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Bruce I. Kogan

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Note

COMPETITIVE BIDDING AND THE OPTION TO RENEW OR EXTEND A STATE PURCHASE CONTRACT

I. Introduction

The general principle requiring competitive bidding before awarding a government contract is well accepted in nearly every state in one form or another. Two recent Washington cases, *Miller v. State*[1] and *Savage v. State*,[2] have raised the question of whether a state purchase contract which is initially let in accordance with competitive bidding requirements violates these same requirements by providing for negotiated renewal or by including an option in the state to extend the duration of the contract beyond its original term. This Note will consider the problems presented by both the negotiated renewal and the extension option. It will analyze *Savage v. State* in light of a survey of the major aspects of state government purchasing contracts.

II. Miller v. State—The Negotiated Renewal

The State of Washington in 1957 called for competitive bids to supply all of the light bulbs required by the state during a twelve month period.[3] A total of twelve firms entered bids on the contract. In compliance with the applicable statutory requirements, the one year contract was awarded in 1958 to the lowest and best

1. 73 Wash. 2d 790, 440 P.2d 840 (1968).
2. 75 Wash. 2d 633, 453 P.2d 613 (1969).
3. "Light bulbs are no trifling matter to the state of Washington. The state buys nearly $300,000 worth each biennium—and the amount will increase steadily in the future." Miller v. State, 73 Wash. 2d 790, 440 P.2d 840, 841 (1968).

bidder, the Platt Electric Supply, Inc. Thereafter, instead of putting the light bulb purchases up for competitive bids, the state regularly renewed the 1958 contract with the supplier by negotiation.[4]

The state's renewal practice led to the institution of a taxpayers' action to enjoin the State and the Director of General Administration from further renewing the 1958 lamp purchase contract. The lower court granted the relief sought[5] after finding the following facts:

> That the discounts contained in said lamp contract No. 184 are substantially less then [sic] discounts presently available from a number of suppliers in the State of Washington, and that the Platt Electric Supply, Inc., gives higher discount rates in a number of instances to users under somewhat similar contracts, including the City of Seattle, City of Tacoma, the County of Multnomah School District, the State of Oregon and the Directors of King County. That the State of Washington is not receiving the advantage of the best available prices, including discounts, in the purchase of lamps under contract No. 184.[6]

While the state disputed the lower court's findings of fact, its main contention on appeal was that the statutory provisions relating to competitive bidding[7] gave it a wide latitude to negotiate contracts for the purchase of state supplies, or to renew by negotiation contracts reached by competitive bids, because the statute directed that purchases be made by competitive bidding only

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4. *Id.* at 791, 440 P.2d at 841.

5. A judgment and decree of injunction was entered against the defendants by the Superior Court of Washington for Thurston County.

6. Finding of fact 6 of the lower court is quoted in a footnote in the *Miller* opinion. 73 Wash. 2d 790, 791, 440 P.2d 840, 841 (1968).

7. WASH. REV. CODE ANN. § 43.19.1906 (1965) provides:

> Insofar as practicable, all purchases and sales shall be based on competitive bids and a formal sealed bid procedure shall be used as standard procedure for all purchases and contracts for purchases and sales executed by the director of general administration through the division of purchasing and under the powers granted by RCW 43.19.190 through 43.19.1393: *Provided*, That sealed competitive bidding shall not be necessary for:
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> (1) Emergency purchases if such sealed bidding procedure would prevent or hinder the emergency from being met appropriately; and
>
> (2) Purchases not exceeding five hundred dollars but in all such purchases quotations shall be secured from enough vendors to assure establishment of a competitive price; and
>
> (3) Purchases which are clearly and legitimately limited to a single source of supply and purchases involving special facilities, services, or market conditions, in which instances the purchase price may be best established by direct negotiation.

'insofar as practicable.'[8] The state further suggested that calling for bids would not be necessary when the purchasing officer, in the exercise of his discretion, determined that to do so would be impracticable.

