

ance that said deed is to be made to Chas. H. Schwegman, Trustee. If, as a matter of fact, this deed is to be made to Chas. H. Schwegman, Trustee, and not to Chas. H. Schwegman individually and personally, the word trustee should be typed in the deed form after the name Chas. H. Schwegman in the granting clause of said deed and after his name in the habendum clause of said deed.

You are accordingly advised that these deeds have my approval as to form, with the exceptions above noted.

Under the provisions of Section 9 of the Act of the General Assembly above referred to, the sales of these tracts or parcels of land are made by you subject to the approval of the Governor and the Attorney General. The sales meet with my approval, and, I have accordingly endorsed my approval upon the deed forms submitted, which are herewith returned.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

28.

BONDING COMPANY—RIGHT TO COMPLETE STATE CONTRACT WHEN  
PRINCIPAL DEFAULTS—ENTERING FACTS ON JOURNAL OF PUBLIC  
WORKS—CERTIFICATION TO STATE AUDITOR.

*SYLLABUS:*

1. *When a proposal has been made by the Department of Public Works for construction work and bids have been received thereon, said bids being accompanied by a bond guaranteeing that the bidder will enter into a contract if the same be awarded to him, and also conditioned upon the faithful performance of said contract, and a contract was so awarded and entered into, the bonding company may, upon default on the part of the contractor, perform the contract so entered into, complete the work, and be entitled to receive from the state payments therefor, as provided in the original contract.*

2. *Such default upon the part of the contractor and said action on the part of the bonding company should be set forth upon the journal of the Department of Public Works after the contractor has so defaulted and a copy thereof certified to the Auditor of State.*

COLUMBUS, OHIO, January 26, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication under date of January 2, 1929, containing a request for opinion as follows:

“On October 25, 1928, the contract by and between the State of Ohio, by R. T. Wisda, Director of Public Works, and the Coventry Construction Co., South Akron, Ohio, for the construction of retaining walls in the Ohio and Erie Canal, Akron, Ohio, was approved by you.

“The Coventry Construction Company could not complete the contract. Its surety, The Commercial Casualty Insurance Company, elected to complete the contract and are, at the present time, going ahead with the work.

“We respectfully request an opinion as to the legality of paying The

Commercial Casualty Insurance Company for work performed under the contract made with the Coventry Construction Company.

"Enclosed herewith is a certified copy of the minutes of this department relative to the failure of The Coventry Construction Company to complete the contract."

The certified copy of the minutes of your department to which you refer relates to an action taken by your department on October 20, 1928. This action was taken after the bids for the work had been opened and the contract awarded to the Coventry Construction Company, and before the contract had been approved by the Attorney General.

It seems that after the contract was awarded, the construction company to whom the contract had been awarded at first failed to perform all things necessary to entitle it to a contract.

With its bid, the construction company filed a bond of The Commercial Casualty Insurance Company, properly executed, the terms and conditions of said bond being as follows :

"Now, therefore, in the event that said proposal is accepted, if the said principal within ten days next after the awarding of the said contract enter into a proper contract in accordance with the proposal, plans, details, specifications and bills of material, which said proposal and contract are made a part of this bond the same as though set forth herein; and faithfully perform each and every condition of such contract; and indemnify the State of Ohio against all damage suffered by failure to perform such contract according to the provisions thereof and in accordance with the plans, details, specifications and bills of material therefor; and pay all lawful claims of sub-contractors, material men and laborers for labor performed or material furnished in carrying forward, performing or completing of said contract; we agreeing and assenting that this undertaking shall be for the benefit of any sub-contractor, material man or laborer having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated."

This bond was given under the provisions of Sections 2315 and 2316 of the General Code.

Section 2315 reads as follows :

"The plans, details, bills of material, specifications of work, estimates of cost in detail and in the aggregate, form of bidding proposal and bond of bidder and other data that may be required shall be prepared on such material and in such manner and form as may be prescribed by the state building commission, and shall be submitted to such commission for its approval. If so approved the same shall be deposited and safely kept in the office of the auditor of state as the property of the state."

