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1. CONTRACT WITH MUNICIPALITY OR OTHER PUBLIC BODY TO SUPERVISE CONSTRUCTION OF PUBLIC IMPROVEMENT—WHERE CONTRACTOR WHOLLY FAILS TO FURNISH SUCH SUPERVISION—PAID AGREED COMPENSATION—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES JUSTIFIED TO MAKE A FINDING AGAINST CONTRACTOR FOR MONEY PAID HIM—SECTION 286, G. C.
2. WHERE SUCH CONTRACTOR PERFORMS CONTRACT SO NEGLIGENTLY OR INEFFICIENTLY THAT IMPROVEMENT IS WHOLLY OR PARTLY USELESS, PUBLIC BODY WOULD HAVE A RIGHT OF ACTION AGAINST CONTRACTOR FOR LOSS OR DAMAGE SUFFERED—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES WITHOUT POWER TO MAKE A FINDING AGAINST CONTRACTOR FOR AMOUNT OF LOSS OR DAMAGE.

SYLLABUS:

1. Where one has contracted with a municipality or other public body to supervise the construction of a public improvement, and wholly fails to furnish such supervision, but has been paid the agreed compensation, the Bureau of Inspection and Supervision of Public Offices is justified, under Section 286 of the General Code, in making a finding against such contractor for the money paid him.
2. Where one who has contracted with a municipality or other public body

to supervise the construction of a public improvement in accordance with plans and specifications adopted by such public body, performs his contract so negligently or inefficiently that such improvement is wholly or partly useless, such public body would have its right of action against such contractor for its loss or damage suffered thereby, but the Bureau of Inspection and Supervision of Public Offices is without power to make a finding, pursuant to Section 286 of the General Code, against such contractor for the amount of such loss or damage.

Columbus, Ohio, December 21, 1945

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

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

"We are inclosing herewith correspondence from our Engineer-Examiner, in which he makes a preliminary report of faulty sewer construction in the Village of L.

We have also a report of the County Engineer on the same matter. Both of said Engineers show that a large amount of money was expended on the said sewer system and that this system is not usable because the sewers were not laid or constructed, according to the plans and specifications approved by the village council.

The failure of the sewer system to function is apparently the fault of the engineer with whom the village contracted to prepare the plans and specifications and supervise the construction, who is a professional registered engineer employed on a contract calling for a fee of 4% of the total construction cost. Further, said contract was presumably entered into in accordance with the provisions of Section 3982-2 of the General Code.

Question: If it can be conclusively shown that the failure of the sewer system to function is the fault or negligence of the contracting professional engineer, is said engineer financially liable for the loss to the village, it being understood that the cost of making the sewer system workable will be approximately \$48,000.00."

Accompanying your communication I note a copy of the contract between the village of L. and the engineer, who, for the purpose of this opinion will be designated as X. It seems to me proper to set out the full terms of that contract. It reads as follows :

"AGREEMENT

This agreement entered into this 19th day of June, 1939, by and between the Village of Lakemore, Summit County, Ohio (party of the first part) and X, Professional Engineer of Cleveland, Ohio (party of the second part)

Whereas, the party of the First part proposes to construct a complete sewerage system and disposal plant and for that purpose requires the services of a consulting designing and supervising engineer in connection therewith;

Now, therefore, the parties hereto have agreed and by these presents do agree as follows:—

1. The Party of the Second Part agrees to furnish any and all of the necessary engineering services required for the proper design and construction of a complete Sewerage System and Disposal Plant for said Village and its inhabitants thereof, as required by the Party of the First Part and including the following:

a. Preliminary investigations, studies and reports, preliminary general plan or plans, approximate estimates of cost and all necessary conferences with the Party of the First Part.

b. Complete general and detail plans, specifications and detailed estimates of cost.

c. Prepare forms for construction proposals, advertisements, construction contracts and bonds, subject to the approval of the Party of the First Part.

d. Receive and tabulate proposals, report same to the Party of the First Part, and assist in awarding contracts for construction.

e. Furnish general supervision of the work of the contractors including line and grade surveys where necessary as the construction progresses and assist in a correct interpretation of the plans and specifications.

f. Furnish property, boundary, right-of-way or other surveys at the actual cost to the Party of the Second Part plus field traveling, and out of the office expenses.

g. Meet with the Party of the First Part or its representatives when requested or necessary for consultation or conference.

h. Prepare necessary plans and applications for permits for the submission to and approval of local, state and Federal authorities (such as municipal building departments, state boards of health, etc.) as may be required for the initiation, prosecution

and construction of the improvement. The cost of such permits, if any, to be paid by the Party of the First Part, but the cost of preparing such plans and applications shall be included in the fee paid the Party of the Second Part.

i. Supervision of equipment and materials to assure that same are in accordance with the terms of the contracts.

j. Prepare and supervise all estimates for payment to contractors, etc.

k. An audit of the accounts.

2. In consideration of the faithful performance of the services to be performed by the Party of the Second Part, the Party of the First Part agrees to pay said Party of the Second Part as full compensation thereafter, the sum equivalent to four percentum of the actual construction cost of the improvement; two percentum of the Engineer's estimated cost to be paid when plans and specifications are completed and delivered to the Council and the balance of the said four percentum to be paid at the time of the certification of the contractor's estimates and in proportion thereto. The above stated fees to be paid from funds derived by the sale of bonds for the above mentioned improvement.

In addition to the above stated fees for engineering services, any monies that may be received from the sale of plans, specifications, etc., are to be the property of the engineer and are to be paid to him."

I am informed further that no contract was let for the construction of this project but that the Village purchased the materials, that all labor was furnished by WPA, and that the services of X consisted of the preparation of plans and specifications and the supervision of the work of the laborers furnished as aforesaid, by WPA. I understand further, that the entire cost of the improvement was approximately \$66,000.00.

