4733.

APPROVAL, BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $25,000.00 (LIMITED).

COLUMBUS, OHIO, September 28, 1935.

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

4734.

CONTRACT—CITY MAY NOT ALTER CONTRACT ENTERED INTO FOR DISPOSAL OF GARBAGE WHEN.

SYLLABUS:

Where a city has entered into a contract for the collection and disposal of garbage of the said city, with a contractor after competitive bidding, it may not legally later modify the terms of said contract by a reduction in the price per year stipulated in the contract and by a change in the requirements of said contract from one for the collection and disposal of garbage to one for the collection of garbage only.

COLUMBUS, OHIO, September 28, 1935.

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

GENTLEMEN:—This is to acknowledge receipt of your communication, reading as follows:

> "We are inclosing copy of letter received from Mr. A. M. Pollock, Director of Public Service, Lorain, Ohio, and in accordance with his request kindly ask that you submit the Bureau an opinion on the questions contained therein.
>
> The only former Attorney General's Opinions having any bearing on these questions which we are able to locate, are No. 448, page 746 of the 1919 Opinions, and No. 503, page 396 of the 1923 Opinions. Neither of those opinions, however, seems to clearly dispose of the question raised by the officials of the City of Lorain."

The letter referred to in your communication reads as follows:

> "I would appreciate it if you will submit the following state-

ment of facts and request for opinion to the Attorney General and forward that opinion to me at the earliest opportunity.

The facts involved are as follows:

The City of Lorain and Douglas A. Miller are parties to a contract destined to expire in June 1936, in the sum of approximately $11,000.00 per year, wherein Miller undertakes to collect and dispose of garbage of the City of Lorain according to certain plans and specifications. The said method of disposal is to either plow under the said garbage or to bury it in trenches.

Miller has furnished a bond duly required by the city, conditioned that he faithfully discharge the conditions of the said contract, and the contract further provides that if Miller breach the contract that the city can take and operate his equipment and also that if the city decides to build an incinerator plant that the city can terminate the contract upon six months notice to Miller.

With the contract as aforesaid, Miller began plowing under the garbage on a certain site until he was ordered to change the location by the Lorain County Board of Health. Following that, Miller began disposal by burial in a trench within the corporation limits of Sheffield. The County Board of Health has approved the method there employed so long as it does not prove or constitute a nuisance, but the village council is contemplating passage of an ordinance prohibiting such burial. Moving to another site is therefore now necessary. The State Board of Health has recommended, but not ordered, the abandonment of this method of disposal.

It is now contemplated by the city and Miller to alter and modify the said contract under the provisions of Section 4331 G. C. in the following respects:

1. To reduce the amount payable Miller from $11,000 to $9,000 per year.

2. To take from the contract Miller's obligation to dispose of the garbage and make it one for collection only.

It is further contemplated to advertise for bids for garbage disposal by reduction and to enter into a new contract for such disposal after such competitive bidding.

The City Council has already by ordinance, directed and requested the alteration of Miller's contract under Section 4331 G. C. and it has also passed an ordinance authorizing the new disposal contract by said method of reduction.

The question at issue is whether or not the said contract with Miller can be validly altered under Section 4331 G. C., as is contemplated here? Is such modification, which changes the nature of the contract from one of collection and disposition to one of collec-

tion only, such a modification as is contemplated by Sec. 4331 G. C., or is this alteration in fact a new contract and substantially different from the original?

Does this alteration violate the requirement that such alteration cannot be made where it increases the cost under the contract,—since here the collection cost under the altered contract is below the total cost of the original, yet, with the new disposal contract, far exceeds the costs of collection and disposal under the original contract? In the event that the altered contract would be enjoined can the parties revert to the original contract or is that contract destroyed by this alteration together with the performance under the scheme of things?

Miller feels he can comply with the original contract and we are anxious that if he accept this alteration at the suggetsion of the city that his contract be not destroyed by it."

The first question arising is whether or not the subject matter of section 4331, General Code, is applicable to a contract for the collection and disposition of garbage. Such section 4331, General Code, provides as follows:

"When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

As indicated in *Opinions of the Attorney General for* 1919, Vol. I, Page 746, at 749, it is arguable that section 4331, General Code, has application only to contracts involving work or improvements such as construction, building and improvement programs. In such opinion it was questioned whether or not a contract for the purchase of a quantity of material by a city was such a contract within the meaning of section 4331, General Code.

In the case of *The State* vs. *Butler,* 178 Mo. 272, 77 S. W. 560, 92 A. L. R. 837, 838, the question arose as to whether or not a contract for the removal and disposal of city garbage was "public work", within a city charter provision requiring contracts for "public work" to be let to the lowest responsible bidder. The court held such a contract was "public work" At page 306 of 178 Missouri, the court said:

> "It is next insisted that this (the contract for the colletcion and disposal of city garbage) is not public work, for the reason that the contract is not for the building of the plant or works by which the garbage is disposed of. It is true the city does not pay for the machinery or plant which does the work; but it certainly will not be disputed that the city does pay for the work done through the operation of the machinery. The disposal of the garbage for the city, whether done by machinery, or hauling and dumping in the Mississippi river, is the performance of public work."

