

GENTLEMEN:—I have examined the transcript of proceedings of the council and other officers of the city of Lorain, relative to the above bond issue, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the legislation authorizing their issuance, will, upon delivery, constitute valid and binding obligations of said city.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

2410.

APPROVAL, BONDS OF CITY OF MARION IN AMOUNT OF \$48,913 FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, September 9, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2411.

BRIDGES AND CULVERTS—FORCE ACCOUNT MAY BE FOLLOWED IN CONSTRUCTION, RE-CONSTRUCTION AND REPAIR OF BRIDGES BY COUNTY—COMPETITIVE BIDDING PLAN ALSO PROVIDED—LATTER SYSTEM RECOMMENDED—SEE ALSO ENSUING OPINION NO. 2412, SEPTEMBER 10, 1921—FORCE ACCOUNT.

1. *In the construction or re-construction, as well as the repair, of a bridge by a county, the method commonly known as force account may be followed, whatever may be the estimated cost of the project,—that is to say, that under sections 7200 and 7214, G. C., the county commissioners may purchase the necessary machinery, tools, equipment and materials, and under section 7198 G. C. authorize the county surveyor to employ the necessary teams and labor; or the commissioners may, by virtue of the last named section, authorize the county surveyor to purchase the materials, lease the implements and tools and employ the labor necessary for the project. (Opinions Attorney-General 1917, Vol. III, p. 2332; and 1918, Vol. I, p. 459, not followed in so far as they hold that there is a distinction between construction and repair.)*

2. *Said sections 7198, 7200 and 7214 do not repeal by implication sections 2343 to 2361, G. C. providing among other things for the construction and repair of bridges upon the competitive bidding plan. The two groups of sections provide distinct methods of bridge construction and repair; and when one group is resorted to for procedure, it must be followed to the exclusion of the other.*

3. *It is recommended that public authorities follow the competitive bidding*

system unless adherence thereto is in particular instances either impracticable or against the public interest.

COLUMBUS, OHIO, September 10, 1921.

HON. JOHN R. KING, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your letter of recent date in which you ask the opinion of this department upon the following:

“May the county commissioners purchase steel for use in the reconstruction of a county bridge without advertising for bids, under sections 2346, 2355 and 2362 et seq. G. C.? The estimated cost of the bridge is in excess of \$1,000.00.

May the county commissioners authorize the county surveyor to purchase such material under the provisions of section 7198 G. C.?

Does section 7214 G. C. confer any such authority?

We call your attention to the opinions of the former Attorney-General, Honorable Joseph McGhee, to be found in the Reports of the Attorney-General for 1917, (p. 2332) and 1918 (p. 459). We are not able to follow clearly the reasoning for the conclusions given in the foregoing opinions, and would request that you review the matter and advise us of your conclusions on the foregoing questions.”

In the first of the two opinions of this department to which you make reference, my predecessor expressed the following conclusion as shown by the first paragraph of the headnotes:

“The commissioners of a county are not authorized to construct bridges by what is known as force account. However, in the repair of bridges the county commissioners may thus proceed.”

In the second of said opinions my predecessor held as follows:

“The county surveyor is given no authority under section 7198 G. C. (107 O. L. 115) to construct bridges by force account, irrespective of what the cost of the construction might be.”

As to this second opinion, no more need be said here than that it refers to, briefly re-states, and follows the earlier opinion. Hence, an examination of the earlier opinion will suffice to determine whether there is justification for the doubt which you intimate as to the soundness of the two opinions.

Your several questions in terms go only to the subject of the purchase of materials, and not to that of whether the entire project may be carried out through force account, i. e., the employment of labor and purchase of tools and equipment in addition to the purchase of materials. However, what is said hereinafter will serve to show that these two subjects are so closely intertwined, when considered from the standpoint of the statutes which you have in mind, that it is practicable only to treat your questions in their broader import, namely, may the county commissioners proceed with the construction or re-construction of a bridge by force account, or are they confined to the competitive bidding plan specified in sections 2343 to 2361, G. C.?

The process of reasoning set out in the opinion of December 13, 1917, being the earlier of the two opinions referred to by you, may be said to consist of three parts:

First: Section 6948-1 as it then read, and as it still reads, was quoted as follows:

“If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such improvement by contractor, proceed to construct the same by force account.”

It was then stated that the word “improvement” as used in said section could not be taken as including “bridges” but must be understood as referring only to roads.

Second: Quotation was then made of section 7198 G. C. which then read, and which still reads, as follows:

“The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account.”

The view taken by my predecessor of this section was that in and of itself it does not confer power either upon the county commissioners or county surveyor to do anything by force account, but that

“* * * it does confer authority upon the county surveyor, when authorized by the county commissioners, to employ laborers, lease implements and purchase material for the construction, etc., of roads, bridges and culverts by force account. This makes it necessary for us to look elsewhere for the power and authority to construct by force account, and when we do this we find no other provision permitting of the construction by force account than section 6948-1 supra, and this goes no further than to permit the construction of roads by force account.”

This expression was followed by a reference to sections 2352 G. C. et seq. (part of the series 2343 to 2361) relating particularly to the construction of bridges and providing in detail for competitive bids after advertisement except in case the estimated cost does not exceed two hundred dollars, in which latter case the contract might be let without publication or notice (provision being made for a special form of advertising for structures estimated to cost less than one thousand dollars). My predecessor noted as to these sections that they were not repealed when sections 6948-1 and 7198 were being enacted and stated as to said sections 2352 et seq. that they

“include all bridges, irrespective of the cost of constructing the same, and these sections are clearly against the idea that the county commissioners may proceed by force account to construct bridges, regardless of the cost of the same.”

Third: Reference was next made to an opinion of Attorney-General Turner found in Vol. I, Opinions 1916, page 882, and the statement made that it had been held in said opinion that under section 7214 and 7198 G. C.,

“county commissioners might proceed with the maintenance and repair of highways under force account, and that they would not be

compelled to advertise for bids in the purchase of material or the hiring of laborers and teams."

Commenting upon this holding, my predecessor in the opinion of December 13, 1917, said:

"Inasmuch as section 7214 G. C. includes bridges as well as roads, the same principle would apply to the repairing of bridges as applies to the repairing of roads, and I am of the opinion that Mr. Turner's reasoning is correct, and that the county commissioners might repair bridges by what is known as force account. This would apply to all cases of repair, regardless of the cost of the same. It must be kept in mind that sections 2352, 2353 and 2354 G. C. relate merely to the construction of bridges."

Taking up in their order the three points made by my predecessor:

First: For present purposes it may be admitted, though the point is not here decided, that my predecessor's view was correct.

Second: It is believed that the construction given section 7198 was erroneous, and that the erroneous view was due to failure to take into account and give proper effect to the history and context of said section.

The original form of said section 7198 appeared in the so-called Cass highway law, 106 O. L. 574. In that act there was an entire chapter entitled "County Highway Superintendent" designated as chapter 7 and embracing sections 7181 to 7213. Previous to the passage of the Cass act there was no such officer as a county highway superintendent; and while it is true that under the terms of the Cass law the county surveyor "shall be the county highway superintendent", yet it is also true that definite provision had already been made in the statutes for a county surveyor and definite duties prescribed for him, and that the chapter in question in the Cass law really made a dual officer of the county surveyor. The powers and duties conferred on the highway superintendent by the Cass law were comprehensive in character, and included his having general charge of the

"construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county." (See 7184 as it appeared in the Cass law).

Similarly, see section 7192 of the Cass law which read as follows:

"The county highway superintendent shall keep the highways of the county at all times in good and suitable conditions for public travel. He shall generally supervise the construction, improvement, maintenance and repair of the bridges and culverts on the highways of the county, the cost of which shall be borne by the county, unless otherwise provided by law."

