

sideration in my 1933 opinion, *supra*, and in my opinion, Senate Bill No. 368, if enacted into law, will not authorize a reduction of the amount of indebtedness which the state of Ohio may incur under the Constitution, nor would such act in any way impair or reduce the credit of the state of Ohio.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4973.

HIGHWAY DEPARTMENT—CONTRACT FOR PURCHASE OF  
AUTOMOBILE FROM HIGHWAY FUNDS FOR SOLE USE  
OF GOVERNOR ILLEGAL—ALTERNATIVE BID—CON-  
TRACT ILLEGAL WHEN AWARDED ON BID CONTRARY  
TO SPECIFICATIONS.

*SYLLABUS:*

1. *Where the Department of Highways, in specifications for the purchase of a passenger automobile, invites proposals from bidders for the furnishing of a 1935 model Lincoln-Judkin automobile with allowance for trade-in of its old Cadillac sedan automobile, and one of the bidders submits an alternative bid, proposing to furnish a 1934 model Lincoln-Judkin automobile with allowance for a trade-in on said old automobile, and said alternative bid is accepted by the said Department of Highways, and a voucher is drawn for payment of the price of the alternative bid, such voucher does not constitute a legal claim for payment from the state treasury by the Auditor of State.*

2. *Highway funds coming from special excise tax moneys in the state highway construction fund, state maintenance and repair fund, and the state gasoline tax excise fund, may not be used for the purchase of automobiles to be used exclusively by the executive or any other department of the state government (other than the highway department).*

COLUMBUS, OHIO, December 9, 1935.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent request for an opinion which reads:

“We respectfully request your written opinion upon the following questions:

Voucher No. 32899, Highway Department, dated November

15, 1935, is presented to this office for payment in the sum of \$3400 for purchase of one 1934 Model Lincoln-Judkin automobile.

The Invitation for Bids for purchase of said automobile for a '1935 Model Lincoln-Judkin 2 window Berlin standard equipped automobile less trade-in of one 7-passenger Cadillac Sedan, etc.'

One of the bidders—and only one—in addition to bidding as per invitation incorporated in his an Alternate Bid as follows:

'1 only 1934 Model Lincoln-Judkin 2 window Berlin standard equipped \$3800, less trade-in allowance on one 7-passenger Cadillac Sedan, Model 341-B, \$400; net price of Alternate Bid \$3400.00.' The purchase price is certified against the Highway Improvement Fund.

Q. 1. In view of the fact that the invitation for bids for purchase of said automobile did not call for bids for 1934 model, does this procedure constitute a legal purchase of said automobile inasmuch as no competitive prices were obtained on 1934 models; and does said Voucher No. 32899 constitute a legal claim for payment from the State Treasury?

Q. 2. The said Lincoln automobile, we are informed, was bought for, and has been used only by the Executive Department of the State. May Highway funds be used to purchase automobiles to be used exclusively by the Executive Department, or other departments of state except the Highway Department?"

The first question arising in connection with your first specific query is, is the Director of Highways authorized in law to purchase a passenger automobile, and if so, must same be purchased only after competitive bidding.

It is a familiar rule of public law that public officers have only such powers as are given them by the statutes and those necessarily implied to carry out the express powers. See 32 *Ohio Jurisprudence*, 933, et seq., "*Public Officers*," sections 74 and 75.

An examination of the statutes does not reveal any express statutory authority for the Director of Highways to purchase a passenger automobile. However, there does appear to be sufficient ground for holding that there is implied authority to do so.

In *Opinions of the Attorney General for 1929*, Vol. I, Page 752, it was held, as disclosed by the syllabus:

"A district board of health may purchase a motor vehicle for the use of the district health commissioner of such district when conditions are such that the successful, economical and efficient performance of the board's duties which are expressly imposed by statute may require such a purchase. Affirming Opinion No. 2995, *Opinions of Attorney General*, 1925, p. 861."

The syllabus of the 1925 opinion, which was affirmed in the 1929 opinion, states:

“There is no express authority authorizing a district board of health to purchase an automobile for the use of its employes. However, where conditions are such that the successful, economical and efficient performance of the board’s duties, which are expressly imposed by statute, requires such a purchase, the authority is reasonably implied. Whether or not such a condition exists is a question of fact to be determined in each case in the discretion of the board.”

