fore, that even if Section 3410-1, General Code, did not require the submission of the question of issuing bonds for the construction of a memorial building to the voters of a township, such submission would be necessary under the provisions of Section 2293-17, supra.

Bond elections are now controlled by the provisions of The Uniform Bond Act (112 O. L. 364) and, specifically, by Sections 2293-19, et seq., General Code, as enacted in said Uniform Bond Act. Without setting out said Sections in full, they require that when the taxing authority of any subdivision is required to submit any bond issue to the electors, it shall pass a resolution declaring the necessity of such bond issue and fixing the amount, purpose and approximate date, interest rate and maturity, and also the necessity of the levy of a tax outside of the fifteen mill limitation to pay the interest on and to retire said bonds. This resolution must be certified to the county auditor at least sixty days prior to the election, who is required to calculate the average annual levy throughout the life of the bonds which will be required to pay the interest on and retire such bonds, and certify the same to the taxing authority more than fifty days prior to the election. Thereafter, and more than forty days prior to the election, the taxing authority must certify its resolution, together with the average tax levy estimated by the county auditor, to the Deputy State Supervisors of Elections of the county, who are required to prepare the ballots and make the necessary arrangement for the election. Notice of the election is required to be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior thereto, and the form of ballot to be used at the election is set out in Section 2293-23, General Code. This form of ballot also contains a provision for the levying of taxes outside of the fifteen mill limitation, as estimated by the county auditor.

Answering your question specifically, it is my opinion that township trustees are not authorized to issue bonds for the erection of a memorial building, without a vote of the people, on petition of a majority of the voters of the township, and provide for levying a tax within the fifteen mill limitation to pay the interest on and retire such bonds at maturity. On the contrary, the question of issuing such bonds must be submitted to the electors of the township at a November election, in accordance with the provisions of Sections 2293-19, et seq., General Code, which requires a majority of fifty-five per cent of those voting upon the proposition in order to carry the same. If the provisions of Sections 2293-19, et seq., General Code, have been followed and the necessary fifty-five per cent majority has been obtained, the township trustees are authorized to proceed to issue the bonds and to levy a tax outside of the fifteen mill limitation to pay the interest on and retire the bonds at maturity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1716.

SCHOOL BUILDING—CONSTRUCTION UNDER URGENT NECESSITY—DEFAULTING CONTRACTOR.

SYLLABUS:

Where the original contractor, on a contract for the construction of a school building, defaults on his contract, and where the condition of the building is such

that the early completion of the same is a matter of urgent necessity or for the security and protection of school property, and the board of education so determines, said board of education may enter into a contract with another person for the completion of such building without further advertisement for bids for the work to be performed; provided, of course, the original contract and bond do not require some other method of procedure. The certificate of the fiscal officer provided for in Section 5625-33, General Code, is a condition precedent to entering into such contract.

COLUMBUS, OHIO, February 16, 1928

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for my opinion, which reads as follows:

"You are respectfully requested to render this department your written opinion on the following matter:

On May 11th, 1927, the ---------- Township Board of Education entered into a contract for the erection of a high school building. Owing to financial difficulties, the contractor has defaulted and it is necessary that the building be completed by some person other than the contractor. The amount of work to be done to complete the building, exclusive of the work done by sub-contractors for which payment has not yet been made, will require the expenditure of approximately $10,000.00. The board of education has in its hands and appropriated for the expenditure under the contract ample funds for the completion of the building. The board desires the early completion of the building intending to use the same for school purposes during the present school year.

Question: May the board of education enter into a contract for the completion of the building without advertising for bids?"

I have had several conferences with the attorney for the bonding company, surety on the original contractor's bond, and with various members of the board of education and the architect, and have found the facts, as represented to me, to be, briefly, as follows: On May 11, 1927, the board of education above referred to entered into a contract for the construction of a high school building, after having advertised for bids and otherwise complied with the requirements of law governing the entering into of contracts for the construction of school buildings. The original contractor has defaulted, and it is necessary to complete the building in some other way. It appears that the board of education still has on hand and in the fund appropriated for the construction of the school building the sum of approximately $20,000.00. When it became apparent that the original contractor would default on his contract, the board obtained a number of informal bids for the completion of the building, according to specifications, with the exception of such work and materials which were to be furnished by sub-contractors of the original contractor. In other words, the original contractor having entered into a number of sub-contracts which have not been completed, the board of education obtained informal bids for the completion of the building, except as to the work and materials to be furnished by such sub-contractors. It appears that the sub-contractors have been directed by the surety company to complete their sub-contracts, the surety company assuming responsibility for the payment of the same.

On February 3, 1928, the board of education adopted a resolution reciting the default of the original contractor and reciting that the original contractor and the surety company had waived the architect's notice of such default, as provided in the contract, reciting further that one H. R. B. ——— has proposed to enter into a contract with the board of education and to furnish surety bond for the performance of the same for the completion of said school building, according to plans and specifications, except certain items under sub-contract, for a consideration of $8,960.00. On the same day the original contractor and the surety company executed a waiver, in which they recognized the fact that default had been made by the original contractor and that justification existed for the termination of the employment of such original contractor, and waived notice of default or intention to terminate the employment, and the certificate of the architect that sufficient cause existed for the termination of said employment, consenting that the board enter into a contract with H. R. B. ——— for the completion of the contract, and consenting that the board be governed by Article 22 of the original contract. The above waiver was signed on behalf of the surety company by an attorney in fact. For the purposes of this opinion it is assumed that the attorney in fact was properly authorized to execute the waiver on behalf of the company. A copy of Article 22 referred to in the above waiver has been furnished me and said article reads as follows:

> ART. 22. "OWNER'S RIGHT TO TERMINATE CONTRACT.—If the contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to sub-contractors or for material or labor, or persistenly disregard laws, ordinances or the instructions of the architects, or otherwise be guilty of a substantial violation of any provision of the contract, then the owner, upon the certificate of the architect that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy and after giving the contractor seven days written notice, terminate the employment of the contractor and take possession of the premises and of all the materials, tools and appliances thereon and finish the work by whatever method he may deem expedient. In such case the contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balances of the contract price shall exceed the expense of finishing the work including compensation for additional managerial and administrative services, such excess shall be paid to the contractor. If such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, and the damage incurred through the contractor's default, shall be certified by the architect."

I do not have before me the original contractor's bond or a copy thereof, but I am informed that the standard form of building contractor's bond was used. That form refers to the contract and incorporates the same into the bond by reference and contains no other or additional provisions as to procedure upon default than are contained in Article 22 of the contract, supra.

The construction and erection of school houses is covered by Section 7623, et seq., General Code. Section 7623 provides, in part, as follows:

> "When a board of education determines to build, repair, enlarge or furnish a schoolhouse or schoolhouses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts three thousand dollars, and in other districts one thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows: * * *"

The Section then contains specific directions as to advertising for four weeks, the acceptance of bids, the opening and tabulation of the same, the requirements of the bids and the award of the contract or contracts, which must be to the lowest responsible bidder.

It appears that the board of education complied with the requirements of Section 7623, General Code, supra, as far as the original contract for the construction and erection of the high school building is concerned, and the question now arises as to whether or not it will be necessary to re-advertise where the contractor has defaulted. I find no provisions in the General Code specifically setting out the procedure to be followed to secure the completion of a school building, where the original contractor has defaulted, nor do I find any court decisions specifically passing on the question.

In my opinion where a contractor has defaulted, two methods are available to secure the completion of the building:

First. The board of education, after giving the required notice to the bonding company, may enter into a contract with a person other than the contractor for the completion of said building, using what funds it has in its hands, which have been appropriated for use on the original contract, and holding the surety company liable for any bills in excess of such funds.

Second. The bonding company having been duly notified of the default may, with the consent of the board of education, complete the building, according to the plans and specifications, and pay all bills incurred in the construction of the building ,and be then subrogated to the rights of the original contractor in any monies remaining in the hands of the board of education.

In the case under consideration, it appears that the board of education and the bonding company desire to proceed under the first method above referred to and it remains to determine what procedure should be followed by the board of education in entering into a contract for the completion of the building.

Section 7623 quoted in part above provides, in effect, that a board of education must advertise for bids for the construction and erection of a school building whenever it determines to construct such building or make any repairs or improvements thereon, except in the case of city districts where the cost does not exceed three thousand dollars, and in other districts where the cost does not exceed one thousand dollars, and except also in cases of urgent necessity, or for the security and protection of school property. It may be contended that Section 7623 applies only to the original contract, that is, where the necessary steps required by Section 7623, General Code, have been followed in awarding the original contract, the provisions of said Section do not apply to contracts for the completion of the work upon default of the original contractor.

In Donnelly on the Law of Public Contracts, Section 150, page 235, it is said:

> "Where statutes require advertising for bids for the construction of public work and the award of the contract to the lowest bidder, if the statute does not in terms cover the reletting of the contract when aban-

doned, but is silent upon this subject, the public body may relet the contract without competition. This is especially true where the original contract expressly provides that in case the contractor unnecessarily delays the work, defaults in other ways or abandons it, the public body may complete the same by contract or otherwise at the expense of the contractor. In some jurisdictions, however, these statutes are declared to apply to unfinished improvements made so through abandonment by the contractor, and contracts relet without advertisement are held invalid."

In support of the proposition stated in the last sentence above quoted, the author cites the case of *City of Chicago* vs. *Hanreddy*, 211 Ill. 24. That was a case where a contractor, under a contract for the construction of conduits for intercepting sewers, defaulted after completing about one-third of the work. Section 50 of Article IX of an act of the State of Illinois to provide for the incorporation of cities and villages, required all contracts for the making of any public improvement to be let to the lowest responsible bidder, and it was contended that that section did not apply to the unfinished portion of a contract where a contractor had defaulted.

On page 32 of the opinion it was said:

"It is further contended that said Section 50 should not be held to apply to unfinished work, where a valid contract had been let and the contractor had abandoned the work. We find no authority for reading into said section an exception to the effect that where a valid contract has been let after advertising for bids, and the contractor has abandoned the work, the city may complete the work by day labor, where the cost of the unfinished work will exceed the sum of $500. The authorities relied upon by the appellants to sustain their position we are of the opinion are not in point. They are cases where the improvement had been completed and accepted by the municipality and an action had been brought against the city for the value thereof, or they arose under statutory provisions which were different from the provisions of the statute in force in this state. To hold that the statute does not apply to an unfinished public improvement after the work has been abandoned by the contractor would be to permit contracts for public improvements to be let to irresponsible parties, which, when abandoned after some portion of the work had been done, would open wide the door to fraud and destroy competition, and enable city officials to do indirectly what in express terms they are prohibited from doing by the statute."

I am inclined to the view that in the absence of a decision by a proper court to the contrary, the board of education, in the instant case, should follow the provisions of Section 7623, General Code, unless the facts are such as would warrant the board in finding that a case of urgent necessity exists, or that the security and protection of school property require their proceeding in some other way. In other words, if the board of education, in the light of all the circumstances, determines that an urgent necessity exists or that the security and protection of school property demands that a contract for the completion of the building be entered into without advertising for bids and passes a resolution to that effect, I am of the opinion that the board may enter into such contract without advertising for bids for the same. The determination of whether or not an urgent necessity exists, or whether or not the entering into of a contract without advertising

is necessary for the security and protection of school property lies, in the first instance, in the discretion of the board of education and a court will not disturb such a determination by a board of education unless there is a palpable abuse of discretion or fraud.

The passage of the resolution above referred to, to-wit, the resolution determining that an urgent necessity exists or that the security and protection of school property demands the entering into of a contract for the completion of a building without advertising is, in my opinion, a condition precedent to entering into such contract.

I also wish to direct your attention to Section 5625-33, General Code, which provides, in part, as follows:

> "No subdivision or taxing unit shall:
> * * *
> (d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. * * *"

In my opinion the certificate required by the above quoted portion of Section 5625-33, General Code, is also necessary as a condition precedent to the entering into of a contract for the completion of the school building, and that without such a certificate the contract would be invalid.

Answering your question specifically, it is my opinion that where the original contractor, on a contract for the construction of a school building, defaults on his contract and where the conditon of the building is such that the early completion of the same is a matter of urgent necessity or for the security and protection of school property and the board of education so determines, said board of education may enter into a contract with another person for the completion of such building without further advertisement for bids for the work to be performed; provided, of course, the original contract and bond do not require some other method of procedure. The certificate of the fiscal officer provided for in Section 5625-33, General Code, is a condition precedent to entering into such contract.

Respectfully,
EDWARD C. TURNER,
Attorney General.