

PUBLIC BUILDINGS: State is liable only to general contractor and not to sub-contractors under construction contracts.

CONTRACTS:

2/3/50

February 3, 1950



Honorable Fred Appleton  
Director  
Division of Public Buildings  
Jefferson City, Missouri

Dear Mr. Appleton:

This is in reply to your request for an opinion which is as follows:

"The Infirmary Building in Nevada, Missouri, is contracted by Seth E. Gien and Associates. They have completed this building and now only await final inspection and payment.

"Now that the contractor is nearing completion, we have a request from the excavation sub-contractor that he be allowed an extra for approximately \$7,619.35. We desire that you study this matter to see if we owe the sub-contractor this money.

"This job was started during Mr. Powell's supervision and on my first visit to the site the contractor was requesting a location where he could get earth in order to fill around the building. At that time there was no question as to whether the contractor would be paid extra for the dirt, for by that time it was decided that the contour plans used were off approximately two feet. This matter has never been presented in the form of a bill until approximately 20 days ago.

"I wish to state the fund for this building has been re-appropriated; however, there remains less than \$2,000.00 in this fund, so it would be impossible to pay for the actual excavation with the funds we have available.

"I would like to call your attention to the paragraph on 'EXTRA WORK', Page SC-2, 'No extra work

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shall be done until this written order is received.' At no time during the progress of this job had the change order been negotiated for this excavation.

"For further reference, Page A-1 on 'EXCAVATION' end of paragraph 5, 'The elevations as shown on the drawings is assumed rock levels as based on test hole data indicated on the site plan. More or less depth of excavation other than that called for by the drawings will be adjusted on the basis of unit price.' Paragraph 7, 'SURVEYS -The contour plans of the site show the present elevation of top surface of materials at intervals spaced throughout the site. The surface elevations were obtained from actual surface of the site and from the best attainable information, but the owner will assume no responsibility for same. Acceptance of the data given on the drawings shall be done at the contractor's risk and responsibility.'

"I cannot allow an extra for the full amount of \$7,619.35, due to the fact that this fund does not have sufficient revenue to cover.

"I would appreciate greatly if you would study the specifications and determine whether the State is liable for this extra excavation claimed by the sub-contractor."

We have examined the various documents which form the contract between Seth E. Glem and Associates, the general contractor, and the State of Missouri. The liability of the State for any extras must be founded on the contract between the State and the contractor. The sub-contractor's rights under this contract are only derivative, and his right to recover must be considered in the light of the provisions of his contract with the general contractor.

Article 16 of the contract between the State of Missouri and the general contractor states as follows:

"Article 16. THE CONTRACT DOCUMENTS--The general conditions of the contract, the specifications and the drawings, together

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with this agreement, form the contract, and they are as fully a part of the contract as if thereto attached or herein repeated. The following is an enumeration of the specifications and drawings: "

On page GC-1 of the Specifications is to be found the following provision:

"A.I.A. GENERAL CONDITIONS: The general conditions in accordance with the standard form of the American Institute of Architects, a copy of which may be seen at the office of the Architects, are to be considered as part of this contract as if included herewith, together with the other general conditions set forth in these specifications."

The general conditions in the standard form of the American Institute of Architects of the contract for the construction of buildings may be found in Modern Legal Forms, Volume 1, Section 1762, pocket supplement. A portion of Section 36 of the standard form is as follows:

"Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the owner."

Where a contractor sublets a contract, and there is, as here, no contractual relationship between the owner and the sub-contractor, the latter cannot pass by the contractor, his immediate employer, and sue the owner for an amount due him on the contract. This is true despite the fact that the work is done under the direction and in accordance with plans furnished by the owner. (Baker vs. McMurry Contracting Company, 223 S.W. 45).

Since the claim presented is one by the sub-contractor, it is not necessary to discuss the possible liability of the State to the general contractor. If the sub-contractor is entitled to recover for any extra work, the liability therefor is that of the general contractor and not that of the State of Missouri.

#### CONCLUSION

Therefore, it is the opinion of this department that the State of Missouri is not liable to the sub-contractor

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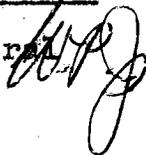
for extra work done by the sub-contractor in connection  
with the construction of the infirmary building at State  
Hospital #3, Nevada, Missouri.

Respectfully submitted,

JOHN R. BATY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General



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