HIGHWAY COMMISSION, STATE: Public contracts, authority to award where low bidder goes below maximum capacity rating by subsequent contracts.

September 21, 1939.

Hon. T. A. Dicus, Chairman,
State Highway Commission of Indiana,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter with reference to the letting of Bridge Contract 1841 on your August 29th letting. Your letter is accompanied by a copy of a letter from the Chief Engineer to Mr. Atcheson in which the following statement is made:

"On August 29, 1939, bids were opened on Road and Bridge Contracts at 10 a.m.

"On Bridge Contract 1841, F.A.G.M. 17-R, the low bid was submitted by the Bontrager Construction Company of Elkhart, Indiana, the price bid being $110,782.73.

"In the same letting Bontrager Construction Company submitted the low bid on Road Contract 1849, Project 366A, which provides for the paving of Chicago Avenue in Hammond and East Chicago, Indiana. The low bid on this contract was $158,964.85.

"The Bontrager Construction Company are pre-qualified with a maximum capacity rating of $482,500.00. On the same date that the two above bids were submitted by the Bontrager Construction Co., had unfinished work amounting to $229,051.52. This left them an available rating of $253,448.48. Contract for this amount could be bid upon by this company.

"The two contracts, Bridge Contract 1841 and Road Contract 1849 put the Bontrager Construction Company $16,299.10 over their available bidding capacity on that date.

"On September 1, 1939, the commission made a tentative award of the Road Contract 1849 to the Thomas H. McQueen Company of Oak Park, Illinois, who was the second low bidder on this contract. At the same time the commission tentatively awarded to Bontrager Con-
struction Company Bridge Contract 1841 in the amount of $110,782.73, which at the time the tentative award was made sufficient bidding capacity was available to the Bontrager Construction Company covering the award of this contract.

"On the same date of August 29, 1939 that the State Highway Commission of Indiana opened bids on the road and bridge contracts, the city of Gary, Indiana opened bids for the construction of an interceptor sewer. The Bontrager Construction Company submitted to the city of Gary, a bid on this sewer construction, which bid amounted to $688,162.40. When the bids for Gary sewer contracts were opened it was found that the Bontrager Construction Company's bid was low.

"When the State Highway Commission of Indiana made tentative award of Bridge Contract 1841 to the Bontrager Construction Company on September 1, 1939, they had no official knowledge of the Bontrager Construction Company having been awarded the contract for the sewer construction in Gary, Indiana. They did have information that Bontrager Construction Company was low on the Gary contract but no information that an award had been made to this company.

"This bridge contract is a Federal Aid Contract in which the total cost of construction, with the exception of engineering charges and right of way, is borne wholly with funds allocated by the Federal Government to the State of Indiana for grade crossing elimination projects. It is necessary that after a tentative award is made by the State Highway Commission of Indiana that a concurrence in this award be obtained from the District Engineer of the Bureau of Public Roads at South Chicago, Illinois. This concurrence was received by the State Highway Commission of Indiana on September 5, 1939.

"Since the tentative award of this contract, the Bontrager Construction Company have been awarded the sewer contract in Gary, Indiana, have made their bond and are ready to proceed with this construction. The awarding of this contract to them was made between the time the tentative award was made of our Bridge
Contract 1841 and the time that the details necessary to lead up to the signing of this bridge contract was completed by the State Highway Commission office."

Based upon the above statement of facts you request an official opinion in answer to the following questions:

"1. Shall the commission sign the contract that was tentatively awarded September 1 by the State Highway Commission to Bontrager Construction Company and approved by the United States Bureau of Public Roads on September 5, 1939?

"2. Shall the commission award to the next low bidder?

"3. Shall the commission reject all bids and readvertise the project that is to be constructed with federal money; the State Highway Commission furnishing the right of way and the supervision?"

The above questions require a consideration of the provisions of chapter 98 of the Acts of 1937. Acts of 1937, page 469. Section 2 of this Act requires all bidders desiring to submit to the State Highway Commission of Indiana a bid for the performance of any contract or contracts with the commission to secure certificates of qualification, which certificates as provided by statute, "shall contain a statement fixing the aggregate amount of uncompleted work which the applicant will be permitted to have at any time under a contract or contracts with the commission, * * *".

Section 1 of the Act makes it unlawful for the commission to award a contract to any person other than a bidder previously qualified in compliance with the terms of the Act, and section 7 of the Act provides that:

"If the commission finds subsequent to the opening of bids that facts exist which would disqualify the lowest bidder, or that such bidder is not competent and responsible, the commission shall reject such bid, despite the fact of prior qualification of such bidder. * * *"

Upon the facts stated there can be no question of the proper pre-qualification of the low bidder at the time the bid was made and at the time the bids were opened sufficient to authorize the letting of the contract for the above described project to the bidder to whom it was awarded. And the only
question, therefore, is as to whether the fact that the low bidder subsequently entered into a contract for the construction of an interceptor sewer at Gary, Indiana, disqualified it from entering into the contract with the State Highway Commission.

Under the statement of facts accompanying your letter, I do not think it did. It will be noted that the bid of such low bidder was accepted prior to the time when the contract was entered into for the construction of the interceptor sewer at Gary, Indiana, and it seems to me, therefore, that the disqualification, if there was a disqualification, took place after the rights of the parties had become established. Your first question, therefore, is answered in the affirmative. Your second question, is answered in the negative. Your third question is answered in the negative, unless facts are made to appear which would justify the rejection of all bids.

PUBLIC WELFARE, DEPARTMENT OF: Validity of regulations adopted by Department concerning bringing non-resident children into State for care by resident families.

September 21, 1939.

Hon. T. A. Gottschalk, Administrator,
State Department of Public Welfare,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Mr. Gottschalk:

I have your letter of September 21, 1939 in which you request an official opinion with regard to the validity of certain regulations which the State Board of Public Welfare is desirous of adopting, and which are as follows to wit:

9-301. Where a resident of Indiana has contacted the State Department of Public Welfare, either directly or through a county department, for assistance in ascertaining the suitability of a non-resident child to become a member of the family of such resident, the said State department shall require that such child receive a thorough mental and physical examination in the state wherein it resides, and a certified statement by a licensed physician showing the complete result of such examination, together with the family history of such