

not more than 3.2% alcohol by weight in municipalities by vote of the people therein, is exclusive, local ordinances to the contrary notwithstanding.

(3) The sale of beer with an alcoholic content of 3.2% by weight may be prohibited in a municipality by a vote of the people thereof, when the question is submitted at a proper election in the manner provided by law.

Respectfully,

JOHN W. BRICKER,

Attorney General.

886.

VOLUNTEER FIRE COMPANY—TOWNSHIP OR VILLAGE AUTHORIZED TO CONTRACT FOR FIRE PROTECTION—COMPENSATION MUST BE REASONABLE—CONTRACT OF SALE—COMPETITIVE BIDDING.

SYLLABUS.

1. *A township or village may enter into an agreement with a volunteer fire company for fire protection for a period of years. However, the payment for such protection must not exceed the benefit of the services obtained.*

2. *Where a township or village enters into an arrangement with a volunteer fire company owning a fire truck and equipment, whereby the subdivision agrees to pay \$250.00 per year for a period of three years, at the end of which time the truck and equipment is to be transferred to the subdivision, such an arrangement is a contract of sale and is violative of the principles of competitive bidding where section 4221, General Code, is not complied with.*

COLUMBUS, OHIO, May 27, 1933.

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

GENTLEMEN:—This will acknowledge receipt of a request for my opinion relative to a communication from the Prosecuting Attorney of Ashland County. This letter reads as follows:

“I will appreciate your opinion as to the legality of payment by township trustees and village councils to the Ashland Community Fire Company for fire protection under the following circumstances.

On April 11th the Ashland Community Fire Company composed of ‘residents of Ashland and vicinity’ was organized purporting to be a volunteer fire company. The residents mentioned are drawn from Orange, Milton, Perry, and Montgomery townships of Ashland County, Weller Township of Richland County and Jeromeville and Savannah corporations.

The S. Corporation proposes to sell to the Ashland Community Fire Company a fire truck complete with equipment upon an installment payment contract.

It is then proposed that the Ashland Community Fire Company will contract with the City of Ashland for the housing and operation of this fire equipment for calls to be made in the townships and in incorporated villages mentioned above.

To pay the cost of this fire equipment it is proposed that the townships above mentioned pay \$250.00 per year, one of the villages \$125 per year and the other incorporated village \$75 per year, for a period of three years, all to the Ashland Community Fire Company who will in turn pay the S. Corporation. It is anticipated that these payments will cover the costs of the equipment and the operating expenses of the equipment for that period and in the end the title to the fire equipment may be transferred to any one of the townships or villages or to the City of Ashland.

Reference is made to Sections 3298-54 et seq. and it is worthy of note that the proposed contract between the townships and incorporated villages and the Ashland Community Fire Company might be construed as a lease. A suggested form for this contract is hereto attached." * * * *

You also inclose a proposed agreement for fire protection between the Ashland Community Fire Company and the Township of Orange. This agreement provides that the Ashland Community Fire Company will render fire protection services to the townships and in return receive the sum of \$250.00 per year, payable semi-annually, for a period of three years. Near the end of the agreement, the following appears:

"It is further covenanted and agreed by and between the parties hereto that at the expiration of three years, fire protection will be figured on operating expenses only and divided equally between the Townships and villages, which will not exceed \$50.00 per year per township."

Section 3298-54, General Code, provides for fire protection for townships. This section reads as follows:

"Township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom, and, when a volunteer fire company has been organized for service in the township, of such character as to give assurance of permanency and efficiency, may purchase and provide, for the use of such company, such fire apparatus and appliances as may seem to the trustees advisable, in which event they shall provide for the care and maintenance thereof, and for such purpose, may purchase, lease or construct and maintain necessary buildings; and they may establish and maintain lines of fire alarm telegraph within the limits of the township."

Section 3298-60, General Code, reads as follows:

"Any township, in order to obtain fire protection shall have authority to enter into a contract for a period not to exceed three (3) years with any city, village or township, upon such terms and conditions as are mutually agreed upon, for the use of its fire department and fire apparatus, if such contract is first authorized by the trustees of such township and the council of such city or village.

A similar contract may be made between a village and any city if authorized by the council of the village and the council of the city. Such

contract shall provide for a fixed annual charge to be paid at such times as may be stipulated in the contract. All expenses thereunder shall be construed as a current expense and the taxing authority of the township or village shall make an appropriation therefor from the general funds, and shall provide for the same in their respective annual tax budgets."

A township in the purchase of fire equipment is subject to the laws regulating competitive bidding. Section 3298-59, General Code, reads in part as follows:

"The township trustees shall have power to enter into contracts for the purpose set forth in this act, but shall be subject to the provisions of law in reference to competitive bidding as to village councils in regard to the purchase of fire apparatus and appliances insofar as they are applicable."

Section 4221, General Code, reads as follows:

"All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

Under the proposed plan, the S. Corporation will sell the truck to the Ashland Community Fire Company upon an installment payment contract. That the S. Corporation could not sell the fire truck to any of the townships or villages in the first instance under a three-year installment payment contract, is well settled. While private individuals may, and often do, make purchases under installment payment contracts covering a period of years, this has not been the practice in so far as public contracts are concerned.

Section 5625-33, General Code, provides that before a political subdivision or taxing unit may enter into a contract involving the expenditure of money, a certificate must be given that the amount required to meet the same has been lawfully appropriated for such purpose and is in the treasury or in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. It is clear that the townships or the municipal corporations in question could not purchase the fire truck unless the certificate required under section 5625-33 was obtained to cover the entire purchase price.

