

371.

PUBLIC WORKS—NO AUTHORITY FOR ANY BOARD TO REDUCE NUMBER OF DAYS OF ADVERTISING—EMERGENCY BOARD MAY ALLOW FUNDS IN THE CASE OF AN EMERGENCY REQUIRING THE EXPENDITURES OF MONEY NOT SPECIFICALLY PROVIDED BY LAW—EMERGENCY CLAUSE IN SECTION 3, HOUSE BILL NO. 168 DOES NOT RELATE TO SECTION 2 OF SAID BILL.

SYLLABUS:

1 *The emergency clause contained in section 3 of House Bill 168 making an appropriation to the Ohio Penitentiary for the construction of a new cell block does not relate to the appropriation made in Section 2 of said bill to the Kent State Normal School for the repairing and extension of a tunnel system. The funds appropriated to Kent State Normal School for this purpose will not be available until on and after June 14, 1927.*

2 *There is no authority in law for the Controlling Board or any other board to reduce the number of days of advertising for bids for the construction or repair of public buildings or structures, the aggregate cost of which exceeds three thousand dollars, or to eliminate the provision that the last appearance of publication shall be not less than eight days prior to the opening of bids, as is provided for in Section 2318 of the General Code.*

3 *Upon proper application by the proper officers, by virtue of the provisions of Section 2313, General Code, the emergency board may allow funds in the case of an emergency requiring the expenditure of money not specifically provided by law.*

COLUMBUS, OHIO, April 23, 1927.

HON. WILLIAM A. CLUFF, *Kent State Normal College, Kent, Ohio.*

DEAR SIR:—I acknowledge receipt of your recent request for an opinion reading in part as follows:

“Supplemental House Bill 168, as passed by the 87th G. A., signed by the Governor and filed by the Secretary of State on March 16, 1927, contains a provision appropriating Thirty Thousand Dollars (\$30,000.00) for a new Tunnel and Equipment at the Kent State Normal School.

This appropriation was asked for to install a Tunnel from Science Hall (a building constructed some years ago and in current use), and the new Teacher Training School building (in the course of erection and to be completed and ready for use in May), the funds in the amount of \$350,000.00 for this training school building being appropriated by the 86th G. A. House Bill 168 contains emergency clause in one section, but not specifically applicable to the appropriation of \$30,000.00 for the new Tunnel.

Question one for your opinion is—as to whether or not the emergency clause as contained in the bill can be construed as applicable to all the items appropriating funds in the bill, thereby permitting the use of the funds immediately and avoid the 90-day requirement under the referendum provision.

Question two for your opinion (assuming the first question is answered in the negative), the funds in the amount of \$30,000.00 as appropriated do not become available for use and subject to contractual obligations until June 16, 1927. Appropriations in H. B. 168 lapse at midnight June 30, 1927, unless encumbered prior thereto. But fourteen (14) days intervene from June 16th to June 30th, 1927, during which time the trustees, according to law, must advertise for competitive bidding for a period of thirty (30) days, the last appearance of such Ad. to be not later than eight (8) days prior to the opening of the bids. These statutory requirements, of course, make im-

possible the following of this procedure. The Board of Control has the proper power to reduce the number of days of advertising.

Can the Board of Control authorize advertising for a shorter period and eliminate the provision that the last appearance of publication shall be not less than eight (8) days prior to the opening of the bids?

Can the Board of Trustees authorize and issue notice to bidders by publication beginning prior to June 16, 1927, and ending some date between June 16th and June 30th, 1927, thereby completing the entire thirty (30) day advertising? If so, please state the date upon which notice to bidders by publication shall start, the date upon which it shall end and the date for the opening of sealed proposals, and to provide the allowance of at least three (3) days: June 28, 29 and 30, for the purpose of opening bids, authorizing and issuing contracts and the execution of all necessary documents incident thereto."

1. You first inquire as to whether or not the emergency clause contained in House Bill No. 168 can be construed so as to apply to all of the sections and items included in said bill. If such clause affects the entire bill, the bill is not subject to the referendum, and all of the appropriated funds are available for immediate use.

In the case of *The State ex rel., Donahey, Auditor of State vs. Roose, Auditor*, 90 O. S. 345, the second paragraph of the syllabus reads:

"Section 1c of Article II of the Constitution of Ohio expressly provides for a referendum not only upon any law but any section of a law. * * *"

House Bill No. 168 makes supplementary appropriations for the remainder of the current biennium ending June 30, 1927. In Section 2 of said Bill, among other appropriations under the heading of "Kent State Normal School—Additions and Betterments", one is made to such school for the repairing and extension of a tunnel system. In Section 3 of this bill an appropriation is made to the Ohio Penitentiary for the construction of a new cell block. There is only one item of appropriation in this section and the only emergency clause of the entire bill is appended thereto. This clause reads as follows:

"This clause is hereby declared to be an emergency clause. That its enactment into law is necessary for the preservation of the public peace, safety and health of the inhabitants of the state of Ohio, and that the provisions of this clause shall be enacted into law and become effective at the earliest possible time, and shall take effect and be in full force from and after its passage and approval by the governor. *The necessity therefor lies in the fact that conditions at the Ohio penitentiary are overcrowded.*"

It is clear that no emergency clause was attached to the appropriation made to the Kent State Normal School, and it is equally clear that the emergency clause relating to the appropriation for the construction of a new cell block at the Ohio Penitentiary has nothing whatever to do with the appropriation for the construction of the tunnel at Kent State Normal College.

