

2542.

ADMINISTRATIVE CODE—DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS AUTHORIZED TO ENTER INTO CONTRACT WITH ARCHITECT IN PRIVATE PRACTICE FOR SERVICES ON BUILDING PROJECTS FOR STATE INSTITUTIONS—WHAT CONTRACT MAY PROVIDE—COMPENSATION FOR SUCH SERVICES—HOW PAID.

1. Under section 154-40 G. C. the department of highways and public works is authorized to enter into a contract with an architect in private practice engaging his services as to building projects for state institutions. Such contract may provide for the architect's services either for the preparation of plans, specifications and estimates; or for the supervision of the work; or both. The board of trustees having charge of the institution is without power to enter into such a contract.

2. Compensation for the services of an architect so engaged by the department of highways and public works, constitutes a proper charge against the appropriation for the building project as to which the services are rendered. However, since the board of trustees of the institution has control of the appropriation, the department of highways and public works should not attempt to enter into the contract of employment until after the terms thereof have been approved by such board. As a pre-requisite to the contract, the certificate named in section 2288-2 must be made; and the contract must receive the approval of the Attorney-General as provided in effect by section 2314 G. C.

QUAERE, whether the services of an architect in private practice may be paid for out of amounts set aside by the emergency board to the use of the department of highways and public works; and whether, if such services may be so compensated, the amount of compensation will constitute a proper refunder charge against the appropriation for the project as to which the services are rendered.

Department of Highways and Public Works, Division of Architecture and Engineering, Columbus, Ohio.

COLUMBUS, OHIO, November 2, 1921.

GENTLEMEN:—Under recent date you have submitted for the examination of this department a document purporting to embody a contract between the board of trustees of Miami university of Oxford, Ohio, and Walter G. Franz.

The document is to the effect that in consideration of certain payments to be made to him by the board of trustees, said Franz is to

“make all necessary drawings and specifications * * * for a brick chimney, including breeching connection, to be an addition to the equipment of the central heating and lighting plant of Miami university, Oxford, Ohio. Also to superintend the installation of the above work.”

The document is not dated, but is understood to have been executed after July 1, 1921.

The question raised by your communication is whether the board of trustees has power to employ an architect for the rendition of the services described.

Section 154-40 G. C. appearing in the Administrative Code, and in effect at the time of the execution of said proposed contract, reads in part:

"Sec. 154-40. The department of highways and public works shall have all powers and perform all duties vested by law in the superintendent of public works, the state highway commissioner, the chief highway engineer, and the state building commission. Wherever powers are conferred or duties imposed upon any of such departments, offices or officers, such powers and duties shall, except as herein provided, be construed as vested in the department of highways and public works.

In addition to the powers so transferred to it, the department of highways and public works shall have the following powers:

(1) To prepare, or cause to be prepared, general plans, specifications, bills of materials, and estimates of cost for the public buildings to be erected by the state departments, offices and institutions. Nothing in this section shall be so construed as to require the independent employment of an architect or engineer as provided by section two thousand three hundred and fourteen of the General Code, in the cases to which said section applies.

(2) To have general supervision over the erection and construction of public buildings erected for the state government, or any department, office or institution thereof, and over the inspection of all materials previous to their incorporation into such buildings or work.

(3) To make contracts for and supervise the construction and repair of buildings under the control of the state government, or any department, office or institution thereof."

In an opinion of this department (No. 2413) dated September 12, 1921, and directed to Hon. Joseph T. Tracy, auditor of state, it was held that said section 154-40

"vests the department of highways and public works with the power to prepare plans for the development of the grounds of a state institution, and likewise all plans for the construction and perfection of systems of drainage in connection with such grounds. The effect of this provision is to take away from boards of trustees of such institution the authority theretofore possessed by them to employ private architects and engineers for the preparation of such plans."

In the same opinion it was further held:

"The supervising of the work incident to the development and drainage of the grounds of such institutions is also confided to the department of highways and public works, and boards of trustees of such institutions have no authority to employ private architects and engineers for such work of supervision."

While the opinion just referred to deals with the preparation of plans for and the supervision of the work incident to the development and drainage of grounds, as provided for particularly by sub-divisions (4) and (6) of said section 154-40, it is believed that what is said in that opinion applies in principle to the preparation of plans, specifications, bills of material and estimates of cost for buildings for the institutions and the supervision over the erection and construction of such buildings and over the inspection of materials going into them. It follows, therefore, that the purported contract above described is without legal force.

While your communication does not in terms request the opinion of this department on the question whether your department has authority to enter into a contract for the employment of an architect, yet it has been learned upon personal conference at your department that you are desirous of knowing whether you have such authority, both as to the preparation of plans, and the supervision and inspection of the work itself. The answer is clearly in the affirmative. While under sections 2314 et seq. (107 O. L. 453), providing for a state building commission, the power to employ an architect was not vested in the commission, but was assumed to be vested in the board having charge of the institution affected, and while therefore the transfer to your department by section 154-40 G. C. of the powers of the state building commission did not of itself operate to vest in your department authority to employ a private architect, yet, by other provisions of said section 154-40, the powers vested in your department in the matter of preparation of plans and supervision over the erection of buildings are very broad. There is no prohibition against the employment of a private architect—on the contrary, the language is (section 154-40 (1)): “To prepare, or *cause to be prepared*, general plans,” etc.; and the further language is (154-40 (2)), “to have *general supervision* over the erection and construction of public buildings * * * and over the inspection of all materials previous to their incorporation into such buildings * * *.”

