on the ballot submitted to the voters at election. The failure to so give the detailed information, renders the election, as it pertains to the bond issue, invalid."

In conclusion, I advise that in my opinion the election authorizing the board of education of Sharon Rural School District, Noble County, Ohio, to issue $7,000.00 bonds is invalid for the reason that the ballot submitted to the voters was materially defective as to form and substance, not being in accordance with the provisions of Section 2293-23, General Code. I am further of the opinion that notes issued in anticipation of the issue of such bonds are not a valid and binding obligation of the subdivision, and I therefore cannot advise their purchase.

Respectfully,
GILBERT BETTMAN,
Attorney General.

501.

MUNICIPALITY—POWER TO EMPLOY ENGINEER TO MAKE CADASTRAL SURVEY ON COST PLUS BASIS UNDER GENERAL LAW—CHARTER PROVISIONS MAY LIMIT.

SYLLABUS:

A municipality may, under the general law, employ an engineer to make a topographic and cadastral survey and provide for his compensation upon a cost plus basis, providing the terms of such a contract are sufficiently definite and certain to establish the rule whereby such compensation may be definitely computed. The home rule provisions of the Constitution will not limit such power, unless a municipality has adopted a charter or legislation inconsistent with the general law.

COLUMBUS, OHIO, June 10, 1929.

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

GENTLEMEN:—Your recent communication reads:

"May a municipality which has a city engineer legally make a contract with another engineer for a topographic and cadastral survey and agree to pay compensation on a cost plus 10% basis?

The engineer with whom the city desires to make a contract makes a specialty of such surveys."

In my opinion No. 239 rendered to your bureau under date of March 25, 1929, it was held that a municipality is authorized by the Uniform Bond Act to issue bonds for the purpose of paying the cost of a cadastral survey. In discussing the nature of such a survey, it was stated in said opinion that:

"A cadastral survey appears to be a survey to establish not only a permanent record of ownerships and values of all real estate within the corporate limits of a municipality, but also to determine and establish all property lines within such limits. It further appears that the making of such a survey contemplates a fixing of permanent monuments at street intersections and other points where it is advantageous to fix any or all property lines."

The nature of a topographical survey is so well known as to require no discussion of the case.

In my Opinion No. 258, issued to your Bureau under date of April 3, 1929, the power of villages to employ engineers other than the engineer authorized as a village officer was considered. It is believed the same power exists for a city to employ engineers in addition to the street commissioner or an engineer who is constituted a public officer as would exist by villages to make such employment. Such a contract is probably in the nature of a contract for personal services, the same as any other employment. However, in the event that such a contract should be distinguished from a personal service contract, it is evident that the same would not be governed by the provisions of the statutes relating to competitive bidding for the reason that such a service would be non-competitive in character. It is clear that such an engineering service is quite different from the ordinary engineering service.

Section 4214, General Code, which relates to the power of municipalities to make employments, provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

In view of the above, it is believed the only question presented is whether a contract for such a service, based upon a percentage of the cost price, is permissible. It may be stated that the courts frown upon public contracts let upon a cost plus basis, although during times of emergency, such as during the late war, such contracts were frequently awarded both by the State and nation. It is generally known that in employing architects upon public buildings, the compensation is usually based upon a percentage of the cost, which, in effect, is practically the same thing as the arrangement which you mention. This practice is followed by the State in the construction of public buildings, and by sanitary sewer districts in the construction of sewers; therefore, it would seem that there is no inhibition in the law with reference to awarding a contract upon a cost plus basis. However, it is essential in any contract that the terms thereof be definite and certain in order that the obligations arising under the same can be definitely determined. While the exact amount which one is to receive for performing services need not be stated, it is imperative that the rule whereby said sum is to be computed be definitely set forth. If the rule is so clearly established as to require only a mathematical computation to determine the sum due, then it is believed that the same would be sufficiently definite. In the case you present it is assumed for the purposes of this opinion that the engineer whom the municipality contemplates employing will be required to furnish necessary assistance and supplies in order to make the survey in question and that the compensation he is to receive for furnishing such labor and materials is a definite percentage in addition to such cost. As hereinabove stated, such contracts are generally looked upon with disfavor and subject to the greatest scrutiny, for the reason that such an arrangement of necessity would create an opportunity for the person employed to increase the costs to his personal advantage. In other words, such an arrangement furnishes an inducement for the person employed to increase the cost of the expense of completing a given project rather than reducing the cost of same.

In the case of *Portsmouth* vs. *Building Company,* 106 O. S., 550, a contract was upheld which contained express provisions for a change in plans and specifications

and which authorized the additional work occasioned by reason of such change, to be paid for upon a cost plus basis, although said court was not giving consideration to that specific phase of the question. As hereinbefore indicated, it is believed that the policy of such a proceeding is left to the sound discretion of the proper municipal authorities and that as a matter of law such a contract may be made so long as the terms thereof definitely establish a rule whereby the final amount to be paid can be determined and so long as such terms would not constitute an abuse of discretion on the part of the municipal authorities. The foregoing conclusion is based of course to a great extent upon the proposition that the person to be so employed is especially qualified for such a service and that the nature of such work is such as to make it absolutely and essentially non-competitive in character. In this connection, it has been noted that in an opinion reported in the Annual Report of the Attorney General, 1914, page 1469, the then Attorney General held that an ordinance of the City of Toledo providing that employes in any of the departments of the city government should be paid the "prevailing wage rate extant in the city" did not comply with the provisions of Section 4214, supra, for the reason that it was not sufficiently definite and certain. However, it is believed that the facts considered by the then Attorney General are clearly distinguishable from the facts considered herein.

In view of the foregoing, it is my opinion that a municipality may employ an engineer to make a topographic and cadastral survey and provide for his compensation upon a cost plus basis, providing the terms of such a contract are sufficiently definite and certain to establish the rule whereby such compensation may be definitely computed.

The above conclusion has been reached with reference to the provision of the general law without consideration of the so-called Home Rule provisions of the Constitution of Ohio as set forth in Section 3 of Article 18 of said Constitution. However, it is believed that said provisions would in no wise limit the power of a municipality with reference to the conclusions hereinbefore reached, unless a municipality in the exercise of such Home Rule powers has adopted a charter or legislation inconsistent with the general law in respect to the matters considered herein.

Respectfully,
GILBERT BETTMAN,
Attorney General.

502.

MILEAGE—CONSTABLE MAY ONLY CHARGE FOR ACTUAL MILES COVERED WHEN SERVING TWO WARRANTS SIMULTANEOUSLY.

SYLLABUS:

Under Section 3347 of the General Code, where a constable travels and serves two warrants at the same time during the same journey, he is not entitled to charge separate mileage on each warrant, but only for the number of miles actually and necessarily travelled in order to serve both warrants.

COLUMBUS, OHIO, June 11, 1929.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 4, 1929, which is in part as follows:

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