and 2447-1, supra. It has been generally held that where the authority is extended by statute to public officers or public boards to sell public property the terms of the authorization must be strictly complied with else the purchaser does not acquire a good title. *Carstarphen* vs. *Plymouth,* 180 N. C., 103; *Southport* vs. *Stanly,* 125 N. C., 464; *City of Albany* vs. *Goodwin,* 203 App. Div., 530; *Leventhal* vs. *Gillmore,* 206 N. Y. S., 120.

Section 7624-1, of the General Code, to which you refer is a special statute authorizing a municipal corporation to transfer and convey by deed any real property owned by it and not needed for municipal purposes, to the board of education of such municipality, to be used by said board for school purposes, upon such terms and conditions as are agreed upon between the municipal corporation and the board of education. It is not necessary under this statute to advertise for bids. It is a special statute however, applying only to municipal corporations and then only to sales made by the municipal corporation to the board of education of the school district of which the municipal corporation is a part. It can not be held to apply to a board of county commissiners, nor is there any corresponding statute authorizing boards of county commissioners to transfer and convey by deed or to make a sale of real estate to a board of education without advertising for bids and otherwise complying with the terms of Sections 2447 and 2447-1, supra.

I am therefore of the opinion that the board of county commissioners of Licking County is not empowered to sell the land referred to in your inquiry to the board of education of the Licking Township Rural School District without complying with the terms of Sections 2447 and 2447-1, General Code, with respect to the passage of the proper resolution and the advertising for bids spoken of in the statute.

It will be observed, however, from the terms of said sections 2447 and 2447-1, General Code, that the commissioners might lease this property to the board of education of Licking Township Rural School District as provided by the statutes, without advertising for bids.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4199.

HIGHWAY DEPARTMENT—EXTRA WORK CONTRACT DISCUSSED.

SYLLABUS:

The legality of an extra work contract discussed.

COLUMBUS, OHIO, April 30, 1935.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads in part as follows:

> "We have before us approved for payment, 1934 Voucher 56593, dated April 8th, 1935, issued by the Department of Highways in favor of W. L. Johnson Construction Co. This voucher contains an item of $3,320.10 as

payment on 434,000 station yards overhaul for borrow as shown on the estimate attached to the voucher. The work is represented to have been done under an extra work contract under Contract 6097 on Pike 504A part."

My opinion is requested as to whether the amount in question may legally be paid.

Under the extra work contract in question, Dated December 31, 1934, the contractor agreed to furnish all materials, appliances, tools and labor, and perform all the following extra work, set forth as "900,000 Sta. Yds. overhaul for E-4 borrow (Sta. 174+197)" for which the unit price was fixed at $.009, the total cost being $8100. Said extra work contract also provided that the work was to be done "in accordance with the general specifications which are a part of a contract between the State of Ohio and W. L. Johnson Construction Co. of Hicksville, Ohio, covering Section A (Pt), S. H. 504, in Pike County," and that "the actual sum to be paid, however, will be the aggregate total determined by the work actually performed by the Party of the Second Part, calculated upon the unit prices."

The following explanatory remarks are set forth in said extra work contract:

"Payment for overhaul necessary because contractor is restrained from using borrow adjacent to embankment between Sta. 174+197, due to expert opinion furnished by Joel D. Justin, Consulting Engineer, whose written report is on file with the department. Contractor shall not be required to carry borrow pits below natural drainage."

The following declaration of emergency signed by the division engineer and dated December 26, 1934, is contained in said extra work contract:

"In my judgment I declare that an emergency exists with respect to the performance of this extra work which will not permit of the delay necessary to advertise said extra work, either by posting or by newspaper publication."

I assume that a finding that an emergency existed was duly entered by the Director of Highways upon his journal.

The original contract was made pursuant to the provisions of what is known as the bridge dam law, being sections 412-16 to 412-23, General Code, both inclusive.

Section 412-16, General Code, reads as follows:

"The director of highways in constructing highways, bridges and culverts under authority of sections 1178 to 1230 inclusive, of the General Code; the county commissioners in constructing highways, bridges and culverts under authority of sections 2421, 2432 and sections 6860 to 7574, inclusive, of the General Code; the trustees of any township in constructing highways, bridges and culverts under authority of sections 3295 and 3298-1 to 3298-53a, inclusive, of the General Code; and any municipality of the state, constructing or improving viaducts, bridges and culverts under authority of section 3939 of the General Code, are authorized, either severally or jointly, upon request of the superintendent of public works, as director thereof, and with the approval of the director of highways, to construct and maintain slack water dams in connection with said highway, highway bridge or culvert so as to create reservoirs, ponds, water parks, basins, lakes or other incidental works to conserve the water supply of the state."

Section 412-17, General Code, reads in part as follows:

"* * *

Such dams shall be constructed under and subject to any laws governing the construction of state, county or township highways, bridges or culverts. Any public authority undertaking construction under this act, shall proceed in the same manner as provided for the construction of highway or street improvements."

Section 412-20, General Code, reads in part as follows:

"* * * The director of highways, the commissioner of conservation, any county, township, municipality and public park board or district, are authorized to proceed with the letting of contracts for the construction of such dams or reservoir projects approved by the superintendent of public works, under provisions of any laws regulating the letting of contracts applicable to their respective department, division, district or political subdivisions, and the authority and terms of this act."

It is seen therefore that the Director of Highways in proceeding under this act is governed by the laws relating to the construction of highways, bridges and culverts and by the laws regulating the letting of contracts applicable to his department.

Section 1206, General Code, reads in part as follows:

"Before entering into a contract the director shall advertise for bids for two consecutive weeks in two newspapers of general circulation and of the two dominant political parties published in the county or counties in which the improvement, or some part thereof is located, if there be any such papers published in said counties, but if there be no such papers published in said counties then in two newspapers having general circulation in said counties, and such director shall also have authority to advertise for bids in such other publications as he may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the office of such director and the resident district deputy director of the district in which such improvement, or some part thereof, is located, and the time within which bids therefor will be received.

* * * * * * * * *

The director shall award the contract to the lowest competent and responsible bidder qualified to bid in accordance with the terms of this act.

Such award shall be made by said director within ten days after the date on which the bids are opened and the successful bidder shall enter into a contract and furnish a contract bond as required by law within ten days after he is notified that he has been awarded the contract."

Section 1207, General Code, Provides as follows:

"No contract for any improvement shall be awarded for a greater sum than the estimated cost thereof plus five per cent. thereof. The bids received for an improvement shall be opened at the time and place stated in the notice and the bids shall conform to such other requirements not inconsistent with the

provisions of this act as the director may direct. If no acceptable bid is made, the director may either readvertise the work at the original estimate or amend the estimate, and again proceed to advertise for bids, and award the contract as provided by law. The director may, under the provisions of this act, contract for the construction or improvement of bridges and culverts or of the grading required in connection with an improvement and may defer making contracts for the remainder of said improvement until such grade has become stable and solid."

Section 1207-1, General Code, authorizes contracts upon a unit price basis. Section 1210, General Code, reads as follows:

"In connection with any project the director may by written instructions to the contractor increase the quantities of any item specified to the extent of twenty per cent. of any such item, but in no event shall the cost of the increase of any one item made under this provision exceed two thousand dollars. In making such increase of any item or items in the above manner the director need not enter into an extra work contract covering the same, but such increase shall be regarded as covered by the original contract. The director may likewise make deductions from any item or items specified in any contract.

In connection with any project where the director desires to increase the quantities of any item or items in excess of twenty per cent, of such items, or in excess of two thousand dollars in connection with any one item on account of unforeseen contingencies not included in the original contract, he shall enter into an extra work contract covering such increase and the provisions relating to the advertising for bids shall apply to the letting of such extra work contract. Provided, that, if an emergency exists which will not permit of the delay necessary to advertise said extra work, such contract for extra work may then be let without any advertising whatever. The director shall make a finding of such fact on his journal. When it is deemed necessary by the director to perform extra work in connection with any project and the proposal of the contractor contains no unit price bid covering the item or items involved in such extra work and the cost of such work does not exceed two thousand dollars, the director may enter into a contract covering such extra work without advertising for and receiving bids therefor."

The appropriation act for the biennium beginning January 1, 1933, and ending December 31, 1934, contains this provision:

"If any order and/or invoice drawn against any appropriation or rotary fund herein made is for labor and materials furnished, the aggregate cost of which exceeds $3,000, or for commodities purchased, it shall show that the same was furnished or purchased pursuant to competitive bidding and that the lowest and/or best bidder was awarded the contract, unless the controlling board shall have authorized the furnishing of such labor or material or the purchase of such commodities without competitive bidding.

Whenever in the judgment of the responsible officers of a department, board, commission, or other agency, it seems desirable and in the interests of economy to construct or repair any building or make any other improvement herein provided by force account, plans, specifications, bill of material and estimate of cost, approved by the state architect and engineer shall be filed with

the controlling board and with the auditor of state. If the controlling board consents to the making of such improvement by force account and certified such consent in writing to the auditor of state, and to the director of finance, sections 2314 to 2330 inclusive of the General Code shall be deemed not to apply to that part of such work to be done by force account. The controlling board may upon similar application in cases of emergency or when the interests of the state require, permit the advertisement for bids to be published once, not more than ten days nor less than eight days preceding the day of the opening of the bids. Such consent shall be certified to the auditor of state and the director of finance and the provisions of section 2318 of the General Code shall be deemed not to apply to that portion of the improvement for which such method of advertising is authorized."

Consequently, no contract for the construction of highways, bridges or culverts could be entered into by the Director of Highways without competitive bidding during said biennium unless it is expressly exempted in pursuance of the above provision of the appropriation act, or unless it is such a contract as comes within the exceptions contained in section 1210, General Code. It is well settled that an exception to a provision in a statute must be strictly construed and should only be applied to cases that are clearly within the terms of such exception. *Bruner* vs. *Briggs,* 39 O. S. 478; *Coal Co.* vs. *Donnelly,* 73 O. S. 298; *State, ex rel.,* vs. *Forney,* 108 O. S., 463.

It appears that there was no item specified in the original contract covering any quantity for overhaul for borrow and that there was no unit price bid for such item.

Section 1210, General Code, excepting only the last sentence thereof, deals solely with increases in the quantities of such items as are specified in the original contract. When the increase in the quantity of any item specified in the original contract does not exceed twenty per cent and the cost of such increase does not exceed $2000.00, no extra work contract is required, but if the increase in the quantity of any such item or items exceeds twenty per cent, or if the increase in the quantity in connection with any one item exceeds $2000.00, then an extra work contract upon competitive bidding is required "covering such increase," except that in case of an emergency advertising may be dispensed with. Clearly, this part of the statute applies only to increases of quantities of items specified in the original contract. An extra work contract for an item not specified in the original contract would not constitute a contract for an increase in the quantity of such item, for there was no quantity for such item in the original contract. Only the last sentence of this section applies to items not contained in the original contract. This sentence provides that:

"* * * When it is deemed necessary by the director to perform extra work in connection with any project and the proposal of the contractor contains no unit price bid covering the item or items involved in such extra work and the cost of such work does not exceed two thousand dollars, the director may enter into a contract covering such extra work without advertising for and receiving bids therefor."

There is no provision authorizing the director in case of an emergency to dispense with advertising where there is no unit price bid covering the item or items involved and the cost exceeds $2000.00. The legislature apparently intended to dispense with the requirement as to advertising for bids in case of an emergency where the items involved were specified in the original contract because the unit price for said items had already been determined by competitive bidding. It is well settled that persons dealing

with public agencies must ascertain at their peril whether the preliminary steps leading up to a contract and prescribed by statute have been taken. As stated in *McCloud and Geigle* vs. *Columbus,* 54 O. S. 439, "they are dealing with public agencies whose powers are defined by law, and whose acts are public transactions and they should be charged with knowledge of both.

In *Wellston* vs. *Morgan,* 65 O. S. 219, the following was held:

> "Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation or appropriation have been complied with."

It is likewise well settled that statutes providing the mode and time for advertising for bids are designed to protect the public and are mandatory, the compliance with which is a condition precedent to the power of the public agency involved to enter into a contract. *McCloud and Geigle* vs. *Columbus, supra; Lancaster* vs. *Miller,* 58 O. S. 558; *Ridge Company* vs. *Campbell, et al.,* 60 O. S. 406; *Hommel and Company* vs. *Woodsfield,* 115 O. S. 675; *Hommel and Company* vs. *Woodsfield,* 122 O. S. 148.

It is my opinion therefore that the voucher in question cannot legally be paid.

Furthermore, since the cost in question exceeds $3000.00, advertising could not be dispensed with in this case even though the items involved were specified in the original contract without the consent of the controlling board as required by the appropriation act referred to, in view of the case of *State, ex rel.,* vs. *Connar,* 123 O. S. 310, which holds that an appropriation act is special in its nature, and where it is later in point of time of enactment controls over the provisions of general statutes.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4200.

SALES TAX—GOODS PURCHASED BY SUPERINTENDENT OF BANKS OR SUPERINTENDENT OF BUILDING AND LOANS FOR USE IN LIQUIDATION OF FINANCIAL INSTITUTION NOT TAXABLE UNDER SALES TAX ACT. (O. A. G. 1935, NO. 4114, APPROVED).

SYLLABUS:

1. *The State of Ohio is the "consumer" of goods purchased by the Superintendent of Banks or by the Superintendent of Building and Loan Associations for use in the liquidation of a particular financial institution, although the purchase price is paid from the assets of the particular institution, and therefore such sales are not taxable under the Ohio Sales Tax Act (Sections 5546-1 to 5546-23, General Code). Opinions of the Attorney General,* 1935, *No.* 4114, *approved and followed.*

2. *Such goods include repair materials and implements for use in preserving and repairing property constituting an asset of a particular institution in liquidation.*