SCHOOLS: School board authorized to construct school building without entering into formal contract for same. School board could make direct purchases of materials needed and employ necessary labor to do the work.

PUBLIC BUILDINGS:

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February 20, 1952 3-4-52

Mr. Hubert Wheeler
Commissioner of Education
Department of Education
State Capitol Building
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an official opinion of this department, which reads as follows:

> "This Department has received inquiries about the laws of this state applicable to powers of the Board of Education in the erection and construction of school buildings. During this period of inflated costs it is very difficult and in some cases impossible to secure a contract for the erection of school buildings that would come within the available funds of the district. The laws of this state limit school district bond indebtedness to a maximum of 5 percent of the assessed valuation which for many districts does not permit the raising of enough money to properly construct school buildings. Because of these conditions school boards are often forced to find a more economical way of providing necessary school building facilities to meet the requirements of the district. Sometimes it is possible for the school board to employ a local person at a reasonable wage to supervise the erection of the school building, employ local labor, and buy its materials from whatever source available. Such a plan would not require any formal contract.

This plan seems to be the only means that some school boards have for providing schoolroom facilities.

"Section 8.250 RSMo 1949 provides in part that no contract shall be made for the erection or construction of any building, improvements, or repairs, the cost of which shall exceed the sum of $10,000, until public bids therefor are requested by advertising as set out in this act. In your Opinion of June 30, 1950 to the prosecuting attorney of Camden County it was held this law applies to boards of education of public school districts. There seems to be no question about the plain meaning of this act as far as contracts are concerned. This act does not seem to indicate that it would be necessary or mandatory that the board of education issue a formal contract for the erection and improvement of school buildings. The act seems to say that any contracting that exceeds the cost of $10,000 must be advertised but does not seem to contain any regulations governing the board of education where contracts are not let.

"I shall be glad to have your advice and official opinion in regard to the following questions:

"1. Does a board of education have authority to carry on a school building program, whatever cost may be involved, without issuing a formal contract for the construction of the building improvements?

"2. If the cost of a school building construction should exceed $10,000 and the board advertised for public bids as indicated in the law but could not secure satisfactory bids that would come within the available funds of the district, would the school board have the privilege of constructing the building without issuing a formal contract, but by using local labor and purchasing materials wherever available?"

At the outset, we might point out that a school district, acting through its board of directors, is authorized to erect school buildings and to build additions and make repairs to those in existence. To accomplish this, the board of directors of a school district is authorized to borrow money and issue bonds in the manner provided by law. Thus Section 165.040, RSMo 1949, in part, provides:

> "For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. * * *"

Given this power, the questions which you have presented generally ask how the board of directors of a school district should exercise it in carrying out a building program, in view of the provisions of Section 8.250, RSMo 1949, providing as follows:

> "No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not

> less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

The courts have heretofore had occasion to construe statutes of a similar character.

In the case of Home Building & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S.E. 895, suit was instituted to enjoin the city from erecting approaches to a certain bridge. The city was undertaking to construct the bridge approaches under direction of its own engineers and officers, and it was contended that such a procedure was in violation of a certain section of the city charter requiring all contracts for the erection of public improvements to be let to the lowest responsible bidder after giving notice by the city council and complying with other provisions of the charter relative to the letting of contracts. In ruling that the city was authorized to construct the particular improvement under the direction of its own engineers and officers the court, at S.E. l.c. 899, said:

> "It is, however, contended by appellant that because section 50 of the charter of Roanoke requires all contracts for the erection of public improvements or buildings within the jurisdiction of the city council to be let to the lowest responsible bidder, after notice, etc., all the acts and doings of the city in connection with the building or construction of the bridge approach in Randolph street are manifestly contrary to law and illegal, - ultra vires.
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> "We see nothing in that clause of the charter which inhibited the city from constructing public buildings or improvements under direction of its own engineers and officers. It simply provides that when such buildings or improvements are let to contract, it shall be to the lowest bidder, and after advertisement, as provided. Any other construction of that provision would prove dangerous, if not injurious, to any

> city, since we see from this record that, if that construction had been followed, the approaches to the overhead bridges in the city of Roanoke would have cost the city $8,000 or $10,000 more than they will under the mode of construction adopted by the city."

In Perry v. City of Los Angeles, 157 Cal. 146, 106 P. 410, suit was instituted to enjoin the officers of the city of Los Angeles from proceeding with the construction or completion of a certain public work's improvement involving an aggregate expenditure of more than $500.00 in any other way than by letting the same by contract to the lowest bidder in the manner prescribed by the charter of the city in the letting of contracts. The particular public work's improvement was a sewer. The charter provision provided that all contracts for the construction or completion of any public work's improvement shall be let to the lowest responsible bidder in the manner therein prescribed. The particular charter provision then set forth a method of obtaining bids. There was also another charter provision providing that all contracts involving an expenditure exceeding $500.00 had to be in writing. As the court pointed out in deciding the case, the real question to be determined was whether the city could itself do such work without letting any contract therefor; in other words, by day labor, under the authority and control of the city by its board of public works, and purchasing such material as it may require therefor. In ruling on the question the court, at S.E. l.c. 412, declared:

> "Provisions of the character of those contained in the Los Angeles charter are manifestly different from provisions requiring work to be done by contract, or to be let to the lowest bidder. According to the ordinary acceptation of the term 'doing work by contract,' it means the letting of the work, or some portion thereof, to some one who agrees to deliver the same completed for a specified price, and does not include the case of one who himself constructs an improvement by means of materials purchased directly by him and artisans and laborers directly employed and paid wages by him. Although the latter is doing the work by contract in the sense that he sustains a contractual relation to every artisan and laborer employed, and to every

materialman from whom he purchases materials, he is not doing the work by contract in the sense in which that term is commonly accepted either by laymen or lawyers. The general legislative recognition that this meaning is to be given to the term is shown by numerous acts, to some of which we have referred, and many freeholders' charters clearly show the same recognition. Of course, where a statute or charter declares that any work must be let to the lowest bidder, there is no possible basis for any other construction than one making bids and contracts imperative. The omission from the Los Angeles charter of any such provision as either of those discussed is most significant. If it had been intended to require that whenever a proposed improvement would cost more than $500, the work must be done 'by contract' let to the lowest responsible bidder, it would have been the simplest matter in the world to say so in plain terms, as has been said over and over again in other acts and charters. The failure to do so indicates that the framers of these charter provisions were guarding solely against the method of letting contracts for public work otherwise than to the lowest responsible bidder, after public notice of the work to be done thereunder; the object being to prevent favoritism in the matter of letting contracts and the payment of a greater price than the work was reasonably worth. There is nothing in the language used to indicate that it was designed to prevent the doing of the work by the city itself through the officers having such work in charge. The doing of the work being expressly authorized, and the board of public works being expressly given charge of the construction thereof, the power to construct otherwise than 'by contract' exists, unless the necessary implication of sections 148 and 207 of the charter is such as to prohibit such method. We are of the opinion that we would not be warranted in holding that these sections do imply any such prohibition. * * *"

Again, in the case of Boecking v. City of Oklahoma City, 162 Okla. 104, 19 P. (2d) 1082, the court was considering an injunction suit wherein it was sought to enjoin the city from entering into a contract with a sand and gravel company for the furnishing of a quantity of concrete to be used in the construction of a sedimentation basin. The plaintiff was contending that the total cost of the erection of the sedimentation basin would exceed $300.00; that the city proposed to construct the basin by labor employed directly by it, and without advertising and securing bids for the entire job. It was contended that this was in violation of a particular city charter provision providing that all contracts pertaining to public improvements involving an outlay of $300.00, or more, shall be entered into only after advertising for competitive bids in the manner prescribed in the charter provision. In deciding the case in favor of the city the court, at P. (2d) 1083, 1084, said:

> "The only question then presented is whether the city may, under the provisions of its charter, construct or erect public improvements or work of the nature here involved where the total cost thereof exceeds $300, by the use of labor employed directly by the city and without advertising for competitive bids therefor.
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> "Charter and statutory provisions of this and similar nature are generally upheld. But a clear distinction is made between provisions which require all public work of such nature, exceeding in some cases a certain amount in costs, and provisions which require only that all contracts for such improvements, etc., to be advertised for competitive bids and award accordingly.
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> "Defendant cites Perry v. City of Los Angeles, 157 Cal. 146, 106 P. 410. The charter of that city provided: 'All contracts for construction of public work or improvements or for furnishing labor and materials therefor, as herein provided, shall be let to the lowest responsible bidder.' The charter then prescribes the method of obtaining bids. It was there held that such provision should not be

> construed as prohibiting the doing of public work by the city itself by day labor. In that case a number of cases above referred to are cited and distinguished.
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> "To the same effect is Home Building & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S.E. 895, 27 L.R.A. 551.
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> "In 19 R.C.L. 1069, the rule is stated as follows: 'A statutory provision that all contracts for public improvements shall be let to the lowest bidder does not prevent a municipal corporation from constructing such a work through its own engineers and officers.'"

In the case of Cooper v. City of Detroit, 222 Mich. 360, 192 N.W. 616, suit was brought to restrain the city from proceeding in the erection of a municipal garage without first having complied with the city charter relative to the letting of contracts to the lowest responsible bidders. The charter provision, in part, provided that no contract for the construction of any public building, the expense of which would exceed $500.00, should be let or entered into except with the lowest responsible bidder. The charter provision further provided the manner of giving notice calling for bids. In ruling in favor of the city the court, at N.W. l.c. 618, said:

> " * * * If the framers of the charter had intended that, when the cost of construction exceeded $500, all work should be done by contract, they undoubtedly would have said so in express terms. The omission of any definite method of doing the work would indicate that they intended to leave something to the discretion of the officials who had it in charge.
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> "We find nothing in the charter of the city of Detroit which expressly or by implication prevents the city from using its own forces in performing the labor necessary for the construction of its municipal garage, though the cost of such labor should exceed $500. The city of Detroit has the power under its charter to construct public works

> or improvements where the amount to be expended exceeds $500 without the letting of contracts for the work. It may do such work with its own forces under the direction and control of the commissioner of public works."

