

HIGHWAYS: Township Board has exclusive right to purchase material and make all necessary contracts in the expenditure of bond money in the construction and reconstruction of roads under Section 7946, R. S. Mo. 1929. Section 7963, R. S. Mo. 1929, also discussed. All expenditures over the sum of \$500.00 must be by public letting.

June 13, 1940

6/14

Honorable James B. Eittiker  
Clerk of the County Court  
Carroll County  
Carrollton, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated June 4, 1940, which reads as follows:

"I am directed by the County Court to submit the following for an opinion.

A Township has voted road bonds under Section 7961, R. S. Mo. 1929, for the purpose of improving roads in the Township. The bonds have been sold, as provided by Section 7963, R. S. Mo. 1929. The Township Board proposes to purchase the necessary materials and the question has arisen whether or not the provisions of Section 7946, R. S. Mo. 1929, give the Township Board the exclusive right to purchase the materials or whether, under Section 7963, the County Court must assist in the purchase of such materials.

It is further requested that we be advised as to whether or not, under Section 7946, the Township Board, if it has the right to do its own buying must advertise for bids before purchasing the materials or whether it may make such purchase, as it deems advisable."

From your statement, we formulate the two following questions: First, does a township board have the right to purchase materials for the construction of roads?

Second, is it imperative that the township board advertise for bids before purchasing materials -- if so, when?

For the purpose of this opinion, we quote verbatim Sections 7946, 7963 and 7947, R. S. Mo. 1929, and hereafter refer to them by numbers:

"Sec. 7946. Who may contract. Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. The county court, the township board or road district commissioners may accept donations of labor or materials from interested parties either on road improvements or bridge constructions and said authority may employ labor or contractors to complete said improvements. Before beginning the construction or improvement of any road, bridge or culvert by day labor or by contract, the plans, specifications, estimates of drainage, maps, profiles, estimates of cost and the specific location of such road, bridge or culvert shall be filed in the office of the county clerk, township clerk, or commissioner of road district, as the case may be, and before becoming effective shall be approved by

said county, township or road district authorities. On completion of the work a detailed statement of the cost shall be filed as in the next succeeding section provided, and shall be recorded in the book wherein are recorded contractors' bids; when any pay rolls or construction accounts are certified to as correct by the engineer in charge of the work, the bills for the same shall be passed upon by the county court, township board or district commissioner, and if found correct, shall be paid: Provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

"Sec. 7963. Bonds to be sold, when -- how. The board of commissioners on behalf of the special road districts, and the county court on behalf of the townships, shall sell said bonds to the best advantage and the proceeds shall be paid over to the treasurer of the district or the county or township, as the case may be, and be by him disbursed, on the order of the board of commissioners or county court, in payment of the cost of holding said election and in paying the cost of constructing or improving roads in such districts or townships, including bridges and culverts."

"Sec. 7947. Specifications, plans, etc., to be filed -- when -- where. -- Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be con-

structed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of \$500, the county, township or district authorities shall order the county highway engineer, or other engineer in their employ, or both such engineers acting together, if so desired, to prepare and file with the clerk of the court, township board or district commissioners, as the case may be, all necessary maps, plans, specifications and profiles, and an estimate of the cost of the work. The court or other proper authority may approve or reject the maps, plans, specifications and profiles and order others prepared and filed. When the maps, plans, specifications and profiles have been approved, the county, township or district authorities shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed, which said advertisement shall be published once a week for three consecutive weeks, the last insertion to be within ten days of the day of the letting. All bids shall be in writing, accompanied by instructions to bidders which shall be furnished by the engineer upon application. All bids on road work shall state the unit prices upon which the same are based. All bids shall be sealed and filed with the clerk of the county court, township board or special road district commissioners, and, on the day and at the hour named in the advertisement, shall be publicly opened and read in the presence of the court, township board or special road district commissioners, and the engineer, and shall then be recorded in detail in some suitable book. All bids shall be accompanied by a certified check

equal to ten per cent. of the engineer's estimate of cost, payable to the county treasurer, to the use of the county, township or road district, as the case may be, or a bidder's bond executed by some surety company authorized to do business in this state or other good and sufficient surety in a like sum shall be given, as a guarantee on the part of the bidder that if his bid be accepted he will, within ten days after receipt of notice of such acceptance, enter into contract and bond to do the work advertised, and in case of default forfeit and pay sum of ten per cent. of the engineer's estimate of cost. The contract shall be awarded to the lowest responsible bidder. The court may in its discretion reject any or all bids. Any bid in excess of the engineer's estimate of the cost of the work to be done shall be rejected. When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be. The contract shall have attached to and made a part thereof the proposal sheet instructions to bidders, the bid, maps, plans, specifications and profiles. Whenever the contract is executed and approved by order of record and indorsement thereon, it shall be filed and preserved as a permanent record. It shall be incorporated in the contract that the county, township or special road district shall reserve the right to make any additions to, omissions from, changes in or substitutions for the work or materials called for by the drawings and specifications, without notice to the surety on the bond given to secure the faithful performance of the terms of the contract. The bidder must agree that before the county or political subdivision shall be liable for any additional work or material, the county or political subdivision must first order the same, and the cost thereof must be agreed upon in

writing and entered of record before such additional work shall apply in case of omissions, deductions, or changes and the unit prices shall be the basis of the values of such changes. In case of disagreement upon the cost or price of any addition, omission or change ordered or so desired, then it is expressly agreed that the decision of the state highway engineer shall be received and accepted as fixing definitely and finally the cost of such change, and when so fixed, the court, township board or special road district commissioners shall enter of record such change. It shall also be provided in the contract that the contractor will furnish and promptly pay for all labor employed and materials used in the performance of such contract."

In turning to Laws of Missouri, 1917, at page 461, Article IV, we find the title "Miscellaneous Provisions". On page 467, under the general title "Road Contracts", we find Section 79 which is now Section 7946, supra. Under the same title, we find Section 80, which is now Section 7947, supra. On page 472, we find the general title "Township and Special District Road Bonds". Under this general title, we find that Section 91 is now Section 7963, supra.

In the case of State ex rel. Wammack & Welborn v. Affolder, 257 S. W. 493, l. c. 494, the court had this to say in construing Section 10750, R. S. Mo. 1929:

"Does section 13204, R. S. 1919, prohibit defendant from paying the warrant? This section reads:

'The township trustee and ex officio treasurer shall not pay out any moneys belonging to the township for any purpose whatever, except upon the order

of the township board. \* \* \* and attested by the township clerk.'

This section was enacted in 1879 (Laws 1879, p. 225), when the Township Organization Act was passed, and has come down without substantial change. Section 10750, R. S. 1919, was passed in 1917 (Laws 1917, p. 473), and provides among other things as stated, supra, that the proceeds of the bonds shall be paid over to the township treasurer and by him disbursed on the order of the county court, etc. In State ex inf. Major v. Amick, 247 Mo. loc. cit. 292, 152 S. W. loc. cit. 597, the court said:

'Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act.'

This rule of construction has been invoked many times, and is applicable here. Since section 10750 is a much later statute than is section 13204, and since section 10750 applies to a particular subject, and since section 13204 is general in its application, we hold that section 10750, on the point in question, should be construed as an exception to the general and prior section 13204."

Therefore, upon the reasoning of this case, and in viewing the titles under which these sections fall, we find that the legislature set up in Sections 7946

and 7947, R. S. Mo. 1929, a plan for the expenditure of "any public moneys, whether arising from taxation or from bonds heretofore or hereafter issued to be expended in the construction, reconstruction, or other improvement of any road, bridge or culvert. The county court, township board or road district commissioners, as the case may be, shall have full power and authority to construct, reconstruct \* \* \* "

It is our opinion that Section 7946, supra, gives the township board the right to expend the money and to purchase materials and to make all necessary contracts in the carrying out of expenditures of any moneys derived arising from the source set forth in this section.

We are further of the opinion that Section 7963, supra, does not take this right away from the township board and place it in the hands of the county court for the reason that it will be noted that Section 7963 carries the title "Bonds to be sold, when -- how.", and is under the general title "Township and special district road bonds", which is a different and distinct title from the one under which Sections 7946 and 7947, supra, fall.

In reading the case of State ex rel. Wannack & Welborn v. Affolder, supra, it will be noted that the court held that Section 7963 was an exception to Section 13204, R. S. Mo. 1919. However, we are mindful of the fact that the reasoning used in determining that case could not be used in the instant case because the sections above referred to were passed in the same act. (See Laws of Missouri, 1917.) It will be noted in this case that the court had in mind the act of 1917, and on page 495, had this to say:

"By the act of 1917, Duck Creek township was granted the power to vote the bonds mentioned in this record. The county court in that instance, by direction of the statute, acted for the township instead of the township board, which usually acts for it."

We are of the opinion that Section 7963, R. S. Mo. 1929, is an exception in that it gives the township board the right to allow the county court to expend the money if it so chooses. However, if it does not choose to do so, the township board, under Section 7946, R. S. Mo. 1929, has the right to expend the money so long as it expends it in accordance with Section 7947, R. S. Mo. 1929.

In conclusion, it is our opinion that the township board does have the right to purchase all materials and make all necessary contracts in the expenditure of moneys derived from the bond fund referred to in your letter.

In regard to your second question, is it imperative that the township board advertise for bids before purchasing materials -- if so, when?

Upon close reading of Section 7947, supra, it will be found that it reads, "Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be constructed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of \$500, the county, township or district authorities shall order the county highway engineer \* \* \* to prepare and file \* \* \* all necessary maps, plans, specifications and profiles." When these "have been approved, the county, township or district authorities, shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed \* \* \* The contract shall be awarded to the lowest responsible bidder. \* \* \* When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be."

It will be noted that this section uses the verb "shall", and it has been held that when the word is used in the statutes, it is usually construed by our courts as mandatory, and must, therefore, be complied with accordingly.

Hon. James B. Bittiker

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June 13, 1940

In answer to your second question, we are of the opinion that Section 7947, supra, makes it mandatory upon the township board to advertise and let for public bidding all contracts where the engineer's estimated cost exceeds the sum of five hundred dollars.

Respectfully submitted,

B. RICHARDS CREECH  
Assistant Attorney General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney General

BRC:VC