

1047

1. HIGHWAYS, CONTRACT—IF DIRECTOR OF HIGHWAYS RECEIVES AND USES MATERIALS WHICH, WHEN TESTED, DO NOT MEET CONTRACT SPECIFICATIONS, STATE NOT OBLIGATED TO PAY FULL CONTRACT PRICE.
2. NO POWER VESTED IN DIRECTOR TO FIX PRICE TO BE PAID FOR MATERIALS FURNISHED DEPARTMENT, EXCEPT BY PROPER ACCEPTANCE OF BID—SECTIONS 1178-26, 1178-27 G. C.
3. WHERE NO FRAUD OR BREACH OF CONTRACT INVOLVED AND MATERIALS FURNISHED STATE FOR WHICH NO VALUE IS FIXED BY LAW OR CONTRACT, AUDITOR OF STATE AUTHORIZED TO ISSUE WARRANT IN PAYMENT OF SUCH CLAIM—REQUIREMENTS, SATISFACTORY VOUCHER, VERIFIED BY AFFIDAVIT SHOWING CLAIM JUSTIFIED, NO SETOFFS AND AMOUNT NOT MORE THAN ACTUAL VALUE OF MATERIALS FURNISHED.

SYLLABUS:

1. In the event the director of highways receives and uses materials which, upon being tested, are found not to meet the specifications contained in the contract for their purchase, the state of Ohio is not obligated to pay the full contract price for them.
2. The director of highways has no power to fix the price to be paid for materials furnished the department of highways except by the proper acceptance of a bid, in accordance with the provisions of Sections 1178-26 and 1178-27, General Code.
3. When no element of fraud or intentional breach of contract is involved and materials are furnished the state of Ohio for which no value is fixed by law or contract, the auditor of state, upon the presentation to him of a satisfactory voucher, which is verified by an affidavit showing that the claim is justly due, any payments which have been made thereon, that there are no set-offs thereto and that the amount claimed is not more than the actual value of the materials furnished, is authorized to issue a warrant in payment of such claim.

Columbus, Ohio, June 27, 1946

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads:

"In order that I may be fully informed of my legal duties in the payment of vouchers submitted by the Highway Director, payable from state appropriations, I am requesting your opinion as to the legality of actions taken by the State Highway director in reference to certain contracts.

In several cases the Highway Director, subsequent to the receipt of bids for various types of material, and also in the cases where competitive bidding was not required, entered into contracts for obtaining the requested material at agreed prices.

However, on laboratory tests made by the Highway Department, it was found that the material did not meet the requirements of the specifications outlined in the contracts.

Thereupon, although the material was not returned to the vendor, but as a matter of fact was retained and used by the Highway Department, the said Department declined to pay the vendor the agreed contract price, but, in lieu thereof, submitted to this office vouchers payable in amounts less than the agreed prices.

In view of the foregoing, your opinion is requested on the following:

1. In the event the materials do not meet the specifications, does the Highway Director, or the Auditor of State, have the right to pay for the materials, or even to accept the same?

2. Does the Highway Director have the legal right to arbitrarily reduce or pay the vendor a lesser amount than the original contract price for material accepted and used by the Highway Department, on the failure of the material to meet the specifications called for in the contract?

3. In the event the Highway Department accepts and uses the faulty materials, is the Highway Director and the Auditor of State obligated to pay the full contract price?"

In addition to your letter I have received a letter from the Department of Highways, which states in part as follows:

" * * * Were it possible to adopt a rule that material which meets the specifications would be accepted and material which did not meet the specifications would be rejected and continue to remain the property of the vendor there would be no difficulty. However, due to the exigencies associated with our operations and the length of time required to place a complete test report in the hands of the individuals throughout the state who are receiving materials it is often necessary to proceed with the use of the material and incorporate it in the finished product.

It might be contended that payment should be made on the basis of a preliminary sample, taken prior to delivery of such material. In some cases this would be impossible and, as a general proposition, it would be inexpedient in that the preliminary sample might not be representative of the material which was actually delivered. In the case of larger contracts, a number of samples should be taken from time to time during the progress of the work or the completion of the order. Should a sample of the material fail to meet the requirements the department has assumed that it has three options—

1. To reject the material if it has not been incorporated;
2. to refuse to make any payment, thus obliging the vendor to file a sundry claim;
3. to make such deduction from the estimate or invoice as in its judgment represents the decrease in life expectancy (in which case the vendor still has recourse to the Sundry Claims Board)."

