

771.

TRUCK—MAY BE PURCHASED BY VILLAGE WITH GENERAL REVENUE AND WATERWORKS FUNDS—COMPETITIVE BIDDING—VILLAGE COUNCIL OR BOARD OF TRUSTEES OF PUBLIC AFFAIRS CAN RECEIVE BIDS.

SYLLABUS:

1. *A truck to be used for all village purposes, including use by the board of trustees of public affairs of the village in connection with the operation of the waterworks, may lawfully be purchased by a village and may lawfully be paid for in part from general revenues and in part from waterworks funds.*

2. *Under such circumstances, the contract of purchase should be regarded as an entirety and the truck purchased as a whole. If the cost of the truck exceeds five hundred dollars, the purchase should be made on competitive bidding after due advertising, according to law. Either the village council or the board of trustees of public affairs may lawfully advertise for bids and award the contract for the purchase of the truck.*

3. *If the truck is purchased by either the village council or the board of trustees of public affairs upon competitive bidding after due advertisement according to law, the other municipal agency need not secure bids, even though it be contributing more than five hundred dollars to the purchase.*

COLUMBUS, OHIO, August 21, 1929.

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

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

“Sections 4361, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code require all contracts for water-works improvements in a village to be entered into by the board of public affairs.

Sections 4221 and 4222, General Code, provide that all other contracts shall be awarded by the council of the village and signed by the mayor and clerk thereof.

The village of _____ desires to purchase a truck to cost not exceeding \$1,000.00, to be used for all village purposes, including use by the board of public affairs in connection with the operation of the water works. Council proposes to pay \$500.00 out of the general fund and the board of public affairs \$500.00 out of the water-works fund.

Since the amount to be expended by council will not exceed \$500.00, and the amount to be expended by the board of public affairs will not exceed \$500.00, must bids be advertised for?

If bids must be advertised for, would council or the board of public affairs, or both bodies, have to award the contract?”

By authority of Sections 4357, et seq., General Code, the control and management of public utilities in villages, operating under general laws, are vested in a board of trustees of public affairs, subject to a like control of the village council as is exercised by city councils, in cities, over the Director of Public Service in his administration of the affairs pertaining to the city-owned public utilities.

Section 4361, General Code, provides in part:

“The board of trustees of public affairs shall have the same powers and

perform the same duties as are possessed by, and are incumbent upon, the Director of Public Service, as provided in Sections * * * 4328 * * * of the General Code, and all powers and duties relating to water-works in any of these sections shall extend to and include electric light, power, and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

Section 4328, General Code, provides as follows:

"The Director of Public Service may make any contract or purchase supplies or material or provide labor or any work under the supervision of that department not involving more than five hundred dollars. When an expenditure 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 nor more than four consecutive weeks in a newspaper of general circulation within the city."

Clearly, in view of the foregoing statutes, all contracts made by a board of trustees of public affairs in villages, and all purchases of materials or supplies, involving an expenditure of less than five hundred dollars, may be made by the board without authorization and direction by ordinance of council and without letting the contract or making the purchase upon competitive bidding, after due advertising therefor. If the contract or expenditure exceeds \$500.00, it must first be authorized and directed by ordinance of council, and a contract in writing thereafter entered into upon competitive bidding, after due advertising.

Village contracts and expenditures on behalf of the village generally, not growing out of the operation of village utilities, are made by the village council, and when any such expenditure, other than expenditures for the compensation of village employes, exceeds five hundred dollars, such contracts shall be in writing and made to the lowest and next bidder after advertising for not less than two or more than four consecutive weeks in a newspaper of general circulation within the village. Section 4221, General Code.

It is clearly within the power of the village council to purchase a truck for use in administering the affairs of the village, when, in the discretion of council, such purchase is necessary, and pay for the same from the properly appropriated revenues of the village. It is equally clear that the board of trustees of public affairs may, in its discretion, purchase a truck from water-works funds, as a part of the expenses of conducting and managing the water-works. The question arises, whether such purchase may be made partly from general revenue funds and partly from water-works funds, thereby resulting, in a sense, in a joint proprietorship in the truck, in the village council and the board of trustees of public affairs. It is very probable that such an arrangement might result in some conflict of authority over the use of the truck, but not necessarily so. Officials might, of course, be somewhat jealous of each other and feel at times that the rights of the joint proprietorship were being abused, but we have no right to assume that such would be the case, and anyway that fact would not preclude the purchase, if the power exists to acquire the property in that way.

It is readily conceivable that in many villages such a joint arrangement in the purchase and operation of a truck would savor of good business management, and would be to the best interests of the taxpayers and water users of the village, and,

inasmuch as there seems to be no law preventing such a course of action, and the purchase of a truck in that manner would in no way be inconsistent with any provision of law, I am of the opinion that if proper legislation is enacted by the village council, to the end that the truck be purchased in the manner described, the action will be lawful. After all, the village council and the board of trustees of public affairs are not two political subdivisions or two separate and distinct entities. Each is a part of the same village government, and is of the village, and answerable to the same citizenry.

We are not here confronted with the constitutional objection often raised as to the right of municipalities to go into partnership with private individuals or corporations. That question was before the court in the case of *Alter vs. Cincinnati*, 56 O. S. 47, the first and second branches of the syllabus of which case are as follows:

1. Under section six of article eight of the Constitution, a city is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property.

2. A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property."

In this case no private interests are involved. Municipalities are dealing purely with municipal funds and the only difficulty is that two different agencies of the village government, which to some extent, but not absolutely, are independent of each other, are joining in the accomplishment of a purpose, the ultimate benefit of which is to the village as a whole, and no specific machinery is set up or authorized by law for such proceeding. I am of the opinion that such a joint purchase is not prohibited by any law and is not inconsistent with any law and is within the powers of a village government, unless by a charter provision such a commingling of funds is prohibited.

In an opinion of my predecessor, found in Opinions of the Attorney General for 1928, page 1797, it is held:

"A municipality may, by proper legislation, use surplus water revenues for the purpose of constructing that portion of a city office building to be dedicated and used for water-works office purposes."

In the course of the opinion the need of a municipal water-works department for office space is pointed out, as is the power of the municipality to provide such office space by the erection of a building, if necessary, with water-works funds, as a part of the necessary cost of the operation of the water-works plant, and it is stated:

"The only difficulty presented by your inquiry is the fact that, in the present instance, instead of the construction of separate buildings, the municipality contemplates the erection of one municipal building only, a part of which is to be used for water-works purposes and for the construction of this part it is sought to use surplus water revenues. The contract will, of course, be let as a whole and the amount of the water funds to be used for this purpose will, I take it, be appropriated for the purpose of the contract. Upon completion the building will, of course, be operated as a municipal structure, and the question resolves itself into whether or not this commingling of funds would be violative of the provisions of the Code, heretofore quoted."

If the funds of a water-works department of a municipality and the general revenues of a municipality may be commingled for the construction of such a permanent structure as a city office building, there certainly can be no objection to the commingling of those funds for the purchase of a truck to be used jointly by the several departments of the municipality.

The contract of purchase, however, should be regarded as an entirety and should be let as a whole, and although neither the council nor the board of trustees of public affairs will, under the facts set up in your inquiry, expend more than five hundred dollars, the purchase should be made upon competitive bidding after due advertisement, according to law, in order to conform with the spirit, if not the letter, of the law requiring competitive bidding for the purchase of any article costing more than five hundred dollars.

There could be no serious objection, in my opinion, to either the council or the board of trustees of public affairs, upon proper authorization by ordinance of council, making the purchase. I can see no reason for saying that either one or the other must make the purchase. I am of the opinion that if proper legislation is enacted by council, including the proper appropriation of money, bids may be received and the award of the contract for the purchase of the truck may be made by either the village council or the board of trustees of public affairs.

In this connection the question naturally arises as to what the result would be if the council and the board of trustees of public affairs were each contributing more than five hundred dollars to the purchase of the truck. Under the strict letter of the law, it would appear that neither the council nor the board of trustees of public affairs could expend more than five hundred dollars without receiving bids, after proper advertising, and the lettering of a contract based on those bids. If, however, proper legislation were enacted by a village council for the purchase of a truck or other article, to be paid for from general funds and water-works funds of the village, each contributing more than five hundred dollars, and bids were asked for according to law by either the council or the board of trustees of public affairs for the entire contract, it would be farcical to require the other municipal agency to ask for and receive bids for its share of the truck. There are circumstances where advertising for bids is not essential, when conditions are such that there cannot be competitive bids.

In the case of *Baird vs. City*, 96 N. Y. 566, 582, it is said :

"It has been frequently held that provisions of law requiring contracts on behalf of a municipal corporation to be let to the lowest bidder may not be obligatory upon its officers on account of their inherent inapplicability to the nature and circumstances of the case. If an article can be obtained from one person alone it would not only be farcical, but also a hazardous proceeding to subject the city to the obligation of making a contract at the lowest price offered, when there was one person who could lawfully bid for the privilege of sale; such a construction might compel a contract for a price dependent upon the arbitrary will and caprice of one only of the parties."

See also *Harlem Gas Light Co. vs. City*, 33 N. Y. 309; *City vs. Electric Co.*, 65 Conn. 324.

In conclusion, I am of the opinion, in specific answer to the questions submitted, that :

1. The village referred to in your inquiry may lawfully purchase a truck in the manner outlined, and, although the council and the board of trustees of public affairs are each to expend less than five hundred dollars for said truck, the aggregate amount expended for the truck will be more than five hundred dollars and the contract of purchase should be regarded as an entirety and the purchase made as a whole, and,

therefore, the truck should be awarded upon competitive bidding, after due advertising, according to law.

2. Bids may be received and the contract awarded by either the council of the village, or the board of trustees of public affairs, if proper legislation to that end is enacted by council.

Respectfully,
GILBERT BETTMAN,
Attorney General.

772.

APPROVAL, BONDS OF MIAMI COUNTY—\$35,000.00.

COLUMBUS, OHIO, August 21, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

773.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND F. & Y. CONSTRUCTION COMPANY, COLUMBUS, OHIO, FOR THE CONSTRUCTION OF STATE ARMORY AND STABLE AT TOLEDO, OHIO, AT AN EXPENDITURE OF \$78,375.00—SURETY BOND EXECUTED BY THE SEABOARD SURETY COMPANY.

COLUMBUS, OHIO, August 21, 1929.

HON. A. W. REYNOLDS, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by and through A. W. Reynolds, Adjutant General and Director of State Armories, and The F. & Y. Construction Company, a corporation, Columbus, Ohio. This contract covers the construction and completion of the Ohio State Armory and stable to be erected at Toledo, Ohio, and calls for an expenditure of seventy-eight thousand three hundred and seventy-five dollars (\$78,375.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent of the Controlling Board to the expenditure has been obtained, as required by Section 11 of House Bill No. 510 of the 88th General Assembly. In addition you have submitted a contract bond, upon which the Seaboard Surety Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared