"The word 'maintain' is practically synonymous with repair." In the case of *Fergus* vs. *Rochford,* 84 Conn. 202 the court in the course of its opinion said:

'The word "maintain" within general statutes 1902, Section 338 requiring widows to maintain and keep in repair the property set apart to them as dower does not mean "to provide" or construct; but means to "keep up" not to suffer to fall or decline, "keep in repair" and maintain as used in the statute being synonymous.'

In the case of *Missouri K. & T. R. R. Co. of Texas* vs. *Bryan,* 107 S. W. 572, 576 it is said:

'The word "maintain" is practically the same thing as repair, which means to restore to a sound or good state after decay, injury, dilapidation or partial construction and when used in reference to railroad right of way includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended'."

It seems quite clear that in view of the foregoing discussion, and the authorities, that "cleaning and sweeping" streets is not "maintenance and repair" within the meaning of these terms as the same are used in Sections 6309-2 and 5537, supra. The terms as used in said statute contemplate some definite repair or improvement of a street or road such as a resurfacing, or repairing of holes and other depressions, where the existing foundations are used in whole or substantial part as a subsurface for the repair or improvement. That this is true, is quite clear from the language that maintenance and repair includes "all *work* done upon any public road" where part of the existing foundation of a street is used as a *subsurface.* In other words, cleaning, sweeping and sprinkling can not be said to be a repair or improvement requiring the use of some part of the existing foundation of a street as a subsurface. In this connection, it should be pointed out that the sweeping and sprinkling of streets are done to conserve the health and insure the well-being of the inhabitants of a municipality and not to enable the streets to be used for the purpose intended. In other words, street cleaning and sprinkling are carried on as sanitary, and not road repair projects.

Of course it is understood that this discussion is limited to the use of the maintenance and repair funds received from the "motor vehicle license tax" and the "gasoline excise tax fund" and not to revenues provided in municipalities by local taxation.

Answering your question specifically, it is my opinion that the monies allotted to municipal corporations from the "motor vehicle license tax" or the "gasoline excise tax funds" may not be lawfully expended by such municipalities for the purpose of sweeping or cleaning streets or roadways, since such sweeping and cleaning of streets is not "maintenance and repair" as that term is defined in Section 6309-2, General Code, and used in Section 5537, General Code.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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1564.

BID—ON AIRPLANE HANGAR—INFORMAL PROPOSAL OUTSIDE OF SPECIFICATIONS WHICH MAY BE ELIMINATED DOES NOT INVALIDATE BID.

*SYLLABUS:*

*A proposal or bid submitted by a contractor for the erection or construction of a building or structure for the use of the state which contains an additional or informa-*

*tory bid outside of the work covered by the approved form of the proposal, but which can be eliminated without affecting in any way the competitive character thereof, is not invalid because of such addition, within the contemplation of Section 2317, General Code.*

COLUMBUS, OHIO, January 11, 1928.

HON. FRANK D. HENDERSON, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for my opinion upon the following:

> "I herewith submit for your consideration, a bid submitted by the ——— Company of Cleveland, Ohio, for a state hangar to be erected near Cleveland, with the request that you render an opinion relative to the legality of the interlinear clause written into the approved typewritten proposal which reads *'If electric service is brought into building from illuminating poles on street add* $1,100.00.'
>
> The above question is raised under the provisions of Section 2317, General Code, which provides *'The form of proposal approved by the State Building Commission shall be used, and a proposal shall be invalid and not considered unless such form is used without changes, alteration or addition.'*

The bid or proposal accompanying the above request is on a mimeographed form, approved by the Adjutant General of Ohio, and the following is quoted therefrom, the matter in italics having been printed in by the bidder in ink:

> "Having carefully examined the entire specifications entitled Specifications for Ohio State Hangar, Cleveland, Ohio, and the drawings similarly entitled, and numbered one to eight inclusive, prepared by the Department of Adjutant General, Division of Director of State Armories, by Fred W. Elliott, State Armory Architect, as well as the premises and conditions affecting the work, the undersigned hereby proposes to furnish all materials and labor included under the title 'General Contract' as set forth in Titles, Bonds, Bids and Contracts, and General Conditions of the Specifications, and in strict accordance with said documents for the following sums:
>
> As specified, Basic Bed ..... $54,000.00
>
> Add for Alternate No. 1, Cement Apron extension ..... $1,830.00
> *If electric service is brought into building from illuminating poles on street, add* ..... $1,100.00
>
> If awarded the contract, the undersigned hereby agrees to complete the above mentioned work by May 20th, 1928."

Your question is whether or not the matter in italics in the above quoted portion of the proposal is a change, alteration or addition, within the contemplation of Section 2317, General Code, so as to make the proposal invalid.

The provisions of law relative to the erection or construction of buildings or structures for the use of the state are found in Sections 2314, et seq., General Code. The purpose of these sections is clearly to make mandatory the awarding of contracts for the erection or construction of such buildings or structures to the lowest

bidder or bidders, after bids have been received on a strictly competitive basis. Briefly, the statutes provide for the preparation of plans, specifications, bills of material, details and estimates of cost, the approval of the same and the filing of the same in the office of the Auditor of State. They also provide for receiving bids after four weeks' publication of a notice of the intention so to do and for the acceptance of the lowest bid or bids submitted.

