MARCH 9, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION—1954 No. 1

DEAR TREASURER ALEXANDER:

You have requested our opinion as to whether the Director of the Division of Purchase and Property, hereinafter called the Director, has the power to secure a performance bond on a contract for building construction at Rutgers University, to select the surety company and to pay the premium for the bond.

Rutgers University advertised for bids for the construction of a new library building. The bidders were furnished with a set of specifications, and the contract subsequently executed the successful bidder was made subject to the specifications. Through inadvertence the specifications provided, *inter alia,* that the successful bidder should, within ten days after acceptance of his bid, "qualify for" a performance bond to be paid for by the "Owner." The "Owner" is defined in the contract as the Trustees of Rutgers University for themselves and on behalf of the State. The successful bid was exclusive of the cost of a performance bond according to the affidavit of the contractor.

It is our understanding that the provision with respect to the performance bond in the specifications is a departure from the policy adopted by the Division of Purchase and Property pursuant to Formal Opinion No. 27 of September 4, 1951. We have reviewed Formal Opinion No. 27 and conclude that, to the extent that it states that the Director lacks the power to select the surety company for a performance bond and to pay the premium therefor, the opinion is hereby withdrawn.

By statute, the Director is in charge of erection and alteration of State office buildings in the City of Trenton (N. J. S. A. 52:27B—64) and of State institutional buildings except for State Board of Education buildings (N. J. S. A. 52:18A—19.2), with the power to award contracts.

The Director has a statutory duty to maintain insurance wherever necessary to safeguard the interest of the State. N. J. S. A. 5227B—62 provides:

> "The director is hereby authorized, and it shall be his duty, after consultation with the heads of State departments and agencies, to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and any other insurance necessary for the safeguarding of the interest of the State. He is hereby authorized, subject to the commissioner's supervision and approval, to establish, in the Division of Purchase and Property, a bureau to administer a centralized system of insurance for all departments and agencies of the State Government."

It should be noted that fidelity bonds are listed with types of insurance in the statute *supra.*

Subtitle 3 of Title 17 of the Revised Statutes covers the general subject of insurance. Chapter 31 of this subtitle, R. S. 17:31—1 *et seq.,* deals with surety bonds required or permitted by law. R. S. 17:31—1 provides:

> "Any bond, undertaking, recognizance, guaranty or other obligation required or permitted to guarantee the performance of any act, duty or obligation, or the refraining from any act, required or permitted, by law, or the charter, ordinances, rules or regulations of any municipality, board, body, organization, court or public officer, to be made, given, tendered or filed with surety or sureties, may be executed by any company authorized under the laws of this state to carry on the business specified in paragraph "g" of section 17:17—1 of this title."

There is no authority elsewhere in the Revised Statutes for the execution of a surety bond either required or permitted by law except by a company which meets the specifications of R. S. 17:31—1. Only a company authorized under the laws of the State to carry on a business specified in paragraph "g" of R. S. 17:17—1 can validly execute such bond. The use of the permissive "may" in R. S. 17:31—1 is of no significance. The use of "shall" would be nugatory as applied to the execution of a surety bond permitted, but not required, by any law.

R. S. 17:17—1 (g) (N. J. S. A.) provides as follows:

> "17:17—1. Kinds of insurance
>
> "Ten or more persons may form a corporation for the purpose of making of any kinds of insurance, as follows: . . .
>
> "g. Against loss from the defaults of persons in positions of trust, public or private, or against loss or damage on account of neglect or breaches of duty or obligations guaranteed by the insurer; and against loss by banks, bankers, brokers, financial or moneyed corporations or associations, of any bills of exchange, notes, checks, drafts, acceptances of drafts, bonds, securities, evidences of debt, deeds, mortgages, documents, gold or silver, bullion, currency, money, platinum and other precious metals, refined or unrefined and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, and also against loss resulting from damage, except by fire, to the insured's premises, furnishings, fixtures, equipment, safes and vaults therein caused by burglary, robbery, hold-up, theft or larceny, or attempt thereat. No such indemnity indemnifying against loss of any property as specified herein shall indemnify against the loss of any such property occurring while in the mail or in the custody or possession of a carrier for hire for the purpose of transportation, except for the purpose of transportation by an armored motor vehicle accompanied by one or more armed guards."

Thus, the statute providing for the formation of insurance companies and classifying kinds of insurance is the statutory authority for the formation of companies acting as sureties on bonds conditioned against loss or damage on account of the breach of an obligation owed to the State.

