

any time before the county board with whom the petition is filed takes official action thereon.

Seventh, the equitable division of funds to be made between the school districts involved, when school territory is transferred under Section 4696, General Code, is to be made by the board of education of the county school district to which the territory is transferred.

Section 4696, General Code, was amended since the decision of the case of *Board of Education of Clinton County vs. Board of Education of Greene County*, 19 O. N. P. (n. s.) 398. At the time of the decision of that case Section 4696, General Code, provided that, when transfers were made by authority of said section, the said transfer should not be effected until an equitable division of the funds or indebtedness between the two districts "be decided upon by the boards of education acting in the transfer." Now, however, Section 4696, provides that the equitable division of funds and indebtedness between the districts involved shall be made by the county board of education to whom the transfer is made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2003.

ROADS AND HIGHWAYS—STATE AID—WHEN PROCEEDING IS "PENDING"—INTERPRETATION OF "LOWEST COMPETENT AND RESPONSIBLE BIDDER".

SYLLABUS:

1. Where an application for state aid was filed under the provisions of former Section 1191, General Code, and the state agreed to co-operate in the construction of a new road to the extent of a certain specified sum of money, such procedure constitutes a proceeding that is "pending" within the meaning of Section 26 of the General Code, so that all steps necessary to complete such improvement, including the awarding of a contract as provided in Section 1207 of the General Code and the retaining of a percentage of ten per cent on all contracts as is provided in former Section 1212, General Code, should be taken under former Sections 1191, et seq., General Code, and not under these sections as amended in House Bill No. 67 (112 v. 430), effective January 2, 1928.

2. Where the Director of Highways is required to let a contract to the lowest competent and responsible bidder, it is within his power and duty to look not only to the size of the bids, but also the pecuniary ability of the bidders and to their skill, experience, integrity and judgment. If in the exercise of his sound discretion he determines that the lowest bidder is not competent or responsible, or both, it is his right and duty to reject the lowest bid and award the contract to the lowest competent and responsible bidder; and in the absence of fraud or bad faith, his decision upon a matter of this kind is final and not subject to review by the courts.

COLUMBUS, OHIO, April 21, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date, which reads as follows:

"In connection with my request for an opinion concerning House Bill No. 67, known as the Edwards-Norton Bill, under date of December 28, 1927, I would appreciate your giving me prompt advice concerning certain questions raised in that inquiry.

First: In regard to whether we can consider bids on projects for a sum greater than the approximate estimate up to five per cent in cases of projects initiated prior to January 2, 1928.

Second: Whether the retained percentage should be ten per cent as under the old law or fifteen per cent as under House Bill No. 67 on contracts where proceedings were initiated prior to January 2, 1928.

Third: As to the meaning of the term 'lowest competent and responsible bidder' and whether I should be governed by House Bill No. 67 in this respect on projects initiated before this law went into effect."

I have heretofore rendered opinions and submitted forms in connection with certain of the questions contained in your communication of December 28, 1927, but have not considered the questions to which you now refer.

In your first question you ask whether you may consider bids on projects for a sum greater than the approximate estimate up to five per cent in cases of projects initiated prior to January 2, 1928.

You inquire in your communication of December 28, 1927, as follows:

"Under the present law, Section 1207, G. C., provides that no contract for any improvement shall be awarded for a greater sum than the estimated cost thereof. This provision is amended in Section 29 of House Bill No. 67, G. C., 1207, to provide that no contract shall be awarded for a greater sum than the estimated cost thereof plus five per cent thereof. I request your opinion as to whether this change applies where the proceedings for the improvement was initiated prior to January 2, 1928, but where the bids are opened or the award made on or after said date."

Former Section 1207 of the General Code reads as follows:

"No contract for any improvement shall be awarded for a greater sum than the estimated cost thereof. The bids received for an improvement shall be opened at the time stated in the notice and the bids shall conform to such other requirements not inconsistent with the provisions of this chapter as the state highway commissioner may direct. If no acceptable bid is made within the estimate, the state highway commissioner may either readvertise the work at the original estimate or amend the estimate, and certify the same to the county commissioners, and upon this adoption of the amended estimate, again proceed to advertise for bids, and award the contract as provided in the preceding section. The state highway commissioner may, under the provisions of this chapter, contract for the construction or improvement of bridges and culverts or of the grade required in connection with an improvement and may defer making contracts for the remainder of said improvement until such grade has become stable and solid."

