any penalty, interest or other charges accruing either before or after such exemption periods and that no steps leading to the assessment or collection of such tax should be taken by the department during such period of exemption.

(4) Upon the expiration of the period of six months following discharge, the Gross Income Tax Division is required by law to enforce the current filing of returns and payment of tax on current income of discharged military personnel, and to assess penalties and interest on delinquencies relating thereto in like manner as such requirements are imposed upon other civilians.

(5) Where penalties and interest were assessed prior to induction and/or prior to October 17, 1940, such penalties and interest must be demanded from and, if not assessed, must be assessed against, discharged members of the armed forces upon the expiration of the period of six months following their discharge.

OFFICIAL OPINION NO. 63

June 25, 1946.

Hon. C. E. Ruston, State Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Mr. Ruston:

I have your letter of recent date in which you request an official opinion on the following questions:

"1. Is a bid for the sale of machinery or equipment for a public utility owned and operated by a city invalid if an escalator clause covering the machinery or equipment is included in such bid?

"2. Would your answer to the first question be the same if it involved the city in its governmental capacity?

"3. Is a bid for the sale of machinery or equipment and its installation by the bidder for a public utility owned and operated by a city invalid if an escalator
clause covering the labor cost incident to the installation is included in such bid?

"4. Would your answer to the third question be the same if it involved the city in its governmental capacity?

"5. Is a bid for construction work including materials, supplies and labor for a public utility owned and operated by a city invalid if an escalator clause covering materials, supplies and labor is included in such bid?

"6. Would your answer to the fifth question be the same if it involved the city in its governmental capacity?"

Since your questions involve the validity of a so-called "escalator clause", it is first necessary to define such term. As I understand this term as used in your questions, it would mean a provision in a bid or a contract whereby the price or the amount fixed therein is subject to be increased or decreased by the occurrence of subsequent contingencies outside of the control of either of the contracting parties. Such an escalator clause may apply either to the price of the product, equipment or supplies included in the bid or contract or to labor cost incident thereto, or to both.

The first question presented is whether such provisions in bids or contracts are invalid because the price is too indefinite or uncertain. The general rule on the construction of contracts of municipalities is well stated in 38 American Jurisprudence, Section 502, p. 177, as follows:

"* * * In general, a contract executed by a municipal corporation in its proprietary capacity is governed by the same rules and should receive the same construction as contractors between individuals.

* * *"

It is a general rule that to constitute a valid bid or contract the price stated therein must be certain or capable of being made certain by reference to a definite standard. As stated in Williston on Contracts, Revised Edition (1936), Volume 1, Section 41, pp. 118-119:
“If a promise indefinite as to price is capable of being made certain by an objective standard as, for example, extrinsic facts, it is enforceable.

“* * *

“* * * And a price qualified by a guarantee against decline of market prices of competitive goods prior to the time for performance of the contract is sufficiently definite. The general view is that where the price of goods is to be fixed in relation to the official quotation of a designated market, or to the price set by a dominant seller of the particular kind of goods on a certain day or on delivery, the provision controls if there is such a quotation or price set, but in the absence of such a quotation or set price the contract is inoperative to the extent that it remains executory. A price is sufficiently definite, however, if it can be ascertained by computation.”

Also this general principle is well stated in Moon Motor Car Co. of New York v. Moon Motor Car Co. (C.C.A. 2—1928) 29 Fed. (2d) 3, 4:

“There is no objection to a promise that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when the time arrives, there shall be in existence some standard by which that can be tested. It is often said that such a standard must not be one within the uncontrolled power of the promisee, as, for example, that the promiser shall buy at any price which the promisee may fix. * * *”

Thus, it has been held that where the price was to be fixed at the market price at the time of delivery of a particular product, such a price was not too indefinite or uncertain.

Abshire v. Smith (1927), 86 Ind. App. 354;
Keystone Steel and Wire Co. v. Pierce Oil Corp. (C.C.A. 7—1927), 17 Fed. (2d) 476;
Ames v. Quimby (1877), 96 U. S. 324;
1943 Ind. O.A.G. 432;
16 Minn. Law Review 750.
In the case of Abshire v. Smith, supra, the Appellate Court of Indiana held that a provision in a contract "the gasoline to be purchased at the regular tank wagon market, based on the Standard Oil Company tank wagon market, and subject to any general advance or decline of the Standard Oil Company" was not too indefinite as to the price at which the gasoline was to be sold.

