

3770.

ROADS AND HIGHWAYS—PROCEEDINGS UNDER SECTION 1212 G. C.
 IN MATTER OF REQUISITIONS FOR PAYMENT TO CONTRACTORS
 OF ESTIMATES DUE THEM FOR WORK ON STATE AID HIGHWAY
 IMPROVEMENTS—HOW SUCH REQUISITIONS DRAWN BY DI-
 RECTOR OF HIGHWAYS AND PUBLIC WORKS—MAY DRAW ON
 EITHER COUNTY OR STATE FOR NINETY PER CENT OF ITS
 SHARE.

When proceeding under section 1212 G. C., and related sections, in the matter of requisitions for the payment to contractors of estimates due them for work on state aid highway improvements, the Director of Highways and Public Works is not required to divide the requisitions for each estimate between county and state in the proportion that each is bearing a share of the cost, but may, in his discretion, draw upon either county or state for the whole of an estimate until an aggregate of ninety per cent of the share of the county or state is exhausted. The same rule applies to requisitions in payment of superintendence and inspection (section 1219 G. C.,) save that the ninety per cent limitation is not applicable.

COLUMBUS, OHIO, November 28, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

GENTLEMEN:—Through the Hon. E. C. Blosser, State Highway Engineer, you have recently submitted to this office the following:

“Applications for state aid on practically every contract which is awarded by the Director of Highways and Public Works are made by the Board of County Commissioners of the counties wherein the improvements are to be located.

The Director of Highways and Public Works acting under the provisions of Section 1212 and 1212-1 G. C. carefully estimates at regular intervals the labor performed and material furnished by the contractors. In each contract awarded by the Director of Highways and Public Works the state's portion of the cost and expense is paid by the Treasurer of State upon the warrant of the Auditor of State. The warrant of the Auditor of State is issued upon requisition of the Director of Highways and Public Works.

The portion of the cost and expense of construction to be paid by the county, Township and property owners is paid by the Treasurer of the county in which the improvement is located, upon the warrant of the County Auditor issued upon the requisition of the Director of Highways and Public Works.

In a great number of instances it has been found necessary to certify entire estimates and payrolls to County Auditors of counties wherein the improvements are being constructed for payment, due to the fact the State's share is made up from Federal funds which are not always available. The question has been raised as to whether or not County auditors may legally pay more than the county's proportionate share on an estimate or payroll and whether or not the Director of Highways and Public Works is acting within his jurisdiction when certifying such estimate or payroll to such

county auditor for payment in its entirety from the county's share of funds.

We respectfully request your opinion as to whether or not the Director of Highways and Public Works is clothed with such authority and as to whether or not it is mandatory upon county auditors to honor such certifications until that portion of the cost and expense of an improvement to be paid by the county, township and property owners has been entirely expended."

Inquiry at your department has elicited the information that your statement to the effect that Federal funds "are not always available" is based on the fact that the Federal Government, when contributing to highway improvement project, does not place its funds at the disposal of the State for the purpose of paying current estimates to the contractor for the improvement. As a result the General Assembly has provided a Rotary Fund against which the State draws for the current estimates to the extent of the Federal contribution pending later receipt of funds from the Federal Government. The Rotary Fund so appropriated is not sufficiently large to carry the advance expenditure of all Federal contributions during the season when your department is doing a large amount of contract work.

The statute immediately involved in the consideration of your inquiry is Section 1212 G. C., which reads as follows:

"Sec. 1212. The state's proportion of the cost and expense of the construction, improvement, maintenance or repair of a highway under the provisions of this chapter, shall be paid by the treasurer of state upon the warrant of the auditor of state. The warrant of the auditor shall be issued upon the requisition of the state highway commissioner and be paid from any appropriation or funds available to carry out the provisions of this chapter. The proportion of the cost and expense of construction, improvement, maintenance or repair to be paid by the county, township and property owners, shall be paid by the treasurer of the county in which the highway is located upon the warrant of the county auditor, issued upon the requisition of the state highway commissioner. Such warrant shall be paid from any funds in the county treasury, available for the construction, improvement, maintenance or repair of roads, bridges and culverts within the county, and not otherwise specifically appropriated. Where the improvement has been made upon the application of the township trustees, the proportion of the cost and expense of such construction, improvement, maintenance and repair to be made by the township and property owners shall be paid by the treasurer of the township in which the highway is located upon the order of the township clerk issued upon the requisition of the state highway commissioner. The payment of the cost of the construction of such improvement shall be made as the work progresses upon estimates made by the engineer in charge of such improvement, and upon approval of the state highway commissioner. Except as hereinafter provided no payment by the state, county or township, on account of a contract for any improvement under this chapter shall before the completion of said contract exceed ninety per cent. of the value of the work performed to the date of such payment, and except, as hereinafter provided, ten per cent. of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications. In addition to the above payments on account of work performed, the state highway com-

missioner may also, if he deems it proper, allow and pay to a contractor a sum not exceeding ninety per cent. of the value of material delivered on the site of the work, but not yet incorporated therein, provided such material has been inspected and found to meet the specifications. When an estimate is allowed on account of material delivered on the site of the work but not yet incorporated therein, such material shall thereupon become the property of the state; but in case such material is stolen or destroyed or damaged by casualty before being used, or for any reason becomes unfit for use, the contractor will be required to replace the same at his own expense. When the retained percentage, plus the difference between the contract price and the estimates allowed, exceeds by more than fifteen per cent. the estimated cost of completing the work, as determined by the state highway commissioner, the state highway commissioner may, if he deems it proper, pay to the contractor all or any part of said excess sum, retaining not less than the estimated cost of completing the work, as determined by him, plus fifteen per cent. thereof."

This section, of course, is to be read in the light of the procedure laid down by the State Highway Code for the carrying out of projects on the state aid plan. Briefly described, this procedure is initiated by an application from the County Commissioners (or in some instances, from Township Trustees), followed by a survey, making of plans, etc., if the application be granted; after which, if the commissioners approve the plans, and provide the necessary funds, the action prescribed by Section 1218 G. C. must be carried out. This section reads in part as follows:

"Sec. 1218. Each contract made by the state highway commissioner under the provisions of this chapter shall be made in the name of the state and executed on its behalf by the state highway commissioner and attested by the secretary of the department. No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney general endorsed thereon as to its form and legality. The provisions of section 5660 of the General Code shall apply to such written agreement to be made by the county commissioners or township trustees and a duplicate of the certificate of the county auditor or township clerk made in compliance with the provisions of said section shall be filed in the office of the state highway commissioner."

The effect of these provisions of Section 1218 is to compel the provision of the county's share of the funds, (i. e., the part of the cost ultimately borne by county, township and property owners); the certification of their availability by the county auditor; and their appropriation by the county commissioners, as a basis for the agreement of the county commissioners to assume in the first instance the

agreed share of the county, township and property owners, or in other words, the share not borne by the State or Federal Government.

Logically, then, when these steps have been carried out, the funds for the county's share really become the funds of the state for the purpose of expenditure. This fact is made plain, not only by the first sentence of Section 1218 to the effect that state aid contracts are made in the name of the State, etc., but by the further fact that the provisions of Section 1212 make the county's share of the funds subject to the requisition of the Director of Highways and Public Works. Any other view of these statutes would lead to the conclusion that it is within the power of the county officials to defeat the purposes of the state aid law by refusing to honor the requisitions of the Director of Highways and Public Works. While it is true that funds representing the county's share of cost are kept in the County Treasury and not turned into the State Treasury, the fact remains that the funds thus in the County Treasury are by the express terms of Section 1212 subject to the requisition of the Director of Highways and Public Works to exactly the same extent as are funds in the State Treasury representing the State's share of the cost of the improvement.

A careful search of the statutes has failed to reveal any provision which requires, expressly or by implication, that the Director of Highways and Public Works, when paying a current estimate, must divide the estimate between the State and county, either in the proportion that each is bearing a part of the cost, or otherwise. Hence, it may be laid down as a general rule that the Director may send his requisitions to the State Auditor for the full amount of each current estimate until the State or Federal Funds set aside for the improvement project are exhausted, and from that time on send the requisitions to the county until the project is fully paid for; or on the other hand, he may reverse this process and first exhaust the funds appropriated for the county's share. The general rule thus stated is, from a technical standpoint at least, subject to an exception because of the language in section 1212

" * * * * * no payment by the *state, county or township*, on account of a contract for any improvement under this chapter shall before the completion of said contract exceed ninety per cent. of the value of the work performed to the date of such payment, and * * * * * ten per cent. of the value of the work performed shall be held until the final completion of the contract * * * * *."

While the spirit and purpose of this language would no doubt be subserved by withholding ten per cent. of estimates from the contractor until final acceptance, whatever might be the fund,—state or county,—in which the ten per cent. was retained, yet it is believed that strict compliance with the letter of the language requires that requisitions for estimates on either state or county treasury cease when an aggregate of ninety per cent. in either treasury is reached, the remaining ten per cent. to be held in that treasury until the work is accepted. Illustration: Contract price, \$100,000.00; State's share, \$50,000.00; county's share \$50,000.00; ninety per cent. of each share, \$45,000.00; if the plan is followed of drawing requisitions against one share and then against the other, instead of dividing the requisitions equally for each estimate, the requisitions against the first share drawn against should stop at \$45,000.00 pending final acceptance.

Clearly then, with the exception noted, the matter of apportioning requisitions is one of administrative discretion with the Director. It is to be presumed that he will act fairly as between county and state and will in ordinary cases draw the

requisitions in proportion based upon the respective shares of county and state. It is the understanding of this office that such is the general practice of your Department. However, when special cases arise, such as are described in your letter, or whenever he deems it in the public interest to do so, the Director is fully warranted in making the requisitions for current estimates wholly upon the county until the share of the county is exhausted, with the exception above noted that requisitions upon the county should not, until the time comes for paying the retained ten per cent., exceed ninety per cent. of the aggregate share of the county.

The "pay-rolls" mentioned in your letter are presumed to be those for superintendents and inspectors as mentioned in Sec. 1219, G. C. Since by the terms of said section, such item is to be treated as part of the cost of an improvement, the same rule would apply to pay-rolls as applies to estimates, save that requisitions for pay-rolls are not subject to the ninety per cent. restriction above noted.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3771.

APPROVAL, CONTRACT OF STATE OF OHIO WITH W. M. BARDO, TOLEDO, FOR REMODELING KITCHEN, TOLEDO STATE HOSPITAL, AT A COST OF \$11,903—SURETY BOND EXECUTED BY NEW AMSTERDAM CASUALTY COMPANY.

COLUMBUS, OHIO, November 28, 1922.

HON. LEON C. HERRICK, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval a contract (four copies) between the State of Ohio, acting by the Department of Highways and Public Works, and W. M. Bardo, of Toledo, Ohio. This contract is for the remodeling of kitchen, Toledo State Hospital, Toledo, Ohio, and calls for an expenditure of Eleven Thousand, Nine Hundred and Three Dollars (\$11,903.00).

Accompanying said contract is a bond to insure faithful performance, executed by New Amsterdam Casualty Company.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,
 JOHN G. PRICE,
Attorney-General.