This section was a part of a series or group of statutes pertaining to state aid, or those improvements on inter-county highways or main market roads which are being constructed on a co-operative basis between the state and county. In passing upon

the question as to when a proceeding was pending in order that the provisions of the former law would be effective, notwithstanding the going into effect of House Bill No. 67, this department on July 25, 1927, in Opinion No. 776, advised you as follows:

1. "A proceeding is 'pending' within the meaning of Section 26 of the General Code when a board of county commissioners makes application for state aid under the provisions of Section 1191 of the General Code, and such a proceeding may be completed under the present law after the effective date of House Bill No. 67, passed by the Eighty-seventh General Assembly (Norton-Edwards Act.)

2. A board of county commissioners or a board of township trustees contracts an obligation within the meaning of Section 91 of House Bill No. 67 at such time as it files an application under Section 1191 of the General Code for state aid, in that by filing such application a board of county commissioners or a board of township trustees agrees to pay one-half of the cost of surveys and other preliminary expenses incident to the construction, improvement, maintenance or repair of an inter-county highway or main market road."

Likewise, on March 8, 1928, in Opinion No. 1828, addressed to Hon. R. L. Thomas, Prosecuting Attorney, Youngstown, Ohio, wherein the question was asked as to whether a contract should be awarded for a co-operative road improvement under former Sections 1191, et seq., of the General Code, or under House Bill No. 67, in a case where the county commissioners had made an application for state aid in the spring of 1926, it was held:

"Where an application for state aid was filed under the provisions of former Section 1191 of the General Code, and the State agreed to co-operate in the construction of a new road to the extent of a certain specified sum of money, such procedure constitutes a proceeding that is 'pending' within the meaning of Section 26 of the General Code, so that all steps necessary to complete such improvement should be taken under former Sections 1191, et seq., General Code, and not under these sections as amended in House Bill No. 67 (112 v. 450), effective on the second day of January, 1928."

As pointed out in your communication of December 28, 1927, under the provisions of former Section 1207, no contract for any improvement could be awarded by the Director of Highways for a greater sum than the estimated cost thereof, while under Section 1207, as it appears in House Bill No. 67 (112 v. 446), "No contract for any improvement shall be awarded for a greater sum than the estimated cost thereof plus five per cent thereof."

In view of my former rulings in Opinions Nos. 776 and 1828, the syllabi of which have heretofore been quoted in full, and answering your first question specifically, it is my opinion that contracts must be awarded under the provisions of former Section 1207 of the General Code in all cases where an application for state aid was filed, as provided in former Section 1191, General Code, prior to the second day of January, 1928, the effective date of House Bill No. 67.

In your second question you inquire:

"Whether the retained percentage should be ten per cent as under the old law or fifteen per cent as under House Bill No. 67 on contracts where proceedings were initiated prior to January 2, 1928."

In your communication of December 28, 1927, this question is stated as follows:

“Section 1212 G. C., as it now stands, provides for a retained percentage of ten per cent on all contracts. This has been amended in Section 33 of the Act, G. C. 1212, to provide for a retained percentage of fifteen per cent. It is necessary that I be advised whether this change applies to contracts where the proceeding for the improvement in question is initiated prior to January 2, 1928, but where the letting is held and the bids opened after that date; or whether the change applies only on contracts where the proceeding for the improvement is initiated after the effective date of the new Act.”

The same reasoning would apply in answering this question as in answering your first question. In other words, all of the various steps incident to a road improvement must be accomplished under former Sections 1191, et seq., of the General Code, provided an application for state aid was filed by the county commissioners prior to the effective date of House Bill No. 67 (Norton-Edwards Act). This would include the retention of the percentage as provided in former Section 1212 of the General Code.

Therefore, answering your second question specifically, as it is contained in your communication of December 28, 1927, it is my opinion that in all cases where proceedings were instituted by the filing of an application for state aid, as provided in former Section 1191, prior to the effective date of House Bill No. 67, you should retain a percentage of ten per cent of the value of the work performed to the date of each payment upon estimates submitted, as provided in former Section 1212, and not the fifteen per cent as provided in new Section 1212 (112 v. 447).

