

It may be further noted that there were introduced in the 90th General Assembly, the House Bill No. 36, and Senate Bills 2 and 85, which in part sought to lower the rate of compensation of judges and clerks of elections, by amendment of section 4785-28, General Code. However, none of said bills was enacted into law.

In view of the foregoing, the conclusion is irresistible that the board of elections of a county has no power to reduce the compensation provided by section 4785-28, General Code, for judges and clerks of elections.

Inasmuch as I am of the opinion that a county board of elections has no authority to reduce the compensation provided for clerks and judges of elections by section 4785-28, General Code, your second question does not require an answer.

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

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1603.

APPROVAL, CONTRACTS FOR HIGHWAY IMPROVEMENT IN HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, September 22, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

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1604.

MILFORD-HILLSBORO ROAD—CONTRACT FOR IMPROVEMENT OF PART THEREOF CONSTRUED (S. H. NO. 9, U. S. ROUTE NO. 50).

*SYLLABUS:*

*Contract for the improvement of part of the Milford-Hillsboro Road, S. H. No. 9, U. S. Route No. 50, construed.*

COLUMBUS, OHIO, September 23, 1933.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

“I respectfully request your opinion on the following:

Under a letting of June 19, 1931, a contract was awarded to The S. Monroe & Son Company of Portsmouth, Ohio, for the widening with concrete and surfacing with T-25 of Sections P—Q—L—K—Pt—SH 9 in Brown and Highland Counties with proposal No. 1 in Brown County and proposal No. 2 in Highland County. It is stated in the two proposals that there should be a certain number of square yards of a certain average compacted depth.

Proposal No. 1 contained the following:

'T-25 84562 sq. yds. bituminous concrete 1-3/4 inches average compacted depth using minimum of 7400 tons—\$0.47 totaling \$39744.14.

'T-25-1 ton bituminous concrete in place (to establish unit price)—\$6.00.

On proposal No. 1 the seventh and final estimate 520 tons T-25 at \$6.00 totaling \$3120.00 was deducted for non-performance.

Proposal No. 2 contained the following:

'T-25 34601.2 sq. yds. bituminous concrete surface course 1-3/4 inches average compacted depth using a minimum of 3028 tons \$ .47 totaling \$16262.52.

'T-25 1 ton bituminous concrete in place (to establish unit price) \$6.00.

On proposal No. 2 the third and final estimate 237.55 tons T-25 at \$6.00 per ton totaling \$1425.30 was deducted for non-performance.

The pavement was built according to dimensional specifications and of satisfactory material but the entire tonnage set forth in each proposal was not required. As shown above, bids were taken on a square yard basis.

It was later learned that the minimum tonnage was in error and that it should have been less than the amount stated. The engineer admitted his error in estimating his minimum tonnage.

The contractor is now asking payment for the amounts deducted for non-performance under the specified minimum tonnage.

Can we pay for the entire number of square yards even though the tonnage set forth was not furnished?"

One of the proposals in question reads in part as follows:

"To the State Highway Director:

The undersigned, having full knowledge of the site, plans and specifications for the above improvement, hereby agrees to furnish all services, labor, materials and equipment necessary to complete the same by Nov. 15, 1931, according to the plans and specifications and to accept in full compensation for the work for each item in the proposal the Unit Prices specified below.

The total amount of the bid, based on the approximate quantities given below and the Unit Prices specified by the bidder amounts to the sum of ..... (\$72016.59).

(In ink)

The Unit Prices specified in the column marked 'Unit Price Bid' will govern the award of the contract. The total given above is only for the convenience of the Director in reading bids.

The quantities in the column headed 'Approximate Quantities' are those given in the Engineer's Approximate Estimate and are those which will be used in determining the total amount of each proposal for this improvement and for the purpose of determining the lowest bidder. It is understood and agreed that these quantities are approximate only. The bidder must give a unit price for each item named. Failure to do so will render the bid informal at the discretion of the Director.

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Item No.	Approx. Quantities	ITEM	Approximate Estimate		Itemized Proposal			
			Est. Unit Cost	Totals	*Unit Price Bid	†Total Amount Bid		
			\$ cts	\$ cts	\$ cts	\$	cts.	
R-1	4,413 cu. yds.	excavation (unclassified) including widening and super-elevation of curves .....			.40	1765.20		
T-7	18,155 sq. yds.	2'x7" concrete widening 1-5½ mix.....			1.37	24872.35		
I-6	81,698 lin. ft.	1½"x9" integral concrete curb 1-5½ mix....			.05	4084.90		
T-1	400 tons	No. 34 crushed stone (Sec. 3.1) for wedge course for superelevating curves rolled in place .....			2.50	1000.00		
T-25	84,562 sq. yds.	bituminous concrete 1-3/4" average compacted depth, using minimum of 7400 tons .....			.47	39744.14		
T-25	1 ton	bituminous concrete in place (to establish unit price) 6 00 .....			6.00			
		Lights, signs and barricades....		50 00	50.00	50.00		50.00
		Premium on State Insurance..		500 00	500.00	500.00		500.00
		Total Roadway Proper.....		\$72,823 91				72016.59"

