

2844.

APPROVAL, BOND FOR FAITHFUL PERFORMANCE OF HIS DUTIES AS EXAMINER IN THE BUILDING AND LOAN DIVISION OF THE DEPARTMENT OF COMMERCE—ROLLAND C. HESKETT.

COLUMBUS, OHIO, January 20, 1931.

HON. JOHN W. PRUGH, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the penal sum of \$5,000.00 upon which the name of Rolland C. Heskett appears as principal and the Southern Surety Company of New York, appears as surety. Said bond is conditioned to cover the faithful performance of the duties of the principal as Examiner in the Building and Loan Division of the Department of Commerce. Said bond has been required in pursuance of Section 677 of the General Code.

Finding said bond to have been executed in proper legal form, I have approved it as to form and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2845.

EXPERT ENGINEER—WHO MAY EMPLOY, TO EXAMINE STATUS OF BRIDGES—FROM WHAT FUNDS SUCH SERVICES MAY BE PAID.

SYLLABUS:

1. *Where there are no funds available in the salary fund for employment of assistants to the county surveyor, said surveyor may not legally employ an expert engineer to examine the status of county bridges and pay for such services from the county bridge fund, or from any other fund.*
2. *Under Sections 2411, 2413 and their related sections, the county commissioners, upon the written request of the county surveyor, may employ expert engineers for such purposes whose compensation and expenses when allowed by the said commissioners may be paid from the general county fund or from the county bridge fund.*
3. *The provision of Section 5625-33 of the General Code, relative to the certificate of the county auditor, has no application to such a contract.*

COLUMBUS, OHIO, January 21, 1931.

HON. CALVIN CRAWFORD, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication recently directed to me by your predecessor, Hon. Paul J. Wortman, which communication reads as follows:

“There are two concrete bridges located within the limits of the city of Dayton on county highways that apparently are in a weakened condition and in need of possible extensive repair.

The county surveyor would like to employ an expert bridge engineer to make a general survey of the condition of these two bridges. We have taken up with our local state examiner the question of payment of such an expert employee. The county surveyor's salary fund is too small to justify payment of expert compensation therefrom and he desires to know if such compensation might come out of a county bridge fund."

Inasmuch as the salary fund is insufficient to justify the surveyor in employing additional assistants, it is clear that he may not make an employment which is payable from another fund. See Sections 2981, 5625-29, and related sections. However, in connection with the inquiry it may be profitable to consider the provisions of Section 2411 of the General Code, which reads:

"When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

It seems clear that there is ample authority for the county commissioners to employ expert engineers for the purposes mentioned upon the request of the county surveyor. Section 2413 of the General Code, among other things, requires the board of county commissioners to fix the compensation of such employes, which compensation, with "their reasonable expenses, shall be paid from the county treasury upon the allowance of the board." Said section further provides:

"No provisions of law requiring a certificate that the money therefor is in the treasury shall apply to the appointment or employment of such persons."

My predecessor, in an opinion found in Opinions of the Attorney General for the year 1928, page 2816, held, as disclosed by the syllabus:

"The provisions of Section 5625-33, General Code, requiring a certificate as to the existence of moneys available, etc., do not apply to contracts of employment of an engineer by the county commissioners under Section 2411 of the General Code, for the reason that Section 2413, General Code, especially provides that no certificate is required in such contracts."

By reason of the foregoing, it will be seen that there is no difficulty in employing an engineer under the foregoing sections by the county commissioners, upon the request of the surveyor. It further will appear that there will be no difficulty in making the cost of such an employment a charge against the general fund of the county. The question as to whether or not such services may be paid for out of the county bridge fund is not so easily disposed of.

Section 5625-6 of the General Code, pertinent to consider in connection with your inquiry, provides in part:

"The following special levies are hereby authorized without vote of the people:

* * * * *

e. In the case of a county, for the construction, reconstruction, resurfacing and repair of roads and bridges, other than state roads and bridges, thereon.

f. In the case of a county, for paying the county's proportion of the cost and expense of the construction, improvement and maintenance of state highways. * * * "

The question now is whether or not the engineering services which you describe can be regarded as coming within the terms of Section 5625-6, etc. In other words, when an engineer performs such service, may it be said that he is constructing, reconstructing or repairing a bridge.

In approaching the present problems, it must be kept in mind that engineering services are generally regarded as the first basic need in connection with the construction of any improvement such as a bridge or building.

In connection with buildings at state institutions, it has been held that the appropriation for the building is properly chargeable with the expense of employing architects other than the state architect. See Opinions of Attorney General for 1922, p. 999.

It would seem, therefore, that inasmuch as section 2413, supra, expressly authorizes the payment of such compensation from "the county treasury," and the so-called bridge fund is for the purpose, among others, of reconstruction and repair of bridges, it would be absurd to say that it could not be used for the most important step looking toward said construction or repair, that is, determining from a scientific standpoint what should be done under the conditions. Of course, it could be argued that engineering services were properly payable from the bridge fund in the event that the bridge is repaired or reconstructed, but such charge could not be paid in the event the engineers' investigation disclosed there was no need for such repair or reconstruction. However, such a construction is too narrow and not in harmony with common sense. It may be more important to have a bridge examined to determine whether it is in need of repair than it would be to have it painted or repaired in some minor way.

In reaching the foregoing conclusions, I am not unmindful of Section 5 of Article XII of the Ohio Constitution, which requires a strict application of the proceeds of tax levies to the purposes for which such levies were made. However, it is believed that expert engineering, such as you describe, is within the purpose for which the bridge fund is levied.

Based upon the foregoing, it is my opinion:

1. Where there are no funds available in the salary fund for employment of assistants to the county surveyor, said surveyor may not legally employ an expert engineer to examine the status of county bridges and pay for such service from the county bridge fund, or from any other fund.

2. Under Sections 2411, 2413, and their related sections, the county commissioners, upon the written request of the county surveyor, may employ expert engineers for such purposes whose compensation and expenses when allowed by the said commissioners may be paid from the general county fund or from the county bridge fund.

3. The provision of Section 5625-33 of the General Code, relative to the certificate of the county auditor, has no application to such a contract.

Respectfully,
GILBERT BETTMAN,
Attorney General.