

OPINION
46-24

April 9, 1946 (OPINION)

BOARD OF ADMINISTRATION

RE: Acceptance of Bids

This is in reply to your recent letter relative to Chapter 71 of the Session Laws of 1945.

Said Chapter 71 provides for the installation of an electric roll call system in the house chamber when the Federal government has granted priorities for or otherwise released to the state all material and supplies necessary for the construction for such installation.

The second paragraph of said Chapter 71 provides as follows:

"Title to said electric roll call system except conduits, iron boxes or frames, junction boxes, wires, motor generator set and other material or parts permanently installed shall remain in the contractor and shall be removed at the end of the regular session of the Legislature in 1947 in the event that the house shall determine that such electric roll call system is not satisfactory. The contract for the purchase and installation of such electric roll call system shall provide for a specific sum which shall be the total cost thereof if such system is accepted by the house and the amount which shall be paid to the contractor in full payment of all services and material in the event that such electric roll call system is rejected by the house."

You state that you have been advised by the two concerns which manufacture and install such systems that the limitations heretofore imposed by the Federal government have now been removed and that the necessary materials for installation are available.

You state further that owing to the peculiarity of the equipment to be installed, and to the fact that each of the two companies have certain patents which the other company may not use without infringement, it will be necessary for you to be advised with reference to certain questions that may arise; namely:

It is difficult to write specifications for the reason that one or the other of the bidding companies cannot make or furnish the particular item or items which may be specified by the board if the competitor holds the patent on that particular piece of equipment, and consequently one or the other of said companies would be precluded from bidding. The question, therefore, is - first, whether under the law bids could be called for without setting up specifications and instead require each bidding company to submit on a specified date sealed bids accompanied by the manufacturer's own drawings and specifications of what it is proposed to furnish and install. Second, there has been litigation in the Federal courts between the two bidding companies relative to alleged infringement of

patent rights. If, after the installation and purchase of a roll call system, it should be determined by the courts that the unsuccessful bidder held the patent right to some of the particular equipment purchased, would the state as purchaser be liable in any way to the company whose patent has been infringed?

One of the prospective bidders has submitted a question with reference to paragraph 2 of chapter 71 in the language, "Before your advertisement for bids is published or mailed to correspondents, we wish you would reach agreement with us as to what section no. 2 of the bill means."

Answering your first question, we do not believe that it is any concern of the state that the two prospective bidders are in litigation with reference to patent rights. The questions involved in such litigation are questions to be determined by the courts in which the litigation is conducted. Such litigation when decided, I presume, will be adverse to one or the other litigant, and if the result would be adverse to the successful bidder, such bidder may not be able to furnish certain equipment covered by patent rights owned by the other company, but, as I have pointed out, that matter is something that cannot very well be guarded against or forestalled by the board of administration.

However, if a successful bidder installs the roll call system and it should afterwards develop that part of the equipment installed is covered by patent rights owned by the unsuccessful bidder, there would be no liability against the state and the parts installed could not be removed. The remedy of the unsuccessful bidder would be an action for damages against the company who was found to have infringed the patent rights.

With reference to the matter of submitting bids, the installation of such a system is one that requires expert and technical knowledge, and consequently the board of administration would hardly be in position to submit specifications which would include every detail, both as to construction and the material to be used. It is our opinion, therefore, that the call for bids should require the bidders to set forth in detail everything necessary for a complete installation of the system. The bid and specifications should specify the following: First, the cost to the state of the complete system in case the system is found to be satisfactory. Second, if the system is found to be unsatisfactory, the bid and specifications should specify in detail the equipment or parts of equipment which will be permanently installed and will belong to the state, and the total cost of same.

In case the system, when installed, should be found to be satisfactory, the total cost may not exceed the sum appropriated therefor; to-wit, \$50,000.00.

You quote from the letter of one of the prospective bidders as follows: "The conduits, iron boxes or frames, junction boxes, wires, motor generator set and other materials or parts permanently installed will be paid for apparently by your department as the work is done, and the contractor who installs them is taking no chance whatever of not being paid; * * *."

The items mentioned are undoubtedly those which are to be permanently installed and will remain as a part of the building even though the system otherwise is found unsatisfactory. For that reason the cost of same should be itemized in the specifications accompanying the bid so that you will be advised what the cost will be.

It is our opinion that in case the system is found unsatisfactory, any and all items of equipment complete in themselves and not specially designed, which are removable without material injury to that part of the building to which they may be attached, should be removed without cost to the state.

We believe it would be advisable, however, for the board of administration to employ the services of a competent electrician to act as a general supervisor during the construction and installation of the system.

NELS G. JOHNSON

Attorney General