It has also been held that a price is not too indefinite or uncertain if it is to be fixed by a third party before the consummation of the contract.


In the case of E. I. DuPont de Nemours and Co. v. Hughes, supra, it appeared that the price of the coal to be furnished by the seller to the buyer was fixed by the United States Fuel Administrator.

It has likewise been held that a provision in a contract providing for a readjustment of price in case existing wage rates were changed was held not to be too uncertain and indefinite as to the price. In the case of Cub Fork Coal Co. v. Fairmont Glass Works (C.C.A. 7—1929), 33 Fed. (2d) 420 the following provision was included in the contract in question:

"(d) It is expressly understood that the price or prices named herein are based on existing rates of pay for all mine labor and the price or prices will be subject to readjustment in event existing rates of pay are changed."

On this matter, the court said as follows at page 422:

"Change in Price of Labor.—Respecting the application of paragraph (d) of the contract and the rise in the price of labor, we are equally certain that no excusable defense is disclosed. The contract called for a readjustment of price in case existing rates of miner's pay were changed. The wages paid to miners were raised during the period covered by the contract. Plaintiff did not insist upon an increase in the price of coal."
Obviously defendant cannot avoid its contract because of an unexercised right of the seller to increase the price.

"Had the seller exercised its right to raise the price the readjustment would have been merely a mathematical problem. The increase would have represented the sum which measured the increased cost of labor. This was sufficiently definite so that it would not have necessitated another 'meeting of the minds' of the contracting parties. The new price would have been the contract price plus the new item which was definite or capable of being made definite. Solter et al. v. Leedom (C.C.A.) 252 F. 133. * * *

In an official opinion (1943 Ind. O.A.G. 432) I held to be valid the following provisions of certain coal contracts entered into by the State of Indiana and certain coal operators:

"If during the life of this contract, the maximum price for coal of the grade and size produced at the mine or mines from which the coal hereunder is to be sold to the Buyer, shall be increased or decreased by the Office of Price Administration, or its successor, or any other agency of the United States Government having power to do so, the contract price as stated in this contract shall be increased or decreased the same number of cents per ton as the subsequent maximum price shall be increased or decreased above or below the maximum price in force at the time of the execution of this contract'."

In that opinion in speaking of the validity of such provisions, it was said:

"It is submitted that the variable terms provided by the proposed combined bid and contract form present an even stronger case of reasonableness and necessity in this time of war emergency when the economy of the nation is being controlled by the federal government. The variables provided in item five (5) depend upon the action of the Office of Price Administration, or other agency of the government having similar power. Item five b (5b) provides for the possible contingency, which is most remote during the
life of this contract, that no federal agency will fix a maximum price, in which event other elements, beyond the control of the state or the seller, shall be considered in adjusting the price. The provisions for variations cover both a decrease as well as an increase. Each bidder is on an equal basis in submitting his bid, all contracts will be uniform, and the rights of the parties will be fixed as soon as the contract is executed. In view of the above authorities, it is my opinion, in answer to your first question, that these provisions are proper, legal, and within your discretion and authority to provide in your contract."

Also, in the case of State ex rel. City of McCook v. Marsh (1922 Sup. Ct. of Nebraska), 187 N. W. 84, it was held that a city paving contract was not invalid which contained a clause that if there was a later increase in freight rates over and above the rates in effect on the date of the proposal, that said unit price would be increased proportionately and reduced likewise if there is any reduction in rates. In that case there was a law which prohibited the contract price from exceeding the estimates of the engineer, but the court held that the clause allowing for an increase or decrease in freight rates did not violate such law. In passing upon this question the court used language very pertinent to the question involved here and said at page 86 of 187 N. W.:

"* * * At the time the contract was entered into business conditions were such that it was generally regarded that there would be an increase in freight rates, but no one could determine in advance what the increase would be. The power to fix the rates was in the hands of public officials. It has been held that, where the cost of an item of expense is fixed by another proceeding, no estimate of the cost is necessary. Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15. It should be further borne in mind that the increase in the freight rates, if any, in no wise inured to the benefit of the contractor. The contract was reciprocal, and contained a provision that, in the event the present freight rates upon the materials used were decreased, the contract price was to be correspondingly decreased.
In letting the contract in this form the council acted within the spirit of the law.”

