

"The secretary of agriculture is hereby authorized to appoint deputy inspectors who shall carry out the instructions of the inspector in the enforcement of the provisions of this act. Such deputy inspectors are hereby invested with the same police power as the inspector and shall be furnished with official badges or other insignia of authority which shall be carried while on duty."

The statute is plain that the deputy inspector must carry an "official badge" or "other insignia of authority." The only question is: What can "other insignia of authority" be construed to mean?

Webster defines "insignia":

"Badges of honor or authority."

While undoubtedly the certificate would be sufficient if it were honored by the party whose premises are inspected, yet, in view of the language used, it is my opinion that in order to strictly comply with the law the inspectors and deputies should possess and carry badges indicating their authority.

It is believed that what has been said relative to the destruction of plants under the provisions of section 1132 G. C. will apply to the question presented in the third paragraph of your letter relative to section 1130 G. C. Therefore no specific reply to said inquiry has been made.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1663.

ROADS AND HIGHWAYS—WHERE CONTRACT UNDER STATE AID IMPROVEMENT SIGNED BY STATE HIGHWAY COMMISSIONER—FUNDAMENTAL CHANGES IN PLANS OF CONSTRUCTION REQUIRED BY PHYSICAL CONDITIONS FOUND TO EXIST IN CONNECTION WITH CONTEMPLATED WORK—CONTRACTOR NOT AT FAULT—MAY TREAT CONTRACT AS NOT HAVING BEEN ENTERED INTO.

Where a contract under the state aid improvement statutes has been signed by the state through the State Highway Commissioner, and it is thereupon found that fundamental changes in plans of construction are required by physical conditions found to exist in connection with the contemplated work, by reason of which fact the contractor without fault on his part has been prevented through an entire working season from beginning work and cannot in any event carry out the original plans, the State Highway Commissioner may treat the contract as not having been entered into.

COLUMBUS, OHIO, November 26, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of November 17th is received, reading as follows:

"Attached find copy of Journal entry of the board of commissioners of Jefferson county.

I have been informed by division engineer that the statements con-

tained in the report of the commissioners are true and that it would be a physical impossibility to construct an improvement on the present location. The county commissioners have made a personal visit to the highway department and held a conference with the advisory board and myself. We have counseled with Mr. Meyer of your department and I believe he understands the details fairly well.

If we are permitted to do so, the easiest way to clear up the situation is to do as requested by the commissioners—cancel the contract and begin anew.

The contractor is Floto Bros. Construction Company, 736 North 7th street, Steubenville, Ohio, and the contract was entered into on December 19, 1919. I understand the contractor is willing for the contract to be cancelled and I presume there would be no difficulty in obtaining his written consent.

If you are able to cite some procedure by which we can cancel the contract, I will appreciate it very much."

The journal entry of the board of county commissioners referred to in your letter is in the shape of a certified copy of the resolution adopted October 29, 1920, Journal 10, page 30, and reading as follows:

"JOURNAL ENTRY

In the matter of contract for the improvement of Section "F" I. C. H. No. 7 with Floto Bros. Construction Co.

To the Hon. Board of County Commissioners, Jefferson County, Steubenville, Ohio.

Gentlemen:—In the matter of a contract for the improvement of Section "F" I. C. H. No. 7 with Floto Brothers Construction Company of this city no work has yet been done on said contract for the following reasons to-wit:

Follansbee Brothers have been actively engaged in the construction of a new plant on the east side of a part of this section, and in connection with said construction have filled their ground to an elevation of from one to eight feet above the level of the roadway, thereby shutting off the drainage of said roadway while the artificial drainage or sewers provided by said company is inadequate for carrying the heavy rainfall.

A great many other minor inconsistencies appeared on the plans in the drainage system and support for the curb, etc., in view of which the State Highway Department ordered a new survey, plans for which are nearly completed.

In the new survey the alignment and grade have been changed to such an extent that there is no resemblance between the plans under which the contract has been awarded and said revised plans.

In the revision of said plans two dangerous interurban grade crossings have been eliminated.

Whereas, by reason of the revision of said plans the said Floto Construction Company has been prevented from performing work under the said contract and said construction company now refuses to enter into extra work contracts for the performance of work under revised plans, it becomes necessary to cancel said contract and re-advertise for bids under the revised plans.

Be it Resolved by the board of county commissioners in regular session that the State Highway Department be requested to cancel said contract, that they authorize the filing of a new petition covering the various projects now being planned between Steubenville and the village of Toronto, and that they rescind all action in regard to former petitions, projects, etc., between the points aforesaid.

I hereby recommend the adoption of the above resolution.

(Signed)

Respectfully submitted,

J. N. LEECH,

County Surveyor.

Moved by Mr. King, seconded by Mr. Bougher, that the foregoing resolution be adopted.

Ayes: Messrs. King, Bougher and Waddle."

In connection with the foregoing, it may be added that several weeks ago Mr. Meyer of this department was requested by you to attend a conference at the office of Mr. T. S. Brindle, chief highway engineer, at which conference, in addition to Messrs. Brindle and Meyer, there were in attendance the members of the board of county commissioners of Jefferson county, a member of the contracting firm of Floto Brothers, and the division engineer, Mr. Fawcett. At said conference it was disclosed that the contractor had done no work whatever under the contract in question; that your department, because of the conditions arising as set forth in the resolution of the commissioners above quoted, never issued orders to the contractor to proceed; and that it was beyond question that a change in plans is required in order to permit of the doing of the work under proper engineering principles.

It is to be said, of course, that the statutes do not confer authority upon the state highway commissioner or any other executive officer of the state to cancel or abandon a contract entered into by the state highway commissioner in pursuance of the state aid plan of carrying out highway improvement. It is equally true, on the other hand, that the statutes do not contemplate the occurrence of such conditions as were disclosed upon the conference above noted, and in said resolution of the commissioners. In other words, the whole theory of the state aid statutes is that upon the signing of the contract no obstacles will be present to prevent the contractor from immediately entering upon the performance of his contract. The statutes all tend to the point that when a contract is signed all preliminary steps will have been taken—including the preparation and approval of plans, estimates and specifications; the provision of funds for the payment of the contractor, and in fact all steps necessary to enable the contractor to proceed promptly with his work.

We can therefore readily understand why the legislature has not made provision for the cancellation of contracts.

It clearly follows, when account is taken of the practical operation of the statutes in question, that where in good faith the public officers having charge of the project are unable to allow the contractor to begin work for an unreasonable length of time, after the signing of the contract, then the contractor is in a broad sense not under any contract, for the reason that the situation contemplated by statute has not come to pass.

It may be noted from the resolution of the commissioners above quoted, and it clearly appeared upon the conference above mentioned, that in reality the contractor could not, if he undertook to do so, carry out the original contract because of the change in physical conditions. Moreover, as the contract was signed in December, 1919, it is perfectly plain that the delay occasioned to the contractor,

without fault on his part, is unreasonable, since such delay has covered an entire working season. It is to be said, that at the conference mentioned, the member of the contracting firm who was present stated that his company was willing that the contract be considered cancelled.

You are therefore advised that under the circumstances stated, you are at liberty to treat the contract as though it had never been entered into.

It is suggested that for the purpose of making a proper record, you have the contracting firm file with you a letter consenting that the contract be treated as cancelled. You can thereupon refer this letter, with the resolution of the county commissioners, to the highway advisory board, together with a recommendation on your part to the board that the contract be treated as cancelled. Thereupon the board should take affirmative action approving your recommendation and ordering spread upon its records the letter of the contractor and the resolution of the county commissioners.

The conclusion above stated finds support in a previous opinion of this department directed by my predecessor under date May 16, 1917, to your predecessor as shown by Opinions of Attorney-General, 1917, Vol. I, p. 677, of which the head-note reads:

“A contractor who bids for the construction of highways has a right to assume that, if awarded the contract under his bid, he will within a reasonable time be permitted to begin the work and to carry it to a completion, without undue delays and hindrances over which he has no control. A delay of two years, due to no fault of the contractor, is unreasonable.”

Other earlier opinions of this department having some bearing on the question may be found in Opinions of Attorney-General, 1918, Vol. II, p. 1067.

It will readily occur to you from what has been said that every effort within the bounds of reason should be made by your department to avoid advertising a contract for letting until such time as it is known that all is in readiness for the contractor to begin work.

Respectfully,
JOHN G. PRICE,
Attorney-General.