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1. HOSPITALS, TUBERCULOSIS—SECTIONS 17, 5625-33 GC APPLICABLE TO CONTRACTS FOR CONSTRUCTION, ADDITIONS AND BETTERMENTS TO HOSPITALS ESTABLISHED UNDER SECTION 3139-1 ET SEQ., G.C.
2. CONTRACTS MAY BE EXECUTED BY BOARD OF TRUSTEES ANY TIME AFTER COUNTY COMMISSIONERS OF PARTICIPATING COUNTIES HAVE APPROPRIATED FUNDS—COUNTY'S SHARE OF COST—FUNDS MUST BE EITHER IN COUNTY TREASURY OR IF RAISED BY TAXATION AND IN PROCESS OF COLLECTION CERTIFICATION MUST BE MADE BY FISCAL OFFICERS OF SEVERAL COUNTIES—SECTION 5625-33 G.C.

## SYLLABUS:

1. The provisions of Section 17 and Section 5625-33, General Code, are applicable to contracts for the construction, additions and betterments to tuberculosis hospitals established under the provisions of Section 3139-1, et seq., General Code.

2. The board of trustees may proceed with the execution of such contracts at any time after the county commissioners of the participating counties have appropriated funds to meet each such county's share of the cost of such project provided the funds so appropriated are either in the county treasury or, if being raised by taxation, are in process of collection, and provided certification to such effect is made by the fiscal officers of the several counties concerned as provided in Section 5625-33, General Code.

Columbus, Ohio, May 14, 1953

Hon. Robert L. Perdue, Prosecuting Attorney  
Ross County, Chillicothe, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Board of Trustees of Mt. Logan Sanatorium, Chillicothe, Ohio, have had tentative drawings made for the construction of a building and placing therein of a new heating plant, together with an incinerator, the erection and completion of which will cost between \$30,000.00 and \$35,000.00.

"The Joint Board of County Commissioners assembled in the Ross County Commissioners Office have approved the plan and authorized the Board of Trustees to have plans and specifications completed, and five (5) of the counties represented in the meeting

on April 15, 1953, agreed to furnish the funds with which to proceed, and one (1) county Jackson, while willing to furnish the money, if they could devise a way to raise the money, are to report back to the Board of Trustees on April 29, 1953.

"The Board of Trustees desire to proceed with this work immediately and have requested that I furnish them with an opinion as to whether they can proceed at this time.

"I therefore request your opinion on the following two specific questions :

"1. Can the Board of Trustees proceed with the construction work and bill the counties participating for the cost of the same when it is completed?

"2. Can a contract be presently let by the Board of Trustees for this proposed construction prior to a certification by the fiscal officers of all the counties participating that there has been an appropriation of funds for the construction and that such funds are available to pay for the same?

"Question No. 2, of course, is directed to you with reference to the provisions of G. C. Section 17 and G. C. Section 5625-33.

"I would appreciate an early reply since the Trustees desire, if possible, to proceed immediately."

It is assumed that the Mt. Logan Sanitorium has been constructed and is now being operated by a joint county district organized as provided in Section 3139-1, General Code. This section is as follows :

"The commissioners of any two or more contiguous counties, not to exceed five, may, and upon the favorable vote of the electors thereof in the manner hereinafter provided, shall form themselves into a joint board for the purpose of constructing, equipping and maintaining a district hospital for the care and treatment of persons having tuberculosis, provided, that no county in which there is a municipal or county tuberculosis hospital shall be included in any such district. Provided, however, that districts now existing containing more than five counties may continue in existence under all the provisions of this act. If the boards of county commissioners fail to provide for the care of the tuberculous, two per cent of the electors of any proposed joint district may file a petition with the board of deputy state supervisors of elections of the most populous county in such proposed district, designating the counties in such district. Such board shall at once certify such fact to the election boards of the counties comprising such proposed district and such proposition shall be placed on the ballot at the next special or general election oc-

curring more than sixty days after the filing of such petition. If a majority of the electors voting on the proposition in each county of the proposed district vote in favor thereof, such district shall be established. After the establishment of such joint district, either by voluntary action of the commissioners or as a result of such election, such joint board of county commissioners shall provide a site or the necessary funds for the purchase of a site and also shall provide the necessary funds for the acquisition, erection and equipment of the necessary buildings thereon. Such expenses as may be incurred by the county commissioners in meeting with the commissioners of other counties for consideration of the proposal to establish a district tuberculosis hospital shall be paid from the general fund of the county. After the organization of the joint board such expenses shall be paid from the funds provided for the erection and maintenance of such hospitals."

In Section 3139-3, General Code, it is provided that the joint board of county commissioners of such district shall appoint a board of trustees who shall be vested with the management and control of the district hospital. Authority is given in Section 3139-4, General Code, to such board of trustees to select the site on which to erect a district hospital, to prepare plans and specifications of the structure, and to "proceed to acquire or erect and equip the necessary buildings."

The apportionment of the cost of such hospital projects is provided for in Section 3139-5, General Code, which reads as follows:

"The first cost of the hospital, and *the cost of all betterments, repairs and additions thereto*, as determined by the board of trustees, shall be paid by the counties comprising the district, in proportion to the taxable property of each county as shown by their respective duplicates. To meet the expense incurred in the purchase of a site or enlargement thereof, and for the erection and equipment of buildings, or for the purpose of enlarging, improving or rebuilding thereof, or for purchasing an interest in a district tuberculosis hospital, the commissioners may borrow such sum or sums of money as may be apportioned to the county, at a rate of interest not to exceed five per cent per annum, and issue and sell the bonds of the county to secure the payment of the principal and interest thereof. Such principal and interest shall be paid as provided in section 2293-8 of the General Code. A statement shall be prepared annually showing the per capita daily cost for the current expenses of maintaining such hospital, including the cost of ordinary repairs, and each county in the district shall pay its share of such cost as determined by the number of days the total number of patients from such county have spent in the hospital during the year, but any sums paid by the patients from such county for their treatment therein shall be deducted from

this amount. The boards of county commissioners of counties jointly maintaining a district hospital for tuberculosis shall make annually an appropriation or otherwise provide sufficient funds to support, and to defray the necessary expense, of maintenance of such hospital." (Emphasis added.)

It appears that the construction project described in your inquiry is within one or the other of the categories "betterment," "additions," or "improvements," the expense of which this section requires the county commissioners of the several counties to make provision for.

Further provision for the apportionment of the expense of "a new hospital building \* \* \*, betterments and additions" is found in Section 3139-9, General Code, which reads as follows:

"Whenever, after any district tuberculosis hospital has been destroyed or become inadequate for the needs of the district or has been established or operated for a continuous period of five or more years, and the board of trustees of such hospital decides that a new site, a new hospital building or buildings, betterments and additions to an existing building or buildings, or new equipment has or have become necessary, any county in the district may complain by proper petition to the court of common pleas of the county in which said district tuberculosis hospital is located, stating that it is unjust and inequitable that such complaining county should pay for the said expense incurred or to be incurred in proportion to its taxable property, as provided for in foregoing sections of this act. In such petition the complaining county shall be the plaintiff and all other counties of said district shall be defendants, and each county shall be required to answer said petition within the ordinary answer day required in civil actions. Upon answer or in default thereof, the matter shall come up for hearing before said court of common pleas, and upon full hearing said court of common pleas may make such order of apportionment of said expense between the counties as may be just, proper and equitable, and thereupon such order shall be binding as between the counties, and in lieu of the apportionment prescribed by foregoing sections of this act."

It would appear that this section is intended to apply in those situations in which the board of trustees has decided upon the necessity for addition or betterment project but where there is a disagreement among the commissioners as to the proper share of the anticipated expense to be borne by each of the several counties concerned; and the provisions of Section 3139-5, supra, would appear to be applicable in the absence of such disagreement in the instant case.

Your inquiry relates to the authority of the board of trustees to proceed to let contracts for an addition and betterment project in advance of the appropriation of necessary funds by the several boards of county commissioners to finance such projects; and specifically you ask whether the provisions of Sections 17 and 5625-33, General Code, are applicable.

Section 17, General Code, reads:

"An officer or agent of the state or of any county, township or municipal corporation, who is charged or intrusted with the construction, improvement or keeping in repair of a building or work of any kind, or with the management or providing for a public institution, shall make no contract binding or purporting to bind the state, or such county, township or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been duly authorized to make such contract. If such officer or agent makes or participates in making a contract without such appropriation or authority, he shall be personally liable thereon, and the state, county, township or municipal corporation in whose name or behalf the contract was made, shall not be liable thereon."

Section 5625-33, General Code, reads in part as follows:

"No subdivision or taxing unit shall:

\* \* \* "(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. In case no certificate is furnished as hereinbefore required, upon receipt by the taxing authority of the subdivision or taxing unit, of a certificate of the fiscal officer that there was at the time of the making of such contract or order, and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract; but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate;

provided, however, that if the amount involved is less than one hundred dollars, the fiscal officer may authorize it to be paid without the affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid. \* \* \*

As to Section 17, General Code, it is plain that the board of trustees, although a public organization created for a public purpose, and so to some extent a legal entity, is neither a "county, (nor a) township." Although the board could be considered a "municipal corporation" in an extremely broad sense, this term has been held to refer only to a "city or incorporated village," and to be so limited as to exclude such a public agency as a board of education. See *Dayton et al. v. Thomas*, 20 O.N.P. (N.S.) 539 (543, 544).