Under the facts recited in your letter and in the letter from the department of highways, no question is raised concerning the legality of the original contract for the purpose of the materials in question and I therefore assume it was entered into in good faith and in accordance with the statutory requirements and that no element of fraud or intentional breach of contract is involved.

The authority of the director of highways to contract for the construction, reconstruction and maintenance of highways and to purchase the material necessary therefor is found in Sections 1178-2, 1178-26 and 1178-27 of the General Code, which provide, in so far as is pertinent hereto, as follows:

Section 1178-2:

“The director shall have general supervision of all roads comprising the state highway system. He shall have power and is hereby authorized to alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair and preserve any road or highway on the state highway system * * *.

* * * The director in the maintenance or repair of state highways, shall not be limited to the use of the materials with which such highways, including the bridges and culverts thereon, were originally constructed but may use any material which he deems proper or suitable. * * *”

Section 1178-26:

All purchases of machinery, materials, supplies or other articles which the director may be authorized to make, shall be made in the manner hereinafter provided. In all cases except those in which the director may, as hereinafter provided, authorize purchases by division deputy directors, or resident deputy directors, all such purchases shall be made at the office of the department of highways in the city of Columbus. Before making any purchase at said office, the director shall be required to give the following described notice to bidders of his intention to purchase. Where the expenditure is not more than five hundred dollars, the director shall give such notice as he may deem proper, or he may make the purchase without notice. Where the expenditure is more than five hundred dollars, the director shall give notice by posting for not less than ten days a written, typed or printed invitation to bidders on a bulletin board in the office of said department, which bulletin board shall be located in a place in the offices assigned to said department and open to the public during business hours. Producers or distributors of any product or products may notify the director in writ-

ing of the class or classes of articles for the furnishing of which they desire to bid, and also of their post office addresses, in which case copies of all invitations to bidders relating to the purchase of such class or classes of articles shall be mailed to such persons by the director first class mail postage prepaid at least ten days prior to the time fixed for taking bids. The director may also mail copies of all invitations to bidders to news agencies or other agencies or organizations distributing information of this character. Requests for invitations shall not be valid or require action by the director unless renewed, either annually or after such shorter period as the director may prescribe by a general regulation entered on his journal. The invitation to bidders herein provided for shall contain a brief statement of the general character of the article which it is intended to purchase, the approximate quantity desired, and a statement of the time and place where bids will be received. Such invitation may relate to and describe as many different articles as the director may think proper, it being the intent and purpose of this provision to authorize the inclusion in a single invitation of as many different articles as the director may desire to invite bids upon at any given time. Invitations issued during each calendar year shall be given consecutive numbers, and the number assigned to each invitation shall appear on all copies thereof. In all cases where notice is required by the provisions of this section sealed bids shall be taken on forms prescribed and furnished by the director, and modification of bids after the same have been opened shall not be permitted."

Section 1178-27.

"Specifications describing the character of the articles which it is proposed to purchase, and the conditions governing shipment and delivery, shall be kept on file at the department of highways and open to public inspection throughout the time during which it is herein required that an invitation to bidders be posted. The director may require bids to be accompanied by a certified check payable to him in an amount fixed by him and stated in the invitation to bidders. Persons, firms or corporations desiring to bid on more than one invitation shall be relieved from furnishing certified checks with their bids provided they first furnish a bond payable to the State of Ohio, in an amount and with surety approved by the director, and conditioned for the faithful performances of all contracts which may be awarded to them and otherwise conditioned as the director may require. All bids shall be publicly opened and read at the time and place mentioned in the notice. All purchases shall be made by the director from the lowest responsible bidder able to meet the specifications and conditions prescribed by the director, except that in the purchase of machinery or equipment or supplies for which fixed and definite

specifications cannot be prepared, the director shall be authorized to purchase the article or articles meeting the general specifications prescribed and which he finds are most suitable for the uses intended. The provisions of this act shall apply to the exchange of machinery and equipment, and shall also apply where in force account operations the director desires to combine in one order the furnishing, hauling, and placing of material. The director may purchase or authorize the purchase without notice, or upon such notice as he may prescribe, materials which in his judgment may be required for the immediate repair of roads or bridges destroyed or damaged by flood, landslide or other casualty. It shall be unlawful to place separate orders for the purpose of defeating the provisions of this act relating to notice, and contracts of purchase shall not be valid unless made in conformity to the provisions of this section."

Thus it appears that like other public officers, the powers of the director of highways are prescribed by law and the manner in which the director of highways shall exercise his power to contract is specifically and in detail recited in Sections 1178-26 and 1178-27, *supra*.

It is stated in 32 O. Jur., beginning on page 933:

"As a general rule, public officers have only such powers as are expressly delegated them by statute, and such as are necessarily implied from those so delegated. These powers must be exercised *in the mode prescribed by statute*. It is equally well settled that where the statute prescribes the mode by which powers conferred upon a public officer or board shall be exercised, *the mode specified is also a measure of power granted.*"

(Emphasis added.)

Applying this rule to the situation recited in your letter, it appears that the provisions of Sections 1178-26 and 1178-27, General Code, not only prescribe the method by which the director of highways may contract for the purchase of material, but also limit his power. His only power to fix the price which the state will pay for such material is, therefore, by the acceptance of a bid in accordance with the provisions of these sections of the General Code. Under the facts stated in your letter and that of the department of highways, the director thereof does not have the power to fix arbitrarily a price less than the contract price which the state will pay for materials furnished under the contract but which upon being tested are found to fail to meet contract specifications. Such a failure constitutes a breach of contract on the part of the person who

agreed to furnish material meeting the stated specifications, and of course the state does not owe to him the full contract price for such material. However, as I have hereinbefore indicated, since no suggestion of fraud or intentional breach of contract appears in any of the correspondence concerning the request for this opinion, and the material was furnished in apparent good faith, and has been used by the state so that it cannot now be returned to the materialman, a valid claim does exist for the actual value of such material so furnished.

The laws concerning your office make specific provision for the payment of such a claim. Section 244, General Code, reads:

“If a claim is presented for work and labor performed or materials furnished, and no provision has been made by law or contract fixing the value thereof, the auditor of state shall require the production of satisfactory vouchers, and have them verified by affidavit, showing that the claim is justly due, the payments thereon, if any, that there are no set-offs thereto, and that the amount claimed is not more than the actual value of the labor performed or materials furnished.”

Under the facts stated, the contract price for the material so furnished has failed and there no longer exists any contract agreement as to the value of the materials furnished, nor does the director of highways have any power under the law to bind the state by a reduction in the price to be paid for materials so furnished. Therefore, no provision has been made either by law or by contract fixing the value of the material actually furnished. The only recourse for the person furnishing materials in the manner which you describe is either to present his claim to the board of sundry claims or to satisfy the director of highways of the actual value of the materials so furnished so that he will present to you a satisfactory voucher for the amount so claimed which is verified by the affidavit of the claimant showing (1) that the claim is justly due, (2) any payments which may have been made thereon, (3) that there are no set-offs thereto, and (4) that the amount claimed is not more than the actual value of the materials furnished.

In specific answer to your questions, it is therefore my opinion:

1. In the event the director of highways receives and uses materials which, upon being tested, are found not to meet the specifications

contained in the contract for their purchase, the state of Ohio is not obligated to pay the full contract price for them.

2. The director of highways has no power to fix the price to be paid for materials furnished the department of highways except by the proper acceptance of a bid, in accordance with the provisions of Sections 1178-26 and 1178-27, General Code.

3. When no element of fraud or intentional breach of contract is involved and materials are furnished the state of Ohio for which no value is fixed by law or contract, the auditor of state, upon the presentation to him of a satisfactory voucher, which is verified by an affidavit showing that the claim is justly due, any payments which have been made thereon, that there are no set-offs thereto and that the amount claimed is not more than the actual value of the materials furnished, is authorized to issue a warrant in payment of such claim.

Respectfully,

HUGH S. JENKINS
Attorney General