

STATE CANCER COMMISSION: Interpretation of provision in contract for State Cancer Hospital relative to heating.

December 19, 1939

Mr. Frank T. Hodgdon, Chairman  
State Cancer Commission  
3713 Washington Boulevard  
St. Louis, Missouri



Dear Mr. Hodgdon:

We are in receipt of your request for an opinion together with enclosures. Your letter reads as follows:

"Over a year ago the general contract for the Cancer Hospital, which is now under construction at Columbia, was let to the Dickie Construction Company. The completion date of this contract called for 360 days from and including the date of the contract, or September 15, 1939. In addition, two paragraphs (copies of which are enclosed) were contained within the contract in regard to keeping the building dry and warm.

"It is the interpretation of the Cancer Commission from paragraph No. 10 (Page G.C.-9) that the Dickie Construction Company is responsible for heating the building and keeping it dry and warm. It is our interpretation 'heating' implies responsibility for the services of someone to fire the furnace, plus the cost of whatever fuel is used.

"The original contract called for the use of gas. Some months after the contract was awarded various changes were made, including a change from the use of gas to coal at the request of the legislature.

Such changes necessitated additional time for construction, bringing the completion of the building into December, 1939. Recently climatic conditions have become such that it is necessary to have heat in the building. On October 19, 1939 the architect asked the Commission to have coal delivered to the building site. We explained our position (by telephone) as stated above. We were informed the general contractor did not consider himself responsible, because the completion date had been extended. As seen from an excerpt from correspondence in regard to Change Order No. 18, the following statement was made by Dickie Construction Company:

"For the extra work described above, we request an extension of sixty (60) days to the completion time given in our contract. We have included nothing in the above estimate for temporary heat, because of these changes, therefore, we ask that this be considered and adjusted when and if temporary heat becomes necessary."

"However, it is our interpretation from this contract that by their own wording Dickie Construction Company implies their responsibility by asking 'that this be considered and adjusted . . .'

"The question at present is: who is responsible for the cost of fuel and the cost of firing the furnace until the building is completed?"

"The Commission at its last meeting on October 29th decided to present the matter to you and abide by your decision. We would appreciate a reply as soon as possible, since the contractor is urging the Commission for an immediate answer."

Change Order No. 18 reads as follows:

"Excerpt of letter from:  
Dickie Construction Company  
to:  
Jamieson & Spearl, Architects

Re: State Cancer Hospital  
Columbia, Missouri  
PWA Docket No. Mo. 1337-F

Date: March 9, 1939

'For the extra work described above, we request an extension of sixty (60) days to the completion time given in our contract. We have included nothing in the above estimate for temporary heat, because of these changes, therefore, we ask that this be considered and adjusted when and if temporary heat becomes necessary.'

The following are clauses in the contract of the State Cancer Commission with the Dickie Construction Company:

"Page G.C.-9

Paragraph #5: 'The contractor must at all times protect the building and material for same from the weather and when the building reaches such a condition that storm water can do any damage muslin screens must be placed in all windows or they may be closed with boards and old sash.'

Paragraph #10: 'This contractor must keep the building dry and warm at all times when by being wet or cold the work will suffer injury before completion, Heating apparatus will be installed to heat the building. This contractor will use same but all damage to it shall be made good at his expense.'

There is no dispute but that the Commission has been responsible for delay in performance of the contract. There is also no dispute that under the terms of the contract the general contractor is responsible for keeping the building dry and warm. The question arises whether by virtue of the Commission's delay the general contractor is presently relieved from his responsibility to heat the building.

Donnelly on the Law of Public Contracts, Section 283, page 401, states that:

" \* \* \* Where the public body postpones commencing the work to a more unfavorable season of the year, and the situation of the parties is so changed that they could not have intended the stipulation as to time to remain in force, no responsibility for stipulated damages can rest upon the contractor."

Similarly, in the case of *Wentzel v. Lake Lotawana Development Co.*, 48 S. W. (2d) (Mo. A.) 185, l. c. 197, the court in holding that the contractor was entitled to reasonable time for completing the work because of the owner's delay, said:

"Plaintiff's evidence was that on account of the delay springtime came on before he had finished felling the trees and trimming branches and brush, and that, with the sap rising and leaves coming out, the operations of trimming and burning became more difficult and required a longer time and more work. In the case of Mis-

souri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 S. W. 1119, 1120, this court said: 'But here the case shows that the parties themselves made a substantial change in the contract, which, in effect, did away with the time limit provision, which left a reasonable time, implied by law, for the performance of the work. In such circumstances, it will not do to say that the contractor should yet be held to the time limited by the contract with an allowance of the time necessary for the changed conditions of the work. That might result in great injustice to the contractor.'

The same rule that provides for abrogation of the stipulated damage clause, and an extension of time for completion of the contract where the owner is responsible for the delay, must necessarily and by analogy apply to a provision requiring heating of the building where the evidence is such that to enforce same would result in an added expense to the contractor which would not have been necessary had the owner not delayed.

A letter under date of October 26, 1939, which you enclosed from George Spearl, the Commission's architect, to Miss Dorothy Hehmann, Executive Secretary of the Commission, reads in part as follows:

"In reply to Miss Hehmann's question, we would state that the original general contract required the contractor to keep the building dry and warm, i.e. to provide temporary heat at his own expense if the weather required it. Completion was called for in September and had he been delayed the weather has been such that no temporary heat would have been necessary. Doubtless all contractors who figured the job gambled on this fact in putting in their lowest

possible bid. This was the reason that, when discussing Change Order 18 with the architects, the contractor made the price of the additional work, for which he asked an extension of time, contingent on the fact that he would not be held responsible for temporary heat."

You declare that the Dickie Construction Company by their own interpretation of the contract implied their responsibility for heating the building by asking that if temporary heat became necessary the cost "be considered and adjusted." We can not agree with the Commission's construction. The heating question was not only to be "considered" but also "adjusted" "when and if temporary heat became necessary."

Temporary heat having become necessary by reason of the delay of the Commission, we are of the opinion that under the terms of the contract the State Cancer Commission is responsible for the cost of fuel and the cost of firing same after the date originally set in the contract for completion.

Respectfully submitted

MAX WASSERMAN  
Assistant Attorney General

APPROVED:

---

W. J. BURKE  
(Acting) Attorney General

MW:HR