

Such act obviously provides that marines who were discharged *for fraudulent enlistment on account of misrepresentation of their age* may obtain a certificate from the Secretary of the Navy showing such marines are held and considered to have been honorably discharged; however, this certificate may be obtained only if the marines' services otherwise were such as would have entitled them to a discharge *under honorable conditions*. In the facts as disclosed by your communication, it does not appear that the marine was discharged *for fraudulent enlistment on account of misrepresentation of his age*, although it does appear that he enlisted while under age. In other words, section 204 of Title 34 would not appear to have any application, as the ex-marine's services, being "undesirable, by reason of inaptitude", were not evidently "otherwise such as would have entitled him to a discharge under honorable conditions," within the provision of such section.

In this connection, it is to be noted that in the official roster of Ohio Soldiers and Marines, Vol. 22 "Marines", published pursuant to an act of the 83rd General Assembly, passed April 17, 1919 (108 O. L. Pt. 1, page 191), there are shown about fifteen discharges of marines which indicated through the service certificate from which the information was taken that the particular marine was discharged on grounds of "minority", "concealing minority," "fraudulent enlistment," and the like. However, from the portion of the discharge presented by the ex-marine which you refer to in your communication, no such grounds appear. It is a question of fact to be determined whether or not the service of the ex-marine in question was "undesirable by reason of inaptitude" for such cause of concealment of minority or fraudulent enlistment alone or for some further cause, and under the doctrine of the cases set out, *supra*, the burden of proof is upon the claimant to show that a discharge is an "honorable" one within the provisions of Section 204, Title 34, United States Code Annotated, *supra*.

I am therefore of the opinion, in specific answer to your question, that:

1. An ex-service man who was discharged from the United States Marine Corps or the United States Navy during the period between April 6, 1917 and November 11, 1918, solely on the ground of fraudulent enlistment on account of misrepresentation of his age, if his service was otherwise such as would have entitled him to discharge under honorable conditions, is by virtue of Section 204, Title 34, United States Code Annotated, "honorably discharged" within the meaning of section 486-10, General Code.

2. Such discharge reading "Discharged as undesirable, by reason of inaptitude," is not an "honorable discharge" within the meaning of section 486-10, General Code, where other elements caused such discharge in addition to such fraudulent enlistment.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4262.

CONTRACT—HOUSE BILL #102 APPLIED TO CERTAIN CONTRACTS ENTERED INTO BY DIRECTOR OF HIGHWAYS.

SYLLABUS:

Applicability of House Bill No. 102 of the 90th General Assembly to certain contracts entered into by the Director of Highways discussed.

COLUMBUS, OHIO, May 14, 1935.

HON. JOHN JASTER, JR., *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"Directing your attention to House Bill No. 102, passed by the Ninetieth General Assembly and effective March 9, 1935, we desire your opinion on the following questions:

1. In the case of the contract let by the Department, such as a contract for the construction of a road, where part of the contract is sublet, is it sufficient for this Department to have on file one affidavit for each sub-contractor, or conversely, are affidavits required from sub-contractors at the time of the submission of each estimate by the principal contractor?

2. Does House Bill No. 102 give this Department authority to reject a low bid when accompanied by a properly executed affidavit, which in all other respects complies with House Bill No. 102 and other existing law, solely on the ground that a private individual or an officer of the code authority for the particular industry, has, orally or in writing, stated that the low bidder has violated or failed to comply with provisions of the code?

3. Does House Bill No. 102 require this Department to investigate and determine the truth of the matters contained in such compliance affidavits which appear on their face to be entirely regular and proper?

4. Is the Department required to obtain affidavits from railroad companies in connection with bills for freight, where the charge is incurred pursuant to a contract for the purchase of materials F.O.B. point of manufacture; under the same circumstances, would an affidavit be required where the delivery was made by truck?

5. Where a contractor agrees to furnish certain materials and pay the delivery charges to the point where they are to be used, is the contractor required to obtain an affidavit from the railroad company furnishing such transportation service? Would an affidavit be required if the transportation was by truck?

6. Is the Department required to obtain affidavits from companies furnishing electric light, gas and water?

7. Does House Bill No. 102 contemplate the furnishing of affidavits from material men from whom sub-contractors on a state contract purchase their materials?

8. Referring to the form of affidavit set forth in House Bill No. 102, where it provides:

'that said affiant or his or its agent duly listed for taxation in the State of Ohio in the year 193—, of property which said affiant was required by (if affidavit is filed on or before March 1, 1933, insert figure "4", if thereafter, insert the figure "5") a law of the State of Ohio to list;'

what figure should be inserted in the blank space therein provided for affidavits filed on or after March 9, 1935."

I shall consider your inquiries in the order in which they are presented.

1. Where a contract is let by the Department of Highways and part of such contract is subsequently sublet, it is sufficient for your Department to have on file one affidavit from each sub-contractor. It is not necessary that affidavits be furnished from sub-contractors at the time of the submission of each estimate by the principal contractor, if they have previously submitted them. Section 5 of the act in question prescribes that "such affidavit or affidavits * * * shall be filed by the principal contractor with the public agency prior to the payment of any compensation to such contractor in connection with such contract." There is nothing in the plain language of this Section

which makes a contract severable; and a single affidavit from a sub-contractor for a single contract would seem all that is necessary. To hold otherwise, would be to enlarge the phrase, "payment of any compensation", and to extend the meaning of the language beyond its obvious intent.

2. There is no authority contained in House Bill No. 102 which gives your Department authority to reject a low bid when accompanied by a properly executed affidavit, which in all respects complies with the provisions of this act and other existing law, solely on the ground that a private individual or an officer of the code authority for the particular industry, has protested that the low bidder has violated, or failed to comply with, provisions of the code of fair competition for such industry. The requirement is that a prescribed affidavit be submitted; no burden is placed upon the public agency to look behind the affidavit and investigate the truthfulness of the statements made therein. The legislature has provided, in Section 8 of the act, against any false statement in such an affidavit. However, I do not wish to be understood as saying that where there is actual prior knowledge on the part of the public agency of the falsity of a statement or statements made therein, it may not then become the duty of the public agency to reject such purported affidavit.

3. The answer to your question 2 is determinative also of question 3.

4. Your department is not required to obtain affidavits from railroad companies in connection with bills for freight, where the charge is incurred pursuant to a contract by you for the purchase of materials F.O.B. point of manufacture. The haulage is no part of the agreement for the purchase of materials or supplies. The definition of "public contract" as used in Section 1 of the act is:

"An agreement for the construction, alteration or repair of any public works or for the purchase of materials or supplies for any public use, or for the use of any institution supported wholly or in part by public funds."

Therefore, it is believed that the situation, concerning which you ask, is sufficiently covered by the affidavit required from the supplier of the materials.

You inquire, also, whether under the same circumstances, an affidavit would be required where delivery is made by truck. The manner of making the delivery is not controlling, where your purchases are made F.O.B. point of supply. The principle involved is identical, whether the carriage is by railroad or by truck.

5. Where a contractor agrees to furnish certain materials and to pay the delivery charges to the point where they are to be used, he should be held responsible for compliance with the statute. If the seller stipulates in his agreement that he is to deliver the materials or supplies, or procure them to be delivered, at the point of use, unlike an F.O.B. purchase by the public agency, this transaction, is within the scope of the act, for delivery becomes one of the terms of the contract. Then, in order to make performance, the supplier must have the service of transportation.

There may be considerable room for doubt and argument as to whether it was ever the legislative intent to include railroad transportation in the term "services" as employed in Section 3 of the statute. The principal contractor, engaging railroad transport, is simply procuring the same at the rate duly fixed by public authority. To a certain extent, the same is true of the trucking industry. But in this field private carriers are also to be found, and they are subject to a code of fair competition. However, the carrier, whether railroad or trucker, would seem to be required to furnish to the principal contractor an affidavit under the statute, the difference lying in the certification, as that of the railroad would be more limited in its application.

