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Furthermore, it has been held that a Prosecutor exercises a discretionary function in approving an affidavit and he cannot be required to approve an affidavit if he does not think that such action is warranted.

*State ex rel. Spencer v. Criminal Court of Marion County* (1938), 214 Ind. 551, 15 N. E. (2d) 1020;

*State ex rel. Freed v. Circuit Court of Martin County* (1938), 214 Ind. 152, 14 N. E. (2d) 910.

With these authorities in mind, an examination of Chapter 80 of the Acts of 1951, which contains substantially all of the laws about which you inquire, fails to show any provision which would tend to take this act out of the general rules heretofore stated.

Thus, to specifically answer your question, should a Prosecuting Attorney fail to approve an affidavit, your only recourse is to present the facts to the Grand Jury for any action that they may feel proper and it should be kept in mind that Grand Juries generally rely on the advice of Prosecuting Attorneys as to what action they should or may take under a given state of facts.

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### OFFICIAL OPINION NO. 71

November 24, 1952.

Mr. Joseph B. Minor,  
Attorney for Indiana State Toll  
Bridge Commission,  
1007 Citizens Bank Building,  
Evansville, Indiana.

Dear Sir:

I have your letter under date of November 22, 1952, in which you request an official opinion of the following:

“On or about the 29th day of September, 1952, the Indiana State Toll Bridge Commission in compliance with the Indiana State Toll Bridge Act, Section 36-

3007 (b), Burns' Indiana Statutes, advertised for bids on the above project and said Commission's Engineers issued to prospective bidders a proposal contract and bond in bound book form, a copy of which is enclosed herewith and marked 'Exhibit A', and same will be referred to herein as the 'Proposal'. A copy of the advertisement for bids can be found on page A-1 of said proposal.

"For the purpose of bidding the project was divided into three parts as follows: Sub-structure—Contract I; Superstructure—Contract II; Toll house and office building—Contract III.

"The engineers' estimates of costs of each contract were as follows:

"Contract I—\$1,966,983.00.

"Contract II—\$2,758,820.00.

"Contract III—\$75,000.00.

"Total of all contracts, \$4,800,803.00.

"The low bid on Contract I was submitted by Bates and Rogers Construction Corporation, in the amount of \$1,598,670.20 and the next low bid on Contract I was Traylor Bros., Inc., in the amount of \$1,730,949.30.

"In addition, Traylor Bros., Inc., submitted a bid on Contract III, said bid being in the amount of \$90,000.00. This was the only bid received on Contract III. In submitting this bid, page E-12 of the proposal was properly filled out, but at the bottom of the page the following was written in pen and ink, to-wit: 'This bid is not to be considered unless we are awarded Contract I'. On page E-13 of the proposal, in the place where bidders were to list combination bids and following the words 'If awarded contracts for' the bidder wrote in ink as follows: 'Contract I we will accept award of Contract III. Bid on Contract III is not submitted to be awarded separately'.

"You will notice that both bids submitted on Contract I is under the engineers' estimate. The bid of Traylor Bros., Inc., on Contract III was not under the

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engineers' estimate for that contract, but the combined bid of Traylor Bros., Inc., on both contracts I and III was under the total combined estimate for said contracts.

"Bates and Rogers take the position that they are entitled to be awarded Contract I on their low bid. Traylor Bros. take the position that since they were the only bidders on Contract III and their combined bids on both Contracts I and III are under the Engineers' estimate, that they are entitled to be awarded said contracts.

"In view of Section 36-112, Burns' Statutes and the proposal issued by the Commission it has the right to reject any and all proposals if any cause exists therefor or award the contract to the lowest and best bidder, provided the bids do not exceed the estimate of costs.

"The Indiana State Toll Bridge Commission at its meeting held November 21, 1952, passed a resolution directing me to write this letter asking your opinion with respect to the following questions:

"1. Can the Indiana State Toll Bridge Commission award Contracts I and III to Traylor Bros., Inc., in view of the fact that (a) there was a lower bid on Contract I, and (b) the bid for Contract III exceeded the estimate of the engineers?

"2. Does the language of the proposal of Traylor Bros., for Contract III, which is set forth above, constitute a valid combination bid as set forth in the proposal?"