The other proposal, so far as it is material to the question involved, is identical with the above form. On the bottom of the proposal and below the signature of the contractor, the following note appears:

"NOTE: The contractor shall make the extension in this column and also add up the totals. However, the unit prices specified, together with the approximate quantities shall determine the total amount of the bid. If there is an error made in the extensions by the bidder the total shall be changed as only the unit prices shall govern. Where there is an item designated as 'lump' the contractor shall enter his bid in the unit price column as well as in the total amount column."

The contract provides that:

"The bidder is required to examine carefully the site of, and the proposal, plans, specifications and contract form for the work contemplated; and it will be assumed that the bidder has investigated and is satisfied as to the conditions to be encountered, as to the character, quality and quantities of work to be performed and materials to be furnished, and as to the requirements of these specifications, special provisions and contract. It is mutually agreed that submission of a proposal

shall be considered prima facie evidence that the bidder has made such examination."

Also:

"The contract shall include the Notice to Contractors, The Proposal, Plans, Specifications, Special Provisions and Contract Bond; also any and all supplemental agreements required to complete the work in a substantial and acceptable manner."

The term specifications is defined in the contract as follows:

"The directions, provisions, and requirements contained herein as supplemented by such special provisions as may be necessary, pertaining to the method and manner of performing the work or to the quantities and qualities of materials to be furnished under contract. Special provisions are specific clauses setting forth conditions or requirements peculiar to the project under consideration and covering work or materials involved in the proposal and estimate but not satisfactorily covered by these general specifications. Supplemental agreements are written agreements executed by the contractor and by the Director covering alterations necessary to the project as hereinafter provided."

The following also appears:

"The party of the second part further covenants and agrees that the following papers shall be bound with or accompany, and be an essential part of this contract: Notices to contractors, plans and specifications, agreement, contract bond and approximate estimate and proposal."

Also:

"These specifications, the plans, special provisions, and all supplementary documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all. They are intended to be cooperative, to describe and provide for a complete work. In case of discrepancy, figured dimensions shall govern over scale dimensions, plans shall govern over specifications, special provisions shall govern over both specifications and plans."

The second paragraph of section 2 reads as follows:

"The quantities listed in the proposal forms are to be considered as approximate and are to be used for the comparison of bids. Payments, except for lump sum contracts, will be made to the contractor only for the actual quantities of work performed or materials furnished in accordance with the plans and specifications and it is understood that the quantities of work to be done and materials to be furnished may each be increased or diminished as hereinafter provided without in any way invalidating the unit bid prices."

The first paragraph of section 9 reads in part as follows:

"For all other than lump contracts, after the work is completed and before final payment is made therefor, the Engineer will make final measurement to determine the quantities of various items of work performed, as the basis for final settlement. The contractor, in all cases, will be paid for the actual amount of work performed in accordance with these specifications as shown by the final measurements, if on a unit price basis."

Unit prices contracts are authorized by section 1207-1, General Code, which reads as follows:

"The director may, if he deems it expedient, enter into any contract authorized by this act upon a unit price basis. Where a contract is entered into upon a unit price basis, the contractor shall be required to state in his bid the sum for which he offers to perform each unit of each different kind or class of work and upon the completion of the work the quantities of each kind or class of work shall be measured and the contractor paid only for the quantities of work actually performed by him. Where the director elects to enter into a contract upon a unit price basis he may include in the estimate such reasonable sum as he may deem necessary to cover variations in the actual quantities of work as compared with the estimated quantities. In the event the actual compensation earned by the contractor exceeds the estimate, any such excess shall be paid from any funds of the department which might lawfully be expended upon the improvement in question. In the event the actual compensation earned by the contractor is less than the estimate, the saving shall inure to the benefit of the state."

The approximate quantities are those appearing under the column headed "Approximate Quantities." So far as bituminous concrete is concerned, the approximate quantity is the amount of yardage which will be used. Payment is to be made for the actual yardage used at the unit price, whether that be more or less than the estimated yardage. What is the unit price per square yard? Clearly, it is forty-seven cents (47c) on the basis of 84,562 square yards, requiring a minimum of 7400 tons, and not, as is claimed by the contractor, forty-seven cents (47c) regardless of the tonnage that may be required. The tonnage is not an approximate quantity, so far as the minimum amount is concerned. To pay the unit price of 47c per square yard for 84,562 square yards, it would be necessary that not less than 7400 tons were used. If less than 84,562 square yards were laid, then the minimum tonnage requirement would be correspondingly reduced and the unit price would remain at 47c for the actual yardage used. In other words, the unit price is based on at least 7400 tons being used in laying 84,562 square yards at the average compacted depth. You say in your letter that "the pavement was built according to dimensional specifications", so that apparently the estimated yardage became the actual yardage used. To entitle the contractor to 47c per square yard therefor, or a total of \$39,744.14, a minimum of 7400 tons would have to be used. Otherwise, reference to tonnage in the proposal is meaningless. Furthermore, there is a unit price bid of \$6.00 for one ton of this material "to establish unit price." This shows clearly that the tonnage is to be

considered in determining the unit price per square yard. The bid for this item can only be for the purpose of taking care of such a situation as has arisen in this case, to furnish a method for determining the amount by which the contract price should be reduced in the event the minimum tonnage specified is not required.

