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1. COAL CONTRACTS — MADE BY MUNICIPALITIES WITH PRODUCERS, AGENTS OR DISTRIBUTORS — EFFECT OF PRICE AND MARKETING RULES AND REGULATIONS FIXED BY NATIONAL BITUMINOUS COAL COMMISSION.
2. BITUMINOUS COAL ACT, 1937—GUFFEY-VINSON ACT—STATUS, CONTRACTS WITH FIRMS OR CORPORATIONS —MUNICIPAL AUTHORITIES BOUND BY SECTIONS 4221, 4328 G. C. — COMPETITIVE BIDDING.

SYLLABUS:

1. *Contracts of municipalities for the purchase of coal made with producers of coal, their agents or distributors, as those terms are defined in the Bituminous Coal Act of 1937, which contracts were made subsequent to the approval of the said Act of Congress (April 26, 1937), and provide for the delivery of coal for a period longer than thirty days from the date of the contract, are abrogated from and after October 1, 1940, so far as price is concerned, and coal delivered after this time in purported pursuance of such contracts is subject to the price and marketing rules and regulations fixed by the National Bituminous Coal Commission and which became effective October 1, 1940. Contracts which may have been in existence at that time with persons, firms or corporations other than producers, their agents or distributors are not so affected.*

2. *The enactment by Congress of the Bituminous Coal Act of 1937, popularly known as the Guffey-Vinson Act, and the fixing of prices for coal by the National Bituminous Coal Commission in pursuance of the said act, does not warrant municipal authorities when purchasing coal in waiving or ignoring the provisions of Sections 4221 and 4328 of the General Code of Ohio, as to competitive bidding.*

Columbus, Ohio, December 31, 1940.

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

I am in receipt of your recent communication, directing my attention to the provisions of Sections 4221 and 4328 of the General Code of Ohio,

and to the provisions of the Bituminous Coal Act of 1937 (50 Stat. 72—U. S. C. A., Title 15, Sections 828 et seq.), popularly called the Guffey-Vinson Act. I am also advised that maximum and minimum prices for coal, effective October 1, 1940, were fixed in pursuance of the said Act. In view of these facts, you have submitted for my consideration two questions as follows:

“Question 1. Is the minimum price fixed by the Bituminous Coal Authority under the Guffey Coal Act, binding to the extent of abrogating municipal coal contracts entered into prior to October 1, 1940, at prices less than said fixed minimum price?”

Question 2. If the said minimum fixed price is to govern future purchases of bituminous coal by municipal authorities and they can secure said minimum prices without advertisement and competitive bidding, may the requirements of the provisions of sections 4221 and 4328 G. C., be waived or ignored in the purchasing of such coal supplies?”

Section 4221 of the General Code of Ohio, provides in substance, that when any expenditure in excess of \$500.00, other than the compensation of employes, is to be made by public authorities in villages, such contract shall be in writing and made with the lowest and best bidder, after due advertising as provided therein. Substantially the same provision is made in Section 4328, General Code, with respect to cities.

In view of the rather limited questions presented, there would seem to be no occasion to go into detail with reference to the provisions of the Bituminous Coal Act in question which are quite lengthy and somewhat complicated, the general purposes of the Act being to stabilize the bituminous coal industry by the fixing of maximum and minimum prices for coal and the establishment and enforcement of marketing rules and regulations. Briefly, it provides for the establishment of a code in which producers of bituminous coal may become members. A penalty tax of 19-½ per cent on the price or market value at the mine is imposed on all bituminous coal sold or distributed in the domestic markets of the United States, but this tax is waived or remitted with respect to producers who accept membership in the said code and abide by the incidence of said membership under the law.

By the terms of the act, a National Bituminous Coal Commission is established in the Department of the Interior, with power, among other things, to prescribe for code members maximum and minimum prices for coal and marketing rules and regulations, subject to the provisions of the act.

Without quoting in detail from the provisions of the act it should be

noted that it is expressly provided therein with respect to the "Bituminous Coal Code" as referred to in the act and the conditions and provisions thereof concerning price fixing and marketing rules and regulations, that:

"For the purpose of carrying out the declared policy of this act, the code shall contain the following conditions and provisions which are intended to regulate interstate commerce in bituminous coal, and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal."