In enacting these statutes the legislature has attempted to set out the various steps leading up to contracts for the erection or construction of state buildings in such detail as to insure the acceptance of the lowest bid, after bids on a strictly competitive basis have been received. In so doing, the legislature has provided in Section 2317, General Code, that proposals or bids shall be submitted only on the form approved by the State Building Commission and that, as quoted from said section in your letter, "a proposal shall be invalid and not considered unless such form is used without change, alteration or addition."

While Section 2317, General Code, refers to forms of proposal approved by the State Building Commission, that commission has, by the terms of Section 154-40, General Code, been superseded by the Department of Public Works, which section also provides that nothing therein, or in Sections 154-37 or 154-41, General Code, shall interfere with the functions of the Adjutant General, as Director of State Armories, although Section 5240, General Code, provides that in the construction of armories and other buildings for military purposes the Adjutant General shall be governed by the provisions of Chapter 1, Title IX, of Part First of the General Code, which is the chapter pertaining to public buildings. The effect of these provisions, in my opinion, is to substitute the Adjutant General for the State Building Commission in the construction of armories and other buildings for military purposes and to require him to comply in all respects in the construction of such buildings with the other provisions of the chapter relating to public buildings generally.

As stated above, the purpose of the law pertaining to public buildings is to make mandatory the awarding of contracts for the erection or construction of such buildings to the lowest bidder or bidders, after bids have been received on a strictly competitive basis. The legislature intended to and did provide safeguards with the view to securing the benefit and advantage of fair and just competition between the bidders and at the same time close every avenue to favoritism and fraud to insure the accomplishment of the work at the lowest price by subjecting the contract for it to public competition.

It seems clear therefore that when the legislature provided in Section 2317, General Code, that a bid or proposal shall be invalid and not considered, unless the form approved by the State Building Commission is used without change, alteration or addition, it had in contemplation such changes, alterations or additions which would destroy the competitive feature of the proposal. In other words, in my opinion Section 2317, General Code, makes invalid proposals containing such changes, alterations or additions as will constitute the proposal a bid on a building or structure different, in some respects at least, from the building or structure covered by the plans and specifications.

While I have been unable to find any reported cases directly in point, I desire to direct your attention to the case of *State, ex rel. Taylor, Prosecutor,* vs. *Nathan B. Abbot, et al., Trustees,* 2 O. C. C. (N. S.) 281. This was an action to enjoin the defendants, as trustees of the Memorial Association of Franklin County, Ohio, from carrying out or completing a contract entered into by them with their co-defendant, W. H. Ellis & Company, for the construction of a memorial building. The act under which the contract was entered into was the act of March 12, 1902, (95 O. L. 41), providing for the construction and maintenance of county memorial buildings

to commemorate the services of the soldiers, sailors, marines and pioneers of the several counties of the state. Section 8 of the act provided that the contract should be based upon detailed plans, specifications, forms of bids, and estimates of cost to be adopted by the board of trustees and that no contract should be let except to the lowest and best bidder. Said section also provided that the contract should be entered into after advertisement in two newspapers published and of general circulation in the county for a period of thirty days. It appears that the defendant, Ellis & Company, submitted a bid, together with specifications, in which they offered to furnish all the materials and construct the entire building, walks, driveways, etc., for the sum of $211,305.00 and in the first paragraph of the specifications stated that the same contained certain changes, which were necessary in the various branches of the work to enable the firm to perform the work for the sum stated, and thereupon the architect prepared supplemental specifications which, in many particulars, were based upon the provisions contained in the specifications of Ellis & Company, in which there appeared many material changes and omissions of matters contained in the original plans and specifications, upon which sealed proposals were invited. The court held, as stated in the first branch of the headnotes:

> "A contract for the construction of a public building is illegal and void, where the plans and specifications upon which it was awarded were not those which the board caused to be prepared and advertised, were not responsive to the invitation to bid, and did not give other bidders the same opportunity to bid that was enjoyed by the contractor to whom the work was awarded."

The third branch of the headnotes reads as follows:

> "Authority to invite alternate bids would not authorize the acceptance of any alternative bid, submitted on condition that if certain parts of the building are omitted, or other changes made, not provided for in the specifications upon which the building (bidding) was invited, the bidder will construct the building for the sum stated in his bid." (Matter in parenthesis the writer's.)

The second and third branches of the syllabus in the case of *Boren & Guckes* vs. *Commissioners of Darke County, et al.*, 21 O. S. 311, read:

> 2. "Where the commissioners proceed, in accordance with said act, to advertise for sealed proposals, to be filed within a time named, for the furnishing of specified labor and materials towards the erection of a court house, it is their duty to award the contract for such labor and materials to the person or persons who shall so offer the same at the lowest price, and give good and sufficient bond to the acceptance of the commissioners for the faithful performance of the contract; provided such price is not in excess of the preliminary estimates required by the act."
>
> 3. "Where a bidder includes in his proposal, with the labor and materials specified in the advertisement, for which proposals are invited, other labor and materials not therein called for, and the price proposed is an aggregate sum for the whole, under said act it can be regarded only as a proposal for the labor and materials advertised for; and if such price is not lower than that of another bidder whose proposal embraces only the labor and materials called for in the advertisement, he is not entitled to have the contract awarded to him, if the other bidder otherwise complies with the act."

