

5275

BRIDGE CONSTRUCTION—COUNTY COMMISSIONERS ELECTED TO PROCEED BY FORCE ACCOUNT—POWER LIMITED TO GIVING AUTHORITY TO ENGINEER—COMMISSIONERS HAVE NO AUTHORITY TO RECEIVE INFORMAL BIDS AND MAKE CONTRACT FOR WORK—AUTHORITY VESTED SOLELY IN COUNTY ENGINEER—SECTIONS 153.31, 5543.19 ET SEQ., RC.

SYLLABUS:

When the board of county commissioners have found it necessary to construct a bridge and have elected to proceed under authority of Section 5543.19 et seq., of the Revised Code, by authorizing the construction of such bridge by force account, rather than erecting such bridge by contract under the provisions of Section 153.31 of the Revised Code, the power of said board is limited to giving authority to the county engineer, and the commissioners have no authority to receive informal bids for such work and make a contract therefor. The authority to carry out such construction is vested solely in the county engineer.

Columbus, Ohio, June 1, 1955

Hon. Robert A. Carton, Prosecuting Attorney
Coshocton County, Coshocton, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"Recently, the Conesville Bridge across the Muskingum River was found to be unsafe for use and it is necessary to replace the same.

"The river divides a township and a school district in such a manner that a bridge is deemed to be necessary and its construction with a minimum of delay is required.

"There is a diversity of opinion between the County Engineer and the County Commissioners as to the procedure by which a new bridge could be constructed.

"The County Commissioners by Resolution dated April 4, 1955, passed the attached Resolution No. 273A to proceed under G. C. 5543.19 to construct a new bridge upon force account and reserved the right to purchase materials relative to the project.

"No detailed plans or specifications for the bridge construction were prepared and no formal bids were asked with respect to the material, but several contractors were advised of the location and the general plans of the proposed bridge and were asked to submit plans and prices thereon, all work and plans, however, to be subject to the approval of the State Highway Director.

"Several such informal proposals were received by the County Commissioners and all of the proposals included both labor and materials for the complete erection of the bridge in place.

"The proposal of the Ohio Bridge Corporation dated April 26, 1955 (copy attached) was accepted by the Commissioners by Resolution No. 273B attached.

"The County Engineer does not approve of the procedure of the County Commissioners under force account in accepting a proposal by a bridge corporation to furnish all labor and material for the erection of a complete bridge in place.

"The questions presented are as follows:

"1. Do the County Commissioners under the provisions of G. C. 5543.19 under force account, have the right to accept a proposal made by a bridge corporation to erect a pre-

fabricated all welded bridge complete in place, the bridge corporation supplying the labor and material therefor.

“2. Can such a proposal be accepted without the approval of the County Engineer and if accepted by the Commissioners, can payment be made by the county to the bridge corporation without the approval of the county Engineer?”

There have been for many years two distinct procedures set forth in the statutes for the erection or repair of bridges on county highways. As to the first in point of time, we find in 98 Ohio Laws, page 21, an act passed February 10, 1871, providing that when it becomes necessary to erect any bridge the county commissioners shall advertise for proposals and let the contract to the lowest and best bidder.

In 1888, this act was amended, 85 O. L. 218, and became Section 796 et seq. Revised Statutes, later Section 2443 et seq. of the General Code. It has come down to the Revised Code, without material changes, as Section 153.31 et seq. Section 153.31 requires that plans and specifications for the substructure of a proposed bridge, shall be prepared by an architect or civil engineer. Section 153.32 makes like provision as to the superstructure, and reads in part:

“* * * The board shall cause to be prepared, plans, descriptions and specifications for such superstructure, which shall be kept on file in the county auditor’s office for inspection by bidders and persons interested, for a period of fifteen days prior to the date for receiving bids, and it shall invite bids or proposals in accordance therewith.”

Section 153.33 provides for alternate plans to be submitted by bidders. Section 153.34 requires the contract to be let to the lowest and best bidder. It will be observed that this entire procedure has been in the law without substantial change since 1888.

The second course provided by the statutes for building county bridges dates from an act passed in 1915, 106 O. L., 574. This was a comprehensive highway law for the state and its subdivisions. Section 155 of that act, as originally worded, made no reference to building a bridge by force account. It read as follows:

“The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties.”

In 107 Ohio Laws, page 69, that section was amended, and now appears in the Revised Code, in substantially the same language as Section 5543.19, G. C. 7198. It now reads:

"The county engineer may, when authorized by the board of county commissioners, employ such laborers and teams, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges, and culverts by force account."

(Emphasis added.)

This section, which, as will be noted, is much later in its enactment than Section 153.31 et seq. stands quite alone, there being no other provisions of the law which appear to be related to the procedure contemplated. It is also worthy of note that in both the General Code and the Revised Code this section appears in a chapter devoted to "duties of county engineer."