Specifically answering your first question, I am of the opinion that the emergency clause as contained in Section 3 of House Bill No. 168, supra, does not apply to any other appropriation item in said bill, that the appropriation to the Kent State Normal School does not fall within any of the exceptions set forth in Article II, Section 1d, of the Ohio Constitution, is therefore subject to the referendum, and that the funds so appropriated are not available until June 14th, 1927.

2. Since the appropriation in question is subject to the referendum and since

Section 2 of House Bill 168 provides that the funds appropriated shall not be expended to pay liabilities incurred subsequent to June 30, 1927, it follows that there will not be a sufficient period of time, between the date when the appropriation is available and when it lapses, to comply with the provisions of law as to advertising for competitive bidding.

Section 2318 of the General Code provides:

"The notice shall be published once each week for four consecutive weeks, the last publication to be at least eight days next preceding the day for opening the bids, in such newspaper or newspapers, and in such form and with such phraseology as the state building commission shall order. Copies of the plans, details, bills of material and specifications shall be open to public inspection at all business hours between the day of the first publication and the day for opening the bids, at the office of the auditor of state, and such other place or places as may be designated in such notice."

There is no provision in the General Code authorizing the Controlling Board, or any other board, to reduce the number of days of advertising, nor is there any authority given to any board to eliminate the provision that the last appearance of publication shall be not less than eight days prior to the opening of the bids. Sections 2314 to 2332, both inclusive, of the General Code, provide how contracts for the construction, alteration and repair of state buildings and structures shall be entered into when the cost thereof exceeds three thousand dollars, and the provisions of these sections must be strictly followed.

3. As to your third question, I find no provision forbidding the preparation of plans and specifications and the advertising for bids during the ninety day referendum period. However, in the instant case there is no money available to pay for same. Section 2288-2 of the General Code reads as follows:

"It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

In this case the director of finance cannot at this time certify that there is money available to pay for the preparation of plans and the letting of advertising unless an appropriation is made for same.

Section 2313 of the General Code reads in part as follows:

"In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or in case of an emergency requiring the expenditure of money not specifically provided by law, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission, may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made or to expend money not specifically provided for by law. * * * (Italics the writer's).

In opinion No. 2407, Opinions, Attorney General, 1921, Vol. II, p. 815, in distinguishing between the Controlling Board and Emergency Board, the following language is used:

"In other words, the controlling board is resorted to when a state department, institution, board or commission seeks, not *more* money, but the authority to spend money *differently* than the legislative schedule or classification of detailed purposes calls for; whereas the emergency board is resorted to when *more* money is needed—either (a) to take care of a deficiency in running expenses, or (b) to take care of an emergency requiring the expenditure of money not specifically provided for by law."

It seems to me that the facts stated in your letter present a "case of emergency requiring the expenditure of money not specifically provided by law" such as would permit the emergency board under the provisions of Section 2313, *supra*, upon application to such board by the proper officers, to allow sufficient funds to cover the cost of the preparation of plans and specifications, the cost of advertising for bids and other necessary preliminary steps in order that the things required to be done prior to the execution of the contract, which may be signed some time between the fourteenth day of June and the first day of July, 1927, may be accomplished, provided of course such board in its discretion sees fit to make the allowance in question.

4. You ask the date "upon which notice to bidders shall start * * *, to provide the allowance of at least three (3) days: June 28, 29 and 30, for the purpose of opening bids, authorizing and issuing contracts and the execution of all necessary documents incident thereto."

As shown above, Section 2318, *supra*, requires the notice to be published once each week for four consecutive weeks "the last publication to be at least eight days next preceding the day for opening the bids." If the bids are to be opened on June 28th, the last publication must be made not later than June 20th, and since the publication must run four consecutive weeks, the first publication must be made not later than May 30th.

Specifically answering your questions, I am of the opinion that:

1. The emergency clause contained in Section 3 of House Bill 168 making an appropriation to the Ohio Penitentiary for the construction of a new cell block does not relate to the appropriation made in Section 2 of said bill to the Kent State Normal School for the repairing and extension of a tunnel system. The funds appropriated to Kent State Normal School for this purpose will not be available until on and after June 14, 1927.

2. There is no authority in law for the Controlling Board, or any other board, to reduce the number of days of advertising for bids for the construction or repair of public buildings or structures, the aggregate cost of which exceeds three thousand dollars, or to eliminate the provision that the last appearance of publication shall be not less than eight days prior to the opening of bids, as is provided for in Section 2318 of the General Code.

3. Upon proper application by the proper officers, by virtue of the provisions of Section 2313, General Code, the emergency board may allow funds in the case of an emergency requiring the expenditure of money not specifically provided by law.

Respectfully,

EDWARD C. TURNER,
Attorney General.