> "An interpretation of the word 'eligible' is given in the case of Carson v. McPhetridge (1860), 15 Ind. 327, wherein it is said:
>
> " 'The term eligible, as used in our Constitution, relates to capacity of holding, as well as capacity of being elected to, an office.' "

Therefore, in my opinion, since a township trustee and a member of a county election board are both holders of a "lucrative office" within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra,* my answer to your specific question is that a township trustee is not qualified and eligible to hold office as a member of a county election board.

OFFICIAL OPINION NO. 31

July 19, 1961

Mr. B. B. McDonald
State Examiner
Indiana State Board of Accounts
912 Indiana State Office Building
Indianapolis 4, Indiana

Dear Mr. McDonald:

This is in response to your request for my Official Opinion concerning the preparation of specifications for public works. The length of your letter prevents me from quoting it in its entirety but each question will be set out and considered in the order presented.

The applicable statutory material is found, as indicated in your letter, in Acts of 1907, Ch. 243, as found in Burns' (1950 Repl.), Section 23-116 *et seq.,* and particularly Section 3 thereof, being Burns' 23-118, which reads, in part, as follows:

> "Any and all schemes, designs, understandings, plans, arrangements, contracts, agreements or combinations to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, directly or indirectly, or to in any manner combine or conspire to stifle or restrict free competi-

> tion for the letting of any contract for private or public work, are hereby declared illegal, and any person who shall, directly or indirectly, engage in any scheme, design, understanding, plan, arrangement, contract, agreement or combination to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, or in any manner combine or conspire to stifle or restrict free competition for the letting of any contract for private or public work, shall be deemed guilty of a misdemeanor, * * *."

It is pursuant to this statutory provision that the State Board of Accounts requires an "open competition" clause to be included, as a matter of practice, in all specifications for public work.

The open competition clause as set forth in your letter reads as follows:

> " 'Where, in these specifications, one or more certain materials, trade names, or articles of certain manufacture are mentioned, it is done for the purpose of establishing a basis of durability and efficiency, and not for the purpose of limiting competition. Other materials, equipment, fixtures or products may be used if they are equal in durability, efficiency and appearance to those mentioned, of a design in harmony with the work as outlined, and the architect and the owner give written approval of a substitution before the article and material are ordered by the contractor.' "

In connection with this statement of policy, and again as set out in your letter, the State Board of Accounts promulgated the following rule with regard to specifications for "manufactured articles":

> " '* * * It seems that the best method of having open competition in this class of supplies is by establishing a standard, which may be done by naming at least three or more of such manufactured articles, by giving the name of the manufacturer and the catalogue number, providing that other articles similar in design and equal in quality may be specified by a bidder in his

> bid and used, if approved, by the architect or engineer and officers having charge of the construction of the work.' "

It is with the foregoing statutory authority, departmental expression of policy, and State Board of Accounts regulation in mind that I now address myself to the five questions you have asked.

Question 1 is as follows:

> "Would it be legal under our Indiana Statutes for an architect or engineer to specify one make, brand name, etc., of a specific manufacturer of material or equipment to be used in the Base Bid eliminating the 'open competition clause' from the specifications, but permitting the bidder to submit voluntary alternates for use of other makes or brand names of material or equipment, with the understanding that in the case of voluntary alternates, they would not be used in determining the low bidder?"

In my opinion it would be legal to specify one make or brand name of a certain manufacturer where it was specified that such make or brand name established a "basis of durability and efficiency" and was not "for the purpose of limiting competition." This means, of course, that alternate bids must be accepted for consideration in *awarding* the bid. To disregard the submitted alternates in awarding the bid would not make the "brand name" specification a standard, but could result in a restriction of competition to the brand name specified.

Therefore, my answer to your first question would be in the negative. Whether the "open competition" clause is contained in the specifications or not does not affect their validity. Such incorporation is merely a statement of policy in line with the unrestricted competition provisions of Burns' 23-118, *supra,* and its omission would not make such statutory provisions any the less a part of the specifications.

Question 2 reads as follows:

> "Are 'voluntary' alternates permitted under our statutes, when the specifications do not call for such

'voluntary' alternates, are not described in the specifications and the drawings are not submitted or adopted covering the materials or equipment for which a voluntary alternate is submitted?"

