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HIGHWAYS—STATE DEPARTMENT OF—CONTRACT—BIDDING VENDOR—WABASH PORTLAND CEMENT COMPANY—DIRECTOR OF FINANCE—AUDITOR OF STATE—PURCHASE, SUPPLIES, MATERIAL, MACHINERY AND OTHER ARTICLES—SUCCESSIVE STEPS—NOTICE, CERTIFICATE, UNENCUMBERED, APPROPRIATED FUNDS—SECTIONS 1226-1 AND 2288 G. C.—WHEN WARRANT MAY BE DRAWN ON TREASURER OF STATE.

**SYLLABUS:**

1. *Where a purchase of materials, supplies, machinery or other articles which the State Highway Director or the Department of Highways is authorized to make is made by the said Director of Highways or Department of Highways, and all the provisions of law with respect to the making of such purchases as provided by Section 1226-1 et seq., of the General Code of Ohio, are complied with prior to December 31, 1938, and there was in existence at the time of the making of said purchase by an award to a successful bidding vendor an unencumbered balance in a proper appropriation as made by Amended Senate Bill No. 369, of the 92nd General Assembly pursuant to which the purchase price therefor should be paid, and said unencumbered balance is not later reduced by*

*subsequent encumbrances below an amount sufficient to meet the needs for payment for said purchase, and after December 31, 1938 the Director of Finance certifies that fact in pursuance of his duty as fixed by Section 2288-2, General Code, it becomes the duty of the Auditor of State to draw his warrant on the Treasurer of State, payable to said vendor, for the amount of the said purchase price upon submission to him of a proper voucher therefor.*

2. *The making of a contract by the State of Ohio, for the purchase of supplies, materials, machinery and other articles which the Director of Highways is authorized to purchase, consists of the successive steps beginning with giving of notice to bidders of the intention of the Director of Highways or the Department of Highways to make such purchases as prescribed by Section 1226-1 et seq. of the General Code of Ohio, and ending with the certification by the Direction of Finance of the availability of unencumbered appropriated funds to pay for such purchases, in accordance with Section 2288-2, General Code.*

COLUMBUS, OHIO, April 6, 1939.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: This will acknowledge your recent communication which reads as follows:

"This office has received a large number of vouchers from the department of highways, relating to purchases made by the department, concerning which there has arisen in the course of our examination the question as to whether or not the vouchers relate to valid and legal contracts.

We present herein the factual situation in regard to a certain voucher No. 45524, dated January 16, 1939, in the amount of \$306.00, payable to the Wabash Portland Cement Company. The facts in regard to this claim, as evidenced by the voucher and related papers, are substantially the same as presented by the other vouchers in our possession, in so far as the same are pertinent to a determination of the legal issues involved.

The memorandum in reference to the bill of lading shows that the Big Four R. R. on December 20, 1938, received the cement noted in the above voucher No. 45524, consigned to the Ohio State Highway Department at Middletown, Ohio. The receiving ticket as signed shows receipt of the cement at the division garage on December 20, 1938.

Purchase order No. 15105, in reference to the said voucher, bearing date of December 27, 1938, signed by I. R. Ault, Director of Highways and X. G. Hassenplug, Chief Engineer of Maintenance requests the above noted vendor to furnish and

deliver the cement to the state highway department. Notation of the expenditure, however, was not posted or charged to the proper fund on the books of the finance department until February 25, 1939.

The records further show that under date of February 21, 1939, H. D. Metcalf, Chief Engineer by C. R. Leavens, Purchasing Agent, addressed a letter to the Director of Finance requesting, in substance, that 1938 order No. 15105 be approved and forwarded by the Director to the highway department as soon as possible. Thereupon the Director of Finance, acting under the provisions of General Code 2288-2 certified there was an available balance in the proper fund.

In view of the foregoing facts, and any other information or law that may be pertinent thereto, we respectfully request your opinion in regard to the following matters:

1. Is there a valid and lawful contract between the Department of Highways and the Wabash Portland Cement Company?
2. What act or action on the part of the officials of the Highway Department is to be classified as the entering into or incurring the contract, if any, with the Wabash Portland Cement Company?
3. Did the Director of Finance comply with the provisions of General Code 2288-2 prior to the execution of the contract?
4. If a lawful liability was incurred, what appropriated funds are to be drawn on for payment of the obligation?"

In Sections 1226-1 and 1226-2, General Code, there are contained provisions respecting the procedure to be followed by the State Highway Director or the Department of Highways in the making of purchases of machinery, materials, supplies or other articles which the State Highway Director or the Department of Highways may be authorized to make. Without quoting these provisions it is sufficient for our present purpose to note that in making such purchases notice in the manner provided for in the statute shall be given to bidders of the intention of the Director or the Department to purchase certain supplies, machinery, materials or other articles. Thereafter, bids in compliance with the notice and specifications are to be received and publicly opened and read at the time and place mentioned in the notice. Upon receipt of such bids all purchases must be made by the Director from the lowest responsible bidder able to meet the specifications and conditions prescribed by the Department, except that in the purchase of material or equipment or supplies for which fixed and definite specifications can not be prepared the Director is authorized to purchase the article or articles meeting the general specifications prescribed and which he finds are most suitable for the uses intended.

As no mention is made in your communication to the contrary, I assume for the purposes of this opinion that the Director of Highways in making the purchases which have ripened into the vouchers referred to by you, complied with all preliminary steps in the making of such purchases as prescribed by Sections 1226-1 and 1226-2 of the General Code of Ohio, referred to above, and that no question concerning fraud or collusion among bidders is involved.

It is assumed, therefore, that proper notice was given to bidders of the intent of the Highway Director to make the purchases involved, that bids were thereafter received, awards made in pursuance thereof, and due notice given to the successful bidder of the award made to him, all in accordance with law. Also, that the material or supplies or machinery purchased, as the case might be, were delivered to and received by the Highway Department as purchased, and that in some instances at least, the materials and machinery were used by the Department.

Statutory provisions pertaining to your inquiry other than those contained in Sections 1226-1 and 1226-2, General Code, are contained in Sections 154-28, 154-29, 154-30 and 2288-2, of the General Code.

Section 154-28, General Code, provides in part, as follows:

“The department of finance shall have power to exercise control over the financial transactions of all departments, offices and institutions, excepting the judicial and legislative departments, as follows:

(1) By prescribing and requiring the installation of a uniform system of accounting and reporting, as to accruals of revenue and expenditures necessary in certifying that funds are available and adequate to meet contracts and obligations.

(2) By prescribing and requiring uniform order and invoice forms and forms for financial reports and statements, and by requiring financial reports and statements.

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(4) By requiring orders, invoices, claims, vouchers or payrolls to be submitted to the department, where such submission is prescribed by law or where the governor shall deem such submission necessary, and by approving or disapproving such orders, invoices, claims, vouchers or payrolls.

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(6) By prescribing the manner of certifying that funds are available and adequate to meet contracts and obligations. \* \* \*  
Section 154-29, General Code, reads in part, as follows:

“As used in Section 154-28 of the General Code:

‘Order’ means a copy of a contract or a statement of the nature of a contemplated expenditure, a description of the prop-

erty or commodity to be purchased or service to be performed, other than services of officers and regular employes of the state, and per diem of the national guard, and the total sum of the expenditure to be made therefor if the same is fixed and ascertained, otherwise the estimated sum thereof.

'Invoice' means and includes estimates on contracts, or a statement showing delivery of the commodity or performance of the service described in the order, and the date of the purchase or rendering of the service, or a detailed statement of the things done, material supplied or labor furnished, and the sum due pursuant to the contract or obligation.

'Voucher' means the order and invoice as herein defined; and wherever in the General Code the word 'voucher' is used it shall be held to have the meaning herein defined.

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All orders and invoices shall specify the appropriation account from which they are payable."

Section 154-30, General Code, reads as follows:

"If any requirement of the department of finance respecting the submission of statements of proposed expenditures, or orders, invoices, claims, vouchers or payrolls is not complied with, or if any statement of proposed expenditure, or any order, invoice, claim, voucher or payroll is submitted to and disapproved in whole or in part by the department of finance, the department shall have authority to notify the auditor of state thereof, and such auditor shall not issue any warrants on the treasury in payment of such expenditure, claim or voucher.

The department of finance may certify to the auditor of state any order or statement of proposed expenditures approved by it, and direct the proper appropriation account or accounts to be charged therewith, or with the estimated amount thereof, in which event the sum so-certified shall be a prior charge on such appropriation account or accounts, available only for the payment of invoices issued against such order, or expenditures within such statement, until the final invoice therefor is filed with the auditor of state, or until the department of finance shall certify that such order and the obligation recited therein have ceased to be an obligation against the state, or such proposed expenditures have been made or abandoned in whole or in part.

Whenever any commodity or service included in any such order or statement so certified is delivered or performed, or whenever any payment is due upon any contract or obligation covered thereby, an invoice shall be filed with the auditor of state

therefor. The total of all invoices issued against any such order shall not exceed the sum of such order or the estimated sum appearing on such order."

Section 2288-2, General Code, provides:

"It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

In the specific case set up in your letter, the facts relating to which you state are typical of all the cases referred to by you in which vouchers are held pending my opinion herein, it appears that a purchase of cement from the Wabash Portland Cement Company had been made by the Highway Department some time prior to December 20, 1938, at which time, according to receipts given, the cement was received by the department at its Division Garage in Middletown, Ohio.

Purchase Order No. 15105 in pursuance of the above purchase was made out under date of December 27, 1938, and signed by the then Director of Highways and the Chief Engineer of Maintenance, and, although you do not so state, I am informed that this so-called "purchase order" was forwarded on said date to the then Director of Finance, for his approval and his certification as to the availability of funds to pay the obligation incident to the purchase as was his duty under the terms of Section 2288-2, *supra*.

For some reason not mentioned, the then Finance Director did not formally approve the said purchase order and did not certify that there was a balance in an appropriation pursuant to which the obligation incident to the purchase should be paid not otherwise obligated to pay precedent obligations although the fact was at that time that there was an unencumbered balance in a then current appropriation from which payment should be made for purchases of cement made by the Highway Department.

Later, to wit, February 25, 1939, the present Director of Finance, after his attention had been directed to the facts relating to the purchase, receipt and use of the cement in question by the Highway Department, and the condition of the proper applicable appropriation as it existed when the certification should have been made, made the certification as to the availability of funds to pay for the cement as purchased that should have been made by the former Director of Finance, and forwarded the same to the Director of Highways. Following this certification, the said Voucher

No. 45524 which you now have, was prepared and forwarded to you for the purpose of having prepared and signed the proper warrant payable to the Wabash Portland Cement Company in payment for the cement purchased.

It will be observed from the terms of Section 154-30 General Code, where the orderly procedure to be followed by the Department of Finance in certifying to the Auditor of State orders and statements of proposed expenditures approved by it and the proper appropriation against which the proposed expenditures are to be charged after such statements of proposed expenditures have been submitted to it, that :

“Whenever any commodity or service included in any such order or statement so certified is delivered or performed, or whenever any payment is due upon any contract, or obligation covered thereby, an invoice shall be filed with the auditor of state therefor.”

All the requirements of law as prescribed for the Highway Department and the Department of Finance with respect to the purchase of the cement in question by Sections 1226-1, 1226-2, 154-30 and 2288-2, of the General Code of Ohio appear to have been met, and it appears further that there is money in the treasury to pay the claim arising on account of said purchase and I find no reason for saying that this is not a valid claim against the state. It therefore becomes the duty of the Auditor of State to draw his warrant on the Treasurer of State to pay the amount found due. (Section 243, General Code.)

In considering the provisions of Section 243, General Code, with respect to the duties of the Auditor of State as prescribed by that section, the Supreme Court of Ohio, in the case of *State ex rel. v. Tracy*, 129 O. S., 550, at page 567, observed :

“Let it not be understood that this section renders the Auditor of State entirely immune to the extraordinary writ of mandamus. If a voucher representing a valid claim against the state is presented to him, concerning which all the requirements of law have been complied with and it is legally due and there is money in the state treasury which has been duly appropriated to pay it, then the law specially enjoins on him as a duty resulting from his office the issuance of a warrant on the treasurer of state, in payment of the claim, and the claimant is entitled to a writ of mandamus to secure his warrant if it is refused ; but if the claim does not meet all these requirements, it is just as much his duty to refuse the warrant.

