

2597.

COUNTY COMMISSIONERS—CONTRACT FOR PUBLIC WORK—CANCELLATION AND RE-AWARDING DISCUSSED.

*SYLLABUS:*

1. *In a proper case a board of county commissioners may cancel and annul a contract theretofore awarded and entered into between said board and a contractor for public work where such cancellation is assented to by such contractor and the rights of the public are not prejudiced thereby.*

2. *Where a contract for public work, entered into between a board of county commissioners and a contractor, is canceled, such board may thereafter award such contract to the lowest bidder for an alternate type of construction incorporated as a part of the original plans and specifications of the improvement, provided that price levels have not so changed as to make it necessary to readvertise in order to protect the public interest, and provided further that such bidder is willing to enter into such contract.*

COLUMBUS, OHIO, September 21, 1928.

HON. F. E. SLABAUGH, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date, requesting my opinion as follows:

“We would like your opinion on the following proposed action of the county commissioners of Licking County, Ohio:

Recently the county commissioners awarded a contract for re-surfacing North Fourth Street, in the City of Newark, Ohio, a part of an inter-county highway, to The Andrews Asphalt Company, stipulating the use of Warrenite-Bitulitalic pavement. This material was bid by The Andrews Company as well as Sheet Asphalt.

The Warrenite-Bitulitalic process is a patented process, and after the award was made to them, but before a contract was entered into, The Andrews Asphalt Company found that they were unable to make satisfactory arrangements with the Warrenite concern for the use of their process. They have requested the county commissioners to rescind the award to them for the use of that material and to award the contract to them on their bid of Sheet Asphalt which was \$1,700 less than the bid on Warrenite-Bitulitalic asphalt and which bid was the lowest bid received for this work on sheet asphalt.

The assertion is made that after the award had been made, the county commissioners are without authority to rescind the award and make a new award on a different bid material.

We would like an early opinion upon this matter and if it is favorable we would ask you further to approve resolutions which it is proposed to have the county commissioners pass in taking this action.”

Accompanying your request is a resolution which the board of county commissioners of Licking County desires to pass canceling the contract entered into with The Andrews Asphalt Paving Company.

I am advised that The Andrews Asphalt Paving Company has executed a contract with the county commissioners and has given a bond for the faithful performance of said contract. It appears that The Andrews Asphalt Paving Company was low bidder upon all the various types of pavement for which bids were received.

The question which you present is whether or not, after a contract has been entered into with the county for the doing of public work and a bond has been executed

for the faithful performance of said work, the county commissioners may by resolution, with the consent of the contractor and the City of Newark, cancel this contract and award the contract for a different type of pavement to the same contractor, who was also low bidder on the type now desired to be contracted for, without a readvertisement for bids.

Inasmuch as the City of Newark is participating in the cost of the improvement in question, I assume that the county and the city are proceeding under the provisions of Sections 6949 and 6950, General Code, which provide as follows:

Section 6949. "The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other proceedings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality."

Section 6950. "If any part of the cost and expense of the proposed improvement is assumed by the municipality, the county commissioners after the approval by them of the surveys, plans, profiles, cross-sections, estimates and specifications for said improvement, shall cause a copy of the surveys, profiles and the proposed proportion of cost and expense to be paid by said municipality to be filed with the council of the municipality. It shall thereupon be the duty of the council of such municipality to examine said surveys, profiles, and the proposed proportion of cost and expense to be paid by said municipality and if after such examination council is satisfied that the public convenience and welfare require that said improvement be made, it shall by resolution so determine, and shall approve said surveys, profiles and the proposed proportion of cost and expense to be paid by said municipality. After the consent of said council has been obtained, an agreement shall be entered into by said council with the county commissioners determining what proportion of the cost and expense of said improvement is to be paid by said municipality, which may include the payment of all or any part of the compensation for land taken and damages to property caused by said improvement as the same shall be allowed by the board of county commissioners or fixed as provided by law. All claims for compensation and damages shall be presented to and heard and determined by the board of county commissioners and all proceedings with reference thereto shall be had by such board in the same manner as though the improvement were located entirely without a municipality. For the purpose of providing by taxation a fund for the payment of the proportion of the cost and expense of said improvement to be paid by the municipality and also the compensation and damages incident thereto, said municipality is authorized to levy taxes upon all the taxable property of such municipality under the same restrictions imposed by law in the case of taxes levied, for the purpose of providing funds for the payment of the municipality's share of the cost of street improvements under the exclusive jurisdiction and control of the council of a municipality. The council of said municipality may assess against

