the time above specified, the amount
20 of this deposit will be returned at the time of such delivery.

Should the quantity of work actually performed amount to more or less than is shown by plans and required by specifications, the Contractor will not be entitled to any claim for damages by reason of such variance, but it will entitle both parties to the contract to an equitable adjustment of the time fixed by the contract for the completion of the work, such adjustment to be based upon the relation be-
30 tween the amount of the original work as required and the amount of the work actually done.

Printed envelopes, in which bids will be required to be submitted, are supplied herewith.

The blank form of Proposal to be used by the bidder, and the forms of Certificate of Surety, Bond,

Contract and Specifications for the work are hereto annexed.

HARRY T. HEADLEY,
*Director of Streets and Public
Improvements.*

The foregoing Instructions to Bidders, and annexed form of Proposal, Certificate of Surety, Bond, Contract, and Specifications were adopted by resolution of the Board of Commissioners of Atlantic City, passed at a meeting held Thursday, September 30, 1926. 10

(Signed) JOSEPH A. McNAMEE,
City Clerk.

EXHIBIT P6.

Regular meeting of the Board of Commissioners held on November 12, 1926. 20
Vice President Ruffu Presiding.

Present: Messrs. Cuthbert, Headley, Kuehnle and Ruffu (4). Absent, Mayor Bader (1).

DIRECTOR OF STREETS & PUBLIC IMPROVEMENTS TO ADVERTISE FOR CONVENTION HALL BIDS TO BE RECEIVED DECEMBER 2, 1926.

BE IT RESOLVED by the Board of Commissioners of the City of Atlantic City, that the revised documents and specifications this day submitted by Lockwood, Greene & Co., Incorporated, Architects, and Alexander H. Nelson, Associated Architect, for the general construction, elevators, fire protection, ice skating rink, plumbing, heating and ventilating and electrical work of the proposed Convention Hall Building to be erected and constructed by the City 30

of Atlantic City, be and the same are hereby approved and ordered filed in the Clerk's Office of the City of Atlantic City.

BE IT FURTHER RESOLVED that the Director of the Department of Streets and Public Improvements be and is hereby authorized and directed to advertise for bids for the furnishing of the material and the performance of the labor necessary for the general construction, elevators, fire
10 protection, ice skating rink, plumbing, heating and ventilating and electrical work for the proposed Convention Hall Building to be erected and constructed by the City of Atlantic City. Said bids to be based on the revised documents and specifications, in and by this resolution, this day approved and in accordance with the plans heretofore approved. Said bids to be opened at a regular meeting of this Board, on Thursday, the second day of December, 1926.

20 Upon motion of Mr. Headley this resolution was adopted by the following vote: Ayes, Messrs. Cuthbert, Headley, Kuehnle and Ruffu (4). Nays, (0).

NOTICE TO CONTRACTORS
CONVENTION HALL, ATLANTIC CITY

30 Sealed proposals for furnishing materials and constructing the Superstructure of the Convention Hall, located between the Boardwalk and Pacific Avenue and between Mississippi and Georgia Avenues, Atlantic City, N. J., will be received by the Board of Commissioners of Atlantic City, N. J., when called for, during a meeting of said Board to be held at its meeting place in the City Hall, Atlantic City, N. J., at the hour of 3 p. m., December 2, 1926. Immediately thereafter and during a session of said Board of Commissioners, the bids will be publicly

opened and read, and awards of contract, if made, will be made by resolution of the said Board of Commissioners as soon thereafter as practicable.

Each successful bidder will be required to execute and deliver a bond with a surety or guaranty company having authority to do business in the State of New Jersey, which bond will be in the full amount of the contract price and will be subject to approval by Atlantic City.

The Board of Commissioners reserves the right 10 to reject any or all proposals and no proposal will be received unless accompanied by a certificate of surety and a certified check, drawn to the order of the City Treasurer of Atlantic City in amount as below listed for the contract. All such deposits, except that of the successful bidder, will be promptly returned and the check of the successful bidder will be held until he complies with the requirements as to the executing of the contract and the filing of the
20 bond.

Separate proposals will be received for each of the following divisions of the work:

| | |
|---|-------------|
| General Construction, certified check required | \$50,000.00 |
| Heating and Ventilating, certified check required | 20,000.00 |
| Plumbing, certified check required... | 10,000.00 |
| Electric Work, certified check required | 20,000.00 |
| Fire Protection, certified check required | 5,000.00 30 |
| Ice Skating Rink, certified check required | 10,000.00 |
| Elevators, certified check required... | 10,000.00 |

Plans, specifications and proposal forms may be examined during business hours and may be obtained, on and after November 16, 1926, at the offices

of Lockwood, Greene & Co., Inc., 24 Federal Street, Boston, Mass., or Pershing Square Building, New York City, and at the office of Alexander H. Nelson, Associated Engineer, Guarantee Trust Building, Atlantic City, N. J. To obtain plans and specifications of work to be covered by any contract a prospective bidder will be required to deposit cash or a satisfactory check in the amount of Fifty (50) Dollars and he may recover the deposit upon returning the plans in good condition, to the office from which they were secured, within one week of the time specified for filing the bids, provided he submits a bona fide proposal on the work covered by the plans and specifications.

HARRY T. HEADLEY,
Director of Streets and Public
Improvements.

October 26, 1926.

20

ADDENDUM No. 1
HEATING AND VENTILATING
SPECIFICATIONS
CONVENTION HALL, ATLANTIC CITY,
NEW JERSEY

APPLICATION. The original specifications for Heating and Ventilating of the Convention Hall at Atlantic City, New Jersey, dated September 30, 1926, remain in full force and effect, except and only as changed by this Addendum No. 1, which now becomes a part of the specifications.

30

We give below answers to questions and other information raised in connection with the Heating and Ventilating for the Convention Hall at Atlantic City, N. J.

1. Under Section B, Page 7, "Air Compressor and Receiver" change "350 R. P. M." to read "250

R. P. M." A speed of 250 to 275 R. P. M. will be satisfactory.

2. Under Section G, Page 5, Ventilation, under column "No. of Motors" at Unit No. S8-2 and 3, make it read 2 instead of 1.

3. On Page 1, Section C, Piping, under Reducing Pressure Valves, the amount of pressure required for hot water tanks is given distinctly as 20 pounds.

4. Under Price No. 4 it is intended to omit all of the sheet metal work in the fan rooms under items S1-1 and S1-2. On the piping plug the 7" Branch on the 8" x 6" x 7" tee on the supply and on the return plug the outlet of the tee in the fan rooms into which the return from the vents connects. For the items V1-1 to V1-12, inclusive, run ducts from opening in wall to below Grade 18" for later connections. The leads for the automatic temperature control are to be carried into the fan room.

5. Under Price No. 5 the sheet metal ducts below the truss space over the ball room under items S8-1, S8-2 and S8-3 shall be installed.

Under items V13-1 to V13-5, inclusive, it is intended to omit all work in connection with these units. On the supply piping for S8-1 plug the outlet at the 6" x 3½" x 6" tee and on the return of the same unit plug the outlet on the 2½" x 1½" x 2½" tee. On the supply piping to units SB-2, SB-3 plug one 8" outlet on the 8" x 8" x 3½" tee and on the return piping plug one 3" outlet on the 3" x 3" x 1½" tee, both of the above in fan rooms No. 16. The automatic thermostatic temperature control leads for temperature control and damper operation shall be run into fan room No. 15.

6. Under Price No. 6 on items S4-1 to and including S4-20 the sheet metal discharge duct in all cases as shown on Section G2-G2 detail sheet No. 2 con-

nect into a masonry or building duct furnished by others from point marked "G-1." Stop off around duct. All sheet metal work under the above items shall be stopped at the points mentioned by the sheet metal ducts below grade 7' 6" shall be installed. Plug or cap the top of steam and return risers near fan rooms. Carry the thermostatic and automatic damper and temperature control leads to the fan rooms. The above items Nos. 4, 5 and 6 are
10 in answer to questions raised by one contractor.

7. It is intended that the entire construction work be completed on July 15, 1928, and the heating and ventilating shall be carried along so as not to delay the general construction in any way.

The clause in Proposal requiring that \$250 be retained as liquidated damages for failure to complete the work on the specified date in contract, shall also apply if the Heating and Ventilating Contractor should delay the orderly procedure of the general
20 construction in any way and the Architect shall have the final decision as to amount of delay except as provided under Article 39 "Arbitration."

The Contractor shall state in his proposal as follows "must be completed substantially June 15, 1928," where blank line occurs in Proposal.

8. On the unnumbered Page "Bond," previous to Page 1 of Proposal, strike out "in the completed Excavations and Foundations for" and insert "for the Heating and Ventilating of."

30 9. Under General Conditions, Article 27, "Guaranty Bond" the Contractor shall pay for the premium as specified under Instructions to Bidders.

10. The cost of the insurance under Articles No. 29 and No. 30 in General Conditions, Section A, shall be paid for by the Contractor, all other conditions to remain as specified.

The above shall take precedence over previous information and shall be taken into consideration in submitting bids.

LOCKWOOD, GREENE & CO., INC.,
ARCHITECTS,
BOSTON, MASS.

November 1, 1926.

ADDENDUM NO. 2
HEATING AND VENTILATING 10
SPECIFICATIONS
CONVENTION HALL, ATLANTIC CITY,
NEW JERSEY

APPLICATION. The original specifications for Heating and Ventilating of the Convention Hall at Atlantic City, New Jersey, dated September 30, 1926, and Addendum No. 1, dated October 26, 1926, remain in full force and effect, except and only as changed by this Addendum No. 2, which now be-
20 comes a part of the specifications.

We give below answers to questions and other information raised in connection with the Heating and Ventilating for the Convention Hall at Atlantic City, N. J.

Price No. 4. If the fans in the garage are omitted, temperature control leads from the fan locations are to be run back to the Engineer's room.

Price No. 5. If the ball room fans are omitted, temperature control leads are to be run back to the utility switchboard room the leads to the openings
30 in which the ceiling vents are to be installed are to be run.

Price No. 6. If the main supply and exhaust fans for the Convention Hall are omitted run all the temperature control leads up to the main fan room floor level.

The principle to be followed out in making these changes is that all leads which are buried in the construction work shall be put in now so that when the fans are installed later there will be no cutting necessary down through the building.

The above shall take precedence over previous information and shall be taken into consideration in submitting bids.

10 LOCKWOOD, GREENE & CO., INC.,
ARCHITECTS,
BOSTON, MASS.

This information has been given to the Johnson Service Company, Philadelphia, and the Powers Regulator Company, Boston.

November 12, 1926.

