

2709.

DIRECTOR OF PUBLIC SERVICE—AUTHORITY TO PURCHASE WITHOUT COMPETITIVE BIDDING AND WITHOUT CONSENT OF COUNCIL—FREIGHT CHARGES NOT INCLUDED IN \$500.00 MAXIMUM.

SYLLABUS:

By authority of Section 4328, General Code, a Director of Public Service in a city may incur an expenditure amounting to \$495.00, without special authorization of council, or competitive bidding, when such expenditure consists of the purchase of an article at the plant of the manufacturer, even though the cost of the transportation of the article to the place where it is to be used will amount to more than \$5.00.

COLUMBUS, OHIO, October 13, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion as follows:

“Section 4328, G. C., provides in part, that when an expenditure within the Department of Public Service, other than the compensation of persons employed, exceeds \$500.00, such expenditure shall first be authorized and directed by ordinance of council and a contract entered into with the lowest and best bidder, after bids have been advertised for.

QUESTION: When a commodity costs \$495.00 at the plant of a manufacturer, may a director of public service of the city purchase, and pay the freight in addition to the cost, without advertising for bids, said total cost being in excess of \$500.00?”

Municipal corporations are by their very nature endowed with power to contract and to be contracted with. The mode of exercising this power is a mere incident to the power itself, and both the power and the mode of its exercise, except as it may be limited and regulated by legislative action, are governed by the principles of the common law with respect to the making of contracts.

By the terms of Section 4323 et seq. of the General Code, there is created in cities a Department of Public Service to be administered by the Director of Public Service, appointed by the Mayor. The Director of Public Service in his administration of the Department of Public Service, is charged with the duty of managing and supervising public works and undertakings including the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, playgrounds, sewers, drains, ditches, culverts, ship channels, streams and watercourses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the Department of Public Safety, or as otherwise provided by law. He is authorized to make any contract or purchase supplies or material, or provide labor for any work under the supervision of his department, not involving more than \$500.00. To make contracts or incur expenditures involving more than \$500.00 he must first be directed to do so by council, and secure proposals therefor by public bidding. Section 4328, General Code, provides as follows:

“The Director of Public Service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an ex-

penditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the Director of Public Service shall make a written contract with the lowest and best bidder after advertisement for not less than two or more than four consecutive weeks in a newspaper of general circulation within the city."

In Corpus Juris, Vol. 44, page 98, it is said :

"Wherever it is so provided by charter or statute, a municipal corporation about to enter into a contract must publish notice thereof for a certain length of time, inviting bids or proposals, and must award the contract under prescribed conditions to the bidder qualifying under the terms of the statute. He must do this wherever the contract relates to work of a character designated in the statute, or, in the amount involved, exceeds a certain fixed limit, bringing it within the operation of the statute. The object of all such provisions is, it has been said, to 'prevent favoritism, corruption, extravagance, and improvidence' in the awarding of municipal contracts, and they should be so administered and construed as fairly and reasonably to accomplish such purpose. * * *

Any municipal officer authorized to make contracts for the corporation may resort of his own choice to the competitive method to obtain the most favorable results for the public; but in the absence of statutory requirement, he is under no legal obligation to award the contract to the lowest bidder. And municipal contracts made without this precaution are valid, where no statute, charter, or ordinance applicable thereto prescribes its use."

If there were no provisions made by statute, or otherwise, requiring advertisement for bids for the making of contracts or the incurring of expenditures involving more than \$500.00, a municipality through its proper officers, would have the right to make such contracts or incur such expenditures in the same manner it is authorized to contract or incur expenditures involving less than \$500.00. *Walsh vs. Columbus*, 36 O. S. 169.

It is a familiar principle of law that legislative enactments in derogation of or modifying common law principles should be strictly construed, insofar as it may be done and at the same time fairly and reasonably safeguard the objects which the Legislature sought to accomplish. The object of providing for competitive bidding with adequate publicity, where contracts are made or expenditures incurred in substantial amounts, is not only, as stated in *Cyc.*, supra, to "prevent favoritism, corruption, extravagance and improvidence" but as well to provide a method whereby the municipality will receive the benefit of competition, and thus obtain the advantage of the lowest possible price and secure the most favorable results for the public.

The Legislature has fixed the arbitrary sum of \$500.00 as the limit in excess of which no contract may be made or expenditure incurred without advertisement and competitive bidding. Just why the sum of \$500.00 was fixed, rather than \$400.00, or \$600.00 is hard to say. Yet, inasmuch as that sum is fixed, a contract involving the expenditure of \$501.00 may not lawfully be made except by competitive bidding, whereas one for \$500.00 may be made without competitive bidding. This is so because the letter of the statute so prescribes. In my opinion, however, a contract which does not come within the letter of the statute, as for instance a contract for the purchase of an article which after adding to its cost other necessary expenditures in

order to make it suitable for use will make its total cost more than \$500.00 is not such a contract as was contemplated when the requirement for competitive bidding was made. This is for the reason that the statute should be strictly construed and cannot be extended by implication beyond its plain terms, especially since under such circumstances it is not necessary to do so in order to fairly and reasonably accomplish the purposes intended by the law, and no studied attempt appears to have been made to evade the law for the purpose of preventing the accomplishment of the objects sought by reason of its enactment.

The purchase about which you inquire is a completed purchase if and when made at the plant of the manufacturer. The cost of transportation is a separate item of expense and cannot be said to be a part of the article itself. The mere fact that an accountant might in furtherance of a strict system of cost accounting add the freight charges to the cost, and classify the total as a capital expenditure rather than classify the freight charges as an incidental expenditure, makes no difference.

In many cases where machinery is bought it is necessary to add something to the machine to make it available for use. A bare machine without power would be useless, yet the cost of the power or the means of transmitting power to the machine could not properly be said to be a part of the cost of the machine. An engine without fuel or oil is of no value, except what it would be worth in the market for scrap, or what its parts might be worth separately, yet in purchasing an engine, the fuel and oil to make it of some practical use cannot properly be said to be a part of the cost of the engine. If the commodity about which you inquire costs \$495.00 delivered at the depot in the municipality making the purchase, and it costs more than \$5.00 to move it from the depot to the place where it is to be used, no one would question the right of the Director of Public Service to make the purchase without first having the authorization of council and advertising for bids.

Of course if the purchase is made to be delivered, and the cost includes the sum of \$495.00 and freight charges of more than \$5.00 the purchase cannot be made without competitive bidding.

I am therefore of the opinion that by authority of Section 4328, General Code, a Director of Public Service in a city may incur an expenditure amounting to \$495.00 without the authorization of council or competitive bidding when such expenditure consists of the purchase of an article at the plant of the manufacturer, even though the cost of transportation of the article to the place where it is to be used will amount to more than \$5.00.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2710.

BONDS—COUNTY MAY NOT ISSUE FOR PROTECTION OF PRIVATE PROPERTY—LIMITATION OF DRAINAGE BONDS—CONSTRUCTION OF PIERS AT RYE BEACH DISCUSSED.

SYLLABUS:

1. *Bonds may not be issued for an improvement under General Code Sections 6442 et seq. covering a period of more than five years.*