501.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN WOOD COUNTY.

COLUMBUS, OHIO, June 29, 1923.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

502.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN LUCAS COUNTY.

COLUMBUS, OHIO, June 30, 1923.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

503.

MODIFICATION OF CONTRACT UNDER SECTION 4331 G. C.—EXPENDITURE MUST NOT EXCEED ORIGINAL APPROPRIATION—MUST HAVE SUBSTANTIAL REFERENCE TO PRIMARY CONTRACT.

SYLLABUS:

1. *Under the provisions of section* 4331 *G. C., the Director of Public Safety with the approval of the Board of Control and the acceptance of the contractor may legally modify an original improvement contract. However, the expenditure made in connection therewith must not exceed the original appropriation for such contract.*

2. *A modification or alteration of a contract under the provisions of section* 4331 *G. C., must have some logical and substantial reference to the primary contract. A modification, the purpose of which is to substitute a new and different contract from the one formerly entered into, is invalid. Such a modification in order to be legal must arise on account of an unforeseen condition arising in connection with the progress of the work begun under a proper original contract.*

COLUMBUS, OHIO, June 30, 1923.

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

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

"Section 3797 of the General Code of Ohio provides that:

'At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof.'

Section 5649-3d G. C. provides that:

'At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances.'

In opinion No. 165 of February 26th, 1912, Vol. 2, page 1633, in the second paragraph of the syllabus it is held:

'Section 5649-3d limiting appropriations to the purpose set forth in the annual budget and to the amounts fixed by the budget commission relates to moneys raised by taxation only, and expressly excludes moneys designated as "receipts and balances" such as those of the general fund derived for the transfer of balances left in other funds at the close of the preceding fiscal year.'

In one Ohio city bonds were issued under the provisions of section 3939, General Code, for the purpose of remodeling a municipally owned market house for general city offices and jail purposes. Alternative bids were advertised for on estimates properly prepared and upon receipt of proposals it was found that the cost of these improvements desired would exceed the fund created by the sale of such bonds and it is now proposed that contracts be entered into for the least expensive of the alternatives and in amounts not exceeding the amount of such bond fund; that the auditor certify to such contracts under the provisions of section 3806 G. C.; that council at the next semi-annual appropriation period appropriate the difference between the estimated cost of the improvements desired and bond fund available; that modifications or alterations thereafter be made in existing contracts in accordance with the provisions of section 4332 G. C.; and that the additional cost thereof be paid from such appropriations.

In the case of Carthage v. Diekmeier, 79 O. S. 323 (345), the court says:

'Moreover, it was not within the power of the council or the village engineer to increase the liability of the corporation beyond the amount for which the certificate had been filed and thereby nullify section 2702.'

Question:

In view of the above statutes, opinion of the Attorney General, and case cited, would it be legal to proceed in the manner proposed?"

An examination of section 3939, G. C., discloses that provision is made therein for the purpose which you state bonds have been issued by the city in question. While there seems to be no express authority authorizing alternative bids to be submitted and considered in the awarding of municipal contracts, it would seem that there is implied authority for such procedure.

The last sentence of section 4332 G. C. provides:

"The general provisions of law relating to the requiring of bids and the awarding of contracts for public buildings, and improvements, so far as they apply, shall remain in full force and effect."

The general practice adopted with reference to the requiring of alternate bids in connection with contracts of this character seems to establish as a custom this method and it has been held in reference to cases in which there are expressed provisions for such method of bidding that the alternate is as much a part of the bid as the bid proper. There seems to be no reason why this would not be true in connection with an alternate in a bid requested by municipal authorities.

Therefore, without further consideration this opinion will proceed upon the assumption that an alternate bid is a proper one under such circumstances.

In view of the statement of facts and the foregoing it will be evident that the Director of Public Service is authorized to enter into a contract for the proposed alternate. Of course, up until this time there is no difficulty with the legal phase of the question. The question, of course, is whether the further intention of the officials of the city to provide additional funds for a modification of the contract is legal.

