

390

## HIGHWAYS, DIRECTOR OF :

1. MAY LEGALLY ENTER INTO CONTRACT WITH ENGINEER TO PREPARE PLANS FOR CONSTRUCTION OF SPECIFIC PROJECT AND FIX COMPENSATION UPON PERCENTAGE BASIS.
2. MAY ENTER INTO CONTRACT WITH PERSON, FIRM OR CORPORATION TO PREPARE PLANS FOR CONSTRUCTION OF SPECIFIC PROJECT AND FIX COMPENSATION UPON PERCENTAGE BASIS.
3. COMPETITIVE BIDDING NOT REQUIRED TO PROCURE ENGINEERS SERVICES ON SPECIFIC PROJECTS—IN ABSENCE OF SPECIFIC PROVISIONS OF LAW TO CONTRARY.

## SYLLABUS :

1. The Director of Highways may legally enter into a contract with an engineer to prepare plans for the construction of a specific project and fix his compensation upon a percentage basis.
2. The Director of Highways may enter into a contract with a person, firm or corporation to prepare plans for the construction of a specific project and fix his or their compensation upon a percentage basis.
3. In the absence of specific provisions of law to the contrary competitive bidding is not required by the Director of Highways in procuring engineers services on specific projects.

Columbus, Ohio, April 19, 1949

Hon. T. J. Kauer, Director, Department of Highways  
Columbus, Ohio

Dear Sir :

I am in receipt of your communication requesting an opinion with reference to the power of the Director of Highways to employ engineers in addition to those upon the regular payroll for specific projects and the method of employment. Your communication reads as follows:

“In connection with the duties of the Director of Highways in making of surveys and preparing plans for highway improvements it frequently would be advantageous to the department to employ engineers in addition to those upon the regular payroll for specific projects.

Section 1178-33 of the General Code, in part, provided :

‘The director shall make, or cause to be made, a map of the highway in outline and profile, and plans, specifications, profiles, and estimates covering the proposed projects.’

Section 1178-17 of the General Code, in part, provides :

‘The director also may employ, and fix their compensation, such assistants as are necessary to prepare plans and surveys. Compensation paid for the preparation of plans, surveys, and specifications shall be regarded as a part of the cost and expense of the improvement for which they were made and the cost thereof shall be paid from funds set aside for such improvement.’

I am informed that in the latter part of 1944, the then Director of Highways entered into a contract with a firm of engineers for the preparation of plans and other engineering services for the reconstruction of Spring Common Bridge on State Highways No. 18 in the city of Youngstown. I am also informed that some question was raised as to the legality of this contract which provided for payment upon a percentage basis but the compensation was eventually paid by the state upon the advice of the Attorney General.

It has been suggested that such a procedure is, by analogy, comparable to the powers exercised by County Building Commissioners under Section 2339. It has further been suggested to me that the power of the Commissioner to employ architects and superintendents during construction of such buildings, and fix

their compensation upon a percentage basis, has been upheld and such procedure is the universal practice.

It further has been suggested to me that such a contract, if entered into by the Director of Highways, would not be subject to the usual provisions of the General Appropriation Bill or statutes requiring competitive bids for the reason that professional services are not included in contracts as are mentioned therein.

In view of the foregoing your opinion is requested upon the following :

1. May the Director of Highways legally enter into a contract with an engineer to prepare plans for the construction of a specific project and fix his compensation upon a percentage basis?

2. If your answer to question one is in the affirmative, may the Director of Highways enter into a contract with a firm of engineers or co-partnership or association in the same manner?

3. In the event you conclude that such a contract may be entered into, does the competitive bidding requirements, ordinarily in the General Appropriation Bill or any other statutes, have application to such a contract?

For your information there is enclosed herewith a copy of a letter of the Attorney General, dated October 8, 1945, which relates to the payment to the firm of engineers under the contract hereinbefore referred to.

I would appreciate having your opinion upon the foregoing as soon as possible."

My attention is directed to an opinion of my predecessor dated October 8, 1945, wherein an opinion was requested with respect to the power of the Director of Highways to employ an engineering firm of engineers to prepare plans, specifications and estimates for reconstructing the approaches in reference to a certain bridge which is a part of the state highway system. Said opinion cites Sections 1196 and 1195-1, General Code. A check discloses that said sections were repealed and became inoperative on October 11, 1945. However, Section 1196 as quoted in that opinion was re-enacted in substance in Section 1178-33, which latter section became effective on October 11, 1945, and quoting from the same it reads in part as follows :

"The director shall make, or cause to be made, a map of the highway in outline and profile, and plans, specifications, profiles,

and estimates covering the proposed projects. When completed the director shall indorse upon such maps, profiles, plans, specifications and estimates of quantities his approval of the same and cause one copy thereof to be placed on file in the office of the director and another in the office of the division deputy director for public inspection on or before starting the publication of notice to bidders as hereinafter provided. \* \* \*

In the execution of any survey authorized by the director any person, firm or corporation, without doing unnecessary injury thereto, may enter upon any lands within the state for the purpose of inspecting, surveying or doing any work deemed necessary to carry out the provisions of this act. \* \* \*

Section 1178-16, General Code, reads in part as follows:

“The director may also appoint a chief clerk, who shall receive a salary not to exceed twenty-five hundred dollars per annum, to be fixed by the director. \* \* \*

Section 1178-17, General Code, reads as follows:

“The director also may employ, and fix their compensation, such assistants as are necessary to prepare plans and surveys. Compensation paid for the preparation of plans, surveys and specifications shall be regarded as a part of the cost and expense of the improvement for which they were made and the cost thereof shall be paid from funds set aside for such improvement.

