

to 6508, inclusive, of the General Code, is available to the State of Ohio as the holder of perpetual fishing easements.

Respectfully

THOMAS J. HERBERT,
Attorney General.

923.

DEPARTMENT OF HIGHWAYS—SECTIONS 1196, 1206, 1207-1, ET AL., G. C.—IN RE: ESTIMATES OF COST, QUANTITIES CONTRACT—FILED FOR PUBLIC INSPECTION—OFFICE RESIDENT DISTRICT DEPUTY DIRECTOR—BINDER—CERTIFIED CHECK—CERTAIN HOLDINGS MODIFIED, OPINION 4930, OPINIONS ATTORNEY GENERAL, 1935, PAGE 1514.

SYLLABUS:

1. *Under the provisions of Sections 1196, 1207-1 and other related sections of the General Code, it is not required that estimates of cost be filed for public inspection in the Department of Highways and in the office of the Resident District Deputy Director, but it is sufficient if estimates of the quantities of the various items are so filed.*

2. *In view of the provisions of Section 1206, General Code, requiring each bidder to file a check based upon the total estimated cost, it is required that such total estimate be made available for the information of the bidders by the Director of Highways.*

3. *The provisions of Section 1196, General Code, require estimates of quantity to be filed and published and the estimates of cost referred to in Section 1197, General Code, are intended for the information of the Director for his use and guidance in awarding contracts in compliance with Section 1207, General Code, and are not required to be published, except the total estimate is required to be made available for the information of bidders in determining the amount of the certified check which is required to be submitted.*

4. *By this opinion, Opinion No. 4930 reported in Opinions of the Attorney General for 1935 at page 1514, is modified in so far as inconsistent with the holdings herein.*

COLUMBUS, OHIO, July 24, 1939.

HON. ROBERT S. BEIGHTLER, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: Acknowledgment is made of your communication requesting my opinion which reads:

“Where the Director of the Department of Highways desires to enter into a contract upon a unit price basis as authorized

in Section 1207-1, Ohio General Code, it has been the practice in the past to file for public information detailed estimates of quantities and of the unit prices of each item, in accordance with Section 1196, General Code.

The United States Bureau of Public Roads has for some time strenuously objected to this procedure of publicizing unit prices before bids are received, contending that it does not encourage the contractor to properly analyze each item of the work on which he is submitting his bid. The Bureau further feels that in cases where only one bid is submitted which may be practically a copy of the Engineer's estimate the external evidence may point toward restricted bidding. It has been further pointed out that Ohio is one of the few remaining states which makes public any information pertaining to the Engineer's estimate of the cost of the work. We believe the Bureau is justified in their position.

We accordingly desire your formal written opinion on the following questions:

1. In awarding contracts on a unit price basis is it necessary that the Department of Highways file in accordance with Section 1196 Ohio General Code, the Engineer's estimate of the unit prices entering into the proposal, that is, estimate of costs, or is it sufficient to file for public inspection in the Department of Highways and in the office of the Resident District Deputy Director, estimates of quantities of the various items without the estimated unit prices?

2. In the event an estimate of cost must be filed, is the law sufficiently complied with upon the Director filing in the Department of Highways and with the Resident District Deputy Director estimates of quantity of the various items and a total estimate of the cost of the units involved without the detailed estimates of cost for each unit?

In this connection do the estimates to be filed in accordance with Section 1196, General Code, refer to estimates of quantity, which information is necessary to a contractor to make an intelligent bid, and on the other hand, are the estimates referred to in Section 1197, General Code, meant to be for the information of the Director for his use and guidance in awarding contracts in compliance with Section 1207 of the General Code."

Section 1196 of the General Code, which gives rise to the inquiries presented, reads:

"The director, in all projects shall make, or cause to be made, a map of the highway in outline and profile, and plans, specifications, profiles, and estimates covering the proposed project. When

completed the director shall indorse upon such maps, profiles, plans, specifications and estimates his approval of the same and cause one copy thereof to be placed on file in the department of highways and another in the office of the resident district deputy director for public inspection at least three days prior to starting the publication of notice to bidders as hereinafter provided. Such copies shall so remain on file until the time of receiving bids."

In an opinion of the Attorney General, found in 1935 Opinions of the Attorney General, page 1514, it was held as is disclosed by the syllabus:

"1. The Director of Highways must, at least three days before advertising for bids for a project to be let on a unit price basis, publish the estimate of cost for such project, which includes the detailed engineer's estimate of unit prices, by filing copies of such estimate in the department of highways and in the office of the resident district deputy director.

2. By virtue of the provisions of section 1196, General Code, the estimate of cost in all projects let by the State Highway Department must be open for 'public inspection', which includes bidders for the projects and disinterested persons.

3. The Director of Highways is under no legal obligation to publish the total estimated cost of a project to be let on a unit price basis in the form of proposal for such projects."

In connection with your inquiry, you have submitted for consideration a letter from August Schofer of the Legal Division of the United States Bureau of Public Roads commenting upon the questions which you submit. Also you inclose a copy of a letter from C. E. Swain, District Engineer of the Bureau of Public Roads of the United States Department of Agriculture relative to the same proposition.