Coming now to a consideration of your third question you inquire:

“As to the meaning of the term ‘lowest competent and responsible bidder’ and whether I should be governed by House Bill No. 67 in this respect on projects initiated before this law went into effect.”

In your communication of December 28, 1927, you state this question as follows:

“Section 28 of House Bill No. 67, G. C. 1206, provides that the Director shall award the contract to the lowest competent and responsible bidder. Section 1206 G. C., as it now stands, provides that the Director of Highways and Public Works shall award the contract to the lowest and best bidder. House Bill No. 67 takes effect on Monday, January 2, 1928. I am familiar with Opinion No. 948, rendered by you to Hon. Clinton Cowen, State Highway Commissioner, on October 18, 1915, defining the powers and duties of a public official required to award a contract to the lowest responsible bidder, or to the lowest and best bidder. I desire your opinion as to my duty and authority under the provisions requiring me to award a contract to the lowest competent and responsible bidder.”

The pertinent part of Section 1206 of the General Code, as amended in House Bill No. 67 (112 v. 445 and 446), as it applies to this question, is as follows:

“* * * The director shall award the contract to the lowest competent and responsible bidder.

* * *

Former Section 1206 contained the following provision:

“* * *

The director of highways and public works shall award the contract to the lowest and best bidder.

* * *”

It will be observed that the only change made by the Legislature as to the awarding of contracts to bidders was the substitution of the words “competent and responsible” for the words “and best.”

In Opinion No. 948, Opinions, Attorney General, 1915, Vol. III, page 2034, to which you refer in your communication of December 28, I had under consideration the language of Section 1201 as that section stood prior to September 1, 1915, and which contained the words “lowest responsible bidder,” and likewise former Section 1206, General Code, which contained the words “lowest and best bidder.” The syllabus of that opinion reads as follows:

“Where the state highway commissioner is required to let a contract to the lowest responsible bidder, it is his power and duty to look not only to the size of the bids but also the pecuniary ability of the bidders and to their skill, experience, integrity and judgment. If in the exercise of a sound discretion he determines that the lowest bidder is not responsible, it is his right and duty to reject the lowest bid and award the contract to the lowest responsible bidder, and in the absence of fraud or bad faith his decision upon a matter of this kind is final and not subject to review by the courts. A similar but somewhat broader construction is to be given to a statute requiring the letting of a contract to the lowest and best bidder.”

On pages 2035 and 2036 appears the following discussion:

“It may first be observed, however, that a board or official charged with the letting of a contract is not required, under all circumstances, to let such contract to the lowest bidder where the statute requires either that the contract be let to the lowest responsible bidder or that it be let to the lowest and best bidder. Under either provision of law the board or official is authorized and required to take into consideration, in the awarding of the contract, certain factors other than the size of the bid. Any other rule would result in reading out of the statute in the one case the word ‘responsible’ and in the other the word ‘best.’

* * *

In the case of *Carmichael vs. McCourt*, 17 O. C. D. 775, 6 O. C. C. (N. S.) 561, the court in construing a statute relating to the state board of public works and requiring that contracts should be awarded to the lowest responsible bidder (Bates R. S. section 218-44) held that such statute must be held to afford a latitude of discretion as to awards greater than that afforded by the public building code, but did not undertake to define that latitude.

In the case of *Stae ex rel. vs. Columbus Board of Education*, 9 O. D., N. P., 336, 6 O. N. P., 347, the court was called upon to construe a statutory provision to the effect that none but the lowest responsible bid should be accepted by a board of education. The suit was one in mandamus and the relators alleged in their petition that they were the lowest responsible bidders and that their bid was \$155.00 lower than the one accepted by the board of education. The board admitted that the relators were the lowest bidders, but denied their responsibility and the court in refusing a writ of mandamus used the following language:

"The board was called upon to determine whether bidders were responsible, but the responsibility of a bidder does not rest upon his ability or inability to give adequate security for the performance of the contract. This term is given a much broader meaning when used in connection with the powers of officers and boards in the making of contracts. It includes pecuniary ability to perform the contract, skill, integrity and judgment.' "

And on page 2037 of the same opinion appears the following:

"A mass of authorities might be cited in support of the proposition that a statute which confers upon a board or public officer authority to award a contract to the lowest and best bidder confers upon the board a discretion with respect to awarding the contract, which discretion cannot be controlled by mandamus.

