

PUBLIC WORKS:  
APPROPRIATIONS:

The State is not legally obligated by the terms of a contract for the construction of a public works project to pay to the contractor sums in excess of the amounts appropriated for said project.



February 10, 1958

Honorable Ralph McSweeney  
Director  
Division of Public Buildings  
Capitol Building  
Jefferson City, Missouri

Dear Mr. McSweeney:

Reference is made to your request for an official opinion, which request reads as follows:

"I will appreciate having a written opinion from your office in reference to payment of solid rock excavation in the Basement and Sewer lines in the New Administration Building at State Hospital #1, Fulton, Missouri.

"I will deliver to your office all contract documents in connection with this project."

From the information submitted with your opinion request and through conversations with you, we understand the facts surrounding the request to be as follow.

The 68th General Assembly, while in special session, appropriated \$1,014,000. for the purpose of wrecking and removing fire-damaged buildings and for the construction, furnishing and equipping of a new administration building at State Hospital No. 1, Fulton, Missouri (Laws of Mo. 1955, Extra Session, pp. 26 and 27.)

After the solicitation of bids, the State, on the 10th of July, 1956, entered into a contract in the amount of \$77,546. for the demolition and removal of fire-damaged buildings. Subsequent change orders resulted in a final contract price of \$73,748. and final payment was approved in April, 1957.

Thereafter, on the 28th day of May, 1956, the State entered into a contract for architectural services in connection with

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the construction of a new administration building at State Hospital No. 1, Fulton, Missouri. Said contract provides for a fee of 6% of the cost of the construction work.

Thereafter, on the 19th day of February, 1957, the State received bids for the construction of said administration building and on the 28th day of February, 1957, the State entered into a contract for the construction of a new administration building at State Hospital No. 1, Fulton, Missouri, which contract called for an expenditure of \$868,959. Subsequent authorized change orders to date have resulted in an authorized contract price of \$874,882.20. The estimated architect's fee, computed at the rate of 6% of the contract price, would be in the amount of \$52,492.93.

Other miscellaneous expenses charged to said appropriation, and paid in whole or in part to date, include advertising costs, costs of test borings, compensation of a "clerk of the works" and architect's fees in conjunction with the demolition contract.

There remained in said appropriation on June 30, 1957, an unencumbered balance in the amount of \$1,742.51.

You inquire specifically as to the State's liability for payments to the contractor to cover the cost of solid rock excavation in the basement, connecting tunnels and sewer lines in connection with the construction of the administration building at State Hospital No. 1, Fulton, Missouri. We are informed that approximately 710 c. yards of solid rock was removed from the basements and areaways, 214.33 c. yards of solid rock removed from steam tunnels, 273 c. yards from sewer trenches and approximately 13.33 c. yards from a basement trench.

Division 3 of the detailed plans and specifications, entitled "Excavation, Backfilling & Grading", is, in part, as follows:

"SEC. 4 - EXCAVATING

\* \* \* \* \*

"Material to be excavated is assumed to be earth and materials that can be removed with hand picks or air-driven spades. If stone or boulders that cannot be removed without use of air drills is encountered and removal is necessary, adjustments will

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be made in contract based on agreed lump sum value in accordance with ART. 12 of the 'General Conditions'."

SEC. - 1 of said Division 3 provides that:

"The following work is not included under this Division:

Excavating and Backfilling for 'PLUMBING AND SEWERING WORK'.  
Excavating and Backfilling for 'HEATING WORK'.  
Excavating and Backfilling for 'ELECTRIC WORK'. "

Article 12, referred to in the above noted provisions, relating to "Changes and Alterations", provides that the Director of Public Buildings shall value and appraise such changes and add to or deduct the same from the contract price.

We further understand that the contractor has not, to date, made any formal demand against the State for additional compensation for excavating solid rock as provided by Division 3 of the detailed plans and specifications, supra, nor has the Director of Public Buildings been requested to value and appraise the above referred to rock excavation for the purpose of allowing, if any, additional compensation. Until such conditions have been met, suffice it to say that we are of the opinion that no obligation rests upon the State to pay the same. However, realizing that such a limited and restricted answer would in nowise dispose of this matter, we will here assume that a proper demand for the allowance of extra compensation has been made and that the Director of Public Buildings has valued and appraised the excavation of solid rock, as above noted, in a specified amount. What, then, would be the obligation of the State to pay the same?

We first wish to direct attention to Section 8.220, RSMo 1949, which provides as follows:

"Whenever the state of Missouri shall pass a bill appropriating moneys for the erection of a public building or buildings, designating the amount or amounts and naming a commission or commissions, or board or boards or any persons to erect said building or buildings, or contract for the

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same, said commissions, boards or persons shall not exceed the amount so appropriated for said purpose in any manner, but shall strictly comply with the act appropriating said moneys."

See also Section 8.250, RSMo Cum. Supp. 1957, which provides, in part as follows:

"\* \* \* No contract shall be awarded when the amount appropriated for same is not sufficient to complete the work ready for service."

From the above two noted statutory provisions, we believe that it is clear that the State cannot become obligated for the expenditure of moneys in connection with public works projects in excess of the amount appropriated for said project. Consequently, we are of the opinion that a contract which purports to obligate the State above and beyond the limits of the appropriation available would be invalid insofar as the excess is concerned.

We note that one estimate fixes the cost of the rock excavation at \$33,760.20. However, we further note that such estimate is predicated upon (in addition to the basement excavation) excavation of rock from steam tunnels, sewer trenches and basement trench. We do not believe that the excavation of rock (exclusive of the basement excavation) would constitute an obligation of the State to grant additional compensation by operation of Division 3 of the detailed plans and specifications for, as above noted, the specifications exclude from the operation of said Division excavations for plumbing, sewerage, heating and electric work. We have examined fully the terms of the contract, together with all contract documents, and are unable to find any provision for additional compensation for the excavation of rock in conjunction with excavations for the installation of plumbing, sewerage, heating and electric work. Therefore, we are of the opinion that the State is not, under and by virtue of the terms of the contract, obligated to grant any additional compensation to the contractor for the excavation of rock in conjunction with the excavation required for the installation of plumbing, sewerage, heating and electric work.

The same source has estimated that the contractor has excavated 711 c. yards of rock from the basement proper and has further estimated that a proper allowance for said excavation

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would be in the amount of \$26.40 per cubic yard. Such would result in an amount due the contractor, if the same were approved by the Director of Public Buildings, of \$18,770.40. A simple arithmetical calculation reveals that any portion of this amount over and beyond the unencumbered balance of the appropriation which might subsequently be appraised and allowed by the Director of Public Buildings would result in the total contract expenditures exceeding the original appropriation.

It is indeed difficult to say that the cost of the excavation of the solid rock from the basement, for which we believe the State would be obligated to pay the contractor a reasonable amount under the provisions of Division 3 of the detailed plans and specifications, supra, if there was an appropriation on hand unencumbered from which it could be paid, would be the construction costs which, in fact, caused the project expenditures to exceed the appropriation. This, we believe, for the reason that the contract should be considered as a whole and the expense to the State for the excavation of solid rock in the basement, under the terms of the contract, is as much a part of the contract as any other item of labor or materials furnished under said contract.

#### CONCLUSION

Therefore, in the premises, we are of the opinion that the State is not legally obligated by the terms of a contract for the construction of a public works project to pay to the contractor sums in excess of the amounts appropriated for said project.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Very truly yours,

John M. Dalton  
Attorney General

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