In the case of Contracting Plumbers' Ass'n v. Board of Education of St. Louis, 238 Mo. App. 1096, 194 S.W. (2d) 731, a taxpayer's suit was instituted against the members of the board of education and the commissioner of school buildings to compel them to do all repair, alteration and construction work on St. Louis school buildings where the cost exceeded $50.00, or $100.00 in cases of emergency, through contracts made after advertisements and public lettings. Section 10733, R.S. Mo. 1939, in part, provided that all contracts for the erection, repair and alteration of school buildings exceeding the amount of $50.00 shall be made by the board of education, after public letting, to the lowest responsible bidder complying with the terms of the letting. In cases of emergency, such contracting was permitted where the cost did not exceed the sum of $100.00. In deciding the question the court, after citing and quoting the cases hereinabove cited, affirmed the judgment of the circuit court which ruled favorably to the board of education. At S.W. l.c. 735, 736, the St. Louis Court of Appeals said:

> "It appears to be the generally accepted rule that in the absence of a requirement to that effect, a municipality need not let public work to contractors, but may do it through its own officers, and that a charter provision requiring all contracts for public improvements to be let to the lowest responsible bidder does not prohibit the municipality from constructing the improvements under the direction of its own engineers and officers.
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> "In the present case plaintiffs would have our statute read that all repairs and alterations costing more than fifty dollars, or more than a hundred dollars in cases of emergency, must be made by contract after public letting to the lowest responsible bidder. But that is not the way the statute reads. It is not the function of the court to rewrite it.

"The judgment of the circuit court should be affirmed. The Commissioner so recommends."

In the above-cited cases it seems that the courts have recognized a distinction existed between two general types of statutes or laws providing for the manner in which official bodies are to proceed in carrying out a public building or improvement program.

In other words, some statutes, charter provisions or laws, in effect, provide that all work to be performed must be let to the lowest bidder or must be done by contract. If such is the case, there is no discretion invested in the official body in carrying out the building or public improvement program, and it can only be done by contract.

In the other class of statutes, charter provisions or laws, it is merely provided that all contracts for the erection or improvement of public works or buildings involving an expenditure over a certain amount shall be let to the lowest and best or responsible bidder after advertising for competitive bids; or it may be provided that no contract shall be let until after advertising, as provided by the law.

We believe that Section 8.250, supra, falls within the last general classification. That is to say, the statute merely provides, in part, that no contract shall be made for the erection, improvement, alteration or repair of any building, the total cost of which shall exceed $10,000.00, until public bids are requested by advertising in the manner provided.

It is our thought that the effect of the statute is to require the officer, board or organization, whichever the case may be, to do certain things or follow a certain procedure if it elects to carry out a building or improvement program by contract, the cost of which will exceed $10,000.00. In other words, if the official body desires to enter into a contract with a contractor who is to perform all of the construction work in connection with the building program, the provisions of the statute must be complied with.

However, the statute does not deprive the official body from exercising a discretion to carry out its building program under its own supervision and control by purchasing the necessary materials and directly employing the required labor in the manner which you have indicated.

To permit a school board or other official body to conduct a building program in such a manner would certainly be justified when an appreciable decrease in the cost would result. The Supreme Court of Virginia, in effect, so stated in the City of Roanoke case.

We therefore construe Section 8.250, supra, to only be applicable in the case of a school board carrying out a building program when the school board elects to enter into a formal contract for the construction of the building or improvements.

We further conclude that the school board would have the authority to carry out such building program without entering into a formal contract by making direct purchases of the required materials and directly employing the necessary labor and supervisory personnel to do the work.

In view of the foregoing we are constrained to answer both questions submitted in the affirmative. In connection with question No. 2, where the school board had advertised for public bids and the bids submitted exceeded the amount of funds available, the school board would be prohibited from contracting with any of the bidders by Section 8.250, supra, for it, in part, provides that "in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service." Certainly, in such an instance the school board would be justified and authorized to carry out the building program in the other manner, as above stated.

In answering the questions presented in your request that which we have said is with reference to school boards generally within the state. However, we might point out that since the court's decision in the Contracting Plumbers' Ass'n Case, supra, wherein Section 10733, R. S. Mo. 1939, was construed relating to the powers of the Board of Education of the City of St. Louis, that section has been amended by the enactment of Section 165.603, RSMo 1949. Under the latter section it appears that the Board of Education within the City of St. Louis would be required to formally contract for building improvements if the cost exceeds $2500.00.

Mr. Hubert Wheeler

CONCLUSION

It is therefore the opinion of this department that a school board would have the authority to carry on a building program, whatever cost may be involved, without entering into a formal contract with another person for the construction of the building. The school board would have the authority to construct the building by making direct purchases of materials needed and directly employing the necessary supervisory personnel and labor to do the work. However, with regard to the city of St. Louis the Board of Education would have to formally contract for building improvements if the cost would exceed $2500.00, as provided by Section 165.603, RSMo 1949.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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