

6063.

HIGHWAY IMPROVEMENTS—ATTESTED ACCOUNTS FILED
BY MATERIAL MEN—ACCEPTANCE BY DIRECTOR OF
HIGHWAYS DISCUSSED—RELEASE OF CONTRACTOR
AND SURETY DISCUSSED.

SYLLABUS:

1. *The fact that attested accounts have been filed covering labor or material or both furnished in the construction of a highway improvement does not prevent the Director of Highways from accepting the project.*

2. *Where such attested accounts have been filed, the Director of Highways has no authority to release the original contract bond and accept a smaller bond until such accounts are either paid in full or released, even though a very small portion of the work under the contract for the improvement remains to be done.*

3. *Where a contract for a highway improvement is divided into three parts, one for the construction of a bridge, one for highway work, and one for roadside improvement, and the first two parts have been fully completed in accordance with the contract, and have been so accepted by the Director of Highways and the highway and bridge opened to the public, the contractor and surety are thereby released from any subsequent damage to the highway and bridge that may be caused by the travelling public, unless the specifications otherwise provide.*

COLUMBUS, OHIO, September 10, 1936.

HON JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion with reference to the following inquiry:

“Under date of November 16, 1934, a contract was entered into by this Department with the contractor for the construction of a project in Cuyahoga County, the contract price being \$535,472.06. This contract was divided into three parts: Proposal No. 1 being bid at \$496,340.80, being for bridge construction; Proposal No. 2 being bid at \$36,153.24, for highway work, and Proposal No. 3 being bid at \$2,978.02, being for roadside improvement.

The bridge and highway work has been completed and most of the roadside improvement and landscaping work is done, with the exception that part of the planting under Proposal No. 3 must be replaced and cannot be done until late in the Fall, due

to the growing conditions. The bridge and highway in question were opened to the public several months ago and are being used by the travelling public at the present time.

The engineers of this Department report that the bridge and highway work has been completed satisfactorily pursuant to the plans and specifications in the contract, the only part of the work not meeting with the approval of this Department being the landscape improvement portion.

It is estimated that something under six hundred dollars worth of work remains to be done to complete the landscaping improvement, in accordance with the contract. It also develops that attested accounts in the totaled sum of \$11,516.07, have been filed with the Department by various material men.

The contractor has formally requested this Department to release the original contract bond and accept in lieu thereof, a cash bond of \$1,000.00, which is practically double the amount remaining to be done by way of landscaping. He also is agreeable to withholding payments in an amount equal to the total of the attested accounts filed.

We desire your opinion with regard to the above matters and particularly with regard to the following questions:

1. Does the fact that attested accounts or liens amounting to \$11,516.07 have been filed and this amount withheld from the contractor, prevent the Department from accepting the project and releasing the bond furnished by the contractor?

2. Does this Department have authority to release the original bond and accept a smaller bond, where only a small amount of work remains to be done?

3. In a case such as this, where the highway and bridge construction is completed, and the road and bridge opened to the traffic, is the contractor liable for subsequent damage to the highway or bridge by the travelling public before formal acceptance of the bridge and highway project and payment of the final estimate?

Section 1208, General Code, requires the Director of Highways, before entering into a contract, to obtain a bond "conditioned, among other things, for the payment by the contractor and by all sub-contractors for all labor performed or materials furnished in connection with the project involved, 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,

* * * against any damage that will result by reason of the negligence of the contractor in making said improvement.”

It is a general principle of law, so well founded as to need no citation of authority, that public officers have such powers as are given them expressly by law, and such implied powers as are necessary to carry out the express powers.

There is nothing in such section 1208, referred to above, nor in any other section of the General Code, authorizing the Director of Highways to release the original contract bond and accept a new bond, cash or otherwise, in lieu thereof. It is noted that section 1208-1, General Code, as enacted in 1933 (115 O. L. 178, 179), provides in the last paragraph that “in the event of the insolvency of any surety or sureties at any time prior to the completion of a contract, the State Highway Director shall be authorized to require the contractor to furnish forthwith a new bond covering the uncompleted portion of the work.”