Accompanying such provisions as these, we find the earlier form of section 7198 already referred to, which section as appearing in the Cass law read:

"The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

Then followed section 7199 which read in part:

"If, in the opinion of the county commissioners it is advisable to provide for the improvement, maintenance and repair of any portion of the highways of the county by contract, such contract, if the cost and expense of the improvement, maintenance or repair of any section of highways, or of any bridge or culvert, exceeds two hundred dollars, shall be let by competitive bidding. All such contracts shall be awarded by the county commissioners or township trustees on estimates, plans and specifications to be furnished by the county highway superintendent, to the lowest and best bidder. If the estimated cost of such work is less than five hundred dollars, and more than two hundred dollars, the same may be let at competitive bidding after advertising the same by posters in at least three public places in the county, for ten days prior to the letting, and if the estimated cost of such work is more than five hundred dollars the same shall be let by competitive bidding, after advertisement once not later than two weeks prior to the letting of contracts, in some newspaper published and of general circulation within the county, if there be any such newspaper published in said county, but if there be no such newspapers published in said county then in a newspaper having general circulation in said county. All bids for such work shall be filed in the office of the township clerk or county auditor. * * * (Here follow provisions for giving of bond by contractor, etc.)

Section 7200 of the Cass law provided in part that:

"The county commissioners may purchase such machinery and other equipment for construction, improvement, maintenance or repair of the highways, bridges, and culverts under their jurisdiction as they may deem necessary, * * *"

Then came section 7201, reading:

"The county highway superintendent may lease or hire machinery, tools and equipment for highway, culvert or bridge repair, at a price to be approved by the county commissioners or the township trustees. The expense thereof shall be paid by the county commissioners or township trustees upon the written order of the county highway superintendent, out of money available for the construction, improvement, maintenance or repair of highways."

It is proper also to refer to section 7203 of the Cass act reading as follows:

"The county highway superintendent may, with the approval of the county commissioners or township trustees, purchase from any public institution, any road material, machinery, tools or equipment, quarried, mined, prepared or manufactured by said institution, pro-

vided the same conform to the standard specifications therefor, for highways, bridge or culvert work in said county."

In the so-called White-Mulcahy act, 107 O. L. 69, the general assembly made quite an extensive revision of the Cass act, and in so doing repealed sections 7199 and 7201, but allowed sections 7200 and 7203 to remain practically as they were in the Cass act, although amending these two latter sections in some particulars. Section 7198 was amended into its form as it stood at the time of the opinion of December 13, 1917, now under discussion. One purpose of this amendment would seem to have been to put into one section the powers that had been conferred on the county highway superintendent by two sections of the Cass act, namely, 7198 and 7201.

It will be kept in mind that the several sections which have just been referred to were all in the chapter of the Cass act entitled "County Highway Superintendent." It is proper here to make mention of another section referred to in your letter, namely, section 7214, which originally appeared in the Cass act under a chapter entitled "Condemnation of Materials for Road Building", and which remains in the same form as enacted in the Cass act, reading:

"The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. If the county commissioners or township trustees, and the owner of such material or land, cannot agree on the price therefor, the county commissioners or township trustees may apply to the probate court or common pleas court of the county in which the same is located, and on receipt of such application, the court shall proceed to assess the value of the material or right to be appropriated in the manner hereinafter provided."

It is important to note that in addition to the chapter of the Cass act entitled "County Highway Superintendent", and in addition to said section 7214, there was a separate chapter numbered chapter 6 and designated "Road Construction and Improvement by County Commissioners." The sections embraced in said chapter were sections 6906 to 6948. This series of sections set forth a complete road improvement proceeding which might have its inception either in the filing of a petition by property owners or if no petition were filed, then in the passage by unanimous vote of a resolution by the county commissioners. Further steps included an order for surveys, estimates, specifications, etc.; notice of intent to make the improvement; hearing of claims for damages; determination of method of providing for payment of cost (which might be distributed among county, township and property owners), assessment of abutting property, issuing of bonds, and the letting of contracts upon competitive bids after two weeks advertisement, etc.

