Hon. C. C. Clifton, Director,
Board of Public Printing,
State House Annex,
Indianapolis 4, Indiana.

Dear Mr. Clifton:

Your letter of recent date asks for an official opinion upon the following facts:

"The Board of Public Printing, at its meeting on November 23, requested the Director to secure an opinion from the Attorney General as to whether they have the authority to change provisions of the existing contracts for State printing and office supplies. Clauses of the contract involved are sections 35, 36, and 37, under General Requirements.

"Upon the lifting of OPA ceilings, practically all paper prices, as well as many supply items, have increased considerably in cost. Before the war, paper prices under our contracts could be revised either upward or downward every quarter of the contract year; but when paper was rationed, this clause was changed to read that paper prices could be revised every thirty days, and that the date of the Printing Board order would determine the price of the paper.

"Contractors and bidders are now asking that this thirty-day clause be waived and that they be permitted to bill these items at the price prevailing at time of delivery. These requests are brought about by the fact that, on many orders, it is impossible to secure sufficient stock for immediate delivery; therefore, before the order is delivered, which is sometimes as much as ninety days, the prices to them have increased."

Sections 35, 36 and 37 of the State Printing Contract, covering the period of July 1, 1946 to June 30, 1948, which are referred to above, are as follows:

"No. 35. Paper Price Revision: All prices of paper stock specified and bid on under these specifications
shall be firm for each 30 days of the contract and shall be revised either up or down for the following 30 days, depending on the advance or decline in the paper market.

"No. 36. In order for the contractor to be entitled to a revision in contract prices to compensate him for a rise in the market price of paper, he shall submit proof to the Board before the commencement of each 30-day period that there has been a change in paper prices either up or down. Should the contractor fail so to notify the Board, he shall lose the privilege of an upward price revision, but the Board may insist upon a downward price revision in accordance with the actual trend of the market.

"No. 37. The revision of the paper prices shall be made on a percentage basis. For example, if a contractor bid a price of 15 cents per pound on a certain paper, and the jobber's printed list shows that there has been an advance of ten (10) per cent over the printed price of the previous period, the price of the paper in question will change to 16.5 cents per pound for the ensuing period. The price for paper will be figured as of the date of issue of Printing Board order."

The foregoing three sections are a part of the General Requirements of the State Printing Contract and are in existence at the present time. Also, it is my understanding that the foregoing three sections were a part of the general requirements and specifications for the State Printing Contract at the time that competitive bids were advertised for and received by said Board.

Section 63-1645 of Burns' 1943 Replacement (1945 Supp.) expressly requires, the Board of Public Printing to advertise for competitive bids for public printing, lithographing, binding, stationery, electrotypes, engraving, printing materials and other office supplies required by the various departments, boards and commissions during the ensuing year or more, pursuant to specifications prepared by the Board under the classifications and divisions thereof, hereinbefore described. It would thus appear that at the time bids were advertised
for and received and the contracts let, they were based upon Sections 35, 36 and 37 of the General Requirements, which provided in effect that the prices for certain items should be firm for thirty (30) days, and shall be revised either up or down for the following thirty (30) days depending upon the advance or decline in the paper market.

Now it is proposed that the State Printing Board waive this requirement of a firm price for thirty (30) days, so that the price would be that as of the date of delivery of the items ordered. This would result in a substantial variance of the contract entered into and would result in a substantial benefit to the contractors, which other bidders did not have at the time bids were advertised for, received and the contracts let.

Section 46 of 43 American Jurisprudence, page 789, states the general rule, concerning the authority of the state or its subdivisions, to modify or change existing provisions of a contract, as follows:

"* * * After bids have been made upon the basis of plans and specifications prepared by public authorities and given out to all interested bidders, no material or substantial change in any of the terms of such plans and specifications will be allowed without a new advertisement giving all bidders opportunity to bid under the new plans and specifications. Public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into, containing substantial provisions beneficial to the bidder which were not included in the specifications, is void. Any other course would prevent real competition, lead to favoritism and fraud, and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications. A contract let upon the basis of anything else than the advertised plans and specifications would be one let without the competitive bidding which is necessary to give it validity."
“Cases are legion in which contracts have been condemned by reason of the departure from the notice or specifications in some particular which was substantially favorable to the bidder. Among particular departures from the advertised plans and specifications that have been regarded as material may be mentioned an extension of the time within which the proposed work is to be completed, in cases where time is of the essence of the contract, a stipulation for the use of paving materials different from that designated in the advertised plans and specifications, or setting a different price for a portion of the work. And the courts will not permit this rule to be circumvented indirectly by permitting public authorities after entering into a legal contract pursuant to the advertised plans and specifications, later to make a new contract or supplemental contract with the successful bidder embodying changes in these plans and specifications. * * *”

(Our emphasis).

Also, in the case of Wickwire, et al. v. City of Elkhart, et al. (1895), 144 Ind. 305, it appeared that bids had been advertised for by the City of Elkhart for a public improvement, but the contract was actually let on terms different from those contained in the advertisements. In holding the contract to be void the Indiana Supreme Court said as follows at page 311:

“In this instance Nims secured the contract upon terms more favorable and entirely different from those upon which all others formed their bids. When his bid was accepted, striking out the features which departed from the elements upon which all bids were asked and received, if it did not destroy his bid it was so because he was concurring in the bid made new by the alteration. He thus had the advantage of two bids. But if such features were stricken out to place all bidders upon an exact equality and give no preferences to any, the contract not having been executed upon the bid so reformed was as if made without bids. In brief, the contract in this case was not awarded upon the bid
of Nims, nor was it awarded upon the competition held."

From the foregoing authorities it is my opinion that a waiver by the State Printing Board of the thirty (30) day firm price requirement contained in Section 35, above quoted, would result in the contractor receiving benefits from the contract upon terms more favorable and different from those upon which all others formed their bids and, therefore, would destroy the purpose of competitive bidding in this type of case.

In answer to your question, therefore, it is my opinion that the Board of Public Printing does not have the authority to waive the thirty (30) day clause contained in Section 35, above quoted, and permit contractors to bill the cost of paper as of the cost at delivery.

OFFICIAL OPINION NO. 103
December 31, 1946.

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

Dear Mr. Ruston:

I have your letter of December 23, 1946 in which you request an official opinion upon the following question:

"The city of South Bend has no treasurer other than the county treasurer and such county treasurer has charge of the collection and disbursement of the Barrett Law assessments of such city. It is necessary that clerks be employed to assist the county treasurer in the performance of such duties.

"This department has been asked whether the appointment of such clerks to assist the county treasurer are to be made by such county treasurer or by the mayor of the city of South Bend."