From the foregoing authorities it is well established that a provision in a bid or contract fixing a definite price subject to be increased or decreased by later occurrences, such as the market price, by the action of a third party, and other similar occurrences, are not too indefinite or uncertain and will be held valid so long as there is a definite fixing of the price at the later time and it is not done solely under the will of the seller or promisee. This first principle is applicable to all the questions which you ask and I will now proceed to take up your questions specifically.

Since your first two questions are closely related, I shall discuss them together. In answering these questions reference should first be made to Chapter 99 of the Acts of 1945, same being Burns’ 1933, Section 53-501, et seq. (Pocket Supp.) This act provides that any person, officer, board, commissioner, department, commission, or purchasing agent authorized to make purchases of material or materials, equipment, goods and supplies, payment for which is to be made from any appropriation of public funds made under the provisions of the Budget Law for any unit of the state, county, township, city or town government, shall comply with the requirements of the act where the amount of the purchase exceeds $500.00. Section 2 of the Act (Burns’ 1933 Section 53-502) requires advertising for bids and an awarding of a contract to the lowest and best bidder.

Section 3 of the Act (Burns’ 1933 Section 53-503) provides that no purchase shall be made unless the bid, offer, proposal, estimate or contract is executed upon the forms prescribed by the State Board of Accounts, setting forth the quantity, quality and price of each and every article and thing proposed for sale.

However, in a recent official opinion to you dated February 21, 1946, No. 15, I held that municipally owned utilities are not required to conform to the provisions of the above act, except in a possible situation where funds raised by taxation may be involved. Also, in the case of Underwood, et al. v. Fairbanks, Morse & Company, et al. (1933), 205 Ind. 316, the Indiana Supreme Court held that a town has implied
and inherent power, as well as statutory authority, to contract for any equipment for municipally owned utilities without notice and without competitive bidding. Thus, a possible objection that an escalator clause would be invalid because it could not be determined which was the lowest and best bid is inapplicable in the case of municipally owned utilities for the reason that they are not required to conform to the requirement of competitive bidding.

A second objection that might be advanced as invalidating an escalator clause would be that the price which might later be fixed might cause the resulting contract to be in excess of the constitutional debt limitation of the city. This argument is not applicable in the case of municipally owned utilities for the Indiana Supreme Court has held that such an obligation is not a debt against the municipality within the meaning of the constitutional debt provisions, but is only an obligation against the fund of the utility. (Letz Manufacturing Co. v. Public Service Commission of Indiana (1936), 210 Ind. 467.)

A third objection that might be made to an escalator clause in bids for municipally owned utilities is that the resulting contract might be in excess of an appropriation made for such contract or in excess of bonds issued to pay for the same. Ordinarily a municipally owned utility does not purchase equipment with a specific appropriation, but purchases it with current funds arising from the operation of the utility, or by the issuance of revenue bonds which are ultimately paid from the income from the utility. In view of this method of finance it would only be necessary to provide a sufficient amount of current funds or revenue bonds to pay for the total cost of the contract including any increase in price.

Based upon the foregoing reasons and authorities it is my opinion that a bid for the sale of machinery or equipment for a municipally owned utility is not invalid if it contains an escalator clause.

In answering your second question it is first pertinent to note that a city operating in its governmental capacity is required to comply with the provisions of Chapter 99 of the Acts of 1945 (Burns' 1933, Section 53-501 (Pocket Supp.)), which was referred to in answering your first question. Section 2 of that Act requires the advertising for bids and an awarding of the contract to the lowest and best bidder. This
requirement raises a question of how a city could determine who was the lowest bidder in the event that some bids contained escalator clauses and others did not.

However, it is to be noted that the requirement does not limit the city to the lowest bidder, but provides that the contract shall be awarded to the lowest and best bidder. Under such a requirement it has been decided repeatedly by the Indiana Supreme Court that the letting agency may in its discretion award the bid to one who was not the lowest bidder, but to one who in its judgment was the best bidder.

Budd v. Board of Commissioners (1939), 216 Ind. 35, 38;
Boyd v. Murphy (1890), 127 Ind. 174, 177.

Thus, this objection will not prevail in view of the discretion which the city has under the provisions of this law to award the contract to the lowest and best bidder.

Section 3 of this law, which also applies to a city acting in its governmental capacity, provides that the bid specifically set forth the quantity, quality and price of each article proposed for sale. This requirement would not destroy the validity of an escalator clause for the reason that a definite price is stated in such clauses subject to be increased or decreased by later occurrences. The use of the term "price" as used in this law is also to be construed in connection with that term as used in the Uniform Sales Act. Section 10 of that Act (Burns' 1943 Replacement, Section 58-109) provides that in a sales contract the price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed. This statutory authority is consistent with the authorities first cited in this opinion to the effect that where the price is to be fixed at a later time than the submission of the bid, this does not render the contract invalid as being too uncertain or too indefinite.

Section 3 of Chapter 99 of the Acts of 1945 (Burns' 1933, Section 53-503) also provides that the bid, offer or contract is to be executed upon the forms prescribed by the State Board of Accounts. In order, therefore, for a bid including an escalator clause to be valid, there would have to be in the form prescribed by the State Board of Accounts a discretionary
express or implied authorization for the stating of such escalator provisions.

Wasson v. First National Bank of Indianapolis (1886), 107 Ind. 206;
Orr v. Meek, Administrator (1886), 111 Ind. 40;
Mayfield v. Nale (1901), 26 Ind. App. 240;
1944 Ind. O.A.G. 295.

Two more objections are also presented in connection with bids containing escalator clauses for the sale of equipment or machinery or supplies to a city operating in its governmental capacity. Section 48-1507 of Burns' 1933 provides in substance that no executive department, officer or employee thereof shall have power to bind any city to any contract or agreement or in any other way to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes thereof; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void.

In construing this statute the Indiana Supreme Court held in the case of Hamer v. City of Huntington (1939), 215 Ind. 594 that where a city had entered into a contract for a fire truck without an existing appropriation therefor, the contract was void. Thus, it may well be argued that an escalator clause in a bid submitted to a city in its governmental capacity may later result in a contract in an amount in excess of the amount of money appropriated for such contract.

The same argument may be advanced in connection with the constitutional debt limitation of a city. A bid may be accepted at a price which is within the constitutional debt limitation of a city, but if there is an escalator clause and a later increase in price, this may result in an amount which would exceed such debt limitation. In order to guard against these contingencies it is suggested that provisions be inserted in the bid or acceptance thereof that notwithstanding any other provisions of the bid or contract in no event shall the total amount payable pursuant to the bid or contract exceed the amount of money appropriated for the contract or the constitutional debt limit of the city.
Based on the foregoing reasons and authorities it is therefore my opinion that a city acting in its governmental capacity may accept a bid for machinery or equipment on a form prescribed by the State Board of Accounts containing an escalator clause, and such bid will be valid to the extent indicated above.

Your third and fourth questions are also interrelated and will be discussed together. In answering these questions, in addition to the authorities above cited, reference should be made to the Minimum Wage Law on public works which is set forth in Burns' 1933, Sections 53-301 to 53-305, inclusive. Section 53-301 of Burns' 1933 (Pocket Supp.) provides that when any person is awarded a contract by the State or any political subdivision thereof, or by a municipal corporation for the construction of any public work, such person shall be required to pay for each class of work on such project a scale of wages which shall in no case be less than the prevailing scale of wages being paid in the immediate locality for such class of work. This law provides for a committee to be named to determine a classification of the labor to be employed and the wage per hour to be paid to each of such classes.

This section then provides in part as follows:

"* * * Provided, That the rate of wages so to be fixed and determined shall not exceed the prevailing wage scales being at the time paid in such locality for such class of work: * * *. Such determination shall be made and filed with such awarding agency at least two (2) weeks prior to the date fixed for such letting, and a copy thereof shall be furnished upon request to any person desiring to bid on such contract. Said schedule shall be open to the inspection of the public. If such committee fails to act and to file such determination at or before the time hereinbefore provided, the awarding agency shall make such determination, and its finding shall be final. It shall be a condition of such contract that the successful bidder and all of his subcontractor (subcontractors) shall comply strictly with such determination made as above provided. * * *" (Our emphasis).
Section 53-302 of Burns' 1933 (Pocket Supp.) requires the successful bidder to file a schedule of the wages to be paid to workmen before any work is performed on such contract. Section 53-304 of Burns' 1933 (Pocket Supp.) defines the terms "municipal corporation" and "public work" as follows:

"The term 'municipal corporation' shall be construed to include any county, city, town, or school corporation, as well as any officer, board, commission or other agency authorized by law to award contracts for the performance of public work on behalf of any such municipal corporation.

"The term 'public work' shall be construed to include any public building, highway, street, alley, bridge, sewer, drain, improvement or any other work of any nature or character whatsoever which is paid for out of public funds, excepting as herein otherwise provided." (Our emphasis.)