You state that the engineer was in error in placing the minimum tonnage at 7400 tons. That may be true, but the bidder could not misunderstand what he was bidding on, namely, the price per square yard on the basis of not less than the 7400 tons being required for 84,562 square yards. If the proposal had placed the minimum tonnage at 6500 tons, the unit price per square yard could have been less, for such material is purchased by the ton. Furthermore, to pay the contractor for this yardage at 47c per square yard, regardless of the amount of tonnage used, would be unfair to other bidders, who may well have underbid this contractor, had they known that the tonnage specifications were to be ignored. Bidding to be competitive requires that all bids be submitted on the same basis. If the amount of 7400 tons was merely an approximate quantity, and not a minimum quantity, the proposal would not have used the word "minimum," as it would have been unnecessary to bid any unit price per ton, and no reduction could be made if there were a variation of the tonnage used from the tonnage estimated.

The view which I have taken of this contract is also borne out by the following part of the specification for bituminous concrete pavement which is a part of this contract:

"(a) For each square yard first base course of the approximate thickness shown on the plans, using a minimum tonnage as specified, complete in place.

(b) For each square yard second base course of the approximate thickness shown on the plans, using a minimum tonnage as specified complete in place.

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(f) For each square yard of bituminous concrete top course of this thickness shown on the plans, using a minimum tonnage as specified, complete in place."

I am informed that this construction of the contract is in line with the practice of your Department for many years. I also wish to call attention to the fact that in the event of a dispute between the Director and contractor, as to the interpretation of the plans and specifications, the contractor has apparently agreed by the following provisions of the contract that the Director may make the decision as to their meaning:

"The intent of the plans and these specifications is to prescribe a complete work or improvement which the contractor undertakes to do in full compliance with the plans, these specifications, the special provisions, proposal and contract. They are to be cooperative and what is called for by either is as binding as if called for by both. Should any misunderstanding arise as to the intent or meaning of said plans or specifications, or any discrepancy appear in either, the decision of the Director in such case shall be final and conclusive.

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The Director shall decide any and all questions which may arise

as to the quality or acceptability of materials furnished and work performed and as to the manner of performance and rate of progress of the work and shall decide all questions which may arise as to the interpretation of the plans and specifications, and all questions as to the acceptable fulfillment of the contract on the part of the contractor, and as to compensation. His decisions shall be final and he shall have executive authority to enforce and make effective such decisions and orders as the contractor fails promptly to carry out."

I am of the view, therefore, that the price of 47c for the entire yardage used should be paid only in the event the required minimum tonnage is used.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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1605.

LEASE OF SUBAQUEOUS LANDS IN MAUMEE BAY BY STATE MAY  
BE EFFECTED ONLY BY LEGISLATIVE ACT GRANTING SUCH  
AUTHORITY.

*SYLLABUS:*

*Although the State of Ohio, consistent with the trust in and upon which it owns and holds the title to the subaqueous lands in Maumee Bay, may lease such lands for a limited term for the purpose of assisting in the construction of an improvement in the Bay which will facilitate navigation and commerce on the waters of the Bay and of Lake Erie, such lease can be effected only pursuant to the authority of an act of the legislature to be enacted for this purpose and in the manner therein designated.*

COLUMBUS, OHIO, September 23, 1933.

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

DEAR SIR:—This is to acknowledge receipt of a recent communication from you in which you request my opinion on a question suggested in a letter directed to you by one William H. Gould who, it appears, is an agent of your Department at Toledo, and who for sometime last past has been considering from an engineering standpoint a project for dredging Maumee Bay off the shore at Harbor View, east of the city of Toledo, Ohio.

From the letter of your agent in this matter, a copy of which you enclose, it appears that the projected improvement is the dredging of the bay at this point for the purpose of constructing therein a mooring basin for the accommodation of the ships of transportation lines which may have occasion to use this basin in connection with their navigation of the Bay and the Great Lakes. It further appears that this projected improvement is to be carried out by said transportation lines and by certain persons and incorporations who are the owners of the uplands at this point, and that the improvement is to be made by and through the agency of a corporation to be incorporated for this purpose. The cooperation of the state in this matter is desired and to this end the state is requested