The Supreme Court of Washington rejected the state's argument for two basic reasons. First, it determined that the instant contract did not fall within one of the statutory exceptions[9] to the general competitive bidding requirement. These statutory exceptions, which are some of those typically present in the competitive bidding rules of other states, exempt from the general requirement emergency purchases, purchases falling below a minimum figure (in this case $500), and purchases limited to a single source of supply.[10] Clearly none of these exceptions applied to the contract in question.

Second, after reviewing the advantages to the public inherent in the competitive bidding procedure and defining the term *practicable*,[11] the court concluded that it would not be impracticable for the state to purchase its light bulb supplies through competitive bidding.

In so concluding, the court effectively and correctly decided that a negotiated renewal of a contract originally awarded in accordance with competitive bidding requirements is void as violating those same requirements.

III. Savage v. State—The Extension Option

In response to the decree of the trial court in *Miller* enjoining the state from negotiating further renewals of the 1958 lamp contract, the state called for competitive bids for the furnishing of electric lamps, light bulbs and starters. The new contract was awarded to the lowest bidder, once again the Platt Electric Supply, Inc.[12]

This contract contained an option provision whereby the state might extend the duration of the purchase agreement for successive one year periods to a maximum of three years beyond the

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8. *Id.*
9. *Id.*
10. See text accompanying notes 49-57 *infra.*
11. Merriam-Webster's International Dictionary (3d ed. 1964), defines *practicable* as (possible to practice or perform: capable of being put into practice, done, or accomplished: feasible.

The word *feasible* is defined in the same dictionary as 'capable of being done, executed, or effected: possible of realization . . . capable of being managed, utilized, or dealt with successfully.'

Accepting these dictionary definitions as the ordinary meaning of the term and applying them now in the term's statutory context, it appears that *practicable* means a practice that is feasible, or a procedure capable of being put into practice. Thus, if an undertaking is possible to practice or perform or is capable of attainment or accomplishment, it is practicable.

Miller v. State, 73 Wash. 2d 790, 793-4, 440 P.2d 840, 842-3 (1968).
12. Savage v. State, 75 Wash. 2d 663, —, 453 P.2d 613, 614 (1969).

original one year term.[13] The sole contention of the plaintiff-taxpayers[14] in the resultant declaratory judgment action was that the option to extend the contract term was a violation of the competitive bidding statute.[15] The trial court agreed and entered summary judgment declaring the option provision void and enjoined the state and the Director of General Administration from exercising the option. On appeal by the state, the Supreme Court of Washington in a 5-4 decision reversed the judgment of the trial court and concluded that the contract was in compliance with the applicable competitive bidding requirements.[16]

A. *Option Held Valid*

The majority view in *Savage* was that an option to extend a contract neither constitutes a negotiation nor creates successive new contracts but, rather, merely extends the duration of a single existing contract.[17] A second element offered in support of the majority conclusion was that there are no statutory requirements limiting the time or duration of a purchase contract. The majority opinion expressed the view that the Director of General Administration made a valid determination that it was in the best interests of the state to protect against a price increase by obtaining a limited and specific option to extend the initial one year contract. The court decided that the essential terms of any state purchase contract must be left to the determination of the administrative officer or agency involved with the letting thereof, subject, of course, to judicial review for unreasonableness or abuse of discretion.[18] The court then concluded that a maximum possibility of

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13. The language of the contract which is at issue provides:
> Contract Dates: This contract shall be for a period commencing on the 1st day of January, 1966, and terminated on the 31st day of December, 1966. Extensions: Bidder and Division of Purchasing covenant and agree that this contract may, at the sole option of the State of Washington, be extended under the same terms and conditions of this contract for a period not to exceed one additional year, and said option to extend this contract for a one year period shall be in effect thereafter for a total not exceeding three additional years.

Savage v. State, 75 Wash. 2d 663, —, 453 P.2d 613, 614 (1969).

14. The plaintiff-taxpayers in this action are identical to those in *Miller*.

15. Statute cited note 7 *supra*.

16. Savage v. State, 75 Wash. 2d at —, 453 P.2d at 616 (1969).

17. Savage v. State, 75 Wash. 2d 663, —, 453 P.2d 613, 615 (1969); *see* Helena Light & Ry. v. Northern Pac. Ry., 57 Mont. 93, 186 P. 702 (1920); State *ex rel.* Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960); 17A C.J.S. *Contracts* § 449 (1963).

18. Pittman Constr. Co. v. Housing Auth., 167 F. Supp. 517 (W.D. La.

four years is not an unreasonable length of time for the state to contract for its lamp and starter needs.[19] Finally, since all bidders had an equal opportunity to respond to the department's invitation to bid on the terms as specified and advertised including the one to four year variable duration option, the majority concluded that no violation of competitive bidding requirements had occurred.

B. *Option Viewed as a Violation*

The minority of the *Savage* court chose not to apply the technical rule of contract law invoked by the majority which treats the exercise of an option to extend as a continued existence of the original contract rather than the formation of a new contract.[20]

The well reasoned dissent written by Judge Hale, the author of the *Miller* opinion, raised a number of arguments to show the invalidity of the extension option clause. The dissent reasoned that state exercise of the extension option is a renewal and, therefore, equivalent to a non-competitive negotiation of a new contract. In view of the mandatory requirement of the statute[21] and the fact that the instance under consideration did not fall within one of the stated exceptions, the minority urged that the extension clause violated the basic purpose of the bidding requirement. The situation which could arise from the exercise of the option was said to present an opportunity for impropriety even if no wrong was actually committed, since no notice would be given to the public that an extension was being entered into at the end of the one year contract period. Another supplier might be in a position after the first year to offer a better price than initially accepted by the state. However, since the exercise of the extension option need not be publicly disclosed, the public could be denied the lowest available price. Another shortcoming in the extension option system noted by the court is that it confers unlimited discretion in the administrative officer making the decision to extend. The officer could choose to extend even though the contractor's performance during the first year were substandard or other contractors were now in a position to offer a better price.

A second dissent dealt with the effective realities of the extension method used by the state in letting the new contract. It pointed out that under the 1958 contract discussed in *Miller*, the

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1958), *aff'd*, 264 F.2d 695 (5th Cir. 1959); Litemore Elec. Co. v. Kawecki, 48 Misc. 347, 265 N.Y.S.2d 29 (Sup. Ct. 1965); State *ex rel.* Democrat Printing Co. v. Schmiege, 18 Wis. 2d 325, 118 N.W.2d 845 (1963).

19. See Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 105 A.2d 614 (1954) for a general discussion on the reasonableness of long term public contracts.

20. Savage v. State, 75 Wash. 2d 663, —, 453 P.2d 613, 618 (1969) (dissenting opinion).

21. Statute cited note 7 *supra*.

state was charged in excess of the best price available by the same contractor involved in the present case. The present contract was suggested to be an attempt by the Department of General Administration to negate the holding of *Miller* and yet accomplish the same illegal purpose. Finally, the second dissent contended that the possibility of the contract lasting for one, two, three or four years results in the state receiving an unfavorable price:

> Under these circumstances, knowing that they might be bound on a 4-year contract and foreseeing that they are in a period of rising prices and costs, the bidder would naturally attempt to average out the anticipated percentage of increase for an item on a 4-year basis. Thus the bid for the first year contract would necessarily be greater than it would have been if the bid were for a 1 year period. As I read the statute, this method of bidding is contrary to its intent and does result in an initially higher sales price for light bulbs.[22]

IV. Major Aspects of State Purchase Contracting

A. *General Considerations*

Basically public contracts resemble private contracts, in that the contracting governmental body subjects itself to the principles of general contract law.[23] However, in many respects public contract law is unique. "A private contract is one between inddividuals only and affects only private rights; a public contract is one to which the state is a party, and which concerns all its citizens."[24]

The initial inquiry in determining whether a state purchasing contract is valid is whether the state agency entering into the agreement had the power to carry out such a transaction. Such authority may be inherent, expressed, or implied, but the existence of some valid power to contract is a prerequisite.[25]

The next consideration to be given a state contract is whether the requisite formalities involved in making such a contract have

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22. Savage v. State, 75 Wash. 2d 663, —, 453 P.2d 613, 619 (1969) (dissenting opinion).

23. Clark County Constr. Co. v. State Highway Comm'n, 248 Ky. 158, 58 S.W.2d 388 (1933). *See generally* W.H. Riemer, Handbook of Government Contract Administration 14-15 (1968).

24. People *ex rel.* Weed-Parsons Printing Co. v. Palmer, 14 Misc. 41, 35 N.Y.S. 222 (Sup. Ct. 1895); 17 C.J.S. *Contracts* § 10 (1963).

25. United States v. McDougall's Adm'r, 121 U.S. 89 (1887); Dallas County v. MacKenzie, 94 U.S. 660 (1876); Forth Worth Cavalry Club v. Sheppard, 125 Tex. 339, 83 S.W.2d 660 (1935).

been substantially fulfilled. In many aspects, these formalities are provided as a means to protect the public interest. While many of these public safeguards are applicable to the entire range of governmental contracts,[26] this discussion will concentrate upon their use in purchasing contracts.

Contracts for purchases of materials and supplies differ from other public contracts in several key respects. While the costs of government procurement and purchasing increase steadily[27] corresponding to increases in government activity, the immediate outlay at any one time is normally within the fiscal means of the state and so does not require the issuance of bonds as do many other public works contracts.[28] In fact, for materials and supplies, as distinguished from equipment, expenditures must normally be met out of current revenues.[29] It must be remembered, however, that in the case of purchases of supplies, delivery will normally extend over a significant period of time thus raising a continuing inspection problem to determine compliance with the contract specifications.

One well recognized precept safeguarding the public interest is that fraud or collusion in the awarding of a contract by public authority will make the contract void.[30] Another long established principle prohibits the expenditure of public funds on anything except a public purpose. A principle which arose origin-

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26. Public contracts can be categorized in four basic groups. First are the contracts for the construction or repair of buildings, roads, recreational facilities and other major public projects. The second group is comprised of the various purchasing contracts for supplies and equipment. The third type of public contract is for the supplying of various required services. Generally, services which can be classed as commercial such as printing and maintenance are subject to bidding requirements, while personal and professional services are often excepted. For an excellent discussion of the personal service exception see Annot., 15 A.L.R.2d 733 (1967). The fourth type of contract is for research and development which may combine elements of each of the three prior categories. While state governments have not been involved with this type of contract to any great extent in the past, it is reasonable to expect that the campaign to eliminate pollution of our atmosphere and waters may result in widespread adoption of such arrangements. At any rate, the federal government has for many years made extensive use of this type of contract, particularly in the defense field. An early and leading case on research and development contracts is Carnegie Steel Co. v. United States, 240 U.S. 156 (1916). For an in depth treatment of the entire area see 9 J. McBride & I. Wachtel, Government Contracts § 53 (1969).

27. The total amount expended by state and local governments for the procurement of goods and services rose from $46.1 billion in 1960 to $97.2 billion in 1968. U.S. Bureau of Census, Statistical Abstract of the United States; 1969, at 312 (90th ed. 1969).

28. *See generally* Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1883).

29. *See, e.g.*, Ellison v. Oliver, 147 Ark. 252, 227 S.W. 586 (1921); Wash. Rev. Code Ann. § 43.88.130 (1965).

30. McMullen v. Hoffman, 174 U.S. 639 (1899); Otter Tail Power Co. v. Village of Wheaton, 235 Minn. 123, 49 N.W.2d 804 (1951).

ally from judicial interpretation but which has since frequently been voiced in constitutions and legislation is the bar against preventing government officers from having any connection with the awarding of governmental contracts in which they have a personal interest.[31] The rationale of this prohibition lies in the inherent conflict between private interest and public obligation.[32]

B. *Competitive Bidding*

The most important means of protecting the public interest in the realm of state purchase contracts is the use of competitive bidding and award to the lowest responsible bidder.