20 ADDENDUM NO. 3
HEATING AND VENTILATING
SPECIFICATIONS
CONVENTION HALL, ATLANTIC CITY,
NEW JERSEY

APPLICATION. The original specifications for Heating and Ventilating of the Convention Hall at Atlantic City, New Jersey, dated September 30, 1926; Addenda No. 1 and No. 2 remain in full force and effect, except and only as changed by this Addendum No. 3, which now becomes a part of these specifications.

30 We give below answers to questions and other information raised in connection with the Heating and Ventilating for the Convention Hall at Atlantic City, N. J.

1. Direct radiation as manufactured by H. B. Smith, U. S. Radiator Co., or other approved standard makes, will be approved as equal to the American Radiator Co. radiation.

2. Under the Vacuum Heating system necessary apparatus, specialties and valves as manufactured by Dunham Co., Barnes & Jones, or other approved Standard makes, shall be considered as equal to Warren & Webster specialties, valves, traps, etc.

3. Registers and grilles as manufactured by Hart & Cooley Co. and Highton Co. shall be considered as equal to those manufactured by Tuttle & Bailey.

4. Oil Burning equipment as manufactured by Ballard Oil Burning Equipment Co. will be considered as equal to the equipment specified. 10

5. Alternate prices on boilers, boiler settings and vacuum pumps, submitted in Proposal, will be given full consideration in awarding the contract.

The above shall take precedence over previous information and shall be taken into consideration in submitting bids.

LOCKWOOD, GREENE & CO., INC.,
ARCHITECTS,
BOSTON, MASS. 20

EXHIBIT P8.
2/11/27 C. W. M.

Regular Meeting of Board of Commissioners held January 20, 1927.

President Bader presiding.

Present: Messrs. Bader, Cuthbert, Headley, Kuehnle and Ruffu (5). Absent, (0).

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PROPOSAL

(Not to be detached)

December 2nd, 1926.

THE HONORABLE BOARD OF
COMMISSIONERS
ATLANTIC CITY, N. J.

Gentlemen:

Price No. 1. Having carefully examined the Instructions to Bidders, the Specifications, entitled "DOCUMENTS AND SPECIFICATIONS FOR THE HEATING AND VENTILATING OF THE CONVENTION HALL AT ATLANTIC CITY, N. J., "Addenda No. 1, No. 2 and No. 3, and the drawings listed therein, as well as the premises and all conditions affecting the work, the Under-
signed herewith proposes to furnish all materials, labor, tools, equipment and other things necessary for the execution of the work, as shown by the plans and required by the Specifications, and the Addenda, which have been prepared by Lockwood, Greene & Co., Inc., Architects, and Alexander H. Nelson, Associated Engineer, for the total lump sum of Five Hundred Twelve Thousand Dollars—\$512,000.00)

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Added to Ded. from
Price No. 1 Price No. 1

| | |
|---|-------------|
| Price No. 2. If Aero-fin radiation is substituted for all cast iron Vento radiation. If this alternate is accepted the automatic control, piping, space requirements, etc., shall meet the approval of the Architect | \$1500.00 |
| Price No. 3. If the Merit oil control system is omitted from the oil burning equipment and the system arranged entirely for hand control | \$3000.00 |
| Price No. 4. If the supply and exhaust ventilating units S1-1 and S1-2, V1-1, V1-2, V1-3, V1-3, V1-5, V1-6, V1-7, V1-8, V1-9, V1-10, V1-11 and V1-12 for Garage are omitted, including the fans, motors, heaters, foundation, supports, piping and valves for supply heaters, where in fan rooms, also the galvanizer iron supply ducts at Garage ceiling | \$34,900.00 |
| Price No. 5. If the supply and exhaust ventilating units S8-1, S8-2 and S8-3 and V13-1, V13-2, V13-3, V13-4, V13-5 for Ball Room are omitted, including the fans, motors, heaters, foundations, supports, piping and valves at heaters and all galvanized iron work and dampers in the Truss space over Ball Room | \$22,000.00 |

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Price No. 6. If the supply and exhaust ventilating units S4-1, S4-2, S4-3, S4-4, S4-5, S4-6, S4-7, S4-8, S4-9, S4-10, S4-11, S4-12, S4-13, S4-14, S4-15, S4-16, S4-17, S4-18, S4-19, S4-20 and V9-1, V9-2, V9-3, V9-4, V9-5, V9-6, V9-7, V9-8, V9-9, V9-10, V9-11, V9-12, V9-13, 10 V9-14, V9-15, V9-16, V9-17, V9-18, V9-19, V9-20, V9-21, V9-22, V9-23, V9-24, V9-25, V9-26, V9-27, V9-28, V9-29, V9-30, V9-31, V9-32, V9-33, V9-34, V9-35, V9-36, V9-37, V9-38, V9-39 and V9-40, Convention Hall are omitted, including fans, motors, heaters, foundations, supports, piping in Fan Rooms, galvanized iron work and dampers above Grade 74' 6" in Fan Rooms \$106,582.00

Price No. 7. If one 600 horse boiler with setting and one 12" x 18" boiler feed pump are omitted, including piping for boiler and pump and walkways and flue for boiler \$27,400.00

Price No. 1 is based on materials and manufac- 30 turers that are named in the Specifications and we give below Alternate prices with manufacturer's names of materials we wish to substitute in accordance with the clause in Specifications regarding substitution of materials.

| | Addition | Deduction |
|--|-------------|-----------|
| Price No. 8. If Two (2) Heinve "V" type boilers, 599 H. P., and One (1) Heine "V" type boiler, 281 H. P. 160 lbs. per square inch operating pressure, set 8 ft. from floor line to center line of drum and all in accordance with the specifications (in lieu of Babcock and Wilcox "Stirling" boilers) and M. M. Casey Sons Corp. Guaranteed by Heine, settings in lieu of Geo. Allen and Son | \$18,600.00 | 10 |
| Price No. 9. Materials and apparatus same as in "Price No. 8" with omission of 1-599 H. P. Heine Boiler, setting, boiler, feed pump, piping, walk-way flue, oil burner etc.; Heine "V" type boilers being supplied for the two remaining required boilers and M. M. Casey Sons Corp. settings (or equal) | \$38,175.00 | 20 |
| Price No. 10. Babcock and Wilcox "Stirling" Boilers, as per specifications in conjunction with Ballard-Sprague and Co., brick settings (or equal) | 5,300.00 | 30 |
| Price No. 11. Babcock and Wilcox "Stirling" Boilers, as per specifications in conjunction with M. & M. Casey & Sons Corp. brick settings (or equal) | 9,000.00 | |

| | | |
|----|---|------------|
| | Price No. 12. For Bradford Brand Pennsylvania shale brick used for facing only, and between face brick and fire brick a local common brick is used with Ballard-Sprague setting | 850.00 |
| | Price No. 13. For Dean Boiler Feed Pumps in lieu of Worthington Boiler Feed Pumps | \$600.00 |
| 10 | Price No. 14. For Bishop-Babcock Heating specialties in lieu of Webster | \$4,000.00 |
| | Price No. 15. For use of Trane specialties in lieu of Webster | 3,000.00 |
| | Price No. 16. For use of Dunham specialties in lieu of Webster | 3,000.00 |
| 20 | Price No. 17. For use of Webster #7 specialties in lieu of Webster Sylphon | 1,500.00 |
| | Price No. 18. For National System of Automatic Temperature Regulation | 4,300.00 |
| | Price No. 19. For entire omission of Temperature Control | 25,000.00 |
| | Price No. 20. For Buckeye Heatovents (or equal) in lieu of "Universal" | 5,300.00 |
| 30 | Price No. 21. For omission of Oil Burning Equipment" | 12,000.00 |
| | Price No. 22. For omission of "Boiler Galleries" and ladders | 4,500.00 |
| | Price No. 23. For omission of Feed Water Heater and associated pipe and valves | \$1,900.00 |

| | | |
|--|---|------------|
| | Price No. 24. For National Pipe in lieu of genuine wrought iron pipe | 1,500.00 |
| | Price No. 25. For omission of "Insulation" "Section F" | 12,000.00 |
| | Price No. 26. For omission of "Boilers," "Boiler Setting" and "Smoke Flue" | 55,000.00 |
| | Price No. 27. For Trane Vacuum Pump and Trane Condensation Pump in lieu of Nash Vacuum Pump and Yeoman Condensation Pump | 2,500.00 |
| | Price No. 28. M. M. Casey & Sons Corp. Boiler settings in lieu of Geo. Allen & Sons as specified | \$4,000.00 |
| | Bidders Signature Riggs Distler & Co. nc. and John Cyrus Distler President P. O. Address 216 N. Calvert St. Baltimore, Md. | 70 |
| | | 30 |

EXHIBIT P9.
2/11/27 C. W. M.

Regular meeting of the Board of Commissioners held on Dec. 2, 1926.

President Bader Presiding.

Present: Messrs. Bader, Cuthbert, Headley, Kuehnle and Ruffu (5). Absent, (0).

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PROPOSAL
(Not to be detached)

Dec. 2, 1926.

THE HONORABLE BOARD OF COMMISSIONERS
ATLANTIC CITY, N. J.

Gentlemen:

Price No. 1. Having carefully examined the Instructions to Bidders, the Specifications, entitled "DOCUMENTS AND SPECIFICATIONS FOR THE HEATING AND VENTILATING OF THE CONVENTION HALL AT ATLANTIC CITY, N. J.," Addenda No. 1, No. 2 and No. 3, and the drawings listed therein, as well as the premises and all conditions affecting the work, the Undersigned herewith proposes to furnish all materials, labor, tools, equipment and other things necessary for the execution of the work, as shown by the plans and required by the Specifications, and the Addenda, which have been prepared by Lockwood, Greene & Co., Inc., Architects, and Alexander H. Nelson, Associated Engineer, for the total lump sum of Five Hundred ten thousand eight hundred twelve— (\$510,812.00) Dollars.

