

1802

CONTRACTS — DITCH, COUNTY — §6131.41 R.C. — ASSESSMENTS—ATTACHMENT OF LIEN.

SYLLABUS:

1. A contract is completed within the meaning of Section 6131.41, Revised Code, upon final performance of the terms of the contract.
2. The board of county commissioners confirms assessments in a county ditch proceeding at the final hearing held pursuant to Section 6131.22, Revised Code.
3. The board of county commissioners, pursuant to Section 6131.43, Revised Code, orders the county auditor to make a *pro rata* reduction in assessments by the difference between the estimated cost and final cost upon final performance of the terms of the contract.
4. A lien for a county ditch assessment attaches to real property from the date the board of county commissioners approves the completion of the contract and orders the levying of assessments.

Columbus, Ohio, March 4, 1958

Hon. John H. Barber, Prosecuting Attorney
Fulton County, Wauseon, Ohio

Dear Sir:

Your request for my opinion reads:

"I have been requested by the Fulton County Auditor and County Commissioners to seek your interpretation of section 6131.43 O.R.C. as it was revised effective August 23, 1957. My question is specifically as follows:

1. When is the contract provided for in Sec. 6131.41 considered completed under the statute. Is it upon the completion of executing the contract and furnishing of bond by the contractor, or is it upon the completion of the work to be performed and/or furnishing of materials under the contract?
2. When should the Board of Commissioners first confirm the assessments on each parcel of land?
3. When should the Board of Commissioners order the Auditor to reduce pro rata the assessments previously confirmed by it?
4. When does the assessments become a lien upon the several parcels of real estate?"

I shall consider your first and third questions together. Section 6131.41, Revised Code, reads:

"The acceptance of the bids in accordance with section 6131.40 of the Revised Code shall be approved by the board of county commissioners. Upon the acceptance of any bid for the whole or any part of an improvement, the bidder shall within ten days enter into a contract in writing to perform the work or furnish the material bid for as prepared by the county engineer. The board by an order entered on its journal shall determine the time within which such work shall be completed and material furnished, but if an improvement requires both labor and material, and contracts therefor are given to different persons, the time of furnishing such material and completing such labor shall correspond with the time provided for its use in the progress of the work. An upper contractor shall not be required to complete his contract until an outlet is furnished by the work done by a lower contractor."

The question of when a contract is "complete," within the meaning of the above quoted statute, would seem to arise only in the interpretation of the last sentence thereof. A consideration of the entire context of the statute indicates that the legislature employed the term "complete his contract" to indicate final performance of the terms of the contract. This interpretation is supported by Section 6131.43, Revised Code, as it was amended in 127 Ohio Laws, 220, to read in part:

"Upon the *completion* of the contracts as provided in section 6131.41 of the Revised Code, the board of county commissioners shall order the county auditor to reduce pro rata the assessments confirmed by it by the difference between the estimated cost of the construction and the *final cost * * **" (Emphasis added)

The emphasized words in the above quoted statutory provision replaced the words "approval" and "contract price" respectively. The amendment indicates legislative recognition that "contract price" can differ from "final cost."

The "contract price" would, of course, be fixed at the time of the execution of the contract while "final cost" might not be ascertainable until performance under the contract is complete and all contingencies resolved. Since "completion of the contracts as provided in Section 6131.41, Revised Code" refers to the time of final performance under the terms of a contract, the county commissioners now, in compliance with Section 6131.43, Revised Code, order the county auditor to make the *pro rata* reduction in assessments at such time.

Your second question is answered by Section 6131.22, Revised Code, which reads in applicable part:

"At the final hearing on a proposed improvement, if the petition is not dismissed, the board of county commissioners shall hear any evidence offered for or against the assessment * * * *The board shall approve and confirm* the assessments and shall order the engineer to let the contracts for the construction of the proposed improvement, and shall fix the time for the letting of the contracts, which time shall be not less than twenty-five days after the date of said order * * *" (Emphasis added)

Your fourth question is answered by that portion of Section 6131.43, Revised Code, as amended in 1957, which reads:

"* * * The auditor shall forthwith place said assessments (as reduced pro rata by difference between estimated and final cost) upon the duplicates of the county, and said assessments shall be a lien upon the several parcels respectively from and

after the date of the order of the board approving the completion of the contracts and ordering the levying of the assessments. The auditor shall be liable on his bond for any damages sustained by any person by reason of such auditor's failure to place promptly said assessments upon the proper duplicates of the county." (Parenthetical matter added)

As noted above, Section 6131.22, Revised Code, provides that the board of county commissioners shall approve and confirm assessments at the final hearing. An appeal may be taken by a dissatisfied landowner questioning the amount of the assessment approved and confirmed against his land. But such assessment does not, by reason of approval and confirmation of the board of county commissioners, become a lien on the real property. Such lien attaches only from the time that the board of county commissioners approves the completion of the contract and orders the levying of assessments pursuant to the provisions of Section 6131.43, Revised Code. The statutory language, "The auditor shall forthwith place said assessments so levied upon the duplicates" and the liability of the auditor on his bond indicates that the auditor is under a duty to comply with the order of the commissioners without delay. Failure of the auditor to act timely in making the assessments a matter of public record would not postpone the effective date of the lien but would make the auditor, or his surety, liable to anyone damaged by such delay.

In specific answer to your questions you are advised:

1. A contract is completed within the meaning of Section 6131.41, Revised Code, upon final performance of the terms of the contract.
2. The board of county commissioners confirms assessments in a county ditch proceeding at the final hearing held pursuant to Section 6131.22, Revised Code.
3. The board of county commissioners, pursuant to Section 6131.43, Revised Code, orders the county auditor to make a *pro rata* reduction in assessments by the difference between the estimated cost and final cost upon final performance of the terms of the contract.
4. A lien for a county ditch assessment attaches to real property from the date the board of county commissioners approves the completion of the contract and orders the levying of assessments.

Respectfully,
WILLIAM SAXBE
Attorney General