While the two foregoing opinions are the most recent opinions on this matter, and would appear to hold that a passenger automobile may be purchased by a public officer or board on the ground of implied authority, without regard to any express statutory provision, it should be mentioned that there are several older opinions of former attorneys general that hold a passenger automobile may not be purchased by a certain public authority therein considered, based on lack of express statutory authority.

In *Annual Report of the Attorney General for 1913*, Vol. II, Page 1360, it was held in an opinion reported therein that county commissioners may not purchase an automobile for use of the county surveyor, on the ground that section 2786, General Code, only provided for office equipment, and such section was not broad enough to authorize the purchase of an automobile.

Similarly, it was held in *Annual Report of the Attorney General for 1914*, Vol. I, Page 520, that county commissioners may not purchase an automobile for the then district assessors, on the ground that section 5620, General Code (103 O. L. 797, now repealed), authorized the purchase of office equipment and supplies, and not an automobile.

Again, in *Opinions of the Attorney General for 1918*, Vol. I, page 622, it was held that township trustees could not purchase a passenger automobile based on the fact that section 3373, General Code, in employing the phrase “machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township”, did not contemplate a passenger automobile.

Finally, in *Opinions of the Attorney General for 1919*, Vol. I, Page 148, it was held that county commissioners were not authorized to purchase an automobile for use of the superintendent of the county children’s home. The conclusion of this opinion was based on the fact that sections 3077 to 3198, General Code, relating to children’s homes contained no statutory implication that such a purchase could be made.

The Supreme Court in the case of *State ex rel. Locher vs. Menning*, 95 O. S., 97, decided, in 1916, that county commissioners could not purchase a passenger automobile for the county surveyor and county highway superin-

tendent, under the then provisions of section 7200, General Code (106 O. L. 617), because such an automobile was not contemplated within the phrase "machinery or other equipment for construction, improvement, maintenance or repair of the highways," etc.

However, after considering all these opinions and the Supreme Court decision in the light of the provisions of section 1190-1, General Code, it would seem reasonably certain that the legislature had authorized the State Highway Department to purchase a passenger automobile. Section 1190-1, General Code, which is section 18 of the Norton-Edwards Act passed in 1927 (112 O. L. 439), reads, so far as pertinent:

"The director (of highways) shall be authorized to secure suitable buildings for housing, storing, caring for and keeping in repair, automobiles, motor trucks, road machinery and equipment received by the department of highways from the federal government *and also other automobiles*, trucks, machinery and equipment *owned by the department.* \* \* \*" (Italics and words in parenthesis mine).

Obviously, the fact that the Director of Highways is expressly authorized to secure suitable buildings for housing "automobiles \* \* \* owned by the department" shows conclusively that the legislature recognized that the Director possessed authority to purchase a passenger automobile if it was necessary in the carrying out of his statutory duties.

Thus conceding that the Director of Highways has authority to purchase a passenger automobile, the next question arises as to whether it is required by law that such a purchase be made only after competitive bidding.

In 1929 the legislature amended section 1226, General Code, section 43 of the Norton-Edwards Act (112 O. L. 457), and enacted sections 1226-1 and 1226-2, General Code, reading as follows:

"Sec. 1226. The director, after notice as hereinafter provided with respect to purchases, is hereby authorized to sell \* \* \* any machinery, tools or equipment not required by the department or that through wear have become unfit for use. The proceeds of such sale shall be paid into the state treasury to the credit of the state highway construction fund. The director is also authorized to exchange such machinery, tools and equipment for new equipment in the manner hereinafter provided and pay the balance of the cost of such new equipment from any funds available for that purpose."

"Sec. 1266-1. All purchases of machinery, materials, supplies or other articles which the state highway director or the department of highways may be authorized to make, shall be made in the

manner hereinafter provided. In all cases except those in which the state highway director may, as hereinafter provided, authorize purchases by resident division deputy directors, or resident district deputy directors, all such purchases shall be made at the office of the department of highways in the city of Columbus. Before making any purchase at said office, the state highway director shall be required to give the following described notice to bidders of his intention to purchase. Where the expenditure is not more than five hundred dollars, the director shall give such notice as he deems proper, or he may make the purchase without notice. Where the expenditure is more than five hundred dollars, the director shall give notice by posting for not less than ten days a written, typed or printed invitation to bidders on a bulletin board in the offices of said department, which bulletin board shall be located in a place in the offices assigned to said department and open to the public during business hours. Producers or distributors of any product or products may notify the director in writing of the class or classes of articles for the furnishing of which they desire to bid, and also of their postoffice addresses, in which case copies of all invitations to bidders relating to the purchase of such class or classes of articles shall be mailed to such persons by the director first class mail postage prepaid at least ten days prior to the time fixed for taking bids. The director may also mail copies of all invitations to bidders to news agencies or other agencies or organizations distributing information of this character. Requests for invitations shall not be valid or require action by the director unless renewed, either annually or after such shorter period as the director may prescribe by a general regulation entered on his journal. The invitation to bidders herein provided for shall contain a brief statement of the general character of the article which it is intended to purchase, the approximate quantity desired, and a statement of the time and place where bids will be received. Said invitation may relate to and describe as many different articles as the director may think proper, it being the intent and purpose of this provision to authorize the inclusion in a single invitation of as many different articles as the director may desire to invite bids upon at any given time. Invitations issued during each calendar year shall be given consecutive numbers, and the number assigned to each invitation shall appear on all copies thereof. In all cases where notice is required by the provisions of this section, the director shall be required to take sealed bids on forms prescribed and furnished by the department, and modification of bids after the same have been opened shall not be permitted."

"Sec. 1226-2. Specifications describing the character of the articles which it is proposed to purchase, and the conditions governing shipment and delivery, shall be kept on file at the department of highways and open to public inspection throughout the time during which it is herein required that an invitation to bidders be posted. The director may require bids to be accompanied by a certified check payable to him in an amount fixed by him and stated in the invitation to bidders. Persons, firms or corporations desiring to bid on more than one invitation shall be relieved from furnishing certified checks with their bids provided they first furnish a bond payable to the state of Ohio in an amount and with surety approved by the director, and conditioned for the faithful performances of all contracts which may be awarded to them and otherwise conditioned as the director may require. All bids shall be publicly opened and read at the time and place mentioned in the notice. *All purchases shall be made by the director from the lowest responsible bidder able to meet the specifications and conditions prescribed by the department,* saving that in the purchase of machinery or equipment or supplies for which fixed and definite specifications cannot be prepared, the director shall be authorized to purchase the article or articles meeting the general specifications prescribed and which he finds are most suitable for the uses intended. The provisions of this act shall apply to the exchange of machinery and equipment, and shall also apply where in force account operations the director desires to combine in one order both the furnishing and the hauling or hauling and placing of material. The director may purchase or authorize the purchase without notice, or upon such notice as he may prescribe, of all materials which in his judgment may be required for the immediate repair of roads or bridges destroyed or damaged by flood, landslide or other casualty. It shall be unlawful to place separate orders for the purpose of defeating the provisions of this act relating to notice, and no contract of purchase shall be valid unless made in conformity to the provisions herein contained." (Italics mine).

In *Opinions of the Attorney General for 1931*, Vol. II, Page 917, it was held, as disclosed by the syllabus of an opinion:

"Under the provisions of sections 1226-1 and 1226-2, General Code, the Director of Highways is required to advertise for, and receive competitive bids on *all* purchases of machinery, *equipment* or supplies involving an expenditure in excess of \$500 except purchases made to repair roads or bridges destroyed by flood or other

casualty. However, in those instances in which definite specifications can not be prepared he may purchase the article or articles which he finds most suitable for the uses intended irrespective of which is the lowest and best bid." (Italics the writer's).

It is noted that the then attorney general considered that the foregoing statutory provisions required competitive bidding for *all purchases of equipment* over \$500, with the single exception of purchases made to repair roads or bridges destroyed by flood or other casualty. Furthermore, it is to be specifically noted that the first sentence of section 1226-1, General Code, states very broadly "*all purchases of machinery, materials, supplies or other articles which the state highway director or the department of highways may be authorized to make.*" *Webster's Twentieth Century Dictionary* defines the word "article" as:

"5. A particular commodity, or substance; as an article of merchandise; \* \* \* In common usage this word is applied to almost every separate substance and material."

Such language would seem to indicate that the legislature intended that purchases of automobiles which it had impliedly authorized to be purchased in 1927, (when section 1190-1, General Code, was enacted) should be included within the requirements for competitive bidding as set out in section 1226-1, General Code, as enacted two years later, in 1929.

However, it should be stated that in the case of *State, ex rel. Locher, Prosecuting Attorney vs. Menning, et al.*, 95 O. S., 97, mentioned above, it was held as disclosed by the syllabus:

"Section 157 of the Cass road law, enacted May 17, 1915 (106 O. L., 574, 618), does not authorize county commissioners to purchase a passenger automobile for official use in supervising the construction, improvement, maintenance or repair of the county highways, and such automobile is not included within the terms 'machinery or other equipment' used in that section."

Section 7200, General Code, as it read at the time the Supreme Court decided the case (1916) stated:

"The county commissioners may purchase such machinery or other equipment for construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction, as they may deem necessary, which shall be paid for out of any taxes levied and collected for construction, improvement, maintenance and repair of roads, as provided in this chapter."

An examination of the opinion in such case shows that the Supreme Court largely decided the case on the ground that a passenger automobile did not come within the phrase "machinery or equipment, etc." already quoted in a preceding paragraph, because of the fact that the use of a passenger automobile for the convenience of county officials in the supervision of highways could not be said to be of such character as related directly to the construction, improvement, maintenance or repair of highways.

In the present instance, however, such Supreme Court opinion would appear to be readily distinguishable, since the language of sections 1190-1, 1226 and 1226-1, General Code, does not limit the use to which the "equipment" is put, as did section 7200, General Code (106 O. L. 617).

Before definitely concluding the matter of necessity of competitive bidding for the purchase of an automobile, the provisions of section 7 of House Bill No. 531 of the 91st General Assembly, regular session, known as the general appropriation bill, should be observed.

You have stated in your communication that the purchase price of the automobile in the present instance is certified against the "Highway Improvement Fund." I therefore assume that the appropriation charged is that appearing on pages 51 and 52 of House Bill 531, under the heading "Department of Highways". Such section 7, on page 167 of the bill, reads in part:

"If any order and/or invoice drawn against any appropriation or rotary fund herein made is for labor and materials furnished, the aggregate cost of which exceeds \$3,000 or for commodities purchased, it shall show that the same was furnished or purchased pursuant to competitive bidding and that the lowest and/or best bidder was awarded the contract, unless the controlling board shall have authorized the furnishing of such labor or material or the purchase of such commodities without competitive bidding. *Nothing herein shall be construed as a limitation to, or upon the authority of the director of highways as granted in section 1178 et seq. of the General Code.\* \* \**" (Italics mine).

If the italicized portion of the foregoing section had not been inserted (in general appropriation bills in former years such was not inserted) there would be no doubt but that competitive bidding was absolutely necessary in this instance, as the purchase of an automobile is undoubtedly a "commodity."

However, in view of the italicized language of the foregoing section, such provisions in the first paragraph are not a limitation upon the authority of the Director of Highways as granted in section 1226-1, General Code, a portion of the chapter beginning with section 1178, General Code. There-



fore, whether or not competitive bidding is necessary in this instance must be determined from the provisions of the permanent statutes.

Hence, as stated in preceding paragraphs, it is believed that a passenger automobile is "equipment" and "an article" which the Director of Highways is authorized to purchase, under the restrictions of section 1226-1, General Code, and therefore the applicability or inapplicability of the provisions of section 7 of House Bill 531, to the instant case, has no bearing on the matter of the necessity for competitive bidding in this instance.

There is little doubt but that a passenger automobile is an article for which definite specifications can be prepared on which to predicate competitive bidding.

In *Opinions of the Attorney General for 1929*, Vol. I, page 620, and Vol. II, page 1127, the question of whether or not competitive bidding could be had for automobile trucks was discussed. It was held in the syllabus of the first of the aforementioned opinions:

"Under the provisions of section 3373 of the General Code, all purchases of trucks by township trustees, where the amount involved exceeds five hundred dollars, shall be made in pursuance to competitive bidding, in accordance with said section. The rule relative to articles being essentially and absolutely non-competitive, has no application to such purchases under this section."

In the syllabus of the second of the two opinions it is stated:

"Where township trustees, desiring to purchase a truck for use in connection with the maintenance of township roads in the specifications of the equipment desired as set forth in its advertisement for bids, describe said truck by name as contradistinguished from mechanical specifications, there is a violation of the principle of competitive bidding required under the provisions of section 3373 of the General Code."

In the body of the last mentioned opinion the case of *Fischer Auto & Service Co. vs. City of Cincinnati, et al.*, 16 N. P. (N. S.) 369, decided by the Superior Court of Cincinnati, August 24, 1914, is cited. This case involved the purchase of an automobile for the use of the chief of police of the city of Cincinnati. The headnote of such case holds:

"1. The provisions contained in sections 3811, 4328 and 4371, relating to specifications for and the letting of public contracts by municipalities require that the specifications upon which bids are invited shall permit of general competition (competition) in the practical and commercial sense.