In an official opinion (1940 Ind. O.A.G. p. 67) the Attorney General of Indiana held that the Department of Public Utilities of the City of Indianapolis was subject to the provisions of the Minimum Wage Law, and this ruling would apply equally to all municipally owned utilities. Thus, if the proposed sale and installation of equipment or machinery to either a municipally owned utility or to a city acting in its governmental capacity constitutes a construction of public work or improvement within the meaning of the Minimum Wage Law, then it is subject to the provisions of such law. This law thus requires the fixing of definite minimum wage rates by the committee for the particular job, and the filing of wage rates schedules by the contractor at least two weeks prior to the date fixed for the letting of the contract. Once the wage rate is filed by the contractor, then that is the wage rate for the entire job and may not later be increased under an escalator clause wherein it is sought to charge such an increase to the unit of government letting the contract.

Based upon the foregoing authorities, it is therefore my opinion that a bid for the sale of machinery or equipment and its installation by the bidder for either a municipally owned utility or a city acting in its governmental capacity, containing an escalator clause covering the labor cost incident
to such installation is invalid. The same principles apply if
the contract is for construction.

Your fifth and sixth questions are likewise interrelated and
will be discussed together. In addition to the statutes and
authorities heretofore cited in answering your first four
questions reference must also be made to Chapter 202 of the
Acts of 1929, same being Burns' 1933, Sections 53-101 to 53-
106, inclusive. Section 53-101 of this law provides that when
any public work or improvement is to be constructed, erected,
altered or repaired under contract at the expense of the state
or at the expense of any city or any other political sub-
division or commission created by law, and when the cost of
the work will be $5,000.00 or more such contract shall be
awarded to the lowest and best bidder. Section 53-102 re-
quires the submission of a bid, a statement of the experience
of the bidder, a proposed plan for performing the work and
the equipment which is available, and a financial statement,
all of which forms shall be prescribed by the State Board of
Accounts.

Section 53-103 of this law requires certain provisions in
the contract prohibiting discrimination against labor on ac-
count of race. Section 53-105 provides that all contracts for
public work by any municipal bodies, boards or officers of
any municipality, township or county in this state, authorized
by law to let contracts for public work, shall be void if not
let in conformity with the provisions of this law.

If there is a bid for construction work including equipment,
materials, or supplies, the cost of which will be $5,000 or
more, for either a municipally owned utility or a city acting
in its governmental capacity, then in my opinion the above
provisions of the law, concerning the letting of public con-
tracts, must be followed. Such a bid containing an escalator
clause for either equipment, materials, or supplies would
not be invalid if the provisions of this law are followed to-
gether with the provisions of the other applicable laws above
discussed in answering your first four questions. However,
an escalator clause covering labor would be invalid since this
would be a construction contract and therefore within the
terms of the Minimum Wage Law (Burns 1933, Sections
53-301 to 53-305) discussed in answering your third and
fourth questions.
It is suggested that in order to have mutuality of benefits in any bid or contract, that any escalator clause provide that in the event of a decrease in the cost of the equipment, materials, supplies or labor such decrease shall accrue to the benefit of the governmental contracting party.

OFFICIAL OPINION NO. 64

June 25, 1946.

Mr. C. E. Ruston, State Examiner,
State Board of Accounts
304 State House,
Indianapolis 4, Indiana.

Dear Mr. Ruston:

Your letter of recent date requests my official opinion as to whether or not a city can carry insurance to cover its liability under Chapter 71, Acts of 1941, (48-6168, 6169 Burns' 1933 Supp.) which law requires any city which maintains a paid Fire Department and Police Department to pay for the care of any fireman or policeman who suffers an injury while performing his duty or who contracts illness or disease caused by the performance of such duties.

The only other statutory enactment which has a direct bearing or is specifically pertinent to this question is Section 40-1202 of Burns' Indiana Statutes Annotated, 1933 (Pocket Supp.), same being Chapter 172, Acts of 1929, as amended. This statute provides that the Workmen's Compensation Law shall not apply to employees of municipal corporations who are members of the Fire Department or Police Department and who are also members of a Firemen's Pension or a Police Pension Fund. This law obviously eliminates the liability and therefore the necessity for any municipality to carry workmen's compensation insurance under the terms of the Workmen's Compensation Law. However, this does not in any way eliminate or relieve the municipality of its liability fixed by Chapter 71 of the Acts of 1941.

A search of the statutes of Indiana fails to disclose any statute or law which either specifically authorizes or in any