My immediate predecessor in an opinion found in Opinions of the Attorney General for 1931, Vol. II, page 871, held as disclosed by the first branch of the syllabus:

"A village council may lawfully make a contract for the purchase of a truck to be paid for at any time during the fiscal year in which the contract is made, in installments or otherwise, from anticipated receipts from the motor vehicle and gasoline taxes, if made at competitive bidding, in compliance with Section 4221, General Code, and in pursuance of a

proper appropriation from which such obligation is required to be paid, not otherwise obligated to pay precedent obligations.”

In the opinion it was pointed out that the council of a village could not lawfully contract to pay for a truck in installments if the deferred payment period extended over into a succeeding fiscal year. However, in the present case, it is proposed to have the Ashland Community Fire Company render fire protection to the political subdivisions in question for a period of years. The question arises whether these subdivisions are not doing indirectly what they may not do directly. From the letter of the prosecutor and the proposed agreement, it appears that one subdivision is paying \$250.00 per year for three years and after that time is to pay only operating expenses not to exceed \$50.00 per year. Also, at the end of three years, the truck is to be transferred to one of the subdivisions without any further payment.

In an opinion found in Opinions of the Attorney General for 1930, Vol. II, page 1133, it was held as disclosed by the syllabus:

“A board of education may legally lease a school bus for a two or three year period if in its judgment such action is for the best interest of the schools under its control. Such a contract of lease may contain a provision granting the board the option to purchase at expiration of lease. However, such a lease must provide for the payment of a rental commensurate with the use of such bus, and such a contract may not be in fact a contract of purchase under the guise of a lease.”

In this opinion it was pointed out that there was no requirement for competitive bidding in connection with purchases made by school boards. While it is a question of fact whether or not the amount that these subdivisions pay for fire protection is commensurate with the services obtained from the fire company, nevertheless the facts in the present case raise a serious question as to the possibility that a court might say this is an attempt to do indirectly what might not be done directly.

A more serious question is presented in this agreement and, to a certain extent, it is linked up with the previous discussion.

Section 4221, General Code, *supra*, provides for competitive bidding where the contract is in excess of \$500.00. As before noted, villages and townships are subject to the laws regulating competitive bidding in the purchase of fire equipment. It has been judicially determined in many recent cases that the laws requiring competitive bidding must be strictly complied with. See the case of *Ludwig, Hommell and Company vs. Village of Woodsfield*, 115 O. S. 675.

This office in an opinion found in Opinions of the Attorney General for 1928, Vol. IV, page 2873, passed upon a similar question to the one here presented. The syllabus of that opinion is as follows:

“1. Where a village enters into an arrangement with a company owning a fire truck and equipment, whereby the village agrees to pay \$300.00 cash on delivery and \$100.00 per month thereafter until the sum of \$5,700.00, with interest, is paid, at which time the lessor agrees to bargain and sell and transfer title to the equipment to the village, such an arrangement is a contract of sale.

2. Under such circumstances, such a contract cannot be entered into except in pursuance to competitive bidding after advertisement, as set

forth in Section 4221 of the General Code, and no funds may be legally expended for such purpose where said statute has not been complied with."

That the question there presented was similar to the one here in question, is shown from the letter requesting an opinion, which reads in part as follows:

"A volunteer fire company or association was organized in the village of M. by a group of citizens, selected a person to act as chief and to represent the association in all financial and other matters. The fire company is not incorporated; was not organized by village officers and its members do not receive any compensation from the village; neither is the so-called chief appointed by the mayor.

The fire company through its chief and without advertising for bids entered into an agreement with The H. F. A. Company of Anderson, Ind., for the use of a fire engine and equipment at the rate of \$100 per month. The agreement further provides that if the village eventually buys the equipment the amounts paid to the H. F. A. Company by the fire company will be deducted from the purchase price to be paid by the village. Copy of this agreement is enclosed herewith.

The village through its mayor and clerk entered into a so-called provisional lease agreement with the Fire Company to furnish fire protection to the village for which services the village was to pay \$300.00 cash on delivery, presumably of the fire equipment to the Fire Company, and \$100 per month thereafter until the sum of \$5,700.00 with interest at the rate of 5½% per annum be fully paid. Thereafter the lessor, the fire company, will bargain and sell, transfer and assign to the village the fire apparatus. Copy of this agreement is enclosed."

Without further extending this opinion, it appears that the proposed agreement here presented is really in effect a contract of sale and is violative of the laws regulating competitive bidding.

It is therefore my opinion, in specific answer to your question, that the proposed agreement by the Ashland Community Fire Company and the various political subdivisions would be invalid.

Respectfully,
JOHN W. BRICKER,
Attorney General.

887.

DEPUTY COUNTY SURVEYOR—AUTHORITY TO APPOINT AS COUNTY MAINTENANCE ENGINEER AND FIX COMPENSATION VESTED IN SURVEYOR—LIMITED ONLY BY COUNTY COMMISSIONERS WHO CONTROL AGGREGATE COMPENSATION.

SYLLABUS:

1. *The authority to appoint a deputy county surveyor to be designated as county maintenance engineer and the authority to fix his compensation is vested in the county surveyor by virtue of sections 2981 and 2788-1 of the General Code.*

2. *Such authority is limited only by the appropriating authority conferred by the budget law (Secs. 5625-1 et seq.) upon the board of county commissioners to control the aggregate compensation for employes in the surveyor's office.*