

SEPTEMBER 4, 1951.

HONORABLE WALTER T. MARGETTS, JR.,
State Treasurer,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1951. No. 27.

DEAR TREASURER MARGETTS:

I have before me your request for an opinion concerning the legality of certain provisions contained in a pamphlet entitled "Contract Work" promulgated by the Division of Purchases and Property in the Department of the Treasury.

The questioned provisions are paragraphs (a) and (b) of "Instructions to Bidders" and paragraph 3 of "General Conditions," as amended by "Addendum to General Conditions for Contract Work."

Paragraphs (a) and (b) of "Instructions to Bidders" read as follows:

"(a) The State of New Jersey agrees to include the interest of the successful bidder in a standard fire and extended coverage insurance policy and will furnish contractors with a certificate of said policy. The State of New Jersey, through the Director of the Division of Purchase and Property, will purchase and pay for this insurance.

(b) Within ten days after the contract is awarded, the successful bidder will be required to execute a performance and completion bond in the full amount of the contract price, which will be furnished and paid for by the State of New Jersey through the Director of the Division of Purchase and Property in the Department of the Treasury * * *."

Paragraph 3 of the "General Conditions" reads as follows:

"3. Bond.

The cost of the required contractor's performance bond shall not be included in the bid. The State of New Jersey, through the Director of Purchase and Property, will purchase and pay the premium on said bond, but the contractor agrees to furnish all information, financial statements, etc., and to execute such agreements and indemnities as are required by the bonding company in connection with the furnishing of said performance bond."

The "Addendum to General Conditions for Contract Work" reads as follows:

"Paragraph 3 is hereby amended by adding the following:

In accordance with section 17:31-1 of the New Jersey Statutes it is immaterial from what surety company the contractor procures the performance bond so long as the surety company is authorized under the laws of New Jersey to carry on a bonding business in the State of New Jersey and provided the surety is satisfactory. The contractor may deal with any agent or broker of his choice.

The premium charge which will be paid direct by the State of New Jersey to the surety is not to exceed the rate of 75 cents per \$100.00 of contract price. The remaining portion of the premium, if any, is to be paid by the contractor."

We will first dispose of the question concerning paragraph (a) of "Instructions to Bidders." This paragraph has reference to the matter contained in section (a) of paragraph 8 of the "General Conditions," which reads as follows:

"8. Insurance.

(a) Fire. Fire Insurance: The cost of fire insurance shall not be included in the bid. The State of New Jersey, through the Director of Purchase and Property, will purchase and pay for said insurance. The contractor agrees to furnish information as to the progress of the work on a monthly reporting basis. The State of New Jersey agrees to furnish the successful bidder with evidence of fire and extended coverage insurance in the form of a fire insurance certificate."

A reading of the "Instructions to Bidders" indicates that their purpose is to assist bidders in complying with the terms of the "General Conditions." It therefore follows that the propriety of paragraph (a) of the "Instructions" will depend upon the legality of section (a) of paragraph 3 of the "General Conditions."

We will therefore consider them as one.

As we view the situation, there is nothing improper in this condition. R. S. 52:27B-62 is sufficient authorization for the Director of Purchase and Property to procure such fire insurance as he considers necessary for safeguarding the interest of the State. Undoubtedly, the State's interest in any of its projects will increase as the work progresses and the Director is charged with the responsibility of purchasing insurance to protect that interest from loss by fire. Of course, the purchase of the insurance must be made in accordance with the law.

Your question concerning paragraph (b) of the "Instructions" and paragraph 3 of the "Conditions," as amended, presents a more serious problem.

For the reasons pointed out in our answer to your first question, these items will also be considered as one.

The broad question presented is whether the State can legally purchase contractor's performance bonds and pay the premiums therefor.

We are of the opinion that such a procedure cannot be justified under the law.

To understand the basis for this opinion, it is necessary to review the powers and duties of the Director of Purchase and Property. This task is simplified by the opinion in *Gann Law Books vs. Ferber, et al.*, 3 N. J. Super. 236, wherein those powers and duties are traced from the creation of the Office of State Purchasing Agent by chapter 68, P. L. 1916 to their incorporation in the Department of the Treasury by chapter 92, P. L. 1948 (N. J. S. A. 52:18A-1, et seq.).

The director, or his predecessors, had no duties with respect to insurance until the enactment of chapter 112, P. L. 1944 (N. J. S. A. 52:27B-1, et seq.) where, in section 62, in addition to being authorized to effect fire insurance upon the State House and the contents thereof, he was authorized "to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and other insurance necessary for the safeguarding of the interest of the State."

In view of the fact that the pamphlet, containing the questioned provisions and entitled "Contract Work," refers to construction projects as distinguished from the general activity of purchasing materials and supplies, it is pertinent to point out at this time that the director, or his predecessors, did not have jurisdiction over these matters until the enactment of chapter 112, P. L. 1944 (N. J. S. A. 52:27B-1 et seq.) and chapter 227, P. L. 1950 (N. J. S. A. 52:18A-19.2). The 1944 Act, section 64, transferred the authority over the construction and alteration of certain buildings from the State House Commission to the director. The 1950 Act made a similar transfer of authority concerning institutional buildings.

It is therefore apparent that the director's authority to purchase and pay for insurance rests upon section 62 of the 1944 Act and the risks contemplated at that time. If those risks include contractor's performance bonds, it must be found in the powers and duties transferred to him by the aforesaid acts.

An examination of the statutes governing the State House Commission (N. J. S. A. 52:20-1 et seq.) and the Department of Institutions and Agencies (N. J. S. A. 30:1-1, et seq.) fails to reveal that authority, nor are there any cases supporting that point of view.

In fact, there would be no such legal authority, because from time immemorial it has been the custom for one to support his obligation by his own undertaking or collateral. That this was the understanding of the Legislature on the subject is indicated by the mandate contained in N. J. S. A. 52:34-3, wherein it is provided that on contracts in excess of \$1,000 a bond for the faithful performance of the contract or agreement shall be furnished by the successful bidder. The same philosophy is apparent in N. J. S. A. 2:60-207 which requires a bond for additional labor and material. It is interesting to observe at this point that the only statute we can find authorizing payment by the State of premiums on surety bonds is N. J. S. A. 17:31-1 concerning the bonds of public officials.

Possibly the director considers the provision in section 62 of the 1944 Act to purchase "any other insurance necessary for the safeguarding of the interest of the State," and the provision in the 1951 budget for "premiums for insurance not otherwise provided" to be sufficient authority for the general condition. We do not think that this position is tenable. A surety bond is defined in N. J. S. A. 17:31-1 as "any bond, undertaking, recognizance, guaranty or other obligation required or permitted to guarantee the performance of any act, duty or obligation, * * *." In other words, the surety binds himself for the performance of an act by another who is already bound to perform the same. Insurance, on the other hand, is an undertaking to compensate the insured for loss on a specified thing from specified causes. (Words and Phrases 4, First Series 3674.) Two different objects are contemplated. The surety says he will perform if the obligor fails to do so. The insurer says he will pay a loss sustained by his insured. An understanding of this difference between the obligations of a surety and that of an insurer clearly indicates that the director does not propose to purchase insurance. It should not be assumed that suretyship and insurance are one and the same because both are regulated under laws generally designated as "insurance laws."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.