943.

CONTRACTS—QUESTION OF FACT WHETHER GIVEN CONSTRUCTION IS NON-COMPETITIVE OR OTHERWISE TO BE DETERMINED IN FIRST INSTANCE BY AWARDING AUTHORITIES.

SYLLABUS:

The Ohio courts recognize the rule that in purchases in which competition is essentially and absolutely non-competitive, the awarding authorities need not attempt competition in letting the contract. However, the statutes requiring competitive bidding cannot be disregarded in those cases in which the construction is only imperfectly competitive, and in all cases every effort must be made to follow such statutes. It is a question of fact as to whether a given construction is non-competitive or otherwise to be determined in the first instance by the awarding authorities.

COLUMBUS, OHIO, November 30, 1923

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

GENTLEMEN: Acknowledgment is made of your recent communication where in you request my opinion as follows:

"Section 4053 G. C. et seq., provide for the election of park commissioners, etc.

Section 4063 G. C. provides that: 'In the letting of contracts, the board of park commissioners shall be govered by the same laws as govern the letting of contracts by the director of public service.'

Section 4328 G. C. provides that: 'The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.'

In the case of State ex rel. v. McKenzie, 29 C. C. 115; 9 C. C. (N. S.) 105; it was held that where the work is essentially non-competitive because of its artistic nature competitive bidding may be dispensed with.

The park commissioners of the City of Alliance contemplate the purchase of a soldiers' monument from a particular concern for $6,000.00 without advertising for bids.

Question: In view of the above provisions of law, could the park commissioners legally make such expenditure without advertising for bids and entering into a written contract?"

As stated in your communication in *State ex rel.* v. *McKenzie*, it was held:

> "When the contemplated construction is essentially and absolutely non-competitive, because of its artistic nature, or is strictly monopolistic, because the function to be performed thereby is necessarily dependent upon a single means which is the subject of an exclusive patent, or franchise, or sole source of supply, then the principle of competition is, so far forth, inapplicable."

While this case was carried to the Supreme Court and reversed upon the ground that the statutes applying to the procedure when a court house is erected by the county commissioners did not apply to a building commission constructing a court house, said opinion did not necessarily reverse the holding of the lower court in respect to the proposition above set forth. The Supreme Court in its opinion did say 'the lowest price does not always secure satisfactory results and * * * some things which are most desired are not open to competition.

In *State ex rel.* v. *Cass, et al.*, 13 C. C. (N. S.), 450, the holding in *State ex rel.* v. *McKenzie*, supra, was followed and approved. This case involved a contract entered into by the building commission for the Cuyahoga County Court House for the painting and decorating of the interior of the court house without competitive bidding. However, it must be kept in mind that in *State* v. *McKenzie*, while it was held that a contemplated construction *essentially and absolutely* non-competitive was not required to be let at competitive bidding, the court in that case just as emphatically pronounced the following:

> "When the contemplated construction is but imperfectly competitive, though not absolutely non-competitive, as where the function to be performed is dependent upon some one of various monopolistic means, the principle of competition, so far as it can reasonably be made applicable, must be strictly pursued; but; in cases of that kind, after the application of the competitive principle has been exhausted, a sound discretion may then be exercised in choosing the most economical means, all things considered, among those that are offered."

Assuming that the authority which you cite is the controlling case upon the subject it follows from the foregoing that it is a question of fact that must be determined in each instance as to whether or not a given undertaking is essentially non-competitive, imperfectly competitive or competitive.

It must be kept in view that it is the policy of the law to let contracts in pursuance to competitive bidding and in each instance every effort must be made by the awarding officials to comply with this provision of the statute. However, the statutes and the courts recognize the rule that in every instance it is not practical or possible to designate with an exact detailed description all of the things required in a given construction. For instance, in the letting of bridge contracts as provided by statute, after having specified some general requirements as to length, width, etc., the contractor may be invited to submit plans with his bid. Thus, it will be seen by this operation that it is possible that such a procedure is the best form of competition. In such cases not only does the contractor bid upon materials firnished but engineering skill is also in competition.

In the purchasing of coal it is frequent that bidders are invited to specify the analysis of the coal to be furnished and the awarding authorities have a right to take into consideration the relative value of the coal as disclosed by said analysis in determining which is the "lowest and best bid."

In the installation of elevators in public buildings the practice is to invite bids and permit the bidder to submit plans and specifications of the particular elevator

that will be furnished and the awarding power may take into consideration the quality of the elevator offered in determining which is the "lowest and best bid."

It is clearly recognized in such cases that the "lowest and best bidder" is not necessarily the lowest bidder. See 15 Ohio Appeals, page 76.

Coming to the specific question you ask, as heretofore indicated, it is a question of fact as to whether or not a given undertaking is non-competitive.

Respectfully,
C. C. CRABBE,
Attorney-General.

944.

APPROVAL, BONDS OF DANBURY TOWNSHIP RURAL SCHOOL DISTRICT, OTTAWA COUNTY, $10,385.43, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, November 30, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

945.

COUNTY NORMAL SCHOOLS—PAYMENT OF EXPENSES—SECTION 7645 G. C. CONSTRUED.

SYLLABUS:

Section 7654-1 General Code does not provide for a joint county normal school between a county board of education and a village board of education, and a village board of education cannot pay any part of the expense of a county normal school other than that incident to the furnishing of rooms, heat, light and janitor service.

COLUMBUS, OHIO, December 1, 1923.

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

GENTLEMEN:—Yours of recent date received, in which you submit the following inquiry and request for a written opinion from this department:

> "May a village school district pay any part of the expense of a county normal school organized under the provisions of section 7654-1 of the General Code?
>
> By a village school district we mean an ordinary village school district, and not an exempted village school district."

Section 7654-1 General Code, reads as follows: