STATE PURCHASING AGENT: In regard to the settlement of coal company claims where no formal contract was entered into to evidence the terms of an accepted bid; same where formal contract had been entered into and price of coal has actually raised.

June 26, 1943.

Hon. L. E. Reeves,
State Purchasing Agent,
Central Purchasing Bureau of Indiana,
404 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of June 18, 1943, requests an official opinion concerning claims by sellers of coal for state institutions during the fiscal year beginning July 1, 1942. You state:

"Many of the coal companies operating under OPA's order raising the maximum price of coal, have billed the state institutions at the rate of 20c per ton since March 13th. Since the discussion with Mr. Wilkerson, the issue probably hinges around 17.87 rather than 20c. This change was based upon all coal shipped since March 13th.

"Some operators entered into a contract, some did not. Some attended the governor's meeting and had already sent their contracts in, and some had not, so you may have a point of equity at issue in order that all be treated on the same basis if you deem that to be an essential factor in the matter.

"We have submitted claims on Pendleton, New Castle, Knightstown, Richmond, Evansville, Central State, Madison, Muscatatuck and the School for the Deaf."

Certain documents concerning the purchase of coal for these institutions have been submitted along with your letter, and this opinion is based upon the knowledge that you, as State Purchasing Agent, gave legal notices that bids would be received for coal for state institutions, and that pursuant to said notices, bids on forms submitted by you were in fact received for each of these institutions. However, as stated in your
letter, some bidders refused to enter into any formal written contract following the submission of the bids, while other bidders did enter into such formal written contract on forms furnished by you. The uniform bid, and the uniform contract for those bidders entering into formal written contracts, have also been furnished for aid in this opinion. It will not be necessary to set out the uniform bid or the uniform formal contract in their entireties, but certain provisions are hereinafter set forth.

At the outset of this opinion it is well to set forth that part of the statute defining your powers as State Purchasing Agent. The statute concerning your powers to contract, provides as follows:

"The state purchasing agent shall have power and it shall be his duty to act as purchasing agent for all state offices, departments, commissions, boards, bureaus, and state institutions in the purchase of supplies, material, furniture, furnishings and office equipment. He shall secure information as to market prices, reasonable values and cost of supplies and material to be purchased. He shall advise and give such other aid and assistance as may be required in the making of all other purchases. He shall have such power as is now provided by law governing the boards of trustees of the various institutions in the purchase of supplies, material, furniture, furnishings and office equipment and when bidding and the publication of notice are required by law, such state purchasing agent shall act as the agent of such state offices, departments, commissions, boards, bureaus, and state institutions in informing prospective bidders and in doing all things necessary for the securing of advantageous bids. * * *"

60-606 Burns' 1933 Supp.; Acts 1941, ch. 39, Sec. 4, p. 121.

The statute concerning purchases by or in behalf of state benevolent, reformatory and penal institutions is as follows:

"In the purchase of supplies, commodities or services that enter into the maintenance or operation of
any of the institutions covered by this act, it shall be
the duty of the board to invite competitive bids through
sealed proposals to the president of the board of each
institution, and the lowest and best responsible bidder
shall be awarded the contract, and the same provision
shall apply to the construction and equipment for all
buildings for any such institution. Public notice of
such bids shall be given by publication in the two (2)
leading newspapers in the county where such institu-
tion is located, and otherwise, if considered beneficial.
If such board deems it advisable and in the interest
of economy, it may, in its discretion, buy certain ar-
ticles in quantity, or may contract for the purchase of
particular commodities or services to be delivered or
furnished to the institution over such period of time,
and to be paid for at such rate or price, as it may deter-
mine. Such fact, however, shall be particularly stated
in the notices. Blank forms for bids shall be furnished
to all applicants but bids shall not be rejected because
not contained on such form. Any or all bids may be
rejected.”

22-105 Burns’ 1933; Acts 1929, ch. 28, Sec. 1,
p. 50.

Section 6 of Chapter 231 of the Acts of 1941, pages 890 and
891, also makes provisions for competitive bids:

“The purchase of any of the items included under
all other operating expenses, or equipment that may
enter into maintenance, repairs or equipment of any
institution or department of the state government cov-
ered by this appropriation act, shall be by competitive
bids as far as it is practicable, and to this end it shall
be the duty of the proper authorities to invite competi-
tive bids through sealed proposals, and the lowest and
best responsible bidder shall be awarded the con-
tract; * * *.”

This is not the first time this office has been called upon
for an opinion concerning the effect of these statutes. On
October 14, 1938, the Attorney General gave an opinion to
Hon. L. L. Needler, State Purchasing Agent, wherein it was stated:

"* * * In my opinion there would be no discretion to omit the requirement for competitive bidding, and in the case of purchases for institutions the publication of the notice as to purchases made upon an annual basis, nor would it be proper to omit the same requirement in case of quarterly or monthly purchases * * *


From an examination of each of the above statutory provisions, and construing them together, it is apparent that the legislature intended that coal be purchased for state institutions pursuant to contracts entered into and based upon competitive bids received as provided by these acts.