This conclusion is reached from an examination of Section 5 of the act, the first sentence of which reads as follows:

"Each person who, during the period prescribed in section 2 of this act, shall have entered into a public contract with a public agency (such person being hereinafter designated as 'principal contractor') shall, before purchasing or procuring, or agreeing to purchase or procure from any other person any materials, supplies, or services (other than labor) with which to perform the terms of such public contract, secure from each such other person an affidavit certifying to the same facts, with respect to such other person, as are prescribed by section 2 of this act with respect to the principal contractor."

The entire clause, ending with the parenthetical words, "other than labor" is modified by the language "with which to perform the terms of said public contract". It is a question as to how far this modification reduces the practical application of the statute. It would seem that unless the performance of the contract necessitates the contractor to procure certain services, they are not within the purview of the statute and, where the service is merely voluntary or one of convenience to the contractor, affidavits are not required.

6. Although courts have held that electric current, gas and water are personal property, capable of delivery and the subject of larceny, the conclusion can hardly be escaped that, when your department contracts for the transmission of the same, over wires or through pipes, you are engaging a *service* primarily, rather than merely purchasing *materials* or *supplies*. These words as used in the statute must be fairly construed and restricted to mean that which may be purchased for the uses as set forth in the paragraph defining public contracts, applying the reasonable and ordinary rules of interpretation to statutes of this character.

Neither "materials" nor "supplies" seems as broad as the technical concept of personal property. An unfortunate result might follow, if an attempt should be made to draw the line, for the purpose of this act, between public utilities involving the transmission of electricity, gas and water, and those involving transport and communication. However these elements may be regarded in other fields of the law, here the evident objectives of the statute, and the subject to which it relates, apparently require that, under the conditions raised in your question, the furnishing of gas, water and electricity to your department be considered in the light of performing a service.

If such service be required as part of the contract for the construction, alteration or repair of a public work, or where furnished to, and required by, principal contractors, dealing with a public agency, affidavits should be secured and filed with the public agency.

7. House Bill No. 102 does not contemplate the furnishing of affidavits from materialmen from whom sub-contractors on a state contract purchase their materials. Materialmen are not mentioned as such in Section 5 and its language can not be broadened to embrace them. The public agency and the principal contractor have no direct contractual relationship to the agent or supplier of the sub-contractor and are not in privity with such agent or supplier. The public agency's duty to enforce this law, or see to it that it is enforced, does not go further than the person with whom the public agency deals and with whom its principal contractor deals. Although House Bill No. 102 may be said to have been designed as a remedial statute, it carries penal provisions and must be strictly construed.

8. It is apparent that a typographical inadvertency is present in the affidavit, the form of which is set forth in Section 6 of the act, for the last parenthetical paragraph sets forth the numerals "1933" as a controlling date, whereas the act was not introduced into the General Assembly until 1934 and did not become effective until March 9, 1935.

It is my opinion that, in sensible practical application, the date which should be inserted in the affidavit is the last required listing date, prior to the submission of said affidavit, for taxation of property in this state. The statute provides that the form used shall be "substantially" as therein set forth.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4263.

APPROVAL, BONDS OF TWIN RURAL SCHOOL DISTRICT, ROSS COUNTY,
OHIO, \$38,800.00 (UNLIMITED).

COLUMBUS, OHIO, May 14, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4264.

APPROVAL, BONDS OF RUSHSYLVANA VILLAGE SCHOOL DISTRICT, LO-
GAN COUNTY, OHIO, \$74,000.00 (UNLIMITED)

COLUMBUS, OHIO, May 14, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4265.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS
RESIDENT DISTRICT DEPUTY DIRECTOR OF HIGHWAYS—GROVER C.
SMITH.

COLUMBUS, OHIO, May 14, 1935.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a bond, in the penal sum of \$5,000.00, with surety as indicated, to cover the faithful performance of the duties of the official as hereinafter named:

Grover C. Smith, Resident District Deputy Director in Noble County—
American Surety Company of New York.

Said bond has undoubtedly been executed pursuant to the provisions of sections 1133 and 1182-3, General Code. Such sections provide, in so far as pertinent here:

Sec. 1183.

" * * * Such resident district deputy directors shall * * * give bond in the sum of five thousand dollars. * * * "