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COUNTY HOSPITAL—ERECTION—BONDS ISSUED AND SOLD—HOSPITAL TRUSTEES AUTHORIZED TO ENGAGE ARCHITECT TO PREPARE PLANS AND TO PAY FEES OUT OF FUND CREATED BY BOND SALE—PART OF COST, HOSPITAL, TO BE PAID FROM ALLOTMENT, FEDERAL GOVERNMENT—COUNTY AUDITOR NOT JUSTIFIED IN WITHHOLDING PAYMENT TO ARCHITECT BECAUSE FEDERAL FUNDS HAVE NOT BEEN RECEIVED—SECTION 3131 G. C.

## SYLLABUS:

Where, pursuant to Section 3131, General Code, bonds have been issued and sold for the erection of a county hospital, the duly appointed hospital trustees are authorized to engage an architect for the preparation of plans for such hospital and to pay his fees out of the fund created by such bond sale, regardless of the fact that part of the cost of such hospital is to be paid from an allotment from the Federal Government; and the county auditor is not justified in withholding such payment because such federal funds have not yet been received.

Columbus, Ohio, July 2, 1948

Hon. Marcus Shoup, Prosecuting Attorney  
Greene County, Xenia, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

“At the November 1947 general election, the electors of Greene County, Ohio, approved a bond issue in the amount of \$950,000.00 for the purpose of constructing, furnishing and equipping a county hospital, including the purchase of a site, the proceedings and legislation being taken under and by virtue of Section 3127 et seq. of the General Code of Ohio and under which bond proceedings the sum of \$750,000.00 was designated for the construction of said hospital building, \$195,000.00 for furnishings and equipment and \$5,000.00 for the purchase of a site, the latter having recently been conveyed gratuitously by the former owners of the real estate.

“The total authorized issue of said bonds have been sold and the \$950,000.00 derived therefrom is now held by the Treasurer of Greene County, Ohio.

"Some time ago the County Hospital Trustees made application for additional supplemental finances from the Federal authorities, to aid in the construction and equipment costs of the hospital and the amount of \$404,666.00 has been approved by the Ohio State Department of Health and the United States Public Health Service.

"The Hospital Trustees, on January 19th, 1948, executed a standard contract with an architect for his complete services in designing, obtaining bids, supervision of construction and submission of equipment for bidding.

"Under the regulations concerning the Federal funds as approved, the Hospital Trustees are advised that such Federal share of the architect's fees will only be advanced when the building is twenty-five per cent completed and in like manner, the residue of said Federal share funds will be advanced periodically as the building goes forward toward completion. The architect's contract with the Hospital Trustees is based on the total amount of the voted \$950,000.00 issue as well as on a part of the supplemental Federal grant funds and the said architect has, in conformity with his contract, upon completion of the preliminary services as recited in said contract, submitted to the Hospital Trustees a statement calling for the percentage amount presently due and accordingly, which percentage is computed on the combined proceeds of the voted bond issue as well as on (part) of the approved supplemental Federal Grant Funds.

"No actual construction of the building has been commenced and it will probably be some time before twenty-five per cent of the structure is actually completed, which requirement, as above mentioned, is a prerequisite before the first Federal Grant advancement.

"The County Auditor does not believe he can legally spend or advance the Federal share of the architect's fees from the voted bond issue funds on hand and accordingly that such Federal funds should first be paid into the county treasury or the County Hospital fund in order that the proper warrant can issue.

"The Board of Hospital Trustees have submitted these facts for determination and desire your ruling on this question, viz:

'May the County Auditor legally and properly cause to be issued his warrant for payment to an architect holding an executed contract for plans and supervision of construction, etc., for a County Hospital, whereby the architect's percent of payment is based on a contract which includes the total funds derived from a voted bond issue as well as supplemental federal funds, the latter funds to be received or credited periodically after certain work on the hospital struc-

ture has been completed, and where the facts disclose that at the time of presentation of said architect's statement, no part of the federal share of said architect's fees have been advanced or paid into the treasury or deposited to the credit of the County Hospital Fund?

"It is reported that there are several similar County Hospital programs now being undertaken in the State of Ohio and wherein, no doubt, this same issue will arise. Your opinion on this matter is requested and an early consideration will be sincerely appreciated."

You have also submitted for my inspection a copy of the contract between the hospital trustees and the architect. I note that that contract provides that the architect is to perform all the services usually incident to the planning, supervision and construction of a public building and that his compensation is to be a fee of 6% of the total cost of the work, exclusive of the site and of furnishings purchased independently by the trustees. The contract provides that 10% of the estimated total basic fee is to be paid by the trustees to the architect upon completion of the preliminary work which includes the preparation of estimate of cost and the preparation of preliminary drawings. I understand from your letter that it is this first installment which is the subject of your inquiry.

It appears to me that there can be no question as to the right of the hospital trustees to enter into the contract which they have made with the architect. These trustees are appointed pursuant to Section 3127 et seq., General Code. Section 3131, General Code, provides that when a tax levy or bond issue for the purpose of constructing a county hospital has been approved by the electors, as provided by law, the governor shall appoint a board of county hospital trustees. Section 3132, General Code, provides in part as follows:

"Such board of trustees shall have full charge and control of the selection and purchase of a site for such hospital (taking title thereto in the name of the county), the selection of plans and specifications, the determination and erection of all necessary buildings thereon, and of the selection and installation of all necessary and proper furniture, fixtures and equipment therefor.

"Such hospital trustees and their successors herein provided for may receive and hold in trust for the use of the hospital any grant or devise of land or any gift or bequest of money or other personal property that may be given for the erection or support of the hospital. \* \* \*"

Section 3134, General Code, provides:

“All funds arising from a special tax levy or bond issue for the purchase, appropriation or construction of such county hospital, *and contributions thereto*, shall be placed in the county treasury to the credit of a fund to be known as the ‘County Hospital Fund.’ And such fund shall be paid out on the order of said board of county hospital trustees, certified by the chairman and secretary thereof.” (Emphasis added.)

Section 3135, General Code, provides:

“Before making a contract for the expenditure of money on any structure or improvement in excess of one thousand dollars, the hospital trustees shall advertise according to law for bids, and cause plans, specifications and detailed drawings to be distributed among the bidders.”

It is obvious that plans and specifications for a building of this character cannot be prepared without the employment of an architect, and I consider the provisions above noted as abundant authority for the employment by the hospital trustees of the architect in question and for the agreement with him to which reference has been made. Accordingly, it seems clear that the board of hospital trustees is under obligation to pay the architect the portion of his fees for which he has submitted a statement, provided he has performed the service which under the terms of the contract entitle him to such payment, and furthermore, that it is clearly the duty of the auditor to pay such installment of compensation to the architect out of the “County Hospital Fund” upon the proper order of the board of county hospital trustees. There is nothing in the contract which suggests that any part of the compensation of the architect is to be payable out of a federal subsidy and nothing in the statute pursuant to which the contract was made which suggests that any part of the obligation arising out of any particular contract must be met out of any subsidy or other gift.

The only possible question that could arise is whether the grant which you state has been made by the Federal Government or the law of Ohio relative to the acceptance and use of such grant contain any limitation as to its expenditure or impose any restrictions on the board of hospital trustees in making the necessary contracts for the planning and construction of the hospital. Congress, by the enactment of Public Law No. 725, approved August 1, 1946, made somewhat elaborate provision for assist-

ance to the various states in carrying out programs for the construction of hospitals, and for that purpose appropriated \$95,000,000 for each of the four years ensuing, to be allocated to the several states. That act contemplated that each state desiring to avail itself of this subsidy, should set up some authority within the state which should have the right to make and administer a general plan to be approved by the Surgeon-General of the United States, for the expenditure of the amount that might be allowed for any particular project. The Federal Government's contribution was to be  $33\frac{1}{3}\%$  of the total cost of any given hospital project. I do not deem it necessary to analyze or set out at length, the provisions of this act. It is sufficient to say that there is nothing in it which allocates any particular portion or percentage of the subsidy to the payment of architect's fees or any other item.

The provisions of the act aforesaid were accepted by the General Assembly of Ohio, by the enactment of House Bill No. 490 of the 97th General Assembly. By this act the department of health of the state was constituted the sole agency of the state for the purpose of developing and administering a state plan for the construction of public and other non-profit hospitals, and it was authorized to accept on behalf of the state any grants or contributions and to provide such methods of administration and take such other action as might be necessary to comply with the requirements of the federal act and the regulations thereunder.

I am informed by the State Director of Public Health that there is nothing in the plan which he has prepared and which the Surgeon-General of the United States has approved, which in any wise limits the expenditure of federal contributions to any particular items, but that the amounts received from the Federal Government and allocated to projects such as the one in question, constitute merely a subsidy which is added to the amount provided by the county and which the hospital trustees are to expend in accordance with their general powers, in the construction and equipment of a hospital. No part of these contributed funds is set aside for the payment of architect's fees or any portion thereof, or to any particular item entering into the completion of the hospital.

Under these circumstances, I can see no possible ground upon which an accruing obligation to the architect should not be paid out of the funds which are already in the hands of the trustees of the hospital or for giving any consideration to the fact that the first installment of the federal grant

may not immediately be due and payable. The obligation of the contractor is a lawful obligation predicated on the power of the trustees to enter into the contract with him, and the right of the trustees to proceed with all matters relating to the planning and construction of the hospital is in no wise dependent upon the fact that they will in due time receive a grant from the Federal Government to cover a certain portion of the total cost.

Accordingly, in specific answer to your question it is my opinion that where, pursuant to Section 3131, General Code, bonds have been issued and sold for the erection of a county hospital, the duly appointed hospital trustees are authorized to engage an architect for the preparation of plans for such hospital and to pay his fees out of the fund created by such bond sale, regardless of the fact that part of the cost of such hospital is to be paid from an allotment from the Federal Government; and the county auditor is not justified in withholding such payment because such federal funds have not yet been received.

Respectfully,

HUGH S. JENKINS,

Attorney General.