The obvious purpose of competitive bidding is to avoid "favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable."[33] In order to best accomplish these aims, it is desirable to enact the requirements in a broad policy statement constitutionally and also in considerable detail statutorily since the common law rule called for invalidation of the contract only upon a showing of fraud or corruption.[34]

Requirements for competitive bidding in state contracts are found in all states, although the nature and extent of such provisions vary greatly from state to state.[35] While the require-

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31. See cases cited at 43 AM. JUR. *Public Works and Contracts* § 14 (1942).

32. *See generally* Hanes & Smith, *The Contracting Officer: His Authority to Act and his Duty to Act Independently*, 70 DICK. L. REV. 333 (1966).

33. 10 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 321 (3d ed. 1966).

34. State *ex rel.* Flowers v. Kelley, 214 F. Supp. 745 (M.D. Ala. 1963), aff'd, 339 F.2d 261 (5th Cir. 1964).

35. ALA. CONST. art. 4, § 69; ALA. CODE tit. 55, §§ 494-512 (Supp. 1967); ALASKA STAT. § 37.05.230 (Supp. 1969); ARIZ. REV. STAT. ANN. § 35-131-13 (Supp. 1969); ARK. CONST. art. 19, § 15; ARK. STAT. ANN. § 14-205 (1968); CAL. GOV'T CODE § 14807 (West Supp. 1969); COLO CONST. art. V, § 29; COLO. REV. STAT. ANN. § 3-4-3 (1963); CONN. GEN. STAT. ANN. § 4-112 (Supp. 1969); DEL. CONST. art. XV, § 8; DEL. CODE ANN. tit. 29, § 6904 (Supp. 1968); FLA. STAT. ANN. § 287.081 (1962); GA. CONST. § XVII; GA. CODE ANN. §§ 1409, 1410 (1957); HAWAII REV. LAWS § 103-22 (1968); IDAHO CODE ANN. § 67-1608 (Supp. 1967); ILL. CONST. art. IV, §§ 15, 25; ILL. ANN. STAT. ch. 127, § 132 (Supp. 1969); IND. ANN. STAT. § 53-501 (1964); KAN. STAT. ANN. § 75-3739 (Supp. 1968); KY. CONST. § 247; KY. REV. STAT. ANN. § 42.070 (1963); LA. CONST. art. 3, § 30; LA. REV. STAT. ANN. § 38:2211 (1968); ME. REV. STAT. ANN. tit. 5, § 1816 (1964); MASS. GEN. LAWS ANN. ch. 7, § 22 (1966); MICH. CONST. art. V, § 25; MINN. STAT. ANN. § 16.07 (1946); MISS. CONST. art. 4, § 107; MO. ANN. STAT. § 34.040 (1969); MONT. CONST. art. V, § 30; MONT. REV. CODE ANN. § 82-

ment of competitive bidding is often so expressed, some other states require that contracts be awarded to the "best bidder," "lowest responsible bidder" or "lowest and best bidder" each of which presupposes the completion of a round of competitive bidding prior to the award.[36]

As will be discussed later,[37] not all contracts are suitable for award by competitive bidding. This limitation, however, should not be interpreted to mean that it is undesirable to adopt in every state a broad and mandatory statutory scheme of competitive bidding which provides the proper and applicable exceptions from the general requirement.[38] Such a statute would certainly create a less confusing standard than the typical one present in the Washington statute,[39] discussed in both *Miller* and *Savage*, which requires competitive bidding only "insofar as practicable."

An advertising requirement exists under most competitive bid systems.[40] The advertising requirement is designed to assure that all persons qualified[41] and desirous of bidding be given an adequate and an equal opportunity to be informed that the public body proposes to enter into a contract. In the absence of specific requirements as to the manner of advertising, competitive bidding necessitates "that a reasonable notice be given of the letting of public contracts in order that by competition in bidding, the public may receive the benefit of the greatest possible value of the

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1913 (1966); NEB. CONST. art. III, § 16; NEB. REV. STAT. § 81-161 (1966); NEV. REV. STAT. § 333.300 (1967); N.H. REV. STAT. ANN. § 8:19 (Supp. 1967); N.J. REV. STAT. ANN. § 52:34 (1955); N.M. STAT. ANN. § 6-5-26 (Supp. 1969); N.Y. STATE FIN. LAW § 174 (McKinney Supp. 1969); N.C. GEN. STAT. § 143-52 (1964); OHIO REV. CODE ANN. § 125.14 (Baldwin 1964); OKLA. CONST. art. V, § 23; OKLA. STAT. tit. 61, § 22 (Supp. 1969); ORE. CONST. art. IX, § 8; ORE. REV. STAT. § 279.714 (1968); PA. STAT. ANN. tit. 71, § 639 (1962); S.D. CODE § 55.2805 (1939); TENN. CODE ANN. § 12-305 (1955); TEX. CONST. art. XVI, §§ 18, 21; TEX. REV. CIV. STAT. ANN. art. 664-3 (1964); UTAH CODE ANN. § 63-2-29 (1968); VT. STAT. ANN. tit. 29, § 953 (Supp. 1969); VA. CODE ANN. § 2.1-275 (1966); WASH. REV. CODE ANN. § 43.19.1906 (1965); W. VA. CONST. art. 6, §§ 15, 34; W. VA. CODE ANN. § 5A-3-11 (1966); WIS. CONST. art. IV, § 25, WIS. STAT. ANN. § 16.75 (Supp. 1969); WYO. CONST. art. 3, § 31; WYO. STAT. ANN. § 9-375 (1957).

36. *See, e.g.*, CAL. GOV'T. CODE § 14807 (West Supp. 1969).

37. See text accompanying notes 52-61 *infra*.

38. H. JAMES, THE PROTECTION OF THE PUBLIC INTEREST IN PUBLIC CONTRACTS 14 (1946).

39. Statute cited note 7 *supra*.

40. *See, e.g.*, GA. CODE ANN. § 40-1409 (1957) which provides in part that "sealed bids shall be solicited by advertisement in a newspaper of state-wide circulation."

41. Among the various factors considered in making the determination of a bidder's qualification are whether he (1) is a manufacturer or regular dealer; (2) has adequate financial resources or ability to secure such resources; (3) is able to comply with the required delivery or performance schedule (taking into consideration all existing business commitments); and (4) has a satisfactory record of performance and integrity. G. CUNEO, GOVERNMENT CONTRACTS HANDBOOK 20-21 (1962).

least expenditure."[42] The test of reasonableness of the notice must, of course, vary with the circumstances of the particular contract contemplated. To achieve the goal of informing both the general public and prospective bidders there must be concern for use of the proper media for sufficient time and with sufficient frequency.[43]

No less important than the requirement of adequate advertising is the need for definite specifications providing all bidders with the nature of the proposed contract so as to enter intelligent bids.[44] The exact method by which the specifications are made available to the public and to the bidders will again vary depending on the circumstances of the individual contract. The best approach would be to include the exact specifications in the advertised notice, and often in state purchase contracts, where the commodity sought is readily identifiable, such inclusion in advertising is conceivable.[45]

Another aspect involved in government purchasing is the prohibition against contract splitting. Contracting officers who do engage in such conduct are attempting to evade the requirements of competitive bidding by dividing an integral purchase into two or more transactions, each of which falls below the minimum figure at which formal bidding procedures become mandatory.[46] While this practice is often not easy to detect, particularly if the subpurchases are made at respectable intervals, courts will not tolerate it when uncovered.[47]

Deposits to insure faithful performance are often required with the entrance of the bid[48] since an action for damages will ordinarily be unavailing in the event of substandard or non-performance.[49] The amount and form of the deposit will again vary with the circumstances of the particular contract.