As will be seen, however, such authorization to obtain a new bond is confined only to the special situation therein set forth, and does not give blanket authority for the Director of Highways to release the original contract bond under any and all conditions and accept a new bond in lieu thereof. This conclusion is fortified by a reference to several former opinions of the attorney general rendered prior to the enactment of section 1208-1, General Code, in 1933, which opinions held that the State Highway Director had no authority to accept any bond other than the original contract bond set forth in section 1208, General Code. See Opinions of the Attorney General for 1916, Vol. II, page 1346; Opinions of the Attorney General for 1918; Vol. I, page 163; Opinions of the Attorney General for 1918, Vol. II, page 1449; Opinions of the Attorney General for 1930, Vol. III, page 1603; and Opinions of the Attorney General for 1931, Vol. III, page 1519.

From what has just been said, it seems clear that the answer to your second specific question is in the negative.

Approaching your first specific question, as shown above, section 1208, General Code, specifically states that one of the conditions of the bond shall be “for the payment by the contractor and by all sub-contractors for all * * * materials furnished in connection with the project involved.”

Under section 2365-3, General Code, a general section, to be read with section 1208, General Code, a special section, “a person to whom any money shall be due on account of having * * * furnished any material in the construction of any * * * improvement, shall furnish the sureties of the bond a statement of the amount due any time after furnishing such material but not later than ninety days *after the acceptance of such improvement by the fully authorized officer.*”

Thus the fact that liens have been filed by material men does not

prevent the highway department from accepting the project, if the said project has been completed upon the terms proposed and in accordance with the plans and specifications. The language of section 2365-3, General Code, clearly shows that the legislature intended that an improvement could be accepted, even though material men were owed money by the contractor for materials furnished on the project. However, as pointed out above, there is no authority for the Director of Highways to release the original contract bond.

Coming now to your third question, your attention is directed to the provisions of section 1212, General Code, which reads as follows :

“The cost and expense of the construction, reconstruction, improvement, maintenance and repair of a highway under the provisions of this act shall be paid by the treasurer of state upon the warrant of the auditor of state. The warrant of the auditor shall be issued upon the requisition of the director and shall be paid from any appropriation or funds available to carry out the provisions of this act. The payment of the cost of the construction of such improvement shall be made at intervals of not more than one month as the work progresses upon estimates made by the resident district deputy director in charge of such improvement, and upon approval of the director. Except as hereinafter provided, no payment by the state on account of a contract for any improvement under this act 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 director 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, or in the vicinity thereof, 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, or in the vicinity thereof, but not yet incorporated therein, such material shall 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 director, the director 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. When a portion of a highway covered by a contract is completed and opened to traffic all retained percentages held in connection with such highway shall be forthwith released and paid to the contractor."

From the last sentence of this section, when read with other portions of the statute, it would seem that the legislature has contemplated that part of a road project may be legally accepted and such road opened for traffic before the entire contract for the construction thereof is completed. It would thus seem to follow that if the road and bridge in question, being held by the engineers to be fully completed according to plans and specifications, were formally accepted at this time by the State Highway Director, the contractor and bondsmen would thereupon be released from any subsequent damage to the highway and bridge caused by the travelling public.

Respectfully,

JOHN W. BRICKER,
Attorney General.

6064.

TOWNSHIP CLERKS—ENTITLED TO EXPENSES IN ADDITION TO REGULAR SALARY, WHEN ATTENDING ANNUAL MEETING CALLED BY COUNTY ENGINEER—PAYABLE BY COUNTY TREASURER FROM ROAD AND BRIDGE FUND.

SYLLABUS:

Township clerks who are called by the county engineer to attend the annual meeting provided for by Section 7189, General Code, are entitled to their actual and necessary expenses in addition to their regular per diem or salary, the same to be paid by the county treasurer from the road and bridge fund of the county on itemized vouchers approved by the county engineer.