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PROVISION OF §§735.071 and 735.074, R.C. ARE LIMITATIONS IMPOSED UPON DEBT INCURRING POWER OF MUNICIPALITIES, AND TAKE PRECEDENCE OVER ANY PROVISION OF CITY CHARTER OR ORDINANCE IN CONFLICT THEREWITH—§§735.071, 735.074, R.C.

SYLLABUS:

The provisions of Sections 735.071 and 735.074, Revised Code, are limitations imposed upon the debt incurring power of municipalities, and take precedence over any provisions of a city charter or ordinance in conflict therewith.

Columbus, Ohio, June 8, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“On October 13, 1959, Sections 735.071 to 735.074, both inclusive, Revised Code of Ohio, became effective. These sections relate to the conditions for payment of contractors engaged in constructing permanent improvements for municipalities.

“In at least two municipalities of the State of Ohio, both of which operate under charters, the local officials have indicated they will not follow the provisions of these statutes, and in one of them an ordinance was passed which declares, after setting up the conditions under which contracts will be let by that city, that these sections of the State Code are inoperative with respect to the contracts of the city. I am enclosing for your consideration a copy of the ordinance and correspondence relating to this problem.

“In view of the foregoing facts, your opinion is respectfully requested with respect to the following questions:

“1. May a charter municipality adopt legislation containing provisions contrary to these sections of the Code above indicated with respect to contracts for permanent improvements?

“2. In the absence of such an ordinance, do Sections 735.071 to 735.074, both inclusive, Revised Code of Ohio, apply to a charter municipality?

“3. In the absence of a charter, are the provisions of Sections 735.071 to 735.074, both inclusive, Revised Code of Ohio, binding upon a municipality?

“Should you desire to examine the charters of either of the municipalities in question, I believe I can make them available for your inspection.”

Sections 735.071 and 735.074, Revised Code, provide as follows:

Section 735.071

“The unit or lump sum price stated in the contract referred to in sections 731.14, 735.05, and 737.02 of the Revised Code shall be used in determining the amount to be paid and shall constitute full and final compensation for all the work.

“Partial payment to the contractor for work performed under the lump sum price shall be based on a well-balanced schedule prepared by the contractor and approved by the architect or engineer who shall apportion the lump sum price to the principal features entering into or forming a part of the work under the lump sum price.

“Partial payment to the contractor for labor performed under either a unit or lump sum price contract shall be made at the rate of ninety-two per cent of the estimates prepared by the contractor and approved by the architect or engineer. All labor performed after the job is fifty per cent completed, shall be paid for at the rate of one hundred per cent of the estimates submitted by the contractor and approved by the architect or engineer.”

Section 735.074

“The amounts and time of payments of any contract made by a city or village, or any board, commission, or agency thereof, shall be governed by sections 735.071, 735.02 and 735.073 of the Revised Code.”

The local officials, who you have indicated will not follow the above quoted provisions of the Revised Code, are apparently relying on the

provisions of Section 3 of Article XVIII of the Ohio Constitution, commonly known as the "home rule amendment," which provides as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It is from the foregoing provision of the constitution that municipal corporations receive their power and authority to contract. The only limitation found within this provision on the grant of "all powers of local self-government" is not applicable here since the question you have presented does not involve "local police, sanitary and other similar regulations." The only limitation, therefore, if any, on the power of a municipal corporation to enter into contracts such as you have described must be predicated upon some other constitutional provision. Such provision is found in Section 13 of Article XVIII of the Ohio Constitution reading as follows:

"Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

At least one lower court in this state has held that the provisions of Section 13 of Article XVIII, *supra*, do not limit the power of charter municipalities as to the manner and method of incurring debts because the Court apparently felt that such provisions had reference only to the amount of such debts. *The City of Akron v. Zeisloft*, 22 N.P. (N.S.), 533. The Supreme Court, however, in the later case of *Phillips v. Hume*, 122 Ohio St., 11, held in the syllabus as follows:

"1. The power of municipalities to incur debts may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII of the Constitution adopted in 1851, and also by Section 13, Article XVIII of the amendments adopted in 1912. Such limitations or restrictions apply to all municipalities, whether operating under charter or otherwise. (*State, ex rel. Toledo, v. Cooper*, 97 Ohio St., 86. *State, ex rel., v. Bish*, 104 Ohio St., 206, and *Berry et al v. Columbus*, 104 Ohio St., 607, are approved and followed.)

"2. The requirement for advertising provided in Section 4328, General Code, is one of the methods of limitation expressly

imposed upon the debt incurring power of municipalities, when an expenditure exceeds five hundred dollars; and if the provisions of a city charter are in conflict with a state law upon that method they must yield to the requirements of the state law."

It would seem, therefore, that under the provisions of Section 13 of Article XVIII, *supra*, the General Assembly may limit the manner and method of incurring debts as well as their amount. This conclusion is further supported by the debates at the constitutional convention relative to Section 13 of Article XVIII, *supra*. See the Proceedings and Debates of the Constitutional Convention of 1912, Vol. 2, page 1451.

Accordingly, it is my opinion and you are advised that the provisions of Sections 735.071 and 735.074, Revised Code, are limitations imposed upon the debt incurring power of municipalities, and take precedence over any provisions of a city charter or ordinance in conflict therewith.

Respectfully,

MARK MCELROY

Attorney General