

1310

AUDITOR, COUNTY—CONTRACTS, WHEN ACTING AS COUNTY ASSESSOR, MUST CONFORM TO REQUIREMENTS, §5705.41(D), RC—EXPENDITURES, FUNDS ALLOWED BY BOARD OF TAX APPEALS, APPROVAL OF COUNTY COMMISSIONERS NECESSARY; §5713.01 RC—585 OAG 1937, p. 1005, APPROVED AND FOLLOWED—RESTRICTION OF ALLOWANCE OF SUCH FUNDS BY BOARD OF TAX APPEALS MAKES UNEXPENDED PORTION NOT SUBJECT TO EXPENDITURE—AUDITOR IS JUDGE OF ADEQUACY OF PERFORMANCE OF DUTIES UNDER CONTRACT WHEN SUCH CONTRACTING PARTY PERFORMS PART OF AUDITOR'S DUTIES AS ASSESSOR OF REAL ESTATE—§5713.01, RC.

SYLLABUS:

1. The county auditor, when acting as assessor of real estate in his county, pursuant to the provisions of Section 5713.01, Revised Code, is amenable to Section 5705.41(D), Revised Code, when contracting for the performance of his duties as assessor, and must have attached to the contract a certificate of availability of funds, unless the funds to be expended thereby were those granted by the board of tax appeals pursuant to Section 5713.01, Revised Code.

2. The county auditor, in expending funds allowed by the board of tax appeals, pursuant to Section 5713.01, Revised Code, may do so without first seeking approval of the county commissioners. Opinion No. 585, Opinions of the Attorney General for 1937, page 1005, approved and followed.

3. The county auditor may not expend any portion of an additional allowance of funds granted him pursuant to Section 5713.01, Revised Code, in the year 1957 or subsequent thereto, where the board of tax appeals has restricted such allowance to the year 1956.

4. The county auditor, being the contracting party, is the judge of the adequacy of performance of a contract which he enters into for the performance of the part of his duties as assessor of real estate, pursuant to Section 5713.01, Revised Code.

Columbus, Ohio, November 19, 1957

Hon. Edward D. Mosser, Prosecuting Attorney
Harrison County, Cadiz, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Questions have arisen concerning the reappraisal of real estate in Harrison County. I therefore deem it advisable to seek your opinion on the following matters:

Statement of Facts

In compliance with section 5713.01 R. C., the Auditor of Harrison County, acting as Assessor, commenced the six year reappraisal of real estate in the county in the year 1955.

The board of county commissioners had appropriated the sum of \$15,000.00 to be used for such purpose in the year 1955.

On November 22, 1955, after having allegedly sought, but was unable to obtain, local appraisers who could and would undertake the task in compliance with the Uniform Rules of the Board of Tax Appeals, State of Ohio, and after receiving bids therefor, the Auditor 'accepted' a written proposal or contract, with an independent appraisal company. (See Appendix 'A' attached.) Under the terms of the contract, the appraisal company was to perform the work during the years 1955, 1956 and 1957, for the total sum of \$45,000.00. The written proposal was amended April 18, 1956. (Also see Appendix 'A'.)

On December 19, 1955, a statement in the amount of \$14,600.00 for 'Appraisal Services Rendered' was submitted to the county auditor by the appraisal company. Thereafter, on December 24, 1955, the board of county commissioners approved payment of the statement, and it was paid on the auditor's warrant No. 3338.

The board of county commissioners failed to appropriate funds, as requested by the auditor, for reappraisal work to be done in 1956 and 1957.

On or about January 10, 1956, the county auditor, under the provisions of section 5713.01 R. C., filed an application with the board of tax appeals, Department of Taxation, State of Ohio, requesting therein an allowance of additional funds in the amount of \$30,400.00 to complete the reappraisal work in Harrison County.

A hearing was had on the application on February 23, 1956, and the amount requested by the auditor was allowed by the board of tax appeals in an entry dated March 20, 1956. (See Appendix 'B' attached.)

The last sentence of the second full paragraph on page 3 of the entry of the board of tax appeals reads as follows:

'We therefore, approve, order, direct and allow the additional amount of money requested by the county auditor in the sum of \$30,400.00 *for the year 1956* for the purpose of completing the reappraisal of real property in Harrison County.' (Underlining added)

The independent appraisal company employed by the county auditor continued the reappraisal work during the year 1956

and 1957 and is as of this date continuing to provide certain services pertinent to the reappraisal work.

On December 31, 1956, the sum of \$15,000.00 was paid to the appraisal company on Auditor's Warrant No. 1650 on a statement rendered by the appraisal company. The statement in question was submitted to the commissioners by the Auditor, but was not approved for payment by such board on the theory that such approval was not required or necessary in view of the prior action of the Board of Tax Appeals.

A balance of \$15,400.00 remains to be paid on the contract accepted by the County Auditor on November 22, 1955.

