

highway on and over that part of the Miami and Erie Canal, the abandonment of which is effected by the enactment of said act. This circumstance is in accord with the view that it was the intent of the Legislature to vest in the Director of Highways as such, the control and custody of the canal property so abandoned for the purposes of said act."

The Attorney General, in said opinion, stated his conclusion with respect to the question which he had in mind, as follows:

"Arriving at this conclusion with respect to the operation of sections 14153-5 and 14153-6, General Code, with respect to the lands to be shown in the maps and plats therein provided for, it follows that section 14153-8, General Code, authorizes the Director of Highways as such to lease not only such of the abandoned canal property as may not be used for highway purposes but also lands of the State of Ohio, adjacent thereto, which formerly have been used in connection with that part of the Miami and Erie Canal abandoned by said act."

I am inclined to the view that assuming the constitutionality of the statutory provisions authorizing an officer of the state, other than the superintendent of public works, to execute leases on canal lands, the former opinion of the Attorney General, above referred to, should be limited to the precise question decided in said opinion as indicated in the language above quoted as the conclusion reached in and by said opinion.

Although the constitutional provisions above quoted, relating to the superintendence of the public works of the state by a superintendent of public works to be appointed by the governor, contemplate that properties of the state constituting a part of its public works might thereafter by a change in the use of such property, or otherwise, cease to be a part of the public works of the state as in the case of such part of the canal lands here in question as may be set off and used for such highway purposes, I am of the opinion that until this is done under the authority of the act here in question the Miami and Erie Canal lands covered by this act still remain a part of the public works of the state and are under the control and supervision of the superintendent of public works, with respect to the matters of maintenance and repair of such properties.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3396.

HIGHWAY DIRECTOR—PURCHASES OF MACHINERY, EQUIPMENT AND SUPPLIES EXCEEDING \$500. SUBJECT TO COMPETITIVE BIDDING—EXCEPTION NOTED—WHEN DEFINITE SPECIFICATIONS UNPREPARABLE AWARD MAY BE MADE TO BIDDER TENDERING MOST SUITABLE ARTICLE.

SYLLABUS:

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 \$500.00 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.

COLUMBUS, OHIO, July 3, 1931.

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

DEAR SIR:—Acknowledgment is made of your recent inquiry which among other things, states:

“We have before us Department of Highways purchase order No. 10387, dated Dec. 30, 1930, covering 120,000 gallons A. E. Special at twelve cents per gallon f. o. b. cars Murray City, Ohio. The amount shown on the order is \$14,400.00. The purchase order is marked ‘confirmation.’ The order is shown as mailed Jan. 2, 1931.”

Your letter further states that the purchase order followed a requisition No. 10990, December 9, 1930, which was approved by an assistant division engineer, a division engineer, assistant engineer of maintenance and the chief engineer of maintenance. It is also stated that the delivery of the material represented in the order was started October 10, 1930, and completed about November 18th of the same year, and that no competitive bids were taken.

Your letter further sets forth a communication received by the chief engineer of maintenance of the highway department from H. P. H. of Chicago, from whom the material was ordered, which reads in part:

“Dear Sir:

Confirming our conversation with you:

I will furnish thirty thousand gallons or more if required, of Emulsified Asphalt of standard Colas specifications at a price of 12c per gallon delivered truck, Murray City, Ohio.

Included in this price for which there is to be no extra charge I agree to furnish not less than two nor more than four highway construction superintendents and foreman and agree to pay all of their expenses, salaries, etc. while on the job, regardless of how long the job will take and it is understood that the cost of this construction service is included in the 12c mentioned above.

We also agree, on account of cold weather being liable to catch us while under construction, to ship all material necessary in insulated tank cars, which tank cars, of course, cost us more per gallon to transport in, but that also is figured in the 12c net price to you and there shall be no other charge for the same.

Trusting to be favored with your business and assuring you that we will give same our very closest supervision, we remain.”
Your communication further contains the following:

“A voucher covering this material has been presented to this office for payment. Payment has been withheld for the reason that no advertisement for bids was issued and no competitive bids were taken. The price per gallon is also regarded by us as exorbitant.

We desire your advice on the following:

1. Is the purchase order for this material a valid claim against the

- State, and is the claim voucher drawn against the order legal?
2. Can the claimant mandamus the Auditor and compel him to issue a warrant in payment of the claim?"

Sections 1226-1 and 1226-2, of the General Code, as enacted by the 88th General Assembly govern the manner of purchase of machinery, materials and supplies by the highway director, and read:

Sec. 1226-1. "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 address, 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 articles 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 performance 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, saying 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."

Section 1226, General Code, gives power to the director to authorize the resident division deputy directors and resident district deputy directors to make certain purchases, but it is believed it does not have application to the case presented.

The sections above set forth clearly require the director to receive competitive bids when the expenditure amounts to more than \$500.00 and requires that the bid of the lowest responsible bidder be accepted. However, in view of the decision in the case of *State ex rel v. Connar*, 123 O. S. 310, the provision relative to accepting the lowest responsible bid will be modified by any express provision of the appropriation bill with reference to the matter.

In other words the general appropriation bill of the 88th General Assembly provided that the expenditure should be made in pursuance of the lowest and best bid. However, the statute contains an exception to the above general provision with reference to the purchase of machinery, equipment or supplies for which fixed and definite specifications can not be prepared in that the director may purchase the article or articles meeting the general specifications prescribed which he finds most suitable for the uses intended irrespective of which bid is the lowest and best.

While in those cases in which definite specifications can not be prepared the director may use his discretion and in so doing disregard the price bid, it is not believed that this provision excuses him from taking bids under the general specifications. In other words it is the established policy of this state to perpetuate the principle of competitive bidding to the extent that it is possible. Therefore, in the instant case it would seem that the director is required to take bids in all cases in-

volving purchases of more than five hundred dollars except in those cases where purchases are made for immediate repair of roads and bridges destroyed by flood or other casualty.

It is obvious that the foregoing suggests a negative answer to both of the inquiries propounded.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

3397.

GASOLINE TAX—MUNICIPALITY'S PORTION RECEIVED UNDER SECTION 5541-8, G. C. APPLICABLE FOR PURCHASE OF STREET CLEANING AND SWEEPING EQUIPMENT.

SYLLABUS:

Funds distributed to municipalities under the provisions of Section 5541-8, of the General Code, as amended by the 89th General Assembly (H. B. No. 7) may be used for the purchase of street sweeping and street cleaning equipment.

COLUMBUS, OHIO, July 3, 1931.

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:

"The present Legislature, in House Bill No. 7, effective August 2nd, 1931, amended Section 5541-8, G. C., to read in part as follows:

"Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be expended by each municipal corporation for the sole purpose of constructing, maintaining, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation, and for the purchase and maintenance of traffic lights."

Question: After the effective date of amended Section 5541-8 G. C., may a municipality's share of the proceeds from the last two cent gasoline tax be used for the purchase of street sweeping and street cleaning equipment?"

Section 5541-8, General Code, from which you quote in your letter, before amendment provided among other things that five per cent of the highway construction fund which was distributed to municipalities should be used "for the sole purpose of constructing, maintaining, widening and reconstructing the public streets and roads within the corporation."

Without attempting to review the numerous opinions construing the language last above quoted, it may be stated that this office consistently held that such funds