

line." The provision giving the option to the commissioners of including within the assessment zone other than property immediately abutting the improvement is found in section 1214 G. C. which reads in part:

"And provided further that the county commissioners by a resolution passed by unanimous vote may make the assessment of ten per cent or more as the case may be of the cost and expense of improvement against real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement."

This language in itself negatives the idea of any authority in the commissioners to create an assessment zone which would be of less width on one side of the road than on the other. The plan of extending the assessment zone to the width of one-half mile or one mile as the case may be, is a mere extension of the abutting land plan, as was pointed out in an opinion of this department dated December 12, 1917, appearing in Opinions of Attorney General for 1917, at page 2305. Furthermore, the legislature by the adoption of the above quoted section 6941 in connection with the improvements by the county commissioners, has itself put a construction on the manner of operation of the plans of a one-half mile assessment zone and a one mile assessment zone; for it is quite plain that if the legislature had intended to leave to the commissioners the option of creating zones of unequal width on the sides of the road, there would have been no necessity for section 6941.

For these reasons then, you are advised that there is no statutory authority in the county commissioners in connection with state aid improvements under sections 1178 et seq. G. C. to exercise their option of providing an assessment zone of one-half mile or one mile in width on either side of the road to be improved when the adoption of a zone of such width would extend the assessment area into an adjoining county. As applied to the case you state, the only course open to the commissioners is to confine the assessment area either to the one-half mile zone or to the abutting lands.

Respectfully,

JOHN G. PRICE,

Attorney-General.

926.

ROADS AND HIGHWAYS—STATE HIGHWAY COMMISSIONER—NOT HIS DUTY TO WITHHOLD ESTIMATES PRIOR TO FINAL ESTIMATE FOR PURPOSES OF CLAIM FOR DAMAGES BY THIRD PARTY ON ACCOUNT OF NEGLIGENCE OF A CONTRACTOR ON STATE HIGHWAY IMPROVEMENT.

Under the terms of a certain contract set forth in the opinion, the state highway commissioner is not under the duty of withholding estimates prior to the final estimate, for the purpose of making up an amount sufficient to cover damages

claimed by a third party on account of negligence of a contractor in the course of performance of a state highway improvement.

COLUMBUS, OHIO, January 12, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—You have written to this department as follows:

"I am in receipt of a letter from _____, attorneys for _____ railroad company under date of October 29, 1919, as follows:

"This is to advise you, as state highway commissioner, that by reason of the negligence of G. B., in blasting at the north end of the _____ railway company's bridge over the Maumee river, on Saturday, August 23, 1919, at about three p. m., the north abutment, spandrel walls and the reinforced concrete arched ring of said bridge were damaged to such an extent as will require re-construction of the north end of said concrete structure. This necessary work will cost at least \$15,000.00.

The _____ company is surety for G. B. on the contract and bond.

We call your attention to page 8 of the contract, which provides:

"The contractor shall be responsible for all injuries to persons and for all damages to property resulting from negligence of himself, his employes, or agents, during the continuance of this contract. Before the final acceptance of the work by the commissioner, the contractor shall restore all property, public and private, which he, his employes or agents have injured during the continuance of this contract."

We, therefore, make demand upon you and respectfully request that before final acceptance of this work that the commissioner shall bear in mind this paragraph of the contract and cause G. B. to comply with the terms thereof, by retaining a percentage of the total amount of the contract price to pay for said reconstruction, which will be at least \$15,000.00. Will you be kind enough to acknowledge receipt of this letter?"

The contract price on this section of road is \$72,934.70. The retainer of 15 per cent required under the law will at the time of completion amount to \$11,940.20. As this retainer will be insufficient to cover the probable cost of replacing the damaged structure, I am asking for your opinion as to whether or not we shall withhold estimates prior to the final estimate in amount sufficient to cover the cost of replacing the damaged structure, the exact cost of which can not at present be determined."

