CENTRAL PURCHASING BUREAU: Opinion supplementing the official opinion of June 26, 1943.

July 14, 1943.

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

Dear Mr. Reeves:

Your letter of July 13th requests an official opinion to supplement an opinion written by me on June 26, 1943, concerning state purchases of coal during the fiscal year beginning July 1, 1942, and to interpret the legal effect of the second grammatical paragraph of Item 5 and Item 5B of a proposed form of combined coal bid and contract for the fiscal year beginning July 1, 1943. Your specific questions are as follows:

"1. The operators desire a written opinion supplementing your decision to the effect that your opinion is not in conflict with the variable terms of the contract; these variable terms being the provision which permits coal companies to raise or lower prices in the event there has been an increase or decrease in the cost of operation.

"2. Should the State of Indiana accept a contract in the form that this is drawn, inasmuch as since the original form was drawn up, the United States Congress has seen fit to discontinue the Guffey Coal Act? The Guffey Coal Act relieves the State of Indiana from the tedious detail of auditing or investigating the representation of the coal companies in respect to increases asked for. In practice this may not be pertinent to the question, but it is a possibility that seems to be important."

Your questions will be considered in the order asked.

The specific provisions of the proposed contract concerning which you desire an opinion are as follows:

"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.

"5b. If during the period of this contract the Federal Government ceases to fix maximum prices for coal, then and in that event the price to be paid thereafter by the Buyer shall be the price as above provided in effect at the time the Federal Government ceases to fix maximum prices.

"It is further agreed that in the event of any increase or decrease in the cost of production, sale or delivery of the coal shipped under this contract, thereafter resulting from (a) any changes in such wage scales and/or hours of employment and/or method of computing hours of employment at the mine; (b) arbitration; (c) enactment of federal or state legislation; (d) imposition by federal or state statutes of a tax on the sale or mining of coal, or subsequent changes in the rate of such tax; (e) the imposition by federal or state statutes of a levy or tax on pay rolls, or otherwise, for unemployment insurance, old age pensions and retirement annuities; (f) any increase in the level of cost of supplies and/or repairs at the mine; that the price or prices specified in this agreement shall be correspondingly increased or decreased on such tonnage as remains to be shipped on and after the date on which such increases or decreases in the cost of production, sale or delivery of coal become effective. If freight rates, or any taxes thereon, are included in the contract price and such freight rates, or any taxes thereon, are changed, the Seller shall receive the benefit of any advance and the Buyer of any reduction therein. Provided, however, that no decrease hereunder shall reduce the price below the effective mini-
mum price established by the Director of the Bituminous Coal Division, United States Department of the Interior, applicable to such coal at the time of shipment thereof.”

It should be noted that the official opinion to you of June 26th, only dealt with the situation as it existed during the fiscal year beginning July 1, 1942. The facts upon which that opinion was based did not necessitate calling into operation Section 6 of the Budget Act of 1941, (Sec. 6, ch. 231, Acts 1941, pages 890, 891) which provided for “competitive bids as far as it is practicable,” since at the time of the letting for coal in 1942, bids were received for all institutions, part of the sellers did enter into formal written contracts with you, and part of them refused, not for the reason, so I am informed, that the costs of operation might go up or that the O. P. A. might authorize an increase in the maximum price, but for the reason there could be no agreement on what state of facts would constitute excusable delay.

Upon a careful re-examination of that opinion, I fail to find anything therein, either on the law cited applicable to public contracts, or my conclusions on the law, which would justify a holding that that opinion would in any way cast doubt upon the validity of the provisions of the proposed combined bid and contract for this fiscal year. The first part of that opinion dealt with written contracts between the seller and you which had no provisions whatever for an increase in price by reason of an increase of the maximum price authorized by the O. P. A. The second part of that opinion dealt with a situation where sellers had refused to enter into any formal written contract with you after they had bid a specified price, and where they had later claimed that certain printed terms and conditions attached to an acknowledgment of your purchase orders authorized an increase in price permitted by an increase of maximum price authorized by the O. P. A. No bids were solicited on that basis, and no formal contract was executed pursuant to the bid on such a basis, and it was practicable to obtain competitive bids, for they were made and received.

So far as I have been able to determine from a search of the Indiana cases on public contracts, it has never been held
that all terms and conditions of a public contract let pursuant to public bids must be advertised in the notice, provided in the bid, or definitely determined and fixed by the contract. If such were the case, it would never be possible to provide for changes in the plans and specifications, or extras and the payment therefor. Such provisions are proper.

"* * * It does not follow, however, that in case plans and specifications are adopted in which the commissioners reserve the right to make alterations in the plans or in the details of construction, and to adjust the price in the proportion that the alterations bear to the contract price of the whole work, the statute requiring the adoption of plans and specifications is thereby disregarded. Certain definite plans and specifications have been agreed upon and adopted, and deposited with the county auditor for inspection, so that every contractor who desires to submit proposals may know precisely upon what to base his estimates. All that the reservation means is that in case the commissioners should see fit to add something to the general plan at one place, or omit something at another, the contract price should be increased or diminished proportionally. No prudent individual would make a contract for the construction of a building of any magnitude without incorporating a provision, somewhere, making specific and definite arrangements concerning extra work. The provision in question seems to be of that character."

Kitchel et al. v. The Board of Commissioners of Union County, et al. (1889), 123 Ind. 540, 543, 544.

Section 4245 Revised Statutes of 1881, which was in force at the time the rights vested in the above case, provided for the advertising for bids and the letting to the lowest responsible bidder.

Public officers may provide for changes in their discretion:

"The specifications provide that if there be any changes or material alterations necessary, the decision of the architect, trustee and advisory board shall con-
trol. This was a very necessary provision. In the con-
struction of any building, there are always minor
changes to be made to meet conditions as they arise,
and such a provision is a protection to the builder,
especially so in the event of a suit on the contractor's
bond. * * *

663, 672, 673.

When a public officer complies with the statutory require-
ments concerning the manner and method of entering into a
contract of a class he is authorized to make, then the law
vests in him discretion as to its provisions so long as no
statutory prohibition is violated and the rights of the public
are preserved.

“There is nothing in the language of chapter 59 of
the Acts of 1931, indicative of an intention on the
part of the Legislature, to limit or restrict the discre-
tion of the trustee to determine the method that would
be used in the transportation of school children. The
evident purpose of the passage of such statute was
to require competitive bidding in connection with the
letting of contracts to school bus drivers and to obtain
the co-operation of the advisory board and the town-
ship trustee in the awarding of such contracts.”

California School Twp., Starke Co. v. Kellogg
(1940), 109 Ind. App. 117, 124.

Where the public officer acts within his statutory authority,
and enters into a contract otherwise valid, the unit of govern-
ment is generally treated as a private individual.

“* * * There is not one law for the state and an-
other for its subjects. When the state engages in busi-
ness and business enterprises, and enters into con-
tracts with individuals, the rights and obligations of
the contracting parties must be adjusted upon the same
principles as if both contracting parties were private
persons. Both stand upon equality before the law.
* * *”

State v. Feigel (1932), 204 Ind. 438, 445.
The discretion of the state as to the terms and conditions of the contract has been construed to be very broad. In the case of State of Indiana v. Wright (1933), 97 Ind. App. 660, the State Highway Commission for the State of Indiana entered into a contract with the plaintiff for the construction of a state highway. The contract as executed by the parties provided, among other things, for the price to be paid for earth excavation, and that if rock excavation be encountered, it should be paid for at three times the price for earth excavation. The contract also provided that the State Highway Commission should classify the excavation work, and the contract, plans and specifications authorized the engineer to make alteration of the plans or in the character or quantity of the work. The engineer also had authority to order extra work whenever in his opinion it became necessary to properly complete the improvement.

