

3043.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND SNEAD & COMPANY, INC., JERSEY CITY, NEW JERSEY, FOR CONSTRUCTION OF BOOK STACKS FOR MUSEUM AND LIBRARY, OHIO STATE ARCHAEOLOGICAL AND HISTORICAL SOCIETY, COLUMBUS, OHIO, AT AN EXPENDITURE OF \$8,583.50—SURETY BOND EXECUTED BY THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

COLUMBUS, OHIO, December 20, 1928.

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

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for The Ohio State Archaeological and Historical Society, Columbus, Ohio, and Snead and Company, Inc., Jersey City, New Jersey. This contract covers the construction and completion of all work included under the title of Base Bid, Alternate No. 1, and Substitution Alternate stated on Form of Proposal, as indicated on the drawings and mentioned in the specifications for Book Stacks Contract for Additions to Museum and Library Building and Equipment, Columbus, Ohio, and calls for an expenditure of Eight thousand five hundred eight-three and 50/100ths dollars (\$8,583.50).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the Controlling Board to the expenditure have been obtained as required by Section 12 of House Bill No. 502 of the 87th General Assembly. In addition you have submitted a contract bond, upon which The Fidelity and Deposit Company of Maryland appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

3044.

LEGAL COUNSEL—COUNTY COMMISSIONERS—AUTHORITY TO EMPLOY SAID COUNSEL TO ASSIST PROSECUTING ATTORNEY IN CIVIL CASES ONLY UNDER SECTION 2412, GENERAL CODE—PROVISIONS FOR IN CRIMINAL CASES NOTED.

*SYLLABUS:*

*Section 2412 of the General Code does not authorize the employment of attorneys to assist the prosecuting attorney in criminal cases, irrespective of the court in which such a case is pending. Employment of such attorneys in criminal cases being prosecuted in the Court of Common Pleas and Court of Appeals is provided for in Section 13562 of the General Code.*

COLUMBUS, OHIO, December 20, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Your recent communication reads:

“Under the provisions of Section 2412, General Code, may the county commissioners when authorized by the Common Pleas Court employ attorneys to assist the prosecuting attorney in a criminal case which is pending on an appeal in the Court of Appeals or in the Supreme Court?”

We have your Opinion No. 2849 to the effect that the Common Pleas Court is without authority to employ attorneys to assist the prosecuting attorney in the Court of Appeals or Supreme Court and it now appears that the employment in question was made under the provisions of Section 2412, General Code, hence this additional question.”

In my Opinion No. 2849, issued to your department on November 9, 1928, it was held, as disclosed by the syllabus:

“1. A board of county commissioners of a county has no authority to allow compensation to attorneys for services rendered by them by way of assistance to the prosecuting attorney in the presentation and argument of a criminal case pending on proceedings in error in the Court of Appeals unless such attorneys have been appointed for said purpose by the Court of Appeals and the compensation has been approved by said court in the manner provided by Section 13562, General Code; and the payment of such compensation out of the county treasury on the allowance of the county commissioners without such appointment and approval by the Court of Appeals is illegal.

2. There is no statutory provision authorizing the appointment of attorneys to assist the prosecuting attorney of a county in the presentation and argument of a criminal case pending on proceedings in error in the Supreme Court; the board of county commissioners of the county in which such criminal case originated is without authority to allow compensation to attorneys for such services, and the payment of the same out of the county treasury on such allowance is illegal.”

In said opinion it was pointed out that there is no authority authorizing the county commissioners to employ an assistant prosecuting attorney in a criminal case pending in the Supreme Court.

Section 2412 of the General Code, to which you refer, provides:

“If it deems it for the best interests of the county, the common pleas court, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board of county commissioners to employ legal counsel temporarily to assist the prosecuting attorney, the board of county commissioners or any other county board or officer, in any

matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest in its official capacity."

In analyzing the provisions of Section 2412 of the General Code, it will readily appear that this section relates to civil cases as distinguished from criminal cases. The language expressly authorizes the board of county commissioners to employ legal counsel to assist the prosecuting attorney in any matter of public business coming before such board or officers and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest in their official capacity. It is fundamental that the county is not a party to a criminal action. In criminal cases the State of Ohio is the party plaintiff and not the county or any officials thereof. Section 13562 of the General Code, referred to in my Opinion No. 2849, *supra*, furnishes the authority for the employment of legal counsel to assist prosecuting attorneys in criminal cases. It is believed that Section 2412, *supra*, in its present form does not include within its terms the power to employ counsel to assist the prosecutor in criminal cases.

In the case of *Ireton et al. vs. State ex rel.*, 21 *Ohio Circuit*, 412, the court had under consideration Section 845 of the Revised Statutes of Ohio. This section was later subdivided into a number of other sections, including Section 2412 of the General Code. (See Opinions of the Attorney General for 1916, Volume II, page 1416.) However, in the case of *Ireton et al. vs. State ex rel.*, *supra*, the court indicated that this section related to employment of such counsel for the benefit of the commissioners and not for other duties. It is pointed out in said opinion that the primary duties of a prosecuting attorney "are of a criminal nature" and that the duties of the commissioners are of a "civil nature." In other words, it clearly appears from said case to be the opinion of the court that Section 845, Revised Statutes, *supra*, did not relate to criminal actions. While the section has undergone some changes it is not believed the said changes would affect the situation in so far as your question is concerned.

In an opinion of the Attorney General, found in the Opinions of the Attorney General for 1919, Volume I, page 29, while not expressly so held, it is indicated that Section 2412, *supra*, relates to the employment of counsel to assist the prosecutor only in civil actions.

In view of the foregoing, you are specifically advised that Section 2412 of the General Code does not authorize the employment of attorneys to assist the prosecuting attorney in criminal cases, irrespective of the court in which such a case is pending. Employment of such attorneys in criminal cases being prosecuted in the Court of Common Pleas and Court of Appeals is provided for in Section 13562 of the General Code.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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3045.

COUNTY COMMISSIONERS—CONSTRUCTION OF CINDER TRAINING TRACK ON GROUNDS OF COUNTY AGRICULTURAL SOCIETY—COST PAYABLE FROM GENERAL FUND—SUBMISSION TO VOTERS MANDATORY WHEN ANNUAL APPROPRIATION FOR IMPROVEMENT EXCEEDS \$10,000.00.