Section 2316 reads as follows :

"The bond provided for in Sections 2315 and 2319 shall be conditioned that, if his proposal is accepted, the bidder will within ten days next after the awarding of such contract, enter into a proper contract in accordance

with the proposals, plans, details, specifications and bills of material and that he will faithfully perform each and every condition of the same. Such bond shall also indemnify the state against the damage that may be suffered by failure to perform such contract according to the provisions thereof, and in accordance with the plans, details, specifications and bills of material therefor. Such bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction for which such contract is made. The bond may be enforced against the person, persons or company executing such bond, by any claimant for labor or material and suit may be brought on such bond in the name of the State of Ohio on relation of the claimant within one year from the date of delivering or furnishing such labor or material, in the court of common pleas in the county wherein such labor or material was furnished or delivered, and such bonds, or sureties thereon shall not be released by the execution of any additional security, notes, retentions from estimates, or other instrument on account of such claim, or for any reason whatsoever, except the full payment of such claim for labor or material."

An examination of the conditions of the bond in this case shows clearly that the terms and conditions thereof are as required by the above quoted sections.

These sections are part of the building regulations found under the title of PUBLIC BUILDINGS, Chapter 1 thereof.

It might be questioned as to whether or not these sections are applicable or whether such contract is governed by Section 412-3 of the General Code, which, in part, reads as follows:

" \* \* \*

All bids shall be filed with the superintendent of public works at his office in the city of Columbus, Ohio, within the time fixed for the filing thereof in said advertisement. The bids shall be opened at twelve o'clock noon on the last day for filing the same, by the superintendent of public works, and publicly read by him. Each bid shall contain the full names of every person or company interested in it and shall separately state the price of both the labor and material to be furnished under it and shall be accompanied by a sufficient bond or certified check on a solvent bank that, if the bid is accepted, a contract will be entered into by the bidders, and the performance of it properly secured.

When entered into, the performance of such contract shall be guaranteed by a bond in manner and form as provided in Sections 2365-1, 2365-2, 2365-3 and 2365-4 of the General Code of the State of Ohio. \* \* \* "

This section is part of Title III, Div. I, C. 9, relating to Superintendent of Public Works, and relates to the powers of the Superintendent of Public Works when, in his judgment, he deems it necessary, among other things, to be for the best interests of the citizens of the state that the surplus waters should be conserved for the interest of commerce and other things provided for in Section 412-1 of the General Code.

This does not, however, need to be considered at this time for the reason that the state has acted under Section 2315 and Section 2316, supra, and that the contractor and bonding company relied thereon.

It will be noted that the conditions of the bond were that if the contract was awarded to the above mentioned construction company, said company would enter into a contract "in accordance with the proposals, plans \* \* \* and faithfully perform each and every condition of such contract; \* \* \*".

On October 20, 1928, your minutes disclose, this contract had not as yet been entered into and the bonding company had been so notified on October 15, 1928.

An examination of the contract and original papers in the office of the Auditor of State discloses that thereafter the contract was entered into and signed by the construction company and approved by the Attorney General, said approval being under date of October 25, 1928.

At that time all provisions of the law had been complied with, including the payment of premiums into the State Insurance Fund. The Industrial Commission's certificate of that fact was under date of October 23, 1928.

According to your communication the Coventry Construction Company failed to do the work under the contract and has failed to complete the terms thereof. Under the terms of the bond the bonding company, under such conditions, could proceed with the work rather than submit itself to liability for damages which might be occasioned in connection with the readvertising and reletting of said work.

It seems that the bonding company has so elected and is proceeding with the work under the contract with the construction company. It is therefore entitled to be paid for the work under the terms of the original contract with the construction company.

The Auditor of State, however, must have some authority to issue warrants on said contract to the bonding company. The only paper relative to a default on file with the Auditor of State at this time is a copy of the resolution of your department adopted October 20, 1928. This action was taken before the contract was entered into and in so far as the Auditor of State is concerned he has no knowledge but that the construction company is proceeding under the contract which was signed by it and approved by the Attorney General on the date hereinabove set forth.

If the contractor did default on his contract after it was legally executed, and the bonding company is proceeding thereunder, such facts and your approval thereof should be set forth upon your minutes and a copy thereof certified to the Auditor of State for his authority to issue warrants to the bonding company.

It is, therefore, my opinion that:

*FIRST:* When a proposal has been made by the Department of Public Works for construction work and bids have been received thereon, said bids being accompanied by a bond guaranteeing that the bidder will enter into a contract if the same be awarded to him, and also conditioned upon the faithful performance of said contract, and a contract was so awarded and entered into, the bonding company may, upon default on the part of the contractor, perform the contract so entered into, complete the work, and be entitled to receive from the state payments therefor, as provided in the original contract.

*SECOND:* Such default upon the part of the contractor and said action on the part of the bonding company should be set forth upon the Journal of the Department of Public Works after the contractor has so defaulted and a copy thereof certified to the Auditor of State.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*