As stated in your letter, it will be noted that two separate states of facts are presented:

(1) Coal purchased from the seller who executed a uniform written contract.

(2) Coal purchased from the seller who did bid to furnish coal but who subsequently refused to execute any formal contract after the submission of his bid.

These questions will be examined in the order named.

(1) Each bid furnished by you embodied the following provisions:

"* * * That, the price for the above grade and size is not to be higher than the applicable maximum price established therefor by the Office of Price Administration, or a price in conformity with the laws and regulations of the Bituminous Coal Commission or other Governmental units. * * * That, a written contract and a bond equal in amount to 10% of the total amount of the purchase not including freight, will be required of all successful bidders."

Also, each formal contract contained the following provisions material to this opinion:
"2. The Agent agrees, for an ______ on behalf of such ______ state institution) that said ______ state institution) will pay ($_______) per ton to said Company for such coal as is furnished by said Company pursuant to the terms of a 'Coal Bid' herebefore referred to.

"3. The Agent, for and on behalf of said ______ state institution) agrees to accept the coal furnished by the Company if such coal and the delivery thereof conform to the terms and conditions of the 'Coal Bid' set forth in item one (1) of this agreement.

"* * *

"5. It is further agreed by and between the Agent and the Company that the said ______ state institution) and the Company will each be bound by the specifications as set out in the 'Coal Bid' in item one (1) of this agreement which bid was heretofore submitted to said Agent and the Central Purchasing Bureau of the State of Indiana. Provided, however, that if the Act of Congress known as the Bituminous Coal Act of 1937, shall expire by limitation, as provided in said Act, and shall not be renewed, this contract shall be and is hereby cancelled after the expiration of four weeks from the date of such expiration.

"* * *

"8. This contract and the performance of all provisions thereof are expressly subject to the Bituminous Coal Act of 1937, and the proper orders and regulations issued thereunder by the Bituminous Coal Division, United States Department of the Interior.

"* * *

"10. In case the coal is applied by the Buyer to a use other than that stated herein, the Buyer shall notify the seller in writing and the Seller shall charge and the Buyer shall pay not less than the applicable minimum price for such coal in effect at the time of such change in application for the use to which it is actually applied.

"* * *"
"12. If the price herein is not paid on the date of payment (including the ten (10) day grace period) specified in Rule 1 of Section VII of the Marketing Rules and Regulations established by the Bituminous Coal Division of the United States Department of the Interior, the Seller shall charge and the buyer shall pay interest as required in the aforesaid Rule 1 of Section VII, commencing on the day following the date payment is due. Only the receipt of a remittance by the seller shall be deemed to constitute payment of the account, as provided in these Marketing Rules and Regulations."

Rule 3 of Section VI of the Marketing Rules and Regulations of the Bituminous Coal Commission provides:

"Rule 3. No contract shall be made at a price below the applicable minimum price as established by the Division at the time of the making of the contract, and every contract shall provide that the price to be paid for the coal to be delivered thereunder shall be not less than the applicable minimum price in effect at the time of delivery."

It is a well settled principle of law in construing contracts that the law of the place where the contract is executed becomes a part of the contract, unless the parties specifically exempt themselves from the law and it is a provision that may be contracted against, and that the law of the place of execution, statutory or otherwise, is deemed to have been written into the contract.

13 C. J. 560;
Hogston v. Bell (1916), 185 Ind. 536;
Dollman v. Pauley (1930), 202 Ind. 387;
Mouch v. Indiana Rolling Mill Co. (1931), 93 Ind. App. 540.

Likewise, it is well settled that any Statute of the United States which properly applies to an Indiana contract, and any rules and regulations made pursuant to such Federal Statute, become a part of the contract to the same extent as if they
had been specifically written into the contract, and all rights of the parties to the contract are limited and governed by any applicable Federal Statute or lawful rules or regulations made pursuant to such Federal Statute. In fact, the statutes of Indiana provide specifically that applicable Federal Statutes are to be considered as part of the law of this state.

"The law governing this state is declared to be:

"First. The Constitution of the United States and of this state.

"Second. All statutes of the general assembly of the state in force, and not inconsistent with such constitutions.

"Third. All statutes of the United States in force, and relating to subjects over which congress has power to legislate for the states, and not inconsistent with the Constitution of the United States."

Sec. 1-101 Burns', 1933; 1 R. S. 1852, ch. 61, Sec. 1, p. 351.

Therefore, in cases where a formal written contract was executed between you and the seller, it is my opinion that the minimum price for any given time of sale established by any lawful order or regulation of the Bituminous Coal Commission would be the minimum price the State of Indiana or any state institution thereof would be legally liable to pay, even though the minimum price as established by the Bituminous Coal Commission may be in excess of the price as bid, and the price as provided in the contract executed pursuant to the bid. But if the minimum price as established by the Bituminous Coal Commission for coal at any given time of delivery did not exceed the contract price, neither the State of Indiana nor the institution thereof covered by the contract would be legally liable to pay any amount in excess of the bid or contract price.

(2) The legal problems involved in the state of facts where the seller submitted bids but no formal written contract was ever agreed upon or executed between you and the seller, presents legal questions of considerable importance to the State of Indiana, and one which, so far as I have been able to determine from a search of the Indiana cases, no
decision directly in point has ever been made by our Supreme Court or Appellate Court.

It is evident from an examination of your statutory powers, the statutes concerning purchase of materials for state institutions, and from your bid form as well, that a formally executed written contract was contemplated. Therefore, we have a case presented where necessary coal was ordered, delivered, and has been used by state institutions, without any written contract providing for the rights of the parties. It is well settled in this state that public officers only have such power to contract as may be granted by law, and that any person dealing with a public officer in this state must take due notice of the officer's limited right to contract, and that all persons attempting to contract with any public officer are bound, and are charged with notice of, these limitations.

Hord v. The State (1906), 167 Ind. 622;
State ex rel v. Board of Commissioners of Fountain County (1896), 147 Ind. 235;
City of Indianapolis v. Wann, Receiver (1895), 144 Ind. 175;
Lund v. Board of Commissioners of County of Newton (1910), 47 Ind. App. 175.

There is nothing in the statutes concerning purchases of coal for state institutions which declares an agreement made in violation of the statutory procedure absolutely void, nor is there any penalty provided for making such unauthorized purchases. If such had been the case, the courts would refuse relief to a seller under any theory. Nor was there anything about the transactions which would be against public policy, and so vitiate the entire transaction. On the other hand, coal for state institutions is a most essential necessity which must be furnished for the institutions. Every requirement of the law has been complied with, with the exception of the execution of a written contract pursuant to the bids submitted.

It has been contended on the part of some of the sellers of coal that since there was no written contract covering the purchase of coal for the entire fiscal year beginning July 1, 1942, that the terms and conditions stated on the seller's acknowledgment of the purchase order to the state institutions would
constitute the contract for sale of coal, and that therefore the state would be bound by these terms. This would be true if the seller were dealing with a private person, but the law of public contracts permits no such freedom in disregarding the statutory requirements concerning contracts. To do so would permit a circumvention of the plain intention of the law, and make the statute of no effect whatever.

The question is then presented, is there any liability upon the state institutions to pay for this coal which was requisitioned and used by them, and if there is a liability, what amount must the institutions pay?

If a private person had received and used the coal under similar circumstances to those involved in this case, there would be no doubt but that the law would imply a contract to pay for the same.

"* * * Where, in the absence of an express contract or order, one person sends or delivers goods to another under circumstances which indicate that a sale is intended, and the one to whom the goods are sent or delivered, with knowledge of the facts, does not object or offer to return the goods, within a reasonable time, but retains and uses or otherwise deals with them as his own, a contract of sale and purchase will be implied, * * * ."

55 C. J. 112, 113.

I can see no reason why this law of implied contracts should not apply in this case, since it was the intention of both parties that the coal be sold to, paid for and used by the state institutions, and in fact all of the coal delivered has been paid for at the bid price without any dispute until the change of maximum price fixed by the Office of Price Administration effective as of March 13, 1943.

It has been recognized in this state that under certain circumstances an action on a quantum meruit against a unit of government is proper.

"There is no merit in the claim of appellant that the county cannot be charged with an assumpsit, although labor and material have been done and furnished for it,
and the same have been accepted and used by the county, because of the informal character of the board meeting at which such matters were agreed to. The individual members of the board seem to have been actively engaged in superintending the erection of the building, and we think that as individuals they are to be so far regarded as agents of the county as to be able to charge the county on a quantum meruit for a sub-basement that the county is enjoying the benefit of."

Board of Commissioners of Fulton County v. Gibson (1901), 158 Ind. 471, 488.

The obligation of the State of Indiana to pay for coal it received and used, even though it was so done by mistake, was recognized in Michigan Central Railroad Company v. State of Indiana et al. (1927), 85 Ind. App. 557. In that case the carrier delivered a carload of coal to the Indiana State Prison by mistake, and it was there used by that institution. In permitting a recovery against the state, the court said at page 561 of the opinion:

"* * * The obligation forming the basis of the action is essentially an obligation to restore a benefit received by the defendant, and not to compensate the plaintiff for damages sustained. The obligation rests upon the principle that the defendant—the state in this case—cannot be allowed, in equity and good conscience, to keep what it has obtained. * * *

The Uniform Sales Act makes the following provisions concerning the price to be paid by the buyer:

"(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

"(2) * * *

"(3) * * *

"(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is
a question of fact dependent on the circumstances of each particular case.”

