County Road Bonds—Failure to Receive Satisfactory Bids—Issuance of in Payment for Work Performed on a Road Contract.

County road bonds may be issued direct to a contractor in payment of work done on a road contract providing that the same are issued in conformity with the requirements of Sections 2907 and 2908 of the Revised Codes of 1907, and providing further that they are not disposed of at less than par.

State Highway Commission,
Helena, Montana.

Gentlemen:

You have submitted for the opinion of this office the question whether, where a county has advertised the issuance of county road bonds but satisfactory bids for the purchase of the same have not been received, and all bids have been rejected, the bonds may be issued direct to a contractor in payment for work performed on a road contract within the county.

Chapter 32 of the Laws of 1915, amending Sections 2907 and 2908 of the Revised Codes of 1907, reads as follows:

> "Section 2907. When the board issues any bonds authorized by this article it is its duty to sell the same and give notice by advertisement in some newspaper published in the county, or if there be no newspaper published in the county then in any newspaper published in an adjoining county for a period of not less than thirty (30) days prior to the time said bonds are to be sold; such advertisement must be for sealed proposals, which must state the amount of such bonds offered for sale and the person offering the highest price therefor in conformity with the requirements of the notice of sale is

entitled to receive the amount of such bonds which he offers to buy; but no bonds must be sold for any price less than the par value thereof; provided however, that the board may effect an exchange of such county bonds to take up its legal outstanding indebtedness or issue same to meet its obligation to another county incident to the creation of a new county, change of county boundary, or on county division, without publishing the notice herein provided for.

"Section 2908. The proceeds derived from the sale of bonds authorized to be issued by this article must be paid into the county treasury and must be applied to the payment of the legal bonds, warrants or orders of the county which may be outstanding or unpaid in the order in which said bonds, warrants or orders become due, or applied in liquidation of its indebtedness incident to the creation of a new county, county division, or change of county boundary lines. But the board may at any lawful meeting provide by resolution for the exchange of any bonds issued under the provisions of this article to take up any outstanding county bonds then due and subject to payment and in order to redeem and pay any legal county warrants or orders of the county issued prior to a day to be fixed by the board and entered of record in the minutes of its proceedings. In the making of such exchange by the issuance and delivery of bonds to take up any such legal outstanding indebtedness of the county the board is vested with judgment and discretion to issue such bonds in such manner as may appear to the advantage and benefit of the county and is hereby authorized to issue and deliver same in such manner and upon such terms as are deemed for the best interest and advantage of the county. The exchange when made must be made dollar for dollar with accrued interest thereon. * * *"

In an opinion of this office rendered to the Board of County Commissioners of Silver Bow County, it was held that the Commissioners had authority to issue such bonds in installments for the purpose of paying a contractor for the construction of highways in that county. The opinion reads, in part, as follows:

"You are advised that you have authority to issue the amount of bonds voted accepting the contractor's bid therefor, and issue the same in installments as the work progresses. This is, I understand from your letter, what you desire to do. In other words the issuance of the bonds in installments and delivery thereof to the contractor is to be a payment as the work progresses.

"You have this authority under Chapter 172 of the Session Laws of 1917, and also under Section 2908 of the Revised Codes of 1907."

Vol. 8, Opinions of Attorney General, p. 400.

However, one of the requirements of Section 2907, supra, is that the bonds may not be disposed of at less than par, which has been held to include accrued interest. This provision means that they must, in fact, bring their par value and accrued interest however negotiated, and that they are not subject to discount either directly or indirectly, or by means of any subterfuge, including the raising of the bid on a contract for the purpose of allowing for a depreciation in the price of bonds accepted in payment of such contract at their face value. In the latter connection, your attention is drawn to the decision of the Supreme Court in the recent case of Evans v. City of Helena, 60 Mont. 577, in which the following language is used:

"Counsel for city insists that inasmuch as the proposed contract will call for the payment of the price of the improvement in bonds or warrants at their face value, this amounts to a strict compliance with the requirement of the statute. In other words, he says that the statute contemplates that bonds or warrants of any improvement district will, at times, be worth less in the market than their face value, and therefore that, inasmuch as the contractor proposes to take the bonds or warrants at their face value for the work done, though in making out his bid he made an allowance for a discount of ten per cent, the statute will not, in fact, be violated. It is clear, however, that it will be as much a violation of the statute for the city council to contract to pay $100 in bonds or warrants for work which costs only $90, as it is for the council to pay $110 for work that costs only $100. Here the proposed price for paving the streets and doing the incidental work was fixed at $349,543.34. *This was arrived at by the contractor by adding to the actual cost ten per cent, because the warrants he expected to receive would, in view of the condition of the market, sell for only ninety cents on the dollar.* The council intended to let the contract, fully understanding the basis upon which the contractor made his calculation. Any way the proposed contract may be viewed, the result will be an agreement by the council to issue and deliver the bonds or warrants of the district at a discount. It amounts to an agreement to do indirectly that which the council is expressly prohibited from doing directly. Therefore, there will be a clear violation of the statute, and the second question, stated supra, must be answered in the negative."

From the foregoing, it is apparent that any contract, involving the discounting of bonds required to be sold at par. would be illegal.

It is, therefore, my opinion that county road bonds may be issued direct to a contractor in payment of work done on a highway contract, but in conformity with the requirements of Sections 2907 and 2908, supra, and under the limitations as to discounting announced in the above decision.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.