It is thus clear that the Cass act contained two separate and distinct methods of road improvement, whether such improvement be considered as construction on the one hand or maintenance and repair on the other, namely, through a formal "proceeding" under sections 6906 to 6948 G. C., in which case there was no alternative in the commissioners, except to do the

work by competitive bids; and second, by what is commonly known as force account, as authorized by sections 7181 to 7213 G. C. under the head of "County Highway Superintendent." Such seems to have been the view of Attorney-General Turner in certain opinions hereinafter pointed out in connection with the third point made in said opinion of December 13, 1917. It may be mentioned here that this department has held on repeated occasions that purchases by the county commissioners under authority of sections 7200 and 7214 G. C. need not be through the medium of competitive bids. See opinion of the date February 25, 1919, found in Opinions of Attorney-General for 1919, Vol. I, page 110, wherein previous opinions are reviewed and followed.

It is also clear that section 7198 as appearing in the Cass act and as it now exists confers power on the county surveyor, when authorized by county commissioners, to proceed by force account in the construction and reconstruction, not only of roads, but also of bridges and culverts. This conclusion is in no wise weakened by the fact that the White-Mulcahy act repealed section 7199 of the Cass act; for in reality said section 7199 was an unnecessary section so far as it purported to confer any power to proceed by force account, that power being plainly contained in sections 7198, 7200 and 7214 of the Cass law. In other words, so far as concerns force account, the main value of section 7199 of the Cass law was to show a very clear legislative recognition that the construction, whether of bridges and culverts, on the one hand, or of a road, on the other, by force account, was plainly authorized by other sections of the Cass act, such as said section 7198, 7200 and 7214; because said section 7199 purported only to define procedure when the commissioners exercised the option given by said section to proceed by *contract* instead of by force account, and if they did proceed by contract the procedure concerning the letting of the contract was practically the same under section 7199 as that set out in sections 6945 to 6948 inclusive.

It is therefore plain that the opinion of December 13, 1917, proceeded on a wrong theory in holding that section 6948-1 as originally enacted in the White-Mulcahy act was the only section which permitted force account in the construction of roads. The insertion of said section must be taken as having reference only to the road improvement "proceeding" set out in the Cass law in sections 6906 to 6948. The legislature itself and not the Attorney-General gave the number to section 6948-1; so that its very numerical order in the General Code is strong evidence of its reference only to sections 6906 et seq. and not to such sections as 7198, 7200 and 7214.

Referring again to present section 7198 in connection with present sections 7200 and 7214, it would seem utterly illogical to hold that under section 7200 county commissioners might purchase machinery, tools and equipment "for the construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction", and under section 7214 might "contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county" (and do this without competitive bidding), and then be without the ready means of employing the teams and labor necessary to make use of the equipment and materials so purchased. Assuredly then section 7198 must be treated as constituting the logical complement of sections 7200 and 7214 with this result: That the county commissioners may themselves purchase the necessary machinery, tools, equipment and materials, and, so to speak, turn them over to the surveyor with authority to use them either in the construction or repair of roads or bridges; or they may give the surveyor even broader authority, that is to say, they may authorize him not

only to employ laborers and teams, but also to lease implements and tools and purchase material for the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts.

The views above expressed are not to be taken as involving the further view that in conferring power to proceed in the construction of bridges by force account the general assembly has impliedly repealed sections 2343 to 2361 in so far as they relate to bridge construction. Those sections can be given full effect upon the theory that the commissioners have two methods of procedure open to them, namely, by conducting an entire proceeding under sections 2343 to 2361, in which event they must proceed by competitive bids after advertisement, except in the limited cases noted in said sections; or they may resort to the force account plan provided by section 7198 and kindred sections.

Third: It is true that Attorney-General Turner had made the holding noted by my predecessor. It is likewise true, however, that in the same opinion he had in answering the second question therein considered expressed the view that county commissioners might

“improve, maintain or repair highways by force account, without regard to the cost of the contemplated work,”

in arriving at which view Mr. Turner had made reference to section 7198 and its kindred sections and to one of his earlier opinions. If Mr. Turner's views were properly the basis of the conclusion on my predecessor's part that force account in the repair of bridges had been authorized, they would seem to have been equal authority for the conclusion that the same method might be followed in the construction of bridges, since the statutes which Mr. Turner cited made no distinction between construction and repair.