The Indiana State Toll Bridge Commission is a duly authorized and legally constituted body existing under the laws of the State of Indiana, created by an act of the Legislature of the State of Indiana, Acts of the General Assembly of the State of Indiana, 1939, which law is known as Chapter 79, Act of the General Assembly of the State of Indiana, 1939, H. 172, approved March 9, 1939, and as amended by Acts of General Assemblies of 1941, 1947 and 1951, defining its powers and duties; providing for the construction, acquisition, extension, improvement, operation and maintenance of interstate

highway bridges and approaches thereto by said Commission, and is as follows:

“There is hereby created a body corporate under the name of Indiana state toll-bridge commission which shall have power to contract and be contracted with, to sue and to be sued in that name and to adopt a seal and alter the same at pleasure. Said commission shall consist of three (3) members, not more than two (2) of whom shall be of the same political party to be appointed by the governor of the state of Indiana, one (1) of whom shall serve for a term of one (1) year, one (1) of whom shall serve for a term of two (2) years, and one (1) of whom shall serve for a term of three (3) years from the date of their appointment. The successors of such appointees shall be appointed by the governor of the state of Indiana, each for a period of three (3) years. Vacancies in the membership of such commission shall be filled for any unexpired term by appointment by the governor. Each member of said commission shall be at least thirty (30) years of age and shall not at the time of appointment, nor during the term for which said appointment was made, be a public official, paid or unpaid, of any county in the state of Indiana or of the state of Indiana. The members of said commission shall within ten (10) days after their appointment by the governor meet and qualify by taking and subscribing an oath to honestly and faithfully discharge the duties of their office as members of such commission and shall thereupon organize by electing a chairman, secretary and treasurer from its members.

“The commission shall have the power to establish by-laws, rules and regulations for its own government and to make and enter into all contracts or agreements and do all things necessary or incidental to the performance of its duties and the execution of its powers under this act. The commission may employ engineering, architectural and construction experts and inspectors and attorneys and such other employees as may be necessary in its opinion and fix their compensation, all of whom shall do such work as the commis-

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sion shall direct. All expenses so incurred by the commission shall be paid solely from funds provided under the authority of this act \* \* \*." (Sec. 36-3001, Burns' 1949.)

Section 36-3002, Burns' 1949 Repl., 1951 Supp., the same being Ch. 296, Sec. 1, p. 978 of the Acts of 1951, provides as follows:

"The Indiana state toll-bridge commission is hereby authorized and empowered to construct and/or acquire by purchase or otherwise or condemn highway bridges and the approaches thereto over and across any river or stream forming the boundary between the state of Indiana and any adjoining state whenever the bridge or any part thereof or the approach thereto will extend within the state of Indiana; and to enlarge, extend and improve such bridges. This act (Secs. 36-3001—36-3017) shall apply although such river may be located either partially or solely within the territorial limits of such adjoining state.

"The Indiana state toll-bridge commission is hereby further authorized and empowered to construct toll roads or highways, together with such approaches, avenues of access, fills, causeways, connecting bridges or ferries, as shall be necessary, appurtenant or incidental to such bridge, bridges, ferry or ferries, from or to any place or places within the state of Indiana, or to places in adjoining states; and to enlarge, extend and improve such toll roads or highways. Said toll roads or highways may be constructed as separate projects or as combined projects; or may be constructed in conjunction with the construction or acquisition of an interstate bridge or bridges authorized by this act, as a combined project.

"Wherever the term 'bridge' is used in this act (Secs. 36-3001—36-3017), said term shall mean such interstate bridges or such toll roads or highways severally as separate projects or collectively to any two or more of such interstate bridges and/or toll roads or highways as combined projects. All of the provisions of

this act relating to bridges shall apply fully to such interstate bridges or such toll roads or highways as separate projects or to any combination of two or more of such interstate bridges or toll roads or highways as combined projects: Provided, however, That any engineers appointed or employed in connection with any toll roads or highways shall be designated by the state highway commission of Indiana, subject to such approval of the purchasers of any revenue bonds issued pursuant to this act as may be provided in the proceedings authorizing the issuance of such revenue bonds."

It is further provided that prior to the commencement of any construction the commission shall receive the approval of the State Highway Commission, which is as follows:

"Before any construction, acquisition by purchase, or otherwise, or condemnation of any bridge, right-of-way, or other property is consummated, the said commission shall submit to and obtain from the state highway commission of Indiana its approval, and no such construction, acquisition by purchase, or otherwise, or condemnation as provided for in this act shall be valid until said state highway commission of Indiana and said state toll-bridge commission shall have concurred in and agreed upon all matters set out in this section." (Sec. 36-3007a, Burns' 1949 Repl., Acts 1941, ch. 217, Sec. 4, p. 654.)

Provision is also made:

"Before any bridge shall be constructed under the provisions of this act, the state toll-bridge commission of Indiana shall cause to be presented to the state highway commission profiles, plans and specifications, and estimates for the construction of such bridge or bridges as they shall designate for construction under the provisions of this act; following which said state toll bridge commission shall give notice of the time, place, terms and conditions for the letting of the contracts for the construction of such bridge or bridges as is now provided by law, for the giving of notices for

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the construction of highways by the state highway commission of Indiana; said state toll-bridge commission shall let the contracts for the construction of such bridge or bridges in the same manner and under the same conditions as are now fixed by law for the letting of contracts for the construction of highways by the state highway commission of Indiana." (Sec. 36-3007b, Burns' 1949 Repl., Acts 1941, ch. 217, Sec. 5, p. 654.)

It is to be noted that the state toll bridge commission shall let contracts for bridge construction in the same manner and under the same conditions as are now fixed by law for the letting of contracts for the construction of state highways. Therefore, we must examine the act authorizing the state highway commission to let contracts.

Section 36-112, Burns' 1949 Repl., the same being Acts 1933, ch. 18, Sec. 12, p. 67; as amended Acts 1935, ch. 88, Sec. 6, p. 249, provides in part:

"On the date and at the time and place named in the notice, the chairman or one of the commissioners designated by him, shall receive all sealed proposals rendered and shall publicly open the same: Provided, That such bids may be opened at any other public place that the chairman may designate on the day such bids are to be opened. The chairman, with the approval of the commission, shall have the right to reject any and all proposals, if any cause exists therefor; otherwise the contract for the construction, improvement or maintenance of such road shall be let by the chairman, with the approval of the commission, to the lowest and best bidder, provided such bids shall not be for a greater sum than the estimated cost thereof.  
\* \* \*"

Your attention is called to that portion of the section which provides that contracts shall be let to the lowest and best bidder but this does not mean to imply that the lowest bid must be received or accepted. The statute vests some discretion in the Indiana State Toll Bridge Commission as to who is the lowest responsible bidder. The general rule as deduced

from the cases is that, in awarding contracts of this nature, public authorities are vested with discretion in determining who is the lowest and best bidder, and their discretion will not be interfered with by the courts, even if erroneous, provided it is based on a sound and reasonable discretion, founded on facts and exercised in good faith.

Eigenman v. Board of Commissioners (1912), 53  
Ind. App. 1, 101 N. E. 38;

Ness v. Board of Commissioners (1912), 178 Ind.  
221, 98 N. E. 33, 1002;

Lane v. Board of Commissioners (1893), 7 Ind. App.  
625, 35 N. E. 28;

Butler v. Darst (1911), 68 W. Va. 493, 70 S. E. 119,  
38 L. R. A. (N. S.) 653;

Altschul v. City of Springfield (1933), 48 Ohio App.  
356, 193 N. E. 788.

Your attention is called to the mandate in Sec. 36-112, *supra*, and of which you inquire, stating "such bids shall not be for a greater sum than the estimated cost thereof." I have carefully reviewed the engineers' estimates of cost of each contract in connection with the proposal for the erection of the Memorial Bridge, as the same was prepared by Sverdrup & Parcel, Consulting Engineers, St. Louis, Missouri. I have also reviewed Paragraph 5, page A-7, of said proposal, which is as follows:

"COMBINATION BIDS for two or more contracts may be made and shall be submitted on the proposal form. A separate and complete bid for each contract shall be included in the combination bid, and only contracts on which individual bids are submitted will be considered as in the combination. The bidder will be allowed to combine the contracts in the combination listed in the proposal as follows: (1) by stating 'All or None', which is preferable, or (2) by listing any two or more contracts that he wishes to bid in combination."

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An examination of Traylor Bros, Inc., bid discloses it made a combination bid on Contracts I and III as provided in said proposal and the total of said combination is less than the engineers' combined estimated cost of said items. It is, therefore, my opinion that since Traylor Bros., Inc., combined bids do not exceed the engineers' estimated cost and further since the proposal invited combined bids the bid of Traylor Bros., Inc., is not a greater sum or sums than the engineers' estimated cost thereof, and would not be contrary to the language of Sec. 36-112, *supra*.

You inquire as to whether certain words in the bid of Traylor Bros, Inc., to-wit: "If awarded contracts for Contract I we will accept award of Contract III. Bid on Contract III is not submitted to be awarded separately," invalidates the bid. As heretofore stated, the proposal invited combination bids and the fact that Traylor Bros., Inc., refused to accept the award of Contract III unless it were awarded Contract I does not violate the rules of competitive bidding. The specifications for the bridge being general, the work thereon has been divided into three parts and combination bids were invited. Therefore, in combining its bid and refusing to accept the award of Contract III unless also granted the award for Contract I meant no more than it should receive all the work under said contracts. It is both reasonable and consistent.

Ness v. Board, etc. (1912), 178 Ind. 221, 98 N. E. 33, 1002.

The fact that the proposal suggested different words be used, to-wit: "All or None" is only a suggestion on the part of the Commission to advise it that the bidder is bidding on more than one contract and that his acceptance of any award is contingent upon his receiving the combination bid. Any variation of these words and still importing the same meaning would meet the requirements to advise the Commission of a combined bid.

It is, therefore, my official opinion that the bid submitted by Traylor Bros., Inc., to the Indiana State Toll Bridge Commission is a valid bid and complies with all statutory requirements.