Then follow the conditions and provisions referred to above. See Section 831 U. S. C. A.—50 Stat. Chap. 127, Section 4. It is also provided in the first paragraph of Section 5 of said act (Section 834 U. S. C. A.) as follows:

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4 (Sec. 831 to 833 U. S. C. A.)"

Under the holdings of the United States Supreme Court in recent years, there can be no question but that the above provision of law is now constitutional, and it is quoted here with the comment that it is practically certain that in any districts or sections of the state wherein locally mined coal is produced or sold, and comes into competition with coal which is mined or shipped from outside the state, the coal locally produced or sold will be held to directly affect interstate commerce in coal and will therefore be subject to the provisions of this act when sold by producers or their agents or distributors.

It will be disclosed upon examination of the act that its provisions with respect to price fixing and the promulgation and observance of marketing rules and regulations apply to code members, their agents and distributors only, and that membership in the code is limited to "producers." The term "producer" as used in the act is defined therein in Section 847 (c) U. S. C. A. as follows:

"The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

In short, it seems apparent that the provisions of the act as to the observance of prices and marketing rules and regulations fixed in pursuance of the act do not have application to retailers of coal as distinguished from distributors of coal as defined in the act, or persons who have a coal yard or coal business and sell in quantities of less than cargo or railroad car lots. The provisions of the act do, however, reach so-called "distributors" who are required to maintain and observe in the resale of coal the price and marketing rules and regulations established under Section 4, Part 21 of the Act. With respect thereto it is expressly provided as follows, in Section 4, Part 2 (b) of the Act:

"The Commission shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members) herein referred to as 'distributors' who purchase coal for resale and resell it in not less than cargo or railroad car lots; and shall require the maintenance and observance by such persons in the resale of such coal of the prices and marketing rules and regulations established under this section (831 to 833 of this Title)."

Pertinent to the subject of your inquiry are also the provisions of Section 833 (e), U. S. C. A. which are in part, as follows:

"No coal subject to the provisions of this section (Secs. 831 to 833 of this title) shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: Provided, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act (Secs. 828 to 851 of this title), until prices shall have been established pursuant to subsections (a) and (b) of part II of this section (subsections (a) and (b) of this section), no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract."

It seems apparent upon consideration of the terms of the Act as a whole, and of the specific provisions thereof as to price fixing and sales at other than established prices, that it has no application whatever to sales other than those made by "producers of coal, their agents or distributors."

I am not unmindful that the courts have consistently held that a statute requiring competitive bidding should not be strained beyond the reasons which support it and that when competitive proposals work an incongruity and are unavailing because the subject of the bidding is controlled by a monopoly, or where no competition on an equal basis is possible, such statutes will be waived. See Dillon on Municipal Corporations, 5th Edition, Section 802, page 1199; McQuillin on Municipal Corporations, Sections 1191 and 1192.

Even so, I would hesitate to say as a matter of law that municipal authorities are justified in making purchases of coal amounting to more than \$500.00 without complying with the provisions of Sections 4221 and 4328, of the General Code of Ohio, as to competitive bidding, as it is possible that retailers who sell coal in a manner other than cargo or railroad car lots, may be able in some instances at least, to furnish coal to municipalities cheaper than producers or distributors could do so, in view of their being absolutely bound by the terms of the Guffey-Vinson Coal Act as to the price at which they are permitted to sell. In any event, municipalities should at least have the benefit of the minimum price fixed for the marketing area in which the municipality is located if any producer or distributor is able and willing to furnish the coal at such minimum price. The proper way to find this out is by inviting bids for the coal.

Contracts of municipalities for the purchase of coal made with producers of coal, their agents or distributors, as those terms are defined in the Bituminous Coal Act of 1937, which contracts were made subsequent to the approval of the said Act of Congress (April 26, 1937), and provide for the delivery of coal for a period longer than thirty days from the date of the contract, are abrogated from and after October 1, 1940, so far as price is concerned, and coal delivered after this time is purported pursuance of such contracts is subject to the price and marketing rules and regulations fixed by the National Bituminous Coal Commission and which became effective October 1, 1940. Contracts which may have been in existence at that time with persons, firms or corporations other than producers, their agents or distributors are not so affected.

Respectfully,

THOMAS J. HERBERT,
Attorney General.