Added to Ded. from
Price No. 1 Price No. 1

Price No. 2. If Aerofin radiation is substituted for all cast iron Vento radiation. If this alternate is accepted the automatic control, piping, space, requirements, etc., shall meet the approval of the Architect. Fifteen hundred dollars

\$1500.00 10

Price No. 3. If the Merit oil control system is omitted from the oil burning equipment and the system arranged entirely for hand control three Thousand Dollars

\$3000.00

Price No. 4. If the supply and exhaust ventilating units S1-1 and S1-2, V1-1, V1-2, V1-3, V1-4, V1-5, V1-6, V1-7, V1-8, V1-9, V1-10, V1-11 and V1-12 for Garage are omitted, including the fans, motors, heaters, foundation supports, piping and valves for supply heaters where in fan rooms, also the galvanized iron supply ducts at Garage ceiling, Thirty-six thousand Dollars

20

\$36000.00

Price No. 5. If the supply and exhaust ventilating units S8-1, S8-2, and S8-3 and V13-1, V13-2, V13-3, V13-4, V13-5 for Ball Room are omitted, including the fans, motors, heaters, foundations, supports, piping and

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valves at heaters and all galvanized iron work and dampers in The Truss space over Ball Room Twenty-Four Thousand Dollars

\$24000.00

10 Price No. 6. If the supply and exhaust ventilating units S4-1, S4-2, S4-3, S4-4, S4-5, S4-6, S4-7, S4-8, S4-9, S4-10, S4-11, S4-12, S4-13, S4-14, S4-15, S4-16, S4-17, S4-18, S4-19, S4-20 and V9-1, V9-2, V9-3, V9-4, V9-5, V9-6, V9-7, V9-8, V9-9, V9-10, V9-11, V9-12, V9-13, V9-14, V9-15, V9-16, V9-17, V9-18, V9-19, V9-20, V9-21, V9-22, V9-23, V9-24, V9-25, V9-26, V9-27, V9-28, V9-29, V9-30, V9-31, V9-32, V9-33, V9-34, V9-35, V9-36, V9-37, V9-38, V9-39 and V9-40, Convention Hall are omitted, including fans, motors, heaters, foundations, supports, piping in Fan Room, galvanized iron work and dampers above Grade 7' 6" in Fan Rooms One Hundred Thirty six thousand Dollars

\$136,000.00

30 Price No. 7. If one 600 horse power boiler with setting and one 12" x 18" x 12" boiler feed pump are omitted, including piping for boiler and pump and walkways and flue for boiler Thirty one thousand seven hundred dollars

\$31700.00

Price No. 1 is based on materials and manufacturers that are named in the Specifications and we give below Alternate prices with manufacturer's names of materials we wish to substitute in accordance with the clause in specifications regarding substitution of materials

| | Addition | Deduction | |
|-------------------------|----------|-----------|-----------------------|
| Webster Co. No. 5 traps | | \$2000.00 | |
| Bidder's Signature | | | 10 |
| and | | | |
| P. O. Address | | | |
| | | | John H. Cooney, Inc. |
| | | | A. J. Walsh, V-Press. |
| | | | Harrison N. J. |

EXHIBIT P10.
2/11/27 C. W. M.

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Regular Meeting of Board of Commissioners held January 20, 1927.

Vice President Ruffu Presiding.

Present: Messrs. Cuthbert, Headley, Kuehnle and Ruffu (4). Absent, Mayor Bader (1).

RIGGS DISTLER & CO. INC.,
AWARDED CONTRACT FOR HEATING &
VENTILATING OF THE CONVENTION
HALL.

WHEREAS, the Riggs Distler & Co. Inc., bidders 30 for the Heating and ventilating of the Convention Hall, made an allowance of three thousand dollars (\$3,000.00) in said Bid for the use of Dunham Valves, on their basic bid of five hundred and twelve thousand dollars (\$512,000.00), thus reducing said bid to the sum of five hundred and nine thousand dollars (\$509,000.00);

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the City of Atlantic City, that the bid of Riggs Distler & Co., INC., for the heating and ventilating of the Convention Hall, in the sum of five hundred and nine thousand dollars (\$509,000.00) be and the same is hereby accepted; the Riggs Distler & Co. Inc., being the lowest responsible bidder; and that the Mayor and City Clerk be and they are hereby authorized and directed to enter into a contract on behalf of the City with the said Riggs Distler & Co. Inc. for said undertaking; provided further, however, that said contract be first approved by the City Solicitor.

Upon motion of Mr. Headley this resolution was adopted by the following vote: Ayes, Messrs. Cuthbert, Headley, Kuehnle and Ruffu (4). Nays, (0).

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REASONS.

(Filed Feb. 14, 1927.)

NEW JERSEY SUPREME COURT.

MARIE T. SMITH,
Plaintiff-in-Certiorari,
 v.
 BOARD OF COMMISSIONERS
 of the City of Atlantic
 City and RIGGS, DISTLER
 & Co., INC.,
Defendants-in-Certiorari.

On Certiorari. 10
 Reasons.

The prosecutor of this writ comes and prays that the resolution of the Board of Commissioners of the City of Atlantic City, passed January 20th, 1927, awarding to Riggs, Distler & Company, Inc., the contract for installing the heating and ventilating system in Convention Hall in said city and accepting its bids therefor, be set aside, vacated and for nothing holden for the following reasons:

1. The said Riggs, Distler & Company, Inc., was not the lowest responsible bidder for said work.
2. The bid submitted by Riggs, Distler & Company, Inc., was not in accordance with the specifications advertised; was double, irregular and illegal.
3. There were other lower responsible bidders for said contract.

EMERSON RICHARDS,
Attorney of Plaintiff-in-Certiorari.

OPINION.

(Filed Mar. 18, 1927.)

NEW JERSEY SUPREME COURT.

Nos. 271 and 272, January Term, 1927.

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MARIE I. SMITH,

Prosecutor,

v.

BOARD OF COMMISSIONERS
of the City of Atlantic
City, *et als.*,

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*Defendants.*No. 271. On Cer-
tiorari.No. 272. On Man-
damus.Argued February 23rd, 1927. Decided March 18th,
1927.

Before JUSTICES PARKER, BLACK and CAMPBELL.

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For the prosecutor, MESSRS. EMERSON L. RICHARDS
and JOHN C. REED.

For the defendants, MR. JOSEPH B. PERSKIE.

Per Curiam:

Case No. 271 is a certiorari to review an award of a contract to Riggs, Distler & Co. for \$509,000.00 for a heating system in the Convention Hall at Atlantic City, N. J., at the instance of a tax payer. Case No. 272 is a rule to show cause why a writ of mandamus should not issue directing the award of the contract to be made to the next highest bidder, John H. Cooney for \$510,812.00. In these cases it is probably of more importance, that a prompt decision be rendered, than the form, in which the decision may be expressed. 10

We have examined these cases with the following result:

First: We are unwilling to set aside the award of the contract in this case to Riggs, Distler & Co. for \$509,000.00 on the sole ground, that the specifications invite "alternative bids." The cases of *Armitage v. Newark*, 86 N. J. L. 5; *Tice v. Long Branch*, 98 N. J. L. 214, are not in point on the facts. Our research has revealed no case in which this point has been directly considered. 20

Second: We can find no evidence, that the specifications have been unfairly manipulated in favor of the contractors to whom the award was made.

Third: The addendum provides; Nos. 3 (2) "Under the Vacuum Heating System necessary apparatus, specialties and valves as manufactured by Dunham Co., Barnes & Jones or other approved standard makes, shall be considered as equal to Warren & Webster specialties, valves, traps," &c. Under this clause 3,000.00 was deducted from Riggs, 30

Distler & Co., bid of \$512,000.00 thus reducing the bid to \$509,000.00 making it the lowest bid and next to that of John H. Cooney of \$510,812.00 to which \$2,000.00 was to be added if the Warren & Webster specialties were adopted.

10 Fourth: The writ of certiorari is a discretionary writ. The suit is not a personal action. In the absence of fraud or manifest manipulation the award in this case should not be set aside at the instance of a tax payer.

The cases of McCarty v. Boulevard Commissioners, 91 N. J. L. 142; affirmed 92 ib. 519; Atlantic Gas & Co. v. Atlantic City, 73 N. J. L. 360, should be applied.

Our conclusions are in case No. 271 the writ of certiorari should be dismissed and the award of the contract to Riggs, Distler & Co. confirmed.

20 In case No. 272 the rule to show cause should be discharged. No costs allowed.

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JUDGMENT.

NEW JERSEY SUPREME COURT.

January Term, 1927.

MARIE T. SMITH,
Prosecutor,
v.
BOARD OF COMMISSIONERS
of the City of Atlantic
City, et als.,
Defendants.

No. 271. On Cer-
tiorari.
Judgment.

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Argument on the above entitled writ of certiorari, to review an award of a contract made by the City of Atlantic City to Riggs, Distler & Company, Incorporated, for five hundred and nine thousand dollars (\$509,000.00) for a heating system in the Convention Hall at Atlantic City, New Jersey, at the instance of a tax payer, having been had on February 23, 1927; Messrs. Emerson L. Richards and John C. Reed, appearing for the prosecutor, and Joseph B. Perskie, city solicitor, appearing for the City of Atlantic City, and Joseph Altman appearing for Riggs, Distler & Company, Incorporated, and the Court being of the opinion that the award of the contract made by the city to Riggs, Distler & Company, Incorporated, on January 20th, 1927, in the

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sum of \$509,000.00, for a heating system in the Convention Hall at Atlantic City, N. J., should be confirmed.

It is on this 21st day of March, 1927, ordered that the writ of certiorari heretofore allowed should be dismissed, and the award of the contract by the City of Atlantic City to Riggs, Distler & Company, Incorporated, on January 20, 1927, in the sum of \$509,000.00, for the heating system in the Convention Hall at Atlantic City, N. J., be and the same is hereby confirmed.

On motion of:

JOSEPH B. PERSKIE, .
City Solicitor of Atlantic
City, N. J.
JOSEPH ALTMAN,
Attorney for Riggs, Distler
& Co., Inc.

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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

| | | |
|---|---|-------------------------------------|
| MARIE T. SMITH, <i>Plaintiff-in-Certiorari-</i> <i>Appellant,</i> | } | 10 |
| v. | | |
| BOARD OF COMMISSIONERS of the City of Atlantic City and RIGGS, DISTLER & COMPANY, INC., <i>Defendants-in-Certiorari-</i> <i>Appellees.</i> | } | On Certiorari. Notice of Appeal. |

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To Joseph B. Perskie, City Solicitor of the City of Atlantic City and Joseph Altman, Solicitor of the Riggs, Distler Company:

Take notice that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause in the New Jersey Supreme Court.

EMERSON L. RICHARDS,
Attorney of Plaintiff-in-
Certiorari. 30

Filed April 2, 1927.

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 GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS
 AND APPEALS.

10 MARIE T. SMITH,
*Plaintiff-in-Certiorari-
 Appellant,*
 v.
 BOARD OF COMMISSIONERS
 of the City of Atlantic
 City and RIGGS, DISTLER
 & COMPANY, INC.,
*Defendants-in-Certiorari-
 Appellees.*

} On Certiorari.
 } On Appeal.
 } Grounds of Appeal.

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 Appellant states the following grounds of appeal:

1. Because the Supreme Court erred in giving judgment for the defendants-in-certiorari or appellees, the City of Atlantic City and Riggs, Distler & Company, Incorporated, instead of for the plaintiff-in-certiorari or appellant, Marie T. Smith, for one or more of the reasons for reversal filed in the New Jersey Supreme Court and brought up with this record.

EMERSON RICHARDS,
*Attorney of Plaintiff-in-
 Certiorari.*

NEW JERSEY COURT OF ERRORS AND
 APPEALS.

