

6589.

APPROVAL—BONDS OF TOLEDO CITY SCHOOL DISTRICT,
LUCAS COUNTY, OHIO, \$110,000.00.

COLUMBUS, OHIO, December 29, 1936.

Industrial Commission of Ohio, Columbus, Ohio.

6590.

HIGHWAY—DECISION OF HIGHWAY DIRECTOR FINAL
WHERE SPECIFICATIONS AUTHORIZE INTERPRETA-
TION THEREOF BY HIM.

SYLLABUS:

Where the specifications provide that the Director of Highways shall be the final arbiter in cases of dispute as to the meaning of the plans and specifications, and he makes a given decision, such decision is final in the absence of fraud, dishonesty or collusion.

COLUMBUS, OHIO, December 30, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: Acknowledgment is made of your recent communication which reads:

"A problem has arisen in connection with the construction of an improvement in Cuyahoga County, designated as SH (ICH) No. 460, Sections Valley View and Garfield Heights (part), FAP 683-B, WPGM 683-B, in relocating and reconstructing Granger Road.

The facts are hereinafter listed in chronological order.

I. The project as originally planned extended from Station 0 plus 49.97 to Station 68 plus 75, as outlined in yellow, red and green on the attached plan sheet, Exhibit A. The project was divided into two proposals with a separate set of plans for each. Proposal No. 1, FAP 683-B, for the highway improvement, is shown outlined in yellow and red. Proposal No. 2, WPGM 683-B, for the grade separation improvement, is shown outlined in green. This original project was designated as S. H. (ICH)

No. 460, Sections Valley View, Independence (part) and Garfield Heights (part), Cuyahoga County.

II. On April 24, 1936, The East Ohio Gas Company submitted to the Department a plan showing the present location of its 18" high pressure gas main and the proposed location of the main to conform to the highway improvement, together with an estimate of the cost of relocating this pipe line. At the point where the new highway alignment crosses the present gas main, the pipe line is situated on private property, having been so located for a period of several years prior to the recent acquisition of a highway right of way by the Department. The Department has agreed to reimburse the Gas Company for any work necessary on its line, in accordance with standard Departmental billing regulations. The plan of rearrangement, as submitted by the company, was determined to be the least costly of the limited number of methods available.

III. The present and proposed gas line locations were incorporated in the highway construction plans, as shown on attached Exhibit B. Notes, appearing on the plans for both proposal No. 1 and proposal No. 2, pertaining to the gas main, were as follows:

Note No. 1, shown on Exhibit B, 'Note: During the construction of this project, the contractor and The East Ohio Gas Company shall mutually cooperate by arranging their respective operations of grading, relocating and reconstructing of gas mains to permit the Gas Company to work within the right of way.'

Note No. 2, Exhibit C hereto, appeared on sheet 2 of proposal No. 1, FAP 683-B, 'Excavation between Station 43 plus 00 and Station 54 plus 00 shall be made to the elevation and full width of subgrade before work is started between Station 54 plus 00 and Station 68 plus 75.'

Note No. 3, as shown on Exhibit E hereto, 'Note: Contractor shall cooperate with the Gas Company by permitting the installation of the 18" gas line shown on sheet 4 and properly protecting same after it has been installed.

'For construction procedure see note on sheet 2 of Federal Aid Project No. 683-B (Proposal No. 1).'

Note No. 4, as shown on Exhibit G hereto, '9.—Place 18" gas line, including excavation and backfill.'

IV. On July 9, 1936, advertisements were released to the newspapers for the receipt of bids on the project as originally planned. The Gas Company was given notice of this advertisement.

V. On the date of sale, July 28, 1936, no bids had been received for this project, known as project No. 252.

VI. That part of the original project outlined in yellow, Exhibit A, had been designed as a temporary connection pending the development of design and plans for a grade separation and tie-in with Schaff Road and Brecksville Road. In the interim, between the completion of plans for project No. 252 and the date of sale, a determination had been made as to the plan for the permanent connection and the Department decided to revise the plans for the original project omitting the tie-in section as outlined in yellow, Exhibit A, since plans for the permanent construction of this section would be available at an early date. In the revision of the original plans certain sheets were omitted including sheet 2 of proposal No. 1 on which appeared note No. 2, Exhibit C. No revision was necessary in the plans for proposal **No. 2.**

VII. The project as revised was designated as S. H. (ICH) No. 460, Sections Valley View and Garfield Heights (part), Cuyahoga County, and advertisements for the receipt of bids were released to the newspapers on August 26, 1936. Section Independence (part) and a part of Section Valley View had been deleted from the original plans.

VIII. The date of sale was September 15, 1936. A contract for the construction of the improvement was awarded to the low bidder.

IX. On September 24, 1936, federal approval was received and the Gas Company was notified to make their line rearrangements as hereinbefore adverted.

X. On September 29, 1936, a meeting was held in Cleveland at which the Department, the Gas Company and the contractor were represented. On this occasion the contractor's representative stated that their plan of operation would require the removal of the present gas line prior to the grading and construction which would be necessary before the proposed gas line could be installed. Following this meeting representatives of the Department and the Gas Company made a study of all other methods of rearranging the gas main. Due to the fact that this main is one of the principal sources of supply for the City of Cleveland, which necessitates its continuous operation so that gas service

will be uninterrupted, plans to care for the pipe line were limited. Estimates and bids were obtained on alternate locations. The most economical alternate would cost in excess of \$20,000.00 more than the line as originally proposed.

XI. The highway contractor was aware of note No. 2, Exhibit C, which note was omitted from the revised plans, and maintains that the Director of Highways is without authority to require him to modify his plan of procedure for construction operations, upon which he claims his bid was based, in a manner which, he states, will greatly increase the cost of his carrying out the contract, and that Note 1, Exhibit B, is general and informative in nature only.

XII. Certain sections of the construction and material specifications which, of course, are a part of the contract, are quoted in Exhibit H, attached hereto, and call attention to the powers vested in the Director in the controlling of contract operations, and the obligations of a contractor in the protection of private property.

XIII. Attached herewith is Exhibit I, as a letter to the contractor dated November 24th, and another letter dated December 4th, in amplification thereof relative to my interpretation of the plans as pertaining to the gas line.

It is requested that the Director of Highways be formally advised as to:

- (a) The legal status of this matter as of this date, and,
- (b) Whether or not the procedure he has followed is in accordance with law and the proper exercise of his administrative function.

Your letter directed to The Horvitz Company under date of November 24, 1936, reads:

“S. H. 460, Sec. Valleyview Pt. & Garfield Hts. Pt.
Cuyahoga County, FAP and WPGM 683-B.

I have your letter of November 20, relative to the above project. You state that you are unable to proceed with the construction of this project until provision is made for removing the gas main from the present location.

This might be a fact as you have stated it if there were no alternate methods of doing the work of grading, but since immediate removal of the existing gas line was not evident in the

plan, I do not feel that you should attempt to confine yourself to this method of construction but that you should proceed to carry on your work in cooperation with the gas company as provided by the plan and your contract. Failure to do this can only cause delays which are naturally chargeable to yourself."

Also, your letter to the said company under date of December 4, 1936, reads:

"Re: SH (ICH) No. 460, Sections Valley View (pt), Garfield Heights (pt), Cuyahoga County.

Referring to previous correspondence in connection with the above improvement, with particular application to my letter to you of November 24, 1936.

This matter has again come to my attention through a letter from the East Ohio Gas Company, dated November 25th, in which they request us to advise them as to the procedure we wish them to follow in regard to the handling of this gas line. Their request is predicated upon your letter to the Gas Company under date of November 20th, to the attention of Mr. Gray, Chief Engineer, in which you request them to take immediate steps to remove the main to a location sufficiently distant to permit you to engage in blasting and grading operations.

Accordingly, it is desired to inform you of the legal background of my letter to you of November 24th, by quoting certain sections of the general specifications governing the administrative functions of the Director of Highways as applied particularly to the note on Page six of the construction plans for Federal Aid Project No. 683-B (1936) as follows:

'Note: During the construction of this project, the Contractor and the East Ohio Gas Company shall mutually cooperate by arranging their respective operations of grading, relocating, and reconstructing of gas mains to permit the Gas Company to work within the right-of-way.'

and also to the present and proposed gas line locations clearly shown and designated on Page six of the construction plans for Federal Aid Project No. 683-B (1936).

Section G-4.01 (page 5) of the general specifications reads, in part, as follows:

‘* * * Should any misunderstanding arise as to the intent or meaning of said plans or specifications, or any discrepancy appear in either, the decision of the Director in such case shall be final and conclusive.’

Section G-5.01 (page 7) of the specifications reads as follows:

‘The Director shall decide any and all questions which may arise as to the quality or acceptability of materials furnished and work performed and as to the manner of performance and rate of progress of the work and shall decide all questions which may arise as to the interpretation of the plans and specifications, and all questions as to the acceptable fulfillment of the contract on the part of the contractor, and as to compensation. His decisions shall be final and he shall have executive authority to enforce and make effective such decisions and orders as the contractor fails promptly to carry out.’”

From the facts stated in your communication, together with the exhibits attached, it appears that you have interpreted the plans and specifications in view of the authority invested in you by the general specifications. Of course, this matter involves questions of fact which can best be determined by those qualified in engineering matters. While the conclusion you have reached would be reasonable in view of the data you have submitted, as above indicated it is not for the Attorney General to attempt to pass on questions of fact. However, it may be stated that with reference to such provisions in specifications as you mention relative to the final determination being given to a designated person, the courts have uniformly held that such decisions will stand unless fraud, dishonesty or collusion intervenes. In the case of *Jones v. Fath*, 101 O. S., 47, the court in its per curiam opinion, among other things, stated:

“Where parties to a building or construction contract agree to abide by the decision of an engineer or an architect having oversight or supervision of such work as to the amount, quality, acceptability and fitness of the several kinds of work which are to be done and paid for under such contract, the decision of the arbiter so designated is binding upon the parties, unless it is shown by clear and convincing evidence that such decision was based upon fraud, dishonesty or collusion.”

Also, in *Conroy Brothers, Inc., v. J. J. Duggan & Brothers, et al.*, 17 O. A., 435, it was held:

“A provision in a building contract, to the effect that all questions in dispute between the contracting parties shall be determined by a certain named architect, is binding upon the parties in the absence of fraud, dishonesty or collusion on the part of such arbiter.”

In view of the foregoing and in specific answer to your inquiries, it is my opinion that your determination of the matter in controversy is clearly within your lawful administrative functions and that such determination is final until and unless a court of competent jurisdiction should find otherwise in a proper proceeding.

Respectfully,

JOHN W. BRICKER,
Attorney General.

6591.

APPROVAL—CONTRACT FOR STEEL WATER TANK AND TOWER AT CAMP PERRY, OHIO, \$10,970.00, UNITED STATES GUARANTEE COMPANY, SURETY—CHICAGO BRIDGE AND IRON COMPANY, CONTRACTOR.

COLUMBUS, OHIO, December 30, 1936.

HON. EMIL F. MARX, *Adjutant General, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval a contract between the State of Ohio, acting by and through yourself as Adjutant General of Ohio and Director of State Armories, and The Chicago Bridge and Iron Company of Chicago, Illinois. This contract covers the construction and completion of a steel water tank and tower at Camp Perry, Ohio, in accordance with the form of proposal dated November 9, 1936. Said contract calls for an expenditure of ten thousand nine hundred and seventy dollars (\$10,970.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. Certificates of the Controlling Board show that such board has released funds for this project in accordance with Section 8 of House Bill No. 531 of the 91st General Assembly. In addition, you have submitted a contract bond, upon