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1. BIDDING—COMPETITIVE—ADDITIONS OR REPAIRS OF PUBLIC BUILDINGS—SECTION 153.40 RC MUST BE READ IN PARI MATERIA WITH SECTION 153.42 RC—CONTRACT DOES NOT EXCEED ONE THOUSAND DOLLARS—CONTRACTS WHICH EXCEED THAT SUM SUBJECT TO STATUTORY REQUIREMENTS OF NOTICE AND COMPETITIVE BIDDING.
2. SECTION 153.44 RC LIMITED IN APPLICATION TO CONTRACTS FALLING WITHIN SCOPE OF SECTIONS 153.01 THROUGH 153.60 RC.
3. CLOCK IN TOWER OF COURT HOUSE—INSTALLATION OR REPAIR—IS AN ADDITION TO OR REPAIR OF BUILDING—CONTRACT—IN EXCESS OF ONE THOUSAND DOLLARS — SUBJECT TO STATUTORY REQUIREMENTS, NOTICE, COMPETITIVE BIDDING AND INDORSEMENT BY PROSECUTING ATTORNEY—SECTION 153.42 RC.
4. CONTRACT—IMPROVEMENT OF PUBLIC BUILDING—AWARDED BY COUNTY COMMISSIONERS—DISREGARD OF STATUTORY REQUIREMENTS—NO LEGAL OBLIGATION—VOID.

## SYLLABUS:

1. Section 153.40, Revised Code, must be read in pari materia with the provisions of Section 153.42, which dispenses with competitive bidding on "additions or repairs" of public buildings where the contract for such improvements does not exceed one thousand dollars, thereby manifesting an intent by the legislature to subject such contracts which exceed that sum, to the statutory requirements of notice and competitive bidding.

2. Section 153.44, Revised Code, which requires the endorsement of the prosecuting attorney as a condition to the validity of "all contracts that exceed one thousand dollars in amount" is limited in its application to those contracts falling within the scope of Sections 153.01 to 153.60, Revised Code.

3. The installation or repair of a clock in the tower of a court house is an "addition to, or repair" of the building, within the meaning of Section 153.42, Revised Code, and where a contract for such improvements exceeds one thousand dollars, it is subject to the statutory requirements of notice, competitive bidding and indorsement by the prosecuting attorney, as provided by statute.

4. A contract for the improvement of a public building, awarded by county commissioners in disregard of statutory requirements, creates no legal obligation, and is void.

Columbus, Ohio, April 22, 1954

Hon. Dorothy Kennedy, Prosecuting Attorney  
Brown County, Georgetown, Ohio

Dear Madam:

Your request for my opinion reads as follows:

"On February 8, 1954, the Brown County Board of Commissioners entered into a contract with the Tower Clock Service Company, of Springfield, Ohio, whereby the said clock company was to install new workings in the tower clock, which clock is on the top of the Brown County Courthouse, for the sum of \$1900.00, 'and is to be paid for by Brown County, when the work is completed', according to the contract. This contract was duly approved by resolution of the Board of Commissioners, and so entered in their Journal.

"On February 23rd, 1954, the work was completed by the clock company to the satisfaction of the commissioners, and the clock company presented the bill for the work in the amount of \$1900.00, to the Brown County Auditor. Shortly thereafter, the Auditor asked me to approve the legality of the bill. This matter had not been brought to my attention before.

"Section 153.44 of the Revised Code of Ohio provides as follows:

*'Before work is done or material furnished, all contracts that exceed one thousand dollars in amount shall be submitted by the board of county commissioners to the prosecuting attorney of the county. If found by him to be in accordance with sections 153.01 to 153.60, inclusive, of the Revised Code, and his certificate to that effect is endorsed thereon, such contracts shall have full effect, otherwise they shall be void.'*

"This contract was not submitted to me until the work was entirely and completely finished and the material furnished. As far as I am able to ascertain, there was no advertisement for proposals, contrary to Section 153.40 of the Revised Code of Ohio, which provides as follows:

*'When plans, drawings, representations, bills of material, specifications and estimates are made and approved as provided in sections 153.21 to 153.39, inclusive, of the Revised Code, the board of county commissioners shall give public notice in two of the principal newspapers in the county having the largest circulation therein, of the time when and*

the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the *erection of the building*, bridge, or bridge substructure, *or the addition to or alteration thereof*, and a contract based on such proposal will be awarded. If there is only one newspaper published in the county, it shall be published in such newspaper. The notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract, and state when and where such plans, descriptions, bills and specifications can be seen. They shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract.'

"Section 153.40 provides only for the erection of a building or the addition to or alteration thereof. The installation of new workings and the taking out of old workings of a clock would not be an addition or the alteration of a building, unless the clock could be considered part of the building.

"In other words, Section 153.44 must be read in pari materia with Sections 153.01 to 153.60. Does this particular contract come within the purview of those sections? If it does not, then there is no need for my approval. If it does, then I could not approve the contract, since Section 153.40 was not compiled with and since, under Section 153.44, the contract was not submitted to me before the work was done. In that latter event, could the board of commissioners pay the bill legally without my approval?"

The provisions of the Revised Code currently applicable to your question, are as follows:

Section 153.40. "\* \* \* the board of county commissioners shall give public notice in two of the principal newspapers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of the building, \* \* \* or *the addition to or alteration thereof*, and a contract based on such proposals will be awarded. \* \* \*"

(Emphasis added.)

Section 153.42. "When the estimated cost of a public building, \* \* \* or of making an *addition thereto or repair thereof*, does not exceed one thousand dollars, it may be let at private contract without publication or notice."

Section 153.44. "Before work is done or material furnished, all contracts that exceed one thousand dollars in amount shall be submitted by the board of county commissioners to the prosecuting attorney of the county. If found by him to be in accordance with sections 153.01 to 153.60, inclusive, of the Revised Code, and

his certificate to that effect is indorsed thereon, such contracts shall have full effect, otherwise they shall be void."

Section 153.46. "No contract shall be made for a public building, bridge, or bridge substructure, or for any *addition to, or change, improvement, or repair* thereof, or for labor and materials, at a price in excess of the estimates required to be made by sections 153.21 to 153.45, inclusive of the Revised Code."

The words "alteration" and "addition" have been held to include additional facilities or improvements constructed in a building, which become part of the building, such as the installation of a steam heating plant: *State v. Commissioners*, 17 C. C., 370, 9 C. Dec. 715; erection of an elevator shaft in a court house: *State ex rel Gard v. Zoller*, 18 C. C., 275; installation of a refrigeration system: *Wilmerton v. Morton*, 74 Cal. App., 2nd 891, 169 Pac., 2d 992; construction of an areaway to a basement: *Kennedy v. City of Fargo*, 40 N. Dak., 475, 169 N. W., 424. These cases are illustrative of the definition given by our Supreme Court of the word "addition," which it held to include any improvement "generally constructed on the ground and annexed to the original building or placed on the top of the same," and such substantial changes as remodeling or ornamentation. *Lewis v. State, ex rel. Kramer*, 69 Ohio St., 473, at page 481.

It is common knowledge that most of the older court houses of this state were designed with a tower for the specific purpose of housing the "court house clock." It would appear, therefore, that such towers and clocks historically have been considered as a part of the court house and that the repair or alteration thereof would constitute the repair or alteration of a building within the purview of Sections 153.40 and 153.42, Revised Code.

Section 153.40, Revised Code, which subjects contracts for "alteration" or "addition" to competitive bidding, must be read in *pari materia* with Section 153.42, which places contracts for "addition or repair" in the competitive category, if they exceed \$1,000.

It is quite obvious that the exception of lesser contracts from competitive bidding in no manner restricted the general provisions, but by inference and implication strengthened them. It is a general rule that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted. Sec. 37 Ohio Jurisprudence, Section 455, page 783. Even if the contract in question were to be considered as one of repair, it would still be subject to competitive bidding and

other statutory requirements if it involved an expenditure of more than one thousand dollars. The contract in question involves an expenditure of \$1900. Statutes relating to public contracts must be construed in a way that will best give effect to their purpose and scope. The rule has been aptly stated in 43, American Jurisprudence, page 768, Sec. 26:

“Laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold.”

With respect to repairs as subject to competitive bidding, the writers of American Jurisprudence make this observation, Vol 43, page 769:

“While, under statutes defining the preliminary steps to be taken by a municipality before entering into a contract for a public improvement, a distinction may be made between ‘construction work’ and ‘repairs,’ contracts for the repair of streets, highways, public buildings, and the like are ordinarily subject to statutory requirements relative to competitive bidding, \* \* \*”

Affirmance of this view is found in the circuit case of *State, ex rel. Guard v. Zoller*, 18 C. C. Rep., 275, which involved an interpretation of Sections 143.40 and 143.42, as they formerly appeared in the Revised Statutes. The headnote of that case reads:

“By the express provision of sec. 798, Rev. Stats., where the estimated cost of any public building, or of making any addition to, or repair of any public building, exceeds \$1,000, and the plans, descriptions, bills of material, specifications and estimates have been approved by the county commissioners, the notice provided for in such section must be given, and without this such county commissioners have no right to enter into a contract for such improvement or repair, and the contract made in this case for the repair of the court house by putting an elevator therein, was illegal and void.”

More specifically, the court in its opinion stated:

“It seems clear to us that if the putting in of this elevator into the court house is an addition to or repair thereof, that the commissioners, by the terms of this section, must advertise as provided in the section, if the estimated cost is over \$1,000, as was the case

here. And it seems equally clear to us that the improvement in question was an addition to or an alteration of the court house.  
\* \* \*

Furthermore, submission of the contract for approval by the prosecuting attorney is an indispensable pre-requisite. The provision in Section 153.44, requiring all contracts exceeding one thousand dollars to be submitted to the Prosecuting Attorney for his approval, "otherwise they shall be void," was held to invest such officer with discretionary power in that particular, as distinguished from a mere ministerial duty. He is not only required to ascertain whether the contract awarded is in legal form, but he must also determine whether the necessary steps which precede the awarding of a contract have been taken. And if he refuses to approve a contract because not awarded in accordance with statutory requirements, he cannot be compelled to do so by mandamus. *State ex rel. Fornoff v. Nash*, 23 Ohio St., 568.

These statutory prerequisites are not for the benefit or protection of the sovereign power alone, but they are of the essence of the contract, and without them no legal obligation is created and the purported agreement will be treated as a nullity. The rule has been applied to a contract involving an expenditure of \$15,000 for the remodeling of a court house, awarded by the county commissioners without the required endorsement of the prosecuting attorney and without competitive bidding, identical with the facts here involved. *State ex rel. Huston*, 11 C. C. (N.S.) 225, 20 C. C. Dec. 515, affirmed in 81 Ohio St., 552.

While Section 153.44 Revised Code, by its terms requires the approval of the prosecuting attorney as to "all contracts that exceed one thousand dollars in amount," I believe it plain that it is limited in its application to only such contracts as are included within the scope of Section 153.40, Revised Code. This, I believe is made clear by the fact that Section 153.44 requires the prosecuting attorney to find that the contract is in "accordance with Sections 153.01 to 153.06, inclusive, of the Revised Code."

Accordingly, the combined effect of the statutory provisions here considered is to subject all county contracts for the construction, alteration, addition or repair of a building to the statutory requirements of notice, competitive bidding, and approval by the prosecuting attorney, where the cost of the particular improvement exceeds one thousand dollars. Contracts

awarded in violation of statutory requirements create no legal obligation. It is the established law of this state that one who deals with county commissioners is charged with notice of the statutory limitations as to the mode of making contracts, and if the attempted contract transcends those limitations or omits or violates the essential requirements, he can neither enforce the contract nor recover on a quantum meruit, nor claim any estoppel against the contract. Hence, a contract made by a county in disregard of statute on the subject is void, and no recovery can be had against it for the value of the improvement contracted thereunder. In such case, the courts will leave the parties to such an unlawful transaction where they have placed themselves, and will refuse to grant relief to either party. *Buchanan Bridge Company v. Campbell*, 60 Ohio St., 406; *Dacek v. Cleveland Paving Company*, 35 Ohio App., 118, 131; 11 Ohio Jurisprudence, page 509, Section 636.

This rule has been also followed in cases involving municipal contracts awarded in violation of statutory provisions, and in each instance the court, because of their illegality, rejected implied assumpsit for the benefits conferred. *Wellston v. Morton*, 65 Ohio St., 219; *Lancaster v. Miller*, 58 Ohio St., 558.

In accordance with the statutory provisions here considered, and the construction placed upon those provisions in the cases here cited, it is my opinion that:

1. Section 153.40, Revised Code, must be read in *pari materia* with the provisions of Section 153.42, which dispenses with competitive bidding on "additions or repairs" of public buildings where the contract for such improvements does not exceed one thousand dollars, thereby manifesting an intent by the legislature to subject such contracts which exceed that sum, to the statutory requirements of notice and competitive bidding.

2. Section 153.44, Revised Code, which requires the endorsement of the prosecuting attorney as a condition to the validity of "all contracts that exceed one thousand dollars in amount" is limited in its application to those contracts falling within the scope of Sections 153.01 to 153.60, Revised Code.

3. The installation or repair of a clock in the tower of a court house is an "addition to, or repair" of the building, within the meaning of Section 153.42, Revised Code, and where a contract for such improvement exceeds one thousand dollars, it is subject to the statutory requirements of notice,

competitive bidding and indorsement by the prosecuting attorney, as provided by statute.

4. A contract for the improvement of a public building, awarded by county commissioners in disregard of statutory requirements, creates no legal obligation, and is void.

Respectfully,

C. WILLIAM O'NEILL

Attorney General