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STATUS, CONTRACT AND BOND, STATE WITH THE CARMICHAEL CONSTRUCTION COMPANY OF AKRON, GENERAL WORK FOR ERECTION AND CONSTRUCTION OF MCGILVREY HALL, KENT STATE UNIVERSITY.

CONTRACT—WHERE STATE AWARDED CONTRACT AND LATER A DIFFERENCE IN VIEW AS TO INTERPRETATION WAS EXPRESSED BETWEEN STATE AND CONTRACTOR—VALIDITY NOT AFFECTED—LIABILITY WITH RESPECT TO MONEYS APPROPRIATED—PWA—KENT STATE UNIVERSITY.

COLUMBUS, OHIO, February 21, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain contract executed by and between The Carmichael Construction Company, of Akron, Ohio, and the State of Ohio, acting through you as Director of the Department of Public Works, covering the general work

for the erection and construction of McGilvrey Hall, a projected science building at Kent State University, together with other files relating to said contract. In this connection, I do not deem it necessary to note all of the proceedings relating to the projected erection and construction of this building which were preliminary to the contract and in contemplation of the same; it will be sufficient, in my view to refer to such only of these proceedings as are material in the consideration of the questions which have been suggested with respect to the validity of this contract.

On the 14th day of March, 1938, the Ninety-second General Assembly enacted Senate Bill No. 457 which, with respect to the appropriation item herein referred to, went into effect on June 14, 1938. By this act an appropriation was made to Kent State University under the item "G Additions and Betterments—G 2. Buildings" in the following words and figures, to wit:

"Science Recitation Building, Equipment, Heating Plant and Service Extension.....\$650,000.00"

Following the enactment of the appropriation act above referred to, which made appropriations to Kent State University and to the other state-supported universities, the Board of Trustees, at a meeting held at the office of the President of the University under date of June 10, 1938, adopted a resolution authorizing and directing the Chairman of the Building Committee of said Board to file an application to the United States of America through the Federal Emergency Administration of Public Works for aid in financing the building program of the University covered by the appropriation therefor above referred to. After considerable correspondence by and between officials of Kent State University and the regional and other directors of the Public Works Administration, this application for federal aid in the construction of said project was approved by the United States, acting through the Federal Emergency Administrator of Public Works, by communication directed to the Board of Trustees of Kent State University under date of November 10, 1938, which communication reads in part as follows:

"Subject to the Terms and Conditions (PWA Form No. 230, as amended to the date of this Offer), which are made a part hereof, the United States of America hereby offers to aid in financing the construction of science buildings, a dining hall and a kitchen building, of alterations to a science building and to a dormitory building and of alterations and additions to a heating plant, including necessary equipment, service extensions and improvement of the site (all herein called the 'Project'), by making a grant to the Board of Trustees of Kent State University, Ohio (herein called the 'Applicant'), in the amount of 45 per

cent of the cost of the Project upon completion, as determined by the Federal Emergency Administrator of Public Works (herein called the 'Administrator'), but not to exceed, in any event, the sum of \$525,487."

On November 16, 1938, the Board of Trustees of Kent State University, at a meeting regularly called by the President, adopted a resolution which referred to and set out the communication to it from the Federal Emergency Administrator of Public Works above referred to, and accepted the offer of federal aid therein made by a further provision in said resolution as follows:

"A resolution accepting the offer of the United States of America to the Board of Trustees, of Kent State University, Kent, Ohio, to aid by way of grant in financing the construction of University Buildings, here-in-after called 'Project.' Be it resolved by the Board of Trustees of Kent State University, Kent, Ohio:

Section 1, that the offer of the United States of America to the Board of Trustees of Kent State University of Kent, Ohio, to aid by way of grant in financing the construction of the buildings in the hereinafter mentioned 'Project,' be, and at the same time, hereby, and in all respects is accepted.

Section 2: That the said Board of Trustees of Kent State University, Kent, Ohio, agrees to abide by all the terms and conditions of said offer, including the condition of terms attached thereto and made a part thereof.

Section 3: That the temporary secretary of the Board of Education be, and is thereby authorized and directed forthwith to send to the Federal Emergency Administration of Public Works, three (3) certified copies of this resolution, and three (3) certified copies of the proceedings of this special meeting in connection with the adoption of this resolution, and such further documents or proofs in connection with the acceptance of said offer as may be requested by the Federal Emergency Administration of Public Works."

Notice of the receipt of a copy of this resolution of the Board of Trustees of the University accepting said award of federal aid in the construction of said project, was acknowledged by the Associate Regional Director, P. W. A., by a communication directed to the President of the University under date of November 22, 1938.

In this connection, it further appears that in the meantime the architect employed for and in connection with this project and acting under

the supervision of the State Architect, prepared the plans, details, bills of material, specifications of work, estimates of cost in detail and in the aggregate to be covered by the general contract here in question and by the other separate contracts authorized and provided for by section 2314-1, General Code, for the construction and equipment of said building. These plans, specifications, estimates, etc., after the preparation and approval thereof, were filed in the office of the Auditor of State as required by section 2315, General Code, as were certain addenda to such plans and specifications which were thereafter prepared.

In the meantime, the Director of Public Works, acting at the request of the Board of Trustees of the University and acting pursuant to the provisions of section 2318, General Code, published notice to bidders with respect to the general work contract here in question, which notice was published once each week for four consecutive weeks between the dates of November 21 and December 12, 1938, inclusive, and which advised prospective bidders that sealed proposals would be received at the office of the Director of Public Works, Division of State Architects and Engineers, until Tuesday, December 20, 1938, at two p. m., Eastern Standard Time, for labor, material, tools, appliances and transportation required to complete science recitation building, equipment and service extension, Kent State University, in accordance with plans and specifications on file in the office of the Auditor of State.

It appears that some time during the course of the publication of this notice to bidders, The Carmichael Construction Company, acting through one of its officials, addressed a communication to the architect in charge, in which inquiry was made as to the interpretation to be placed upon Items A to F, inclusive, under the heading of "GENERAL WORK BASE BIDS AND ALTERNATES MCGILVREY HALL—SECTIONS A, B AND ALTERATIONS INSTRUCTIONS" as said items appeared on page 1 of 2 in the prepared specifications. Responsive to this inquiry, the architect prepared Addendum No. 5 to said specifications, copies of which addendum, apparently, were forwarded to The Carmichael Construction Company and to each and all of the other prospective bidders on the work and material covered by this contract. This addendum, so far as the same is material, reads as follows:

"General Work—Base Bids and Alternates
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Instructions: As specifically stated in this paragraph as originally drafted, the drawings and specifications show and describe work covered not only in the Base Bids (Items 1, 2, 3, 4, and 5 in the Form of Proposal) but in the Alternates and lettered omissions hereinafter listed. The lettered omissions hereinafter listed refer to paragraphs (a), (b), (c), (d), (e) and (f) immediately beneath the paragraph headed INSTRU-

TIONS. Therefore, the work embraced in the lettered paragraphs (a) through (f) herein mentioned *shall not* be included in any Base Bid. In short and finally, the paragraph, *INSTRUCTIONS*, together with lettered paragraphs beneath, definitely and positively take precedence over all drawings and over other parts of these specifications.

(d) All that was originally written in the lettered omission paragraph (d) shall be stricken out and the following shall be substituted:

There shall be no *BRONZE DOORS, FRAMES, AND TRANSOMS OR BRONZE DISPLAY CASES* in any *BASE BID*. Doors and entrances shown or specified in bronze shall be of hollow metal with baked enamel finish in accordance with specifications for other hollow metal work and to the details shown for bronze work. The trim and door frames for display cases shall be changed from bronze to hollow metal of the same specification and to the details shown on Sheet A-31. Although not shown on the detail, each door of display cases shall have a piano hinge and a properly fitted lock."

Thereafter, sealed proposals responsive to said published notice for bids for the work to be performed under the general contract were submitted by The Carmichael Construction Company and by three other bidders, all of which proposals were likewise responsive to the plans and specifications and addenda thereto on file in the office of the Auditor of State. When these bids were opened and tabulated on December 20, 1938, it was found that the base bid of The Carmichael Construction Company in the sum of \$474,456.00 was the low bid on this job; said bid being \$19,906.00 lower than the next low bid. Later on the same day, to wit, December 20, 1938, the Board of Trustees of Kent State University, apparently acting on the recommendation of the State Architect, passed a resolution awarding the contract to The Carmichael Construction Company on its base bid of \$474,456.00 and requesting the Director of Public Works to enter into a contract with said Carmichael Construction Company in accordance with the bid received. It quite clearly appears that The Carmichael Construction Company was advised of the award of the contract to it and that the award of the contract thus made was accepted by The Carmichael Construction Company. Thereafter and as of the date of December 20, 1938, a contract encumbrance record was executed in proper form by the authorized officials of Kent State University and by the Director of Public Works, covering the sum of \$260,950.80 as the amount of money to be paid The Carmichael Construction Company out of the moneys appropriated by the legislature for the erection and construction of said building; said sum of \$260,950.80

being fifty-five per cent of the proposed contract price and being the full amount of the bid of The Carmichael Construction Company less forty-five per cent of this amount granted by the Public Works Administration as its contribution on the contract price of the work to be done in the construction of this building. On December 27, 1938, this contract encumbrance record—the same being No. EE-2274—was approved by John H. Ferguson of the Division of Budget and, apparently, at the same time the contract encumbrance record was signed by M. Ray Allison, Director of Finance, pursuant to the authority and duty conferred and imposed upon him by section 2288-2, General Code.

In this connection, it appears that sometime late in the month of December, 1938, after the award of the contract as above stated, a difference in the views of The Carmichael Construction Company, represented by certain of its officers and agents, and of the architect and some of the members of the Board of Trustees of the University, was indicated at a conference in the office of the Board of Trustees. And, apparently, by reason of this difference in view which was communicated to the Director of Public Works, there was a delay in the signing of the contract until on or about January 25, 1939. This contract, signed as above indicated by The Carmichael Construction Company and by the State of Ohio, acting through you as Director of Public Works, has been submitted to me, together with other related and necessary files, for my consideration and approval.

The first question suggested with respect to the validity of this contract arises by reason of the fact that the appropriation made to the Kent State University for the erection and construction of this building in the sum of \$650,000.00 above noted, is made subject to the following provisions in said appropriation act:

“The sum set forth herein designated ‘total personal service’, ‘total maintenance’, and ‘total additions and betterments’, for the purposes therein specified, are hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund, not otherwise appropriated.

The sums herein named shall not be expended to pay liabilities or deficiencies existing prior to January 1, 1938, or incurred subsequent to December 31, 1938.”

Obviously, the question here presented is whether under the facts above stated the moneys covered by this appropriation or any part thereof can be expended in paying the contract price of the work called for in this contract. And just as clearly this question depends on the further question as to whether any liability was incurred against this appropriation item prior to December 31, 1938. As to this, there is support for the view that the contract entered into by and between the Board of Trus-

tees of Kent State University and the Public Works Administration, evidenced by the communication of the Public Works Administration granting to the Board of Trustees federal aid in the construction of this building subject to the conditions therein provided for and by the resolution of the Board of Trustees accepting such grant, was a definite commitment by both said Board of Trustees and the Public Works Administration with respect to this improvement and the state and federal moneys to be expended in the construction of the same and in this view this contract so made and entered into by and between the Board of Trustees and the Public Works Administration would have the effect of encumbering the funds appropriated by the State for the construction of the improvement in the same way that the preliminary contract between the state and a board of county commissioners for the improvement of a state road creates a liability upon the part of the state with respect to moneys appropriated by it for the purpose of such improvement, as is indicated by the opinion of the Attorney General under date of December 1, 1928, wherein it was held (Opinions of the Attorney General, 1928, Vol. IV, p. 2747) :

“Where, prior to January 1, 1929, a definite contract was entered into between the State of Ohio and a board of county commissioners, for the improvement of a state road, pursuant to the provisions of Section 1200, General Code, a liability upon the part of the state has been incurred and consequently moneys appropriated for such purpose by the 87th General Assembly may be expended for such improvement after December 31, 1928.”

I am convinced that the award of this contract to The Carmichael Construction Company and its acceptance of the same, together with the execution of the contract encumbrance record, above referred to, under date of December 27, 1938, had the effect of creating a liability against this appropriation item. On the occurrence of these facts, a legal right accrued to The Carmichael Construction Company which it could enforce by appropriate action in mandamus to compel the execution of the contract by the Director of Public Works pursuant to said award. This conclusion follows by clear implication from what is said by the Supreme Court of this State in deciding the case of *State, ex rel., vs. The Board of Public Service of Columbus, Ohio*, 81 O. S., 218; and this conclusion follows likewise from what was distinctly held by the Supreme Court in the case of *State, ex rel. United District Heating, Inc., vs. State Office Building Commission*, 124 O. S., 413. Earlier cases supporting this view are: *Beaver and Butt vs. Trustees of the Institution for the Blind*, 19 O. S., 97; *Boren and Guckes vs. Commissioners of Darke County*, 21 O. S., 311. Touching the fundamental question here under consideration, it is noted that under date of June 22, 1915, at a time when the fiscal year of the

State ended on the thirtieth day of June, annually, and when expenditures of moneys appropriated by the legislature were prescribed accordingly, the Auditor of State submitted to the then Attorney General a question which was stated as follows:

“If an advertisement is inserted before July 1, 1915, for bids for the construction of a building under the provisions of section 2314, et seq., of the General Code, does such advertisement create a liability to the extent that at the end of the advertising period a contract or contracts could be entered into after July 1, 1915, payable from the appropriations available prior to July 1, 1915?”

Answering this question, the Attorney General said:

“The mere insertion of an advertisement in a newspaper, calling for bids for the construction of a building under the provisions of sections 2314, et seq., of the General Code, does not create any liability on the part of the state for payment of anything other than costs for such advertisement. Not until a contract is awarded under an advertisement for bids is there any liability on the part of the state to pay the contract price, and funds not available at that time cannot be applied to such contract. Therefore your question is answered in the negative.”
Opinions of the Attorney General, 1915, Vol. II, p. 1111.

The then Attorney General in this opinion clearly indicated the view that the award of a contract did create a liability against the State to pay the contract price for the work to be done under such contract. I am in accord with the view indicated by the Attorney General in the opinion above referred to; and with respect to the question at hand, I am of the opinion that on the facts above stated there was a liability incurred against the moneys appropriated for the construction of this building, prior to December 31, 1938, and that moneys for this purpose can be expended under this appropriation and under Section 2 of Amended House Bill No. 3 of the 93rd General Assembly reappropriating unexpended balances of said appropriation item against which liabilities have been lawfully incurred. See Section 154-30, General Code.

The only other question remaining for consideration is whether the difference of views indicated by and between The Carmichael Construction Company and of the architect and certain members of the Board of Trustees of the University with respect to the proper interpretation of the work to be done by The Carmichael Construction Company as contractor under Items A to F, inclusive, as set out on page 1 of 2 of the specifications and in Addendum No. 5 relating thereto, indicates a failure to agree on the terms of the contract thereby preventing the formation of a

contract between the parties. As to this, it is to be observed that the contract by and between The Carmichael Construction Company and the State of Ohio, represented by the authorized officials of Kent State University and of the Department of Public Works, is that indicated by its proposal which was responsive to the plans and specifications and the addenda thereto; and the mere fact that after the award of the contract to The Carmichael Construction Company a difference in view was expressed with respect to the interpretation to be placed upon the contract thus made did not affect the validity of the contract as such. Touching this question, the following is said in Am. Jur., Vol. 12, page 517:

“One who offers or accepts a contract of a certain character is bound by its terms as properly interpreted, even though he meant something different and thought the words conveyed his meaning. It has been said that the court must give effect to the meaning and intention of the parties as expressed in the language of their contract, in the absence of anything to show legal impediment to prevent their entering into any contract they see fit or their expressing it in the language of their own choice. Accordingly, one who accepts a written obligation is conclusively bound by its terms. Parties who have reduced their agreement to writing in plain, unequivocal terms or in terms susceptible of interpretation and construction under recognized rules of law are bound by the meaning of the contract which is reached by a proper interpretation. Where there is no right to the reformation of a written contract, the rights of the parties must be determined according to the writing.”

On the considerations above noted, I am approving the contract here in question. Needless to say, however, I am not at this time expressing any view as to the proper interpretation to be placed upon the particular items in the specifications and referred to in Addendum No. 5. For, as above stated, the question as to the interpretation to be placed upon the contract made by the written proposal of The Carmichael Construction Company responsive to the plans and specifications and addenda thereto upon which proposal the award of this contract was made, does not indicate that there was not a meeting of the minds of the parties upon the terms of this contract, the effect of which, so far as the question of the performance of the same by the contractor is concerned, is a matter to be hereafter determined by appropriate means.

In conclusion, I note that The Carmichael Construction Company submitted a bond in proper form executed by itself and by the Standard Accident Insurance Company conditioned as provided in Sections 2316 and 2365-4, General Code, securing the State of Ohio and other persons protected by its terms in the performance by the contractor of its obliga-

tions with respect to the construction of this building. This bond is accordingly likewise approved by me as are the certificate of premium payments of said contractor under the Workmen's Compensation Law and other files which were submitted to me in connection with said contract; which contract, together with the other files hereinabove noted and referred to, is herewith enclosed.

Respectfully,

THOMAS J. HERBERT,
Attorney General.