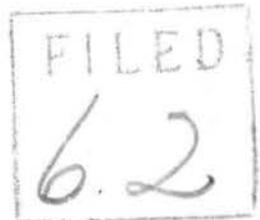


COUNTY COURT: County court may not pay county clerk compensation  
COUNTY CLERK: for acting as agent for county in making contracts  
under the King-Thompson road bill.

January 15, 1948



Honorable Harold L. Miller  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department on the following statement:

"Request that I be furnished with an opinion as to whether of not the County Court would be authorized to order additional expenditure as payment to the County Clerk, in addition to his salary for duties in connection with the County Aid Program, as provided for in C. S. for H. B. 214, by appointing the County Clerk as agent for the county to make contracts on behalf of the county, as provided in Section 13766, R. S. of Missouri, 1939, in view of the duties imposed upon the County Court and necessarily their Clerk by Section 4 of said Bill."

DeKalb County is a county of the third class, and the law fixing the salary of the county clerk of such counties is found in Laws of Missouri, 1945, page 1544.

Committee Substitute for House Bill No. 214, referred to in your request, is found in Laws of Missouri, 1945, page 1471. Section 4 of that bill, which relates to the subject of your inquiry, is found on page 1503, and reads as follows:

"The county court of each county desiring to avail itself of the benefits of this Act shall, with the advice and assistance of its county highway engineer, or if none, of its county surveyor, formulate a program for the improvement, construction, reconstruction or restoration of county roads, as provided for in this Act, for the period for which funds are appropriated for the County Aid Road Fund. Such program, together

with specific plans, specifications and estimates for each project included in said program, shall be submitted to the State Highway Commission for approval, within the period for which the funds are appropriated to the County Aid Road Fund. If such program and the plans, specifications, and estimates for each project submitted, comply with the provisions of this Act and with the general plans, specifications and requirements formulated as provided in this Act, the same shall be approved by the State Highway Commission, and it shall so notify the State Auditor and the State Treasurer, who shall thereupon set aside from the share of the County Aid Road Fund apportioned to such county, an amount of said fund on account of each project included in said program, which amount so set aside shall not exceed fifty per cent (50%) of the total costs of such project, and in no event shall exceed the sum of Seven Hundred Fifty Dollars (\$750.00) per mile of the county road included in such project. No part of the County Aid Road Fund shall be used for acquisition of right-of-ways."

Referring to this section, it will be found that the county highway engineer is supposed to advise and assist the county court in formulating a program under this bill. There is nothing in this section which refers to the county clerk or his duties in connection therewith. Under Section 5 of this bill, Laws of Missouri, 1945, page 1474, the county court is authorized to contract for road improvement. This section reads as follows:

"Upon compliance with the provisions of the foregoing section, the county court shall thereupon, or at such times as it shall determine, publicly advertise for sealed bids for each of the projects included in its approved program. The contract for each project shall be awarded to the lowest and best bidder; provided that the county court may reject any and all bids. In asking for bids and awarding such contracts, the county court may combine one or more of the approved projects

in one contract. In the event that no bids are received, or in the event that such bids are in excess of the estimate of cost thereof as prepared by the county highway engineer, the county court, the special road district, or the township board in those counties having township organization, may perform the work provided for in the specifications, provided, however, that the amount to be paid from the County Aid Road Fund shall in no event exceed fifty per cent of the estimate of cost prepared by the county highway engineer, or the sum of \$750.00 per mile, whichever sum is less."

This section does not authorize the county court to appoint an agent to enter into contracts for road improvement. However, Section 13766, R. S. Mo. 1939, referred to in your request, does authorize county courts to appoint agents to make contracts on its behalf.

Referring to said Sections 4 and 5, supra, it will be seen that the county court does have duties to perform in carrying out the program under this act, and naturally, there are additional duties imposed on the county clerk as a result of these duties being imposed on the county court. However, since the lawmakers have not made any provision for compensation for this work, either to the county court or the county clerk, then there would be no authority to pay them out of public funds for these services.

In the case of *Madaway County vs. Kidder*, 129 S.W. (2d) 857, 860, the court applied this principle in the following language:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. \* \* \*"

It appears from your request, however, that there is no claim that the county clerk is entitled to additional compensation for these added duties, but you inquire whether or not

it would be legal to appoint the clerk as agent for the county court to make contracts under the road bill for the county court. Even if the county court were authorized to appoint and compensate the county clerk for the aforesaid purposes, such compensation could not be for services which the clerk performs under the act as county clerk. In other words, the only compensation, if any, which could be paid would be for making the contract.

Again referring to Section 5, supra, it will be seen that the county court lets the contract to the lowest and best bidder, and that it may reject any and all bids. In the performance of this duty, the court exercises a discretionary function and this could not be delegated to the clerk as agent of the court. This principle is announced in 15 C.J., page 465, Section 116, as follows:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant. \* \* \* "

Said Section 13766, R. S. Mo. 1939, does authorize the county court to appoint an agent to make contracts on its behalf. However, such appointment would only confer on such an agent a ministerial duty and he could not perform discretionary duties for the court.

Even though the court should appoint the clerk as its agent to make the contract, we do not think under the circumstances that the court would be authorized to compensate him for this service. We make this statement because the statute does not expressly provide for compensation, and we do not think the duties are such that compensation would be implied. In the case of *Blades vs. Hawkins*, 240 Mo. 187, the court had before it for consideration the question of the authority of the county court to employ expert accountants to examine the accounts of the county officers. The examination of the officers by these accountants showed that the county officers were in default some \$5,000 or \$6,000. In view of the technical nature of this work, the court held that the county court did have implied authority to employ and pay these accountants.

In speaking of authority of a county court to employ and pay agents, the court said, l.c. 195:

"The more important proposition, and the one chiefly controverted, is as to the power of the county court to employ an expert accountant to audit the public records and the accounts of present and prior officials. Its power to do so must be found in some express statutory grant, or else implied as essential to the proper execution of powers expressly granted or duties expressly imposed. Section 6759, Revised Statutes 1899, prohibits counties and other municipal bodies from making any contracts not within the scope of the powers of the municipality or expressly authorized by law. This provision is but declaratory of the common law; for these public corporations never have been deemed to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county courts and commissioners, as well as to the governing bodies of other subordinate political corporations. (7 Am. & Eng. Ency. Law, sec. 789; Wolcott v. Lawrence Co., 26 Mo. 277; Sturgeon v. Hampton, 88 Mo. 204.) There is in our statutes no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created. \* \* \* \*"

The Hawkins case, supra, however, differs from the case here because in that case, the duties performed by the agents were of a technical nature and required special talent and skill, while in the case here under consideration, the county clerk or any other person appointed as agent would only have to perform a ministerial function in making the contract. That being the case, under Section 13766, supra, the county court might appoint the clerk or any other person to make the contracts provided for in said Section 5 of the act. However, since no provision for payment of such agent for this service is made, under the statute, we do not think the court would have implied power to pay out public funds for this purpose.

#### CONCLUSION

From the foregoing, it is the opinion of this department that the county court may appoint the county clerk or any other person as agent to enter into contracts for road improvement under said Committee Substitute for House Bill No. 214. We are also of the opinion, however, that the court would not be authorized to pay out any public funds for this service because the statute does not expressly provide for such payment and the duties are such that authorization for payment would not be implied.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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TWB:VLM