

1844.

DEPOSITARY OF FUNDS MAY GIVE TWO OR MORE SEPARATE BONDS
TO SECURE DEPOSITARY CONTRACT—SECTION 4295 G. C. CON-
STRUED.

SYLLABUS:

Under Section 4295, General Code, a municipality may accept two or more separate bonds to secure a single depositary contract, but such bonds shall not limit the liability of the obligor in such a manner that a partial loss, less in amount than the penal sum of the other bond or bonds, would cause a loss to the obligee.

COLUMBUS, OHIO, October 15, 1924.

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

Gentlemen:—

I am in receipt of your communication as follows:

“Section 7605 General Code relative to depositories for school funds provides for competitive bidding and that ‘such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States, the State of Ohio, or county, municipal, township or school bonds issued by the authority of the State of Ohio * * * in a sum not less than the amount deposited.’

“Section 4295 G. C., relating to the deposit of municipal funds provides for competitive bids and ‘a good and sufficient bond issued by a surety company authorized to do business in this state,’ etc.

“It will be noted that the singular form of the word ‘bond’ is used in both of the above mentioned sections of the General Code, which gives rise to the following questions:

“*Question 1.* May a bank give two or more separate bonds instead of one bond to secure a single depositary contract?

“*Question 2.* Should you conclude that more than one surety or good and sufficient bond may be given in compliance with the above provisions of the General Code, what provision should be made as to the sharing of losses in the event that a depositary does not meet its obligations?

“*Question 3.* Should one of the sureties be insolvent and there should be a partial loss less in amount than the penal sum of the other bond or bonds, would the solvent bonds bear the total loss or only their original pro-rata share?

“*Question 4.* May each surety limit its liability as was done in the case of the Realization Co. vs. Bonding Co., 88 O. S., 216, or would it be liable for the full amount of the penalty on its bond?”

Section 4295, General Code, provides:

“The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a

surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the State of Ohio or of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than 10 per cent. in excess of the maximum amount at any time to be deposited. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

Your questions arise from the fact that the singular form of the word "bond" is used in Section 4295 G. C. It is believed that a study of the different statutes relating to depositaries of public funds will throw some light on the proper construction of this statute.

Section 330-3, General Code, as far as pertinent, provides:

"The treasurer of state before making such deposits shall require that each and every approved bank or trust company to deposit with him United States government bonds, bonds of this state, county, township, school district, road district, or municipal bonds of this state at not less than their par value, in an amount equal to the amount of money to be deposited with such banks or trust companies, or surety company bonds, which when executed shall be for an amount equal to the amount deposited plus 5 per cent, conditional for the receipt and safe keeping and payment over to the treasurer of state or his written order of all moneys which may come into the custody of such bank, or trust company under and by virtue of this act * * * ."

Section 2722, General Code, in so far as pertinent, provides:

"No award shall be binding on the county nor shall money of the county be deposited thereunder until the hypothecation of the securities hereinafter provided, or until there is executed by the bank or banks or trust companies so selected and accepted a good and sufficient undertaking * * * *."

Section 7605, General Code, in so far as pertinent, provides:

"Such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States * * * ."

Section 7607, General Code, as far as pertinent, provides:

"Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, * * * ."

The similarity of the above statutes will be noted, although each one uses different wording. The purpose of these statutes is the same, that is, *to secure the public fund while in the hands of the depository*. The means of securing the deposits is in all cases by an undertaking, surety, bond or the pledging of securities mentioned in section 4295, General Code.

It will be noted that Section 4295 G. C., uses the words "a good and sufficient bond issued by a surety *** or secure said moneys by a deposit of bonds *** and which in the opinion of the treasurer are good and collectible". The purpose is disclosed by the above wording to have at all times sufficient security for moneys deposited.

A bond such as was given in the case of *The Assets Realization Company vs. American Bonding Company* of Baltimore, 88 O. S., 216, provides:

"That in the event of default on the part of the principal herein, the surety will only be liable thereunder for such proportion of the total loss thereby sustained by the obligee as the penalty of this bond shall bear to the total amount of the bond."

The court held in this case that each bond was a separate contract, that they were not co-sureties and that each company could only be held for an aliquot part of the loss sustained by obligee. Whether this was a proper contract for the municipalities to enter into was not passed upon in this case, as the city was not an interested party to such suit.

If each company can be held for an aliquot part of such obligation only, the insolvency of one of the companies makes it impossible for the obligee to recover its total loss even though such loss be only a small part of the penal sum of the obligation.

In the case of co-sureties, as long as one of the sureties is solvent and his financial responsibility is equal to the loss, the obligee is protected. The same is true of a bond given by a single surety. In both of these cases, as long as sureties are solvent there is protection. In a case where surety companies limit their liability, there is not complete protection if one of the many sureties is insolvent. Certainly in such cases separate bonds limiting the liability of sureties in case one becomes insolvent, is not a sufficient bond. As a further illustration, the law relating to administrators and executors, section 10606, in part provides:

"Every executor before entering upon the execution of his trust, must give bond, with two or more sufficient sureties in such sum as the court orders, * * * *"

Certainly it will not be maintained that under the above statute any court would accept a contract in which each surety limited his liability to one-half of the penal sum. This it is believed would not be deemed a sufficient surety.

You are therefore advised that a bank may give two or more separate bonds to secure a single depository contract, but such bonds should not limit the liability of the obligor in such a manner that a partial loss, less in amount than the penal sum of the other bond or bonds, would cause a loss to the obligee.

Respectfully,

C. C. CRABBE,

Attorney General.