1008

1. RESEARCH—DIRECTOR OF HIGHWAYS AUTHORIZED TO CONDUCT RESEARCH AND COOPERATE WITH ORGANIZATIONS CONDUCTING RESEARCH—HIGHWAY DESIGN, CONSTRUCTION, MAINTENANCE, MATERIAL, SAFETY AND TRAFFIC—SECTION 1178 G. C.
2. AUTHORITY INCLUDES POWER TO ENTER INTO CONTRACT.
3. CONTRACT ENTERED INTO BETWEEN THEN DIRECTOR OF HIGHWAYS AND ENGINEER TO COOPERATE WITH AUTOMOTIVE SAFETY FOUNDATION WITH CONCURRENCE AND APPROVAL OF UNITED STATES PUBLIC ROADS ADMINISTRATION, VALID AND LEGAL EXERCISE OF POWERS CONFERRED ON DIRECTOR—APPROVED.

SYLLABUS:

1. The director of Highways is authorized under Section 1178, General Code, as amended in 121 Ohio Laws, page 456, as a function of the Department of Highways to conduct research; and to cooperate with organizations conducting research, in matters pertaining to highway design, construction, maintenance, material, safety and traffic.

2. The authority referred to in Paragraph 1, supra, includes the power to enter into a contract for such purposes.

3. In light of the foregoing, a contract entered into on December 9, 1948 between the then director of Highways and G. Donald Kennedy contemplating the cooperation of the Automotive Safety Foundation and the concurrence and approval of the U. S. Public Roads Administration before any payments are to be made is a valid and legal exercise of the powers conferred on the director of Highways, and is approved.

Columbus, Ohio, September 22, 1949

Mr. T. J. Kauer, Director, Department of Highways
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion which in so far as is pertinent to the question you submit, is as follows:

"Under date of December 9, 1948, the then Director of Highways entered into a contract with G. Donald Kennedy,

under the terms of which the Automotive Safety Foundation of Washington, D. C., agreed to act as agent for the said G. Donald Kennedy. The contract became effective upon date of Public Roads Administration approval which was on December 30, 1948. A copy of said contract is enclosed herewith.

"It will be noted that the purpose of the contract is to cooperate with the Automotive Safety Foundation to make a study of all phases of highway needs and to carry on the work of the Ohio Highway Study Committee of the Ohio Post-War Program Commission. It will be observed that G. Donald Kennedy will assume the professionl engineering responsibility for the study and will present his findings in a bound report with appropriate graphics and 10,000 copies will be furnished to the State Highway Department. The contract sets forth numerous other obligations on the part of Mr. Kennedy and the Foundation.

"The Director of Highways agrees to cooperate by furnishing factual information, professional services, tabulation and basic information and other things as disclosed by the contract. The Director further agrees to furnish necessary office accommodations, stenographic and clerical assistance, transportation and telephone service in Columbus for the staff. The Director of Highways further agrees, in paragraph 7 of Article III, to make payment to the Foundation, as agent for G. Donald Kennedy, for the various items set forth in Sections 6 and 7 of Article II. It will be observed that the out-of-pocket expenditures provided for in said contract in Section 3 of Article IV, and necessary expenses of staff members is estimated at $39,000.00. In said paragraph, estimates of salary and expenses of staff members resident in Ohio is $35,000.00. The cost of publication of the report is estimated at $14,000.00 and the total cost of the work to be performed by G. Donald Kennedy is estimated to be not more than $88,000.00, based on general items shown in Exhibit "A" attached to the contract.

"Section 4 of Article IV provides that the time estimated by which the agreement is to be performed and the total cost may be increased as mutually agreed upon. * * *"

"Under date of March 14, 1949, I issued an invoice to the Auditor of State, being voucher No. 57430 for the sum of $2,203.43, a copy of which is attached hereto, for payment of the department's obligation under the terms of said contract for January, 1949; also on March 25, 1949, I issued to the Auditor of State voucher No. 57873 for the sum of $2,206.29 for payment of the Department's obligations under the contract for the month of February, 1949. The Auditor of State, as yet, has not honored said vouchers and raises among others, two questions. First, that the contract provides for an estimated amount to be

paid thereunder rather than a definite and stipulated amount. It will be noted, however, that the contract further provides that by mutual agreement the estimated expenditures may be extended. Secondly, the Auditor raises the question as to whether or not the contract is legal by reason of the contract's failure to definitely state the respective salaries of those representatives of the Foundation which are to be reimbursed.

"In view of the premises, your opinion is respectfully requested as to whether the instrument under consideration is a legal contract, and if so, is it the duty of the Auditor to draw warrants upon the vouchers submitted."