In Section 5625-33, General Code, the pertinent words in this respect are "subdivision" and "taxing unit." These terms are defined in Section 5625-1, General Code, as follows:

"The following definitions shall be applied to the terms used in this act:

"(a) 'Subdivision' shall mean any county, school district, except the county school district, municipal corporation, township, township fire district or township waste disposal district in the state. \* \* \*

"(i) 'Taxing unit' shall mean any subdivision or other governmental district having authority to levy taxes on the property in such district or issue bonds which constitute a charge against the property of such district including conservancy districts, metropolitan park districts, sanitary districts, road districts and other districts."

These definitions do not patently include a board of trustees of a district tuberculosis hospital as such. It is by no means clear, however, that this is dispositive of your questions. An examination of the several statutory provisions which set out the powers and functions of such boards of trustees quite clearly show that they are without authority to raise funds by taxation or to expend any such funds except such as are so raised and appropriated to their use by the county authorities. It is true that they enjoy the statutory right to have the several boards of county commissioners provide sufficient funds for the support of the hospital concerned, but in this respect they are in no more favorable or authoritative position than many other statutory offices, departments and institutions which are required by law to be supported by a particular county. This being so, it

must be concluded that such a board of hospital trustee is, in a very real sense, an agent, or agency, of each of the counties which have joined together to create it, and so, as such agent, in the expenditure of public monies, is subject to the same statutory limitations as are applicable to its several principals. It follows, therefore, that both sections 17 and 5625-33, General Code, being applicable to counties, are applicable also to such board of hospital trustees. Under this view it cannot be supposed that the board is authorized to let a building construction contract prior to a certification by the fiscal officers of the several participating counties that there has been made an appropriation of funds by the commissioners of all of such counties to meet the cost of the construction proposed, and that such funds are "in the (county) treasury or in the process of collection."

As to your first question, assuming that all of the counties involved have appropriated sufficient funds to cover the share of each in the cost of construction, I perceive no reason why the trustees should not proceed with the execution of a construction contract in advance of the actual receipt of the funds so appropriated, provided the funds so appropriated are either "in the treasury or in the process of collection." By reference to Section 3139-5, General Code, we find provision for the allocation of the cost of "betterments, repairs and additions" among the several counties "in proportion to the taxable property of each county." This section provides, also, that the county commissioners may raise the amounts so apportioned by borrowing and that they may issue bonds for such purpose. Although this section does not expressly authorize a tax levy to provide such funds, or to repay the amounts borrowed for such purpose, we find the following language in the section immediately following, i. e., in Section 3139-6, General Code:

"All taxes levied by the county commissioners of any county under the provisions of section 6 (G. C. 3139-5) of this act shall, when collected, be paid over to the trustees of the district tuberculosis hospital upon the warrant of the county auditor, at the same time that school and township moneys are paid to the respective treasurer; and the board of trustees shall receipt therefor and deposit said funds to its credit in banks or trust companies to be designated by it and said banks or trust companies shall give to said board, a bond therefor in an amount at least equal to the amount as so aforesaid deposited; and thereupon said funds may be disbursed by said board of trustees for the uses and purposes of said district tuberculosis hospital, and accounted for as provided in the foregoing sections. \* \* \*"

From this language it would appear that the commissioners may either (1) borrow the necessary funds, appropriate them to the use of the hospital, and pay them over to the trustees at once, or (2) appropriate such funds in anticipation of the receipt of proceeds of current levies. In either situation no practical problem would be involved, for I assume, in the first instance, that but a short time would intervene between the appropriation and the payment to the trustees; and in the second instance no waiting period would be involved because in such case, as provided in Section 5625-33, supra, the contract could be let at any time after the funds to be raised by taxation are "in process of collection."

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The provisions of Section 17 and Section 5625-33, General Code, are applicable to contracts for the construction, additions and betterments to tuberculosis hospitals established under the provisions of Section 3139-1, et seq., General Code.

2. The board of trustees may proceed with the execution of such contracts at any time after the county commissioners of the participating counties have appropriated funds to meet each such county's share of the cost of such project provided the funds so appropriated are either in the county treasury or, if being raised by taxation, are in process of collection, and provided certification to such effect is made by the fiscal officers of the several counties concerned as provided in Section 5625-33, General Code.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General