

180.

APPROVAL, LEASE TO OFFICE ROOMS AT 180 EAST LONG STREET
FOR USE OF THE DEPARTMENT OF PUBLIC WELFARE.

COLUMBUS, OHIO, March 11, 1929.

HON. H. H. GRISWOLD, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date re-submitting for my examination and approval a certain lease and copies thereof, executed by one George L. Gugle whereby he leases and demises to Richard T. Wisda, Director, Department of Public Works, for the Department of Public Welfare, certain floor space in a building owned by the lessor at 180 East Long Street, Columbus, Ohio.

An examination of the lease submitted shows that said lease has been corrected with respect to the matters pointed out in former Opinion number 125 of this department which caused the lease to be disapproved upon its first submission to this department. Said lease is, therefore, accordingly approved as to legality and form and my approval is endorsed upon said lease and the copies thereof, all of which are herewith returned.

Encumbrance Estimate, number 5143, submitted with said lease and the copies thereof, has been examined and found to be in proper form. Said encumbrance estimate shows that there is a sufficient balance in the proper appropriate account to pay the rental of this lease for the term thereof. Said incumbrance estimate is likewise returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

181.

MUNICIPALITY—PURCHASE OF FIRE EQUIPMENT WITH AID OF CONTRIBUTIONS FROM PRIVATE CITIZENS—LOWEST BID—SPECIFIC CASE DISCUSSED.

SYLLABUS:

1. *There is no authority whereby municipalities may contribute to a fund to be expended by others than the city authorities for the purchase of fire apparatus. The purchase of such equipment by the municipal authorities must be in pursuance of advertisement and competitive bidding.*

2. *There is no inhibition against the municipal authorities accepting the lowest bid for such equipment notwithstanding such bid is made by reason of an arrangement whereby citizens have agreed to make a contribution to such bidder in the event his bid is accepted.*

COLUMBUS, OHIO, March 11, 1929.

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

GENTLEMEN:—In your recent communication you request my opinion as follows:

“Agents for fire apparatus companies circulate petitions in villages, signers of which pledge themselves to contribute a fixed amount, if council will provide the additional amount needed for the purchase of fire apparatus.

When sufficient funds have been subscribed by private parties and council has provided the municipality's portion of the cost, bids are advertised for, and the bid of the company which has solicited subscriptions to the fund is accepted for the reason that the village will pay less from the village treasury for the apparatus purchased from this company than if purchased from its competitor.

Question 1. May a municipal corporation contribute to a fund being raised by citizens for the purpose of purchasing fire apparatus without competitive bidding?

Question 2. May the bid of a company to furnish fire apparatus be accepted when such bid is in an amount which is the difference between the total cost of such apparatus and the amount the company will receive as donations from citizens?"

The general proposition that a municipality by reason of the expressed provisions of Sections 4328 and 4221, General Code, may not legally enter into contracts except pursuant to advertisement and competitive bidding is well established. There are numerous decisions of the Supreme Court to this effect.

One exception to this rule is found in cases wherein a contemplated purchase is essentially and absolutely non-competitive because of some particular character of the same. See *State ex rel., vs. McKenzie*, 29 C. C. 115; also *Opinions of the Attorney General*, 1923, page 758. However, it is evident that the case you present does not come within the exception above noted.

In view of the above, in considering your inquiry we may start with the basic proposition that competitive bidding is required in making a purchase of fire apparatus by a municipality, when the same involves an expenditure in excess of \$500.00.

For the purposes of this opinion, it will be assumed from the statement of facts that the subscriptions made by the citizens of the municipality constitute a contract or agreement with the owners of the fire apparatus and are not made under such terms or conditions as would create a trust fund which would be payable to the municipality for its use. In other words, if the subscription contract is so drawn or worded as to create a trust for the benefit of the municipality, or, in the event that such funds should come into the treasury of the municipality by reason of donations to it, then the funds would be in the same status insofar as expenditures are concerned as any other funds available to the municipality for such use. On the other hand, if such subscription contract merely constitutes an agreement between the owners of the apparatus and the citizens of the municipality whereby such citizens agree to pay to such owners certain definite sums upon the happening of a certain contingency, then, of course, the municipality would have nothing to do with the expenditure of such fund.

From your statement of facts the latter condition would seem to obtain in the case you have in mind.

There seems to be no authority to authorize a municipality to make a donation to others for such an enterprise although there is no inhibition against private citizens making donations to the municipality. In connection with state building projects similar conditions have arisen. To illustrate, interested citizens have subscribed to a fund contributed towards the construction of public buildings, such as college buildings. In such cases the State Legislature may appropriate an amount to meet its share in language recognizing the specific project. In other instances it may not mention that the fund appropriated is to be used in connection with donated funds. The practice has been, in such instances, for the state to proceed in the same manner as if it were to construct the building itself. However, the Director of Finance certifies as to the state's share of the fund, usually with a notation with reference to the

amount that has been otherwise provided. The contracts usually expressly provide that in no event is the State to expend more than a certain amount and that the contractor is to look to the subscription fund for the remainder of the contract price. Under such circumstances the State takes the initiative and all formalities of law insofar as the State's share is concerned are complied with.

In the case you have under consideration the municipal authorities proceed to purchase a certain fire apparatus. In pursuance of the advertisement for bids, the owner of said apparatus submits a bid. According to your statement, he reduces such bid to an amount which represents the market price less the amount subscribed. It is believed that this procedure in no wise violates the provisions of the statute. In such case the owner who is to receive the subscribers' money undoubtedly will be the low bidder. However, it is conceivable that some competitor could have the same arrangement with another group of citizens of the same municipality and by reason of such arrangement would be able to submit a bid lower than his competitor. While, of course, this is not probable it must be conceded that it is possible.

It is believed that there is no basis for the municipal authorities to question the motive which actuates a low bidder in making the low bid under such circumstances. Such officers are concerned with reference to the quality of the equipment to be furnished and the price to be paid.

Many reasons may account for a bidder desiring to submit a low figure but, as above stated, such motives are immaterial and need not be considered by the awarding authorities, in the absence of fraud or collusion.

In view of the foregoing and in specific answer to your inquiries you are advised that

1. There is no authority whereby municipalities may contribute to a fund to be expended by others than the city authorities for the purchase of fire apparatus. The purchase of such equipment by the municipal authorities must be in pursuance of advertisement and competitive bidding.

2. There is no inhibition against the municipal authorities accepting the lowest bid for such equipment notwithstanding such bid is made by reason of an arrangement whereby citizens have agreed to make a contribution to such bidder in the event his bid is accepted.

Respectfully,

GILBERT BETTMAN,
Attorney General.

182.

RESIDENT DISTRICT DEPUTY DIRECTOR—NECESSITY FOR REAPPOINTMENT WHEN CHANGE IN HIGHWAY DIRECTORS OCCURS.

SYLLABUS:

Where it is desired by the Director of Highways now in office to continue in office or position resident district deputy directors appointed by his predecessor, under the provisions of Section 1183, General Code, such persons should be appointed to their respective positions by such highway director and they should qualify pursuant to their respective appointments.

COLUMBUS, OHIO, March 11, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows: