

906.

APPROVAL, BONDS OF CALEDONIA VILLAGE SCHOOL DISTRICT,
MARION COUNTY, \$8,454.62, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, November 16, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

907.

DIRECTOR OF HIGHWAYS—NO AUTHORITY TO CANCEL OR ABANDON CONTRACT ENTERED INTO IN PURSUANCE OF STATE AID PLAN IN CARRYING OUT HIGHWAY IMPROVEMENTS—WHETHER OR NOT A DELAY IN EXECUTION OF CONTRACT IS UNREASONABLE IS QUESTION OF FACT.

COLUMBUS, OHIO, November 19, 1923.

SYLLABUS:

1. *The statutes of Ohio do not confer authority upon the Director of Highways and Public Works, or any other executive officer of the state, to cancel or abandon a contract entered into by the Director of Highways and Public Works, in pursuance of the state aid plan in carrying out highway improvements.*

2. *A contractor who bids at a letting of the Director of Highways and Public Works for the construction of a road improvement 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 completion without undue delays and hindrances over which he has no control.*

3. *Whether or not a delay in the execution of a contract is an unreasonable delay is, as a general rule, a question of fact, dependent upon all the facts and circumstances surrounding and affecting the particular transaction.*

4. *One possessing the right to rescind a contract on the ground that there has been an unreasonable delay in the execution of such contract, is required to exercise his right within a reasonable time after discovering the facts justifying rescission.*

5. *In a case where the award was made on February 17, 1923, and the execution of the contract is delayed until June 8, 1923, owing to the delay of the Director of Finance in certifying the funds, and the contractor has indulged in a vacillating or hesitating course of conduct and does not reject and rescind the contract until July 2, 1923, it cannot be held, as a matter of law, that such delay was unreasonable and justified a rescission of the contract, or that the delay was*

taken advantage of by the contractor with that measure of promptness as is required by law.

COLUMBUS, OHIO, November 19, 1923.

HON. L. A. BOULAY, *Director, Department of Highways and Public Works, Columbus, Ohio.*

In re: I. C. H. No. 466, sec. A.; I. C. H. No. 91, sec. B-1., Cuyahoga County.

DEAR SIR:—Receipt is acknowledged your letter of recent date, relating to the above entitled matter. It is noted that in connection with the matter you give the following facts:

Date of Letting,	February 9, 1923;
Date of Award,	February 17, 1923;
Date of Contract,	February 24, 1923.

That the contract was held in the office of the Director of Finance until June 5, 1923, and transmitted by mail by Leon C. Herrick, former Director, June 7, 1923, and received by the contractor on June 8, 1923.

On June 20, 1923, correspondence was had with the contractor, relative to its not starting the work; and on June 29, 1923, the contractor was relieved of the contract, under section 1209, General Code.

You also state that:

On July 2, 1923, the contractor refused to accept the contract;
That the contractor states that no plans or profiles were ever received by him.

You also state:

That the contract and specifications mailed him, also the copy mailed to the county and the original on file in the Highway Department do not contain any specifications for the Warrenite Bitulithic type of pavement, which is the type on which the award was made.

You first inquire whether or not the Director of Highways has the right to cancel this contract.

It may be said, as a matter of law, that a contract of this character does not become effective until the funds have been certified by the Director of Finance and the contract finally delivered to the contractor, this being the holding of the Court of Appeals of this county in the recent case of the State of Ohio, *ex rel. Foster, v. Boulay, et al.*

The statutes do not confer authority upon the Director of Highways and Public Works, or any other executive officer of the state, to cancel or abandon a contract entered into by the Director of Highways and Public Works, in pursuance of the State Aid Plan of carrying out highway improvements:

Opinions for 1920, Vol. II, pp. 1094-1906.

Likewise, it is a rule of law that 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:

Opinions for 1917, Vol. I, p. 677.

It will be apparent, from the above statement of the rules of law, that your question revolves itself around the proposition:

(1) As to whether or not the delay between the award and the final execution of the contract was of such a nature and extent as to be unreasonable;

(2) If the delay was unreasonable, did the contractor take advantage of the delay at the time when the same became unreasonable?