—————
 MARIE T. SMITH,
*Plaintiff-in-Certiorari,
 Appellant,*

v.

BOARD OF COMMISSIONERS OF THE CITY OF ATLANTIC
 CITY, *et al.*,
*Defendants-in-Certiorari,
 Respondents.*

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 ON APPEAL.

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 BRIEF.

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 FACTS.

Atlantic City is a municipal corporation governed by the provision of the Walsh Act.

The city having determined to acquire lands and erect thereon a Municipal Convention Hall building took the necessary legal steps to carry into effect such determination. All proceedings taken prior to the awarding of the contract to the respondent, Riggs Distler & Co., Inc., may be conceded to be lawful and regular. Some time prior to November 4,

1926, the city advertised for bids for the construction of the heating and ventilation work to be opened on that date and which, for reasons not appearing in the proceedings, were rejected. Thereafter, there was a re-advertisement for proposals for the erection and construction of the heating and ventilating machinery. This last advertisement was for proposals in accordance with revised plans and specifications adopted November 12th, 1926. The advertised date of opening the bids was December 2, 1926. On that date the Commissioners met and opened the bids, and it was ascertained that two bids for the work of heating and ventilating the Convention Hall, lower than all others, had been submitted by Riggs, Distler & Co., Inc., whose bid was \$512,000, and John H. Cooney, Inc., whose bid was \$510,812. The Board of Commissioners at a regular meeting held January 20, 1927, adopted a resolution awarding the contract to Riggs, Distler & Co., Inc., at the price of \$509,000. That result was reached by deducting \$3,000 from the amount of their bid as submitted.

Resolution adopting revised specifications, etc., *State of the Case*, p. 55.

General description of work, *State of the Case*, p. 45.

Addendum No. 1, *State of the Case*, p. 58.

Addendum No. 2, *State of the Case*, p. 61.

Addendum No. 3, *State of the Case*, p. 62.

Proposal of Riggs, Distler & Company, Inc. (Ex. P8), *State of the Case*, p. 63.

Proposal of John H. Cooney, Inc. (Ex. P9), *State of the Case*, p. 69.

Resolution awarding contract (Ex. P10), *State of the Case*, p. 72.

The documents and specifications for the heating and ventilating of the Convention Hall, among other things, provide (*State of the Case*, pp. 49, 50):

ALTERNATE BIDS. Every item mentioned in the following specifications is intended to represent the materials that will be demanded.

The contractor must submit a bid covering every item that is specified, and should he wish to submit any substitute that he considers equal in value and efficiency with the one specified, he shall state what the item suggested is, and what the difference in cost is, if any. If the substitutions of material (equally good) are offered at the time the bids are submitted they will be considered; and in the event of the owner wishing to accept the substitute, arrangements will be made for the change before a contract is entered into.

If no items are suggested as substitutes at the time the bids are submitted, then no deviations will be allowed from the materials specified.

Under the title "Vacuum Heating System," the same document provides:

The heating contractor is to provide all necessary apparatus, specialties, etc., for the complete installation of a Warren-Webster or other approved vacuum system of steam heating.

By addendum No. 3 to the heating and ventilating specifications the architects in purported response to questions and information raised in connection with the heating and ventilation stated:

"Under the Vacuum Heating System necessary apparatus, specialties and valves as manufactured by Dunham & Company, Barnes & Jones or other approved standard makes, shall be considered as equal to Warren & Webster

specialties, valves, traps, etc." (*State of the Case*, p. 62.)

Under the foregoing specifications, Riggs, Distler & Company, Inc., submitted a lump sum bid of \$512,000 and the bid submitted by John H. Cooney, Inc., was a lump sum bid of \$510,812 as before stated.

Upon all of the alternates for which bids were specifically requested the Cooney Company was low.

The Riggs, Distler Company appended to their bid under the heading of "Alternate Bids" which were in fact, substituted bids, see brief ante; two typewritten pages suggesting twenty-eight (28) substitutions of materials for those specified in the contract ranging in price from \$850.00 to \$55,000.00. None of the other contractors bidding submitted prices under this heading. The testimony is that the bidders were not apprised by the language of the specifications that they might suggest such substitutions.

Among the substitutions offered by Riggs, Distler & Company was substitution No. 16, reading as follows:

"Price No. 16—For use of Durham specialties in lieu of Webster—deduct \$3,000.00."

It should be noted that the specifications already permitted the use of Durham valves if the contractor so desired, as one of the several makes of valves that he might use in performing the work.

The Board of Commissioners upon the advice of the engineers proceeded to deduct item No. 16 of the substitutions from the basic price of Riggs, Distler & Company's bid of \$512,000.00, thereby making the bid \$509,000.00 and then declared it to be the lowest bid, whereupon the Board of Commissioners of Atlantic City awarded the contract to Riggs, Distler

& Company in the sum of \$509,000.00. This was done over the written protest of the John J. Cooney Company.

Whereupon the plaintiff-in-certiorari as a taxpayer and in behalf of all other taxpayers brings this writ.

ARGUMENT.

The theory upon which the award is attacked is that the Riggs, Distler Company submitted not one bid, but two bids, and that the second of the two bids was an illegal bid.

The illegality and even fraud in the specifications consisted in inviting "alternate bids" under the provision embodied in the "General Description of Work," which "alternate bid" invitation is described on pages 49 and 50 of the *State of the Case*. The "alternate bid" provision permitted any contractor to "suggest any *substitute* that he considers equal in value and efficiency with the one specified," and permits him to suggest "What the difference in cost is, if any." The invitation then continues that if the substitutions are "offered at the time the bids are submitted they will be considered," and the contract changed accordingly.

It would seem that the above provision only has to be stated to demonstrate its illegality. The minds of the bidders could not be addressed to a common standard, since each bidder would not, consciously at least, be offering a substitution similar to that of the other bidders. In fact it would seem that the purpose of the clause was to invite different substitutions from the different bidders. In *Armitage v. Newark*, 86 N. J. L., p. 5, the Court in quoting Jus-

tice Van Syckel in *Van Reipen v. Jersey City*, 58 N. J. L. 262, said "No contract can be properly upheld under proposals which do not require competitive bids upon the *same definite basis*." The Court continuing said, "The mischief to be apprehended * * * is that owing to this multiple standard it is impossible to tell who is or rather would have been the lowest bidder had there been a common standard of time alike for all," and further "At all events upon both reason and authority a contract based upon such non-competitive bidding is not a valid one under the law we are now considering."

An inspection of the bid of the Riggs, Distler Company demonstrates better than argument how non-competitive was the standard set up. On Page 66, *State of the Case*, we find the dual bids of which complaint is made.

"Price No. 1 is based on materials and manufacturers that are named in the Specifications and we give below alternate prices with manufacturer's names of materials we wish to substitute in accordance with the clause in Specifications regarding substitution of materials."

It will then be seen that there were to be two bids. The first bid is Price No. 1 which is a lump sum bid plus alternates that were specifically called for in conjunction with Price No. 1 and the second bid is prices upon the *substituted materials substituted by the bidder*.

The bidder in this case then suggested four different types of boilers as possible substitutes for the boilers provided in the specifications (Prices 8, 9, 10 and 11, pages 66-67 *State of the Case*) and suggested deductions from the lump sum bid ranging from \$5300 to \$38,175. Obviously there could be

no common standard to which all the bidders would address themselves.

An inspection of Section B, page 1, of the detail specifications concerning boilers, discloses that there was an elaborate specification three and one-half (3½) pages long, requiring certain standards of manufacture, testing, setting, etc. The original specification called for two 610 H. P. Class 12, XII Babcock and Wilcox "Stirling" boilers. Price two under the second bid of "*suggested alternates*," is a quotation upon two Heine boilers aggregating only 599 H. P.

Even if the other bidders had suggested Heine boilers would they have dared to have suggested boilers of less H. P. than those originally suggested, and could the smaller boilers be called a "Substitution?" Is there any question but that the bid submitted under Price No. 8 was an illegal bid?

The original specifications elaborately set out the requirements for the boiler settings. Price No. 10 dismisses the boiler settings with "Ballard-Sprague and Co., brick settings (or equal)." If this price was adopted what specification, if any, would have governed the boiler settings?

If neither of these items could be justified (and the same criticism may be applied to every one of the twenty-eight items listed under the head of Substitutions), then there can be no defense for item No. 16 wherein a deduction of \$3000 is offered if Dunham valves are used in lieu of Webster. There was no specification covering the Dunham specialties or valves.

It is therefore contended that all of the prices submitted by any of the bidders under the head of Substituted Materials, were illegal and constitute dual bids.

The vice to be apprehended from this form of bidding is that as suggested by Justice Garrison in the *Armitage Case*. There is no standard by which the lowest bid may be determined, and because it affords a ready device whereby the public body, or the architects and engineers representing such a body, may so manipulate the bids as to award contracts to a favored contractor.

The favored contractor need only to know privately what materials he may offer in "Substitution," and quote prices upon such "substitutions" in order to achieve the contract. Substitutions are rarely as good as originals, but even if of equal value, it may well pay the favored contractor to quote a price upon the substitutions lower than their actual cost, so that when the bids are opened, if it be ascertained that he is not the lowest bidder, he may by collusion with the governing body or the engineers cause the adoption of the "substitute" and create a new bid that will bring him lower than his competitors, who without knowledge of what "substitutes" would be acceptable to the Board or the engineers could not possibly offer the same "substitutes" at any price.

The justice of this observation may be found by examining the substitutions offered in the instant case. If there was fraud or collusion between the Board and the favored contractor it was necessary to reduce the Riggs, Distler bid by at least \$1,189, in order to award the contract to it. The nearest prices to this amount were prices number 15, 16, 17, 23 and 24. All the other prices were either too small or too large for the purpose intended. One wonders at the moderation exhibited when one realizes that price 17, showing a reduction of \$1500 was not selected, but that price number 16, showing a reduction of \$3,000 was approved. Generosity

which gave the taxpayers surcease to the extent of \$1,500 in a half a million dollar contract, should be noted, at least as evidence, that there was some modicum of conscience left in whoever was responsible for this most ingenious effort to evade the statute. This generosity, however, did not extend to the selection of Price No. 14 for identically the same substitution, wherein an offer of \$4,000 deduction was made. If this one item of \$3,000 was picked out of the twenty-eight for the avowed purpose of saving taxpayers money, why not the \$4,000 item, or why were not items showing deductions of much larger amounts not considered? Was it because just \$3,000 was needed to make this particular bidder the apparent low bidder?