We have, therefore, two entirely independent and different modes of procedure whereby the county may construct a bridge. It might be claimed that because the procedure set forth in Section 5543.19, R. C., 7198 G. C., supra, was enacted at a later time than that outlined in Section 153.31 supra, R. C., 2343 G. C., et seq., therefore the later statute would operate as a repeal of the former. I do not deem it necessary to decide that question. One of my predecessors, in Opinion No. 2410, Opinions of the Attorney General for 1921, page 822, held:

"2. Said sections 7198, 7200 and 7214 do not repeal by implication sections 2343 to 2361, G. C. providing among other things for the construction and repair of bridges upon the competitive bidding plan. The two groups of sections provide distinct methods of bridge construction and repair; and when one group is resorted to for procedure, it must be followed to the exclusion of the other."

That conclusion, it appears to me, may be strengthened by the fact that the earlier provision was mandatory in form, while the later provision relative to force account is merely permissive. In other words, the legislature having laid down a mandate for the procedure of the county commissioners in erecting a bridge by competitive bids, saw fit at a later time to give them permission to perform the work in another manner, to wit, by turning the entire matter over to the county engineer.

Proceeding on the belief, therefore, that my predecessor was right in saying that these statutes give the commissioners a choice of procedure,

I propose to examine Section 5543.19 *supra*, in order to determine what happens if the commissioners choose this process of construction by force account instead of advertising for bids and letting a contract. It is to be noted first, that the commissioners must decide what procedure to take, and the statute provides that when they give authority for the county engineer to construct a bridge by force account, then it is the county engineer and not the commissioners who employs the necessary laborers and purchases the necessary materials and constructs the bridge by force account. In Opinion No. 2106, Opinions of the Attorney General for 1930, page 1136, it was held :

“In the maintenance and repair of county roads which are authorized by the county commissioners to be done by force account and without contract, the employment of the necessary laborers for the prosecution of the work rests with the county surveyor and not with the county commissioners.”

The Attorney General quoted from an earlier Opinion No. 271, Opinions of the Attorney General for 1927, page 466, where it was held :

“In the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account, the county surveyor may when authorized by the county commissioners, employ such laborers and teams as may be necessary.”

The Attorney General further said that the same conclusion had been announced in several earlier opinions. In Opinion No. 3139, Opinions of the Attorney General for 1931, page 527, it was held :

“When the county commissioners have authorized the surveyor to construct or improve a road by force account, under the provisions of Section 7198 of the General Code, *the surveyor has the sole power to contract* with laborers with reference to the construction of such improvement, and the approval of the county commissioners is not required as a condition precedent to the payment of such wages.” (Emphasis added.)

As you state, it was held by my immediate predecessor in Opinion No. 1498, Opinions of the Attorney General for 1950, page 103, that a pre-fabricated bridge may be purchased and constructed under the force account statute under consideration.

In Opinion No. 768, Opinions of the Attorney General for 1951, page 504, I had occasion to consider the respective powers and authority of county commissioners and the county engineer in matters relating to

road and bridge maintenance, particularly when they elect to have such work done by force account. It was held as shown by the first branch of the syllabus:

“County commissioners themselves have no authority to carry on county road and bridge maintenance and repair by force account, and where such commissioners elect, under the provisions of Section 6948-1, General Code, that certain such work shall be undertaken by such method, they have no discretion but to commit the execution thereof to the county engineer under the provisions of Section 7198, et seq., General Code.”

These opinions plainly point to the conclusion that while the county commissioners have full authority, if they so choose, to retain control over the erection of a bridge, and to proceed under the laws above referred to, to advertise for bids and let a contract for such work, yet where they elect to turn the work over to the county engineer, to be performed by force account, they must permit the engineer to proceed without dictation or interference from them. In other words, they cannot relinquish their control and at the same time keep it. It must be borne in mind that the county engineer is not the mere servant of the commissioners, but is also an elected officer, with many independent powers and duties.

In the resolution submitted, it rather clearly appears that the board is proceeding upon bids informally received, and without advertisement, and has undertaken to award a contract to one of the bidders; and so far as I can discover, they have not attempted or intended to give authority to the engineer to build the bridge by force account or to exercise any other control over the project. In effect, it is an attempt on the part of the commissioners, to do the work by force account under their own direction, a proceeding which the statute does not authorize.

Accordingly, I feel constrained to hold that the board of county commissioners has proceeded without compliance either with the law relative to the advertisement for bids and letting of the contract to the lowest and best bidder as provided for in Section 133.31 et seq., or with the statute authorizing them to commit the project to the county engineer, to have the work done by force account.

It is therefore my opinion that when the board of county commissioners have found it necessary to construct a bridge and have elected to proceed under authority of Section 5543.19 et seq. of the Revised Code, by authorizing the construction of such bridge by force account, rather than

erecting such bridge by contract under the provisions of Section 153.31 of the Revised Code, the power of said board is limited to giving authority to the county engineer, and the commissioners have no authority to receive informal bids for such work and make a contract therefor. The authority to carry out such construction is vested solely in the county engineer.

Respectfully,

C. WILLIAM O'NEILL

Attorney General