

134.

HOUSE BILL No. 203—APPROPRIATIONS FOR CONSTRUCTIONS BY STATE INSTITUTIONS—CONTRACTS AWARDED BUT NOT APPROVED PRIOR TO JANUARY 1, 1929—VALIDITY IN DISCRETION OF CONTROLLING BOARD.

SYLLABUS:

1. *House Bill No. 203 of the 88th General Assembly expressly authorizes the use of the funds therein appropriated in the payment of contracts in which the award was made prior to January 1, 1929, but which said contracts were not approved by the Attorney General prior to said date without making new plans, obtaining new proposals, etc. Such use of said funds, however, may only be made in the event that the Controlling Board consents thereto.*

2. *Under said act, if in the discretion of the Controlling Board it is advisable, it may require a new proceeding to be instituted and new proposals to be obtained.*

COLUMBUS, OHIO, February 28, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Hon. Herbert B. Briggs, State Architect and Engineer, has submitted to this department the following inquiry:

“The 87th General Assembly by H. B. 502 made certain appropriations for the construction of structures for various state institutions. For nearly all of these projects, plans, specifications, bill of material, estimate of cost and form of proposal were prepared and filed with the Auditor of State. Bids were advertised for in the manner prescribed by law. Bids were received and contracts awarded, encumbrance estimates prepared and approved by the Director of Finance but the contracts were not approved by you prior to Jan. 1st.

In the syllabus of Opinion No. 33, Jan. 28, 1929, you state that by reason of Section 2 of H. B. 502, the appropriations made by the 87th General Assembly may not be expended for liabilities incurred subsequent to December 31st, 1928, and until a contract is approved by the Attorney General it cannot be considered as a liability.

It has come to our attention that there has been introduced in the 88th General Assembly a bill reappropriating funds for various projects upon which bids have been already received in the manner prescribed by law.

Should the 88th General Assembly pass a bill of this nature and should it become a law, may contracts be legally entered into with the respective low bidders who were awarded contracts prior to Jan. 1, 1928.

We are not unmindful of the fact that it will be necessary to secure the permission of the Controlling Board for expenditure of funds should the reappropriation measure require such a release by the Controlling Board.

If contracts, based upon bids received prior to Jan. 1st, may not be legally entered into will it be necessary to file new drawings, estimates of cost, bills of material, and forms of proposal for the respective jobs with the Auditor of State and readvertise for new bids for four consecutive weeks as provided for by law for all new projects.”

In my opinion Number 33, issued January 28, 1929, referred to in the communication, it was held as disclosed by the syllabus:

1. The appropriations by the 87th General Assembly, House Bill No. 502, for additions and betterments to the Department of Public Welfare, by reason of the provisions of Section 2 of said Appropriation Bill, may not be expended for liabilities incurred subsequent to December 31, 1928.

2. No valid contract for such improvement, the aggregate cost of which exceeds three thousand dollars, can be lawfully entered into until the Attorney General, under the provisions of Section 2319 of the General Code, has certified his approval on the contract and bond. It follows that no liability is incurred under said contract until such approval is made.

Said opinion was based upon the provisions of Section 2319 of the General Code, the latter part of which expressly provides that no contract shall be entered into in pursuance of Sections 2314 et seq. of the General Code, until the contract and bond shall be submitted to the Attorney General and his approval is certified thereon. In the opinion it was pointed out that such approval was an essential step in the consummation of a contract and in view of the provisions of Section 1 of the General Appropriation Act of the 87th General Assembly to the effect that no moneys therein appropriated could be expended to pay liabilities incurred subsequent to December 31, 1928, unless such approval was had prior to January 1, 1929, no liabilities were incurred and therefore the moneys appropriated were not available for the purpose of paying said contracts. This opinion was also based on an opinion of my predecessor, being No. 2958 issued December 1, 1928, wherein there was considered the question as to when such funds were encumbered and contracts entered into by the Director of Highways and Public Works in a road improvement proceeding and in which the conclusion was reached that such contracts must be executed prior to January 1, 1929, in order to incur a liability.

In the opinion to which you refer, there were two classes of contracts involved; one in which everything had been done excepting the approval of the Attorney General, and the other in which there was neither the approval by the Attorney General nor a certificate from the Director of Finance made under the provisions of Section 2288-2 of the General Code.

Without undertaking to set out specifically Sections 2314 to 2332, inclusive, of the General Code, which relate to the manner of making improvements and awarding contracts in the class of cases you mention, it may be stated that there is no definite time fixed as to when a certificate of the Director of Finance may be obtained or the approval of the Attorney General may be made. That is to say, the statutes require that no contract may be entered into until such approvals have been made, yet there is no definite time, as above stated, within which such approval may be made. It is assumed that in the contracts under consideration, an appropriation was duly made by the 87th General Assembly at the time it was determined by the Department of Public Works to proceed to make the improvements in question.