abutting property owners all or any part of the proportion of the cost and expense of said improvement and the compensation and damages to be paid by it. Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municipality, and under the exclusive control of the council."

Section 6950, above quoted, was amended by the 87th General Assembly (112 v. 493), and it is noted from the provisions of said section that the council of the municipality has no voice in determining the kind of material but simply approves surveys, profiles and the proposed apportionment of this cost.

From the statement of facts submitted it would appear that other bidders have no complaint, inasmuch as The Andrews Asphalt Paving Company was the low bidder upon each alternate proposal. And it would seem that in the particular case the taxpayers cannot be injured in any way, since, if the contract is let for a material other than Warrenite-Bitulitalic pavement, the amount involved in said contract will be less by the approximate sum of \$1700.00 than the executed contract. The council of the municipality apparently has approved the surveys, profiles and the proposed proportion of the cost and expense to be paid by said municipality for both types of material and consequently, if a change in the material would be made at this time, the council by its action in approving the surveys, profiles and the proposed proportion of the cost and expense for each of two types of material can have no complaint to offer. In other words, the council of the municipality had notice and knowledge that the county commissioners were contemplating the award of a contract for the improvement of the street in question by the use of either of two types of material. By its action it was left to the board of county commissioners to adopt whichever one of the materials it saw fit.

A board of county commissioners is purely a creature of statute and has only such powers as are expressly given to it by statute and such as are necessarily implied for the purpose of carrying out such express powers. *Elder vs. Smith, Auditor, et al.*, 103 O. S. 369. In this instance, however, the power is expressly conferred upon the county commissioners to advertise for bids and let the contract and that power carries with it necessarily the right to function with respect to such letting in the same manner as other public bodies, boards or commissions. It is a settled rule of law that a public body, having authority to make a contract, also has similar authority to annul a contract, provided no vested rights have intervened. This principle as applied to the power of the council of a municipality is discussed in the case of *Newark vs. Fromholt, et al.*, 102 O. S. 81, where Judge Hough, at page 91, says:

"Now, as before stated, there is no authority conferred by statute upon a director of public service or a board of control, or both, to rescind a contract. Neither is there any specific authority for council so to do. *There is, however, a general fundamental rule of law that between principals the power to make a contract carries with it the general power to unmake it. This general principle is sound, and we can conceive no reason why it cannot be applied to municipalities; if properly applied.* A contract for a street improvement, on the part of the city, must, under the law, be authorized and directed by ordinance of council, and when so directed, and that authorization and direction has been taken advantage of by the making of a contract, the city officials are concluded from making another contract upon the same subject-matter *without affirmative and proper authorization and direction therefor.*" (Italics the writer's.)

I believe this principle applicable to the action of the county commissioners and such commissioners have authority to cancel a contract where no vested rights have

intervened. In this instance the award of the contract in the first instance vested certain rights in the contractor, but these rights are, as I understand it, expressly waived in writing by the contractor. Consequently no vested rights are involved and the county commissioners have the right to cancel the contract.

Cancellation of the contract places the county in the situation which existed prior to the entering into of the contract, that is, advertisement has been made and bids received for doing the work on alternate plans. The discretion, clearly, originally existed to adopt either one of the two types of pavement in the first instance. I do not believe that the exercise of that discretion in the first instance by the award of the contract for the one type exhausted the powers of the commissioners. They have the inherent right to reconsider the matter so long as vested rights have not intervened. In this instance they desire to reconsider and adopt the alternate type and to award the contract to the lowest bidder for that type. I believe that this may be done unless, under the facts here existing, it is necessary to readvertise.