Where a claim is questionable, the dictates of good sense and good business judgment impliedly at least demand that he refer

it to the law department of the state for opinion, and be governed thereby."

Apparently, you question the validity of this claim, else you would not have submitted it to this office for opinion.

At the time of the incurring of the obligation to pay for the cement in question there was in existence an unexpended balance of an appropriation to and for the Department of Highways for purposes including such purposes as those for which the cement was purchased, by virtue of Amended Senate Bill No. 369, known as the General Appropriation Act of the 92nd General Assembly, effective July 19, 1937. Said Amended Senate Bill No. 369 of the 92nd General Assembly, was entitled, "An act to make general appropriations for the biennium beginning January 1, 1937, and ending December 31, 1938." The said act made general appropriations for use of the different departments, offices, boards and commissions of the state government and contained an appropriation to and for the Department of Highways for purposes included within which were such purposes as are applicable to the purchase here under consideration. The said act contained the following provision in Section 3 thereof:

"The appropriations made in this act shall be and remain in full force and effect for a period of two years commencing with the dates on which said appropriation shall take effect, for the purpose of drawing money from the state treasury in payment of liabilities lawfully incurred hereunder and at the expiration of such period of two years and not before, the moneys hereby appropriated shall lapse into the funds from which they are hereby severally appropriated."

In Section 2 of Amended House Bill No. 3, of the 93rd General Assembly, known as the Partial Appropriation Act, of the 93rd General Assembly passed January 13, 1939 the following provision is found:

"Unexpended balances of all appropriations and reappropriations of the 92nd General Assembly, against which liabilities have been lawfully incurred, are, to the extent of such liabilities, hereby reappropriated from the funds from which they were originally appropriated or reappropriated and made available for the purpose of discharging such liabilities."

The liability for the payment for the purchase here under consideration was incurred when the obligation became effective to pay for the cement which was at the time when the award was made to the successful bidder to furnish the cement. I have not been furnished with the exact date when this was done but it manifestly was during the biennium of



1937-1938 as the merchandise was received by the Highway Department and purchase order No. 15105 was made out and sent to the Director of Finance prior to December 31, 1938. An obligation to pay for purchases made under circumstances as they existed with respect to this purchase and the liability of the State of Ohio to pay the amount involved in such purchases arises at the time awards are made in pursuance of bids received by the Highway Department. *State ex rel. v. Board of Public Service*, 81 O. S., 218; *State ex rel. United District Heating Company, Inc. v. State Office Building Commission*, 124 O. S., 413; *Beaver & Butt v. Trustees of the Institution for the Blind*, 19 O. S., 97; *Opinions of the Attorney General for 1915*, page 1111; *Opinion No. 184* rendered under date of February 21, 1939, and addressed to the Director of the Department of Public Works.

The certificate of the Director of Finance in the instant case, as made on February 25, 1939, was made in accordance with the provisions of Section 154-30, General Code, and in pursuance of his duty as prescribed by Section 2288-2, General Code, and constituted the last step in the making of a complete and enforceable contract for the purchase of the cement and a necessary step before payment for the cement could be made. The duty of the Finance Director to make this certificate when proper basis exists therefor as it did in this case inasmuch as the purchase had been made in accordance with law and certification of that fact had been made to the Finance Director at a time when funds were available for payment for such purpose from an unencumbered balance of a then current appropriation and no later encumbrance of said appropriation had been made changing the situation, is purely ministerial and could have been enforced by an action in mandamus at any time during the existence of the said unencumbered balance in the proper appropriation.

Speaking of the duty of the Finance Director as prescribed by Section 2288-2, General Code, the Supreme Court of Ohio, in the case of *State ex rel. v. Baker*, 112 O. S., 356, said:

“In the event the money is in fact in the fund, it is the ministerial duty of the Director of Finance to make the required certificate and the discharge of this duty may be compelled by mandamus.”