The director also may appoint additional clerks and stenographers, and such other engineers, inspectors and other employes within the limits of the appropriation as he may deem necessary to fully carry out the provisions of this act; the salary of each of said employes to be fixed by the director within the limits of the appropriations made by the General Assembly. All employes and appointees hereinbefore mentioned in this act shall, in addition to their salaries, receive their actual necessary traveling expenses when on official business.”

It is significant that in Section 1178-16, in addition to the chief clerk, whose appointment and salary are provided for, the appointment of other secretaries is also provided for and the term *salary* is used when referring to their compensation.

In Section 1178-17, the director is authorized to appoint such assistants as are necessary to prepare plans and surveys. The term *salary* is not used. The term *compensation* is used. The first paragraph of Section 1178-17 refers to such assistants as are necessary to prepare plans and surveys. I

presume that such assistants by the very nature of the work they are to perform, are engineers, and this reasoning is borne out by the first sentence in the second paragraph of said section whereby the director may appoint additional clerks and stenographers, and *such other engineers*, inspectors and other employes within the limits of the appropriation as he may deem necessary to fully carry out the provisions of this Act, the salary of each of said employees to be fixed by the director within the limits of the appropriations made by the General Assembly.

From the use of the two words *salary* and *compensation*, I can find no basis for concluding that they intended *compensation* to be applicable to those employees not on the regular payroll, and *salary* to apply to those employees who are on the regular payroll. I make the above deduction for the reason that regardless of whether the director employs assistants, or appoints clerks and stenographers and such other engineers, inspectors and other employees, the legislature used the word *employ* in one instance and the word *appoint* in another with interchangeable meaning.

In reading Sections 1178-16 and 1178-17, it seems to be very clear that the legislature was attempting to accomplish a general objective, which was to make certain that the Director of Highways would have power and authority to procure sufficient personnel to carry out and accomplish the duties of his department, and they used the words *employ* and *appoint* without any thought of any significant difference in meaning. Regardless of the fact of whether the director employs, appoints or procures a person, partnership or corporation to assist him he certainly must pay the salary or compensation fixed by the legislature in instances where such is the case. If he is authorized, as he certainly is, to employ, appoint, etc., other persons, corporations or partnerships, when he deems it necessary to fully carry out the provisions of the Act, it is also certain under implied powers that he may fix the compensation, and where it appears as it does in this instance that the legislature failed to prescribe the method by which the director should fix such compensation, it is believed that there can be no question but what he has the power to do so by any method which in his discretion is fair and within the realm of good judgment. To enter into contracts for the procurement of personal or professional services of a specialized nature and fix the compensation on a percentage basis is recognized as being valid. See *State, ex rel. v. Ferguson*, 145 O.S., 12:

“Although contracts relating to public projects involving expenditure of money may not ordinarily be entered into by public officials without advertising and competitive bidding as prescribed by law, an exception exists where the contract involves the performance of personal services of a specialized nature requiring the exercise of peculiar skill and aptitude.”

Attorney General's Opinion for 1932, No. 4884, recites in the eighth branch of the syllabus as follows:

“A contract with an architect for public work which provides for the architect's compensation to be computed upon a percentage basis of the cost of the improvement is not thereby invalid.”

An examination of that opinion discloses in the body thereof the following statement:

“The practice of paying architects on a commission basis is recognized in an opinion appearing in Opinions of the Attorney General for 1929, Vol. 2, page 833.”

The language of the sections pertaining to compensation of an architect in substance is the same as that pertaining to the compensation of engineers in this case. I see a great similarity in the type of services being contracted for and the same reasoning applies to the employment of engineers as it does to the employment of architects.

Therefore, I am of the opinion that the Director of Highways may legally enter into a contract with an engineer to prepare plans for the construction of a specific project and fix his compensation upon a percentage basis.

Your second question is, may the Director of Highways enter into a contract for the above discussed purpose with a firm of engineers, co-partnership or association in the same manner? I direct your attention to the quotation from Section 1178-33, supra. In the second paragraph thereof the legislature used the following significant statement with reference to going on private property for the purpose of making surveys, etc.:

“In the execution of any survey authorized by the director, any person, firm or corporation \* \* \* may enter upon any lands within the state for the purpose of inspecting \* \* \* or ordering any work deemed necessary to carry out the provisions of this act.”

Without specifically specifying that the director could employ partnerships and corporations to prepare plans for the construction of a specific project, they very definitely anticipated and contemplated that the director could and would, where in his judgment it was found necessary, enter into contracts with persons, firms and corporations to have plans, specifications, etc. made for such proposed projects.

Therefore, in summarizing, I am of the opinion :

(1) That the Director of Highways may legally enter into a contract with an engineer to prepare plans for the construction of a specific project and fix his compensation upon a percentage basis ; and

(2) That the Director of Highways may enter into such contract with a person, firm or corporation.

Having answered the first and second questions in the affirmative, it goes without saying that in the absence of provisions of law to the contrary, the competitive requirements ordinarily contained in the General Appropriation Bill and other statutes have no application to the procurement of the type of services referred to here.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.