

It would seem, furthermore, that one of the purposes of section 52:34-5 is to protect the interest of the State by authorizing a waiver of the usual bidding procedure where, as here, the latter would probably result in excessive quotations from bidders because of the uncertainties involved in the work.

For the foregoing reasons, the State House Commission may grant the authority here sought so far as a public exigency justifies such action. In the circumstances presented, however, the exigency would appear to exist only to the extent that the use of competitive bidding would not operate to the benefit of the State. In respect to items on which competitive bids can appropriately be secured, the regular procedure in the Highway Law should be followed.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By : THOMAS P. COOK,
Deputy Attorney General.

MAY 31, 1951.

HON. FRANK DURAND,
State Auditor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 20.

DEAR SIR:

You have requested an opinion as to whether the State Auditor has the power to conduct post-audits of the transactions and accounts kept by or for the New Jersey Turnpike Authority.

It is our opinion that the State Auditor has not only the *power* but also the *duty* to conduct post-audits of all transactions and accounts kept by or for the New Jersey Turnpike Authority.

Article VII, Section I, paragraph 6, of the Constitution of 1947, provides:

The State Auditor shall be appointed by the Senate and General Assembly in joint meeting for a term of five years and until his successor shall be appointed and qualified. *It shall be his duty to conduct post-audits of all transactions and accounts kept by or for all departments, offices and agencies of the State Government, to report to the Legislature or to any committee thereof as shall be required by law, and to perform such other similar or related duties as shall, from time to time, be required of him by law. (Italics ours.)*

An agency of the State is not essentially an agency of the State Government. In common speech and common apprehension the government of the State and the State itself are usually regarded as identical; the one is often confounded with the other, and often the former is meant when the latter is mentioned. *Poindexter vs.*

Greenhow, 114 U. S. 290. Counties and municipalities are agencies of the State but not of the State Government; so, too, with other entities created by law, as, for example, the Passaic Valley Sewerage Commissioners. See *Brickett vs. Lagay*, 134 N. J. L. 1 (E. & A., 1945). But the duty which the Constitution itself lays down for the State Auditor relates precisely to departments, offices and agencies of the State Government. If, then, the Turnpike Authority is an agency of the State Government, the State Auditor has the constitutional duty to conduct post-audits of transactions and accounts kept by or for it.

In *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235, our Supreme Court (1949), taking up the point that the Turnpike Authority was constituted a body corporate and politic in the State Highway Department (N. J. S. A. 27:23-3), said:

This statutory provision is manifestly intended to be a compliance with the constitutional provision requiring that "all executive and administrative offices, departments, and instrumentalities of the State Government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments," *Article V, Section IV, paragraph 1*. But the State Highway Commissioner is given no authority whatsoever over the Turnpike Authority. The Turnpike Authority is in but not of the State Highway Department and that fact does not make it any the less an independent entity, as the language of the entire act clearly demonstrates.

Whatever the significance of the distinction, as marked by the Supreme Court, between "in" and "of," that distinction nevertheless judicially confirms the fact that the Turnpike Authority is in the State Highway Department in compliance with Article V, Section IV, paragraph 1, of the Constitution. No reason suggests itself to us for recognizing the Turnpike Authority to be an agency of the State Government for the purpose of Article V, Section IV, paragraph 1, but not for the purpose of Article VII, Section I, paragraph 6.

Nor do we think it material that the Turnpike Authority is not dependent upon the State Treasury for its operations. While it may be true that the primary function of the State Auditor, the only officer authorized by the Constitution to be appointed by the Senate and General Assembly, is to examine into expenditures of money provided by the Legislature, it is equally true that the same paragraph of the Constitution which assigns to him the duty "to conduct post-audits of all transactions and accounts kept by or for all departments, offices and agencies of the State Government" also lays upon him the duty (besides that of reporting as required) "to perform such other similar or related duties as shall, from time to time, be required of him by law." Thus the Constitution does not confine the State Auditor's jurisdiction to such departments, offices and agencies of the State Government as shall receive appropriations from the State Treasury.

Will it be seriously questioned that the State Auditor would have the duty to conduct post-audits of the transactions and accounts kept by or for the Turnpike Authority, if the act creating that body had not provided (N. J. S. A. 27:23-14) that the Turnpike Authority "shall cause an audit of its books and accounts to be made at least once in each year by certified public accountants"? However that may be, this statutory provision does not oust the State Auditor of post-audit jurisdiction over the Turnpike Authority. From the standpoint that the Constitution is not a

grant but a limitation of legislative power (*State vs. Murzda*, 116 N. J. L. 219), the constitutional prescription of duty for the State Auditor is, we think, *pro tanto* a constitutional restriction upon the Legislature. We are not to be understood as saying that it was the intention of the Legislature to relieve the State Auditor of post-audit jurisdiction over the Turnpike Authority. We are only to be understood as making the point that the Legislature could not, even if it so desired, make effective provision to transfer to another person or other persons the duty assigned to the State Auditor by the Constitution in clear and imperative language.

In this connection, it is to be observed that neither the Constitution nor the implementing statute relating to the State Auditor (R. S. 52:24-1 *et seq.*) requires the State Auditor to conduct an *annual* post-audit of all departments, offices and agencies of the State Government. Therefore, the requirement, in the Turnpike Authority Act, of an audit to be made "at least once in each year by certified public accountants" evinces an unmistakable legislative intent that the annual report, which the same section of the act (N. J. S. A. 27:23-14) requires the Turnpike Authority to make to the Governor and the Legislature, shall truly, in the words of the Legislature, "set forth a complete operating and financial statement covering its operation during the year."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JUNE 4, 1951.

COL. CHARLES H. SCHOEFFEL, *Superintendent,*
New Jersey State Police,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 21.

DEAR COLONEL SCHOEFFEL:

This will acknowledge receipt of your letter regarding summons issued to Arthur G. Nelson, Annandale, New Jersey, for overloading a truck which bore farmer's registration license, with your request as to whether or not a farmer can be arrested and convicted for overloading a truck, where he is carting farm products.

The term "commercial motor vehicle" includes every type of motor-driven vehicle used for commercial purposes on the highways, such as the transportation of goods, wares and merchandise, excepting such vehicles as are run only upon rails or tracks and vehicles of the passenger car type used for touring purposes or the carrying of farm products and milk, as the case may be. Under this section the exemption would apply only to vehicles that are run on rails or tracks and the passenger car type used for touring purposes. These words must be read in connection with the words "or the carrying of farm products and milk, as the case may be." (39:1-1.)