STATE BOARD OF ACCOUNTS: Ditch Improvements—Whether county commissioners have authority to award a contract to complete a ditch improvement initiated under Chapter 62 of the Acts of 1937.

October 23, 1942.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Mr. Jensen:

I have before me your letter in part as follows:

"In a proceeding for the construction, reconstruction, alteration and rehabilitation of a drain with the aid of the Civilian Conservation Corps, prior to the completion of the improvement, the Civilian Conservation Corps withdrew from the project.

"It is the desire of the board of county commissioners to award a contract to complete the improvement. The question is presented as to whether the board of commissioners has the authority under the pending proceedings instituted under Chapter 62 of the Acts of 1937, to award a contract, or whether it would be necessary to institute a new proceedings under the provisions of Chapter 264 of the Acts of 1933."

You request an official opinion in answer to the following questions:

"1. Does the board of county commissioners have authority to award a contract for the completion of a ditch improvement project instituted under Chapter 62 of the Acts of 1937, from which project the Civilian Conservation Corps withdrew prior to its completion?

"2. In a county in which no general ditch improvement fund has been established, can the cost of construction or improvement of ditches be paid from the county general fund?"
Chapter 62 of the Acts of 1937, referred to by you, is Section 27-222 to Section 27-224 of Burns' Indiana Statutes Annotated (1933), June, 1942, Cumulative Pocket Supplement. Sections 4 and 5 of the 1937 Act, supra, were omitted from Burns' statutes, Section 4 being the Repealing Section and Section 5 being the section Declaring an Emergency. As pointed out by you in your letter, Chapter 62 of the Acts of 1937 supra, referring especially to subsection (c) of Section 2 of said Act, provides that no contracts shall be awarded for the construction of the project.

Your first question, therefore, must be answered upon a determination of what actually became of the project when the Civilian Conservation Corps withdrew before the work was completed. This Act, Chapter 62 of the Acts of 1937, is declared to be supplemental to Chapter 264 of the Acts of 1933, it being expressly provided that it:

"* * * shall not be construed to repeal, alter or amend any of the provisions of said act * * *." 

and that for the purposes described in the Act the procedure set out therein is to be followed. (Burns' Indiana Statutes Annotated (1933), June, 1942, Cumulative Pocket Supplement, Section 27-224).

It thus appears that Chapter 62 of the Acts of 1937 does not repeal in any sense any part of Chapter 264 of the Acts of 1933, but is actually supplemental thereto, affording a new procedure which may be followed under certain conditions set out in that Act. One of the essential conditions upon which the adoption of the procedure set out in Chapter 62 supra, is available is the condition set out in subsection (c) of Section 27-222 supra, which provides in part as follows:

"(e) When, by preliminary negotiations between the properly constituted authorities and citizens of the county or counties in which such public drain is located and the proper officers or agents of the United States government, it seems apparent that for the relief of such situation federal aid will be extended under and
by virtue of the civilian conservation corps, to assist in the reconstruction (and) rehabilitation of such public drain, whereby a share of the expense involved necessary to rehabilitate such drain or to construct such control dams will be assumed by the federal government or its agents * * * ." 

Burns' Indiana Statutes Annotated (1933), June, 1942, Cumulative Pocket Supplement, Section 27-222.

It is apparent that the existence of this condition was present at the time the proceeding was begun but, when the Civilian Conservation Corps withdrew from the project, it seems to me, that the condition upon which the improvement was to proceed has failed, and further procedure under Chapter 62 of the Acts of 1937 would be unauthorized. This is particularly true as respects the matter inquired about in your first question. In other words, it is difficult to see how the board would be authorized to proceed under Chapter 62 of the Acts of 1937 by entering into a contract for the construction of the project when the Act, upon which they purport to be proceeding, provides that no contract shall be awarded.

I have given some consideration to the possibility that the intention in providing that no contract should be awarded was to provide simply that none need be awarded but, in my opinion, that was not the intention but that the provision of the statute was made as it was because of the fact that the work was to be done by the Civilian Conservation Corps and that on account of that fact no contract should be awarded. It seems to me that with the withdrawal of the Civilian Conservation Corps from the project, it is necessary for the board now to proceed under Chapter 264 of the Drainage Act of 1933. Your first question, therefore, is answered in the negative; that is, as respects further proceedings under Chapter 62, supra.

Answering your second question, I desire to refer you to Section 27-131 of the June, 1942, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated (1933), and to the interpretation of similar language of that section as embodied in the Opinions of the Attorney General of 1938, page 109. Note especially the following language, quoting from Section 27-131 supra:
"* * * If the board of county commissioners shall deem it inadvisable to establish said fund," (referring to the General Ditch and Improvement Fund) "all payments from and reversions to such fund shall be paid from and shall revert to the county general fund. Such fund shall consist of all funds in any ditch fund not otherwise appropriated at the time this act takes effect, or any taxes then or thereafter levied or collected for ditch purposes, the proceeds of all bonds issued and sold for the construction of specifically named ditches and from the collection of all special payments and benefits to property as provided in this act for the construction, repair or enlargement of ditches and such other funds as by law are or may hereafter be provided to be paid therein."

Burns' Indiana Statutes Annotated (1933), June, 1942, Cumulative Pocket Supplement, Section 27-131.

If by virtue of the above quoted provisions there is in the general fund any of the funds referred to therein, in my opinion, the same may be used to pay the costs of construction or improvement of ditches. Your second question is answered accordingly.

In answering your third question, I desire to quote from the Opinions of the Attorney General issued to the State Examiner under date of February 25, 1938, as follows:

"In view of the provisions of this particular section, a portion of which was quoted above" (referring to Chapter 110 of the Acts of 1935), "it is my opinion that if monies are due to a person or corporation, etc., because of ditches, drains, or the repairing of either of them, and the county treasury has money which was paid into it pursuant to assessment on persons or property of the county in territory less than that of the whole, no appropriation is necessary for the payment from the county treasury of such sums."

I concur in this opinion.