PUBLIC INSTRUCTION: School bus contracts, procedure in awarding same.

May 10, 1943.

Hon. Clement T. Malan,
Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Dr. Malan:

This will acknowledge receipt of your letter dated May 4th, 1943, in which you state that:

"Some misunderstanding has arisen as to the procedure to be followed in awarding school-bus drivers' contracts under the provisions of Chapter 200 of the Acts of 1943."

Your letter refers to my opinion to you dated April 19th, 1943, from which the following language is quoted, to-wit:

"Township school trustees are required to advertise for bids as provided by Chapter 200 of the Acts of 1943."

Your present letter then quotes from Section 3 of Chapter 200, Acts 1943, as follows:

"Before contract negotiations shall be entered into by the trustee and advisory board of any township in this state the trustee shall give ten days notice of such proposed negotiations by posting notice in at least three public places within such township and by one publication of such proposed negotiations in each of two newspapers."

Your specific questions are:

1. "Will you kindly advise whether such notice shall provide that cash bids are to be submitted or that such notice shall advise present or prospective school-bus drivers that contracts will be negotiated at a certain time and place. The use of the word 'bids' in your opinion has been construed by some trustees
and drivers to mean that cash bids must be submitted as in the past."

2. "Does this act give the township trustee and advisory board the option of accepting bids for contracts or negotiating for contracts without the acceptance of bids, after the provided notice has been given, or does it make the negotiating of contracts without bids the sole procedure to be followed."

Before answering your questions I refer you to all of the language in rhetorical paragraph 1, page 3, of my opinion dated April 19, 1943, which reads as follows:

"Applying the law as established by the above cited authorities to the provisions of Chapter 200, Acts of 1943, it is my opinion that, under the provisions of Sections 2 and 3 of Chapter 200, of the Acts of 1943, township school trustees are required to advertise for bids as provided by Chapter 200 of the Acts of 1943, but that, after due notice has been given as required by the Act, the township trustee, with the consent of the advisory board, has a discretion as to the bids which should be accepted, and for this reason, the township trustee, with the consent of the advisory board can negotiate with the various bidders and award a contract, and that they are not necessarily required to award the contract to the 'lowest and best responsible bidders' as required by the provisions of Chapter 161 of the Acts of 1941, which has been suspended until March 15, 1945."

The words "bid," "bidder" and "negotiate" contained in the above language are defined by Webster as meaning the following: "Bid—an offer—a statement of what one will give or do for something to be done or furnished." "Bidder—one who bids—one who invites—offers a price." "Negotiate—to conduct communications or conferences as a basis of agreement." The term "contract" has been defined by Blackstone as "An agreement upon a sufficient consideration to do or not to do a particular thing." See Webster's Dictionary. To reach an agreement there must be an offer by one party and an acceptance of the offer by the other party, with a sufficient
consideration moving between the parties. Such an offer must either be in writing, or oral, or may be both. In view of the meaning of the above phrases and words it would seem that if all of the language contained in my opinion of April 19th, 1943, is construed in its entirety, there should be no confusion or misunderstanding as to the proper construction to be placed upon Chapter 200, Acts of 1943.

Section 3, Chapter 200, Acts 1943, provides:

"The trustee, at least ten days prior to the time for the negotiation of said contract, shall prepare in writing a description of the route or routes to be let, giving the approximate length of each route, the equipment required to be furnished by the school-bus driver, and any other necessary information to advise the school-bus drivers of the terms and conditions of such proposed contract. * * * Before contract negotiations shall be entered into by the trustee and advisory board of any township in this state, the trustee shall give ten days notice of such proposed negotiations by posting notice, etc., * * * that specifications for the several school-bus routes are on file in the trustee's office and that said trustee, with the advice and approval of the advisory board of such township, is prepared to negotiate contracts for the letting of the several bus routes of said township."

Chapter 200, Acts 1943, is silent as to the manner in which any such negotiations shall be conducted, whether in writing, by written bids, statements, proposals or orally. Therefore, either method, or all, would be legal and come within the purview of the Act. However, Burns' R. S. 1933, Section 65-104, provides:

"The duties of township trustees shall be: First. To keep a true record of his official proceedings in a book to be provided for that purpose."

Again Burns' R. S. 1933, Section 65-301, defining the duties of the advisory board, reads in part:

"* * * Such board shall keep a record of their proceedings in a separate book, to be furnished by such
trustee, and kept as a part of the record of the town-
ship, to be known as 'The Record of the Advisory
Board' of such township, and to remain in the custody
of the chairman of such board.'"

In construing the above quoted language the Appellate
Court of Indiana in the case of First National Bank v. Van
Buren School Tp., 47 Ind. App. 79, said:

"It will be observed that the record of the advisory
board is a public record, and that the proceedings of
the board are required to be set out therein in full.
This record is open to inspection to all persons doing
business with the township."

In negotiating a school-bus route contract under Chapter
200, Acts 1943, the township trustee and advisory board are
not acting as individuals, but are acting in their official
capacity and awarding contracts calling for the expenditure
of a large amount of public funds, which are derived from
taxation.

Therefore, it would seem that although Chapter 200, Acts
1943, does not expressly require that persons desiring to
obtain a contract must submit a written bid or offer, state-
ment or proposal, nevertheless in view of the above quoted
statutes requiring a public record to be kept of all official acts
of township trustees and advisory boards, a sound public
policy and fidelity to public duty and trust would render it
advisable that the township trustee and advisory board re-
quire all persons desiring a contract to submit a statement,
bid or offer in writing as to what they are each willing to do,
or furnish, so that the same may be filed and thereby a per-
manent public record may be preserved for public inspection.
Such requirements are reasonable, practical and create no
unnecessary hardship upon the part of any one, and give all
persons concerned an opportunity to know the basis upon
which a contract is awarded. In transacting official duties
and discharging a public trust, there should be no reason for
concealment, especially in matters involving the expenditure
of public funds.

In view of the above reasons my answer to your first ques-
tion is that it is not necessary for the notice to provide that
cash bids only are to be submitted. The notice must state that on or after a certain date contracts will be negotiated and awarded. The date must not be less than ten days from the date of posting of the notice or the first publication of notice as provided in Section 3 of Chapter 200, Acts 1943.

Your second question cannot be answered by an either yes or no. As I have heretofore stated in this opinion, a contract cannot come into existence until there is an offer and an acceptance. A bid is an offer. In the letting of the contract by the trustee and advisory board, they will have to receive and accept an offer made by one, who proposes to operate a school-bus route. It would be impossible to negotiate a contract without accepting some offer which, in the final analysis, is only a bid on the part of the offerer. The trustee and advisory board in awarding the contract could receive a series of offers from the proposed operators of the routes, and these need not necessarily be in writing. As a result of such negotiation, the trustee with the consent of the advisory board could then accept the offer which was most advantageous to the township. The Act does not make the negotiating of contracts without bids the sole procedure to be followed.

SEcurities commiSSionER: Whether certain certifi-cates to be issued by the Indiana Mutual Life Insurance Company of Elkhart, Indiana, are securities.

May 10, 1943.

Mr. Warren Day,

Securities Commissioner,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of May 5, 1943, requesting an official opinion as to whether the certificate, issued by the Indiana Mutual Life Insurance Company of Elkhart, Indiana, pursuant to Section 97 of the Indiana Insurance Law of 1935, is a security within the meaning of the Indiana Securities Law. The following is a copy of the certificate referred to: