with public agencies must ascertain at their peril whether the preliminary steps leading up to a contract and prescribed by statute have been taken. As stated in *McCloud and Geigle* vs. *Columbus,* 54 O. S. 439, "they are dealing with public agencies whose powers are defined by law, and whose acts are public transactions and they should be charged with knowledge of both.

In *Wellston* vs. *Morgan,* 65 O. S. 219, the following was held:

> "Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation or appropriation have been complied with."

It is likewise well settled that statutes providing the mode and time for advertising for bids are designed to protect the public and are mandatory, the compliance with which is a condition precedent to the power of the public agency involved to enter into a contract. *McCloud and Geigle* vs. *Columbus, supra; Lancaster* vs. *Miller,* 58 O. S. 558; *Ridge Company* vs. *Campbell, et al.,* 60 O. S. 406; *Hommel and Company* vs. *Woodsfield,* 115 O. S. 675; *Hommel and Company* vs. *Woodsfield,* 122 O. S. 148.

It is my opinion therefore that the voucher in question cannot legally be paid.

Furthermore, since the cost in question exceeds $3000.00, advertising could not be dispensed with in this case even though the items involved were specified in the original contract without the consent of the controlling board as required by the appropriation act referred to, in view of the case of *State, ex rel.,* vs. *Connar,* 123 O. S. 310, which holds that an appropriation act is special in its nature, and where it is later in point of time of enactment controls over the provisions of general statutes.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4200.

SALES TAX—GOODS PURCHASED BY SUPERINTENDENT OF BANKS OR SUPERINTENDENT OF BUILDING AND LOANS FOR USE IN LIQUIDATION OF FINANCIAL INSTITUTION NOT TAXABLE UNDER SALES TAX ACT. (O. A. G. 1935, NO. 4114, APPROVED).

SYLLABUS:

1. *The State of Ohio is the "consumer" of goods purchased by the Superintendent of Banks or by the Superintendent of Building and Loan Associations for use in the liquidation of a particular financial institution, although the purchase price is paid from the assets of the particular institution, and therefore such sales are not taxable under the Ohio Sales Tax Act (Sections 5546-1 to 5546-23, General Code). Opinions of the Attorney General,* 1935, *No.* 4114, *approved and followed.*

2. *Such goods include repair materials and implements for use in preserving and repairing property constituting an asset of a particular institution in liquidation.*

COLUMBUS, OHIO, May 1, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date, which reads:

> "Under date of April 4, 1935, your office issued Opinion No. 4114, the syllabus of which is as follows:
>
> 'The State of Ohio is the "consumer" of goods purchased by the Superintendent of Banks of Ohio for use in the liquidation of a particular bank, within the meaning of Section 5546-2, General Code, although the purchase price is paid from the assets of the particular bank, under Section 710-97, General Code, and therefore such sales are not taxable under the Ohio Sales Tax Act (Sections 5546-1 to 5546-23, General Code).'
>
> We assume that the opinion applies alike to purchases by the Superintendent of Banks and the Superintendent of Building and Loans.
>
> Since the issuance of that opinion, the Sales Tax Section of the Tax Commission has been besieged by parties selling to the Superintendent of Banks and the Superintendent of Building and Loans. In view of the fact that there are numerous banks and building and loan companies in process of liquidation under state supervision, we feel that the question of the applicability of the sales tax to purchases made by persons in charge of liquidating these institutions is of some importance. Sales to these institutions include large quantities of building materials, implements and repair materials to be used on the property owned by the institution being liquidated, as well as office equipment and supplies which are necessary to conduct the business.
>
> If the opinion is to be construed liberally and all purchases made by institutions which are in the process of liquidation under state supervision are to be exempt from tax, the State will lose a large amount of revenue and the difficulties of the administration of the Sales Tax Act will be multiplied.
>
> In view of the foregoing facts, we should appreciate a reconsideration of your opinion and we respectfully request that after consideration you advise this department further, relative to the interpretation of Opinion 4114 relative to the taxability of sales to the Superintendent of Banks and to the Superintendent of Building and Loans."

Section 5546-2, General Code, exempts from the tax sales "when the consumer is the state of Ohio." In Opinion No. 4114, referred to in your letter, I pointed out that under the statutes relating to the liquidation of banks title to all assets and property of a bank vests in the Division of Banks of the Department of Commerce when it is taken over for liquidation. I further pointed out that the liquidation of a bank is a governmental function which the state may properly undertake. Furthermore, I made it clear that this office was committed to the proposition established by Opinion No. 4021, rendered March 6, 1935, that property owned by a division of state government or by a state officer, although held for purposes of liquidation and distribution to the creditors and stockholders of a quasi-public corporation, is state property. Thus in Opinion No. 4021, *supra,* I held that salaries paid to state officers and employees from such property are free from taxation by the federal government under the Constitution of the United States. Upon similar reasoning in Opinion No. 4114, *supra,* I held that the state of Ohio is the "consumer" of goods purchased with funds so held or with funds derived from other property so held.

In your letter you state that sales to the Superintendent of Banks and to the Super-

intendent of Building and Loan Associations include building materials, implements and repair materials to be used on the property being liquidated, as well as office equipment and supplies. The scope of the former opinion was not limited to any particular class or character of property purchased by the Division of Banks. I am unable to see any reasonable distinction between classes of property so purchased, except that it must all be reasonably necessary to the performance of the governmental function being undertaken. This would be the only class of property which the respective superintendents could legally purchase with the assets of institutions in their possession. Material for the repair of a dwelling house, taken over as an asset of a particular institution, in order to make the property marketable, may be as necessary to a complete liquidation as stationery for the liquidating agent to carry on his correspondence.

From the foregoing, it appears that I approve the conclusion reached in Opinion No. 4114, *supra,* upon the reasoning therein stated, and further that I am of the opinion such conclusion is not limited to any particular class of property purchased as long as it is reasonably necessary to the liquidation. These conclusions are equally applicable to purchases by the Superintendent of Building and Loan Associations, in possession of a domestic building and loan association under Sections 687, et seq., General Code.

Section 687, General Code, authorizes the Superintendent of Building and Loan Associations to take possession of the business and property of an association, and is strictly analogous to Section 710-89, General Code, relating to banks. Section 687-1, General Code, relating to the procedure upon taking possession, contains language almost verbatim with Section 710-90, General Code.

Section 687-3, General Code, reads in part:

> "Immediately upon the posting of notice on the door or doors of a building and loan association by the superintendent of building and loan associations, as provided in section 687-1 of the General Code, the possession of all assets and property of such building and loan association of every kind and nature, wheresoever situated, shall be deemed to be transferred from such association to, and assumed by the superintendent of building and loan associations; and such posting shall of itself, and without the execution or delivery of any instruments of conveyance, assignment, transfer, or endorsement, vest the title to all such assets and property in the superintendent of building and loan associations. * * * "

This language is almost identical with that contained in Section 710-91, General Code, and relied upon in Opinion No. 4114, *supra.*

The Division of Building and Loan Associations has been created under Section 154-8, General Code. When the Superintendent of Building and Loan Associations, as the head of that division, takes possession of and title to the property of an association, he does so on behalf of the state. As stated by the Supreme Court in *Warner* vs. *The Mutual Building & Investment Co.,* 128 O. S., 37, 42, "Such superintendent is not only a creature but an arm of the state * * * . " This language is to the same effect as that used by the court with relation to the Superintendent of Banks in *Farkas* vs. *Fulton,* 18 Abs., 277 (Motion to certify overruled by the Supreme Court March 27, 1935), and which I quoted in Opinion No. 4114, *supra.* In the *Farkas* case the court held that in liquidating a bank the Superintendent of Banks acts as an agent of the state and that "his possession is that of the state, who is his principal." Necessarily the same is true of the Superintendent of Building and Loan Associations.

If either superintendent in question, because he is an agent of the state, is immune from liability for torts committed by an employee while performing duties in connec-

tion with the liquidation of a particular institution. *(Farkas* vs. *Fulton, supra),* it follows that when such superintendent purchases property out of assets of a closed institution for use in its liquidation, he does so on behalf of his principal, the State of Ohio.

In the former opinion it was pointed out that banks being quasi-public institutions, the state engages in a proper governmental function when it regulates and liquidates them. That building and loan associations fall within the same category as banks is apparent from the following language in *Warner* vs. *The Mutual Building & Investment Co., supra,* at p. 44:

> "The right of the state to regulate, supervise and control building and loan associations must be conceded. The business conducted by a building and loan association is a species of banking, and the state in the exercise of its police power has complete and absolute supervision over it, and the Superintendent of Building and Loan Associations is no less a trustee because he holds such position. *Central Elevator Co.* vs. *People, ex rel. Moloney, Atty. Gen.,* 174 Ill., 203, 51 N. E., 254, 43 L. R. A., 658."

