

1439.

APPROVAL, BONDS OF THE VILLAGE OF JEFFERSON, MADISON COUNTY—\$41,193.20.

COLUMBUS, OHIO, December 23, 1927.

*Industrial Commission of Ohio, Columbus, Ohio.*

1440.

BOND—FOR LABOR AND MATERIAL ON PUBLIC BUILDINGS—LIABILITY—STATE NOT INTERESTED PARTY.

SYLLABUS:

1. Under the provisions of Section 2316, General Code, a surety company upon a bond conditioned "for the payment of all material and labor furnished for or used in the construction for which such contract is made" becomes liable for the full payment, upon default of its principal in reference to such payment, of all claims, up to the amount of the face of the bond, for labor or materials furnished upon construction work for the use of the state.

2. Laborers, material men and sub-contractors who have furnished or delivered labor or materials upon construction work for the use of the state may bring suit against a surety company upon a bond conditioned to pay such laborers and material men as provided in Section 2316, General Code. Such suit may be brought within one year from the date of delivering or furnishing such labor or material, in the Court of Common Pleas of the county wherein such labor or material was furnished or delivered. There is no provision in law whereby the state is called upon to assist such laborers or material men in making collection of their claims from the bonding company.

COLUMBUS, OHIO, December 23, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

"Your consideration and recommendations are respectfully requested regarding the following:—

A contract in the amount of \$20,230.00 was entered into by the state on the 5th of October, 1926, with J. J. Evans of Columbus, Ohio, for combined general plumbing, heating and ventilating, and electrical contracts for three cottages for the C. N. & I. Department of Wilberforce University, Wilberforce, Ohio. This contract was approved as being in compliance with law by you on October 19th, 1926. A state form of bond in the amount of \$21,000.00 was submitted by J. J. Evans, which bond holds the Globe Indemnity Company of Newark, New Jersey, as surety.

The contract was completed on or about August 1st, 1927, and the buildings accepted by the state August 13th. Before the final estimate was issued to Mr. Evans, we were advised by Evans and by Bates & Company, local agents for the bonding company, that Evans would be unable to satisfy all outstanding obligations which were incurred by him in the construction of these buildings.

Several subcontractors inquired of me what procedure should be followed in order to collect money due them from Mr. Evans on their contracts. They were all referred to the bonding company as it is my understanding, according to the wording of the bond, that the Globe Indemnity Company were and are liable for all lawful claims of subcontractors, material men, and laborers for labor performed or material furnished in completing this contract.

Under date of November 8th, Mr. John N. Schilling, subcontractor for heating and ventilating under Mr. J. J. Evans, advised that the bonding company offered to settle his account at fifty cents for each dollar claimed.

On December 10th, Mr. Schilling advised that he agreed to settle the account at 75c on each dollar claimed.

#### QUESTIONS:

1. Under the terms of the state form of bond, is the bonding company liable for the full amount of all lawful claims of subcontractors or material men?

2. If Question No. 1 is answered in the affirmative, is there any manner in which the state can compel the bonding company to fulfill the requirements of the bond?

3. If Question No. 2 is answered in the negative, then inasmuch as subcontractors enter into contracts on state work with the understanding that they are protected by the state form of bond, is the state in any legal manner obligated to assist the subcontractors or material men in pressing claims against a surety?"

It is assumed that the improvement in question, involving as it does the placing of heating and ventilating systems and other equipment in buildings which belong to the state, and which are in use by the state, was constructed under the provisions of Sections 2314, et seq., General Code. Section 2314, and following sections of the General Code are under Chapter 1, Title IX, entitled "Public Buildings," and include Sections 2314 to 2332, both inclusive of the General Code.

Upon the assumption that the construction work in question was being constructed under the provisions of Sections 2314, et seq., General Code, it follows that the bond was given by the bidder according to the provisions of Section 2316, General Code, which section provides as follows:

"The bond provided for in Sections 2315 and 2319 shall be conditioned that, if his proposal is accepted, the bidder will within ten days next after the awarding of such contract, enter into a proper contract in accordance with the proposal, plans, details, specifications and bills of material and that he will faithfully perform each and every condition of the same. Such bond shall also indemnify the state against the damage that may be suffered by failure to perform such contract according to the provisions thereof, and in accordance with the plans, details, specifications and bills of material therefor. Such bond shall also be conditioned for the payment of *all* material and labor furnished for or used in the construction for which such contract is made. The

bond may be enforced against the person, persons or company executing such bond, by any claimant for labor or material and suit may be brought on such bond in the name of the State of Ohio on relation of the claimant within one year from the date of delivering or furnishing such labor or material, in the court of common pleas of the county wherein such labor or material was furnished or delivered, *and such bonds, or sureties thereon shall not be released by the execution of any additional security, notes, retentions from estimates, or other instruments on account of such claim, or for any reason whatsoever, except the full payment of such claim for labor or material.* (Italics the writer's.)