The final aspects in the competitive bid process are the formal-

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42. Reiter v. Chapman, 177 Wash. 392, 397, 31 P.2d 1005, 1007 (1934).
43. *See, e.g.*, FLA. STAT. ANN. § 287.081 (1962) which requires that the notice be published regularly for two weeks prior to the opening of bids.
44. Flynn Constr. Co. v. Leininger, 125 Okla. 197, 257 P. 375 (1927).
45. James v. Humphrey, 226 Ark. 325, 289 S.W.2d 691 (1956).
46. *See, e.g.*, ALA. CODE tit. 55, § 499 (Supp. 1967) which provides in part: "No purchase or contract shall be divided into parts . . . for the purpose of avoiding the requirements of this chapter."
47. State v. Kollarik, 22 N.J. 558, 126 A.2d 875 (1956); Yohe v. City of Burrell, 418 Pa. 23, 208 A.2d 847 (1965); Fonder v. City of Lower South Sioux Falls, 76 S.D. 31, 71 N.W.2d 618 (1955).
48. See cases cited at 81 C.J.S. *States* § 118 n.20 (Supp. 1969).
49. Wisconsin Bridge & Iron Co. v. Alpena, 238 Mich. 164, 213 N.W. 93 (1927).

ities attached to the bid itself. The public interest would appear best protected by a requirement that all bids be in writing to guarantee an equal basis for comparison.[50] Written bidding also offers the advantage of forming a permanent record against which the performance of the successful bidder could later be judged. A requirement that the written bids be sealed also acts as a public safeguard by preventing a premature disclosure which would destroy the equality of bidding opportunity.[51]

C. *Common Exceptions to Competitive Bidding*

In light of the fact that competitive bidding acts to protect the interests of the general public, the range of exceptions to the procedure should be restricted. Further, whatever exceptions are to be made should be enumerated in the statutes governing the bidding and not left to the discretion of the awarding officer as to the feasibility or practicability of bidding in any particular purchase.[52]

The amount involved in the purchase contract is often the determining factor in whether an exception to the bidding procedure exists. While every contract could by statute be made to fall within the bidding requirements, this would be wasteful and inefficient for purchases involving relatively small amounts of money. The minimum in effect presently varies throughout the states from a low of $50[53] to a high of $4000[54] for purchase contracts.

A second exception from bidding is the case of an emergency situation in which the immediate public need for procurement of the item outweighs the advantage to be gained by delaying to observe the formalities.[55] The question that arises in connection with this exception is what are the limits on the discretion of the contracting officer to determine when such an emergency exists.[56]

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50. *See, e.g.*, KY. REV. STAT. ANN. § 42.070 (1963) which requires written and sealed bids on all purchases over $300.

51. *Id.*

52. *See, e.g.*, NEB. REV. STAT. § 81-161.03 (1966) which vests complete discretion in that state's Purchasing Agent to omit bidding in any case.

53. ME. REV. STAT. ANN. tit. 5, § 1816 (1964).

54. HAWAII REV. LAWS § 103-22 (1968).

55. Statute cited note 7 *supra*. *See generally* 10 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 343 (3d ed. 1966).

56. The State of Illinois has attempted to limit the discretion of the awarding officer to involve the emergency exception in the following manner:

> Where funds are expended in an emergency by purchase, contract or otherwise, however, the person or persons authorizing the expenditure shall file an affidavit with the Auditor General of the State of Illinois within 10 days after the purchase or contract setting forth the conditions and circumstances requiring the emergency purchase. The Auditor General shall file with the Legisla-

A third common exception provides that bidding requirements may be waived when the item sought is available only from a single supplier.[57] This exceptional situation can be further complicated when a patented article is expressly listed in the contract specifications.[58]

The final exception that is sometimes provided for in the laws controlling state purchase contracts allows the contract to be let without bidding after there has been a round of bidding in which either no bids were submitted or in which all bids were rejected.[59] There are several instances in which all bids could be rejected as when all are deemed to be too high[60] or when no "responsible"[61] bidder competes.

