

lated as required by law, but a copy of the proceedings awarding the contract is not among the papers submitted.

An examination of the contract further reveals that there is no time mentioned in said contract when the work contemplated therein shall be completed, and further there is no provision as to a penalty for each day that the contract is delayed beyond the time fixed for its completion.

Section 2331, General Code, provides:

"All contracts under the provisions of this chapter shall contain provisions in regard to the time when the whole or any specified portion of work contemplated therein shall be completed and that for each and every day it shall be delayed beyond the time so named the contractor shall forfeit and pay to the state a sum to be fixed in the contract, which shall be deducted from any payment or payments due or to become due the contractor."

For the reasons above stated I am returning herewith to you the contract, together with all other data submitted in this connection without my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

678.

APPROPRIATION FOR INVESTIGATION OF RATES OF OHIO BELL
TELEPHONE COMPANY—MAY BE ENCUMBERED BY CONTRACT
—LIABILITY INCURRED SUBSEQUENT TO JUNE 30, 1927.

SYLLABUS:

1. *Contracts to prepare an appraisal of the property of The Ohio Bell Telephone Company; to prepare proper studies and reports of operating expenses and other allied questions incident to determination of rates by the Public Utilities Commission; to prepare analyses of evidence already before said Commission; and to place same in evidence before the Commission and Courts, create a present liability of the state to pay the contract price therefor, and are not "liabilities incurred subsequent to June 30, 1927," as that language is used in Am. S. B. 293, filed May 11, 1927.*

2. *If there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations, the Director of Finance may so certify, and may sign encumbrance estimates encumbering such balance for the purpose of paying the price fixed by the contracts for the services therein specified.*

COLUMBUS, OHIO, June 30, 1927.

HON. WILBUR E. BAKER, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—Your letter of June 29, 1927, requests my opinion on the following facts:

"Amended S. B. No. 293, enacted by the 87th General Assembly, and filed in the office of the Secretary of State on May 11, 1927, carries an appropriation to the Emergency Board of \$50,000.00 'to be used for telephone rate investigation.'

Section 2 of this act provides: 'The following sums shall not be expended to pay liabilities incurred subsequent to June 30, 1927.'

Of the above appropriation of \$50,000.00, \$40,000.00 has been allotted to the department of Attorney General to be used in the matter of state wide investigation of telephone rates of the Ohio Bell Telephone Company."

Your question is whether the balance in this fund is encumbered and remains available after July 1st, 1927, by contracts for the making of an appraisal and other reports and analyses for use in the proceeding in which the Public Utilities Commission of Ohio is seeking to determine proper rates to be charged by The Ohio Bell Telephone Company, and for the proper presentation of same in said proceeding, or any court action which may grow out of said proceeding and determination.

The contracts in question provide as follows:

"I will prepare an appraisal of the property of The Ohio Bell Telephone Company used and useful in furnishing telephone service in the State of Ohio; proper studies of operating expenses and other allied questions incident to final determination of rates by the commission; together with analyses of evidence already in the record; and will place such appraisal, studies and analyses in evidence * * *."

"I will perform all necessary legal services incident to the further investigation and presentation of the above matter to the commission or any court to which it may be taken, * * *"

Both contracts fix the compensation to be paid at prescribed rates for the time actually consumed, and both provide for their termination by the Attorney General at any time.

At the outset it will be observed that the question is not now affected by the provisions of Section 22 of Article II of the Constitution of Ohio, which provides that no appropriation shall be made for a longer period than two years. The appropriation in question here was made by a bill filed in the office of the Secretary of State on May 11, 1927.

The determination of your question, therefore, depends upon the interpretation of the act itself.

The appropriation was made to the Emergency Board "to be used for telephone rate investigation" and the act provides that the sums appropriated therein "shall not be expended to pay *liabilities* incurred subsequent to June 30, 1927."

The purpose for which the money was appropriated naturally requires the preparation of an appraisal, the statements of income and expenses incident thereto, the analyses of evidence now in the record, and the proper placing of same before the commission and courts, and involves engineering and legal services. In the very nature of the case this purpose could not have been accomplished between May 11, 1927, and July 1, 1927. It would have been impossible to spend \$50,000.00 in that length of time in any economical or efficient manner.

The contracts in question, therefore, provide for the things contemplated by the legislature, and create a liability on the state to pay therefor. The fact that the total amount to be paid is contingent upon the time actually consumed does

not change the situation. The contracts provide for the doing of the definite thing contemplated by the legislature, and fix the liability of the state to pay. That liability is created upon the signing of the contracts and is not a liability incurred subsequent to June 30, 1927. The parties to these contracts are not mere employes of the Attorney General, but are independent contractors. In these respects the question here differs from the general question submitted by you as to whether a fund can be encumbered for the payment of "salaries and professional services to be incurred subsequent to June 30, 1927". As to that general question, it need only be said now that each case must be decided on its own facts.

The distinction between contracts of the nature involved here and ordinary contracts of employment is recognized in Section 154-29, General Code, wherein the legislature said:

"'Order' means a copy of a contract or a statement of the nature of a contemplated expenditure, a description of the property or commodity to be purchased or *service* to be performed, other than *services of officers and regular employes of the state*. * * *"

See also Section 154-30, hereinafter set out.

The certificates which you are required to make are provided for by Section 2288-2 and Section 154-30, General Code, as follows:

" * * * 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." (Sec. 2288-2)

" * * * The department of finance may certify to the Auditor of State any order or statement of proposed expenditures approved by it, and direct the proper appropriation account or accounts to be charged therewith, or with the estimated amount thereof, in which event the sum so certified shall be a prior charge on such appropriation account or accounts, available only for the payment of invoices issued against such order, or expenditures within such statement, until the final invoice therefor is filed with the Auditor of State, or until the department of finance shall certify that such order and the obligation recited therein have ceased to be an obligation against the state, or such proposed expenditures have been made or abandoned in whole or in part.

Whenever any commodity or service included in any such order or statement so certified is delivered or performed, or whenever any payment is due upon any contract or obligation covered thereby, an invoice shall be filed with the Auditor of State therefor. The total of all invoices issued against any such order shall not exceed the sum of such order or the estimated sum appearing on such order." (Sec. 154-30)

The legislature has authorized the expenditure of this fund for "telephone rate investigation". When the contracts above set out are made there will be an obligation to pay the contract price. If there is "a balance in the appropriation * * * not otherwise obligated to pay precedent obligations", you have authority to sign encumbrance estimates encumbering the balance allotted to the Attorney General out of the funds appropriated by Am. S. B. 293.

Respectfully,
EDWARD C. TURNER,
Attorney General.