In answering your question, reference may be made to certain provisions of the contract other than those quoted in the course of the letter sent you by the attorneys for the railroad company. Among these other provisions are the following:

"* * * The contractor shall hold the state and county harmless from any claims for injuries to structures or from any damage to persons or property occasioned by any neglect, default, want of proper care, or misconduct on the part of the contractor or any one in his employ, during the continuance of this contract." (*Contract p. 9*).

"Once each month, providing the work is progressing satisfactorily, there will be made an estimate of the amount and value of material in place. *Eighty-five per cent* of the value so determined, less any previous payments made, will be paid to the contractor monthly. No partial pay-

ment can be construed as an acceptance by the commissioner, of any part of the work. No monthly payments as a rule will be made for an amount less than five hundred dollars. Any or all estimates may be withheld indefinitely until any or all the orders given by the commissioner in compliance with, and by virtue of, the terms of this contract, have been complied with by the contractor.

* * * * *

Before the final estimate is allowed, the improvement shall be inspected by the commissioner, and if he finds the work is completed according to the plans and specifications, there shall be issued certificates of the amount of work done, and the contractor shall receive the balance due on the contract." (*Contract, p. 12*).

The condition set forth in the bond given by the contractor in connection with said contract is as follows:

"Now, therefore, the condition of this obligation is such, that if the said proposal be accepted and said principal shall, within ten (10) days after receiving notice thereof, enter into proper contract with said state of Ohio, for the construction and completion of said improvement, and shall well, truly and faithfully comply with and perform each and all of the terms, covenants and conditions of such contract, on his (its) part to be kept and performed, according to the tenor thereof; and will perform the work embraced therein, upon the terms proposed and with the time prescribed, and in accordance with the plans and specifications furnished therefor, and to which reference is here made and the same are made a part hereof, as if fully incorporated herein; and shall fully pay all direct or indirect damages that may be suffered during the construction of such improvement by reason of the negligence of the contractor in the construction thereof, and until the same is finally accepted; and shall pay all claims of sub-contractors, material men and laborers arising from the construction of said improvement; and shall save the state of Ohio and the _____ county free and harmless from the payment of any claim or claims of sub-contractors, material men or laborers on account of the construction of said improvement; then this obligation shall be null and void, otherwise to be and remain in full force and virtue in law.

And the said surety hereby stipulates and agrees that no changes, extensions, alterations, deductions or additions, in or to the terms of the said contract, or in or to the plans and specifications accompanying the same shall in any wise affect the obligation of said surety on its bond."

In connection with the provisions quoted from the contract and bond, it is pertinent also to refer to certain provisions of statute which were in force at the time of the signing of the contract and bond in question.

Section 1208 G. C., as it appeared in 107 O. L. 126, read in part:

" * * *. Before entering into a contract the commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, county or township against any damage that may result by reason of the negligence of the contractor in making said improvement. In no case shall the state be liable for damages,

sustained in the construction of any improvement under this chapter. * *”

Section 1212, as found in 107 O. L. 127, read in part:

“* * *. The payment of the cost of the construction of such improvement shall be made as the work progresses upon estimates made by the engineer in charge of such improvement, and upon approval of the state highway commissioner. Except as hereinafter provided no payment by the state, county or township, on account of a contract for any improvement under this chapter shall before the completion of said contract exceed eighty-five per cent of the value of the work performed to the date of such payment, and except as hereinafter provided, fifteen per cent of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications. In addition to the above payments on account of work performed, the state highway commissioner may also, if he deems it proper allow and pay to a contractor a sum not exceeding eighty-five per cent of the value of material delivered on the site of the work but not yet incorporated therein, provided such material has been inspected and found to meet the specifications. When an estimate is allowed on account of material delivered on the site of the work but not yet incorporated therein, such material thereupon become the property of the state; but in case such material is stolen or destroyed or damaged by casualty before being used, or for any reason becomes unfit for use, the contractor will be required to replace the same at his own expense. When the retained percentage, plus the difference between the contract price and the estimates allowed, exceeds by more than fifteen per cent the estimated cost of completing the work, as determined by the state highway commissioner, the state highway commissioner, may, if he deems it proper, pay to the contractor all or any part of said excess sum, retaining not less than the estimated cost of completing the work, as determined by him, plus fifteen per cent thereof.”

It is noteworthy that the provision in the contract that:

“Any or all estimates may be withheld indefinitely until any or all the orders given by the commissioner in compliance with, and by virtue of, the terms of this contract, have been complied with by the contractor”

is perfectly consistent with the provision in section 1212 G. C., that no payment “shall before the completion of said contract *exceed* eighty-five per cent of the value of the work performed to the date of such payment.” In other words, the state highway commissioner is vested with authority by the contract to withhold payment of the entire eighty-five per cent on current estimates and is not prohibited by statute from so doing. He is also vested with authority by said section 1212 to allow in his discretion certain payments in excess of eighty-five per cent of the value of work performed.

Without going into further detail, it may be said that the provisions quoted from the contract, contract bond and statutes are the only provisions found which have a bearing on your inquiry; and these provisions very plainly leave to the sound discretion of the state highway commissioner the matter of estimates, subject of course to the limitation in section 1212 that the commissioner may not allow more than eighty-five per cent except under special circumstances set forth in that section, and the further limitation that by the express terms of the contract

the commissioner may not finally accept the work until the contractor restores all property, public and private, which he or his employes or agents may have injured during the course of the work, which limitation must be understood as meaning that the final estimate may not be paid over to the contractor until he shall have made such property restoration, since it has been seen from a further provision above quoted from the contract that before allowing the final estimate the commissioner must find the work completed according to plans and specifications.

You will have observed that the references to statutes herein are to such statutes as amended, 107 O. L. 69, commonly known as the White-Mulcahy act, effective June 28, 1917. The contract in question is dated December 27, 1917. If the application for state aid as to the work covered by the contract was granted prior to June 28, 1917, the question might arise whether the provisions of the Cass law, in force prior to June 28, 1917, govern as to the matter of estimates rather than the provisions of the White-Mulcahy act. However, the only substantial difference between the two sets of statutes, so far as your inquiry is concerned, is that the Cass act did not contain the optional feature of section 1212, permitting the state highway commissioner in certain circumstances to allow estimates in excess of eighty-five per cent. Your letter indicates that you do not intend to exercise that option in respect to the contract now being considered and that current estimates will not be allowed in excess of eighty-five per cent, for which reason it is unnecessary to pass upon the question of applicability as between the Cass act and the White-Mulcahy act. As a matter of caution, it is respectfully suggested that if question arises with you as to the desirability of allowing estimates in excess of eighty-five per cent in respect to the contract under discussion, you refer the matter to this department for opinion before taking action.

Specific answer to your question is that you are not under the duty of withholding estimates prior to the final estimate in an amount sufficient to make up the supposed amount of the alleged damage referred to in the letter sent you by the attorneys for the railroad company.

Respectfully,

JOHN G. PRICE,

Attorney-General.

927.

OHIO AGRICULTURAL EXPERIMENT STATION—CHIEF OF DEPARTMENT OF NUTRITION—FAILURE OF GENERAL ASSEMBLY TO APPROPRIATE FUNDS FOR SALARY OF SAID OFFICER.

The mere failure of the General Assembly to appropriate funds to pay the state's share of the salary of the chief of the department of nutrition at the Ohio Agricultural Experiment Station; does not per se abolish the office or position, nor does it prevent the application of the so-called Adams fund (Act of congress of March 16, 1906), to the payment of that portion of the salary provided for in the plan officially approved by the federal secretary of agriculture.

COLUMBUS, OHIO, January 12, 1920.

Board of Control, Ohio Agricultural Experiment Station, Wooster, Ohio.

GENTLEMEN:—Your letter of recent date relating to the payment of compensation to Dr. E. B. Forbes from the fund appropriated by congress to carry out