344.

SURETY BOND—BID ON CONTRACT FOR AGRONOMY BUILDING—OHIO AGRICULTURAL EXPERIMENT STATION, WOOSTER, OHIO—FAILURE TO PERFORM CONTRACT—PROPER PROCEDURE—LIABILITY FOR DAMAGE—HOW CHANGES MAY BE LEGALLY MADE—WHAT CONSTITUTES A LEGAL CONTRACT.

SYLLABUS:

1. *A surety bond, the terms and conditions of which are in accord with the provisions of Section* 2316, *General Code, and which accompanies a bid on a contract for general contract work of an agronomy building at the Ohio Agricultural Experiment Station at Wooster, Ohio, held both a bid bond and a contract bond.*

2. *A surety company acting as surety on a bond which is conditioned that the bidder shall within ten days after the awarding of the contract enter into a proper contract in accordance with the plans, specifications, etc., is liable to the state for any damages suffered by the state by reason of the failure of the bidder to enter into such contract, such failure being occasioned by the inability of such bidder to furnish the proper certificate of the industrial commission as required by Section* 2319, *General Code, prior to entering into such contract.*

3. *The proper procedure in such case is to re-advertise and re-let said contract. The damages for which the surety company can be held liable include the cost of re-advertisement and the excess of aggregate cost of the work on the re-letting over the original contract price, if there be such excess.*

4. *The original appropriation made by the legislature can not be exceeded on the re-letting of such contract but if any changes in plans, specifications, etc., are necessary in order to keep within such appropriation, which diminish the value of the building for the purposes for which it was intended, such changes may properly be considered in fixing the amount of damage sustained by the state through failure of the bidder to enter into a proper contract.*

5. *The encumbrance estimate should be prepared, approved, and certified to by the director of finance prior to the signing of the contract.*

6. *A contract is legally entered into when the requirements of law leading up to the same have been complied with and when the approval of such contract by the attorney general has been obtained and such approval has been endorsed on the contract.*

COLUMBUS, OHIO, April 19, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of a communication from Herbert B. Briggs, State Architect and Engineer, relative to a contract for general contract work of an Agronomy building at the Ohio Agricultural Experiment Station at Wooster, Ohio, which reads as follows:

> "Enclosed, I hand you a formal request signed by Director G. F. Schlesinger, of the Department of Highways and Public Works, for an opinion on the above contract.
>
> Enclosed, I also hand you the following contract documents by and between the Fravel Construction Company, and the State of Ohio:
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> 1. Contract signed by the Fravel Company and Mr. Schlesinger.
> 2. Division of Contract of the Fravel Company.
> 3. Proposal of the Fravel Company dated October 6, 1926.
> 4. $30,000.00 Bond of the Aetna Casualty and Surety Company, attached to the Proposal, with the Financial Statement, Power of Attorney, and Certificate of Compliance, also attached.

5. Copy of my report to the Board of Control, dated October 22, 1926, with a Tabulation of Bids attached.

6. Proof of Publication with approved Form of Notice to Bidders attached.

7. Encumbrance Estimate No. 740, in an amount of $18,900.00, signed by C. G. Williams, Director, and W. H. Kramer, Bursar, under date of November 9, 1926, with approval by me under date of December 2, 1926, and approved by Mr. Schlesinger under date of December 8, 1926.

Director of Finance Baker approved the Encumbrance and certified that the funds are available to meet the obligation under date of February 21, 1927 * * *."

Accompanying the above communication is your request for an opinion on the above mentioned contract. Briefly stated, the facts as outlined in your request are as follows:

The 86th General Assembly having made an appropriation of $30,000 for the construction of an Agronomy building at the Ohio Agricultural Experiment Station at Wooster, Ohio, plans, specifications and other required documents were prepared by the state architect and engineer, which documents were properly approved and filed with the auditor of state. Publication of the notice of intention to receive bids was properly made and bids were received and tabulated. The Fravel Construction Company's bid in the sum of $18,900, being the lowest bid, was accepted and the contract awarded to said bidder. Accompanying said bid was a bond in the sum of $30,000 on which the Aetna Casualty and Surety Company of Hartford, Connecticut, was surety. Accompanying said bond were the required certificate of compliance, financial statement and power of attorney.

The contract having been awarded to the Fravel Construction Company, the state architect and engineer prepared the contract and the same was signed on the part of the Fravel Construction Company and also on the part of the State of Ohio by G. F. Schlesinger, as Director of Highways and Public Works. At the time of signing the contract the Fravel Construction Company was requested to furnish a certificate from the Industrial Commission showing that the workmen's compensation laws had been complied with, but it appears that said company was and still is unable to furnish said certificate because of its failure to pay premiums in a substantial amount assessed by the Industrial Commission. The encumbrance estimate was prepared and was certified to by the director of finance on February 21, 1927.

Additional information furnished by your department is to the effect that the Fravel Construction Company has abandoned all effort to pay the delinquent premiums due the Industrial Commission and comply with the requirements of law essential to the entering into of a valid contract with the state.

You submit the following questions:

"1. Does the wording on the form on which the Aetna Company's bond is written fully conform to the provisions of Section 2316 of the G. C. and other, if any, statutory provisions in re bonds?

2. If not should (and how) the wording of the form be changed?

3. Is the Aetna Company's bond a bid bond?

4. Under the Aetna Company's bond, can it be held (and how) to proceed with the contract?

5. If, after formal notice is given to the Aetna Company that the contract has been awarded to the Fravel Company, the Aetna Company does not proceed with the contract, and it is found that new bids will have to be secured, can the Aetna Company be held under its bond, for:

(a) Cost of re-advertisement.

(b) Cost, if any, in excess of the Fravel Company's bid.

(c) Damage resulting from delay in procedure with the construction work because of the Fravel Company's delay in delivery of the industrial certificate.

6. Premised on the power to hold the Aetna Company under its bond as set forth in 5 (next above), what action and procedure shall be followed?

7. If the bids other than and apart from the Fravel Company's bid for the construction of the building are rejected, and new bids are advertised for, can the Aetna Company be held under its bond, for:

(a) Cost of re-advertisement.

(b) Cost, if any, in excess of the aggregate total of the lowest and best of such bids received October 6, 1926.

(c) Damages resulting from delay in procedure with the construction work because of the Fravel Company's delay in delivery of the industrial certificate.

7-1. Premised on the power to hold the Aetna Company under its bond as set forth in 5 and 7 above, and further premised on the possibility that the aggregate of the bids of all trades secured through re-advertisement, exceed the total amount of the appropriation can the Aetna Company be held for such excess cost (and how) and can the State proceed with a construction project under such conditions the cost of which exceeds the amount of the appropriation?

8. If the Aetna Company can be held under its bond to proceed with the contract, will it be necessary to secure its written approval for an extension of time for the completion of the work?

NOTE: An extension of time for the completion date will have to be made because of the delay of the Fravel Company in delivery of the Industrial Commission Certificate.

9. Is the procedure in the awarding of contracts as set forth under II.—*'CUSTOMARY PROCEDURE IN AWARDING CONTRACTS'*— above, the correct procedure, particularly as to:

(a) Time of signatures on contract by the contractor and by the state.

(b) Certification of funds on the encumbrance estimate by the Director of Finance.

10. Should the Director of Finance make certification as to funds prior to, or subsequent to signing of the contract by the contractor and by the state?

11. When is a contract legally entered into?"

Your question numbers 1, 2 and 3 may be answered together. Section 2315, General Code, provides that the form of bidder's bond shall be approved by the state building commission (now the director of highways and public works). Section 2319, General Code, provides that no proposal shall be valid unless it be accompanied by a bond in the form approved by the state building commission with sufficient sureties in a sum equal to the total amount of the proposal. The terms and conditions which such bond shall contain are set out in Section 2316, General Code, which provides as follows:

> "The bond provided for in Sections 2315 and 2319 shall be conditioned that, if his proposal is accepted, the bidder will within ten days next after the awarding of such contract, enter into a proper contract in accordance with the

proposal, plans, details, specifications and bills of material and that he will faithfully perform each and every condition of the same. Such bond shall also indemnify the state against the damage that may be suffered by failure to perform such contract according to the provisions thereof, and in accordance with the plans, details, specifications and bills of material therefor. Such bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction for which such contract is made. The bond may be enforced against the person, persons or company executing such bond, by any claimant for labor or material and suit may be brought on such bond in the name of the state of Ohio on relation of the claimant within one year from the date of delivering or furnishing such labor or material, in the court of common pleas of the county wherein such labor or material was furnished or delivered, and such bonds, or sureties thereon, shall not be released by the execution of any additional security, notes, retentions from estimates, or other instruments on account of such claim, or for any reason whatsoever, except the full payment of such claim for labor or material."

The bond furnished by the Fravel Construction Company with the Aetna Casualty and Surety Company as surety, is executed in the form furnished by the state, follows the language of Section 2316, supra, and is both a bid bond and a contract bond. I see no reason for suggesting any change in the language used in said bond.

Your questions numbers 4, 5, 6, 7 and 8 can also be answered together. The questions presented in your request arise out of the failure or inability of the Fravel Construction Company to furnish the certificate of the Industrial Commission to the effect that it has complied with each and every condition of the Act of February 26, 1913 (Workmen's Compensation Law), and of all acts amendatory and supplementary thereto, as required by Section 2319, General Code. Section 2319 reads in part:

"* * * No contract shall be entered into until the Industrial Commission of Ohio has certified that the corporation, partnership or person so awarded the contract has complied with each and every condition of the act of February 26, 1913, and of all acts amendatory and supplementary thereto, known as the workmen's compensation law * * *."

The question before us is not as to whether the bonding company can be compelled to carry out the contract, or whether the state can do so and require the bonding company to answer for any damages arising out of the failure of the contractor, the Fravel Construction Company, to carry out the contract. This would have to be premised upon a finding that a binding and legal contract had been entered into.

The bond guaranteed that the contractor would within ten days next after the awarding of the contract enter into a proper contract in accordance with the plans, specifications, etc., and that it would faithfully perform the same. The furnishing of the certificate of the Industrial Commission above referred to is a condition precedent to entering into a "proper contract," and failure or inability to furnish such certificate precludes the contractor from entering into a proper contract. It follows that, the contractor being unable to furnish the required Industrial Commission Certificate and therefore being unable to comply with the requirements of law and the terms and conditions of the bond and enter into a proper contract within ten days after the contract had been awarded to it, the surety on the bond is liable to the state for any damages occasioned by such default.

There having been no proper contract entered into, it follows that there is no contract which either the bonding company or the state could carry out.

The proper procedure in the instant case in my opinion would be to give notice to the bonding company of the failure of the contractor to enter into a proper contract

and of the state's intention to hold the company for all damages occasioned by such failure. The work should then be readvertised, proposals should be received and the contract again awarded. Some of the elements of damage for which the bonding company would be liable would be the cost of such readvertisement and other incidental expenses in connection with the same, together with such sum as would equal the amount of the excess of the new contract price over the old contract price, if there be such excess. There may, of course, be other elements of damage properly chargeable or attributable to the failure of the Fravel Construction Company to enter into a proper contract. The above are merely suggested as some of the elements of damage. It is my opinion that you should ascertain whether the other contractors who have been awarded the heating and plumbing and the electrical contracts will agree in writing to waive the delay occasioned by the Fravel Construction Company's failure to enter into a proper contract and the necessity of re-advertising and re-letting of the contract. If such waivers cannot be obtained these contracts should also be re-let, and it is my opinion that the excess of the aggregate of the contract price upon re-letting, if there be such excess, would also be a proper element of damage.

The answer to your question 7-1 depends upon conditions that may develop upon the re-letting of the contract as above outlined, and it is therefore difficult to answer the same at this time. However, I am of the opinion that since the aggregate cost of the work upon the original letting of the contract could not exceed the amount of the appropriation, it would not be permissible to exceed the appropriation on the re-letting. If it should become necessary in order to keep within the appropriation, to change the plans, specifications, etc., in such a way as to leave out certain features of the building as originally planned, or to diminish the value of the building for the purposes for which it was originally planned, such change might properly, in my opinion, be considered in determining the amount of damages occasioned by the default of the Fravel Construction Company. In view of what has been said above, an answer to your question number 8 seems to be unnecessary.

In answer to your questions numbers 9 and 10, it is my opinion that certification of funds on the encumbrance estimate should be made prior to the signing of the contract. 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 answer to your last question it is my opinion that a contract is legally entered into when the requirements of law leading up to the same have been properly complied with and when the approval of such contract by this department has been obtained and such approval has been endorsed on the contract.

Respectfully,
EDWARD C. TURNER,
Attorney General.