The bond referred to in the above quoted section is not only a bid bond but a contract bond as well, in that provision is made therein that the bidder will within ten days next after the awarding of the contract, enter into a proper contract in accordance with his proposal; and said bond is also conditioned that such contractor shall faithfully perform and carry out each and every condition of the contract according to the provisions thereof, and in accordance with the plans, details, specifications and bills of material therefor.

The answer to your first question may be found in the express language of Section 2316, supra, as follows:

*"and such bond, or sureties thereon shall not be released by the execution of any additional security, \* \* \* or for any reason whatsoever except the full payment of such claim for labor or material."* (Italics the writer's.)

It will be borne in mind that the bond provided for in Section 2316, supra, is conditioned among other things "for the payment of all material and labor furnished for or used in the construction for which such contract is made."

Provision is also made in said section that "the bond may be enforced against the person, persons or company executing such bond, by any claimant for labor or material and suit may be brought on such bond in the name of the State of Ohio on relation of the claimant within one year from the date of delivering or furnishing such labor or material, in the court of common pleas of the county wherein such labor or material was furnished or delivered."

It is quite apparent that a bonding company which furnishes a surety bond under the terms of Section 2316, supra, becomes liable to the full amount of all claims of subcontractors or material men for the furnishing of labor and material upon construction work for the use of the state. It is of course understood that a bonding company could not be held liable for claims for labor and materials furnished and delivered upon construction work for the use of the state, in an amount greater than the face of the bond.

In arriving at the foregoing conclusion, I am not unmindful of the provisions of Section 2365-1, General Code, which provides:

*"That when public buildings or other public works or improvements are about to be constructed, erected, altered, or repaired under contract, at the expense of the state, or any county, city, village, township or school district thereof, it shall be the duty of the board, officer or agent, contracting on behalf of the state, county, city, village, township, or school district, to require the usual bond as provided for in statute with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all sub-contractors, for all labor performed or materials furnished in the con-*

struction, erection, alteration or repair of such building, works or improvements.”

Sections 2314, et seq., General Code, apply only to those cases where the aggregate cost of the work therein provided for exceeds the sum of \$3,000, while the provisions of Section 2365-1, supra, may apply as to the state, in all cases where the contract price does not exceed \$3,000. To hold that Section 2316 of the General Code did not have application to the bond in question would, in effect, be saying that Section 2365-1, supra, repealed by implication the provisions of Section 2316, supra. While it is true that Section 2365-1, supra, is a later enactment than Section 2316, supra, yet there is nothing in the provisions of the two sections which are inconsistent, providing the contract cost exceeds \$3,000.

As heretofore pointed out, Section 2316, supra, is a part of a series or group of statutes, to wit, Sections 2314 to 2332, both inclusive, General Code, and provision is made in said group of statutes that all contracts and bonds given under the provisions of said group must be submitted to the Attorney General and approved by him before the state may enter into said contracts. There is no such provision in Section 2365-1, supra, Sections 2314, et seq., General Code, are special sections dealing solely with buildings or structures and equipment therefor for the use of the state, while Section 2365-1, supra, deals generally with all public buildings, regardless of whether they belong to the state or to a political subdivision of the state.

Although provision is made for the bringing of such suit in the name of the state, this does not mean that any department of the state may become a party to the suit. I see no way in which the state would or could become a necessary or proper party. Under the statutes, a suit must be brought in the name of the real party in interest, and in the instant case the state is not the real party in interest.

Answering your questions specifically, it is my opinion that Section 2316, General Code, gives to laborers, sub-contractors and material men complete and sole authority to collect claims for labor and material furnished and delivered on construction work for the use of the state; and that there is no way or manner by which the state may assist sub-contractors or material men in presenting such claims against a surety company.

Respectfully,  
EDWARD C. TURNER,

*Attorney General.*

---

1441.

TAX AND TAXATION—DELINQUENT LAND TAX FORECLOSURE—  
ACTION MAINTAINED BY COUNTY TREASURER AS OFFICER NOT  
AS INDIVIDUAL—STATUTE OF LIMITATIONS NOT APPLICABLE—  
AUDITOR OF STATE MUST ACT WITHIN THREE MONTHS.

*SYLLABUS:*

1. *The period of three months mentioned in Section 5718, General Code, refers to the time within which the auditor of state must act; and there is no limitation applicable to the action brought by a county treasurer under said section.*