

on November 6, 1956 unless such persons secure from the judge of the county court an order directing the District Board to permit such persons to vote. Any attempted reregistration by such persons before municipal clerks to vote in the General Election of 1956 are therefore invalid.

To carry out the intent of the Legislature under the provisions of N.J.S. 19:31-15, it is our opinion that the County Board of Elections has the authority and the duty to do any and all things to prevent fraudulent and improper voting, including voting by persons whose names have been removed from the registry list for disqualification and who have not obtained an order of the county court permitting them to vote.

Very truly yours,

GROVER C. RICHMAN, JR.  
*Attorney General*

By: SAUL N. SCHECHTER  
*Deputy Attorney General*

SNS/LL

SEPTEMBER 26, 1956

HONORABLE ROBERT L. FINLEY  
*Deputy State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-29

DEAR MR. FINLEY:

Our opinion has been requested concerning two questions which have arisen in connection with the authority vested in the Division of Purchase and Property to award contracts respecting the construction of buildings or public works. The questions posed are (1) whether contracts, invoices, change orders and other documents executed with respect to the construction of a building or public work require the approval of an agency or department of the State other than the Division of Purchase and Property; and (2) whether contracts executed with respect to the construction of a building or public work may validly provide that approval or acceptance of the promised performance by an agency or department which did not execute the contract on behalf of the State is a condition precedent to payment.

I

IS APPROVAL OF CONTRACTS, INVOICES AND CHANGE ORDERS BY AGENCY OR DEPARTMENT OTHER THAN DIVISION OF PURCHASE AND PROPERTY NECESSARY?

We turn first to the pertinent provisions of Title 52 vesting contracting power in the Division of Purchase and Property:

"All purchases, contracts or agreements, the cost or contract price whereof is to be paid with or out of State funds shall, except as otherwise provided in this act, be made or awarded only after public advertisement for bids therefor, in the manner provided in this act." (N.J.S.A. 52:34-6).

"Any such purchase, contract or agreement may be made, negotiated, or awarded by the Director of the Division of Purchase and Property without advertising if the aggregate amount involved does not exceed \$2,500.00, in any manner which he may deem effective to promote full and free competition whenever competition is practicable." (*N.J.S.A.* 52:34-7).

It appears evident that Chapter 48 of the Laws of 1954 (*N.J.S.A.* 52:34-6, *et seq.*) was intended to consolidate in one agency the letting of all contracts involving State funds, except as otherwise provided in the act. Further we fail to find any evidence in the act which establishes that the Legislature intended this authority to let contracts be exercised subject to the approval of other agencies or departments. Of course, this power may be subject to exceptions, expressed or implied, elsewhere appearing in legislative enactments; but in their absence there is conferred on the Division of Purchase and Property exclusive authority to enter into contracts.

In other words, *N.J.S.A.* 52:34-6, *et seq.*, in the absence of other qualifying legislation, seemingly vests in the Division of Purchase and Property the exclusive power to award contracts, and this power is exercisable without the approval of any other agency or department. However, as there may be exceptions from this general grant of power, it will be necessary in outlining the relationship of the Division of Purchase and Property with other departments of the State government to examine the aforementioned statutes in the light of the statutory scheme that exists with respect to the agency or department concerned. Thereby we can ascertain whether a department or agency has been excepted, either expressly or impliedly, from the provisions of *N.J.S.A.* 52:34-6, *et seq.*

As it is not feasible, for the reasons hereinabove stated, to set forth in one opinion our conclusions with respect to all State departments, we shall limit this opinion to a consideration of the relationship of the Division of Purchase and Property with the Department of Institutions and Agencies and the Department of Education. The opinion request seems to indicate that these departments should be among the first considered.