Whether or not a delay in the execution of a contract is an unreasonable delay is a question of fact, dependent upon all the facts and circumstances surrounding and affecting the particular transaction.

It is not believed, from what is given in your letter, that it can be said that the delay incident to the final execution of the contract was, as a matter of law, such a delay as would be unreasonable. Neither is it believed, from the statement, that the contractor considered the delay as being unreasonable. It will be noted that he received the contract on June 8, 1923; that the then Director wrote him on June 20, 1923, (twelve days later), relating to his not starting the work; that nothing was heard from the contractor until June 28, 1923 (eight days later), when he himself was apparently debating the proposition as to whether or not he would accept or reject the contract; and no final step was taken until July 2, 1923 (twenty-four days after the final execution of the contract).

Assuming, for argument, that the delay was unreasonable, did the contractor take prompt advantage of the delay?

It should be kept in mind that if the delay was unreasonable and such as to warrant a rescission, it became so not later than the date when the contract became effective, namely June 8, 1923, and possibly earlier. That all the facts of the reasonableness or unreasonableness of the delay were within the knowledge of the contractor.

One possessing the right to rescind a contract on the ground of fraud, mistake or other sufficient cause, and desiring to exercise such right, must not be guilty of any unreasonable or unnecessary delay in the assertion of his purpose and in taking steps to make it effective, or he will be denied relief in equity, on the ground that such delay is tantamount to a waiver of his objections to the contract, or is a manifestation of his election to affirm it rather than to repudiate. In order to escape the imputation of laches in this matter, it is necessary for him to act "promptly", "with reasonable promptness", "with due diligence", after discovering the facts on which his claim to rescind is based. It is possible that all these phrases, with reference to time, should be understood as substantially equivalent in meaning.

Black on Rescission and Cancellation, sec. 536.

It has been held by some authorities that the rescission must be "at once", or "immediately", or even "at the earliest practicable moment"; but it is believed that the true rule is that, after discovering the facts justifying rescission, the contractor is entitled to a reasonable time in which to decide upon the course he will take.

But this does not mean that he will be indulged in a vacillating or hesitating course of conduct, but that he must act with such a measure of promptness as

can fairly be called "reasonable" with reference to all the circumstances of the particular case. Rescission must be prompt, unconditional and unequivocal.

Black on Rescission and Cancellation, sec. 536.
 Parmere v. Adolph, 28 O. S. 10;
 Whitney v. Bissell, 75 Or. 28;
 146 Pac. 141;
 L. R. A. 1915 D. 257;
 Shappiro v. Goldberg, 192 U. S. 232.

It would seem that the contractor did not conform to the rule.

The statute requires that the plans and specifications for the improvement shall be on file in the office of the State Highway Commissioner and the County Surveyor, but I know of no provision which requires that the contractor be furnished a copy thereof. Plans and specifications were a matter of public file and were accessible to him.

Neither do I believe that the contractor is in position to raise the question that the type of road upon which he bid was not specified.

By your second inquiry you ask, if the contract is not cancelled, what should be the procedure in order to secure the construction of this project. Your attention is directed to sec. 1209, General Code, where a statutory line of procedure is laid out and which, it is believed, needs no comment.

Respectfully,

C. C. CRABBE,

Attorney-General.

908.

TAXATION—LEASEHOLD BONDS HELD BY CREDITOR CORPORATION
 SHOULD BE CLASSED AS "INVESTMENT IN BONDS".

SYLLABUS:

Where a book account against a corporation is surrendered in exchange for the bonds of said corporation, said bonds, for taxation purposes, are to be considered as "investments in bonds" and not as "credits."

COLUMBUS, OHIO, November 19, 1923

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is hereby made of the receipt of the Commission's letter of recent date, requesting the opinion of this department, as follows:

"We herewith enclose a letter from Mr. John A. Zangerle, Auditor of Cuyahoga County, concerning the taxation of leasehold bonds held by an Ohio corporation in Cuyahoga County and kindly request that you advise the Commission whether such bonds are to be considered for the purpose of taxation as 'investments in bonds' or merely as 'credits'.

We are also enclosing a memorandum in support of the contention made by the attorneys representing the holders of the bonds."