Questions

Based on the foregoing Statement of Facts, your opinion on the following questions is respectfully requested:

(1) Is the County Auditor, when acting as assessor of real estate in his county pursuant to the provisions of sec. 5713.01 R. C., amenable to the provisions and requirements of Sec. 5705.41 (D) R. C., to the extent that any 'proposal' accepted or contract entered into by such auditor for services pertinent to such real estate reappraisal must have attached thereto a certificate of availability of funds as provided in such section?

(2) Based on the Statement of Facts, and assuming that the contract entered into by the county auditor was not void ab initio, and further assuming that as of December 31, 1956, performance under the contract was in compliance with the terms thereof, was the County Auditor authorized by virtue of the provisions of Sec. 5713.01 R. C., and the action of the Board of Tax Appeals, to make payment of \$15,000.00 on his Warrant No. 1650 without first obtaining the approval of the County Commissioners?

(3) In view of the fact that the entry of the Board of Tax Appeals (Appendix 'B') authorized the sum of \$30,400.00, 'for the year 1956 for the purpose of completing the reappraisal of real property in Harrison County', and assuming that there remains an unexpended balance of such allowance in the amount of \$15,400.00, can the County Auditor expend such sum in the year 1957, or at any subsequent time, for the purpose of making final payment due under the reappraisal contract?

(B) If the answer to 3 (A) is 'Yes', can such sum be expected on the warrant of the Auditor without the approval of the County Commissioners?

Note: In questions 3 (A) and 3 (B) it is assumed that the services called for under the re-appraisalment contract have

been completed to the satisfaction of the Auditor at the time payment is to be made.

(4) Assuming the reappraisal contract to be regular in all other respects, is the County Auditor, acting in his capacity as assessor and in the exercise of sound discretion, the judge of the adequacy of performance under the contract?"

Your first question must be considered in light of Sections 5705.41 and 5713.01, Revised Code.

Section 5705.41, Revised Code, reads in pertinent part as follows:

"No subdivision or taxing unit shall:

(D) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, *or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose* and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. *If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided that if the amount involved is less than one hundred dollars, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.*" Emphasis added)

Were there no additional facts, this failure to attach the certificate would, under the prevailing law, operate to make the contract unlawful, the contract being a continuing one within the meaning of Section 5705.41, Revised Code.

The statement of facts as presented indicates that the certificate of availability of funds as prescribed in the above quoted section was not

attached to the contract entered into by the county auditor at the time of its execution. However, the statement of facts also indicates that the board of county commissioners approved payment of the first year's statement for appraisal services rendered under the contract executed by the auditor. The savings provision in Section 5705.41, Revised Code, as above quoted, clearly states that in the event no certificate is furnished as required at the time of entering into the contract, if a certificate is later submitted to the taxing authority, here the board of county commissioners, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract. The board of county commissioners, having approved the issuance of a warrant to pay for the first year's service under the contract, is presumed to have acted properly in its official acts, and, therefore, it must be assumed that the necessary certificate was furnished them pursuant to the saving provision requirements indicated above. Therefore, as to payments for the first year's services under the contract, the requirements of Section 5705.41, Revised Code, were met.

Section 5713.01, Revised Code, reads in pertinent part as follows:

“The auditor, with the approval of the board of tax appeals, may appoint and employ such experts, deputies, clerks, or other employees as he deems necessary to the performance of his duties as assessor; the amount to be expended in the payment of the compensation of such employees shall be fixed by the board of county commissioners. If in the opinion of the auditor, the board of county commissioners fail to provide a sufficient amount for the compensation of such employees, he may apply to the board of tax appeals for an additional allowance, and the additional amount of compensation allowed by such board shall be certified to the board of county commissioners, and the same shall be final. The salaries and compensation of such experts, deputies, clerks, and employees shall be paid upon the warrant of the auditor out of the general fund of the county; and if the salaries and compensation are, in whole or in part fixed by the board of tax appeals they shall constitute a charge against the county regardless of the amount of money in the county treasury levied or appropriated for such purposes.”

Clearly, the provisions of the above quoted portion of 5713.01, Revised Code, are in conflict with 5705.41, Revised Code, in the requirement of a certificate of availability of funds when the board of tax appeals allows an additional amount of compensation for the purposes of making assessments for purposes of taxation over and above that fixed by the board of county

commissioners. This question was considered by one of my predecessors in office in Opinion No. 584, Opinions of the Attorney General for 1937, page 1005, and I concur in this reasoning and conclusions. The syllabus of this opinion is as follows :

“The provisions of Section 5548, General Code, (5713.01, Revised Code), relating to the compensation of deputies, clerks, experts or other employes appointed or employed by the county auditor in making the appraisal of real property in the county, as provided for by said section, are not repealed or otherwise affected by the later provisions of the present Budget Law (Secs. 5625-26 to 5625-33, inclusive, G. C.) (5705.35 to 5705.41, inclusive, Revised Code) ; and if the county auditor finds that the county commissioners have failed to provide a sufficient amount of money to pay the compensation of the necessary deputies, clerks, experts or other employes appointed or employed by him for this purpose, he may make application to the Tax Commission of Ohio for an additional allowance of money for this purpose, and such additional amount of money allowed by the Tax Commission for the payment of such compensation will on the certification thereof by the Tax Commission to the board of county commissioners of the county be final as against said county, and be a sufficient warrant for the payment of the compensation of such appointees or employes out of the general fund of the county whether the money necessary to pay such compensation has been appropriated by the county commissioners for this purpose or not.”

(Revised Code references added.)

From the above cited opinion it is clear that the provisions of Section 5705.41 (D), *supra*, are not applicable to the expenditure of funds by the county auditor when such funds are allowed by the board of tax appeals pursuant to Section 5713.01, Revised Code.

It should be emphasized, however, that only the additional allowance authorized by the board of tax appeals is excepted from the operation of Section 5705.41 (D), Revised Code, and any contracts or orders for the expenditure of moneys other than those specifically allowed pursuant to Section 5713.01, Revised Code, are not so excepted.

Therefore, in answer to your first question, the county auditor, when acting as assessor of real estate, pursuant to Section 5713.01, Revised Code, is amenable to Section 5705.41 (D), Revised Code, as to any contracts or orders for the expenditure of moneys, except as to the expenditures of funds allowed by the board of tax appeals pursuant to Section 5713.01, Revised Code.

With respect to the second question which you present, I direct your attention again to the syllabus of Opinion No. 584, Opinions of the Attorney General for 1937, page 1005 as quoted above. It is concluded thereby that the additional money allowed by the tax commission, now the board of tax appeals, will on the certification thereof to the board of county commissioners of the county *"be final as against said county and be sufficient warrant for the payment of the compensation of such appointees or employees out of the general fund of the county whether the money necessary to pay said compensation has been appropriated by the county commissioners for this purpose or not."*

The above referred to opinion in holding that the certification by the tax commission, the board of tax appeals in the instant case, is sufficient warrant for the payment of the compensation of appointees out of the general fund of the county whether the money has been appropriated by the county commissioners for this purpose or not, negatives any suggestion that the board of county commissioners retains control over the funds allowed pursuant to Section 5713.01, Revised Code. Therefore, the county auditor in expending funds allowed him by the board of tax appeals, pursuant to Section 5713.01, Revised Code, need not obtain the approval of the board of county commissioners.

In answer to your question 3 (A), the journal entry of the board of tax appeals, allowing the additional funds requested by the county auditor, pursuant to Section 5713.01, Revised Code, allowed such funds for the year 1956, and expenditures by the auditor pursuant to this entry should be restricted to the period clearly and unambiguously described. In support of this position I might point out that the additional funds allowed by the board of tax appeals are a charge on the county pursuant to Section 5713.01, Revised Code, but can only be a charge for the period described in the entry as being the period for which such funds were allowed. Therefore, in the matter at hand, the allowance could not be considered a charge against the county for other than the year 1956, and the effect of the entry should also be limited to that period.

Your question 3 (A) being answered in the negative, your question 3 (B) need not be considered.

In passing we may note the propriety, in the instant case, of a renewed application by the auditor to the board of tax appeals for an allowance of funds for the year 1957.

Referring now to your fourth and final question, it is my opinion that the county auditor is the judge of the adequacy of performance under the contract which he entered into for the purpose of aiding him in the performance of his duties as assessor of the real estate in his county pursuant to Section 5713.01, Revised Code. The county auditor, having contracted with another for the performance in part of his duties, is the contracting party and as such should determine what performance by the other contracting party or parties would constitute completion of the terms and conditions of the contract. Additionally, the contract is for the performance of the county auditor's duties, as assessor, and the county auditor, being responsible for the performance of his office as assessor and otherwise, should be the judge of the adequacy of performance.

In specific answer to your inquiry, it is my opinion, and you are accordingly advised that:

1. The county auditor, when acting as assessor of real estate in his county, pursuant to the provisions of Section 5713.01, Revised Code, is amenable to Section 5705.41 (D), Revised Code, when contracting for the performance of his duties as assessor, and the certificate of availability of funds must be attached to such a contract except (1) where the taxing authority subsequently authorizes payment thereunder, and (2) where the funds to be expended thereunder were allowed by the board of tax appeals pursuant to Section 5713.01, Revised Code.

2. The county auditor, in expending funds allowed by the board of tax appeals, pursuant to Section 5713.01, Revised Code, may do so without first seeking approval of the county commissioners. Opinion No. 585, Opinions of the Attorney General for 1937, page 1005, approved and followed.

3. The county auditor may not expend any portion of an additional allowance of funds granted him pursuant to Section 5713.01, Revised Code, in the year 1957 or subsequent thereto, where the board of tax appeals has restricted such allowance to the year 1956.

4. The county auditor, being the contracting party, is the judge of the adequacy of performance of a contract which he enters into for the performance of the part of his duties as assessor of real estate, pursuant to Section 5713.01, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General