

1455

1. ARMORY—GRANT, FEDERAL FUNDS MADE TO STATE—USE, CONSTRUCTION OF ARMORIES UNDER CONTRACT BETWEEN STATE AND UNITED STATES—STATE TO EXECUTE CONSTRUCTION CONTRACTS—FUNDS— BECOME STATE FUNDS WHEN RECEIVED—DISBURSED, SECTION 301 G. C.—CONTRACTS EXECUTED UNDER SECTION 2288-2 G. C.
2. PROVISIONS, SECTION 5242 G. C.—APPLICABLE TO TOTAL COST OF ARMORY CONSTRUCTION PROJECT—STATUS OF FEDERAL GRANT IN AID TO STATE.
3. FEDERAL FUNDS FOR USE BY STATE—AVAILABLE AFTER ENACTMENT OF EXPRESS APPROPRIATION BY GENERAL ASSEMBLY—FUNDS MAY BE UTILIZED TO EXPAND STATE'S ARMORY CONSTRUCTION PROGRAM —EXPANSION LIMITED TO PROVISION OF ADDITIONAL FACILITIES RATHER THAN PROVISION OF MORE COSTLY FACILITIES—SECTION 8, AMENDED HOUSE BILL 672, 99 GENERAL ASSEMBLY—SECTION 5242 G. C.

SYLLABUS:

1. . Where a grant of federal funds is made to the state for use in the construction of armories under a contract between the state and the United States which provides that the state shall execute the construction contracts for such projects, such funds, when received by the state, become state funds and can be disbursed only as provided in Section 301, General Code; and the execution of such construction contracts can be accomplished only as provided in Section 2288-2, General Code.

2. The provisions of Section 5242, General Code, limiting the total amount which may be expended on a particular armory construction project, are applicable to the total cost of such project, regardless of the circumstances that a portion of the funds used to meet such cost represents a federal grant in aid to the state.

3. Where federal funds for use by the state in armory construction projects have become available after the enactment of an express appropriation for such purpose by the General Assembly, such funds, under the provisions of Section 8, Amended House Bill No. 672, 99th General Assembly, may properly be utilized to expand the state's armory construction program beyond that contemplated at the time of enactment of such express appropriation; but such expansion is limited, by the terms of Section 5242, General Code, to the provision of additional facilities, rather than the provision of more costly facilities.

Columbus, Ohio, June 3, 1952

Maj. Gen. Albert E. Henderson, The Adjutant General of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Your advice is requested in the following matter.

"Under the provisions of Sections 2314 to 2355-2, inclusive, General Code, the Adjutant General may construct armories, subject to the limitation of Section 5242, General Code, and the provisions of Section 2288-2, General Code.

"Our 1952 construction program contemplates the addition of six new armories, the cost of which is to be borne 75% by the Federal Government and 25% by the State of Ohio. Our appropriation was obtained prior to the knowledge that the Federal Government would participate in the construction costs and only proposed the building of three armories. Our funds therefore are sufficient for the building of the three additional armories because of this Federal assistance.

"Our questions are could you approve our contracts for such construction if:

"(1) the Federal Government paid directly to the contractors its proportionate share of the cost.

"(2) we presented under provision of Section 2288-2, General Code, the Contract Encumbrances to the contractors for the State's portion and an encumbrance of Federal funds or its agreements to pay the contractors for its portion.

"If the contracts can be approved under these circumstances, will the limitations of Section 5242, General Code, apply to only the State's portion of the cost, or to the total cost?"