V. SAVAGE REVISITED

The majority opinion in *Savage v. State*[62] by distinguishing an option to renew from an option to extend relied on the rule set forth in *Helan Light & Ry. v. Northern Pac. Ry.*[63] that an option to renew would be considered as the right to require the execution of a new contract while an option to extend operates as a right to require continuation of the original contract. In the *Helena* case, the contract provided that the railway company reserved the right "to renew the same contract for an additional period of 5 years."[64] While this language would ordinarily create an option to renew, the *Helena* court held it to be an option to extend so as to avoid the effect of a regulating public utility statute that had been enacted subsequent to the formation of the original contract but prior to the renewal. The reluctance of the *Helena* court to apply the ordinary meaning rule in construing the word "renew" is explained by looking "to the reading of the entire contract,

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tive Audit Commission and the Governor, at the end of each fiscal quarter, a complete listing of all emergency purchases and contracts reported to him during that fiscal quarter. The Legislative Audit Commission shall comment upon that listing in its annual report to the General Assembly.

ILL. ANN. STAT. ch. 127, § 132.6(a)(3) (Supp. 1969).

57. *See, e.g.*, statute cited note 7 *supra.*

58. *See generally* G. CUNEO, GOVERNMENT CONTRACTS HANDBOOK 75 (1962); 9 J. McBRIDE & I. WACHTEL, GOVERNMENT CONTRACTS § 52 (1969); Rotondi, *Government Competitive Procurement and Patent Infringement: Substance and Solution*, 27 FED. B.J. 325 (1967).

59. *See, e.g.*, WIS. STAT. ANN. § 16.75 (1969).

60. *See, e.g.*, N.Y. STATE FIN. LAW § 174 (McKinney Supp. 1969).

61. See discussion note 41 *supra.*

62. 75 Wash. 2d 663, 453 P.2d 613 (1969).

63. 57 Mont. 93, 186 P. 702 (1920).

64. *Id.* at 100, 186 P. at 703 (1920).

and to the practical construction given to it by the parties themselves, rather than to the phraseology used."[65] Therefore, the rule stated in the *Helena* decision and relied on by the majority of the court in *Savage* is somewhat modified. The general circumstances surrounding the entire contract would appear to be determinative of whether or not a particular option clause is for renewal or extension rather than the language used. In that regard, the majority in *Savage* should have looked to the circumstances surrounding the contract rather than the language used to determine the nature of the option clause in question. Had this been done, the majority could have held that the clause provided an option to renew despite the use of extension language and that the renewal provision was invalid pursuant to the holding in *Miller v. State*.[66]

It is submitted that the views offered by the dissenting opinions are the proper ones. Competitive bidding requirements are enacted, as has been discussed, to protect the public interest. In this regard, the bidding requirement should be construed so as to encompass as many state contracting situations as possible. The technical contract distinction between renewal and extension, made by the majority of the Washington Supreme Court, resulted in a decision which is inconsistent with the earlier holding in *Miller* and in direct conflict with the policy underlying the competitive bidding procedures which have been considered.

VI. Conclusion

Ideally, each state should enact statutes governing the field of state purchase contracting which reflect detailed and complete consideration of all of the aspects discussed. The thoroughness with which these points are covered presently varies from state to state. However, all states do adhere to the general policy of protecting the public interest by means of interpreting the requirements of competitive bidding, no matter how scant the requirements may be, to include as many contracts as possible. Applying this approach, it would appear that the decision in *Savage* was erroneous and inconsistent with the court's earlier holding in *Miller*. In as much as the extension option represents state contracting without adherence to competitive bidding requirements, contracts containing such a clause should be invalidated.

Bruce I. Kogan

65. *Id.* at 106, 186 P. at 705 (1920).
66. 73 Wash. 2d 790, 440 P.2d 840 (1968).