It appears from the statement of your examiners that there is no fault or defect in the plans or specifications which were furnished by X and which were adopted by the village authorities, but that he failed or neglected to give proper supervision to the construction, that the work was not constructed in accordance with the plans and specifications, that the sewer is wholly useless and that the cost of rebuilding it so as to make it serviceable, would be approximately \$48,000.00.

The authority of your bureau in regard to inspection of public financial operations and making findings as the result of such inspection, is found in Section 284 et seq. of the General Code. Said Section 284 provides for the periodical examination by the bureau of all public offices. Section 286, General Code, provides that the report of such examination shall be filed in the office of the bureau, and in case it relates to the expenditure of public money belonging to the treasury of a village a certified copy shall be filed with the mayor of such village. The section further provides as follows:

“If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political sub-division or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. * * *

The term ‘public money’ as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor.”

Section 286-1, General Code, provides that in filing such civil action it shall be sufficient for the plaintiff to allege in the petition so much of the report of the bureau as relates to the claim against the defendant therein, and that the amounts claimed against the defendant are unpaid. This section further provides: “A certified copy of any portion thereof, shall constitute prima facie evidence of the truth of the allegations of the petition.”

These sections were under consideration in the case of *State, ex rel. vs. Maharry*, 97 O. S., 272, where it was contended that the statutes in question and the remedies therein provided apply only to public officers and that an action could not be brought pursuant thereto against a contractor or anyone else who was accused of having received public money or prop-

erty illegally. The court held, as shown by the 4th paragraph of the syllabus:

“These statutes are comprehensive enough to warrant actions against either public officers, former public officers or private persons.”

In the course of the opinion, at page 276, it was said:

“What is the paramount purpose of these statutes? It is to protect and safeguard public property and public moneys. Finally we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril; that is, the rights of the public, as beneficiaries, are paramount to those of any private person or corporation.”

Further on in the opinion the court, after quoting the pertinent portion of Section 286, supra, said:

“It should be noted that the statute covers ‘any public money * * * illegally expended * * * or any public property * * * converted or misappropriated.’

When either of these two facts appear, that is (a) illegal expenditure of public money or (b) any public property converted or misappropriated, then there is warrant and authority in law for bringing the action under these statutes.”

It should be noted, however, that that action was brought against a contractor who had undertaken to build a bridge for the county, and who had received, as was set forth in the report of the bureau the sum of \$18.30 in excess of the amount due him under his contract. Consequently, assuming the truth of the finding and the allegation of the petition, there was clearly an illegal payment of money belonging to the county. If we are to apply to the case presented by your communication the statutes above referred to and the principles laid down by the court in the case just noted, we must in order to justify a finding against X, find either that he has received public money illegally or that he has converted or misappropriated public property, and if any finding is to be made against him, plainly it must be limited to the extent to which he has received such public money illegally or has converted or misappropriated public property. We may dismiss at once the proposition that your finding could be

based on the consequential damage that the village may have suffered by reason of his fault or negligence. Your bureau is not authorized by law to determine questions of negligence, or by your finding create prima facie evidence of liability for unliquidated damages which a municipality might suffer by reason of the negligent conduct of a contractor. The questions of negligence and damages are within the province of a jury under instructions by a court in a proper case. However, a different conclusion may be reached if we confine ourselves to the payments which were made to him for his services.

In the case you have presented, X was manifestly agreeing to serve the village in two distinct capacities (1) as an engineer in the preparation of plans and specifications for the approval of the village authorities, and (2) as a supervisor of construction. These two services might easily have been performed by two wholly different persons. It appears to me that if X had wholly failed to provide any plans and specifications but had been paid for so doing, that would be an illegal payment which could be recovered, and if on the other hand he had wholly failed to provide the supervision of construction which he agreed to furnish, then payment for such service would also be illegal. In either event, if the amount could be fixed, I see no reason why it should not be recovered from him on the strength of a finding by your bureau. The principle obstacle with which you would be confronted in making a finding in this case, would be the apparent difficulty of determining what amount X was paid for preparing the plans and what he was paid for supervision. The compensation as shown by the contract was to be four per cent for the entire service, and no basis is shown for the division between his service as a designing engineer and his service as a supervisor of construction. It is true that under the contract two per cent was to be paid him *when* the plans were completed, and the balance was to be paid him *at the time* of the certification of the contractor's estimates and in proportion thereto, but that alone would not appear to be conclusive.

If, however, X has been negligent or inefficient in his supervision, whereby the village has suffered great loss or damage, that is a matter for the village to pursue if it sees fit, by an action for damages. From the information which you have furnished, the situation here presented would appear to fall within this category.

I do not understand that the right of the village to recover damages

which it may have suffered by the fault or negligence of X, is in any way determined or limited by the finding of your bureau, nor do I consider that the village is confined, in legal proceedings to establish and recover its damages, to the procedure set out in the statutes to which I have referred.

Specifically answering your inquiry, it is my opinion :

1. Where one has contracted with a municipality or other public body to supervise the construction of a public improvement, and wholly fails to furnish such supervision, but has been paid the agreed compensation, the bureau of inspection and supervision of public offices is justified under Section 286 of the General Code, in making a finding against such contractor for the money paid him.

2. Where one who has contracted with a municipality or other public body to supervise the construction of a public improvement in accordance with plans and specifications adopted by such public body, performs his contract so negligently or inefficiently that such improvement is wholly or partly useless, such public body would have its right of action against such contractor for its loss or damage suffered thereby, but the bureau of inspection and supervision of public offices is without power to make a finding, pursuant to Section 286 of the General Code, against such contractor for the amount of such loss or damage.

Respectfully,

HUGH S. JENKINS

Attorney General