

4402.

APPROVAL, BONDS OF VILLAGE OF MILTON, MIAMI COUNTY, OHIO, \$4,000.00.

COLUMBUS, OHIO, July 9, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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4403.

APPROVAL, BONDS OF PARIS TOWNSHIP RURAL SCHOOL DISTRICT, STARK COUNTY, OHIO, \$3,871.47.

COLUMBUS, OHIO, July 9, 1935.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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4404.

CONTRACT—COMPLIANCE AFFIDAVITS OF H. B. 102 NOT REQUIRED BY PUBLIC AGENCIES.

**SYLLABUS:**

*Public agencies of Ohio are no longer under a duty to require from those with whom they contract the compliance affidavits prescribed by Section 2 of Amended House Bill No. 102, enacted by the 90th General Assembly, as amended by Amended Senate Bill No. 189, passed by the 91st General Assembly.*

COLUMBUS, OHIO, July 9, 1935.

HON. JOHN JASTER, JR., *Director, Department of Highways, Columbus, Ohio.*

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

“Pursuant to our conversation, we are addressing this request to you for your opinion on questions arising under amended House

Bill No. 102 passed by the Ninetieth General Assembly, as amended by Amended Senate Bill No. 189 passed by the Ninety-First General Assembly.

Pursuant to the above law requiring compliance affidavits from persons entering into contracts with the state where the amount exceeds \$50.00, this Department has been requiring such affidavits stating affirmatively compliance with a code, listing of property for taxation and compliance with the Workmen's Compensation Law. Some uncertainty has arisen as to the course which should be pursued in view of the decision by the Supreme Court of the United States in the Schechter case, the decision of the Ohio Supreme Court in the recent case involving the Ohio Recovery Act and the decision of the Franklin County Common Pleas Court in the case decided this week involving the letting of a contract for sales tax stamps. The questions confronting us with reference to compliance affidavits are these:

1. Is this Department still under a duty to require compliance affidavits from those with whom it contracts where the amount is in excess of \$50.00?

2. Is the Department authorized to waive requirement of compliance affidavits in the case of non-resident persons or corporations?

The problem confronting us is whether or not we are authorized to reject a bid of a person or corporation which is the low bid because that person has failed or refused to submit a compliance affidavit as provided in House Bill No. 102 as amended and we desire an opinion as to the course of procedure which we should follow both in case of residents or non-residents."

Your questions involve a consideration of Amended House Bill No. 102 and Amended Senate Bill No. 189 in the light of recent judicial decisions. It will be noted that the title of House Bill No. 102 states that this act is intended, first of all, to effectuate the policies and purposes of the National Industrial Recovery Act and the laws of this state supplementary thereto; but this is not borne out by analysis of the language of the statute. For, notwithstanding this expressed objective, the only portion of either the National Industrial Recovery Act or House Bill No. 705, known as the Ohio Recovery Act, specifically referred to in this legislation, or in Amended Senate Bill No. 189, is that which deals with codes of fair competition.

That enforcement of Title I of the NIRA, dealing with these codes, was the controlling consideration behind this supplementary legislation is amply established by the language of the act itself. Section 4 of House Bill No. 102 declares that during the period prescribed in Section 2, every public contract controlled by it shall expressly stipulate that articles, materials or supplies to

be used in its performance shall be furnished by persons operating in compliance with the code of fair competition promulgated pursuant to the applicable recovery act or acts for their several particular industries, and who are registered members therein, if registration is provided for under said code. An affiant is required to certify under Section 2 of the act to the following:

“(a) . That said person, if engaged in an industry subject to an approved code of fair competition, is complying with all the provisions of such code and that he is a registered member of said industry if registration is provided for in said code or by the code authority thereof;”

Yet affiant is not required to certify under this section, or in the affidavit set forth in Section 6 of the act, that he is obeying *all* the provisions of any so-called recovery act, but only that he is complying with the code of fair competition for his particular industry and is a registered member therein. All of this seems to establish definitely and conclusively, that the chief object of this legislation, so far as the recovery acts were concerned, was to secure compliance with their code features and with those solely. There is nothing in Amended Senate Bill No. 189 which contradicts in anywise the opinion here expressed; on the other hand, its perusal may be said to strengthen the view already taken.

Although the policies and purposes of the taxation and workmen's compensation laws of Ohio are, according to the titles of these two acts, likewise sought to be effectuated, it must be noted that this additional method of securing their enforcement shall be only “so long as a recovery act shall remain in effect”,—for the prescribed affidavits are not required thereafter.

The decision of the Supreme Court of the United States in the Schechter case, U. S. Law Week, Vol. 2, No. 39, and the holdings of the Supreme Court of Ohio in the cases of *State, ex rel. Reams, vs. Dusha* and *Divisional Code Authority No. 23 vs. Riesenbergs*, 129 O. S. 279, 8 Ohio Bar No. 12, have had the effect of declaring all compulsory codes of fair competition, national or state, unconstitutional.

With all provisions eliminated as to such codes of fair competition, and enforceability thereof at an end, and with the recovery legislation so emasculated that it may well be argued whether any constitutional vitality survives, the conclusion would not be justified that any requirement of House Bill No. 102 and Amended Senate Bill No. 189 is still effective, merely because of the remaining existence, if any, of other entirely unrelated sections of either the National Industrial Recovery Act or House Bill No. 705, with which other sections this auxiliary legislation has nothing to do and to which it makes no specific reference.

In addition to this, the Common Pleas Court of Franklin County in the

unreported case of *Dent vs. Thomas*, and the Mahoning County Common Pleas Court in the unreported case of *Smith vs. Gluck, et al., County Commissioners*, have recently declared certain provisions of House Bill No. 102 unconstitutional. However, in view of the other matters heretofore discussed, there seems no need to comment further on these decisions.

It is my opinion, therefore, that public agencies of Ohio are no longer under a duty to require from those with whom they contract the compliance affidavits, prescribed by section 2 of Amended House Bill No. 102, enacted by the 90th General Assembly, as amended by Amended Senate Bill No. 189, passed by the 91st General Assembly.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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4405.

APPROVAL, PROPOSED AGREEMENT FOR HIGHWAY CONSTRUCTION IN HURON COUNTY, OHIO.

COLUMBUS, OHIO, July 10, 1935.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my consideration proposed agreement with reference to the matter of the separation of grades of State Highway No. 289 and the tracks of the New York Central Railroad Company and the Wheeling and Lake Erie Railway Company in the Village of Monroeville on U. S. Route 20, Huron County, Ohio.

After examination, it is my opinion that said agreement is in proper legal form and when properly executed by you will constitute a binding contract.

Said agreement is being returned herewith.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*