It should be conceded that public bodies should zealously endeavor to adopt specifications or use materials which will serve the purpose at the least cost to the public; and that it should seek the most advantageous terms from the bidders and that it is the right and duty of the authorities to decide what methods and materials will be most advantageous. But as Justice Garrison puts it in the *Armitage case*, "When and how often?" The history of the instant case shows that the identical specifications with the exception of the addenda had been before submitted to bidders; that the authorities knew what the bids were, both for the entire work and for the main alternates that they had requested, and that these bids had been rejected. What further information did they need? Having decided what materials they wanted and having advertised for those materials, how under the reasoning of the *Armitage case* can they again exercise this right of selection, and this time, *after the bids are received*? As is so well stated in the *Armitage case* "Nothing would so fatally discourage bidders as a well-founded

suspicion that contracts are not awarded to the lowest bidder who complied with the conditions of the public advertisement; and to encourage competitive bidding was one of the main purposes of the statute in question." The effect of the "alternate bid" clause was literally to tear up the advertised specification and to submit another specification, the details of which resided in the heart of the contractor, and not in any plans or specifications that had been adopted by the governing body in pursuance to the statute.

For these reasons it is submitted that the Riggs, Distler bid was a double bid consisting (1) of all of the bid under the printed specifications as advertised and adopted by the Commission, and (2) the bids submitted under the "Substitution" clause.

The bid of \$3,000 having been submitted under this clause, it was illegally submitted and could form no part of a legal award. Another way of testing this contention is, suppose that the Riggs, Distler bid of \$512,000 had been the lowest lump sum bid submitted, could it then have had the contract for \$512,000 rather than \$509,000?

It was argued that by force of addenda, *Number 3, page 62 State of the Case*, Dunham specialties or valves were specifically mentioned and that this in some manner altered the legal situation. A careful reading of this clause shows that no *alternate bids* were requested as between Warren Webster, Dunham Co., and Barnes & Jones specialties. The clause as plainly as language can make it, declares that "Apparatus, specialties, valves, as manufactured by Dunham Co., Barnes & Jones, or other approved standard makes, shall be considered as equal to Warren & Webster specialties, etc." Applying then this paragraph to the question asked above, could the Board of Commissioners have awarded the contract

to the Riggs, Distler Company for \$512,000 had that lump sum bid been the lowest bid, notwithstanding that under the alternate bids it had offered a reduction of \$3,000? Since it is clear that it could, it follows that this bid was a dual bid, in which either \$512,000 or \$509,000 became the bid as the exigencies of the case required.

It is submitted that the clause declaring Dunham Co., Barnes & Jones valves would be considered as equal to Warren & Webster valves was merely inserted for the purpose of widening the competition. As the specification originally stood Warren & Webster had a monopoly which would naturally have resulted in this company's quoting a higher price to all of the bidders than they would have quoted, provided there was the competition of the Dunham Co. and the Barnes & Jones Co. That this was the reason for the addenda is beyond question, and the contention that *alternate prices* were asked for is a mere subterfuge.

The testimony of both Cook and Nelson, the engineers produced by the City, is against this contention that alternate bids were asked upon the valves. Both the witnesses testified that the addenda clause had to be read in conjunction with the alternate bid clause, *Nelson page 42 State of the Case*, and consequently this bid must be considered entirely whether legal or illegal according to whether or not the alterate bid clause is a legal or illegal provision.

In *Tice v. Long Branch*, 98 N. J. L. page 214, Mr. Justice Black, speaking for the Court of Errors, said, "It is universally recognized where there is no common standard there is no competition" citing *Browning v. Freeholders*, 79 N. J. L. 494, and *Johnson v. Atlantic City*, 85 N. J. L. 145. Continuing, the learned Justice said: "Whatever element enters into the competitive scheme, it should be the same

for all, *not left for each bidder to fix for himself* and thereby estimate his bid upon a basis different from that of any other bid * * * each bidder was called upon to make a proposal resting largely upon his own judgment, with absolutely no guide as to details. No one could tell which was the lowest bid, because no two would be on the same basis." It would almost seem as if the above language had been written with knowledge of the instant case. Continuing, the Court said, "The necessity of having a common standard and the importance of definite and precise specifications upon which to found corporate action are too apparent to require argument * * * this is left entirely to the discretion of the Commissioners." In the instant case the bidders were left entirely in the dark as to what *substitutions* might be made and they certainly were misled and left in the dark if it was the intention that alternate bids were to be required under the addenda, because nowhere in that document is there any request made for such alternate bids, nor was there on the proposal blank, pages 63, 64, 66, 67, 68, *State of the Case*, a blank space made whereby alternates upon the valves might be written in.

It is also submitted that the resolution of award, page 72, *State of the Case*, is defective, since there is no action by the Commissioners changing the specifications and adopting the use of the Dunham valve and even under the resolution of award a contractor is still free to use either Warren & Webster or Barnes & Jones valves.

"The award must follow the terms of the advertisement." *Godfrey v. Freeholders*, 39 N. J. L. page 514.

For the reason that the bid of the Riggs, Distler Company was a double bid, and because all of the proposals submitted under the "Substitutions"

were illegal, and because the Resolution of Award did not conform to the advertisement, it is submitted that the contract was illegally awarded to the Riggs, Distler Company, and that the Resolution of Award should be set aside.

Discussing the opinion of the Supreme Court, it is submitted that the learned Judges erred in the conclusions reached. Taking up the points as stated in the opinion.

FIRST.

It is submitted that the first conclusion is erroneous. The Court said, "We are unwilling to set aside the award of the contract in this case to Riggs, Distler & Company for \$509,000 on the sole ground that the specifications invite 'alternative bids.'" It was not argued that the invitation for alternate bids would have been illegal but it was submitted as a fact and argued as a proposition of law that invitation to submit alternate bids upon *substituted* materials for which no specifications were provided, was not an invitation of alternate bids.

It is therefore submitted that the reasoning in the Armitage case and in the Tice case, is controlling. These cases lay it down as a question of fundamental public policy that the governing body must select the methods and materials for the doing of the public work and that all of the bidders must under the Statute be obligated to bid upon the same materials and methods of construction. That there cannot be competition unless the bidders' and the municipalities' minds meet upon a common ground. This we take it, is the doctrine of the cases cited and it is again reiterated that where the contractor is to provide the specifications by suggesting the *substitu-*

tions, there can be no common meeting of the minds of all the contractors addressed to the same proposition.

It is conceded for the purpose of this argument that the municipality may invite bids upon alternate type of construction provided it provides a specification covering each alternate type and that it may then select one of the alternates as the type of construction required, but to do so it must provide plans and specifications covering each alternate so that all of the contractors or bidders are bidding upon the same identical proposition. In the case at bar alternates were called for and duly specified in the specifications, all of the contractors bid upon the alternates and understood what they were doing. It is conceded for the purpose of this argument that the City had a right to invite these alternates and that it could then have awarded the contract upon any one of the alternates, but the City did not do this, on the contrary, it disregarded the alternates as well as the main contract and awarded the contract upon a *substituted* material, for which there was no specification in fact and which all the bidders did not have an equal opportunity to bid upon.

The Court remarks, "Our research has revealed no case in which this point (facts of this case) has been directly considered." It might well be replied that probably no municipality has heretofore acquired sufficient audacity or nerve to undertake to juggle public bidding by the methods selected in this case, or it may be that no municipality has retained advisors sufficiently clever to invent this means of serving a favorite contractor, but because the method of evading the plain terms of a plain statute may not heretofore have occurred to other municipalities, constitutes no reason for denying to

the taxpayers of Atlantic City, relief in the instant case.

SECOND.

The Court could find no evidence that the specifications had been unfairly manipulated in favor of the contractor to whom the award was made. Attention is called to the evidence of Charles Fay, page 10 (State of the Case):

"Q. Is there anything in the entire specifications, instructions to bidders, and so forth, that you have read, that would give all of the bidders notice that they could deduct if Barnes and Jones' valves were used or Dunham's valves were used?

A. No, there is not."

In the testimony of Walsh, page 22, line 14 (State of the Case):

"Q. Is there anything in the revised specifications or in the advertisements issued by Atlantic City that advises the bidders for the heating and ventilating contract that if the City decides to use Dunham valves and traps, Barnes & Jones valves and traps, that they could deduct any sum from the base bid that might be made?

A. No."

The testimony of the City's experts was one long continual evasion. Cook, the architect, is asked, page 38 (State of the Case):

"Is there anything in this addenda that you gave to the contractors advising them that if Dunham valves and traps were used they might make a deduction?"

To this the witness will give no direct answer. He finally was induced to say, page 39, line 11 (State of the Case):

“Q. * * * Your claim is, as I understand it, Mr. Cook, that this addenda marked number three contains in itself notice to the people who might bid that they can deduct from their basic bid any sum in case Dunham valves are used rather than Barnes and Jones or Warren and Webster; is that right?”

A. Yes, sir; it is required.”

The addenda referred to reads as follows:

“2. Under the Vacuum Heating system necessary apparatus, specialties and valves as manufactured by Dunham Co., Barnes & Jones, or other approved Standard makes, shall be considered as equal to Warren & Webster specialties, valves, traps, etc.”

It will be noted that the addenda above quoted gives no foundation whatsoever for the argument that alternate prices were invited as contended for by the witness.

The engineer Nelson testified as follows, page 42, line 1 (State of the Case):

“Q. You can't find it in addenda three, but you do find another provision in the contract, at page 2, which you say permits that deduction; is that right?”

A. Yes.”

The witness then read the provision he referred to, page 42 (State of the Case):

“A. ‘The contractor must submit a bid covering every item that is specified, and should he wish to suggest any substitute that he considers

equal in value and efficiency with the one specified, he shall state what the item suggested is, and what the difference in cost is, if any.’”

It therefore appears that the witnesses for the City could point to no clause in the specifications that would have justified the manipulation of the bids as was done in the instant case and against this we have the direct testimony of the plaintiff's witnesses, that there was nothing to direct their minds to the use of substituted materials.

The fact that the City acting upon the advice of its engineers picked out this one small item of \$3,000.00, in a \$600,000.00 contract, thereby reducing the amount of the contract by approximately \$1,900.00, is in itself so suspicious a circumstance that puts the City under the obligation of demonstrating that it had a clear legal right so to do. It is earnestly suggested that the mere statement of the method used to make the Riggs, Distler Company the lower bidder is evidence that the bids were manipulated and unfairly manipulated in favor of the contractor to whom the award was made.

THIRD.

The third point is a mere statement of the evidence and contains no finding of either fact or law.

FOURTH.

The fourth and last reason given is that certiorari being a discretionary writ, a taxpayer standing in the position of a representative of all the taxpayers

must show that all the taxpayers can be injured by the action of the municipality.

McCarty v. Boulevard Commissioners, 91 N. J. L. 142; and *Atlantic City Gas & Water Company v. Atlantic City*, 73 N. J. L., 360.