Another phase of the problem here presented was considered in my Informal Opinion No. 117, addressed to you on March 20, 1952. In that opinion it was held:

“It would appear that all of the statutes above referred to (Sections 5237 to 5252, both inclusive), would be applicable to the construction of facilities contemplated in the contract here under consideration. Accordingly it is my recommendation that Article VI of the contract be expanded so as to include the following provision:

The acquisition, construction, expansion, rehabilitation or conversion of any of the facilities comprehended by the terms of this agreement and the utilization of such facilities shall be in conformity with the provisions of Sections 5237 to 5252, both inclusive, and other related sections of the General Code of the State of Ohio. * * *

“Your attention is invited also to the provisions of Section 2288-2, General Code, which requires a certificate of the Director of Finance as to the availability of funds before particular building projects, pursuant to the agreement here in question, are undertaken, it being my view that the submission to the government of plans, specifications and cost estimates of a specific project under the provisions of paragraph 1 of Article I of the agreement, and the approval thereof by the government, would constitute a separate contract within the meaning of Section 2288-2, General Code.”

Section 2288-2, General Code, reads as follows:

“It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations.”

It is clear, in my opinion, that the words “any contract, agreement or obligation involving the expenditure of money” refer to an obligation of the state in which the expenditure of *state funds* is involved. We may, therefore, inquire whether the construction contracts here in contemplation are state obligations in whole or merely in part.

In connection with your inquiry, to which my Informal Opinion No. 117, *supra*, was responsive, you forwarded to me a copy of the pro-

posed contract between the State and the United States relative to the construction of armories on the so-called federal participation basis. In Article I, paragraph 2 of that contract, it is provided :

“The state agrees :

“* * * 2. To contract separately for each project all work, material, and/or services required to carry out this agreement.
* * *”

This provision makes it clear that the state is to be a party to the construction contracts with the persons who undertake the actual work of construction; and that the United States is not to be such a party. In such case, the state could expect, if the further provisions of Article I of the proposed contract with the United States are met, to receive grants in aid to pay a portion of the construction costs which the state has obligated itself to meet. The expenditure of such funds is authorized by the provisions of Section 8 of Amended House Bill No. 672, 99th General Assembly, which reads :

“All revenues received from the federal government by the state of Ohio, or any of its departments or divisions, and any receipts or any collections made for and on behalf of the United States government are hereby appropriated for the purpose for which allotted or collected.”

It would appear, however, if such federal funds are withheld by reason of failure to meet any of the conditions of Article I of the proposed contract with the United States, that the state, in the ordinary case, would be bound by the terms of its construction contract to proceed thereunder and to meet the costs thereof entirely from state funds. Accordingly, because the General Assembly, in Section 8 of Amended House Bill No. 672, supra, has recognized that funds received as federal grants in aid become state funds which must be appropriated by that body, and because the state is bound on its construction contracts, regardless of the availability of federal funds, I must conclude that such contracts must be deemed to be state obligations; and that under the provisions of Section 2288-2, supra, the certificate of the Director of Finance is required to cover the entire cost of the project, including the contribution of the United States.

Here we may observe that a provision in the proposed contract with the United States, Article II, paragraph 2 authorizes the payment of

federal funds, as to any armory construction project, either to the state, or directly to the construction contractor, to cover the federal government's proportionate share of the cost of the project. I find nothing in Ohio statutes, either relative to armory construction or relative to state fiscal affairs, which would authorize the Adjutant General to enter into such an arrangement. On the contrary, if the federal funds in question are considered to be state funds following the actual receipt of the federal grant, it would appear that they could be disbursed only upon warrant of the auditor of state, as provided in Section 301, General Code.

On the other hand, if we should consider such funds, so paid directly by the United States to the construction contractor, *not* to be state funds, and the construction contract is so drawn as to limit the obligation of the state thereunder to its proportionate share of the cost, then that contract obviously represents a cooperative project between the two governments in which neither of them alone is responsible for completing such project. I do not find that the Ohio statutes authorize the Adjutant General to enter into such an arrangement on behalf of the state, nor, for that matter, does such a cooperative arrangement appear to be authorized under the provisions of the federal law, Public Law 783, 81st Congress, under the terms of which the grants in aid here in question are authorized. I do not, of course, doubt that the General Assembly has the power, on behalf of the state, to authorize such cooperative or joint projects. I merely point out that it has not done so.