The facts in the above case were briefly as follows: The county commissioners awarded a contract for the construction of a court house in Greenville, Ohio, to Rouzer & Rouzer, on their proposal to furnish all materials and to do all the work necessary for the erection and completion of the court house, according to plans and specifications, for the sum of $115,000.00. It appeared that this proposal was almost $13,000.00 higher than that of the relators and it further appeared that the bid accepted embraced work and a large amount of material not submitted to the competing bids of the other bidders. In holding this proposal invalid, the court said on page 322:

> "To allow contracts to be made on bids of this character would be an easy evasion of the statute, and open wide the door to favoritism, rings and frauds, in contravention of the manifest policy of the act; for if a contract, in a case like this, may be made, including brick, on proposals called for on the balance of the structure only, a contract might as well be made for the entire edifice, on bids for brick, or any single item only, with a favorite who may bid for the whole without competition. It is the obvious policy and intention of the statute to render such favoritism impossible. The commissioners are invested with no such discretion. On the contrary, it is the clear intent and policy of the statute to withhold it, and thereby shut the door against all favoritism."

While the above cases are not directly in point, they do serve to show that the courts in determining whether or not bids for the construction of public buildings are invalid, due to changes or alterations therein, examine such bids and decide the question on whether or not the changes, alterations or additions are such as destroy the competitive feature of the bid.

The proposal submitted with your communication contains the following bid:

"As Specified, Basic Bid---------- $54,000.00
Add for Alternate No. 1, Cement Apron Extension---------- 1,830.00"

and also contains the following, which is not a part of the approved form of proposal:

> "If electric service is brought into building from illuminating poles on street, add $1,100.00."

The logical interpretation of the bid and the additional language above referred to seems to be that the bidder proposes to construct the building, as specified, for the sum of $54,000.00, plus the sum of $1,830.00, if alternate No. 1 is accepted, and that the bidder further offers to install the necessary connections from the electric line on the street to the building for the sum of $1,100.00. It seems to me that the offer to bring in the electrical service from the street is more in the nature of an informatory bid than a change, alteration or addition in the form of proposal. In other words, the bidder offers to construct the building, as specified, for a certain sum, and offers in addition thereto, and outside of his offer to construct the building, to install the necessary connections to bring the service from the street to the building. As I view it, this is mere surplusage and not such a change, alteration or addition in the proposal as would destroy the competitive feature of the same. If the proposal had been changed to read, "As specified, plus electric service connection from street to building, $55,100.00," or similar language, this would, in my opinion, constitute such a change, alteration or addition in the form of proposal as would render the same invalid under the provisions of Section 2317, General Code.

Of course, in considering the bids submitted, the offer to construct the electric service line from the street to the building cannot be considered in awarding the contract; that is, in considering all the proposals the offer to construct such service line must be eliminated.

Specifically answering your question, it is my opinion that a proposal which contains an additional or informatory bid outside of the work covered by the approved form of the proposal, but which can be eliminated without affecting in any way the competitive character thereof, is not invalid because of such addition, within the contemplation of Section 2317, General Code.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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1565.

TOWNSHIP TRUSTEE BOND—APPROVAL—ELECTION—VALIDITY OF ELECTION OF OFFICIAL AT POLLS—OPINIONS NO. 1560 AND 1390 APPROVED AND FOLLOWED.

*SYLLABUS:*

1. *There is no authority for the examination and approval of the bonds of newly elected township trustees by any officer or officers other than a justice of the peace. Where, however, there is no justice of the peace to approve the bond of newly elected township trustees, each of such trustees should enter into a bond with two good and sufficient sureties residents of the same township with the trustee, as required by Section 3269, General Code, (or with a duly authorized guarantee company as surety, as authorized by Section 9571, G. C.) and file the same with the township clerk for record. When such bond is so entered into and filed, said trustees are authorized to enter upon the duties of their office and no vacancy would be created therein. Opinion No. 1560 of January 10, 1928, approved and followed.*

2. *Whether or not a judge of elections, whose name was not printed on the ballot, and who was elected a member of a board of education is, under Section 5092, General Code, ineligible to serve depends upon the facts in each particular case. If such judge of elections had been engaged in actively promoting his candidacy for such office he would be ineligible. If on the other hand he did not seek or aspire to the office or actively promote his candidacy, he would be eligible, notwithstanding the fact that he had served as a judge of the election in which he was elected. Opinion No. 1390 of December 17, 1927, approved and followed.*

COLUMBUS, OHIO, January 11, 1928.

HON. W. J. JONES, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 4, 1928, which reads as follows:

> "Would like to have your opinion as to who can approve the bonds of newly elected township trustees in a township where there is no justice of the peace.