According to the statements in the communication before me, it will be assumed that all of the steps required by the statute to be taken before an award is made, were duly complied with. However, before said contracts were submitted to the Attorney General by the specific provisions of the Appropriation Act, the fund was no longer available and accordingly no approval of the Attorney General was given.

The reappropriation act to which you refer is known as House Bill No. 203 and has recently been passed by both branches of the General Assembly. It is necessary, in order to determine the solution to your question, to examine the specific provisions of said Appropriation Act. In other words, in the final analysis the Legislature may authorize such use of an appropriation, which is made within its constitutional author-

ity, and attach such conditions with reference to such use as seems to it expedient. Said Act was made an emergency measure entitled:

“An Act to make reappropriation of funds appropriated by the 87th General Assembly for additions and betterments, and to declare an emergency.”

In Section 1 of said Act it is provided, among other things that the sums appropriated therein “may be expended in the payment of obligations incurred by said departments on and after January 1, 1929.”

The provision last mentioned, standing alone, might be said to indicate that it was not the legislative intent that said funds were to be used for contracts resulting from proceedings initiated prior to January 1, 1929. However, as pointed out in the opinion of my predecessor, No. 2958, hereinbefore referred to, in the cases you mention no obligations were incurred. It follows therefore that there is no inhibition in this section of the act against the use of said funds for such obligations. Moreover Section 2 of the Act creates the Controlling Board, in accordance with the usual practice in connection with such legislation, the details of which need not be especially considered herein. Section 4 of said act contains, among other things, the following:

“The funds herein reappropriated for such purposes may be legally expended with the consent of the controlling board in payment of contracts duly awarded prior to January 1, 1929, although not legally entered into prior to such date. In such instances it shall not be necessary to make new plans, readvertise or obtain new proposals, unless the controlling board so requires.”

Section 5 of said Act reads:

“This act is hereby declared to be an emergency measure, necessary for the preservation of the public peace, health and safety of the citizens of Ohio, and shall become effective and be in force from and after its passage and approval by the governor. The necessity therefor lies in the fact that plans, specifications, bills of material and estimates of cost have been completed for many of these improvements, others have been proceeding under force account construction by authority granted by the controlling board, and it is urgent that the uncumbered balances in the appropriation accounts included in this act be made available at once so that work may proceed as soon as weather conditions in the spring will permit.”

It is unnecessary to discuss the status of the contracts you mention, in the event the funds were reappropriated without any conditions attached thereto, for the reason that said Appropriation Act in the language hereinbefore mentioned specifically authorizes the use of such funds for any existing awards with the consent and approval of the Controlling Board. It appears clearly to make such approval a discretionary matter with said Controlling Board, for the reason that said act clearly implies that such Controlling Board may, in its discretion, require new proceedings to be instituted and new proposals obtained.

Based upon the foregoing, you are specifically advised:

1. House Bill No. 203 of the 88th General Assembly expressly authorizes the use of the funds therein appropriated in the payment of contracts in which the award was made prior to January 1, 1929, but which said contracts were not approved by the Attorney General prior to said date, without making new plans, obtaining new

proposals, etc. Such use of said funds, however, may only be made in the event that the Controlling Board consents thereto. In all such cases it will of course be necessary to obtain the certificate of the Director of Finance and the approval of the Attorney General except in cases involving less than \$3,000.00 where the approval of the Attorney General is not mandatory.

2. Under said act, if in the discretion of the Controlling Board it is advisable, it may require a new proceeding to be instituted and new proposals to be obtained.

Respectfully,

GILBERT BETTMAN,
Attorney General.

135.

CONSTABLE—AUTHORITY TO PATROL HIGHWAYS WITHIN HIS COUNTY.

SYLLABUS:

A duly elected or appointed constable has authority, in the performance of his duties to patrol the highways in any township in his county by virtue of the authority and power granted to him by Sections 3340 and 3345, General Code.

COLUMBUS, OHIO, February 28, 1929.

HON. RUPERT R. BEETHAM, *State Prohibition Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 21, 1929, in which you request an opinion as to the following question:

“Does a constable have the right to leave his township and patrol highways in another township?”

In answer to your inquiry, your attention is directed to Sections 3340 and 3345 of the General Code, which sections define the general powers and duties of a constable. Section 3340, General Code, is as follows:

“Each constable shall apprehend, on view or warrant, and bring to justice, all felons, disturbers and violators of the criminal laws of this State, and suppress all riots, affrays, and unlawful assemblies, which may come to his knowledge, and, generally, keep the peace in his proper county.”

Section 3345, General Code, is as follows:

“Constables shall be ministerial officers of the courts held by justices of the peace, in criminal cases, within their respective counties. They shall apprehend and bring to justice felons and disturbers of the peace, suppress riots, and keep and preserve the peace within their respective counties. They may execute all writs and process in criminal cases throughout the county in which they reside, and in which they were elected or appointed. If a person charged with the commission of a crime or offense, flees from justice, any constable of the county wherein such crime or offense was committed, shall pursue and arrest such fugitive from justice, in any other county of the state, and convey such fugitive before any justice of the peace of the county where such crime or offense was committed.”