

OPINION NO. 76-061

Syllabus:

1. The discretion vested in the Director of Transportation by R.C. Chapter 5521 and 5531 to enter into agreements for co-operation in the expense of highway projects includes the discretionary authority to determine manner and time of co-operative contract payments. In the exercise of this discretion, agreements for such cooperation may specify dates when payment is due or may provide that payment shall be due at the requisition of the Director.

2. Payment under the cooperative agreements authorized by R.C. Chapters 5521 and 5531 becomes due and payable to the state either as specified therein or at the requisition of the Director. Once payment becomes due and payable to the state, the provisions of R.C. 115.10 apply in respect to the collection of such claims.

To: Richard D. Jackson, Director, Dept. of Transportation, Columbus, Ohio
By: William J. Brown, Attorney General, August 31, 1976

I have before me your request for my opinion in respect to the discretionary authority granted by R.C. Chapters 5521 and 5531 to the Director of Transportation in executing agreements for cooperation in the expense of projects affecting state highways. Your inquiry concerns the applicability of R.C. 115.10 to cooperative contracts executed under the authority of these chapters. Your questions read as follows:

1. Does R.C. 115.10 impose a mandatory requirement that the Director of Transportation certify as delinquent to the Auditor of State any and all claims, issued on contracts entered into with appropriate agencies of the Federal government pursuant to Chapter 5531 of the Ohio Revised Code, Counties, Municipal corporations or other political subdivisions or special districts in this state pursuant to Chapter 5521 if he fails to collect such claim within thirty days after it comes into his possession? Or in the alternative does the Director of Transportation have the discretionary authority to enter into the contracts containing the provision that the amount(s) shall be paid by the proper officials upon the requisition of the State Transportation Director under provision of Chapter 5521 of the Ohio Revised Code?

2. Does the Department of Transportation have the discretionary authority to permit the deferral of requisition when in the judgment of the Department of Transportation, such deferral is in the best interest of the traveling public?

R.C. Chapter 5521 provides for cooperation between the state and its political subdivisions in the expense of projects undertaken by the Director of Transportation which affect state highways. R.C. Chapter 5531 provides for similar cooperation between the state and the federal government. R.C. 5521.01 specifies that a municipal corporation may enter into an agreement for cooperation in the expense of a project affecting a state highway within its boundaries and sets forth the procedure to be followed in the formation and execution of such an agreement. R.C. 5521.02 to 5521.05 set forth similar authority and procedures applicable to county cooperation in the expense of such projects undertaken by the Director of Transportation. R.C. Chapter 5531 grants to the Director the authority to enter into agreements with the federal government for federal cooperation in the expense of a variety of road and highway projects.

Cooperation by either a municipality or a county as set forth in these sections requires the express approval of the Director. R.C. 5521.01, 5521.05 and 5521.07 grant broad discretion to the Director in determining whether such cooperation shall occur. R.C. 5521.01 specifies that the Director may pay the entire cost of such projects or any part thereof from state funds. R.C. 5501.31 specifically provides that the Director may undertake such projects affecting state highways with or without the cooperation of any municipal corporation or board of county commissioners.

For further discussion of the Director's authority to proceed where consent to such an undertaking is refused by a municipal corporation, see R.C. 5521.01 and Village of Fairlawn v. Preston, 2 Ohio St. 2d 165, (1965); City of Lakewood v. Thormeyer, 171 Ohio St. 135, (1960).

Where the Director determines that a proposal for cooperation in the expense of such a project made by a municipal corporation or board of county commissioners should be approved, the statutory authority granted to him by R.C. 5521.01, 5521.05 and 5521.07 is equally broad in determining the terms of any agreements entered into for this purpose. Improvements undertaken cooperatively shall be constructed under the sole supervision of the Director.

With respect to the time at which a municipal corporation's share must be paid under such a cooperative agreement, R.C. 5521.01 states in pertinent part:

"The proportion of the cost and expenses payable by the municipal corporation shall be paid by the proper officers thereof, upon the requisition of the director, and at such times during the progress of the work as may be determined by him, or as may be otherwise provided by law."

Where a county enters a cooperative agreement or joins with a municipal corporation in such an agreement, R.C. 5521.05 provides in similar language for the payments upon the requisition of the Director.

The prepayment of a subdivision's share under an agreement to cooperate may be required by the Director pursuant to R.C. 5521.07. Again this is a determination which lies within the discretion of the Director. That section reads in part:

"In all cases in which the director of transportation desires to cooperate with the board of county commissioners or with any municipal corporation in the establishment, construction, reconstruction, widening, maintenance, repair, railway grade crossing elimination, or other improvement of any section or portion of a state highway, the director may as a condition, require such county or municipal corporation to provide the portion of the cost of such improvement which it proposes to furnish, and to pay the same into the hands of the treasurer of state as a state depository and custodian, to be by him kept and disposed of as authorized in section 5521.08 of the Revised Code. Such requirement may be prescribed by the director at any time after the board or legislative authority of a municipal corporation has, by resolution, proposed such cooperation, and when such requirement is prescribed, the director may not proceed with the improvement upon the cooperative basis proposed until such requirement is met." (Emphasis added.)

R.C. Chapter 5531 authorizes the Director of the Department of Transportation to cooperate with the federal government or to accept federal funds for various highway and road projects. The Director is specifically authorized to enter agreements with federal officials for these purposes. R.C. Sections 5531.01, 5531.02, 5531.04, 5531.05, 5531.07. In addition R.C. 5531.03 provides for cooperation between political subdivisions and the Department of Transportation in accordance with procedures available to the Director under R.C. Chapter 5521. The necessary inference from the above sections is that the Director is given broad discretion to determine by agreement the times at which payments under those sections become due.

The discretion granted to the Director by these statutory provisions reflects his general authority as the contracting authority to act on behalf of the traveling public and his responsibility to promote and provide the best available road and highway facilities. In respect to the cooperative undertakings authorized by R.C. Chapters 5521 and 5531, the practical considerations of highway improvements require considerable discretion both in formulating and executing cooperative agreements in that a variety of factors, including the diverse funding sources available to cooperating subdivisions, affect the total cost and time schedules of such projects.

To this end, the General Assembly has specified in R.C. Chapters 5521 and 5531 that payments under the cooperative agreements executed thereunder may be "requisitioned" at such times as the Director determines. R.C. 5521.01, R.C. 5521.05.

R.C. 115.10 requires state officers and agents in possession of a claim, which is due and payable, to demand payment thereof. When payment is not made in thirty days he is required to certify it to the Auditor of State. For the purposes of R.C. 115.10 payment under

cooperative agreements, authorized by R.C. Chapters 5521 and 5531, becomes due and payable at the requisition of the Director. Thus, the provisions of R.C. 115.10 become applicable only when requisition has occurred.

As discussed above, R.C. 5521.07 specifies that if the Director requires prepayment of the cooperating subdivision's estimated share of improvement expense, he may not proceed with an improvement project until such payment has been made to the state. I am, however, aware of no statutory provision which limits the Director's authority in determining that such a requirement shall be made or that requisition shall be made at specific times during the course of such contracts.

I must, therefore, conclude that the question of when to requisition is left to the informed discretion of the Director. This decision, of course, must be made in light of the Director's general duties and responsibilities to the traveling public. The statutory authority granted to the Director includes the authority to defer requisition where he determines such deferral is in the public interest.

It should be noted that it is the cooperative contract itself which requires that requisition shall occur. As a result of that contract a claim arises in favor of the state, which becomes due and payable upon requisition by the Director. The Director has no authority to compromise or settle a claim of the state by postponing requisition indefinitely. Such an action would be an abuse of the Director's discretion under R.C. Chapter 5521.

However, the Director is given the authority to determine the manner and time of payment under a cooperative contract. It is clear then that the Director could enter a contract which specifies that payment by the cooperating political subdivision shall be due, for example, two years following completion of work on the improvement. Similarly, when the contract leaves the time of payment to the discretion of the Director, he may defer requisition until after completion of an improvement where such deferral constitutes an exercise of informed discretion based on the Director's duties and the public interest.

It is my understanding that invoices or estimated statements of account are, in practice, sent by the Department to co-operating political subdivisions at varying times during the course of co-operative highway projects. From information you have supplied it is apparent that these invoices/statements serve a critical accounting function and, therefore, cannot factually be construed to be a "requisition." It is also my understanding that in the few situations where a formal "requisition" may become necessary, communications between the contracting parties (for example, the Director and the officers of a municipality) are clearly understood to be the formal and final demand for payment.

Once requisition has occurred, payment under cooperative agreements becomes due and payable to the state. Under the terms of R.C. 115.10, when an officer or agent of the state comes into possession of a claim due and payable to the state, he must demand

payment thereof. If payment is not made within thirty days, the officer or agent involved must certify the claim to the Auditor of State.

The provision of R.C. 115.10 apply to payments under cooperative agreements authorized by R.C. Chapter 5521 and 5531 once payment thereunder becomes due and payable to the state, either as specified by the agreement itself or upon the requisition of the Director. It is, therefore, my opinion, and you are so advised that:

1. The discretion vested in the Director of Transportation by R.C. Chapters 5521 and 5531 to enter into agreements for co-operation in the expense of highway projects includes the discretionary authority to determine manner and time of co-operative contract payments. In the exercise of this discretion, agreements for such cooperation may specify dates when payment is due or may provide that payment shall be due at the requisition of the Director.

2. Payment under the cooperative agreements authorized by R.C. Chapters 5521 and 5531 becomes due and payable to the state either as specified therein or at the requisition of the Director. Once payment becomes due and payable to the state, the provisions of R.C. 115.10 apply in respect to the collection of such claims.