Conceding for the purposes of argument that the legislature intended section 4331, General Code, to include a contract of the nature under discussion herein, the next question arises as to whether or not the proposed modification of the garbage contract mentioned in your communication would be valid within the letter and spirit of the section.

In *Opinions of the Attorney General for* 1923, Vol. I, Page 396, mentioned in your communication, it was held as disclosed by the syllabus:

> "1. Under the provisions of section 4331, G. C., the Director of Public Safety with the approval of the Board of Control and the acceptance of the contractor may legally modify an original improvement contract. However, the expenditure made in connection therewith must not exceed the original appropriation for such contract.
>
> 2. A modification or alteration of a contract under the provisions of section 4331, G. C., must have some logical and substantial reference to the primary contract. A modification, the purpose of which is to substitute a new and different contract from the one formerly entered into, is invalid. Such a modification in order to be legal must arise on account of an unforeseen condition arising in connection with the progress of the work begun under a proper original contract."

As shown by the second paragraph of the syllabus of the foregoing opinion, a proposed modification of a contract, the purpose of which is to substitute a new and different contract from the one formerly entered into, is invalid. Also the proposed change must result from conditions existing that could not be foreseen at the time of entering into the original contract.

Referring to the modification proposal of the city council which you set forth, it clearly appears to me that the reduction in price of $2,000 per year and the changing of the collection and disposal contract to one for collection only, make a new and different contract from the one formerly entered into, and would not be valid procedure under section 4331, General Code. Further-

more, it would appear from the facts of your subject-matter that the proposed change in the terms of the contract could not be said to result from conditions existing that could not be foreseen at the time of entering into the original contract.

On the other hand, assuming for the purposes of argument that the contract for collection and disposition of garbage does not come within the type of work or improvement contemplated by section 4331, General Code, it would appear that the conclusion reached would be the same.

In an opinion appearing in *Opinions of the Attorney General for* 1932, Vol. I, Page 500, it was held as disclosed by the syllabus:

> "Where a municipality has entered into a contract whereby it leased real estate owned by it and not needed for any municipal purpose, to the highest bidder after authorization and advertisement as required by section 3699, General Code, neither the council nor any other officer of such municipality has the power substantially to modify any of the terms of said lease, or to reduce the amount of rent therein provided for."

While this opinion did not discuss section 4331, General Code, it did review the general case law on the question of whether a municipality may modify a contract where there is no statute applicable to the subject matter of the contract, and as shown by the syllabus, held that a municipality had no power to modify a contract when the terms and conditions of such contract are to be varied substantially, since it would destroy the advantage intended to be secured by competitive bidding required for the letting of a given contract. Reducing the amount of the consideration of the lease contract was held to be a substantial variance of the terms and conditions of the said contract.

There is no doubt but that a contract for the collection and disposition of garbage constitutes an "expenditure" within the department of public service, within the meaning of section 4328, General Code, and being for over $500.00 requires competitive bidding. Hence, it would appear that the argument of the 1932 opinion would be equally applicable to the situation presented here.

In your letter, as stated before, it is proposed to reduce the consideration payable to the contractor from $11,000 to $9,000 per year, and to change the conditions of the contract so that the contract is for collection of the garbage instead of collection and disposal, as originally entered into.

Surely, on the authority of the 1932 opinion, such a change in the terms of the contract would be making a new and different contract, and it does not appear to be arguable that such a change would be anything else than a substantial variance from the terms of the original contract.

Coming now to the question of the effect of entering into a new contract on the proposed basis upon the original contract, it would appear that the original contract would, in reality, be entirely abrogated by such procedure.

In the case of *Phelps* vs. *Gas and Fuel Co.,* 101 O. S. 144, the court stated at page 148:

> "In passing it may be observed that the contracts of a municipal corporation, unless limited by positive provisions of statute law, are governed by the same principles as apply to contracts between individuals."

In *Page on Contracts,* 2nd Ed., Vol. 4, Page 4399, Section 2492, it is stated with relation to the question of the affect of a new contract made when an executory contract is modified:

> "A subsequent contract which does not by express terms abrogate an earlier contract, will, nevertheless, operate as a discharge thereof if it is inconsistent with such earlier contract."

Certainly the proposed changes in the contract, as stated in your communication, would make the contract inconsistent with the original contract, and I therefore feel that if a contract were not entered into on the basis described, the original contract would be discharged.

In conclusion, it may be pointed out, as stated in the 1932 opinion, that a municipal contract may be rescinded by consent of both parties to the contract. See *Newark* vs. *Fromholz,* 102 O. S. 81, 91; *Opinions of the Attorney General for* 1932, Vol. I, Page 500, 501. If the municipal contract under consideration here were to be rescinded by consent of both parties, a new contract concerning the subject matter therein would have to be let according to the statutory provisions applicable thereto.

Respectfully,
JOHN W. BRICKER,
Attorney General.