

2935.

DEPARTMENT OF PUBLIC WELFARE SHOULD OPEN BIDS AND ENTER INTO CONTRACTS FOR PURCHASE AND INSTALLATION OF ELEVATORS, BOILERS, ENGINES, PUMPS AND ELECTRICAL WIRING FOR USE OF STATE INSTITUTIONS—DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS REQUIRED TO APPROVE SAID PLANS—DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS MAY LEGALLY ASSIST DEPARTMENT OF PUBLIC WELFARE IN DRAWING OF PLANS.

1. *Contracts for the purchase and installation of elevators, boilers, engines, pumps and electrical wiring, for the use of state institutions under the supervision of the Department of Public Welfare, should be made by the Department of Public Welfare; and bids for the items just mentioned should be opened by said department.*

2. *The Department of Highways and Public Works succeeds, by reason of section 154-40 G. C., to the powers and duties of the so-called State Building Commission, to wit section 2314 G. C. et seq. It is therefore necessary, in the installation of elevators, boilers, engines, and anything else comprehended by section 2314 G. C., that the plans and specifications receive the approval of the Department of Highways and Public Works, as the successor of the State Building Commission.*

3. *If the Department of Public Welfare desires the assistance of the Department of Highways and Public Works, in respect of the drawing of plans, etc., for the above mentioned work, such assistance may be legally rendered where arranged for pursuant to section 154-21 G. C.*

COLUMBUS, OHIO, March 17, 1922.

DR. H. S. MACAYEAL, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter in which you request the views of this department on the following questions:

“(1) Whether the Department of Public Welfare has any authority to open bids when it has prepared plans and specifications for engineering work, or whether this is to be left exclusively with the purchasing division.

(2) The question has arisen between the Highway Department and this department as to just how far the Highway Department shall go in matters pertaining to construction; whether this involves such projects as the installation of elevators, the placing of boilers, engines, pumps, electrical wiring, etc.”

Your first question does not specifically show what things you have in mind when you speak of opening bids. In order to avoid possible misunderstanding of the views herein expressed, it will be assumed that you are speaking of bids for the furnishing or installation (or both) of the things specifically mentioned in your second question, to wit elevators, boilers, engines, pumps and electrical wiring.

In order to say what department shall open bids, it is necessary to ascertain what department makes the contract. The opening of bids is really a part of the procedure of contracting, and in the absence of an express statute to the contrary, the rule would be that the department, board or officer having the power to make the contract is to be regarded as the proper authority to open bids relative thereto.

The question, then, may be put thus: What state department is it which makes the contract to buy elevators, boilers, engines, pumps and electrical wiring, when those things, or any of them, are needed at a state institution under the management of the Department of Public Welfare?

In order to answer that question, it is necessary to consider the meaning and application of two different statutes. The first is what is called the state building commission act, and the second is section 154-37 G. C., found in the recently enacted administrative code.

Section 2314 G. C., the first section of the state building commission act (107 O. L. 453), expressly mentions building equipment. Said section says:

"* * * Whenever additions or alterations, structural or other improvements are to be made, or heating, cooling or ventilating plants or other equipment to be installed for the use of the state, or in * * * an institution supported in whole or in part by the state, or for the supply of material therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board or other authority, upon whom devolves the duty of constructing * * * or installing the same, hereinafter called the owner, shall make or cause to be made * * * the following: full and accurate plans, suitable for the use of mechanics and other builders in such construction, improvement * * * or installation * * *."

Subsequent related sections provide further procedural steps. Among them is section 2319 G. C., which says:

"On the day and at the place named in the notice, such owner shall open the proposals, and shall publicly, with the assistance of the architect or engineer, immediately proceed to tabulate the bids * * *."

The legislative appropriations from which the moneys are to come to pay for the boilers, engines, pumps, and electrical wiring, referred to in your questions, are made to the Department of Public Welfare, and that department would, from the standpoint of the state building commission act, be the "officer, board or other authority upon whom devolves the duty of constructing, erecting, altering or installing the same."

Consideration must now be given to section 154-37 G. C., part of the new administrative code. The first part of that section transfers to the Department of Finance all powers and duties theretofore possessed by (1) The Secretary of State and Auditor of State under sections 1846 and 1847 G. C.; (2) the state purchasing agent in the office of the Secretary of State; (3) the Commissioners of Public Printing and the Supervisors of Public Printing; (4) the Ohio Board of Administration under section 1849 G. C. The section then continues, with this provision:

"In addition to the powers so transferred to it, the Department of Finance shall have power to purchase *all other supplies, material and equipment* for the use of the state departments, offices and institutions, excepting the military department and institutions administered by boards of trustees * * *."

The items above enumerated, to wit elevators, boilers, engines, pumps, and electrical wiring, are all in the nature of equipment for buildings. They are among

the things with which it is necessary to furnish a building, in order to make it function for its intended use. The question is, though, whether these things are "equipment" within the purview of section 2314 G. C. et seq., or whether they are "equipment" within the meaning of section 154-37 G. C. If the first cited statute is to apply, the contract is to be made by the "owner"—in this case by the Department of Public Welfare; if the second cited statute governs, the contract is to be made by the Department of Finance.