This conclusion as to your first question possibly makes it unnecessary to consider the second. However, it is proper here to point out the limitations found in Section 5242, General Code, as to the maximum expenditure which can be made as to each armory constructed. This section reads :

“The maximum amount to be expended by the state for the building or purchase of any armory shall be one hundred fifty thousand dollars for one organization and fifty thousand dollars for each additional Ohio national guard organization for which quarters are to be provided therein. The adjutant general may allow a sum not to exceed five thousand dollars for the furnishing and equipping of each armory so built or purchased. A sum of not to exceed five thousand dollars per annum shall be allowed to each organization of the Ohio national guard or the Ohio defense corps to cover armory rent, heat, light, water and janitor service, the amount to be determined by the adjutant general, and all sums expended for said purposes to be approved and paid by the adjutant general upon vouchers certified.”

If this limitation on the amount which can be expended on a single armory is deemed applicable only to that portion of the cost representing the state's contribution, then it is clear that an armory might be constructed at a total cost of \$600,000 in a case where the state is to bear twenty-five per cent of the cost and the United States to contribute the balance.

I seriously doubt whether such a result was intended either by the General Assembly or by the federal Congress. It is far more logical to suppose that Congress intended, in making funds available for armory construction, to provide *additional* facilities, rather than *more costly* facilities.

As to the intent of the General Assembly, we may note that Section 5242, *supra*, was amended in 1949 so as to change the limitation on the amount which might be expended in the construction of a single armory from \$125,000 to \$150,000. In a subsequent amendment, effective June 5, 1951, the amount of this limitation was unchanged. In your inquiry you indicate that the current appropriation "was obtained prior to the knowledge that the Federal Government would participate in the construction costs." Accordingly, we may infer that the General Assembly contemplated, as recently as one year ago, that a suitable and adequate armory could be constructed with total expenditures within the limits of Section 5242, *supra*. Here, too, it is logical to suppose that the General Assembly, had it contemplated the possibility of federal funds becoming available for armory construction, would have intended that such funds be used to construct additional facilities, rather than more costly facilities.

Finally, if the construction contracts here contemplated must be deemed to constitute state obligations, and the funds expended thereunder, from whatever source obtained, to be state funds in the legal sense, at least, we must conclude that the limitations of Section 5242, General Code, are applicable to the total expenditure involved in each case, regardless of the circumstance that a portion of the total funds so expended represents a federal grant in aid to the state.

I do not, of course, question the authority of the Adjutant General to use the federal funds available to construct armory facilities in addition to those contemplated at the time the specific appropriation for this purpose was made by the General Assembly. This possibility was clearly

contemplated by the enactment of the provision in Section 8, Amended House Bill No. 672, 99th General Assembly, hereinbefore noted.

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

1. Where a grant of federal funds is made to the state for use in the construction of armories under a contract between the state and the United States which provides that the state shall execute the construction contracts for such projects, such funds, when received by the state, become state funds and can be disbursed only as provided in Section 301, General Code; and the execution of such construction contracts can be accomplished only as provided in Section 2288-2, General Code.

2. The provisions of Section 5242, General Code, limiting the total amount which may be expended on a particular armory construction project, are applicable to the total cost of such project, regardless of the circumstances that a portion of the funds used to meet such cost represents a federal grant in aid to the state.

3. Where federal funds for use by the state in armory construction projects have become available after the enactment of an express appropriation for such purpose by the General Assembly, such funds, under the provisions of Section 8, Amended House Bill No. 672, 99th General Assembly, may properly be utilized to expand the state's armor, construction program beyond that contemplated at the time of enactment of such express appropriation; but such expansion is limited, by the terms of Section 5242, General Code, to the provision of additional facilities, rather than the provision of more costly facilities.

Respectfully,

C. WILLIAM O'NEILL

Attorney General