

2647.

PUBLIC UTILITY CONTRACT—NO FUNDS IN VILLAGE TREASURY—
VALID IF PAYMENT TO BE MADE FROM EARNINGS—BIDS OVER
\$500 DISCUSSED.

SYLLABUS:

1. A village operating a combined water and electric power plant may legally enter into a contract for the purchase of new boilers and equipment for such plant without there being in the village treasury or in the process of collection all of the funds to cover the contract price, providing said contract requires the payments to be made by the municipality out of the earnings of said public utility.

2. Section 4328, General Code, applies to the board of trustees of public affairs in the purchase of equipment for a combined water-works and power plant, and when such purchase exceeds five hundred dollars the same must be made in pursuance to authority of council and the contract let, after advertisement, to the lowest and best bidder.

COLUMBUS, OHIO, September 29, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your communication, which reads:

“Section 4221, G. C., provides in part that when any village expenditure, other than the compensation of persons employed, exceeds \$500.00, bids must be advertised for and a contract must be entered into with the lowest and best bidder.

Section 5625-33, G. C., 112 O. L. page 406, provides in part that the fiscal officer of a taxing district must certify that funds are in the treasury, or in process of collection, and are lawfully appropriated for the purpose, before any contract is entered into, or order given, involving the expenditure of money on the part of the corporation.

Section 5625-36, G. C., 112 O. L. 408, provides in part that the certificate required by Section 5625-33 as to money in the treasury shall not be required for the making of contracts on which payments are to be made from the earnings of a publicly operated water works or utility, but in case of any contract made without such certification no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable except out of such earnings.

The village of ----- has a combined water, electric light and power plant, and at this date has a surplus in the water and light fund of approximately \$20,000.00. New boilers are needed which will cost approximately \$50,000.00, and the village, through its Board of Public Affairs, proposes to enter into a contract for the purchase of such equipment at this date, paying \$20,000.00 on account and pledging the earnings of the plant during future years for the balance.

QUESTION No. 1: May a contract of this character be legally entered into under these conditions?

QUESTION No. 2: If permissible, must bids be advertised for and a contract be entered into with the lowest and best bidder?”

The sections of the General Code, or portions of the sections to which you refer, and applicable in connection with your inquiry, provide:

Section 4221. "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

Section 5625-33. "No subdivision or taxing unit shall; * * *

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. * * *"

Section 5625-36." * * *

The certificate required by Sections 33 and 34 of this act as to money in the treasury shall not be required for the making of contracts on which payments are to be made from the earnings of a publicly operated water works or public utility, but in the case of any such contract, made without such certification, no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable except out of such earnings."

In considering your first inquiry it may be helpful to consider Section 4 of Article XVIII of the Ohio Constitution, which provides:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

From the constitutional provision above quoted, and statutory enactments of the same general import, it must be concluded that a municipality has ample power to construct, maintain and operate a public utility such as you describe in your communication. In construing this section of the constitution, the Supreme Court of Ohio in the case of *Insurance Co. vs. Wadsworth*, 109 O. S. 452, held:

"The power to establish, maintain and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation."

Notwithstanding the liberal pronouncement of the court with reference to powers exercised under the constitutional provision referred to, it is believed that such powers

are intended to be exercised in the manner prescribed by statutory law. This was indicated in the Supreme Court opinion above referred to, in considering the question of whether one contract involved was for more than five hundred dollars and therefore subject to the provisions of Section 4328 of the General Code. The court disposed of the question by finding that the contract under consideration was for less than five hundred dollars, and therefore the objections urged upon that ground were not well taken. While there is no express holding by the court, there is an indication in said opinion that said statute would have applied had the sum in controversy exceeded five hundred dollars.

In considering the provisions of Sections 5625-33 and 5625-36, as above set forth, it will be observed that the Legislature, in its clear and unmistakable language, exempted from the requirement that a certificate shall be made as to the existence of a fund in the treasury or in the process of collection "contracts on which payments are to be made from the earnings of a publicly operated water works or public utility."

In the case you present, clearly it would seem that the power lies with the board of public affairs to enter into a contract for the purchase of the equipment mentioned without the necessity of obtaining a certificate as to the existence of the funds. It may be noted, however, that such a contract must of necessity require that payments are to be made solely from the earnings of the public utility.

Coming to your second inquiry, it will be noted that Section 4221, in plain and unambiguous language, requires all contracts made by the council of a village involving an expenditure of more than five hundred dollars to be in writing, and made with the lowest and best bidder, after advertising. This provision seems to be in harmony with the policy of the Legislature in seeking to prevent the abuse of the power of public officials entering into contracts without competitive bids. This principle is grounded upon the theory that competitive bids give the subdivision of government the best opportunity of obtaining the lowest price in making a given purchase. However, it should be noted that Section 4221, General Code, applies to contracts made by the council of a village, and the question may logically arise as to whether this is applicable to contracts entered into by the board of public affairs, which you state has been established in the village in question. However, inasmuch as Section 4361, General Code, provides in substance that the board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by and incumbent upon the directors of public service, as provided in Section 4328 and other sections, and said Section 4328 contains practically the same provisions binding the director of public service as are set forth in Section 4221, it is believed that what has been said in reference to Section 4221, binding the council of a village to advertise for bids for contracts involving more than five hundred dollars would be equally true of a board of public affairs, although it is probably Sections 4361 and 4328, General Code, which establish such limitations. In either event the result is the same.

In examining the provisions of the General Code, no sections have been found which exempt the village council or the board of public affairs from the operations of the sections which require competitive bids in contracts involving more than five hundred dollars. It being the established policy of the Legislature to require competitive bids pursuant to advertisement, the absence of statutes exempting such operation must of necessity force the conclusion that no exceptions were intended in the case which you present.

Specifically answering your inquiry, you are advised:

1. A village operating a combined water and electric power plant may legally enter into a contract for the purchase of new boilers and equipment without there being in existence all of the funds to cover the contract price, providing that said contract requires the payments to be made by the municipality out of the earnings of said public utility.

2. Section 4328, General Code, applies to the board of trustees of public affairs in the purchase of equipment for a combined water works and power plant, and when such purchase exceeds five hundred dollars, the same must be made in pursuance to authority of council and the contract let, after advertisement, to the lowest and best bidder.

In closing, it is desired to add that the above opinion is written on the assumption that the village in question has not, under the Home Rule Sections of the Constitution of Ohio, made provisions contrary to the sections of the code herein involved; and no consideration has been given as to the effect of any such provisions, if adopted.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2648.

APPROVAL, BONDS OF READING VILLAGE SCHOOL DISTRICT, HAMILTON COUNTY, OHIO—\$65,000.00.

COLUMBUS, OHIO, September 29, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2649.

APPROVAL, BONDS OF THE CITY OF EAST PALESTINE, COLUMBIANA COUNTY—\$19,485.00.

COLUMBUS, OHIO, September 29, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2650.

APPROVAL, BONDS OF THE CITY OF EAST PALESTINE, COLUMBIANA COUNTY—\$16,303.10.

COLUMBUS, OHIO, September 29, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.