Moreover, said section 154-40 (1) says that:

“Nothing in this section shall be so construed as to *require* the independent employment of an architect or engineer as provided by section 2314 of the General Code, in the cases to which said section applies;”

thus clearly giving rise to the implication that your department is *permitted* to employ the services of a private architect.

From what has been said it follows that so far as the mere question of ultimate authority is concerned, you are at liberty to enter into a contract with Mr. Franz calling for his employment either for the preparation of plans, or for the supervision of the work, or both. However, before undertaking to exercise such authority, you must see to it that certain prerequisite conditions have been fulfilled.

The appropriation for the specific work named in your communication is found in 109 O. L. at page 473, where, under the head of appropriations to Miami university, there appears an item “brick stack, power plant, \$10,000.” Is this item subject to a charge for architect’s services in the event that your department, instead of itself performing the services through its regular salaried employes, sees fit to employ for the special work at hand the services of an architect in private practice? As already pointed out, section 2314 relating to the state building commission proceeded on the assumption that the architect or engineer was employed by the board having charge or control of the institution which was to expend the appropriation, and not by the state building commission. The contract of such architect or engineer was to be prepared and approved by the attorney-general and filed with the auditor of state. Furthermore, section 2323, which is part of the act relating to the state building commission, reads as follows:

“No contract shall be entered into pursuant to section 2317 at a price in excess of the entire estimate thereof. Nor shall the entire cost of the construction, improvement, alteration, addition or installation including changes and estimates of expenses for architects or en-

gineers, exceed in the aggregate the amount authorized by law for the same."

At the time of the passage of the administrative code there was no appropriation available for general architectural services, that is to say, no central authority of the state was in position to furnish architectural services. Hence, the board entering upon an expenditure for a state institution under its control must of necessity have resorted to the appropriation for the building in order to pay for the services of an architect.

With the passage of the administrative code, provision has been made (section 154-6) for an officer within the department of highways and public works to be known as state architect and engineer. However, the only specific appropriation made by the general assembly in connection with that office is for the salary of the state architect and engineer (109 O. L. 438). Therefore, to the extent at least that architectural services may be provided for by special contract for services as to a given building project, we must presume that it was the intention of the legislature to permit the continuance of the practice previously existing as to the payment of the architect's compensation out of the appropriation for that project, especially as the building program provided for during the present biennium is unusually heavy. It is quite true that the general assembly placed under the control of the emergency board an appropriation which might be devoted in part by that board to making provision for a salaried working force under the state architect and engineer. However, this grant of power by the general assembly cannot be taken as an expression of intention on its part that all architectural and engineering services are to be paid for out of the same central fund; for in the first place, the emergency appropriation is a general one, having no special reference to architectural and engineering services, and in the second place, the policy of making available to your department for the use of the state architect and engineer, any funds at all for a salaried working force, is left entirely to the emergency board.

So much being determined, we come to a practical administrative question arising from the fact that while your department employs the architect, the appropriation out of which payment for his services is to be made is under the control of the board which calls for the services of your department. If, upon receiving a call for such services, your department should undertake, without consulting the board having control of the appropriation, to enter into arrangements for the services of a private architect, to be paid for out of such appropriation, would such arrangements be the basis for an obligation which the architect might enforce by mandamus against the board? Clearly not, for if the board might do nothing else, it might abandon the building project and permit the appropriation to lapse. From a practical standpoint, then, you may safely enter into the contract of employment only after approval has been given to its terms by the board having control of the appropriation out of which payment for the services is proposed to be made. With the giving of such approval, an appropriate time will have arrived for the making of the certificate described in section 2288-2 G. C. Finally, before becoming effective, the contract must receive the approval of the attorney-general, as provided in effect by section 2314 G. C.

No opinion is now expressed upon two questions which are perhaps suggested by the foregoing discussion—first, may the services of a private architect be paid for out of amounts which have been or may be set aside by the emergency board to the use of your department for architectural services;

and, second, if such services may be so compensated, will the amount of compensation constitute a proper refunder charge against the appropriation for the project as to which the services are rendered?

Respectfully,
JOHN G. PRICE,
Attorney-General.

2543.

APPROVAL, DEFICIENCY BONDS OF JACKSON TOWNSHIP RURAL SCHOOL DISTRICT IN AMOUNT OF \$7,500.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 3, 1921.

2544.

APPROVAL, BONDS OF LUCAS COUNTY, OHIO, IN AMOUNT OF \$4,597.77 FOR SEWER CONSTRUCTION.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 3, 1921.

2545.

APPROVAL, BONDS OF LUCAS COUNTY, OHIO, IN AMOUNT OF \$601,-158.67 FOR SEWER CONSTRUCTION.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 3, 1921.

2546.

APPROVAL, BONDS OF LUCAS COUNTY, OHIO, IN AMOUNT OF \$4,159.12 FOR WATER SUPPLY LINES IN SEWER DISTRICT.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 3, 1921.