#### *Department of Institutions and Agencies*

In a Memorandum Opinion to the Department of Institutions and Agencies dated November 10, 1955, the functions and powers of the Division of Purchase and Property with respect to the construction of State institutional buildings were outlined as follows:

"It is our opinion that *N.J.S.A.* 52:18A-19.2 through *N.J.S.A.* 52:18A-19.4 contains provisions of such a comprehensive nature as to effectively place in the hands of the Director of the Division of Purchase and Property all the functions, powers and duties which were formerly in the State Board of Control of Institutions and Agencies, the Department of Institutions and Agencies and the Commissioner of Institutions and Agencies with relation to the construction of State institutional buildings. Accordingly, the State Board of Control of Institutions and Agencies, the Department of Institutions and Agencies, and the Commissioner of Institutions and Agencies no longer have any functions, powers, duties or responsibilities with respect thereto."

Inherent in this transfer of functions and duties was a vesting of authority in the

Division of Purchase and Property to let contracts with respect to State institutional buildings without the approval of the Department of Institutions and Agencies. That authority is confirmed by *N.J.S.A. 52:34-6, et seq.*

In the absence of any subsequent legislation superseding Chapter 48 of the Laws of 1954 (*N.J.S.A. 52:34-6, et seq.*) it is our opinion that the approval of the Department of Institutions and Agencies is not required with respect to contracts, change orders, invoices, and other documents executed in connection with the construction of State institutional buildings.

*Department of Education*

At the outset it is to be noted that the powers formerly vested in the State Board of Control of Institutions and Agencies with respect to construction specifically excepted therefrom the State Board of Education. *R.S. 30:3-7*. Thus, the Division of Purchase and Property did not by virtue of *N.J.S.A. 52:18A-19.2* and *52:18A-19.3* (transferring certain functions and powers of the Department of Institutions and Agencies) obtain any such powers or functions with respect to the State Board of Education.

It is our understanding that the Department of Education is presently engaged in the construction program authorized by Chapter 360 of the Laws of 1952. By that enactment there was appropriated to the Department of Education from the State Teachers' College Building Construction Fund certain sums for the purpose of constructing, reconstructing, repairing and developing the several State Teachers' College buildings and for providing equipment and facilities therefor. An additional appropriation from the Fund was made by Chapter 2 of the Laws of 1956.

The 1952 enactment provides as follows:

"3. The State Treasurer is hereby authorized, empowered and directed and it shall be his duty to set up and maintain the aforementioned appropriation in the 'State Teachers' College Building Construction Fund', established heretofore pursuant to the statutes of this State. The funds herein appropriated may be requisitioned by the State Board of Education for the uses and purposes specifically enumerated herein subject to the approval of the Director of the Division of Purchase and Property in the Department of the Treasury and subject to the same restrictions and control as are exercised over all other appropriated State funds, but not inconsistent with the provisions of chapter three hundred and forty of the laws of one thousand nine hundred and fifty-one."

\* \* \*

"7. The State Board of Education, subject to the approval of the Director of the Division of Purchase and Property in the Department of the Treasury, is hereby authorized and empowered to acquire, on behalf of the State, within the limits of available appropriations therefor, such lands that may be necessary to carry into effect the aims and purposes of this act either by purchase, gift, grant, devise or by the exercise of the power of eminent domain; and, through the said Division of Purchase and Property in the Department of the Treasury, is further authorized and empowered to do all things necessary to carry out the provisions of this act and to give full force and effect thereto."

"8. The State Board of Education, subject to the approval of the State

House Commission, is further authorized and empowered to use for buildings and equipment at the State Teachers' Colleges any money or other property heretofore or hereafter acquired by gift or otherwise for such purposes, in addition to the amounts appropriated for such purposes by this or any other law."

Thus with reference to the construction, development, etc. authorized under the aforementioned act, it would seem that the State Board of Education is authorized, subject to approval of the Director of the Division of Purchase and Property, to enter into contracts acquiring lands. However, with respect to matters other than the acquisition of land the statute provides that the State Board of Education is empowered to do these things "through the said Division of Purchase and Property".

It is well settled that in construing a statute "it is to be assumed that the Legislature was and is thoroughly conversant with its own legislation." *State v. McCall*, 14 N.J. 538, 547 (1954); *Barringer v. Miele*, 6 N.J. 139, 144 (1951). The Legislature being charged with knowledge of its own legislation enacted Chapter 48 of the Laws of 1954 (*N.J.S.A. 52:34-6, et seq.*) well knowing that by Chapter 360 of the Laws of 1952 there had been conferred on the State Department of Education certain powers with respect to the State Teachers' College building construction program. Was there a repeal by substitution?

Chapter 48 of the Laws of 1954 applies to "all purchases, contracts or agreements, the cost or contract price whereof is to be paid with or out of State funds" [emphasis supplied]. This indicates a legislative intent to cover in one statute the entire subject matter of the award of State contracts. By force of this legislative declaration the provisions of Chapter 360 of the Laws of 1952 with respect to letting contracts are to be discarded, not upon the ground of repeal or because of inconsistency, but by way of substitution. Cf. *Board of Education v. Tait*, 81 N.J. Eq. 161 (*E. & A.* 1913); *McGarvey v. Board of Pension Commissioners*, 119 N.J.L. 390 (*E. & A.* 1938). The words of Justice Garrison in the *Tait* case, *supra*, succinctly state the principle:

"The doctrine in question is that when a general rule is provided by the legislature to cover an entire subject-matter, all earlier and different legislative rules touching such matter are to be discarded in favor of such later rule." (81 N.J. Eq. at pp. 162, 163)

Accordingly, it is our opinion that in the absence of subsequent legislation superseding Chapter 48 of the Laws of 1954 (*N.J.S.A. 52:34-6, et seq.*) that contracts, change orders, invoices, and other documents executed by the Division of Purchase and Property in connection with the construction program authorized by Chapter 360 of the Laws of 1952 are not subject to the approval of the Department of Education.

The position of the Division of Purchase and Property with respect to Rutgers University was set forth in Formal Opinion 1956 — No. 9, dated July 2, 1956. There you were advised that the functions exercised in the past by the Division of Purchase and Property with respect to purchases and construction for Rutgers have now been expressly reserved as functions of the new Board of Governors under Chapter 61 of the Laws of 1956.

## II

MAY A CONTRACT VALIDLY PROVIDE THAT APPROVAL  
OF PROMISED PERFORMANCE BY AN AGENCY OR DE-

PARTMENT WHICH DID NOT EXECUTE THE CONTRACT  
ON BEHALF OF THE STATE BE A CONDITION PRECE-  
DENT TO PAYMENT?

We now turn our attention to the second of your inquiries. This presents for consideration the validity of making payments under a contract contingent upon the acceptance of the work by an agency or department of the State which did not execute the contract on behalf of the State. The problem posed requires that we examine briefly the subject of conditions in a contract.

Initially we note this observation of the court in *Duff v. Trenton Beverage Co.*, 4 N.J. 595 (1950) :

"The parties may make contractual liability dependent upon the performance of a condition precedent; . . . A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen. By its very nature, a conditional promise becomes absolute only upon performance of the prescribed condition." (at pp. 604, 605).

Without more this statement would seem to answer the query posed, but we will not rest our position on that alone.

Building and construction contracts are governed by the general principles of law applicable to contracts generally, *Terminal Const. Corp. v. Bergen County, etc., Dist. Authority*, 18 N.J. 294, 310 (1955), and this includes conditions precedent and subsequent, 9 *Am. Jur., Building and Construction Contracts*, §16, p. 13. A promise in terms conditional on the satisfaction or approval of a third party is common in contracts. In many contracts it is expressly provided that some act of a third person shall be a condition of a promisor's duty to pay money or to render some other specified performance, 9 *Am. Jur., Building and Construction Contracts*, §33, p. 23; 3 *Corbin on Contracts* (1951), §649, p. 587; 3 *Williston on Contracts (Rev. ed. 1936)* §675A, p. 1943, for parties to a contract are at liberty to agree upon a condition precedent upon which their liability shall depend. *Kennedy v. Westinghouse Elec. Corp.*, 29 N.J. Super. 68, 78 (*App. Div.* 1953), affirmed 16 N.J. 280 (1954); *Duff v. Trenton Beverage Co.*, *supra* (at p. 604). Such stipulations in contracts are valid and upheld by the courts. *United States v. Bussey*, 51 *Fed. Supp.* 996, 998 (*D.C. Calif.* 1943).