In *State v. Community Health Service, Inc.*, 129 N. J. L. 427 (E. & A., 1943), the former Court of Errors and Appeals approved the opinion of Mr. Justice Oliphant, sitting as Supreme Court Commissioner, in which Justice Oliphant adopted a definition of insurance which is broad enough to encompass performance bonds. In his opinion he referred to the statement in Moresh v. O'Regan, 120 N. J. Eq. 534, 549 (Ch., 1936), rev'd. 122 N. J. Eq. 388 (E. & A., 1937), that "a contract which for a consideration, undertakes to do anything other than to pay a sum of money upon the destruction or injury to something in which the other party has an interest, is not a contract of insurance." With respect to this definition, Justice Oliphant said, 129 N. J. L. at 429:

"This pronouncement was apparently based on the definition of insurance as contained in 32 C. J. 975 & 1; 'broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain ascertainable sum of money on a specified contingency.'

"Tested by this rule the business of the defendant is not that of insurance, but I believe the definition therein contained is too narrow. I prefer that found in the Mass. Gen. Laws 175, S2. It is 'an agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has an interest.' Of this definition, the Massachusetts Supreme Judicial Court has recently said, in Attorney-General, ex. rel. Monk v. Osgood Co., 249 Mass. 473. 'This statutory definition does not differ in any essential from the common-law definition.'"

Aetna Casualty & Surety Co. v. International Re-Insurance Corp., 117 N. J. Eq. 190 (Ch. 1934), also reinforces the construction that the Legislature intended to classify surety bonds as insurance.

The Court of Chancery held that an obligee on a surety bond was a policyholder within section 10 of the Insurance Act of 1902 providing that the deposit of securities with the Commissioner of Banking and Insurance by authorized insurance companies should be in trust for policyholders.

The opinion by Vice-Chancellor Buchanan states:

"An insurance policy is the formal written instrument in which the contract of insurance is embodied; and a contract of insurance by a surety or guaranty company, though in the form of a bond, is in fact a policy of insurance and should be so construed."

Referring to what is now R. S. 17:31—1 quoted *supra,* the Vice-Chancellor's opinion concludes:

"Moreover, section 46 of this act of 1902, provides that surety bonds made by insurance companies incorporated thereunder and authorized to carry on the business of insurance (indemnifying) against loss by reason of breach of duty or obligation (specified in subdivision 7 of section 1 of the act), shall be deemed and taken to be in full compliance with all qualifications prescribed by statutes under which the giving of such a surety bond is required or authorized. This is an obvious recognition of the fact that such surety bonds (whether or not they be in cases where such bonds are required or authorized by statute) are contracts of insurance against loss by reason of breach of duty or obligation, and of the kind contemplated by insurance companies organized under the act for the purpose of doing the business specified in subdivision 7 of section 1, and are 'policies' within the meaning of that word in section 2. Section 47 requires that any such insurance company, in order to be entitled to the benefits of the provision of section 46, 'must comply with all the requirements of the act applicable to such company'—and assuredly sections 8 and 10 deal with one of such requirements. All this further confirms the conclusion that the holder of such a surety bond is a policy holder within the meaning of section 10."

The statute (N. J. S. A. 52:27B—62) empowering the Director to purchase and secure any insurance necessary for the safeguarding of the interest of the State is *in pari materia* with the statutes in subtitle 3 of Title 17 dealing with insurance. N. J. S. A. 52:27B—62 was enacted in 1944, while the applicable provisions of Title 17 were enacted in 1902.

Because of the specific statutory authority, it is not necessary to consider the Director's incidental powers in a matter related to State construction involving a large prospective saving for the State.

There is no basis in legal theory for a distinction between suretyship and insurance in deregation of the plain language of the above statutes. Both the surety (see N. J. S. 2A:44—143 to 147) and the insurer have primary obligations. That the surety's obligation is both joint and several is not a material distinction.

Inasmuch as Rutgers University in respect to contracts for construction financed by the Trustees secures and pays for the performance bonds, there can be no greater right in the contractor on Rutgers University construction financed by the State to choose his own bondsman than on any other State construction. The contractor does not contract with the surety company of his choice for a performance bond to the Trustees of Rutgers as sole owner.

In view of the foregoing authorities, it is our opinion that the Director is authorized to secure the performance bond, select the surety company and pay the premium for the bond out of the legislative appropriation for the construction of the library at Rutgers University.

It is also our conclusion that the Director may legally continue the policy adopted subsequent to the issuance of Formal Opinion No. 27 of September 4, 1951 which has been to permit the successful bidder to secure the performance bond from any authorized surety company of his own selection and to pay the premium therefor. In such cases, the contracts executed by the contracting agency and approved by the Director so provide and the cost of the performance bond is presumably included in the bid. Under this procedure the State's interest is fully safeguarded without interference with the normal and desirable relationship between the contractor and the surety company and there is therefore no need for the Director to exercise his authority to secure a performance bond.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General