

2634.

DISAPPROVAL, BONDS OF GEauga COUNTY, OHIO—\$40,000.00.

COLUMBUS, OHIO, September 27, 1928.

Re: Bonds of Geauga County, State of Ohio, \$40,000.00.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have examined the transcript relative to the above bonds, which are a portion of an issue of \$77,317.06 issued by Geauga County, in anticipation of the collection of special assessments and to pay the county's portion of the cost of improving a certain road.

Upon the examination of said transcript, I find that the bonds were advertised for sale for three consecutive weeks in a newspaper of general circulation, as required by Section 2293-28, General Code. The bond advertisement recites that the bonds shall bear interest at the rate of 5% per annum, payable semi-annually, but said advertisement contains no provision that any bidder desiring to do so may present a bid or bids based upon the bonds bearing a rate of interest other than specified in the advertisement. The bonds were, however, awarded to Stranahan, Harris & Oatis, of Toledo, Ohio, which firm bid par, accrued interest and a premium on the basis of the bonds bearing interest at the rate of 4¾% per annum. In view of the fact that there was no provision in the bond sale advertisement for bidding at rates of interest other than specified therein, I am of the opinion that the award of the bonds to a bidder at 4¾% interest was without authority in law.

I am compelled to advise you, therefore, not to purchase the above issue of bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2635.

ELECTION—CONTRACT WITH BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—NEED NOT ACCEPT LOWEST BID.

SYLLABUS:

A board of deputy state supervisors of elections may, in its sound discretion, award a contract for the printing of ballots to the lowest responsible bidder, even though such bidder is not the lowest bidder. Such action of the board will not be disturbed unless a clear showing is made to the courts that its action constitutes an abuse of discretion. Whether or not such action constitutes an abuse of discretion in a given case is a question of fact, which must be determined from all of the circumstances.

COLUMBUS, OHIO, September 28, 1928.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads:

"At a recent meeting of the Board of Deputy State Supervisors of Elections of Pike County, Ohio, there were two bids made for the printing of the ballots in Pike County.

The Republican Herald of Waverly through its publisher, J. P. D. bid Eight Hundred (\$800.00) Dollars and L. C. placed his bid at Seven Hundred Forty-Nine and 50/100 (\$749.50) Dollars. Mr. C. is not a printer, but is a tenant farmer in the west end of Pike County. He has no printing equipment of any kind and so far as we know is not a prospective purchaser of any. The contract was awarded to the Republican Herald.

The Board of Deputy State Supervisors of Elections took the position that since L. C. had no equipment with which to print the ballots that he was not a *responsible bidder* within the meaning of the law.

Was the action of the Board of Deputy State Supervisors of Elections in rejecting Mr. C's bid and awarding the contract to the Republican Herald for Eight Hundred (\$800.00) Dollars legal?"

The inquiry you present necessitates an examination of Title XIV of the General Code, which relates to "Public Elections." Chapter 1 of said title, which relates to "Supervision of Elections," contains Section 4819, which, in part, provides:

"The deputy state supervisors for each county shall advertise and let the printing of the ballots, cards of instruction and other required books and papers to be printed by the county; * * *"

Chapter 8 of said title, relating to "Ballots and Supplies," contains Sections 5050 and 5051, which read as follows:

Section 5050. "The printing provided for in this chapter, except poll books and tally sheets, shall be let by the board of deputy state supervisors to the lowest responsible bidder in the county, upon ten days notice published not more than three times in two leading newspapers of opposite politics published in such county. In case of special elections, the board may give notice by mail, addressed to all the printing offices within the county instead of publishing such notice."

Section 5051. "Each bid for such printing must be accompanied by a bond, with at least two sureties, satisfactory to the board of deputy state supervisors, in a sum double the amount of the bid, conditioned for the faithful performance of the contract for such printing as may be awarded him, and for the payment as liquidated damages by such bidder to such board of any excess of cost over the bid or bids which the board may be obliged to pay for such work by reason of the failure of the bidder to complete his contract. No bid unaccompanied by such bond shall be entertained by the board."

It is believed that Section 5050, as above set forth, is the only section really necessary to be construed in connection with your inquiry. This section was under consideration by the court in *Printing Company v. Yeatman*, reported in 22 O. C. C. 584. The court, as stated in the fourth branch of the headnotes of said case, held:

"It is not an abuse of discretion in the board of deputy supervisors of elections to give the contract for the printing of the ballots to a higher bidder where there is danger the lower bidder may by a strike of his employes be prevented from furnishing the ballots at the proper time, to be used at the election."

In the body of the opinion the court indicated that the presumption is that the supervisors in awarding the contract have exercised a sound discretion and the burden of proof rests upon one attacking their action to establish a state of facts which would constitute an abuse of such discretion. The court in its opinion further pointed out that such discretion can be attacked only when there are present some "equitable grounds of fraud or mistake, or find the discretion or award to be wrongful, fraudulent, collusive or arbitrary." The following is quoted from the opinion:

"The remotest and slightest increase of chances of anything interfering with the franchises of ninety thousand electors on the day of election as against an increased cost of two hundred dollars presents a ponderable question which might well honestly be resolved one way or the other."

It will be noted that in the above case, the contract was awarded to one whose bid was two hundred dollars higher than the lowest bid. In the case you present there is only a difference of fifty dollars and fifty cents. In view of the foregoing decision the conclusion must be reached that a board of deputy state supervisors of elections is not required to award the contract to the lowest bidder but may award it to the high bidder, if, in its sound discretion, the facts and circumstances justify such an award. Undoubtedly, the ability of the bidder successfully to furnish ballots, to the end that a proper election can be held, is one of the factors that may properly be taken into consideration. The discretion of the board in making an award will not be disturbed unless a showing is made which will justify a court in holding there has been an abuse of discretion. What constitutes an abuse of discretion in a given case is a question of fact which is not within the authority of the Attorney General to determine. In other words, your inquiry presents a question wherein the Attorney General can only advise you as to the rule of law which may be applied to all of the facts surrounding the transaction.

You are therefore advised that the board of deputy state supervisors of elections may, in its sound discretion, award a contract for the printing of the ballots to the lowest responsible bidder, even though such bidder is not the lowest bidder. Such action of the board will not be disturbed unless a clear showing is made to the courts that its action constitutes an abuse of discretion. Whether or not such action constitutes an abuse of discretion in a given case is a question of fact, which must be determined from all of the circumstances.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2636.

CEMETERY—EXPENDITURES BY UNION CEMETERY TRUSTEES—
AUTHORIZATION BY JOINT RESOLUTION OF MUNICIPAL COUN-
CIL AND TOWNSHIP TRUSTEES WHEN AMOUNT EXCEEDS \$500—
EXCEPTIONS NOTED—PROCEDURE AFTER RESOLUTION.

SYLLABUS:

When an expenditure in excess of \$500.00 is made by union cemetery trustees elected by authority of Section 4193-1, General Code, other than for the compensation of persons employed by such trustees, such expenditure must first be authorized by resolution of the joint board consisting of the council or councils of the municipal corporation or corporations and trustees of the township, which own the cemetery in common. When so author-