2. The carrying out of a contract for the purchase of an automobile for municipal use will be enjoined where the specifications are so drawn as to prevent compliance therewith except by one concern, unless compliance is attained by the purchase and assembling of automobile parts from different factories and the production in that manner of an unknown machine at a cost possibly prohibitive."

The latter of the two 1929 opinions, presented the following facts: Township trustees desired to purchase a certain make of truck for use in connection with maintaining of the township roads and advertised as provided by section 3373, General Code, but instead of describing the truck for the purchase of which they desired proposals by mechanical specifications, they described the same by *name* in the advertisement. The question presented was, did the advertisement comply with the terms of section 3373, General Code? The then attorney general stated at page 1128, in responding to this question:

"It is a rather difficult question to determine with exactness what the specifications should properly contain in connection with an advertisement for the purchase of a given article of machinery or equipment by a public board. However, the law of Ohio is well established that under the existing statutes the principle of competitive bidding must be applied, except in those rare instances wherein a given article is essentially and absolutely non-competitive in its nature. In the case you mention it is obvious that no specifications are given excepting the designation of the name of a certain truck, and therefore the competition is immediately limited to the dealers distributing the truck named. It may be, of course, that the purchasing board has in mind certain mechanical features of the truck named, which it desires, and has information that this particular truck is suitable for its purpose. However, it is not believed that its knowledge of the particular truck will justify its designating this particular truck in its advertisement, rather than giving general specifications, to the end that all those having such vehicles as are desired, may have the opportunity to bid. Section 3373, General Code, expressly provides that all purchases of equipment under the provisions of said section shall be made in pursuance of competitive bidding when the amount involved exceeds five hundred dollars."

Further on in the opinion, after quoting the second branch of the head-note of the Fischer Auto case, hereinbefore quoted, it is stated:

"The opinion in this case contains a comprehensive discussion of what is necessary to be specified in an advertisement for the purchase of an automobile by competitive bidding. Without undertaking to set forth the specifications that were used therein, the court concluded that such specifications were so drawn 'that no known make of automobile, except the Hudson, came within the city requirements,' and that therefore every other machine was disqualified. In that case, however, there was much more latitude given than in the case you present."

For the purposes of this opinion, it is to be conceded that competitive bidding can be had and is necessary when the highway department purchases an automobile, regardless of the question of whether or not the highway department set up its specifications in proper form.

It is a well recognized principle of public law that bids for public work and equipment must conform to specifications in order to constitute legal bids upon which legal contracts may be entered into. See 33 *Ohio Jurisprudence*, page 698, section 56 of the topic "Public Works." As stated by Shauck J., in *Pease vs. Ryan*, at page 50 of 7 *Ohio Circuit Court Reports*:

"It is familiar in the law governing contracts by public officers that proposals must respond to the advertisement by which they are invited, for otherwise there would be no competition."

Moreover, it will be noted from the underscored sentence of section 1226-2, General Code, supra, that the legislature has specifically prescribed that all purchases must be made from the lowest responsible bidder able to meet the specifications and conditions prescribed by the department.

Clearly, the specifications herein called for a 1935 model Lincoln automobile, and a bid to furnish a 1934 model could not possibly be said to meet the specifications. It is a well known fact that each year's model of any given make of automobile is somewhat different and the market valuation of the car depends to a great extent on the year model of the given car. If the unsuccessful bidder in this case had known that the awarding authorities would consider accepting a 1934 model, he might possibly have submitted a cheaper price than the said successful bidder. Hence, no competition was had on the basis of furnishing the 1934 model, and the bid for the 1934 model may not legally be accepted and a legal contract be based thereon.

Concluding that the bid for the 1934 model opposed the specifications set forth, and that consequently a legal contract could not be entered into as a result thereof, it is unnecessary for the purposes of your first question to decide whether or not the specification as set forth in the invitation to bidders were properly set up, in view of what is stated in the 1929 *Opinions of the Attorney General* at pages 1127 et seq.

I am therefore of the opinion, in specific answer to your first question, that the purchase of the 1934 model automobile would be illegal under the procedure set forth by you in your communication, and the voucher does not constitute a legal claim for payment from the state treasury.

Coming now to your second question, I may say that you state the automobile in question was charged against the appropriation from the Highway Improvement Fund. The Highway Improvement Fund, as used in the appropriation act is synonymous with and refers to the "state highway construction fund" for which provision is made in sections 5541-7, 5541-8 and 1213, General Code. See *Opinions of the Attorney General for 1928*, Vol. III, page 2401 at page 2405 and *Opinions of the Attorney General for 1927*, Vol. III, page 1898, at page 1902. In other words, such funds come from what is known as the second one and one-half cent gasoline excise tax moneys.

It is stated in Article XII, section 5, Ohio Constitution:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only it shall be applied."

Now, section 1213, General Code, above mentioned, states in part:

"\* \* \*

2. The remainder of the money paid into the treasury to the credit of the state highway construction fund shall be used for the construction of the state highway system as the same has been heretofore designated or as may hereafter be established or located by the director in the manner provided by law, and *for the maintenance of the state highway department.*" (Italics mine).

Furthermore, section 1179, General Code, provides in part:

"\* \* \*

The expenses of the office of state highway director \* \* \* shall, unless otherwise provided by law, be paid out of any funds of the department of highways available for construction, reconstruction, improvement, maintenance or repair of highways. \* \* \*

Also section 1211, General Code, reads in part:

"The funds derived by the state highway department from the registration of automobiles shall be used for the reconstruction, widening, repairing, resurfacing and maintaining of the state system of highways. \* \* \*

The first two of the foregoing statutory provisions, sections 1213 and 1179, General Code, obviously permit the gasoline tax moneys levied by section 5541, General Code, in so far as the portion available and appropriated to the state highway department is concerned, to be used for the purchase of the passenger automobile in question so long as the same is used by the state highway department in carrying out its functions. However, in view of the provisions of section 5 of Article XII of the Ohio Constitution, it would seem that such automobile could not be purchased for the use of any other state department or the executive, without violating the said section.

An examination of the General Code does not disclose any provision by which the highway construction fund moneys or moneys from the state gasoline excise tax fund coming from the first one and one-half cent gasoline tax, sections 5527 and 5537, General Code, and the motor vehicle license tax moneys constituting the "state maintenance and repair fund" (sections 6291, 6309 and 6309-2, General Code) may be used for the purchase of an automobile by the State Highway Department which may be used exclusively by any other state department or the executive.

It is proper, however, to call attention, in this connection, to the provisions of section 154-21, General Code, a section of what is known as the Administrative Code. Such section reads:

"Under the direction of the governor, the directors of departments shall devise a practical and working basis for cooperation and coordination of work and for the elimination of duplication and overlapping functions. They shall, so far as practicable, cooperate with each other in the employment of services and the use of quarters *and equipment*. The director of any department may empower or require an employe of another department, subject to the consent of the superior officer of the employe, to perform any duty which he might require of his own subordinates."

The office of the governor is not one of the branches mentioned in the Administrative Code.

I am therefore of the opinion, in specific answer to your second question, that highway funds may not be used to purchase automobiles to be used exclusively by the executive department or departments other than the highway department.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

4974.

RECOUNT—APPLICATION FOR RECOUNT UNDER SECTION  
4785-162, G. C., MAY NOT BE WITHDRAWN—DEPOSIT  
MAY NOT BE REFUNDED.

*SYLLABUS:*

*When an application for recount of the vote cast in one or more precincts has been filed pursuant to the provisions of Section 4785-162, General Code, there is no authority whereby the applicant may thereafter withdraw such application and receive a refund of moneys deposited in accordance with such section to defray the cost of such recount.*

COLUMBUS, OHIO, December 9, 1935.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“I have received from the Board of Elections of Cuyahoga County a communication as follows:

‘On Monday, November 25th on request of the Board I talked to you regarding your interpretation of Section 4785-162-163-164. At that time Mr. John Krause, Chairman of the Board, also discussed with you the same matter. At the conclusion of both conversations I was directed to write to you and request a written opinion on the following questions for future guidance,—

(1) If a candidate files a request to recount a certain number of precincts accompanied by the necessary deposit within the time requirements and after the completion of several precincts may he withdraw his request for the remaining precincts and have his deposit for the uncounted precincts refunded to him?

(2) When an application is filed for recount for a certain number of precincts accompanied by the necessary deposit within the time requirements may an applicant withdraw said request prior to the commencement of the recount and have his money refunded?’

Inasmuch as the request for a ruling on the two questions submitted involves interpretation of election laws, I am submitting this to you for an opinion on both inquiries contained in said letter.

I desire to add that the Board of Elections of Cuyahoga County has pending recounts involving both questions and we would, therefore, appreciate an early ruling in this matter.”

Section 4785-162, General Code, provides that any candidate voted for