Under the terms of said Section 2288-2, General Code, it is, of course, necessary that the certificate spoken of there be executed by the Director of Finance, and transmitted to the Auditor of State, as the last step in the making of a binding and enforceable contract for the payment for purchases made by the Director of Highways before the Auditor of State is justified in drawing warrants in payment for said purchases. However, the making of a contract and the incurring of an obligation should not be confused. As pointed out above, the incurring of the obligation is merely

one of the steps in the making of the contract. It should be noted that Sections 154-28, 154-29, 154-30 and 2288-2, General Code, were all enacted in the same act of the Legislature known as the "Administrative Code" enacted in 1921 (109 O. L., 105), and all relate to the same subject matter, and should therefore be considered and construed in *pari materia*.

That an obligation and liability are incurred in cases of this kind prior in any action that the law requires the Director of Finance to take with reference to the matter is clearly recognized by the Supreme Court of Ohio, in the case of *State ex rel. Herrick*, 107 O. S., 611. In that case the court reviewed at considerable length the provisions of Sections 154-28, 154-29, and 154-30, General Code, with respect to the provisions of those statutes concerning the relations of the different departments of State created by the Administrative Code to each other and particularly the relation of the Department of Finance to the other departments with respect to the incurring of obligations by the different departments, and although in that case Section 2288-2, *supra*, was not mentioned, it was then in force and must necessarily have been considered by the courts. In commenting on the provisions of these various statutes and the relation of the Department of Finance to the other departments it was observed:

"We have therefore reached the conclusion that the duties of the Director of Finance in the relation of that department to the Department of Highways do not begin until a valid obligation has been entered into by the Director of Highways."

Upon consideration of the statutory provisions referred to herein, former opinions of this office, the holdings of the Supreme Court of Ohio and particularly the observations of the court in the case of *State ex rel. Herrick* referred to above, the conclusion is inescapable that an obligation was created by the Department of Highways in favor of the Wabash Portland Cement Company and a liability arose upon the State of Ohio to discharge this obligation some time prior to December 27, 1938, and that said obligation should be discharged by the payment to the Wabash Portland Cement Company for the cement purchased from appropriations made by the 92nd General Assembly in Amended Senate Bill No. 369 enacted and effective July 19, 1937, unencumbered balances in proper appropriations having been in existence at the time the said liability was incurred. The fact that the Director of Finance did not make his certification in pursuance of Section 2288-2, General Code, prior to December 31, 1938, does not change the situation.

The specific questions submitted by you in your letter of inquiry are to a great extent academic. Your interest in the matter is, of course, solely whether or not the claim of the Wabash Portland Cement Company is valid, so that you may lawfully draw a warrant for the payment of the claim. There is at this time without a doubt a valid and lawful contract

between the State of Ohio and the Wabash Portland Cement Company for the purchase and payment for the cement in question. That contract was concluded by the certificate of the Director of Finance made in pursuance of Section 2288-2. The contract itself consisted of successive steps beginning with the action of the Director of Highways in giving notice to bidders of his desire to make purchases of the cement in question. Following this the receipt of bids and the awarding of the contract, the receipt of the goods, the making of proper certification to the Director of Finance and his certification back were each separate steps in the making of a completed contract, and it is impossible to definitely point to any one particular act or action on the part of the officials of the Highway Department or of other officials of the State of Ohio which may be said to be the entering into or incurring of the contract. It took each of these successive steps to make a complete and valid contract, and before a completed and valid contract existed of course payment of the purchase price of this cement could not lawfully be made. However, the making of this contract should not be confused with the incurring of the obligation or the liability of the State of Ohio.

I am of the opinion, in view of the circumstances as submitted to me, that a legal liability of the State of Ohio exists to the Wabash Portland Cement Company on account of the purchase in question and that that liability should be discharged by the payment of the purchase price from funds appropriated by Amended Senate Bill No. 369 of the 92nd General Assembly and reappropriated by the provisions of Amended House Bill No. 3 of the 93rd General Assembly. I am further of the opinion in view of those facts that you, as Auditor of State are justified in drawing your warrant upon the Treasurer of the State of Ohio, payable to the Wabash Portland Cement Company in pursuance of said Voucher No. 45524 and that it is your duty to do so.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*