Moreover, my predecessor's point that section 2352, 2353 and 2354 “relate merely to the construction of bridges” would seem to have been not well founded; for a close examination of those sections, especially in the light of section 2347, indicates that they were intended to relate to repairs, as well as to construction.

You will doubtless have noted that as a result of the views expressed in the present opinion, a question has arisen which you do not ask, namely, may a bridge construction project be carried out partly under section 7198 and related sections, and partly under sections 2343 to 2361; and that this question has perhaps been answered, by implication, in the negative. In order, however, that the matter may not be left to implication alone, the statement is here made that in the opinion of this department the commissioners are not authorized to begin proceedings under one group of sections, and then switch to the other group, as, for instance, they are not to make a purchase of materials under authority of section 7214, for a given improvement, and then from that point onward attempt to proceed under sections 2343 to 2361. Once they take a definite step in expenditure of funds by force account, they have no alternative except to follow that method to the completion of the project. Similarly, if they resort to sections 2343, et seq., they are not at liberty to make partial application of the force account statutes. The views just stated are but a logical outgrowth from the fact that the two groups of sections are so utterly divergent in character that there is no reconciling and giving effect to them except on one theory, which is, as already suggested, that the legislature has conferred authority on the commissioners to elect as between the two methods of procedure.

The conclusions reached in this opinion are the result of a careful study

of pertinent statutes and have been arrived at only because such statutes are believed to admit of no other construction. As suggested in previous opinions of this department, the rule should be that public authorities should follow the competitive bidding system unless in particular instances it is impracticable or clearly against the public interest to do so.

For your information, a copy is enclosed of an opinion (No. 2412)—being rendered on this date to Hon. Walter B. Moore, prosecuting attorney, Woodsfield, Ohio, which, while it deals with bridge repair rather than bridge construction, may prove of interest to you.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2412.

BRIDGES AND CULVERTS—COUNTY COMMISSIONERS MUST CAUSE COUNTY SURVEYOR TO PREPARE PLANS, ETC., BEFORE PROCEEDING BY FORCE ACCOUNT ON ROAD OR BRIDGE REPAIR WORK—WHAT STATUTES APPLICABLE TO FORCE ACCOUNT WORK—SEE ALSO SUBSEQUENT OPINION NO. 2411, SEPTEMBER 10, 1921.

1. *In case county commissioners desire to do road or bridge repair work by force account, they must, before making purchases for the purpose (sections 7200 and 7214 G. C.) and before authorizing the county surveyor to make purchases and employ labor and teams for the purpose (section 7198 G. C.), cause the county surveyor to prepare plans, specifications and estimates (sections 2792 and 7187 G. C.) This is true without regard to the cost of the work.*

2. *The requirements of sections 5660 and 5661 G. C. are applicable to the purchases of materials, tools, equipment and supplies, and to the employment of teams and labor under authority of sections 7198, 7200 and 7214 G. C.*

COLUMBUS, OHIO, September 10, 1921.

HON. WALTER B. MOORE, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—You have written to this department as follows:

“In the report of examination by the county officers of Monroe county, Ohio, for period ending May 24, 1920, my attention has been called to the following language used in connection with the report on the commissioners’ office:

‘Section 7198 G. C., 107 O. L. 115, provides for certain improvements by “Force Account.” The opinion of the Attorney-General, Vol. III, 1917, page 2332, holds that this does not apply to the construction of new bridges.

If in the repair of any bridges or roads, the commissioners decide to proceed by such method they should so definitely state, that there would be no question as to their intent, and should require the plans, specifications, estimates, etc., just the same as if proceeding to let contract by competitive building, the proper resolution should then be entered upon their journal showing their intent, and the work should then proceed under the direct supervision of the county surveyor. And