1260.

APPROVAL, BONDS OF MAHONING COUNTY—$100.000.00.

COLUMBUS, OHIO, December 5, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1261.

PUBLIC WORK—DEFAULT OF CONTRACTOR AND COMPLETION BY SURETY—DISPOSITION OF ESTIMATES EARNED BUT NOT PAID PRIOR TO DEFAULT DISCUSSED.

SYLLABUS:

Where a contractor defaults upon public work and the surety company takes over the work of completing the contract, estimates earned by the contractor prior to default but not paid when the work is taken over by the surety company should be withheld until such time as the relative rights of the interested parties may be determined.

COLUMBUS, OHIO, December 5, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Your recent communication reads:

"On October 17, 1929, a contract which had been entered into between the State of Ohio and The Canton Sand & Gravel Company known as Section 'D' (Bridge) S. H. No. 70, Tuscarawas County was declared forfeited by the State and the contractor and surety company notified.

The Southern Surety Company furnished the bond for this work and they immediately elected, by notifying this Department in writing, to take over and complete this contract.

Shortly prior to the date of forfeiture of this contract several estimates had been submitted for this work and had not yet been paid on that date. These estimates, of course, were to be paid to The Canton Sand & Gravel Company.

It is respectfully requested that you advise me as to whether these estimates should now be paid to the Southern Surety Company, the present recognized contractor on this work, or to the original contractor The Canton Sand & Gravel Company. The work covered in these estimates, of course, was performed by The Canton Sand & Gravel Company."

Section 1208, General Code, in part provides:

"* * * Before entering into a contract the director shall require a bond with sufficient sureties, conditioned, among other things, for the payment by the contractor and by all sub contractors for all labor performed or materials furnished in connection with the project involved, that the contractor will perform the work upon the terms proposed, within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, and in case of a grade separation

will also indemnify any railroad company involved, against any damage that may result by reason of the negligence of the contractor in making said improvement. In no case shall the state be liable for damages sustained in the construction of any improvement under this act.

* * *

The bond required to be taken under the provisions of this section shall be in an amount equal to one-half of the estimated cost of the work, and shall be approved by the director as to sufficiency of the sureties and shall be in such form as may be prescribed by the attorney general."

Section 1209, General Code, which relates to the procedure in the event of the failure of the contractor to complete the work, provides in part:

"If the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this act, the director shall make a finding to that effect and so notify the contractor in writing and the right of the contractor to control and supervise the work shall immediately cease. The director shall forthwith give written notice to the surety or sureties on the bond of such contractor of such action. If, within ten days after the receipt of such notice, such surety or sureties or any one or more of them notify the director in writing of their intention to enter upon and complete the work covered by such contract, such surety or sureties shall be permitted so to do and the director shall allow them thirty days after the receipt of such notice in writing from them, within which to enter upon the work and resume the construction thereof, unless such time be extended by the director for good cause shown. If such surety or sureties so entering upon the work do not carry the same forward with reasonable progress or if they improperly perform the work, or abandon, or fail or refuse to complete the work covered by any such contract, the director shall complete the same in the manner hereinafter provided. If, after receiving notice of the action of the director in terminating the control of the contractor over the work covered by his contract, the surety or sureties on such contractor's bond do not within ten days give the director the written notice provided for above, it shall be the duty of the director to complete the work in the following manner: He shall first advertise the work for letting in the manner provided in this act, and the estimated cost at which such work shall be so advertised shall be the difference between the original contract price therefor and the amount or amounts theretofore paid to the original contractor, and at such letting the contract for the completion of the work shall not be let at a price in excess of such estimate. If no bids to complete the work for an amount not exceeding such estimate are received, the director shall cause that portion of the work still uncompleted to be reestimated and shall readvertise the same at the amended estimate in the manner provided in this act, and relet the work for not more than such estimate. * * *"

In connection with your inquiry, attention is directed to my opinion No. 28 issued to Hon. R. T. Wisda under date of January 26, 1929, a copy of which is enclosed herewith, the syllabus of which reads:

"1. When a proposal has been made by the Department of Public

Works for construction work and bids have been received thereon, said bids being accompanied by a bond guaranteeing that the bidder will enter into a contract if the same be awarded to him, and also conditioned upon the faithful performance of said contract, and a contract was so awarded and entered into, the bonding company may, upon default on the part of the contractor, perform the contract so entered into, complete the work, and be entitled to receive from the state payments therefor, as provided in the original contract.

2. Such default upon the part of the contractor and said action on the part of the bonding company should be set forth upon the journal of the Department of Public Works after the contractor has so defaulted and a copy thereof certified to the Auditor of State."

While the opinion above referred to was based upon Sections 2314, et seq., of the General Code, and the proceedings of the Director of Highways are under Section 1209 and related sections with reference to the awarding of contracts, it is believed that an analysis of the latter sections will disclose that the reasoning in the former opinion is applicable to a similar question arising under the sections of the Code governing your procedure in connection with the awarding of contracts.

This opinion was, however, directed particularly to the right of the surety company to have paid to it the amounts which it earned in the performance of the contract and it did not purport to deal with the right of the surety company with respect to estimates earned by the contractor before default but not payable until after default. This is the question concerning which you now specifically inquire.

In the case of *State, ex rel.* vs. *Schlesinger*, 114 O. S., 324, it was held as disclosed by the syllabus that:

"A surety on the bond of a contractor for public work, who completes the work after abandonment by the contractor, is subrogated to all the rights of the state in the fund remaining at the time of declaration of forfeiture, and entitled to priority of payment of the balance of said fund as against the assignee of such contractor, to whom the balance of said fund had been assigned to secure loans received by him, the proceeds of which were used in making payment of the claims of laborers and materialmen, even though the surety on such bond was obligated to pay all claims of laborers and materialmen, and even though such money was loaned and such claims paid before declaration of forfeiture."

An examination of the facts under consideration by the court in that case discloses that the contractor, prior to his default, had partially completed the work and there was due him an estimate for which the voucher had been drawn. The contractor had assigned all of his interest in the contract to the bank and the bank had notified the director of highways and the auditor of state of said assignment. The state made no claim to said fund, having interpleaded asking the court to indicate the proper complainant to receive the same. In that case, the State, of course, reserved percentages for the purpose of completion of the contract. Under said state of facts, the court concluded as hereinbefore stated in the syllabus of said case.

A exhaustive dissenting opinion, which was concurred in by three judges of said court, discloses that the decision affected sums that were due upon completed portions of the work as well as sums that were yet to become due. In fact, said dissenting opinion cites numerous authorities indicating that the right of subrogation does not inure for the benefit of the surety in the case of a defaulting of a public contract, excepting as to the reserved percentages held by the owner. However, the opinion of the majority, as hereinbefore indicated, is to the contrary. The case thoroughly reviews many decisions upon the question.

This case would apparently justify the conclusion that the surety company is entitled to payment even as to estimates which were earned by the contractor prior to default. At least the case disposes of any rights to these estimates so far as claims of assignees of the contractor are concerned. It is possible, however, that circumstances might arise whereby the rights of the surety company would not be superior to other claims and, in view of the fact that the statute does not clearly cover the rights of the parties under these circumstances, I feel that the safest course for you to pursue would be to retain such estimates until such time as the relative rights of the interested parties may be judicially determined. It is, of course, possible that payment may be made without suit through agreement of the parties, but in each instance it would be advisable for you to consult this office in order that you may be properly protected in any such agreement.

In view of the foregoing, I am of the opinion that, where a contractor defaults upon public work and the surety company takes over the work of completing the contract, estimates earned by the contractor prior to default but not paid when the work is taken over by the surety company should be withheld until such time as the relative rights of the interested parties may be determined.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1262.

ELECTION CONTEST—EXCLUSIVE JURISDICTION OF THE MUNICIPAL COUNCIL TO WHICH COUNCILMAN CLAIMS TO BE ELECTED —WHEN ELECTION BOARD REQUIRED TO TURN OVER BALLOTS.

SYLLABUS:

1. *Under Section 4237 of the General Code jurisdiction to hear the contest of a member of a municipal council has been conferred upon such municipal council, and that remedy is exclusive.*

2. *The council to which a member claims to be elected is the proper body to pass on his election.*

3. *Ballots involved in such contest must be turned over to the clerk of council by the board of deputy state supervisors of elections, if such board has been advised of the contest within thirty days subsequent to the election.*

COLUMBUS, OHIO, December 5, 1929.

HON. JOHN E. BAUKNECHT, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent request for my opinion which reads as follows:

> "You will recall our conversation concerning the question of the election in Wellsville, and I am now submitting the question to you for an opinion.
>
> The question is, first, whether the council of a city is the proper board to consider a contest of an election to the office of councilman, and involving a recount of the board; second, in the event the council is the proper body, does the council to which the contesting member claims to be elected or the council holding office at the time of contest, hear and determine the matter; third, is the board of deputy state supervisors of elections required to turn the ballots over to the council of the city for making the recount for position of councilman?