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 in 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
way prohibits the municipality from insuring against its legal liability. As a matter of sound business logic it would seem that any governmental unit should insure itself, if possible, against any legal liability such as the one fixed by Chapter 71 of the Acts of 1941 (48-6168-9 Burns’ 1933 Supp.) because of the frequent and dangerous hazards involved in the employment of policemen and firemen, if authorities can be found therefor.

Persuasive of this argument and as showing the attitude of the Legislature on the question of insurance for cities, I call your attention to a recent enactment of the General Assembly—Section 39-1819 Burns’ Indiana Statutes Annotated 1933 (Pocket Supp.), same being Chapter 52, Acts of 1941. This law empowers cities to purchase insurance covering their officers, agents, appointees and employees on account of any liability incurred as a result of the operation by such persons while on state or city business of any motor vehicle owned by the state or city. This law limits the liability of the city or state to the maximum coverage under the policy. Chapter 71, Acts of 1941 places no such limitation on the city’s liability.

A governmental unit’s right, if not duty, to insure its property against loss by fire, wind, etc., is well established in Indiana and throughout the nation.

Clark School Township v. Home Insurance and Trust Co. (1898), 20 Ind. App. 543;
100 A.L.R. 581 (Note page 600);
14 American Jurisprudence, pg. 208;
43 American Jurisprudence pg. 112.

A city which has the proper authority and power to conduct any given enterprise or purpose unquestionably has the implied power to do those things which are necessarily incident thereto and which are necessary to carry out such enterprise or purpose. Under its power and duty to protect property against fire and to safeguard life and property, it has been held that a city has the incidental implied power to offer a reward for the arrest and conviction for anyone guilty of arson within the municipal area.

Choice v. Dallas (1919), 210 S. W. 753.
A city possesses manifold miscellaneous implied powers which arise as the result of a statutory enactment or of an inherent power. See McQuillen on Municipal Corporations, Second Edition, Revised Volume 1, Section 384.

As I have suggested before, the right and duty of a governmental unit to insure its property against loss by fire, etc., is incidental to the unit's power to own and manage its property. It therefore seems analogous that a similar duty to insure against the positive statutory liability imposed by Chapter 71 of the Acts of 1941, which latter liability is not limited and which because of the hazardous employment involved could conceivably be even more disastrous from the financial standpoint than a loss by fire. Since the liability which is fixed under Chapter 71 of the Acts of 1941 must be paid from the general fund, any loss thereunder would come from tax funds and I am of the opinion that the city and its taxpayers are entitled under the law to be protected in so far as is possible from such liability. This power does not extend to carrying insurance against acts or under circumstances in which a municipality has no liability.

It is my opinion, therefore, that a city is empowered to carry insurance on the liability which is created by Chapter 71 of the Acts of 1941 and the opinion of the Attorney General under date of October 9, 1941, on the same subject is superseded.

OFFICIAL OPINION NO. 65

June 24, 1946.

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

Dear Sir:

This will acknowledge receipt of your letter of June 21, 1946 in which you ask for my opinion concerning the legality of the payment by the Auditor of Hendricks County of certain funds raised by taxation to Central Normal College. In your letter you state that the funds in question were raised