See *State ex rel., Hermann*, 63 O. S. 440;
State ex rel., vs. Board of Public Service, 81 O. S. 218;
Scot vs. Hamilton, 7 O. C. C. (N. S.) 495; 19 O. C. D., 652;
Yaryan vs. Toledo, 18 O. C. D., 259.

The term 'lowest and best bidder' seems to be given a somewhat wider meaning by the courts than the term 'lowest responsible bidder,' although the distinction between the meaning of the two terms is somewhat vague. In determining which of several bids is the lowest and best, you have a right to look to the pecuniary ability of bidders to perform the contract and to their skill, experience, integrity and judgment, and to any other similar consideration affecting their power to carry out a contract entered into by them and the probability of their being able to execute the contract in a workmanlike manner within such time as it may be proper to allow for the completion of the same."

In the opinion just referred to the word "competent" was not under consideration. This word is defined in Webster's New International Dictionary as follows:

"To be qualified, to be appropriate or suitable.

1. Answering to all requirements; adequate; sufficient; suitable; capable; qualified; fit."

While the word "responsible" might pertain to the financial ability of the contractor to carry on the work contemplated, the word "competent" might have the same reference. Notwithstanding the amending of Section 1206 in House Bill No. 67, I am inclined to follow the test laid down in the first part of the syllabus of the 1915 Opinion heretofore quoted, and state that in considering who may be the lowest competent and responsible bidder, it is within your power and duty to look not only to the size of the bid but also to the pecuniary ability of the bidders and to their skill, experience, ability and judgment. Further, if in the exercise of a sound discretion you determine that the lowest bidder is not competent or responsible, or both, it is within your right, and it is your duty to reject the lowest bid and award the contract to the lowest competent and responsible bidder.

In view of the conclusion above reached, that is, that there is little, if any, difference between the words "lowest competent and responsible bidder" and "lowest and best bidder," it makes little or no practical difference whether you follow the provisions of Section 1206, General Code, as amended in House Bill No. 67, or the provisions of Section 1206 as it stood prior to such amendment. Technically, however, in view of

the above discussion in regard to pending proceedings, it is my opinion that in all cases where such proceedings were instituted by the filing of an application for state aid, as provided in former Section 1191, General Code, prior to the effective date of House Bill No. 67, you should proceed under Section 1206, General Code, as it stood prior to its amendment in said House Bill No. 67, in the awarding of contracts, but as to proceedings instituted since the effective date of House Bill No. 67, you should be guided by the provisions of amended Section 1207 in the award of such contracts.

Respectfully,

EDWARD C. TURNER,

Attorney General.

2004.

APPROVAL, 13 GAME REFUGE LEASES.

COLUMBUS, OHIO, April 21, 1928.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date in which you enclose the following Game Refuge Leases, in duplicate, for my approval:

No.	Name.	County.	Township.	Acres.
	Clayton V. and Alta M. Burk	Wood	Liberty	148
1085	John H. Morehead	Harrison	Green	189
1086	Cadiz Block Coal Co.	Harrison	Green	633
1087	Walter V. Ball	Putnam	Jackson	60
1088	Bernard Dickman	Putnam	Jackson	58
1089	Gotlieb Kimmerle	Putnam	Jackson	68
1090	H. W. Wueller	Putnam	Jackson	50
1091	Wm. H. Rower	Putnam	Jackson	220
1092	Harvey F. Rower	Putnam	Jackson	60
1093	Jesse M. Blakley	Putnam	Jackson	60
1094	George S. Hedrick	Putnam	Jackson	40
1095	Albert S.andler	Putnam	Jackson	83
1096	Frank Chandler	Putnam	Jackson	105

I have examined said leases and find them correct as to form and I am therefore returning the same with my approval endorsed thereon.

Respectfully,

EDWARD C. TURNER,

Attorney General.

2005.

APPROVAL, BONDS OF THE VILLAGE OF POMEROY, MEIGS COUNTY
—\$20,000.00.

COLUMBUS, OHIO, April 21, 1928.

Industrial Commission of Ohio, Columbus, Ohio.