Illustrative of such contracts are promises to pay for land subject to the approval of title by a third party, *Atlas Torpedo Co. v. United States Torpedo Co.*, 15 S.W. 2d 150 (*Tex. Civ. App.* 1929); or to purchase a lease provided its validity is approved by a third party, *Wilhelm v. Wood*, 151 *App. Div.* 42, 135 N.Y. *Supp.* 930 (*Sup. Ct.* 1912). In this jurisdiction our courts have been called upon many times to give effect to contracts providing that certain rights shall accrue or be withheld upon the issuance of a certificate of an architect or engineer. *Byrne v. Sisters of St. Elizabeth*, 45 N.J.L. 213 (*Sup. Ct.* 1883); *Bradner v. Roffsell*, 57 N.J.L. 412 (*E. & A.* 1894); *Landstra v. Bunn*, 81 N.J.L. 680 (*E. & A.* 1911); see *Schauffelee v. Greenberg*, 83 N.J.L. 737, 738 (*E. & A.* 1912); *T. F. Callahan, Inc. v. Commrs., etc., Union Twp.*, 102 N.J.L. 705 (*E. & A.* 1926); see *Annotations*, 54 *A.L.R.* 1255 and 110 *A.L.R.* 137. Our attention has not been brought to any case in this jurisdiction in which the validity of such provisions has been successfully challenged. Nor, are we aware of any rule of law or of public policy which forbids the parties to a contract to submit to a third party for determination or decision the question of satisfactory performance.

Too, the duty to pay for work or goods may be conditioned on the promisor's satisfaction as contracts requiring the work to be satisfactory to the employer are valid. *Williams v. Hirshorn*, 91 N.J.L. 419 (Sup. Ct. 1918); *Gwynne v. Hitchner & Yerkes*, 66 N.J.L. 97 (Sup. Ct. 1901); *Restatement, Contracts* §265.

Accordingly, the Division of Purchase and Property may validly provide in contracts that payment shall be conditional on the acceptance or approval of the work or materials by an agency or department which did not execute the contract on behalf of the State. As a matter of policy, there may be merit in conferring upon the using department which is versed in the field, the authority to accept the performance.

Very truly yours,

GROVER C. RICHMAN, JR.  
*Attorney General*

By: HAROLD ASHBY  
*Legal Assistant*

SEPTEMBER 28, 1956

HON. JOSEPH E. MCLEAN, *Commissioner*  
*Department of Conservation and Economic Development*  
State House Annex  
Trenton, New Jersey

MEMORANDUM OPINION—P-30

DEAR COMMISSIONER MCLEAN:

You have asked our opinion concerning the enforceability of a clause which is proposed to be inserted in deeds for the grant of riparian lands by the State. The clause reads:

"This grant is made with the understanding that the lands herein described and conveyed shall not be used for the purpose of ingress to or egress from a lagoon or bayou lying inshore of the aforesaid granted lands other than such lagoons or bayous as are shown on the map attached hereto and made part hereof until such permission is authorized, and upon payment of such additional compensation and upon such other terms as shall be fixed by said Department of Conservation and Economic Development, Division of Planning and Development, or its successors in function."

You inform us that additional compensation is charged to the upland owner for a grant of riparian lands if his application discloses a proposed lagoon or bayou construction inshore from the mean high water line. Instead of \$5.00 per front foot, for example, a lump sum consideration in excess of that amount (usually at the rate of one-tenth of the front foot consideration for each foot of lagoon frontage) is fixed by the Council as the purchase price of the grant, within its discretion to determine the compensation for riparian deeds pursuant to R.S. 12:3-10.

The lagoon clause is intended to guarantee additional compensation to the State at the same rate, in the event that the State's grantee or his assignee seeks a permit to dredge in order to admit tidal waters to his upland at any time subsequent to the