The first question which you ask is whether the contract is valid as providing "* * * an estimated amount to be paid thereunder rather than a definite and stipulated amount." The provisions of the contract set forth in Article IV, Paragraphs 1 through 5 inclusive are pertinent in considering this question and are as follows:

ARTICLE IV

"1. Expenditures incurred in the study shall be reimbursable only after the concurrence of the Public Roads Administration in the project and the execution of this agreement.

"2. Payment of monthly claims submitted in accordance with Article II, Sections (6) and (7) will be made by the party of the first part. The final claim shall be submitted within 90 days after completion of the contract and payment thereof will be made within 60 days thereafter.

"3. The actual out-of-pocket expenditures for salary, travel, subsistence and other necessary expenses of staff members with headquarters in Washington, D. C., is estimated at $39,000.00. Since it is not feasible for the party of the first part to pay directly the salaries and expenses of staff members resident in Ohio as originally contemplated such salaries and expenses, now estimated at $35,000.00 will also be paid by and reimbursed to the party of the second part through his agent, the Automotive Safety Foundation. The cost of publication of the report as provided in Article II, Section (3) is estimated at $14,000.00. The total cost of the work to be performed by the party of the second part under the terms of this contract, including the publication of the report, is accordingly estimated to be not more than eighty-eight thousand dollars ($88,000.00), based on the general items shown in exhibit A.

"4. The time estimated by this agreement and the total cost may be extended and increased respectively as mutually agreed upon and approved.

"5. The party of the first part reserves the right to rescind this contract upon written notice at any time within ninety days from its execution subject only to reimbursement for actual out-of-pocket expenses incurred by the party of the second part as described in Article II, Sections (6) and (7)."

It cannot be said that all contracts are rendered void even though they do not specify the price or amount of compensation for such service nor are they necessarily rendered uncertain or invalid. Your attention is invited to the case of In Re Estate of Butler 137 Ohio State, Page 96, in which the sixth paragraph of the syllabus is as follows:

"A written contract, whereby one party agrees to pay another for services theretofore rendered and for services to be thereafter rendered by the latter, which does not specify the price or amount of compensation for such services, is not void for uncertainty but is valid to secure the party rendering such services a reasonable compensation therefor covering any period prior to and 15 years after the execution of such contract."

Nor can this contract be held invalid solely on the ground that there is a want of legal advertising and receipt of competitive bids for it must be borne in mind that the contract calls for professional services of a highly-skilled nature.

Your attention is invited to the case of State, ex rel. Doria v. Ferguson, Auditor, 145 O. S. 12. This was an action in mandamus to require the auditor to honor a voucher issued in payment to an attorney for furnishing certificates of title on various parcels of real estate required by the Department of Highways. In that case, objection was made that the Director of Highways could not enter into a contract involving more than Five Hundred Dollars ($500.00) in absence of competitive bidding. The court overruled this objection and held as disclosed in the syllabus as follows:

"2. Although contracts relating to public projects, involving the expenditure of money, may not ordinarily be entered into by public officials without advertisement and competitive bidding as prescribed by law, an exception exists where the contract involves the performance of personal services of a specialized nature requiring the exercise of peculiar skill and aptitude."

In course of the opinion at Page 17, the court said as follows:

"While it is quite true that public contracts may not ordinarily be entered into without advertisement and competitive bidding, a

well recognized exception exists where the contract is for personal services of a specialized nature requiring the exercise of peculiar skill and aptitude. 43 American Jurisprudence, 770, Section 28; 142 A.L.R. annotation, 542. This exception has been recognized and applied in Ohio. Cudell v. City of Cleveland, 16 C.C. (N.S.), 374, 31 C. D., 548, affirmed without opinion, 74 Ohio St., 476, 78 N.E., 1123; 33 Ohio Jurisprudence, 638, Section 14. Compare State, ex rel Baen, v. Yeatman, Aud., 22 Ohio St., 546.

"The services relator was engaged to supply fall within the noted exception. They represented a necessary emergency undertaking demanding the immediate enlistment of trained persons thoroughly familiar with the public records and their use. See, also, 43 American Jurisprudence, 772, Section 31."

See also City and County of San Francisco et al v. Boyd, 17 Cal. (2d) 606, 110 Pac. (2d) 1036.

In the Doria case supra, the services were furnished by an attorney at law, while in the instant case, the services are those of an engineer. The practice of engineering is recognized as a profession under the laws of Ohio. It is too well settled to require the citation of authority that it is a skilled and learned profession requiring highly specialized education and experience.

In addition to that, the services called for in this contract are to be performed by those in a specialized branch of engineering, namely Conduct of Traffic and Highway Surveys.

Therefore, any objection that the contract was entered into without competitive bidding in light of the Doria case, supra, must fail and it is my opinion that competitive bidding was not required in entering into such contract.

As I have pointed out above, under the general law of contracts, absolute certainty is not required. I wish to point out that although the language above quoted from Article IV of the Contract here under consideration does set forth an estimate of the amounts required, the concluding words of Paragraph 3, Article IV, quoted above, place what must be regarded as an overall limit on the total amount. I refer to the concluding sentence of the said Paragraph 3, Article IV supra, which is as follows:

"* * *. The total cost of the work to be performed by the party of the second part under the terms of this contract, including publication of the report, is accordingly estimated to be not

more than eighty-eight thousand dollars ($88,000.00), based on the general items shown in exhibit A." (Emphasis added.)

Exhibit A which is referred to above, which is attached to and made a part of the contract is a detailed estimate of cost and after a list of all of the items, there is a footing which is labeled as follows: "Total—$88,000.00".

For the purpose of an encumbrance of funds, it may be said that this provides a definite figure. For the purpose of the certification to the federal government, this again furnishes a definite total figure. It is significant to note in Paragraph 1, Article IV, supra, that no payment whatever is authorized or required under the terms of this contract until there is a concurrence of the Public Roads Administration of the federal government in the project and the execution of this agreement. Your letter states that the federal government has approved this project and you have informed me that in the event it is carried out in accordance with its standards, the federal government will pay one-half of the total cost thereof.

Paragraph 4 of Article IV provides that the time for performance and the total cost of the project may be altered by mutual agreement. That is merely a contingency which may occur in the future and the agreement of both parties is required before such a change may be made. Any questions incident thereto properly should await the happening of such a contingency. It cannot be said that they affect the validity of the contract here under consideration.

It should also be noted that a further safeguard of the interests of the State is contained in this contract. I refer to Paragraph 5 of Article IV, supra, wherein the Director of Highways reserved the right for 90 days to give written notice to rescind the entire agreement.

In that event, the state is liable only for the reimbursement for actual expense incurred prior to the effective time of such rescinding of the contract.

In light of the foregoing, it is, therefore, my opinion that the contract is sufficiently definite and certain as to the maximum or total amounts required to be paid thereunder and it cannot be held to be invalid for indefiniteness or uncertainty.

Your second question is whether or not this contract is valid for the reason that it does not definitely state the respective salaries of those representatives of the Foundation for which reimbursement is to be made.

This question goes directly to the power of the Director of Highways to enter into such a contract and it, therefore, becomes necessary to examine the sources of that power. Your attention is invited to pertinent provisions of Section 1178 of the General Code as amended, effective October 11, 1945 (121 Ohio Laws, Page 456). That Section reads in part as follows:

> "The functions of the Department of Highways shall be * * * to conduct research and *to cooperate with organization conducting research in matters pertaining to highway design, construction, maintenance, material, safety and traffic;* * * *."
>
> (Emphasis added.)

I wish to call your attention to the fact that the language above quoted which is underscored was completely new to the Highway law. It was added along with other changes at the time of the amendment made in 1945.

The Legislature, in adding this language to a section of the Highway law dealing with the functions of the Department of Highways, had something definite in mind. In my opinion, it recognized the importance of research with reference to highway design, construction, maintenance, material, safety and traffic, and it specifically authorized the Director of Highways to conduct such research as he deemed useful along those lines. Likewise, it recognized the value of cooperation between the Director of Highways and "organizations conducting research in matters pertaining to any of these subjects."

Can it be said that the Legislature added this new language without intending that it should be given any effect? The well established rules of statutory interpretation forbid such a conclusion. New language added to a statute must be given its full force and effect.

It is my opinion that the Legislature recognized the necessity for the assembling of scientific and statistical data as an aid to the development of the highway system. Proper planning has for years been recognized as a valuable aid in all types of permanent improvement, but we are not here required to justify the wisdom of the power conferred for it is sufficient if the powers are in fact conferred. It, therefore, becomes pertinent to inquire as to what power was conferred by this language just above quoted upon the Director of Highways and whether or not the contract under consideration here represents a proper exercise of such powers.

The word "contract" is not set forth in the language quoted from Section 1178 supra. What we do find is a specific grant of authority to the Director of Highways to conduct research in the field here under consideration and "to cooperate with organizations conducting research" in such fields. As to the meaning of the word "cooperate", Webster's new International Dictionary gives the following definition:

> "To act or operate jointly with another or others; to concur in action, effort, or effect."

Among the synonyms set forth by the above authority are "contribute," "agree", and "combine.".

Throughout the contract under consideration there are repeated references to services which are to be performed by persons in the employ of the Director of Highways. The engineering responsibility is placed upon G. Donald Kennedy, party of the second part, and certain responsibilities are placed upon the Automotive Safety Foundation. As heretofore pointed out, the concurrence and approval of the U. S. Public Roads Administration is required before any reimbursement is permitted under the contract and this already has been given. Thus, it appears, that when considered in light of the entire contract, a number of agencies and individuals must cooperate before the project authorized by the contract may successfully operate.

