

OPINION NO. 1183

Syllabus:

1. If the total estimated cost of resurfacing a county road does not exceed \$6,000.00 per mile, the Board of County Commissioners may elect to proceed, either under the provisions of Section 5555.61, Revised Code, or of Section 5555.71, Revised Code.

2. If the total estimated cost of resurfacing a county road does not exceed \$6,000.00 per mile and the Board of County Commissioners elects to proceed by force account, the provisions of Section 5543.19, Revised Code, are applicable.

To: Charles W. Ayers, Knox County Pros. Atty., Mt. Vernon, Ohio
By: William B. Saxbe, Attorney General, July 1, 1964

I have before me your request for my opinion, reading as follows:

"The Board of County Commissioners have determined to undertake a resurfacing program by blacktop of some of the county roads. There are sufficient funds in the road and bridge fund to pay for such resurfacing. The cost of such work as estimated by the county engineer which includes, labor, material, freight, fuel, hauling, use of machinery and equipment with an operator furnished under R.C. Section 5555.71 will not exceed \$6,000.00 per mile. However, the county does not own the machinery necessary to perform the work of resurfacing the road with blacktop nor does the county have any employees who have the experience as operators of such equipment. The county can lease the necessary machinery equipment with an operator furnished from a contractor who is in the business of resurfacing roads with blacktop."

The question presented is as follows:

"May the county commissioners proceed by force account in such blacktop program and authorize the county engineer to lease the necessary machinery equipment with an operator furnished under R.C. Section 5543.19 and R.C. Section 5555.71 or must the county advertise for bids for furnishing all the labor, materials, equipment and doing the work as provided in R.C. Section 5555.61?"

Section 5555.61, Revised Code, provides as follows:

"After the board of county commissioners decides to proceed with the improvement, it shall advertise for bids once, not later than two weeks prior to the date fixed for the letting of contracts, in a newspaper published and of general circulation in the county, but if there is no such newspaper published in the county then in a newspaper having general circulation in said county. The board may also cause advertisements for bids to be inserted in some trade paper or other publication to be designated by it. Such notice shall state that copies of the surveys, plans, profiles, cross sections, estimates, and specifications for such improvements are on file in the office of the board, and the time within which bids will be received. The board may let the work as a whole or in convenient sections, as it de-

termines, and shall award the contract to the lowest competent and responsible bidder. Such contract shall be let upon the basis of lump sum bids, unless the board orders it let upon the basis of unit price bids."

Section 5555.71, Revised Code, provides as follows:

"Before undertaking the construction, reconstruction, widening, resurfacing, repair, or improvement of a road, the board of county commissioners shall cause to be made by the county engineer an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost. The board may, in lieu of constructing such improvement by letting the work by contract, proceed by force account. When the total estimated cost of the work exceeds six thousand dollars per mile, the board shall invite and receive competitive bids for furnishing all the labor, materials, and equipment and doing the work, as provided in section 5555.61 of the Revised Code, and shall consider and reject such bids before ordering the work done by force account. When such bids are received, considered, and rejected, and the work done by force account, such work shall be performed in compliance with the plans and specifications upon which the bids were based. This section applies to new construction and repair work."

One of my predecessors in Opinion No. 2411, Opinions of the Attorney General for 1921, opined with regard to earlier versions of these present sections, that the two are so utterly divergent in character that there is no reconciling and giving effect to them except on the theory that the legislature has conferred authority on the commissioners to elect as between the two methods of procedure. It was further concluded that when one procedure is resorted to, it must be followed to the exclusion of the other.

In Opinion No. 2460, Opinions of the Attorney General for 1921, it was stated that "section 6948-1 (Section 5555.71, Revised Code) is a statute of limited application, and merely authorizes the county commissioners to adopt the force account method instead of the contract method of completing road projects formally undertaken under Section 6906 et seq., General Code." The opinion continued "s/o far then as the actual carrying out of the force account project is concerned, reference must be had to section 7198 et seq." (Section 5543.19, Revised Code)

I concur with the statements as expressed in the aforementioned Opinions, #2411 and #2460. It would appear that the earlier provision, enacted in 1915, was mandatory in form, while the later provision, passed in 1917, relative to force

account is merely permissive. In other words, the legislature having laid down a mandate for the procedure of the county commissioners in conducting road repair, saw fit at a later time to give them permission to perform the work in another manner, to wit, by turning the matter over to the county engineer.

Section 5543.19, Revised Code, provides as follows:

"The county engineer may, when authorized by the board of county commissioners, employ such laborers and teams, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges, and culverts, by force account."

It was concluded in Opinion No. 3139, Opinions of the Attorney General for 1931, page 527, as disclosed by the syllabus:

"When the county commissioners have authorized the surveyor to construct or improve a road by force account, under the provisions of section 7198 of the General Code, the surveyor has the sole power to contract with laborers with reference to the construction of such improvement, and the approval of the county commissioners is not required as a condition precedent to the payment of such wages."

It is noted that the title of "County Surveyor" was changed to that of "County Engineer" in 1935, (116 Ohio Laws, 283).

Opinion No. 768, Opinions of the Attorney General for 1951 and Opinion No. 5275, Opinions of the Attorney General for 1955 are in general accord with the 1931 opinion.

In Opinion No. 1124, Opinions of the Attorney General for 1957, I had occasion to review and explain the many opinions directed to questions arising under Sections 5555.61 and 5555.71, *supra*, and predecessor sections, and concluded as disclosed by the first branch of the syllabus:

"Under authority of Section 5543.19, Revised Code, a resolution of a board of county commissioners, duly adopted and entered in the minutes, authorizing a county engineer to proceed in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account, grants to him the power to hire and discharge employees and, unless the board specifically reserves to itself the right to purchase materials, to make such purchases without supervision or interference."

I reaffirm the conclusion expressed in this syllabus.

Accordingly, and based upon the foregoing authority and upon a reading of the statutes, it is my opinion and you are hereby advised that:

1. If the total estimated cost of resurfacing a county road does not exceed \$6,000.00 per mile, the Board of County Commissioners may elect to proceed, either under the provisions of Section 5555.61, Revised Code, or of Section 5555.71, Revised Code.

2. If the total estimated cost of resurfacing a county road does not exceed \$6,000.00 per mile and the Board of County Commissioners elects to proceed by force account, the provisions of Section 5543.19, Revised Code, are applicable.