58-109 Burns 1933; Acts 1929, ch. 192, Sec. 9, page 628.

The provisions of the Uniform Sales Act that “it (the price) may be determined by the course of dealing between the parties” is certainly broad enough to bind the parties as to the price for coal sold before the dispute arose following the raise in maximum authorized by the Office of Price Administration, which of course would enforce the bid price, which was in fact paid.

Does clause (4) of Section 9 of the Uniform Sales Act (supra) control the price of coal delivered since the effective date of the Office of Price Administration rule increasing the maximum price? This section must be construed with the statutes defining the method of contracting for supplies for state institutions (supra), and these provisions clearly intend that supplies, such as coal, be purchased at the bid prices. Of course, this bid price might be raised by operation of law if the minimum price fixed by the Bituminous Coal Commission exceeded the bid price, in which event the minimum price fixed by that federal agency would become the bid price. It is my understanding that at all disputed times when coal was purchased, the wholesale market price of coal was equal to or in excess of the bid price. Therefore, under the second state of facts, it is my opinion that the sellers should recover only the bid price, or the minimum price fixed by the Bituminous Coal Commission if that minimum exceeded the bid price, since to permit a recovery of a higher price would be to violate the public policy of this state as declared by the statutes regulating the purchase of supplies for state institutions.

The court in Michigan Central Railroad Company v. State of Indiana et al. (1927), 85 Ind. App. 557 (supra), felt controlled by this public policy, and refused to permit the plaintiff to recover the reasonable value of the coal misdelivered, but did permit recovery of $3.40 per ton, which was the bid and contract price which the Indiana State Prison was paying for similar coal purchased from other sellers. At page 561 of the opinion the court said:
"* * * It would be contrary to sound public policy to require the state to pay more for coal delivered and received by mistake than it would be required to pay under a contract resulting from competitive bids. We hold that the measure of recovery is the state's contract price, and not the market value of the coal at the time and place of misdelivery."

A question of interest may also be involved in these transactions. The State of Indiana may become liable for interest, if it contracts for the same.

Carr, Auditor et al. v. State ex rel. (1890), 127 Ind. 204.

Rule 1 of Section VII of the Marketing Rules and Regulations of the Bituminous Coal Commission, as adopted February 11, 1943, provides as follows:

"(1) Unless payment of an account for the sale of coal is received by the seller within ten (10) days after the due date of such an account as provided in these Marketing Rules and Regulations, the seller shall charge and the buyer shall pay interest from and after the due date of the account at the rate of not less than five (5%) per centum per annum on the invoice price of the coal sold; Provided, however, that no interest need be charged on the account by the seller unless such interest exceeds fifty (50c) cents on the total purchases for any one month, except where an account remains unpaid thirty (30) days after the due date thereof interest must be charged from the due date, regardless of the amount of such interest; Provided, further, that in the case of sales made to State or local Governments, or any agency thereof, interest need not be paid at a rate in excess of, but shall be paid at a rate of not less than that prescribed by applicable statutes or rules as the maximum rate of interest governing such payments, where that prescribed maximum is less than five (5%) per centum per annum; and Provided, further, that the provisions
of this Rule shall not apply in the case of sales made to the Federal Government or any agency thereof."

It is my opinion that this rule is binding upon the State of Indiana and that the state is legally liable for interest in any case which may fall within the rule above set forth.

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INSURANCE COMMISSIONER: Rule-making power of the Commission with respect to rates to be paid by casualty insurance companies.

June 28, 1943.

Hon. Frank J. Viehmann,
Insurance Commissioner,
State House,
Indianapolis, Indiana.

Dear Mr. Viehmann:

I have before me your letter requesting an official opinion as to the right and authority of the Department of Insurance, under its rule-making power, to enact Rule No. 9, second amendment, which is as follows:

"WHEREAS, on the 15th day of May, 1939, the Department of Insurance for the State of Indiana did promulgate Rule No. 9 of the Department of Insurance and on the 5th day of September, 1939, said Department did amend said Rule No. 9, which said Rule No. 9 and amendment thereto are now in full force and effect; and,

"WHEREAS, since the promulgation of Rule No. 9 and the amendment thereto, the Department of Insurance, acting by and through the Insurance Commissioner has continued investigation of conditions and contingencies affecting the automobile insurance business covered by such rule and amendment thereto; and,

"WHEREAS, the Department has ascertained that as of the 22nd day of November, 1942, the Government of the United States shall limit by a gasoline rationing system, the operation of cars of the citizens of the