In the McCarty case the Court used the language of Mr. Justice Garrison in the Atlantic City Gas Company case which is as follows:

“As a taxpayer the prosecutor has a different standing, viz., as the representative in theory of the taxpaying interest of the county; but the bids that the prosecutor is attacking are the lowest, hence the interest of the taxpayers would not apparently be advanced by the success of such attack. Certiorari is a discretionary writ, hence a prosecutor who in theory represents the taxpayers of the county should not be permitted to work an injury to them in point of fact, which might readily happen if the real cause of such prosecutor's intervention were its private interest or a personal grievance.”

To which the Court in the McCarty case added the following:

“The Court and the prosecutor who hold this attitude towards the public are in contemplation of law inspired by a common purpose, to the accomplishment of which there must come a time when the Court should determine the public rights, represented in the prosecutor, upon grounds that substantially effect them, and not upon sharp questions and verbal criticisms which under the guise of protecting the public from a figmentary injury, inflict upon it one both actual and serious.”

It is suggested that the language above quoted is

not authority for the language used by the Supreme Court in the instant case, and for which these cases are summoned as authority. The language here used is, “In the absence of fraud or manifest manipulation the award in this case should not be set aside at the instance of a taxpayer.”

It is submitted that this is not the law and is unwarranted by any reported case. Manifestly the suit of a taxpayer may prevail in certiorari where there is illegality in the award, lack of power in the municipality to make the award, lack of authority to do the thing proposed to be done by the municipality, all of which would be beside the question of fraud or manipulation. Certainly the Court did not intend to say that if there had been no satisfactory authority for the erection of this Convention Hall, a taxpayer could not have complained and used the writ of certiorari for that purpose, yet this language baldly stated as it is without qualification and upon the authority of the McCarty case and the Gas Company case, is certainly not the law of this State.

The right of a taxpayer, we apprehend, is the right to intervene generally to prevent a general harm to the municipality and its taxpayers occasioned by the illegal act of its governing body. It is no answer in such a case that the illegal act will result in a possible saving to the municipality and that such saving thereby excuses the irregular or illegal action. There is the broader question of public policy. If the contract may be manipulated to the advantage of a favorite contractor by the method used in this case, clearly every future contract may be so manipulated. This means the utter defeat of the Statute, the end of honest competitive bidding and the utter undoing of the taxpayers of the municipalities in this State.

THE CONTRACT AND SPECIFICATIONS DID NOT CONFORM TO THE STATUTE.

It is respectfully urged that the specifications and contract do not contain the legislative provision contained in the *Act of 1917, page 345, Section 5*, which is as follows:

"Every contract entered into by any municipality for any improvement shall contain a provision for a deduction from the contract price of the wages paid by the municipality to any inspector or inspectors necessarily employed on such work by the municipality for any number of days in excess of the number stated in the specifications as the number of working days to be allowed for the completion of such improvement. All specifications for the work of any improvement shall fix the date before which the same shall be completed or the number of working days to be allowed for the completion thereof."

The Supreme Court has already held in *Kessler v. Atlantic County*, argued at the November Term, 1923, decided 1924, which case is not reported, as follows:

"That this act provides that every contract for any work requiring inspection shall contain a provision for deduction from the contract price of wages to be paid by the said county to inspectors for any number of working days to be allowed for the completion of such work. * * * It was upon these that the bids were submitted and considered and the resolution of award was made. The argument now is that as the act requires this provision in the contract,

it will be sufficient if it be inserted in the contract when that document is prepared for formal execution. We think, however, that this would be adding a new condition after the terms of the contract had been definitely settled by the specifications and the bids. The bids were based upon the specification and nothing else. Those specifications provided, apparently, for everything that was to be stipulated between the parties, including the form of surety bond and sufficiency of sureties, etc. *No contractor could be compelled to agree in a formal contract to such a stipulation as that quoted from the statute*, as, in fact, the only contract that could properly be made based upon the specifications and the bids, is that the contractor will perform the work according to the specifications. We think, therefore, that a resolution based upon specifications not complying with this feature of the statute should not be allowed to stand."

Since this provision was not in the contract or specifications, it is clear upon the unreversed authority of the Supreme Court, that the present contract cannot stand. Either the Court in the instant case must overrule the *Kessler* case or it must reverse the judgment of the Supreme Court in the instant case.

The reason given in the *Kessler* case likewise applies to the main contention made in this cause, that the contractors having bid upon the specifications as they stood, no alterations, even by agreement between the municipality and the contractor, can be made in the specifications. In the *Kessler* case the taxpayer would have been benefited by the insertion

of the clause in the contract and which the contractor was willing to execute requiring the payment of the extra inspection by him, but the Court held that this was unfair to the other contractors and could not be done.

In conclusion, it is earnestly submitted that if this Court approves of the principle that contracts may be awarded by public bodies upon *substituted bids* according to the plan used in the instant case, then the Statute requiring public bidding will be practically repealed. This case is of the utmost public importance. Either the legislature has failed in its object of requiring competitive bidding upon all public work or the present award is illegal. This taxpayer's suit should be decided upon the broad ground of either sustaining unimpaired the right of the public to require that public work shall be done pursuant to public bids without suspicion of manipulation or collusion or the public should know that the safeguards provided by the Statute are abortive, useless and deceptive.

If the specifications in the instant case are approved, architects, engineers, contractors and venial public officials will have afforded to them a safe and convenient method of defrauding the public in the award of public contracts, free either of the restraint of the courts or fear of punishment therefor.

Upon the broad ground of public policy as well as the heretofore apparently well established law of this State, all possibility of the manipulation of public contracts should be discouraged. Nothing is more demoralizing to the honest Government of a municipality than the possibility of giving public work to favorite contractors. Even if actual corruption of the public officials does not result, widespread suspicion upon the part of the public is inevitable.

It is therefore earnestly contended that the principle of the Armitage case is enunciated in the vigorous language of Mr. Justice Garrison to the effect that public bodies must decide upon a definite specification and that all bidders must submit their bids upon a single definite program, should be preserved without impairment.

JOHN C. REED,
Attorney for Plaintiff-in-Cer-
tiorari-Appellant.
EMERSON RICHARDS,
Of Counsel for Plaintiff-in-Cer-
tiorari-Appellant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

MARIE T. SMITH,
Plaintiff-in-Certiorari,

v.

BOARD OF COMMISSIONERS OF THE CITY OF ATLANTIC
CITY and RIGGS, DISTLER & Co., INC.,
Defendants-in-Certiorari.

ON CERTIORARI.

BRIEF FOR DEFENDANTS-IN-CERTIORARI.

The state of the case in the above entitled cause
discloses the following:

FACTS.

1. That the City of Atlantic City is a municipal corporation and that Marie T. Smith is a citizen and resident thereof and a taxpayer therein.
2. That on May 6, 1902, the City of Atlantic City, by popular vote, adopted the provisions of an act entitled, "An Act relating to, regulating and providing for the government of cities," approved April

3rd, 1902, and the various supplements and amendments thereto.

3. That it thereafter adopted and is now governed by the provisions of an Act of the Legislature approved April 5th, 1911, commonly called the Walsh Act.

4. That on October eighteenth, 1923, the City of Atlantic City adopted the provisions of an ordinance entitled, "An ordinance providing for the purchase of lands and premises within the limits of the City of Atlantic City to be used as and for a site for the erection of a convention hall, building or buildings, and providing for the preparation of plans and specifications and advertisement for bids for the erection and construction of the Convention Hall, building or buildings, and providing for the preparation of plans and specifications and advertisement for bids for the erection and construction of the Convention Hall, building or buildings, and providing the necessary cost thereof, and for the submission of the entire question and of this ordinance to a referendum," a copy of which ordinance is attached to the return and marked Exhibit P1.

That in pursuance to the ordinance aforesaid, an election was duly had in the City of Atlantic City, with the following result: that the votes, by vote of majority, approved 5802 and disapproved 2135.

5. That on December twentieth, 1923, the City of Atlantic City regularly adopted an ordinance entitled, "An ordinance to authorize the acquirement of lands to be used for convention building or buildings, convention purposes and facilities, exhibitions, entertainments, receptions, lectures, addresses, assemblages and other like purposes," a copy of which

ordinance is attached to the return and marked Exhibit P2.

6. That in pursuance to the ordinance last mentioned and marked Exhibit P2, the city did legally acquire the lands and premises referred to in said ordinance.

7. That on the seventh day of May, 1925, the City of Atlantic City regularly adopted an ordinance entitled, "An ordinance authorizing the issuance of seventy-five thousand dollars (\$75,000.00) temporary bonds of the City of Atlantic City for the purpose of providing funds wherewith to defray the necessary costs and expenses for architects and engineers for the preparation of proper plans, specifications, drawings and details for the erection and construction of a convention hall, building or buildings, on the site recently purchased by the City of Atlantic City, and known as 'Rendezvous Park,'" a copy of which ordinance is attached to the return and marked Exhibit P3.

8. That thereafter, on the twenty-third day of December, 1926, the City of Atlantic City regularly adopted the provisions of an ordinance entitled, "An ordinance authorizing the issuance of temporary bonds of the City of Atlantic City in the amount of six million, three hundred and thirty thousand dollars (\$6,330,000) for the purpose of temporarily financing a further portion of the cost of erecting and constructing a convention hall building in and for said city," a copy of which ordinance is attached to the return and marked Exhibit P4.

9. That thereafter the Board of Commissioners of the City of Atlantic City advertised and invited the

submission of bids for the erection, construction, equipment and completion of said Convention Hall, and for separate divisions of the work included therein and among other divisions of said work for which bids were invited was the work of installing a system of heating, and ventilating, including the labor and materials necessary to complete the installation thereof in accordance with the plans and specifications prepared by the architects and engineers aforesaid.

10. That in pursuance to legal authority the City of Atlantic City advertised for bids for the construction of the superstructure of the Convention Hall, which bids were to be returned on November fourth, 1926.

11. That all bids received on November fourth, 1926, were rejected.

12. That thereafter there was a re-advertisement and bids were received by the City Commissioners for the various branches of the work necessary for the superstructure of the Convention Hall, on December second, 1926.

13. That on November twelfth, 1926, the City of Atlantic City adopted revised plans and specifications for the construction of the superstructure of the Convention Hall, and authorized the advertising for bids made returnable December second, 1926, a copy of which revised plans and specifications is attached to and made part hereof, marked Exhibit P6. Also attached to and made part hereof, is a copy of the first notice to the contractors, specifications, and so forth, marked Exhibit P5. Attached to and made part hereof, is a copy of the basic bid and addenda

of Riggs, Distler & Co., Inc., and the base and addenda bid of John H. Cooney, Incorporated; marked Exhibits P8 and P9, respectively. Attached to and made part hereof is a copy of the resolution awarding the contract in question to Riggs, Distler & Co., Inc. (marked Exhibit P10), passed on January twentieth, 1927. This resolution was presented January sixth, 1927, and passed final reading on January twentieth, 1927. (State of Case, pages 3 to 7, inclusive.)