Section 4331 G. C., which relates to alterations and modifications of contracts provides:

"When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

It will be evident that it is within the power of the Service Director with the approval of the Board of Control and the acceptance on the part of the contractor to legally modify a contract which has been duly entered into. While there is no doubt about the existence of such power it is the scope of the power which causes the difficulty in connection with your inquiry.

In the case of Lloyd v. Toledo, 20 O. C. C. (N. S.), page 47, the opinion contains a comprehensive discussion of this subject. In that case it was held:

> "Where an appropriation for a specific municipal improvement has been made and funds provided by a sale of bonds to pay for the entire cost of such improvement, and thereafter a new contract is entered into modifying some of the terms of the original contract, the failure of the city auditor to certify that the money was in the treasury to the credit of the fund from which it is to be drawn does not render the modified contract invalid and this is true for an additional reason when the modifying contract imposes no increased liability upon the city."

In this case there was a contract entered into for the construction of a bridge and a bond issue sold in the amount of $825,000.00, which sum was appropriated for the purpose of carrying out the contract. After the work was started there was a change in the method of construction of some of the piers for the bridge which would entail the expenditure of $900,000.00 in order to complete the project. The court held that the modification of the contract was a valid exercise of the powers of the city officials and the fact that there was no Burns Certificate as to the existence of the funds was of no effect, but the court, however, further indicated that the total expenditures under the original contract and the modification thereof could not exceed the amount appropriated therefor by the original bond issue. However, the court very carefully guarded the point as to whether council had power to appropriate a further sum for the purpose of the modified contract. The concluding paragraph of said opinion is as follows:

> "It must be understood that nothing contained in the foregoing decision is intended to express any opinion as to the power of the city council with reference to further appropriations for the completion of the bridge, if occasion therefor should arise."

In this opinion it was held that the Burns Law Certificate is not required where the fund is provided from the sale of bonds for a specific purpose. Citing 74 O. S. 185, 81 O. S., 66, and 10 C. C. (N. S.) 137. It was stated in this opinion that if the modified contract is shown to be the result of fraud or bad faith, or an abuse of discretion of the city officials entering into said contract, that a court would enjoin the execution of the same, but the court further pointed out that matters of engineering relating to the interpretation of contracts of such character were questions in the first instance to be determined by the engineers and officials in charge.

In the case of the city of Newark vs. Fromholtz, 102 O. S. page 81, there is an extended discussion of the powers of the Director of Public Service and Board of Control to modify contracts. It is stated in this opinion that:

> "This power, however, cannot be considered one to absolutely rescind, annul or wipe out a contract regularly made, and we find no such authority given by the legislature."

And it was further held in said opinion that when the contract is authorized and directed by ordinance of council, and a contract has been entered into in pursuance thereof, that the city officials are precluded from making a contract upon the same subject matter without affirmative and proper authorization and direction

therefor. No doubt council by proper action may rescind a contract and determine to enter into a new or different contract. However, if such a course should be taken all of the formalities for the awarding of the contract would have to be followed.

From the foregoing it will be evident that a modification as contemplated by section 4331 has reference to a condition arising "in the prosecution of" the work being constructed in pursuance to a contract properly entered into. This section provides a remedy for those cases arising due to conditions that could not be foreseen at the time the original contract was entered into.

From the statement of facts it clearly appears that the council proposes to use the provisions of section 4331 to aid in obtaining a kind of improvement which it cannot obtain under the contract which it is now authorized to enter into in view of the proposals, bids and funds at its disposal for this purpose. In my opinion the officials mentioned are wholly without legal authority to anticipate at the time of entering into a contract that the same is to be changed to a different type of improvement by an attempted modification in the future. The effect of such a procedure would in effect be an effort to circumvent the law and do indirectly that which they may not do directly.

Respectfully,
C. C. CRABBE,
Attorney General.

504.

APPROVAL, BONDS OF CITY OF CUYAHOGA FALLS, SUMMIT COUNTY, $36,785.00, STREET IMPROVEMENTS.

COLUMBUS, OHIO, June 30, 1923.

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

505.

APPROVAL, BONDS OF CITY OF CUYAHOGA FALLS, SUMMIT COUNTY, $11,530.00, SIDEWALK IMPROVEMENT.

COLUMBUS, OHIO, June 30, 1923.

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