

1828.

APPROVAL, BONDS OF DELAWARE CITY SCHOOL DISTRICT IN
AMOUNT OF \$4,000.

COLUMBUS, OHIO, January 29, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

1829.

ROADS AND HIGHWAYS—STATE AID IMPROVEMENT—BIDS ON
SEVERAL TYPES OF IMPROVEMENT OF VARYING COSTS—
WHERE COUNTY COMMISSIONERS OF NECESSITY ISSUE BONDS
ON MOST COSTLY TYPE OF IMPROVEMENT—SURPLUS SUBJECT
TO PROVISIONS OF SECTION 5654 G. C.—SINKING FUND.

Where the state highway commissioner, in response to application of county commissioners for state aid on a highway improvement project, proposes to call for bids on several types of improvement of varying costs, the county commissioners, if they issue bonds to provide for the share of cost over and above that assumed by the state, are under the necessity of basing the bond issue on the most costly type of improvement. If there is a surplus of bond proceeds due to the non-adoption of the most costly type, such surplus is subject to the provisions of section 5654 G. C.

COLUMBUS, OHIO, January 31, 1921.

HON. HARLAN F. BURKET, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—You have recently submitted for opinion an inquiry made of you by your board of county commissioners, as follows:

“The state highway commissioner has the right to receive bids for the construction of inter-county highways on any type and at different prices, according to the type. The law says that the county must have their portion of the cost and expense of such improvement either in the county treasury or same shall be in the process of collection before the state highway commissioner can receive bids on said improvement.

Inasmuch as the county commissioners cannot sell bonds to exceed in amount the cost of the improvement for which the bonds are being sold, and as the state highway commissioner may sell the cheaper type, in some cases making the difference in the highest and lowest type as high as fifty thousand dollars, just what amount of bonds shall the county commissioners sell for such improvements?

During the year 1920, the county commissioners tried to sell the bonds for the highest type of improvement with the right to reduce the amount of the issue in case the cheaper type was sold, but we found that this was very impractical as the bond buyers do not care to wait any length of time after buying said bonds before same are delivered.”

To the inquiry above stated, you say that the commissioners have added another,

and desire to know in case bonds should be sold for the higher type of improvement, in what fund, if any, should the surplus be placed in case the state highway commissioner awards the improvement work on a cheaper type.

Authority for the issuing of bonds to provide the so-called county's share of state aid improvements is found in section 1223 G. C.; and as the commissioners indicate, the limit of such bond issue in a given case is

"the aggregate sum necessary to pay the shares of the estimated compensation, damages, cost and expense payable by the county, township or townships and the owners of lands assessed for such improvement."

While the provision just referred to is one of limitation rather than of grant, yet in any event as a practical proposition the amount of a bond issue for a given improvement will be governed by the estimates of cost of such improvement. Furthermore, the practical side of the principal inquiry submitted by your commissioners as first above set forth, brings into prominence the provisions of section 1218 G. C., which as amended 108 O. L. 491, reads:

"Each contract made by the state highway commissioner under the provisions of this chapter shall be made in the name of the state and executed on its behalf by the state highway commissioner and attested by the secretary of the department. No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. Such agreement shall be filed in the office of the state highway commissioner with the approval of the Attorney-General endorsed thereon as to its form and legality. The provisions of section 5660 of the General Code shall apply to such written agreement to be made by the county commissioners or township trustees and a duplicate of the certificate of the county auditor or township clerk made in compliance with the provisions of said section shall be filed in the office of the state highway commissioner.

The state highway commissioner shall not proceed to the opening of bids for any work to be let by him until the provisions of this section relating to the making of an agreement by the local authorities have been fully complied with, and if at the time fixed for the opening of bids, such provisions have not been fully complied with or if for any other reason the state highway commissioner should at said time find himself without full authority to immediately proceed to determine the lowest and best bidder and to award and enter into a contract, it shall be the duty of the state highway commissioner to forthwith cancel the letting of said work, return all bids unopened and thereafter readvertise the letting of the work at such time as he may be fully authorized to forthwith proceed to determine the lowest and best bidder and award and enter into a contract."

Since, by the terms of this section, the making of a written agreement by the county commissioners is a condition precedent to the letting of contracts by the state highway commissioner in cases where the county is contributing to the cost

of the improvement, and since, in turn, by the terms of said section when read with section 5660, the provision of funds by the commissioners is a condition precedent to the making of the written agreement, it follows that where the county has not available for appropriation current tax funds in sufficient amount to provide for the county's share of cost, the only alternative is a bond issue based upon the estimated cost of the most costly type for which bids are to be received. In other words, it would be a vain proceeding for the state highway commissioner to call for bids on a type estimated at a cost of \$150,000, if the county commissioners had based their bond issue and written agreement on a type estimated at a cost of only \$100,000, because the state highway commissioner would be limited in advance of the receipt of bids to the \$100,000 type. Moreover, if the county commissioners had resort to a bond issue in order to provide funds for the share of cost over and above that assumed by the state, assuredly the written agreement above mentioned could not safely be made at any earlier time, to say the least, than that at which the bonds were in process of delivery after being duly sold; and of course there are practical, if not legal, obstacles to the sale of an issue of bonds with an accompanying condition that in certain contingencies part of the bonds will be recalled after being put in process of delivery.

For these reasons, there is no escaping the conclusion that if the county commissioners desire the state highway commissioner to call for bids on several types of improvement, they must base their bond issue on the estimated cost of the most costly type of improvement.

The second inquiry of the commissioners may be answered by quoting section 5654 G. C., which reads:

"The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

Respectfully,

JOHN G. PRICE,

Attorney-General.