HIGHWAY COMMISSION, STATE: Construction of highways by counties—Procedure when construction is in cooperation with Works Progress Administration.

January 25, 1938.

Hon. M. R. Keefe,
Chief Engineer,
State Highway Commission of Indiana,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter inquiring whether under section 10 of the Motor Vehicle Highway Account Act of 1937 the State Highway Commission of Indiana has the power to adopt the following as a regulation of said commission:

"Funds from a county's allotment of funds from the motor vehicle highway account may be used to pay part or all of the county's share of the cost of proper road or bridge construction projects built under agreement with the Federal Works Progress Administration or other federal authority, subject to the following conditions:

"1. If the county's share exceeds 25% of the estimated cost of the work or exceeds $1000, all portions of the work to be paid for with funds from the motor vehicle highway account shall be advertised for bids and let to contract in the manner prescribed.

"2. If the county's share is less than 25% of the estimated cost of the work and also less than $1000, the purchase of necessary materials for such work under a general purchase contract or contracts for such materials will be approved as in substantial compliance with the law, provided the general purchase contract or contracts were let pursuant to competitive bids in all respects as provided by law.

"3. Plans and specifications shall be submitted to the state for approval on such projects when the total cost, including the federal participation, exceeds $1500 per mile. If the total cost is less than $1500 per mile, a summary statement will be sufficient."
In the consideration of your question, I desire in the first place to consider each of your paragraphs numbered 1, 2 and 3 separately.

Paragraph numbered 1, I think, does not go quite far enough. The language "shall be advertised for bids and let to contract in the manner prescribed" should be made to read "shall be advertised for bids and let to contract in the manner prescribed by chapter 135 of the Acts of 1937." With this addition paragraph numbered 1 is approved.

Paragraph numbered 3 is also deficient in that the last sentence thereof should be amended to read as follows:

"If the total cost is less than $1500 per mile, a summary statement will be sufficient to require the commission to approve or disapprove the project."

With this modification paragraph numbered 3 is approved.

Paragraph numbered 2, however, doubtless is the portion of the regulation which is responsible for the asking of the question. The validity of this provision requires a careful consideration of sections 10 and 6(c) of said Motor Vehicle Highway Act.

Section 10 of said Act provides that—

"The commission is hereby authorized to make, promulgate, alter, amend or repeal rules and regulations for the purpose of carrying out the provisions of this Act."


Section 6(c) of said Act provides that—

"All construction of county highways from the funds provided by this Act shall be undertaken by the board of commissioners of the county in the manner prescribed by this Act, and so far as applicable in the manner authorized and permitted by the County Unit Highway Act, being chapter 112 of the Acts of the General Assembly of 1919 and any and all acts amendatory thereof and supplemental thereto, except that the county commissioners shall not receive or act upon any petition which might otherwise be received and acted upon by virtue of that Act and shall not make or issue any bonds under the terms of that Act for high-
way construction purposes, so long as any law of this state prohibits the making and issuance of bonds under said Act.”


It will be noted that section 6(c), above quoted, provides that the construction of county highways from the funds provided by said Act shall be undertaken by the board of commissioners of the county “so far as applicable in the manner authorized and permitted by the County Unit Highway Act, being chapter 112 of the Acts of the General Assembly of 1919.” (Our italics.)

I think it is obvious that the method prescribed by chapter 112 of the Acts of the General Assembly of 1919 is hardly applicable to a construction program where all the labor is to be provided by the Federal Works Progress Administration or other federal authority and only the materials are to be furnished by the county; and the question then is as to whether the highway commission, as a basis for its approval of any particular contract, may substitute the method set out in paragraph numbered 2 of the regulation, supra, for the method set out in chapter 112 of the Acts of the General Assembly of 1919.

Section 10, supra, in terms authorizes the commission “to make, promulgate, alter, amend or repeal rules and regulations for the purpose of carrying out the provisions of this Act.” Section 6(c), on the other hand, provides the procedure to be used in the construction of county highways from the funds provided by the Motor Vehicle Highway Account Act by requiring the adoption of the procedure set up in chapter 112 of the Acts of the General Assembly of 1919 so far as applicable. While recognizing that there may be some conditions to which chapter 112 of the Acts of the General Assembly of 1919 is not applicable, the Act fails to set out a procedure in such cases unless it is intended that the highway commission shall be given some latitude through its rule and regulation making authority. The purpose of the provision in paragraph numbered 2 is to use the general purchase contract for materials for maintenance of highways as a means of obtaining the necessary materials in small amounts for construction purposes without the necessity of re-advertising. Apparently from a practical standpoint such a method is
desirable. It would in all probability result in a lower cost for materials than could possibly be obtained in bids for small quantities only and it would, of course, save the cost of additional advertising. As already stated, the State Highway Commission Account Act seems to contemplate that there might be some cases in which chapter 112 of the Acts of 1919 would not be applicable.

The case referred to, in my opinion, is such a case and one to which the rule making authority of the commission expressly stated in the Act might very well apply. The commission proposes to make a regulation embodied in paragraph numbered 2, supra, which secures competitive bidding and, as pointed out, would probably result in a public saving. There might be some question as to whether the contractor bidding for the furnishing of materials for maintenance could be required to furnish these more or less small quantities of materials for use in construction under his contract, but this could easily be taken care of as to future contracts by including such items in the specifications which are made the basis for the bids. The proposed regulation as modified is approved.

MEDICAL REGISTRATION AND EXAMINATION, STATE BOARD OF: Not unethical or illegal for dentist to make x-ray pictures and plates for a physician.

January 26, 1938.

Hon. J. W. Bowers, M. D.,
Secretary Indiana State Board of
Medical Registration and Examination,
301 State House,
Indianapolis, Indiana.

Dear Dr. Bowers:

I acknowledge receipt of your request for an official opinion in answer to the following inquiry:

"A dentist with a small X-ray machine has been making pictures of the extremities for a few physicians in a community. He makes the plate and neither attempts a diagnosis nor suggests any kind of treatment. He has had the only X-ray machine in the community