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RIGHTS-OF-WAY, APPRAISAL—§5501.11 OR 5521.06 RC—CONTRACT WITH INDIVIDUAL OR FIRM—NO REQUIREMENT FOR COMPETITIVE BIDDING . . .

SYLLABUS:

Where the director of the department of highways undertakes the purchase or appropriation of easements for highway purposes under the general authority of

Section 5501.11, Revised Code, or Section 5521.06, Revised Code, he may, as an incident of and to facilitate such acquisition, cause an appraisal to be made of the real property involved and may contract with any person or firm for the purpose of securing such specialized appraisal service. Such services, requiring peculiar skill and aptitude, may be contracted for without competitive bidding.

Columbus, Ohio, July 3, 1957

Hon. George J. Thormyer, Acting Director
Department of Highways, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"With respect to the Department's plans to utilize the services of private firms or individuals for the appraisal of real property in connection with the acquisition of rights-of-way for the Interstate Highway Program, it is possible that some question may be raised as to the Department's authority or power to contract for such services.

"I, therefore, request an informal opinion as to whether or not the Department of Highways has authority to enter into contracts with individuals or firms for services pertaining to the appraisal of real property without the necessity of taking competitive bids for such services which are of a specialized nature requiring peculiar skill and aptitude."

The question at hand is virtually identical with that which was before the court in Doria v. Ferguson, 145 Ohio St., 12. The syllabus in that case is as follows:

"1. One who furnishes to another a certificate or memorandum containing a statement of the substance of documents or facts appearing on the public records, which affect the title to real estate, without expressing any opinion as to the legal significance of what is found or as to the validity of the title, is not engaged in the practice of law.

"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 the statement of the case in that decision there is the following language, page 13:

"It was agreed that relator was to receive a minimum sum of \$20 per certificate with a higher rate for more involved and complicated ones. The relator, *with skilled assistance which he had been authorized to procure*, promptly prepared and delivered 185 certificates covering some 265 separate parcels of real estate."

(Emphasis added)

In Judge Zimmerman's opinion in the Doria case he said, pages 16, 17:

"The second contention of the respondent is that if the services furnished by the relator did not constitute the practice of law, the Director of Highways lacked authority to make an agreement with relator respecting the certificates, at a cost in excess of \$500, and in the absence of competitive bidding (Section 1206 et seq., General Code); and that House Bill No. 227, 95th General Assembly, being the General Appropriation Act for the biennium 1943-1944, contains no appropriation of any money to the Department of Highways for the preparation of certificates of title.

"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; 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."

On the point of the general authority of the director to contract for these services Judge Zimmerman said, pages 17, 18:

"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."

This latter language quite plainly suggests that in the exercise of his powers to construct roads, and to carry out projects incidental thereto, the director has general power to proceed by contract rather than by force account, *i.e.*, by the purchase of materials and the use of public employees to perform all necessary personal services.

All of the statutes cited above as providing the basis for such general authority are found without pertinent substantive change in Sections 5501.01, 5519.01, 5519.04, and 5531.04, Revised Code. Moreover, in Sections 5501.11 and 5521.06, Revised Code, general authority is given the department to purchase or appropriate road easements. We may accordingly conclude that the Doria decision would apply in the case at hand unless it has been impliedly overruled by State, *ex rel.* Stilson v. Ferguson, 154 Ohio St., 139, for I am unable to distinguish between (1) a contract with an individual to provide personal services through his own employees, and (2) a similar contract with a partnership or corporation.

In the Stilson case the syllabus reads:

"1. The provision of Section 1178-17, General Code, authorizing the state director of highways to "employ such assistants as are necessary to prepare plans and surveys" for the improvement or construction of highways must be construed by giving the words employed therein their ordinarily accepted meaning and significance.

"2. The phrase, "employ such assistants," as used in Section 1178-17, General Code, does not authorize the director of highways to enter into a contract with a firm of professional engineers, delegating authority to such firm to make surveys, plans and contract specifications for the improvement of a state highway, for which service compensation is to be a fee based upon a specified percentage of the cost of the proposed highway improvement."

In the opinion in that case by Judge Matthias we find this statement, pages 142, 143:

"Both parties concede that the determination of this question requires the interpretation of Section 1178-17, General Code, as

in effect at the time of the execution of the contract. This section then read, and now reads, as follows:

'The director also may employ such assistants as are necessary *to prepare plans and surveys*. Compensation paid for the preparation of plans, surveys and specifications shall be regarded as a part of the cost and expense of the improvement for which they were made and the cost thereof shall be paid from funds set aside for such improvement.

'The director also may appoint additional clerks and stenographers, and such other engineers, inspectors and other employees within the limits of the appropriation as he may deem necessary to fully carry out the provisions of this act. All employees and appointees hereinbefore mentioned in this act shall, in addition to their salaries, receive their actual necessary traveling expenses when on official business.' " (Emphasis added)

The actual scope of the ruling in this case may be noted by the following statement, at page 149, in the opinion:

"We hold, therefore, that the word, "assistants," as used in Section 1178-17, General Code, was used by the General Assembly in its ordinary sense and does not include the employment of a firm on a contract basis to carry out the preparation of plans and surveys for the highways of this state."

Because the Stilson contract did relate solely to "plans and surveys," it is evident that the parties, and the court, regarded this special statutory provision as controlling, and thus found no occasion to inquire whether the "general right" of the director, mentioned by Judge Zimmerman in the Doria case, could be found in the general statutes which he cited as authority therefor. This is quite evidently the reason why the court failed, in the Stilson case, to discuss, or even to notice, the Doria decision, and the reason why the parties therein failed to mention the Doria case in their briefs.

Because we are not here concerned with any special statutory provision similar to that in Section 1178-17, General Code, limiting the right of the director to the use of "assistants" in the acquisition of road easements, or any incidental phase of acquisition such as appraisal, I must conclude that the rule in the Stilson case has no bearing on the question at hand, and that that question is disposed of by the rule in the Doria case.

As to the question of competitive bidding, without venturing an opinion by way of comparison of the business of (1) preparing certificates

or memoranda of title, and (2) appraisal of real property, it is evident, in my opinion, that the latter is one "of a specialized nature requiring the exercises of peculiar skill and aptitude" within the meaning of the court's language in the Doria case; and I thus conclude that such bidding is not required here.

In specific answer to your inquiry, therefore, it is my opinion that where the director of the department of highways undertakes the purchase or appropriation of easements for highway purposes under the general authority of Section 5501.11, Revised Code, or Section 5521.06, Revised Code, he may, as an incident of and to facilitate such acquisition, cause an appraisal to be made of the real property involved and may contract with any person or firm for the purpose of securing such specialized appraisal service. Such services requiring peculiar skill and aptitude, may be contracted for without competitive bidding.

Respectfully,

WILLIAM SAXBE

Attorney General