In connection with the question presented, it may be helpful to consider the provisions of other related sections, particularly Section 1207-1, General Code, which authorizes the Director, if he deems it expedient, to enter into contracts upon unit price basis which require the contractors to state in their bids the sum for which they offer to perform each unit of each different kind or class of work, etc. Said section further provides:

"* * * Where the director elects to enter into a contract upon a unit price basis he may include in the estimate such reasonable sum as he may deem necessary to cover variations in the actual quantities of work as compared with the estimated quantities. In the event the actual compensation earned by the contractor exceeds the estimate, any such excess shall be paid from any funds of the department which might lawfully be ex-

pending upon the improvement in question. In the event the actual compensation earned by the contractor is less than the estimate, the saving shall inure to the benefit of the state."

Another section of the General Code which is in *pari materia* is Section 1207, which among other things provides:

"No contract for any improvement shall be awarded for a greater sum than the estimated cost thereof plus five per cent thereof."

Section 1206 of the General Code is believed important to consider in connection with the inquiry presented, which among other things provides:

"Each bidder shall be required to file with his bid a certified check for an amount equal to five per cent of the estimated cost, but in no event more than ten thousand dollars, payable to the director, which check shall be forthwith returned to him in case the contract is awarded to another bidder, or in case of a successful bidder when he has entered into a contract and furnished bond as required by law."

Also important to consider in connection with the inquiry presented is Section 1197 of the General Code, which among other things provides:

"Before undertaking the construction, improvement, maintenance or repair of a state highway, or a bridge or culvert thereon, the director of highways shall make, or cause to be made, an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, use of equipment and all other items of cost and expense."

It is interesting to note that Section 1196, *supra*, was Section 27 of the so-called Norton Edwards Act and Section 1197 was Section 79 of said original act, notwithstanding the designation of the Attorney General with reference to code numbering.

It is contended by the United States Bureau of Public Roads that the term "estimates" used in Section 1196, *supra*, has reference only to estimated quantities and does not necessarily include estimated cost. This conclusion is based upon the proposition that Section 79 of the Act or Section 1197, General Code, expressly provides for "an estimate of the cost."

It is contended with much force that in the enactment of the so-called Norton Edwards Act the Legislature, when it intended to include as a part of an estimate the cost, it so stated in definite and certain

language. While it is conceded that the word "estimate" may include both quantity and cost, when all of the provisions of the act under consideration are construed together, it would appear that Section 1196, supra, refers to estimated quantities, whereas Section 1197, supra, relates to estimated cost.

The opinion hereinbefore referred to, without attempting to differentiate between the two sections with reference to estimated quantity and estimated cost, assumes that estimated costs are included within the provisions of Section 1196, supra. It will be conceded that under the terms of Section 1196, the estimate made thereunder must be published in accordance with the express provisions of said section. The particular point is whether or not said section requires the cost to be estimated therein. While Section 1197 expressly requires an estimate of the cost of any work undertaken in connection with the construction, improvement, maintenance and repair of state highways before bids are taken thereon, said section does not require the publication of such estimate of cost.

However, it must be noted that Section 1206, hereinbefore referred to, requires that each bidder shall file with his bid a certified check covering five per cent of the estimated cost which clearly indicates that it was the intention of the Legislature that a prospective bidder should have access to the total estimated cost of the proposed project or else he would be in no position to comply with the provisions of the statute in the submission of his bid.

Taking the act by its four corners and applying the well known rules of statutory construction thereto, it is believed to be apparent that Section 1196, supra, properly refers to estimated quantities and does not include estimated costs. Section 1197, supra, definitely refers specifically to estimated costs which would seem to preclude including such estimates in the former section, which latter section does not require the publication of said cost. Section 1207-1, supra, authorizes the Director to enter into a contract upon unit price basis, but does not necessarily require an estimated cost upon each unit or at least it does not require the publication of any such estimate. Section 1206, supra, as hereinbefore stated, does definitely require the prospective bidder to file with his bid a certified check equal to five per cent of the total estimated cost which clearly indicates that such information must of necessity be available to such bidder although, as stated in the former opinion to which you refer, there is no legal obligation to publish the total estimated cost.

Based upon the foregoing citations and discussions and in specific answer to the inquiries presented, it is my opinion that: (1) Under the provisions of Sections 1196, 1207-1 and other related sections of the General Code, it is not required that estimates of cost be filed for public inspection in the Department of Highways and in the office of the Resident District Deputy Director, but it is sufficient if estimates of the quantities

of the various items are so filed; (2) In view of the provisions of Section 1206, General Code, requiring each bidder to file a check based upon the total estimated cost, it is required that such total estimate be made available for the information of the bidders by the Director of Highways; (3) The provisions of Section 1196, General Code, require estimates of quantity to be filed and published and the estimates of cost referred to in Section 1197, General Code, are intended for the information of the Director for his use and guidance in awarding contracts in compliance with Section 1207, General Code, and are not required to be published, except the total estimate is required to be made available for the information of bidders in determining the amount of the certified check which is required to be submitted. (4) By this opinion, Opinion No. 4930 reported in Opinions of the Attorney General for 1935 at page 1514, is modified in so far as inconsistent with the holdings herein.

Respectfully

THOMAS J. HERBERT,
Attorney General.

924.

BONDS—VILLAGE OF AMHERST, LORAIN COUNTY, \$34,000.

COLUMBUS, OHIO, July 24, 1939.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the Village of Amherst, Lorain County,
Ohio, \$34,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of first mortgage electric generating plant revenue bonds dated June 1, 1939, in the aggregate amount of \$80,000, and bearing interest at the rate of $3\frac{3}{4}\%$.

From this examination, in the light of the law under authority of which the above bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said village.

Respectfully

THOMAS J. HERBERT,
Attorney General.