

CONTRACTS:) Contract may be amended to permit a retention
STATE OFFICE BUILDING:) of 10% on payments to the contractor on
monthly estimates.

March 25, 1938



Honorable Edgar M. Eagan
Executive Secretary
Permanent Seat of Government
Jefferson City, Missouri

Dear Mr. Eagan:

This Department wishes to acknowledge your request for an opinion under date of March 22, 1938, wherein you state as follows:

"Our contract documents for the construction of the State Office Building provides for a fifteen per cent (15%) retainage on the monthly estimates. This figure was inserted in the original forms in compliance with our general statutes.

A question has arisen on this point. Mr. A. L. Lehr, of the Lehr Construction Company, has called my attention to Section 3, at page 414, Laws of Missouri, 1937, under which we operate, in which it provides that 'Such per centage not less than ten' may be retained.

It seems that the fifteen per cent (15%) retainage works an unusual hardship upon the contractor and, therefore, Mr. Lehr has requested the reduction in conformity with the work under the State Building Commission. Please give me your opinion as to whether or not the retainage can be reduced to ten per cent (10%) under the law."

Article 7 of the Agreement for the construction of the state office building at Jefferson City, Missouri, entered into by the State of Missouri acting by and through the Board of Permanent Seat of Government and the Lehr Construction Company of St. Joseph, Missouri, makes the following provision for progress payments:

"The State of Missouri shall make payments on account of the contract as provided herein, as follows: On or about the tenth day of each month, 85% of the value, based on the contract price, of labor and material incorporated into the work and of materials suitably stored in reasonable quantities at the site thereof, up to the last day of that month, as estimated by the Architects, less the aggregate of previous payments; and upon completion of the entire work, the sum sufficient to increase the total payments up to 85% of the contract price."

Section 13746 R. S. Missouri 1929, is a general statute relating to public buildings and improvements and provides the manner of payment of contractors where more than Five thousand dollars has been appropriated by the General Assembly for the erection of a new building, as follows:

"All appropriations made by the general assembly amounting to five thousand dollars or more, for the erection of new buildings on state account, or for the repairing of buildings already erected on state account, shall be drawn from the state treasury only in the manner herein provided. After being furnished with satisfactory evidence that a bona fide contract has been entered into for the erection or repairing said building or buildings, and not less than thirty days after the contractor has commenced work, the state auditor may draw his

warrant on the state treasury, in favor of the contractor entitled thereto, for 85 per cent. of the value of all labor and materials incorporated in the work, or for materials which have been delivered on the site of the building and accepted by the architect or engineer in charge, such value being calculated in proportion to the contract amount; and thereafter not oftener than once each month the state auditor may draw his warrant on the state treasury in favor of the contractor for 85 per cent. of the value of all labor and materials furnished and computed in the same manner, less all previous payments made; and upon being furnished satisfactory evidence that the contract has been satisfactorily completed and the work accepted, the state auditor shall draw his warrant on the state treasury in favor of the contractor, for the balance due on contract; Provided, that all estimates of labor and materials furnished shall be prepared and certified correct by the architect or supervising engineer in charge, and approved by proper officials of the institution, commission, or board responsible for such construction: Provided further, that in no event shall an amount exceeding 85 per cent. of the entire contract price be paid to the contractor until the final payment is made after the contract is satisfactorily completed and work accepted; and, provided further, that in no case shall the amount contracted therefor exceed the amount appropriated by the general assembly for such purpose."

The 59th General Assembly authorized the construction, furnishing, equipping and maintenance of a state office building at Jefferson City, Missouri, and appropriated the sum of \$850,000.00 for such purposes (Laws of Missouri 1937, Sec. 48-c, page 46).

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Section 3 of the Laws of Missouri 1937, page 414, is a special statute and provides the manner of payment to the contractor who holds a contract for the erection of the state office building, in part as follows:

"Such percentage not less than ten, as in its judgment the board shall deem proper, shall be reserved from payments on the monthly estimates or work contracted for, until such contract or the portion thereof to which such payments are applicable shall have been completed, inspected and accepted by the Board."

In the case of State vs. Brown, 68 S. W. (2) 55, 1. c. 59, 334 Mo. 781, the Court in holding that a special statute, if later than the general one relating to the same subject matter, will be regarded as an exception to or qualification of a prior general one, said:

"Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; * * *"

The latter statute authorizing the Board of Permanent Seat of Government in its judgment to retain not less than 10% from payments to the contractor on the monthly estimates is a qualification of the general statute which requires a reservation of at least 15%.

From the foregoing we are of the opinion that the Board may in its judgment amend Article 7 supra of the contract it has with the Lehr Construction Company for construction of the State Office Building, to permit a retention of 10% on the payments to the contractor on the monthly estimates instead of the present 15% retention.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General