

results of his work, one whose contract relates to a given piece of work for a given price. These characteristics, however, though very suggestive, are not necessarily controlling. Generally speaking, an 'independent contractor' is one who exercises an independent employment and contracts to do a piece of work according to his own method, without being subject to the control of the employer, save as to the results of his work. One test, sometimes said to be decisive, is as to who has the right to direct what shall be done, and when and how it shall be done, who has the right to the general control."

In the case of *Tuttle vs. Embury-Martin Lumber Company*, 158 N. W., 875, the Supreme Court of Michigan pointed out that the test of relationship of employer and employe is the right to control, and stated that it is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.

As is pointed out in the 1919 opinion, all of these questions are questions of fact which must be determined by you after all of the facts are placed before you, and are not questions of law to be determined by this office. If you find that these various persons are independent contractors and are performing the duties required of them by virtue of the contracts in their own way and in their own manner, limited only by the provisions of the contracts, and that the company has no right to control their activities in these respects, then these agents are not employes within the meaning of the act. On the other hand, if the company has a right to direct and control their services and activities in performing the duties contemplated by the contract, then they are employes of the company regardless of whether or not the company exercises that right.

It is therefore my opinion that the question of whether or not agents, managers and superintendents of a life insurance company are employes, is a question of fact to be determined by you after considering not only the contract appointing such agent but all the other facts which would assist in a determination of whether or not the contract was a contract of hire or an independent contract.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1365.

PARTITION FENCE—LEGALITY OF TOWNSHIP TRUSTEES AWARDED CONTRACT FOR ITS CONSTRUCTION TO ONLY BIDDER WHEN PROPOSAL RECEIVED AFTER ADVERTISED DATE.

SYLLABUS:

Where, under Section 5913, General Code, township trustees have advertised for a period of ten days for bids to build or repair a line fence, and no bids have been received during that period, the contract may be awarded to a satisfactory contractor whose bid is received after such period of advertising.

COLUMBUS, OHIO, January 6, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

"One of the persons failing to build the portion of partition fence assigned to him by the trustees of one of the townships in Licking County, and, the aggrieved party having made an application therefor, said Township Trustees made an order to build the fence, determined its kind, made specifications therefor and caused notice thereof to be given by the clerk, as required by law, that the contract would be sold to the lowest responsible bidder. Advertisement for bids was made by posting notices as provided under Sec. 5913 of the General Code.

No bids for such work were received at the time stated, but within a few days a bid was made by a responsible contractor which all members of the Board of Trustees considered fair and reasonable. The Trustees are asking whether, in the circumstances, they may award the contract to this man.

Since a summary method of collection is provided for under these fence statutes, it would seem to be the case that all proceedings under these sections must be carefully followed and the law strictly complied with.

The benefit of your opinion is respectfully requested as to whether the Township Trustees may award the contract to the only person who has bid, even though such bid was received *after* the time stated in the advertisement, or whether it will be necessary to readvertise, as provided under Sec. 5913 of the General Code, and continue to do so until a bid for construction of the partition fence in question is received in compliance with its terms."

Section 5910, General Code, provides that when a person neglects to build or repair a partition fence, or the portion thereof he is required to build or maintain, the township trustees may assign to each person his equal share thereof, upon complaint of one of the parties involved.

Section 5913, General Code, to which you refer, reads:

"If either person fails to build the portion of fence assigned to him, the township trustees upon the application of the aggrieved person, shall sell the contract to the lowest responsible bidder agreeing to furnish the labor and material and build such fence according to the specifications proposed by the trustees, after advertising them for ten days by posting notices thereof in three public places in the township."

It will be noted that the latter section provides for sale of the contract to the lowest responsible bidder *after* advertising for ten days. There seems to be no provision that the bid must be received within such period.

Although Section 5913, *supra*, contemplates competitive bidding, it appears that in the present case only one bid was received, and this "within a few days" after the ten day bidding period. The opportunity for competitive bidding was given, and thus the statute was complied with. It also appears from your inquiry that such bid was reasonable, and was submitted by a responsible contractor.

Specifically answering your question therefore, I am of the opinion that where, under Section 5913, General Code, township trustees have advertised for a period of ten days for bids to build or repair a line fence, and no bids have been received during that period, the contract may be awarded to a satisfactory contractor whose bid is received after such period of advertising.

Respectfully,
GILBERT BETTMAN,
Attorney General.