As above noted, the statutes relating to the liquidation of building and loan associations are like those relating to bank liquidations in so far as they are material to your inquiry. In support of this conclusion, I call your attention to the following language of the court in *The Mutual Building & Investment Co.* case, supra, at p. 43:

> "Section 687-3, General Code, provides that upon the posting of the notice as required by Section 687-1 by the Superintendent of Building and Loan Associations, the *possession and title to all assets and property of such building and loan association are transferred to, and vested in, the Superintendent of Building and Loan Associations.* He becomes the *alter ego* of the particular building and loan association; in other words, a trustee for the benefit of the creditors of the institution and for the institution itself." (Italics the writer's)

As in the case of banks (Section 710-97, General Code), expenses of liquidating building and loan associations "shall be paid out of the property of such association in the hands of the superintendent * * * . " Section 687-14, General Code. As pointed out in Opinion 4114, *supra,* the fact that articles are purchased with funds derived from a single institution does not take such sales out of the statutory exception in question, viz., "when the consumer is the state of Ohio," since such funds are owned by the state. In Opinion No. 4114, I quoted at length from Opinion No. 4021, supra, where it was pointed out that funds derived from taxation are not paid by all citizens of the state and that a number of administrative departments derive their operating funds from fees assessed against particular types of business or against classes of people enjoying a particular benefit or privilege.

On the other hand the functions and activities of each department of state government do not benefit all of the people of the state. Nevertheless such departments perform proper governmental functions and sales of articles used by them are sales to the state as "consumer." The legislature has seen fit to make the regulation and liquidation of financial institutions a governmental function. When an arm of the state government purchases articles necessary to the liquidation of such institution, the state is the "consumer."

As above noted, a financial institution is a business affected with the public interest. That is the ground upon which the state regulates and supervises them as it does. The

depositors and other creditors and the shareholders of such an institution have a direct financial interest in it, but the public also has an interest. As above noted, the public does not directly share in the cost of liquidation. Since the legislature did not exclude from the exemption in question sales of articles to agencies of the state for use in liquidating these institutions, it is not for me to say that the legislature did not intend that the public share of liquidating expense should be borne by an exemption under the Sales Tax Act. If the legislature did not intend to exempt the sales in question, I may suggest that it is in session and by proper enactment can include such sales within the tax.

Without further extending this discussion, and specifically answering your inquiry, it is my opinion that:

1. The State of Ohio is the "consumer" of goods purchased by the Superintendent of Banks or by the Superintendent of Building and Loan Associations for use in the liquidation of a particular financial institution, although the purchase price is paid from the assets of the particular institution, and therefore such sales are not taxable under the Ohio Sales Tax Act (Sections 5546-1 to 5546-23, General Code). Opinions of the Attorney General, 1935, No. 4114, approved and followed.

2. Such goods include repair materials and implements for use in preserving and repairing property constituting an asset of a particular institution in liquidation.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4201.

APPROVAL, CONTRACT FOR HEATING FOR PROJECT KNOWN AS REMODELING FORMER STATE LIBRARY FOR OHIO SENATE, $3,634.00, AETNA CASUALTY AND SURETY COMPANY OF HARTFORD, CONN., SURETY-WUELLER AND THEADO OF COLUMBUS, OHIO.

COLUMBUS, OHIO, May 1, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for the Ohio Senate, and Wueller and Theado of Columbus, Ohio. This contract covers the construction and completion of Contract for Heating for a project known as Remodeling former State Library for Ohio Senate, Columbus, Ohio, in accordance with Item No. 2 of the form of proposal dated April 5, 1935. Said contract calls for an expenditure of three thousand six hundred and thirty-four dollars ($3,634.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. It is noted that it is not necessary under section 2 of House Bill No. 145 of the second special session of the 90th General Assembly, appropriating the money for this contract, that the Controlling Board approve the release of the funds.

In addition, you have submitted a contract bond upon which the Aetna Casualty and Surety Company of Hartford, Connecticut, appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared