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CONTRACT — BOARD OF EDUCATION — MAY UNDER SECTION 7623 G. C. PROVIDE CONTRACTOR SHALL BE HELD LIABLE FOR FAILURE TO COMPLETE CONTRACT WITHIN SPECIFIED TIME — BOARD IN SOUND DISCRETION MAY WAIVE SUCH PROVISION WHERE CONTRACTOR UNABLE TO COMPLETE PERFORMANCE THROUGH REASONS BEYOND HIS CONTROL.

SYLLABUS:

*A board of education may lawfully incorporate in contracts let under and in pursuance of Section 7623, General Code, a provision that the contractor shall be held liable for a reasonable sum to be fixed by the terms of the contract as and for liquidated damages for his failure to complete the contract at the time specified therein, and that the board may, in the exercise of*

*a sound discretion, waive the said provision for reasons which they deem sufficient and satisfactory where it appears that the contractor, for reasons beyond his control, could not comply with the provisions of the contract as to the time of completion or performance.*

Columbus, Ohio, April 18, 1940.

Hon. D. H. Jackman, Prosecuting Attorney,  
London, Ohio.

Dear Sir:

This is to acknowledge receipt of your request for my opinion, which reads as follows:

“The Board of Education for Deercreek Township, Madison County, Ohio, has recently asked me a question which requires the interpretation of General Code Section 7623, and possibly some general law in connection with it.

On the 9th of August, 1938, they voted a levy and authorized the issue of bonds for the purpose of constructing a school building in cooperation with the federal government. Thereafter, a regular contract was let under Section 7623, and one of the provisions of the contract was to the effect that the building was to be completed by such a date, and that for each day thereafter, during which the building was incomplete, a specified sum was to be forfeited by the contractor as liquidated damages. As the deadline approached it became apparent to the board of education, for reasons which they deemed sufficient and satisfactory, that the contractor could not possibly comply with the deadline, and the board of education passed a resolution waiving their rights and damages and extending the time in which the building could be completed.

The question now arises whether or not that is such a modification of the contract as would entirely without the scope of their authority and, as such, be entirely void.

It is generally considered a well recognized rule that a board of education may not bind the public beyond the scope of its powers.

It was probably not required to have the penalty clause in a contract in the first instance, but, having incorporated such a clause does the board have the power under the law of Ohio, to waive the provision in favor of the contracting parties? If not specific authority, are they hereby estopped, and all other taxpayers as well, from thereafter asserting their claims for damages under the contract as originally constituted?”

Section 7623 of the General Code of Ohio, wherein provision is made

for boards of education to let contracts for the erection of school buildings, contains no provision authorizing the board to fix a time for the completion of contracts let under and in pursuance of the said statute and provide a penalty for failure of the contractor to complete the performance of the contract at the time specified. The law provides in Section 2331, General Code, that all state contracts entered into under the provisions of Sections 2314 et seq. General Code shall not only contain a provision in regard to the time when the whole or any specific portion of the work contemplated therein shall be completed, but shall provide a forfeiture for delay. County road contracts must contain a provision for the payment of certain expenses in case of non-performance within a stipulated time. (Section 6947-2, General Code). With respect to contracts entered into by a city director of public service (Section 4330, General Code), and by villages (Section 4222, General Code) it is provided that where a bonus is offered for completion of the contract prior to a specified date a pro rata penalty for like sum for every day of delay beyond the specified date, may be exacted.

Inasmuch as Section 7623, General Code, contains no provision with respect to penalties and bonuses, the question is presented as to whether or not a board of education may include such provisions in contracts let for the construction of school buildings.

A former Attorney General, in an opinion which will be found in the published Opinions of the Attorney General for 1915, at page 483, held with respect to county commissioners that in the absence of express statutory authority therefor, the county commissioners might lawfully provide for forfeiture of a definite sum by the contractor in case the contract was not completed by the time specified therein, especially where the contractor was responsible for the delay. In the course of this opinion the then Attorney General said:

“I think the general authority of the board of county commissioners to make a contract carries with it the implied authority to incorporate such a provision in said contract.

While the validity of such a provision in a contract made by a board of county commissioners has not been passed upon by any court, I am of the opinion that the rule of law applicable to such a provision in a private contract applies with equal force to a contract made by a board of county commissioners.”

Whether or not a board of education may incorporate in contracts let under and in pursuance of Section 7623, General Code, provisions for penal-

ties in case the work to be performed under the contract is not performed by a specified time is not material in the present instance, as the board by resolution extended the time and have, I understand, accepted the work. This, in my opinion, amounts to a waiver, which I think the board was within its rights in making. Under a contract prescribing a time for the performance of the work, with a proviso that upon default by the contractor the city may either declare the contract forfeited, or hire persons to complete the unfinished portion and charge the expense to the contractor, the Supreme Court of Ohio, in the case of *Hubbard v. Norton*, 28 O. S., 116, held that the municipal authorities might lawfully waive the delay in performance, and where they did so, and exacted complete performance, the contractor was entitled to be paid for full performance of the contract without deduction of any amount that might have been stipulated as liquidated damages on account of delay.

In *McQuillin on Municipal Corporations*, Section 2078, it is said :

“A contract provision that the contractor may be granted an extension of time to complete the work on condition that a certain per cent per month shall be deducted from the assessments is in the nature of a penalty which the municipality may enforce, or not, in its discretion. The specified penalty for delay is a matter entirely between the municipality and the contractor, and the property owner taxed for the improvement is not entitled to credit for any part of the penalty where payment of the penalty is not enforced.

Acceptance of work without claim for stipulated damages provided in the contract on account of delay in completing the work to be paid prior to acceptance, constitutes a waiver of such damages.”

In specific answer to your question, I am of the opinion that a board of education may lawfully incorporate in contracts let under and in pursuance of Section 7623, General Code, a provision that the contractor shall be held liable for a reasonable sum to be fixed by the terms of the contract as and for liquidated damages for his failure to complete the contract at the time specified therein, and that the board may, in the exercise of a sound discretion waive the said provision for reasons which they deem sufficient and satisfactory where it appears that the contractor, for reasons beyond his control could not comply with the provisions of the contract as to the time of completion or performance.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.