In holding that the State of Indiana was liable to the plaintiff contractor for the rock excavation actually done by the contractor, although disallowed by the engineer, at a contract price of three times the price of the dirt excavation, the court said:

"An examination of the act leads to the inevitable conclusion that it was the intention of the legislature to establish a commission, vested with broad and comprehensive powers, having for its purpose the establishment, construction, and maintenance, as expeditiously as conditions would permit, of a public highway system for the state. While the act expresses the general method of procedure to be followed in the accomplishment of some of its purposes, and sets out specifically the form of bond to be required of contractors for work, it is a significant fact, that while contracts for work must be in writing, there is no form of contract, nor are there any prescribed conditions to be inserted in contracts, contained in the act. We conclude, therefore, that the form and conditions of the contracts for work, were matters to be determined upon by the state highway commission, subject to the statute and the approval of the attorney-general, as to legality and form. Sec. 8287, Burns' 1926; Donnelly, Law of Public Contracts, Sec. 17. The State Highway Commission
has the power to formulate and enter into any contract within the purpose of its creation, which is not prohibited by statute, or against public policy. Schipper v. City of Aurora (1889), 121 Ind. 154, 22 N. E. 878.

"In entering into the contract (the state) laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities, measures with few exceptions, those of a state whenever it enters into an ordinary business contract." Carr v. State (1890), 127 Ind. 204, 26 N. E. 204; City of Indianapolis v. Indianapolis, etc., Co. (1916), 185 Ind. 277, 113 N. E. 369; Cleveland, etc., Co. v. State of Ohio (1912), 85 Ohio State 251, 97 N. E. 967, 39 L. R. A. (NS) 1219."

State of Ind. v. Wright (1933), 97 Ind. App. 660, 664, 665.

In a previous appeal of the same case, the facts disclosed that the specifications provided as follows:

"* * * (1) That the engineer may order changes in the plans, or in the character or quantity of the work, as he may find necessary, not to exceed twenty per cent of the contract price, the contractor agreeing to make the changes at the unit prices bid for the items involved; that work other than that provided for in the contract be performed by the contractor whenever, in the opinion of the engineer, such work is necessary, the work to be done as previously agreed upon by the contractor and the engineer; but 'if no such agreement can be made, or, where the method of payment is impracticable, the director may order the work to be done' on what is termed a 'force account' basis, for which work the contractor is to be paid in the following manner: For all labor and teams, 'the current local rate of wage, to be agreed upon in writing before starting the work,' for the time employed, plus ten per cent; for all materials furnished, the contractor shall receive the actual cost plus ten
per cent; and for any machine power, tools or equipment which it may be deemed necessary or desirable to use, the contractor to be allowed 'a reasonable rental price, to be agreed upon in writing before such work is begun,' the compensation thus provided 'shall be received by the contractor as payment in full for all extra work done on the “force account” basis.'” (Page 247 of opinion.)

The court in this previous appeal held that the complaint was not sufficient to warrant a recovery for the force-account items, since there was “no averment that the wages for labor and the rental price for machine power, tools and equipment were agreed upon in writing before commencement of the action.” State v. Wright (1928), 89 Ind. App. 244, 251. At no place in the opinion is there any suggestion by the court that such “force account” provisions were invalid, and in my opinion such provisions are valid. Such uniform force-account provisions have been incorporated in state highway commission contracts for many years.

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.
In answer to your second question, I wish to state that the Guffey Coal Act is still in force, and it will not expire by limitation until August 23, 1943. If the contract is executed when the act is still in force, the provisions are certainly proper. However, if the contracts should not be executed until after its expiration, or if the act should expire during the life of the contract, I find nothing in the contract which would require redrafting to provide against such expiration.

STATE ATHLETIC COMMISSION: Validity of a rule of commission with respect to unsold tickets for any prescribed event.

July 20, 1943.

Mr. Sam Murbarger, Secretary,
State Athletic Commission of Indiana,
225 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of July 16, 1943, received as follows:

"At the past meeting of the Commissioners of the State Athletic Commission held July 2, 1943, the following rule, which I am herewith submitting for an official opinion of the Attorney General, was unanimously passed by the Commission.

"'It is the rule of the Commission that hereafter the Commission be supplied with the printers' reports of sets of tickets as furnished the promoters throughout the state, that promoters use a new set for each event, and that the unsold tickets together with the ticket taker's stubs be preserved for the Commission's inspection.

"'In case of general admission, roll tickets may be used with the opening and closing numbers included on each inspector's report.'"

The State Athletic Commission of Indiana was created, and the powers and duties of said commission prescribed, by Chapter 93 of the Acts of 1931, same being Section 63-201 to