An easy way out of the difficulty, of course, would be to treat section 2314 G. C. as having been repealed by implication, section 154-37 G. C. being the later statute. It is not believed, however, that such a course of reasoning would be sound. In the first place, repeals by implication are never favored. Secondly, the administrative code itself refers to section 2314 G. C. in such a way as to recognize it as existing. Note the provision in section 154-40 G. C. which says:

"Nothing in this section shall be so construed as to require the independent employment of an architect or engineer as provided by section two thousand three hundred and fourteen of the General Code, *in the cases to which said section applies.*"

It does not appear impossible to harmonize these two sections and give meaning to both. This is accomplished by regarding the "equipment," mentioned in section 154-37 G. C., as something in the nature of things *movable*, as distinguished from something installed in a building and hence *immovable*.

That part of section 154-37 G. C. which precedes the sentence "In addition to the powers so transferred to it," etc., suggests that the legislature had in mind movable equipment, other than equipment installed in a building. The "supplies and equipment required for the use and maintenance of state officers, boards and commissions, the Commissioners of Public Printing and the Supervisor of Public Printing" are not such as require installation in a building; and the "supplies" purchased by the Department of Finance as the successor of the Board of Administration (section 1849 G. C.) are all of the movable, non-installable type.

You are therefore advised that whenever the purchase and installation of elevators, boilers, engines, pumps and electrical wiring (or anything else constituting what we may call "capital equipment") for state institutions is desired, the contracts for such equipment should be entered into, and the bids relative thereto opened, by the Department of Public Welfare.

What has been said above, in connection with the item called "electrical wiring," would not be applicable to the mere purchase of a quantity of *electric wire*. That is to say, if all that is needed for a given institution is a known quantity of wire suitable for conducting electric current, the same to be installed by prison labor or by the regular employes at the institution, such wire would then fall into the category of "supplies, material and equipment," within the meaning of section 154-37 G. C., and the purchase of same would fall within the province of the Department of Finance.

It will be observed that section 2314 G. C. refers only to work or equipment the aggregate cost of which is in excess of \$3,000.00. Nevertheless, it is the view of this department that the rule just announced as to equipment of a non-movable type and requiring installation in a building is to be followed regardless of the amount of the expenditure provided for by the contract. This is so not because section 2314 G. C. is regarded as applicable to such a case, but because section 154-37

G. C. is equally inapplicable. Under such circumstances, the purchase and installation should be handled as it was prior to the going into effect of the administrative code.

Your second question seems to be a restatement of the question passed upon by this department in Opinion No. 2407, rendered September 9, 1921. In that opinion the question was stated thus:

"Does the Department of Highways and Public Works have powers in connection with the installation, remodeling and repairing of steam and electric power plant, transmission and distribution systems, other mechanical equipment, and structures other than buildings at the state institutions, and if so, to what extent?"

The holding of said opinion was as follows:

"The statutes prescribing the powers and duties of the Department of Highways and Public Works vest said department with no authority in the matter of the installation and repair, at state institutions administered by the Department of Public Welfare, of steam or electric power plants, transmission and distribution systems, mechanical equipment, and structures other than buildings."

Said opinion was based on a construction of that part of the new administrative code which deals with the Department of Highways and Public Works, to wit section 154-40 G. C., and made the point that steam or electric power plants, transmission and distribution systems and mechanical equipment, are not "buildings" within the meaning of said section.

Attention may here be called to the fact that the Department of Highways and Public Works succeeds to the powers and duties of the so-called State Building Commission. The first half of said section 154-40 G. C. says:

"The Department of Highways and Public Works shall have all powers and perform all duties vested by law in the Superintendent of Public Works, the State Highway Commissioner, the Chief Highway Engineer, and the State Building Commission. Wherever powers are conferred or duties imposed upon any of such departments, offices or officers, such powers and duties shall, except as herein provided, be construed as vested in the Department of Highways and Public Works."

One of the duties of the State Building Commission is to approve necessary plans and specifications, section 2315 G. C. providing:

"The plans, details, bills of material, specifications of work, estimates of cost in detail and in the aggregate, form of bidding proposal and bond of bidder and other data that may be required shall be prepared on such material and in such manner and form as may be prescribed by the State Building Commission, and shall be submitted to such commission for its approval. If so approved the same shall be deposited and safely kept in the office of the Auditor of State as the property of the state."

It would therefore appear that in the installation of elevators, boilers, engines, and anything else comprehended by section 2314 G. C., the plans and spe-

cifications must receive the approval of the Department of Highways and Public Works, as the successor of the State Building Commission.

It may also be pointed out that if the Department of Public Welfare should desire the assistance of the Department of Highways and Public Works, in respect of the drawing of plans, etc., for the work referred to in your questions, such assistance could be legally rendered where arranged for pursuant to that part of section 154-21 G. C. which says:

“The director of any department may empower or require an employe of another department, subject to the consent of the superior officer of the employe, to perform any duty which he might require of his own subordinates.”

Respectfully,
JOHN G. PRICE,
Attorney-General.

2936.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN MEIGS AND HIGHLAND COUNTIES, OHIO.

COLUMBUS, OHIO, March 20, 1922.

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

2937.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND FRANK L. PACKARD FOR ARCHITECTURAL SERVICES ON GYMNASIUM AT OHIO UNIVERSITY, ATHENS, OHIO.

COLUMBUS, OHIO, March 22, 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 Frank L. Packard. This contract is for architectural services on gymnasium at Ohio University, Athens, Ohio.

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.

Said contract has been approved and the same is herewith returned to you, together with all other data submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.