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1. ARCHITECT — CONTRACT FOR EMPLOYMENT — PLANS AND SPECIFICATIONS — CONSTRUCTION OF COUNTY HOSPITAL—NOT SUBJECT TO COMPETITIVE BIDDING—SUM MAY EXCEED ONE THOUSAND DOLLARS.
2. NOTICE—PUBLICATION TO BIDDERS—COUNTY BUILDINGS—NOTICE MUST BE PUBLISHED WEEKLY FOR FOUR CONSECUTIVE WEEKS — NEWSPAPERS UNDER PRESCRIBED RATES—SECTION 153.40, CHAPTER 7, RC.
3. TRUSTEES OF COUNTY HOSPITAL—PUBLIC OFFICERS OF COUNTY—PREMIUMS FOR FIDELITY BONDS—PAYABLE OUT OF GENERAL FUND OF COUNTY—CHAPTER 339., 3929.17 RC.

## SYLLABUS:

1. A contract for the employment of an architect to draw up plans and specifications for the construction of a county hospital is not subject to competitive bidding even though exceeding the sum of one thousand dollars.

2. The publication of notice to bidders for the construction of such hospital is governed by the provisions of Section 153.40, Revised Code, relating to county buildings; such notice must be published weekly for four consecutive weeks next preceding the day named for making the contract and in newspapers and under rates prescribed by Chapter 7 of the Revised Code.

3. Trustees of a county hospital operating under the provisions of Chapter 339., Revised Code, are public officers of the county, and premiums for their fidelity bonds are payable out of the general fund of such county as provided by Section 3929.17, Revised Code.

Columbus, Ohio, January 17, 1955

Hon. Robert D. Schuck, Prosecuting Attorney  
Hancock County, Findlay, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The electors of Hancock County, at the November election, approved a bond issue for the purpose of constructing a county hospital, and a Board of County Hospital Trustees has been appointed pursuant to Section 339.01, et seq., Revised Code.

This Board has requested that I obtain your opinion on the following questions:

“1. Does Section 339.05, Revised Code, require the board of County Hospital Trustees to advertise for bids before making a contract in excess of \$1,000 for the employment of an architect to prepare plans and specifications?”

“2. Are the provisions of Sections 153.31 to 153.99, inclusive, Revised Code, applicable to the proceedings of a Board of County Hospital Trustees in the construction of a hospital?”

“3. Which sections of the Code are to be followed by the Board in advertising for bids ‘according to law’ as required by Section 339.05, Revised Code? If the words ‘according to law’ refer only to Sections 7.11 to 7.14, inclusive, Revised Code, how many times and over what period of time is the advertisement to be published?”

“Is the premium on the bond required of each member of the Board of County Hospital Trustees by the last paragraph of Section 339.03, Revised Code, payable from the county general fund or from funds arising from the bond issue?”

Section 339.03, Revised Code, provides that the board of county hospital trustees shall have complete charge of the selection and purchase of a site for a county hospital, and that they shall take title to such site in the name of the county, select plans and specifications, and determine and erect all necessary and proper furniture, fixtures and equipment.

As to the requirement of competitive bidding, Section 339.05, Revised Code, provides:

“Before making a contract for the expenditure of money on any structure or improvement in excess of one thousand dollars, the board of county hospital trustees shall advertise according to law for bids, and shall cause plans, specifications, and detailed drawings to be distributed among the bidders.”

It should be noted that contracts under this statute are limited to “structure or improvement,” as distinguished from those involving services of special skill or professional services, such as the employment of an architect to make preliminary plans and specifications and to superintend the construction. To illustrate the impracticability of awarding such contracts by competitive bidding let us assume that a county desired the services of a skilled and competent attorney to represent the county in

some important piece of litigation involving a large sum of money, could it be seriously contended that the county should, before letting the contract, submit it to competitive bids, and then be required to hire the person making the contract? The answer according to the prevailing trend of judicial opinion, including Ohio, is definitely no. Hence, the statutory provision for competitive bidding does not apply to a contract for the employment of an architect to design, plan, and superintend the construction of a county hospital. See Annotation 142 A.L.R., 543; *Cudell v. Cleveland*, 16 C. C., N.S., 374, affirmed in 74 Ohio St., 1123; *Alcorn v. Price*, 13 N. P., N.S., 558; *Lurie v. Board of Education*, 12 Ohio Opinions, 358.

In Opinion No. 3381, Opinions of the Attorney General for 1948, page 309, a contract which obligated the trustees of a county hospital to pay an architect a fee for the preparation of plans for the construction of the hospital, based on a percentage of the cost of construction and amounting to thousands of dollars, was held a valid obligation within the powers of the county to enter into it, although not executed in accordance with statutory formalities. Similarly, in *Heninger v. Akron*, 64 Ohio Law Abs., 417, a contract awarded by a municipality for codification of city ordinances was held to be one involving services of skill and not subject to competitive bidding.

The case you present does not differ from the cases already adjudicated and those considered in previous rulings by this office, namely, that a contract for the employment of an architect is not subject to competitive bidding.

As to advertising for bids, Section 339.05, Revised Code, provides that "the board of county hospital trustees shall advertise according to law for bids, and shall cause plans, specifications and detailed drawings to be distributed among the bidders." The words "advertise according to law" obviously refer to the provisions of Section 153.40, Revised Code, relating to the construction of county buildings, also to the provisions of Chapter 7, of the Revised Code. Section 153.40 provides:

"When plans, drawings, representations, bills of material, specifications, and estimates are made and approved as provided in sections 153.21 to 153.39, inclusive, of the Revised Code, the board of county commissioners shall give public notice in two of the principal newspapers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of the building, bridge, or

bridge substructure, or the addition to or alteration thereof, and a contract based on such proposals will be awarded. If there is only one newspaper published in the county, it shall be published in such newspaper. The notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract, and state when and where such plans, descriptions, bills, and specifications can be seen. They shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract."

Provisions of Chapter 7, Revised Code, prescribe the newspapers qualified to publish legal notices and the rates to be charged for such legal advertising, and are made applicable to the publication of all advertisements, notices and proclamations required by a public officer of the state, county, municipal corporation, township, school, benevolent or other public institution, and notice to contractors.

It clearly appears from these statutory provisions that notice to bidders must be published weekly for four weeks next preceding the day named for making the contract and in accordance with the rates of publication fixed by statute. No less than the prescribed number of publications will satisfy the statute, nor may more legally be contracted for. *Vindicator Printing Company v. State*, 68 Ohio St., 362.

On the question of expenditures for bonds, Section 339.03, Revised Code, provides that the trustees shall serve without compensation, but shall be allowed their necessary and reasonable expenses incurred in the performance of their duties. Such expenses shall be paid out of the funds provided for such hospital. Each trustee shall give bond for the proper performance of his duties, in such sum as the board of county commissioners requires, with sureties to its approval. Section 339.06, Revised Code, requires that the administrator of the hospital and such other employees as the board of county hospital trustees deems necessary, shall be bonded in amounts established by the board of county hospital trustees, the expense of which shall be paid out of hospital operating funds.

But who pays the premiums for the bonds posted by the trustees? Obviously, the trustees could not qualify for the gratuity of premium under the provisions of Section 339.06, since they are neither employees nor administrators as contemplated by the statute. Nor can the payment of such premiums be considered as "expenses incurred in the performance of their duties," since the trustees could not legally perform any duties until their bonds have been filed with and approved by the county com-

missioners. They are, however, entitled to have such premium paid by the county as public officers of the county, under the provisions of Section 3929.17, Revised Code, which reads:

“The premium of any licensed surety company on the bond of any public officer, deputy or employee shall be allowed and paid by the state, county, township, municipal corporation, or other subdivision, or board of education, of which such person giving the bond is such officer, deputy or employee.”

But are the trustees of the county hospital public officers within the purview of the statute? It has been said that the requisite elements to constitute a public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be in virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he cannot be subject to the direction and control of a superior officer. *State ex rel Attorney General v. Jennings*, 57 Ohio St., 415. In other words, the trustees must possess these attributes in order to qualify as public officers.

In application of this principle, the courts of Ohio have declared members of county and municipal boards, invested with power to exercise governmental functions, to be public officers. Held as such were county commissioners, members of the board of control, members of the county budget commission, trustees of a municipal hospital, directors of an infirmary board, member of the board of workhouse directors, trustees of municipal gas works, trustees of waterworks, etc., see 32 Ohio Jurisprudence, pages 882, 884, Secs. 23, 24. Likewise, trustees of a firemen's pension fund; *State v. Wright*, 2 Ohio Law Abs., 344; members of a school board; *Cline v. Martin*, 94 Ohio St., 420; also members of such boards serving *ex officio*, or members of incorporated boards, 42 American Jurisprudence, page 901, Sec. 30.

The broad and sovereign powers conferred by the statute on the county hospital trustees—to acquire the hospital site in the name of the county; to superintend the building of the hospital and the purchase of proper equipment; to employ the necessary help including the appointment of an administrator; to establish rules of government and rules of admission; to have the entire management and control of the hospital—clearly show such trustees to possess, within their sphere of action, the attributes of sovereignty and independence as to make them not mere employees but public officers of the county as contemplated by the statute.

The funds out of which such premiums are to be paid present no difficulty. Section 339.04, Revised Code, provides:

“All funds arising from a special tax levy or bond issue for the purchase, appropriation, or construction of a county hospital, and contributions thereto, shall be placed in the county treasury to the credit of a fund to be known as the ‘county hospital building fund.’ Such fund shall be paid out on the order of the board of county hospital trustees, certified by the chairman and secretary of the board.”

It is clear from the provisions of this section that such expenditures may not be made out of the hospital building fund or of the bond issue, and only premiums for bonds posted by the administrator and bonded employees may be paid out of the operating fund as provided by Section 339.06, Revised Code. However, the immunity of premium to which the trustees are entitled as public officers is not dependent upon any provisions of the County Hospital Act, and such premiums must be paid out of the general fund of the county as provided for public officers by Section 3929.17, Revised Code. Thus, in Opinion No. 6939, Opinions of Attorney General for 1944, page 280, the syllabus reads:

“The trustees of a county hospital have no authority to pay out of public funds at their disposal, the premium on a bond given to secure the faithful performance of their duties by any of the employees of said board, excepting the bond of the superintendent of such hospital whose bond is provided by Section 3137 of the General Code (R. C. 339.06), and which may be paid for out of such public funds by virtue of the provisions of Section 9573-1, General Code (R. C. 3929.17).”

This opinion has been modified by subsequent legislation, but without affecting its legal principle. Section 339.06, Revised Code, now provides that the administrator of the hospital and such other employees shall be bonded in amounts established by the board of county hospital trustees, the expense of which shall be paid out of the hospital operating funds. The amendment, however, did not affect the rule that the trustees, as public officers, were entitled to have the premiums for their bonds paid out of public funds under the provisions of Section 3929.17, Revised Code. In the recent Opinion No. 4566, Opinions of Attorney General for 1954, page 565, it was similarly held that under the provisions of Section 339.06, Revised Code, which authorizes the hospital trustees to designate the amounts and forms of insurance protection and the board of county com-

missioners to secure such protection, the duty of paying the premiums falls upon the county commissioners.

Accordingly, in specific answer to your questions it is my opinion that :

1. A contract for the employment of an architect to draw up plans and specifications for the construction of a county hospital is not subject to competitive bidding even though exceeding the sum of one thousand dollars.

2. The publication of notice to bidders for the construction of such hospital is governed by the provisions of Section 153.40, Revised Code, relating to county buildings; such notice must be published weekly for four consecutive weeks next preceding the day named for making the contract and in newspapers and under rates prescribed by Chapter 7 of the Revised Code.

3. Trustees of a county hospital operating under the provisions of Chapter 339, Revised Code, are public officers of the county, and premiums for their fidelity bonds are payable out of the general fund of such county as provided by Section 3929.17, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General