

2482.

BOND—ACCEPTANCE OF CONTRACT BOND BY HIGHWAY DIRECTOR—
 NO SUBSTITUTION MAY THEREAFTER BE MADE FOR SUCH
 ORIGINAL BOND.

SYLLABUS:

After the highway director has accepted a contract bond given under the provisions of Section 1208, General Code, he may not lawfully substitute another bond for such original bond.

COLUMBUS, OHIO, October 25, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent communication, as follows:

"I respectfully request your opinion on the following:

A contract was entered into with The Highway Construction Company, Cleveland, Ohio, for the improvement of Section B-2, X & U, S. H. 17, Cuyahoga County, December 19, 1929. The surety bond was executed by the Lloyd's Casualty Company, 75 Maiden Lane, New York City.

The Highway Construction Company now requests that it be permitted to submit a bond with the Seaboard Company as surety. The Seaboard Surety Company agree to make their bond retroactive to December, 1929.

Can the Highway Department accept such a substitution of sureties?"

It is a general principle of law that public officers have only such powers as are expressly given to them by statute or those necessarily implied to carry out express provisions so granted. After a close study of the Ohio General Code, I find no provision which would expressly or impliedly give you as Highway Director authority to substitute a bond for the one which was given at the time of entering into the contract with the Highway Construction Company. Aside from this evident lack of authority, there are other reasons why such a substitution should not be made. Now the bond which the Lloyd's Casualty Company executed on December 19, 1929, was undoubtedly given to the State of Ohio pursuant to the provisions of Section 1208, General Code. Said section provides as follows:

"The director may reject any or all bids. Before entering into a contract the director shall require a bond with sufficient sureties, conditioned, among other things, for the payment by the contractor and by all sub-contractors for all labor performed or materials furnished in connection with the project involved, that the contractor will perform the work upon the terms proposed, within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, and in case of a grade separation will also indemnify any railroad company involved, against any damage that may result by reason of the negligence of the contractor in making said improvement. In no case shall the state be liable for damages sustained in the construction of any improvement under this act.

Nothing in this section shall be construed to require the director to take a bond in connection with any force account work but he may, in his discretion, require bond in connection with force account work.

If any bond taken under the provisions of this act is executed by a surety company, the director shall not be authorized to approve such bond unless there is attached thereto a certificate of the superintendent of insurance that such surety company is authorized to transact business in this

state, and a copy of the power of attorney of the agent of such company executing such bond. The superintendent of insurance shall upon request issue to any duly licensed agent of such company such certificate without charge.

If any bond taken under the provisions of this act is executed by a private individual or individuals as sureties, the director shall not be authorized to approve such bond unless there is attached thereto a sworn financial statement of such sureties showing the amount and specific character of their assets and liabilities, or a certificate of the county auditor of the county in which said sureties or one of them reside or have property to the effect that in his judgment such sureties are residents of this state and worth in the aggregate double the sum to be secured beyond the amount of their debts and have property liable to execution in this state equal to the sum to be secured, and also a sworn statement setting out each county in which such individual sureties and each of them own real estate.

The bond required to be taken under the provisions of this section shall be in an amount equal to one-half of the estimated cost of the work, and shall be approved by the director as to sufficiency of the sureties and shall be in such form as may be prescribed by the Attorney General."

It is to be noted from a perusal of the above section that the bond which is given shall be conditioned "among other things, for the payment by the contractor and by all sub-contractors for all labor performed or material furnished in connection with the project involved." Also the bond form used by your department contains the provision that the contractor "will indemnify the state, county and township, against any damage that may result by reason of the negligence of the contractor in making said improvement or doing said work."

In an opinion published in Opinions of the Attorney General for 1918, Vol. I, p. 163, it was held as disclosed by the syllabus:

"After a contract for a road improvement has been entered into by and between the state highway commissioner and the contractor, there is no authority in law warranting the state highway commissioner in accepting a bond as a substitution for that originally given by the contractor."

The laws in effect at the time of the rendition of said opinion required conditions in bonds covering road improvements almost parallel to those now required and noted by me above. The following language of the then Attorney General is significant:

"As stated above, there is no authority in law for the state highway commissioner accepting a different bond from that which was given in the beginning of the proceedings to improve the highway. Further, under the law I do not believe that he would be warranted or justified in doing so. It must be remembered that the bond is given not entirely for the uses and purposes of the State of Ohio, but for the benefit of the county and the township or townships interested in the matter of the improvement, as well as the property owners who are assessed for a part of the cost and expense of the improvement. Further, the bond which is given by the contractor inures to the benefit of all material men who furnish material for the improvement for which the bond is given, as well as to all laborers who perform labor thereon.

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From these provisions it must be considered that the labor performed

upon a road improvement and the material furnished for the road improvement is performed and furnished with a view to the bond as it existed at the time that the labor is performed and the material is furnished. In law, at least, it can be assumed that the man performing labor and those furnishing material for road improvements take into consideration the fact that such and such a person or company is surety on the bond and that said person or company is satisfactory to said persons. Hence, in law it occurs to me that the state highway commissioner has no authority, after a contract for a road improvement has once been entered into to substitute a new bond for that which was given in the beginning, or, in other words, in substituting one surety for another.

Further, I am of the opinion that to do so would be against sound public policy. If this principle were followed it might lead to the substitution of a surety which is not financially responsible for one which is financially responsible, and this even though the state highway commissioner should exercise the greatest care and caution in making the change."

It is believed that the above opinion is decisive of the question at hand and that any further extended discussion is unnecessary. I may say that I am in entire accord with said opinion.

Accordingly, in specific answer to your question, I am of the opinion that after the highway director has accepted a contract bond given under the provisions of Section 1208, General Code, he may not lawfully substitute another bond for such original bond.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2483.

APPROVAL, ONE GAME REFUGE LEASE TO LAND IN LOGAN TOWNSHIP, AUGLAIZE COUNTY, OHIO.

COLUMBUS, OHIO, October 25, 1930.

HON. J. W. THOMPSON, *Commissioner, Division of Conservation, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted lease No. 2084, in which Clarence Lathrop grants 153 acres of land situated in Logan Township, Auglaize County, Ohio, to the State of Ohio for Game Refuge purposes for the term of five years.

Finding said lease to have been executed in proper legal form, I have accordingly endorsed my approval thereon and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.