As above pointed out, the statute does not expressly authorize the execution of a contract but it does empower the Director of Highways to accomplish the result provided for in the statute. Can it be said, therefore, that the power to enter into such a contract is necessarily implied from the language used?

In 46 Corpus Juris 1032, in discussing implied powers, there appears the following:

> "* * *. In addition to the powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may fairly be implied therefrom. * * *".

In State v. Hildebrant, 93 O. S. 1, the court in the fourth paragraph of the syllabus held:

> "Where an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it,

> the command carries with it the implied power and authority necessary to the performance of the duty imposed."

In the case of Doyle v. Doyle, 50 O. S. 330, the first paragraph of the syllabus reads in part as follows:

> "That which is plainly implied in the language of a statute is as much a part of it as that which is expressed. * * *"

It is also clear that where a power is granted it will not fail because the detailed method as to how it is to be exercised has not been set forth. In state, ex rel. The Attorney General v. Morris, et al., 63 O. S. 496, Judge Burket in his opinion at Page 512 stated:

> "* * * And if it should be found that certain things are authorized to be done by the board of revision, and no statute can be found prescribing *the exact mode of performing that duty or thing,* the presumption would be that the general assembly intended that it might be performed in a reasonable manner, not in conflict with any law of the state. This principle was recognized by this court in Jewett v. Railway Co., 34 Ohio St., 601, 608, where the following is found in the opinion: 'Where authority is given to do a specific thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner.' * * *"

In 33 Ohio Jurisprudence, page 630, it is said:

> "* * * The general rule is that a grant of power carries with it such implied power as is necessary to make the express power effective * * *."

And in the same volume at page 629 there appears the following:

> "It is the acknowledged rule—in some instances to be gathered from implication rather than from direct language—that the power of a public authority, board, or officer to contract must be found in the provisions of the Constitution or statutes."

Does the failure of the statute here under consideration to expressly use the word "contract" invalid this contract. In my opinion it does not. How else could the co-operation contemplated by the General Assembly be made effective without an agreement of some sort. The statutes relating to the Department of Highways make frequent reference to the term "cooperate". In those statutes dealing with the relationships of the

Highway Department to the federal government, the term is frequently used and the practice, I am informed, over the years has been for the Department of Highways to enter into a contract with the federal government. That the power to contract may be implied is borne out by the case of State, ex rel. Doria v. Ferguson, Auditor, supra. It should be born in mind that there was no express authority for the Director of Highways to enter into a contract with the relator in the Doria case supra. Notwithstanding this fact, the court approved the contract and at Page 17 of the opinion wrote:

> "In our opinion there can be little doubt as to the general right of the Director of Highways to enter into an agreement of the type in issue. Under Section 1178, General Code, the Department of Highways is charged with the duty of constructing state highways. Section 1201, General Code, empowers the Director to appropriate property for such purpose. He is authorized under Section 1188, General Code, to pay expenses in connection with appropriation proceedings out of funds available for highway construction. And Section 1228-2, General Code, specifically authorizes him to cooperate with the United States Government in carrying out the provisions of the Defense Highway Act of 1941 and to pay expenses relating thereto from available funds."

It will be noted that in the Doria case, supra, no fixed rate of compensation per hour or day or month was fixed but merely a minimum sum of $20.00 per certificate with a higher rate for more involved and complicated ones. Likewise, Doria had been authorized to provide skilled assistants and so far as appears from the report of the case, their compensation was not fixed. The very nature of some operations renders difficult an advance determination of all of the details, but in this case, in the absence of a modification of the agreement, an upper limit to the cost is fixed and in my opinion the contract as written is sufficient and in light of the authorities cited constitutes a valid and binding contract.

In conclusion, therefore, it is my opinion that:

1. The Director of Highways is authorized under Section 1178 General Code, as amended in 121 Ohio Laws, Page 456, as a function of the Department of Highways to conduct research; and to cooperate with organizations conducting research, in matters pertaining to highway design, construction, maintenance, material, safety and traffic.

2. The authority referred to in Paragraph 1, supra, includes the power to enter into a contract for such purposes.

3. In light of the foregoing, a contract entered into on December 9, 1948 between the then Director of Highways and G. Donald Kennedy contemplating the cooperation of the Automotive Safety Foundation, and the concurrence and approval of the U. S. Public Roads Administration before any payments are to be made, is a valid and legal exercise of the powers conferred on the Director of Highways, and is approved.

Very truly yours,

HERBERT S. DUFFY,
Attorney General.