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SYLLABUS:

1. The board of county commissioners, upon written request of the county engineer, may, under authority of Sections 305.15 and 305.17, Revised Code, make contracts with private firms for engineering services when they deem such required in connection with sewer construction projects, without having attached thereto the certificate of funds available otherwise required by Section 5705.41, Revised Code.

2. The board of county commissioners may not make a contract with a private firm for engineering services previously furnished or for the purchase of existing engineering drawings in connection with a sewer project without having attached thereto the certificate of funds available required by Section 5705.41, Revised Code.

Columbus, Ohio, March 9, 1963

Hon. John S. Ballard
Prosecuting Attorney
Summit County Courthouse
Akron, Ohio

Dear Sir:

Your office has submitted the following request for the opinion of the Attorney General:

“For some time our Board of County Commissioners has had under process pursuant to Section 6117 and 6103 a certain Sanitary Improvement No. 77, known as the Meadowbrook- Lynwood Sanitary Improvement. In our Resolution of February 2, 1960, the Commissioners approved general plans and ordered the County Engineer to prepare detailed plans for this improvement and to submit

“* * *

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* * *”

(Emphasis added)

Since Section 5705.41, *supra*, is general in wording, unless a specific exception applicable to the contract you describe is found, it will be necessary that the contract have attached the required certificate of the fiscal officer. You have suggested Sections 305.15 and 305.17, Revised Code, as a possibly applicable exception. Section 305.15 provides:

“When the services of an engineer are required with respect to roads, turnpikes, ditches, bridges, or any other matter, and when, on account of the amount of work to be performed, the board of county commissioners deems it necessary, upon the written request of the county engineer, the board may employ a competent engineer and as many assistant engineers, rodmen, and inspectors as are needed, and may also enter into contracts with any person, firm or partnership qualified to perform engineering services in the state for this purpose and fix the compensation therefor. In awarding such contracts the board shall not be required to comply with sections 153.40 and 5555.61 of the Revised Code. If no such contract is entered into, the board shall furnish suitable offices, necessary books, stationery, instruments, and implements for the proper performance of the duties imposed on the engineer, assistant engineers, rodmen, and inspectors by such board.”

In ruling on a prior form of this section, one of my predecessors concluded that only the establishment of an employee relationship, not an independent contractor relationship, was contemplated (Opinion No. 373, Opinions of the Attorney General for 1917, Vol. II, page 1011). The Code section upon which my predecessor based his ruling was amended, however, with the enactment of a new Section 2411, General Code, in 1951 (124 Ohio Laws 320) which provided:

“When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county * * * *engineer*, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed * * * *and may also enter into contracts with any person, firm or partnership qualified to perform engineer-*

ing services in the state of Ohio for this purpose and fix the compensation therefor. In awarding such contracts the board shall not be required to comply with the provisions of sections 2352 and 6945 of the General Code and, excepting where contracts are entered into, shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

(Emphasis indicates italics in the quotation.)

You will note that the amended section places a duty upon the board to furnish an office and office supplies, etc. This would be the normal circumstance where an employee relationship was created. You will also note, however, that the section provides a specific exception to this duty "where such contracts are entered into." This would be the normal circumstance in the case of independent contractors; that is, there would be no duty to furnish an office or office supplies, etc. I am constrained to conclude, therefore, that the amended form of the section, which now appears without substantial change as Section 305.15, Revised Code, contemplates the establishment of independent contractor relationships as well as employee relationships.

Concerning the question of whether the fund availability certificates, required by Section 5705.41, *supra*, are required in the case of contracts (either employee or independent contractor) made under authority of Section 305.15, *supra*, Section 305.17, Revised Code, provides :

"The board of county commissiners shall fix the compensation of all persons appointed or employed under sections 305.13 to 305.16, inclusive, of the Revised Code, which, with their reasonable expenses, shall be paid from the county treasury upon the allowance of the board. No law requiring a certificate that the money for such compensation and expenses is in the treasury shall apply to the appointment or employment of such persons."

I am aware that, in view of its wording, this section might be construed as applicable only in the case of employment of individuals, rather than to all agreements now authorized by the referenced sections. The wording of Section 305.17, *supra*, however, dates from before the 1951 amendment to Section 305.15 which I have analyzed above. Since Section 305.17, *supra*, covers Section 305.15 by ref-

erence, it is my opinion that, in amending Section 305.15, the legislature intended those matters treated in the amendment to be covered also by the provisions of Section 305.17. It is further my opinion, as it was the opinion of two of my predecessors, that as to agreements covered by Section 305.17, *supra*, no certificate of funds available is required (see Opinion No. 3004, Opinions of the Attorney General for 1928, Vol. IV, page 2816, and Opinion No. 2845, Opinions of the Attorney General for 1931, Vol. I, page 47). It is my conclusion, therefore, that contracts for engineering services of the general type described in your letter of request may come within the purview of Sections 305.15 and 305.17, *supra*, and, as a result, not be required to have attached the certificate of funds available mentioned in Section 5705.41, *supra*.

Despite the general conclusion which I have just indicated above, however, I am unable to conclude that the specific contract about which you have asked me could properly be entered into by the board. In the first place, you do not indicate in your letter of request that the board has received the "written request of the county engineer" as is required by Section 305.15, *supra*. It is not this lack of a written request (which I assume, could fairly easily be rectified) however, which poses the major problem.

In your letter you state that the county engineer "engaged" a private engineering firm in 1960 without the knowledge of the board of county commissioners. If by the term "engaged" you mean entered into some form of contractual agreement, then I must conclude that no liability on behalf of the county was created. Section 3.12, Revised Code, would apparently cover the making of such an agreement by the county engineer in the circumstances you describe, and that section specifically provides that the county shall not be liable thereon. You further state in your letter that you believe the private engineering firm completed its work in 1960. If that is the case, it appears to me that any contract for those engineering services, which the board might attempt to enter into at this time, would lack valid consideration flowing from the private engineering firm to the county and would, therefore, be no contract at all (11 Ohio Jurisprudence 2d 314, Contracts §74). Even if such a contract might otherwise be considered valid, as an exception to the general consideration rule based upon moral consideration or

the acceptance of a pre-existing debt barred by law (see 1 Williston on Contracts, page 634-643) I am in considerable doubt that the county commissioners have the power to make such a contract. The county commissioners have only such powers to bind the county as they are granted by statute (*State ex rel. Allen v. Lutz*, 111 Ohio St., 333; *Vindicator Printing Co. v. State*, 68 Ohio St., 362; 14 Ohio Jurisprudence 2d, 371, Contracts §224).

Whether or not the board has power to make such a contract as a general matter, I must conclude that they do not have such power under authority of Section 305.15, *supra*. That section carries with it the special power to make a contract without the certificate of funds available otherwise required by Section 5705.41, *supra*, and I am unwilling to construe it as applicable to an adoption or ratification or to any contract not clearly within its terms. If a contract for the 1960 engineering services can be made at all, then, it is my opinion that it will require the normal certificate of funds available.

Your office has submitted with your letter of request a proposed contract with the private engineering firm which is couched, not so much in terms of engineering service, but more in terms of a purchase of engineering drawings. I perceive a number of possible problems connected with this type of formulation. In view of your question, however, it is sufficient to point out here that, if the contract is interpreted as one for the purchase of engineering drawings, it cannot properly be considered a contract for engineering service within the meaning of Section 305.15, *supra*. As in the case of a contract for services rendered in the past, then, the certificate of funds available referred to in Section 5705.41, *supra*, would be required.

I am aware that the above analyses are both technical and restrictive. It is my belief, however, that such is required where contracts by a board of county commissioners are in question. I have already noted the rather strict limitations on that body's powers. When these limitations are considered in connection with the specific provisions of Section 3.12, *supra*, and Section 5705.43, Revised Code (which, in effect, sets up the penalties attendant upon failure to comply with Section 5705.41, *supra*) I can only con-

clude that the legislature intended a strict and limited interpretation of the powers of the board.

In specific answer to your questions, then, it is my opinion and you are so advised:

1. The board of county commissioners, upon written request of the county engineer, may, under authority of Sections 305.15 and 305.17, Revised Code, make contracts with private firms for engineering services when they deem such required in connection with sewer construction projects, without having attached thereto the certificate of funds available otherwise required by Section 5705.41, Revised Code.

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Respectfully,
WILLIAM B. SAXBE
Attorney General