

1128.

DEFAULTING CONTRACTOR—PROPER FOR HIGHWAY DEPARTMENT  
TO PAY BONDSMEN IN SPECIFIC CASE.

## SYLLABUS:

*Payment by the Department of Highways and Public Works to bondsmen of defaulting contractor for work done by such bondsmen, pursuant to Section 1209, General Code, considered and held proper on facts presented.*

COLUMBUS, OHIO, October 10, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date reading as follows:

“On January 22, 1926, the Department of Highways and Public Works entered into a contract with the Losey Engineering and Supply Company for the construction of I. C. H. No. 177, Section Ripley in Brown County. On September 20, 1926, the Department of Highways and Public Works drew their voucher No. 8953 to the order of the Losey Engineering and Supply Company covering estimate No. 9 in the amount of \$9,961.92 and of this amount the state paid the contractor \$7,471.44 and certified to John P. Stephan, Auditor of Brown County, the sum of \$2,490.48. This certification was made to Brown County under date of September 23, 1926, and a duplicate copy of such certification was made under date of October 6, 1926, this duplicate copy being requested by the County Auditor of Brown County. In some manner Mr. Stephan, the County Auditor of Brown County, honored both the original and duplicate certification and in consequence the Losey Engineering and Supply Company received and used an over payment of \$2,490.48.

On February 19, 1926, the Department of Highways and Public Works entered into a contract with the Losey Engineering and Supply Company for the construction of I. C. H. No. 459, Sections G and H, Highland County, and five estimates were drawn to the order of said contractor and paid. However, before both of the above contracts were completed the Losey Engineering and Supply Company under date of February 16, 1927, advised G. F. Schlesinger, Director of the Department of Highways and Public Works, that they were abandoning the contract for the improvement of Sections G and H, I. C. H. No. 459 in Highland County and on February 23, 1927, the Director made the following finding:

‘In my opinion as Director of Highways and Public Works the Losey Engineering and Supply Company of Kenton, Ohio, who have a contract with the Department of Highways and Public Works for the improvement of Sections G and H, I. C. H. No. 459, Highland County, have not carried same forward with reasonable progress and have abandoned, failed and refused to complete said work. I therefore hereby relieve said contractor of this work in order that the completion of this contract shall be pursued in accordance with the provisions of Section 1209 of the General Code of Ohio.’

In pursuance with the provisions of Section 1209 of the General Code of Ohio the Director of the Department of Highways and Public Works under date of February 23, 1927, advised the bondsmen of the Losey Engineer-

ing and Supply Company, H. M. Porter and W. B. Gramlich, that he had relieved the said Losey Engineering and Supply Company of the work on Sections G and H, I. C. H. No. 459, Highland County, and asked them to advise him within ten days whether or not they intended to enter upon and complete the work in question. The bondsmen, H. M. Porter and W. B. Gramlich, advised the Department that they did intend to enter upon and complete the work in question and in furtherance of this they contracted with Hill and Woodyard to complete the construction of I. C. H. No. 459, Sections G. and H, Highland County.

On June 10, 1927, the Department of Highways and Public Works drew their estimate No. 6 to the order of H. M. Porter and W. B. Gramlich (these gentlemen being the bondsmen for the Losey Engineering and Supply Company) in the amount of \$618.21 and same was approved and paid.

On August 23, 1927, the Department of Highways and Public Works drew their voucher No. 41612 for the seventh and final estimate covering the full amount of the contract price plus \$136.20 extra work and deducted \$2.77 for non-performance and this voucher is now being held pending an opinion from you as to whether or not the Department of Highways and Public Works should issue this voucher and the Auditor of State approve and pay said voucher owing to the fact that the Losey Engineering and Supply Company who are the original contractors on this work are in the hands of a receiver, and that the said Losey Engineering and Supply Company are also indebted to the County Auditor of Brown County in the amount of \$2,490.48 covering duplicate payment made on estimate No. 9 issued in the construction of I. C. H. No. 177, Section Ripley, in Brown County, which duplicate payment was received and used by the said Losey Engineering and Supply Company and said amount has never been returned to the said Auditor of Brown County.

I am attaching hereto various papers covering the forfeiture of the contract entered into with the Losey Engineering and Supply Company and the steps the bondsmen on the above contract have taken to complete this work in accordance with the provisions of Section 1209 of the General Code of Ohio, and I would kindly ask you to return all papers when same have served your purpose."

The contract with the Director of Highways and Public Works pertaining to the construction of I. C. H. No. 459, Sections G. and H, Highland County, was duly awarded to the Losey Engineering and Supply Company under date of February 19, 1926, for \$13,136.67, with H. M. Porter and W. B. Gramlich as sureties on the contract bond of said company.

From the various papers submitted by you relative to the contract, it appears that the contracting company entered on the performance of the work and partially completed the same: that the company received vouchers in payment therefor at various times aggregating \$8,271.00; that on February 16, 1927, the contractor abandoned the contract and accordingly so notified the Director of Highways and Public Works. It appears from the notice of abandonment served on the Director of Highways and Public Works that the company had previously been placed in the hands of a receiver, and the receiver endorsed on the written notice of abandonment the following:

"I hereby approve the foregoing.  
Horace Porter  
Receiver for The Losey  
Engineering and Supply  
Company."

Whereupon, on February 23, 1927, the Director of Highways and Public Works made the finding set forth in letter above quoted, such finding being on the same date duly served on Messrs. H. M. Porter and W. B. Gramlich, the sureties, in a letter, a copy of which is as follows:

“Enclosed find copy of order made by me relieving The Losey Engineering & Supply Company of work on Sections G. & H., I. C. H. No. 459, Highland County.

This written notice is being served upon you in accordance with Section 1209, General Code, as found in 108 Ohio Laws, Page No. 478. Therefore, please advise me within ten days from receipt of this notice whether you intend to enter upon and complete the work in question.

I am also sending copy of this letter and its enclosure to The Losey Engineering & Supply Company, Kenton, Ohio.”

The bondsmen, pursuant to said notice, advised the Department of Highways and Public Works that they did intend to enter upon and complete the work in question, and in furtherance thereof they contracted with Hill and Woodyard to complete the construction of I. C. H. No. 459, Sections G and H, Highland County. The contract having now been completed, the Department of Highways and Public Works has duly drawn its voucher No. 41612 covering the balance of the contract price in the amount of \$3,668.45, which voucher you state is now being held pending an opinion from this department as to whether or not it should be issued and approved and paid by the Auditor of State, owing to the facts (a) that the Losey Engineering and Supply Company is in the hands of a receiver, and (b) that said company is also indebted to the county auditor of Brown County in the amount of \$2,490.48 covering duplicate payment on estimate No. 9, issued in the construction of I. C. H. No. 177, Section Ripley, Brown County, which duplicate was requested by the county auditor of Brown County.

It appears that the receiver did not elect to complete the contract, and he could not have so elected without having been specifically ordered and directed so to do by the court appointing him. It does appear, however, that he approved the action of the contracting company when it abandoned the further performance of the contract.

Under and by virtue of the provisions of Section 1209, General Code, which reads, in part, as follows:

“If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the state highway commissioner shall make a finding to that effect and so notify the contractor in writing and the right of the contractor to control and supervise the work shall immediately cease. The state highway commissioner shall forthwith give written notice to the surety or sureties on the bond of such contractor of such action.

If, within ten days after the receipt of such notice, such surety or sureties or any one or more of them notify the state highway commissioner in writing of their intention to enter upon and complete the work covered by such contract, such surety or sureties shall be permitted so to do and the state highway commissioner shall allow them thirty days after the receipt of such notice in writing from them, within which to enter upon the work and resume the construction thereof, unless such time be extended by the state highway commissioner for good cause shown. \* \* \* If, after receiving notice of the action of the state highway commissioner in terminating the control

of the contractor over the work covered by his contract, the surety or sureties on such contractor's bond do not within ten days give the state highway commissioner the written notice provided for above, it shall be the duty of the state highway commissioner to complete the work in the following manner: \* \* \*

the sureties on the bond were obligated either to complete the unfinished work under the contract or pay the cost thereof, and had the option to take over the unfinished work called for in their principal's contract and complete it. This they elected to do, entering into a contract therefor with Hill and Woodyard.

The sureties through their contractor have completed the unfinished job of their principal and I am of the opinion that such work should now be paid for by the delivery of the voucher to the Auditor of State, on which he should draw his warrant in payment thereof.

You say that the auditor of Brown County requested a duplicate copy of a certification, the original of which had been certified to John P. Stephan, Auditor of Brown County, for the sum of \$2,490.48, which duplicate the auditor honored, and which resulted in the county officials of Brown County paying the Losey Engineering and Supply Company, on another contract, \$2,490.48 more than was coming to them. However, it does not appear that the sureties on the bond of the Losey Engineering and Supply Company had anything to do with the issuance and payment of the duplicate voucher, nor does it appear that the contractor had anything to do with the issuance and payment thereof. Indeed, for aught that appears, neither the contractor nor the sureties on the bond of the Losey Engineering and Supply Company knew anything about the issuance and payment of the duplicate voucher. I see no lawful reason why the money due to the bondsmen for completing the contract should not be paid.

The auditor of Brown County has a claim or cause of action against the Losey Engineering and Supply Company to recover the excess amount paid to said company on account of the issuing of the duplicate voucher, but that does not in any way preclude or prevent the payment of the balance of the money due and owing to the bondsmen for the completion of I. C. H. No. 459, Sections G and H, Highland County.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

1129.

CONTRACT—OF POLITICAL SUBDIVISION FOR CONSTRUCTION OF  
SYSTEM OF SEWERS—COST OF AUDIT MAY BE PAID AS PART OF  
COST OF IMPROVEMENT.

SYLLABUS:

*Political subdivisions joining in a contract for the construction of a system of sewers and a sewage disposal plant, under authority of Sections 6602-10, et seq., General Code, may in their discretion provide that, after the construction work is completed, settlement shall be made among the several contracting parties in accordance with an audit made*