14. The original plans and specifications called for Warren and Webster specialty valves, traps, etc. The revised plans and specifications, on which bids were invited on December second, 1926, contained an addendum, dated November twelfth, 1926, in form following:

“November 12, 1926. ADDENDUM NO. 3. HEATING and VENTILATING SPECIFICATIONS, CONVENTION HALL, ATLANTIC CITY, NEW JERSEY.

Application. The original specifications for Heating and Ventilating of the Convention Hall at Atlantic City, New Jersey, dated September 30, 1926; Addenda No. 1 and No. 2 remain in full force and effect, except and only as changed by this Addendum No. 3, which now becomes a part of these specifications.

We give below answers to questions and other information raised in connection with the Heating and Ventilating for the Convention Hall at Atlantic City, N. J.

1. Direct radiation as manufactured by H. B. Smith, U. S. Radiator Co., or other approved Standard makes, will be approved as equal to the American Radiator Co. radiation.

2. Under the Vacuum Heating System necessary apparatus, specialties and valves as manufactured by Dunham Co., Barnes & Jones, or other approved Standard makes, shall be considered as equal to Warren & Webster specialties, valves, traps, etc.

3. Registers and grilles as manufactured by Hart & Cooley Co. and Highton Co. shall be considered as equal to those manufactured by Tuttle & Bailey.

4. Oil burning equipment as manufactured by Ballard Oil Burning Equipment Co. will be considered as equal to the equipment specified.

5. Alternate prices on boilers, boiler settings and vacuum pumps, submitted in proposal, will be given full consideration in awarding the contract.

The above shall take precedence over previous information and shall be taken into consideration in submitting bids.

LOCKWOOD, GREENE & CO., INC.,
ARCHITECTS,
BOSTON, MASS."

(State of Case, pages 62 and 63.)

15. The general description of the work, Exhibit P5, contained the following paragraph:

"The contractor must submit a bid covering every item that is specified, and should he wish to suggest any substitute that he considers equal in value and efficiency with the one specified, he shall state what the item suggested is, and what the difference in cost is, if any." (State of Case, page 50.)

16. The basic bid of Riggs, Distler & Co., Inc., Exhibit P8 (State of Case, pages 64 to 69, inclusive),

was five hundred and twelve thousand dollars (\$512,000.00). Price No. 16 contained in said bid was in form following:

"Price No. 16. For use of Dunham specialties in lieu of Webster, DEDUCT \$3000." (State of Case, page 68.)

The basic bid of John H. Cooney, Inc., Exhibit P9 (State of Case, pages 70 to 73), was five hundred and ten thousand, eight hundred and twelve dollars (\$510,812.00), and in said bid, as shown in State of Case, page 73, was contained a proviso that if Warren & Webster No. 5 traps were used, there was to be ADDED the additional sum of two thousand dollars (\$2,000.00), on the basic bid of five hundred ten thousand eight hundred and twelve dollars (\$510,812.00).

17. The Board of Commissioners of the City of Atlantic City awarded the contract for the heating and ventilating to Riggs, Distler & Co., Inc., on January 20th, 1927, in the sum of five hundred and nine thousand dollars (\$509,000.00), having determined that the Riggs, Distler & Co., Inc., was the lowest responsible bidder.

ARGUMENT.

This writ seeks to review and set aside the resolution adopted by the Board of Commissioners on January twentieth, 1927, awarding the contract to Riggs, Distler & Co., Inc., for the heating and ventilating work of the Convention Hall, in the sum of five hundred and nine thousand dollars (\$509,-

000.00). The said resolution is more fully set forth in paragraph 17 of the facts.

The attack on the award, as is set out in the reasons, page 75 of the State of the Case, is of a three-fold nature:

- “1. The said Riggs, Distler & Co., Inc., was not the lowest bidder for said work.
2. The bid submitted by Riggs, Distler & Co., Inc., was not in accordance with the specifications advertised; was double, irregular and illegal.
3. There were other lower responsible bidders for said contract.”

Directing the Court's attention to the second reason, it is most respectfully submitted that the bid of Riggs, Distler & Co., Inc., was in strict compliance with the specifications as advertised; was not double, nor irregular, nor illegal. The original plans and specifications, it is true, called for Warren & Webster specialties, valves, traps, etc. The addendum under date of November twelfth, 1926, paragraph two thereof, advised prospective bidders that the types of valves as manufactured by *Dunham Company* and *Barnes and Jones*, type of valves available to all bidders, would be regarded as of equal value with the type of valve originally called for in the specifications under the heading of Warren & Webster. This broadened the field of competition, and placed all bidders on an equal footing.

The expression or statement used, “*of equal value*,” means equal value from the standpoint of service to which the valves were to be subjected, and not of COST. This interpretation is borne out by the heating and ventilating expert produced by the prosecutor herself. The Court's attention is di-

rected to the testimony of CHARLES H. FAY (State of Case, pages 12 and 13):

“Q. From your twenty or thirty years' experience that you have had, would you say that Warren and Webster specialties and Dunham Company's specialties and Barnes and Jones's specialties, as to these traps, were of equal value?”

A. Yes, I would say they would be, of the same type.

Q. When you say of equal value, do you mean equal value from the standpoint of the service to which you subject these valves?

A. Yes.

Q. You don't necessarily mean the same from the standpoint of cost, do you?

A. No.

Q. You know, as a matter of fact, that there is a difference in cost between Dunham Company, Barnes and Jones, and Webster Company, don't you?

A. Well, they always vary, yes, but you don't know who is going to be high and low.

Q. So, when the expression is used, ‘Will be regarded of equal value,’ you, as an engineer, draw the conclusion that the expression is used as of value for the purpose to which you intend to subject these valves; isn't that right?

A. Absolutely.”

This version was further corroborated by the testimony of Walter W. Cook, produced by the defendants (State of Case, page 32):

“Q. Was the expression ‘of equal value’ based on the use to which the valve would be subjected or on the cost of the valve?”

Mr. Reed: I object on the ground that it is an attempt to construe a perfectly plain written instrument, and that is in the province of the Court.

A. Equal as to service."

As to bidding on specifications of this nature being double, irregular and illegal, the Court's attention is respectfully directed to the case of *Schwitzer v. Board of Education*, 79 N. J. L. 334, in which *Justice Trenchard* held:

"Specifications otherwise sufficient are not objectionable in requiring estimates from prospective bidders for municipal work on certain alternatives therein named."

The first and third reasons attacking the award will be argued together.

There is no one type of specialty, valve or trap, whether it be (a) Warren & Webster, or (b) Dunham Company, or (c) Barnes & Jones, on which bids were submitted by any bidder, all on an equal footing, that can produce a lower bid than five hundred and nine thousand dollars (\$509,000.00), the amount set forth in the resolution of award to Riggs, Distler & Co., Inc. (see State of Case, page 36):

"Q. Is there any combination of the three types of valves, Warren and Webster, Dunham or Barnes and Jones, that you could use which would make a lower net result than \$509,000.00?"

Mr. Reed: I object because of the fact that the witness's answer calls for his conclusion and that it is not in his province, either as an architect or as someone batting for the specialist, to make any such conclusion. It is a matter for the City Commissioners to determine. It is a matter of law.

A. No, sir, there is not, after careful analysis."

See also State of Case, pages 40 and 41, testimony of ALEXANDER H. NELSON:

"Q. Directing your attention to addenda number three, issued under date of November twelfth, 1926, as to the type of valves or traps, is there any one combination of either Dunham Company, Barnes and Jones, or Warren and Webster specialty valves, that you can make up from the bids of either Riggs, Distler & Company or John Cooney Company, Incorporated, and get a lower net figure than \$509,000.00?"

Mr. Reed: I object to the question on the ground that it calls for this witness's conclusion as to a matter of fact, and that is a matter of law for the Court to decide from what papers were before the Commission and the evidence in this case.

A. There is no such combination.

Q. In other words, \$509,000, according to your judgment, represents the lowest bid from all the figures submitted by any of the contractors on this particular phase of the work?

A. It does."

The testimony of the expert of the prosecutor, Charles H. Fay, on this phase of the case is, to say the least, most interesting, and justifies the statement that a reading thereof, especially the cross-examination, shows that it does not conflict with the testimony of the defendants. (See State of Case, pages 19 and 20.)

"Q. If in the Riggs, Distler bid the basic bid was \$512,000 and the City concluded to use Dunham valves and were given the privilege of de-

ducting \$3000, wouldn't their basic bid be \$509,000?

A. If you deduct those two figures it might be.

Q. Can you offer any evidence which will show any combination of any type of valves to be used in this case which will make the bid less than \$509,000?

Mr. Reed: I object to the form of the question as being improper cross-examination and an improper question.

A. Well, I didn't look over them for combinations, but the three types of valves were mentioned in the specification. From the contractors' standpoint, the contractor would use any one of the three. I don't see where you ask him to give you separate bids on those three valves. If I were the contractor, unless you asked for bids on those valves, I wouldn't consider I had any legal right to bid on them.

Q. You are now speaking as a contractor?

A. As a contractor.

Q. I am speaking to you as an expert heating man, and I want you, if you can, to explain how you can take either the Warren and Webster valve or the Dunham valve or the Barnes-Jones valve or any combination of the three under the plans and specifications, and reach a final result which will make the basic bid less than \$509,000.

Mr. Reed: I object to the question as being improper cross-examination.

A. Well, I don't know whether I ought to be testifying as an architect or engineer. I am a licensed engineer, and I am not brought here to testify as to my opinions as to what this situation might be as far as the right to deduct or add."

The testimony of Mr. Fay, the expert of the prosecutor, justifies the further conclusion that if he was serving the City's interest, he, too, would have selected the bid based on the Dunham type of valve, and it, therefore, logically follows that the City could make no other award than that which it did, to Riggs, Distler & Co., Inc., in the sum of five hundred and nine thousand dollars (\$509,000.00). (See State of Case, page 15):

"Q. I want to give you every opportunity in the world to answer intelligently, and I don't want by my form of question to mislead you. I am going to repeat it once more that if you conclude that type Warren and Webster valve, Dunham valve and Barnes and Jones are of equal value for the purpose to which you subject them, and you can get any one of the three cheaper than any of the two others, and they are of the same value for the purposes for which you are going to use them, why wouldn't you select the cheaper one?

A. *From one standpoint I would.*

Q. From what standpoint wouldn't you?

A. Well, that would depend on what position they were placed in. I would be assuming a position—in answering your questions I would be assuming the position of your architect, your designer.

Q. And your refusal to answer is because you have a feeling morally that you were brought down here for Cooney, as a witness for him, and don't want to testify to anything that might benefit the other side; is that right?

Mr. Reed: I object to that question.

A. No, sir."

If a contractor submitted either Warren & Webster

type of valve, Dunham Company or Barnes & Jones, it would have been the plain legal duty on the part of the City to accept any one of the three types of valves. If the City did accept the Dunham Company type of valve under the bid of Riggs, Distler & Co., Inc., it could have gotten the work for the contract price of five hundred and nine thousand dollars (\$509,000). If the next lowest bidder, John H. Cooney, Inc., at whose instance and for whose benefit this suit is being prosecuted, had submitted Dunham and Company type of valve, its lowest bid would have been five hundred and ten thousand, eight hundred dollars. Ambrose J. Walsh, an officer of John H. Cooney, Inc., testified that it might well be that they were bidding on the Dunham and Company type of valve. See testimony of Ambrose J. Walsh (State of Case, page 27):

“Q. And you might have selected Dunham valves?”

A. It is possible.

Q. If you selected Dunham valves, your basic bid of \$510,800 would have remained the same, wouldn't it?

A. Absolutely.

Q. And the bid of Riggs, Distler under Dunham would have been \$509,000, wouldn't it?

A. I don't say their bid would be that at all.

Q. They said that their basic bid was \$512,000, didn't they?

A. Yes.

Q. They said if we wanted to use Dunham valves, deduct three thousand dollars. Wouldn't that make their basic bid \$509,000 if they used Dunham valves and that was accepted by the City?

A. No, it wouldn't make their basic bid \$509,000.

Q. Why do you say that?

A. The specifications called for certain prices which would be the basic bid. Outside of that there is no basic bid.

Q. That is your answer to that question?

A. It is.”

It is clear under the specifications that every type of commodity called for demanded a bid thereon. (Agreed State of Facts, Exhibit P5, paragraph 15.)

See agreed state of facts under stipulation No. 15, and testimony of Alexander H. Nelson on page 42 of the State of Case:

“Q. Will you read it?”

A. ‘The contractor must submit a bid covering every item that is specified, and should he wish to suggest any substitute that he considers equal in value and efficiency with the one specified, he shall state what the item suggested is, and what the difference in cost is, if any.’ ”

That these specifications left no room for doubt, and were thoroughly understood by all of the bidders, is evidenced by the small margin of difference among the bidders, and no bidder seemed to think the specifications at all indefinite, or made any objection thereto. In addition to the bid of Riggs, Distler & Co., Inc., and John H. Cooney, Inc., there was the bid of H. E. Crook Co., Inc., the lump sum of which was five hundred and thirty-three thousand, nine hundred dollars (\$533,900). The latter two bidders likewise had some additions and deductions which did not affect the net result of making Riggs, Distler & Co., Inc., bid of five hundred and nine thousand dollars (\$509,000), the lowest bid. Attention is called to the same to indicate:

- (a) the close competitive bidding had on the subject matter; and
- (b) the fact that all bidders thoroughly understood the plans and specifications.

The very fact that John H. Cooney, Inc., inserted that if Warren and Webster valves were desired their basic bid of five hundred and ten thousand, eight hundred dollars (\$510,800) would have to be increased by the sum of two thousand dollars (\$2000) clearly indicates that they agreed with the interpretation of the plans and specifications as testified to by Alexander H. Nelson and Walter W. Cook, witnesses of the defendants.

Justice Trenchard, in Schwitzer v. Board of Education, 79 L. 342, held:

“Specifications otherwise sufficient are not objectionable in requiring estimates from prospective bidders for municipal work on certain alternatives therein named.”

No bidders seemed to have thought the specifications at all indefinite, and this resulted in intelligent and competitive bidding and in the awarding of a binding contract.

The logic of the prosecutor is difficult to comprehend, for when her contention is analyzed and summarized it amounts to this:

That in her opinion Riggs, Distler & Co., Inc., should not have the award made to them because they made a deduction from their basic bid, and the contract should be given to John H. Cooney, Inc., because they made an addition to their basic bid.

Justice Garrison, in Atlantic City Gas Co. v. Atlantic City, 73 L. 360, held:

“The action of a municipal council clearly in the interest of the taxpayers will not be set aside upon a doubtful point of procedure at the suit of a prosecutor who has suffered no special injuries of which he can be heard to complain.

The writ of certiorari is a discretionary writ. A prosecutor who only in theory represents the taxpayers of a city should not be permitted to work an injury to them in a point of fact, which might readily happen if the real cause of such prosecutor's intervention were its private interest or a personal grievance.”

Justice Black, in McCarty v. Boulevard Commissioners of the County of Hudson, 91 L. 137, affirmed 92 Id. 519, and in Maginnis v. City of Wildwood, 94 L. 90, held:

“Certiorari is a discretionary writ, hence a prosecutor who in theory represents the taxpayers of a county should not be permitted to work any injury to them in point of fact. Proceedings to review municipal action under such prerogative writ are not personal actions in which the prosecutor may upon sharp grounds insist upon a personal right. Rather is the prosecutor to be regarded, if not as *amicus curiae*, as a friend of the public. The Court and the prosecutor who hold this attitude toward the public are in contemplation of law inspired by a common purpose, to the accomplishment of which there must come a time when the Court should determine the public rights, represented in the prosecutor, upon grounds that substantially affect them, and not upon sharp questions and verbal criticisms, which under the guise of protecting the public from a figmentary injury,

inflict upon it one that is both actual and serious."

The Court and the Court of Errors and Appeals of our State have lately held in the case of *Hudson v. Atlantic City* that the Commissioners occupy a fiduciary relationship to the taxpayers and inhabitants of the community; that it is incumbent upon them at all times to serve their best interest. No one can quibble with that as a proposition of law. Assuming the plans and specifications did not oblige a prospective bidder to make any deductions or additions for the user of any one of the three types in question, the fact that they all did it, and the City having determined that any one of the three were equal in value for the use to which they were subjected, and could by picking out any one of the three types of valves which each bidder had an equal opportunity to bid on, save the City three thousand dollars (\$3000), as in this case, by the user of Dunham and Company valves, what legal justification would there have been or can there be for their refusal to do so? Any other determination would be a breach of that relationship that exists between the Board of Commissioners and the taxpayers and inhabitants of our community to serve their best interest.

Justice Fort, in case of *Faist v. Hoboken*, 72 L. 363, held:

"The statute is intended to secure to the City the contracting of work to the lowest responsible bidder, and mere irregularities in the form of the bid, or details of a statement which do not in any way mislead or injure, are not sufficient to justify the rejection of such a bid."

And on page 364, of same case, *held*:

"The City has secured all that the statute

exacts for the protection of the officials making the contract and at the same time secure the work to be done by the lowest responsible bidder, in the interests of the people. To secure this should be the aim of the municipal officials without regard to technicalities or immaterial formalities in bidding."

It is most respectfully submitted that almost the entire brief of the appellant in this case is based on facts which we find do not exist in this case.

The entire State of Case is free from a scintilla of evidence with relation to boilers, yet a great part of the brief for the appellant is confined to this subject matter. The sole basis of the attack on the part of the appellants was confined to the controversy arising under addendum No. 3, under date of November 12, 1926; and, no matter how strong language is used in denunciation of the conduct on the part of the defendants in this case, the fact remains that *every bidder had an equal opportunity, and stood on the same footing, with relation to his bidding on addendum No. 3*. Every bidder was free to bid on either *Warren and Webster valves, Dunham Company valves or Barnes & Jones valves*. The fact that no bidder—including John H. Cooney, Inc.—made any protest or objection thereto at the time of the bidding, indicates that there was a definite and clear understanding on the part of all of the bidders.

It is most respectfully urged, that, quite apart from any language in the specifications which, for the purpose of discussion, could be characterized as either illegal or subject to criticism, the fact remains, as is disclosed by the State of Case, that the award made in this case was not based on any commodity which the bidder could have substituted as of equal value but *only those items were used which were*

specifically mentioned and on which every bidder had an equal opportunity and stood on the same footing. Every bidder could have bid on Warren and Webster valves, Dunham Company valves and Barnes & Jones valves; and, although the language may justify the conclusion that he (the bidder) could have substituted some other type of valve of equal value, no such substitution was considered.

This was a stupendous undertaking. And, if, as a result of information received from bidders, the cost of the undertaking could be lessened, the City could reject all bids, take advantage of the information received, and re-advertise.

Paragraph 14 of the facts answers the objection that the specifications were defective in that they were not adopted by the Commissioners; for this clearly states that on November 12, 1926, the City adopted revised plans and specifications for the construction of the superstructure, etc., * * * on which bids were returnable on December 2, 1926; and that there was a re-advertisement for said bids. (Stipulation No. 12, State of Case, page 6.) That the appellants received a copy of this addenda, under date of November 12, 1926, is indicated from the fact that they have acted on same. (See State of Case, pages 62 and 63.)

Objection is made that the contract and specifications do not conform to the statute. It is most respectfully submitted that there is not a scintilla of evidence disclosed in the State of Case with reference to this subject matter.

It is, therefore, not a proper subject matter for consideration by the Court at this stage of the proceedings. It is, however, a fact that the specifications do contain the number of working days within which this undertaking should be completed; and the contract executed between the parties in interest

does contain the provision requiring the contractor to pay to the City wages paid by it to any inspector or inspectors necessarily employed by it for any number of days in excess of the time within which the work contemplated is to be completed; but as above stated, there appearing nothing in the State of Case on the subject matter, it cannot now—for the first time—be raised in this Court.

Almost every step in this venture or undertaking has been contested and received the attention of the Supreme Court. The situation now is, that the major contract involving the sum of four million, five hundred thirty-two thousand and fifty dollars (\$4,532,050.00) was attacked (*William R. Brown, et als., prosecutor, v. City of Atlantic City and M. B. Markland Co.*, Case No. 273, January Term, 1927), and received approval of the Supreme Court.

There was awarded, and are now outstanding, the following contracts—in the stated amounts—with reference to this Convention Hall superstructure, separate and apart from the heating and ventilating contract, the subject matter of this suit:

- (a) Otis Elevator Co.—Elevators.....\$ 80,490.00
- (b) Globe Automatic Sprinkler Co.—
Fire Protection\$ 61,600.00
- (c) Pennsylvania Engineering Co.—
Ice Skating Rink\$ 61,500.00
- (d) W. G. Cornell Co.—Plumbing...\$140,200.00
- (e) Electrical Equipment Company—
Electrical Work\$430,966.00

Each of the contractors, under the awards aforesaid, are performing their undertakings. It is, therefore, most respectfully submitted, that in the absence of fraud or manifest manipulation, neither of which appears in this case, the award made by the City in

the instant case should not be set aside; and that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,
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JOSEPH ALTMAN,
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Inc.*