I think that many of the matters already set forth in answer to your question No. 1 are applicable here. The statutes of this state (excepting the Acts of 1955, Ch. 282, Sec. 2, as found in Burns' (1961 Supp.), Section 53-115, which requires alternates on bids for heating contracts to include coal) do not express any provisions with respect to "voluntary" alternates. My answer to your question is limited to a consideration of proposed alternates in regard to materials and equipment rather than alternates in the nature of proposed changes in specifications and construction.

Even in the absence of any statute or case law prohibiting such alternates, it is my opinion that voluntary alternates would not be permitted under the circumstances set out in your question. I must assume that a voluntary alternate which is not described in the specifications is outside of the specifications, and to that extent would not be an acceptable alternate, since the latter includes products or materials which meet all specifications but are of a different brand name or make.

However, where a voluntary alternate submitted is within the specifications, even though not specifically designated by brand name, I am of the opinion that a reasonable condition of its being considered could be the submission of plans, drawings and other data for consideration by the awarding agency, to serve the purpose of enabling it to determine whether such voluntary alternate is within the specifications. Otherwise, the awarding agency would have the sole burden of determining from its own investigation the propriety of the alternate bid in terms of the specifications. Unless the awarding agency is fully informed as to the proposed alternate it is difficult to see how an honest determination could be made relative to the lowest and best bid, i.e., a determination that such alternate was in fact within the specifications.

Therefore in answer to your second question, it is my opinion that alternates and substitutes cannot be considered unless

they are within the specifications as determined and distributed to bidders by the awarding agency. It is my further opinion that when acceptable alternates or substitutes are submitted pursuant to the specifications it is the duty of the bidder to fully inform the awarding agency as to the durability, efficiency, etc., of the alternates in order to enable the awarding agency to properly determine whether the alternate is within the specifications, and further to determine the lowest and best bid.

Question No. 3 reads as follows:

> "If the specifications name three or more makes or brand names of equipment or materials, would that eliminate the need of the 'open competition clause' in the specifications?"

Beyond the policy requirement established by the State Board of Accounts there is no statutory requirement that the "open competition" clause be used and, as a matter of law, the provisions of Burns' 23-118, *supra,* are as much a part of the instructions or notice to bidders as if the statute was set forth therein.

Therefore, in answer to your third question, it is my opinion that you may properly determine that the need for the "open competition" clause could be eliminated by the use of three or more makes or brand names of equipment or materials in the specifications. However, it is my opinion that the "open competition" clause is a good statement of policy, and if used would tend to clearly set forth the state's position relative to unrestricted competition.

Question No. 4 reads as follows:

> "Is it within the authority of an awarding agency to require a mechanical or electrical contractor to assign his contract to the general construction contract?"

In answer to this question, it is my opinion that the awarding agency does have authority to require a mechanical or electrical contractor to assign his contract to the general construction contract provided the specifications give such con-

tractors notice that this procedure may be followed at the option of the owner or awarding agency. By providing clear and adequate notice of this, the bidder submits his bid knowing that such assignment may come to pass and has indicated his acceptance of this procedure by submitting his bid.

Question No. 5 reads as follows:

> "Does the owner, such as a School Board, have the authority to insist upon certain materials or equipment for service standardization throughout their buildings?"

Such an "owner" would have the right to insist upon such standardization, but whether his justification for such insistence upon the use of a particular article of manufacture or brand name is valid or amounts to a plan to stifle free competition is a fact question which could not be answered herein.

OFFICIAL OPINION NO. 32

July 19, 1961

Mr. Earl M. Utterback
Executive Secretary
Indiana State Teachers' Retirement Fund
506 State Office Building
Indianapolis 4, Indiana

Dear Mr. Utterback:

Your letter of June 9, 1961, has been received and reads as follows:

> "We request an official opinion on problems that have arisen in application of Senate Enrolled Act No. 86 passed by the General Assembly of 1961.
>
> "This act provides 'Every person who shall be receiving or eligible to receive a retirement benefit from the Indiana State Teachers' Retirement Fund shall be eligible to receive and shall receive from such fund an additional retirement benefit of an amount sufficient when added to his present pension benefit derived from