On this question there exists some measure of doubt but the circumstances of this case are such as to impel me to the conclusion that no readvertisement is necessary. Pertinent to the present conclusion is the following quotation from 44 Corpus Juris, 106:

“Where the lowest bidder to whom the contract is awarded fails to comply with the conditions thereof, the contract may be awarded to the next lowest bidder without a readvertisement, unless there has been collusion between the lowest and next to the lowest bidders, and a failure to comply with the statutory provisions designed to secure publicity and prevent fraud, or unless a readvertisement is deemed necessary to protect the public interest.”

Similarly, I believe it unnecessary to readvertise where, after the contract has been let, the commissioners have properly determined to adopt the alternate type of paving, and no vested rights have intervened, unless such an appreciable length of time has intervened between the original advertisement and the subsequent award on the alternate type as to make it clearly necessary to readvertise in order to protect public interest. That is to say, unless there has been a substantial change in price levels, which would clearly indicate the probability of securing better prices upon a readvertisement, I feel that reconsideration may be had and the contract awarded to the lowest bidder on the alternate type, provided that he consents to such award. This rule is stated in 44 Corpus Juris, p. 113, as follows:

“A bid which has been rejected may afterward, upon reconsideration, be accepted, provided no rights have vested meanwhile, and the bidder consents.”

Sustaining this conclusion is the case of *McClain vs. McKisson*, 15 O. C. C. 517, of which one of the branches of the head notes is the following:

“Council, after having rejected all bids for a public contract, may, at a subsequent meeting, without readvertising for bids, reconsider its first action, and award the contract to one of the original bidders.”

As I understand the facts, The Andrews Asphalt Paving Company in this instance is willing to enter into a contract for the alternate type of material and it was the lowest bidder for this kind of work. Consequently, unless there has been a substantial change in price levels in the intervening time, I believe the commissioners have the authority to enter into a contract with such low bidder in the event that such bidder is still willing so to do. I express no opinion as to the right of the county commissioners to compel the execution of a contract by such bidder at this time.

Summarizing, and by way of specific answer to your inquiry, I am of the opinion that the county commissioners, under the facts existing in this case, have the authority to cancel the contract awarded and entered into and to proceed to award the contract to the lowest bidder on the alternate type of pavement. The resolution which you have asked me to approve is in satisfactory form, but I suggest that it be recited therein that the public interest will be served by the cancellation of the contract in question.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2598.

TRUSTEE OF WILBERFORCE UNIVERSITY—MUST BE ELECTOR OF OHIO.

*SYLLABUS:*

*Members of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University must be electors of the State of Ohio.*

COLUMBUS, OHIO, September 21, 1928.

MESSRS, JOSEPH L. JOHNSON, *President*, and J. OTIS HAITHCOX, *Secretary*, Board of Trustees, The Combined Normal and Industrial Department of Wilberforce University, 1375 East Long Street, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge the receipt of your request for my opinion reading as follows:

“At a meeting of the Board of Trustees of Wilberforce University, held June 20, 1928, Bishop W. H. Heard was elected to be a member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce. Bishop Heard has charge of the Third Episcopal District of the A. M. E. Church which includes the State of Ohio. His residence, however, is in Philadelphia, Pa. The eligibility of Bishop Heard to serve as a member of the C. N. & I. Board has been questioned. The Board will appreciate it very much if your office will look into the matter and give us an opinion. It is important that this matter be given attention at a very early date as at present the Board is without full membership.”

As I understand your inquiry, Bishop Heard resides in Philadelphia, Pa., and is not an elector of the State of Ohio.

The question presented by your inquiry is whether or not a person who is not an elector of this state may be a member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University.

The above mentioned department was created by an Act of the Legislature found in 84 O. L. 127 and carried into the General Code as Sections 7975 to 7986-1, both inclusive.

Section 7975 directs that such a department be established and maintained at Wilberforce University. Section 7976 provides for the creation of a Board of Trustees to be known as “The Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University,” and reads as follows: