STATE COLLEGES:
CONSTITUTIONAL LAW: Section 39(3), Article III, Missouri Constitution of 1945, prohibits the Missouri General Assembly from authorizing Northeast Missouri State College to pay for extra work done by a contractor which was not provided for by the contract between the college and the contractor.

OPINION NO. 55

COMPARE: State ex rel. Milham v. Rickhoff, 633 S.W.2d 733 (Mo banc 1982).

May 27, 1971

FILED
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Mr. Clyde Burch
College Attorney
Northeast Missouri State College
Kirksville, Missouri 63501

Dear Mr. Burch:

This official opinion is issued in response to your request for a ruling on whether Northeast Missouri State College is legally authorized to pay a contractor for curbing constructed at the site of the new Industrial Education Building on the campus of the college.

From the information furnished to us with your opinion request, we understand the factual situation to be basically as follows: The base bid submitted by the contractor in question included a provision for concrete curbing around part of a parking lot. The specifications for Alternate Bid No. 1-E called in part for placing blacktop curbing around the rest of the parking lot and around another paved area. Alternate Bid No. 1-E submitted on behalf of the contractor was not accepted. Therefore, the contractor in question, who was awarded a contract for the work covered by the base bid, had the responsibility for placing concrete curbing around part of the parking area.

During construction, the contractor, under the mistaken impression that the college had accepted its Alternate Bid 1-E, installed concrete curbing around the area covered by Alternate Bid No. 1-E as well as around the area covered by the base bid. Although the contractor installed concrete curbing instead of asphalt curbing in the area covered by Alternate Bid No. 1-E, the college is using this curbing. Because of the contractor's mistake, the college was able to reduce the cost of the work called for by Alternate Bid No. 1-E.

In summary, the contractor made a mistake in installing concrete curbing in an area not included within the contract between it and the college. Although concrete rather than asphalt curbing was installed by the contractor, the curbing is being used by the college to its financial advantage. Under these circumstances, is the college authorized to pay for the curbing installed by mistake and without a contract?

Mr. Clyde Burch

Article III, Section 39(3), Missouri Constitution of 1945, prohibits the granting of extra compensation to contractors after a contract has been entered into and performed in whole or part. Section 39(3) of Article III provides that:

> "The general assembly shall not have power:
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> * * *
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> "(3) Extra compensation to public employees or contractors.--To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

Is the General Assembly prohibited from authorizing a state college to grant extra compensation to a contractor for work done outside of the contract between the contractor and the state college? To answer this question, we must first determine whether a state college is a "municipal authority" as that term is used in Section 39(3) of Article III.

The Supreme Court has generally adopted a broad definition of "municipal corporation" in interpreting other provisions of the Missouri Constitution. For instance, in interpreting the provisions of Article X, Section 6, Missouri Constitution 1875, which provided that "all property . . . of the state, counties and other municipal corporations . . . shall be exempt from taxation . . .", the Missouri Supreme Court, in State ex rel. Caldwell v. Little River Drainage Dist., 291 Mo. 72, 236 S.W. 15 (1921), stated:

> "The statutes of this state under which drainage districts are organized declare them to be public corporations. Because of their inherent nature and because of the purposes for which primarily they are created, we have repeatedly held that they are not private corporations in any sense; that they are political subdivisions of the state, and exercise prescribed functions of government. Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 253, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727; Morrison v. Morey, 146 Mo. 543, 561, 48 S. W. 629; Drainage District v. Turney, 235 Mo. 80, 90, 138 S. W. 12. We have also said that they are municipal corporations. Wilson v. Drainage District, 257 Mo. 266, 286, 165 S. W. 734;

> State v. Taylor, 224 Mo. 393, 469, 123 S. W. 892. In its strict and primary sense the term 'municipal corporation' applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts. Wilson v. Trustees of Sanitary District, 133 Ill. 443, 464, 27 N. E. 203; Rathbone v. Hopper, 57 Kan. 240, 242, 45 Pac. 610, 34 L. R. A. 674. . . ." Id. at 16. [Emphasis supplied]

In the case of Laret Inv. Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65 (en banc 1939), the court referred again to the broad definition of "municipal corporation":

> "The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service. See Dillon on Municipal Corporations, Fifth Ed. Sec. 32.
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> "This court has adopted the broader definition. In state ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W. 15, loc. cit. 16, we said: 'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.'
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> "See also State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 S.W. 848; Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S.W.2d 151; State ex rel. Caldwell v.

> Little River Drainage District, 291 Mo. 72, 236 S.W. 15; Harris v. William R. Compton Bond Co., 244 Mo. 664, 149 S.W. 603.
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> "The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. . . ." Id. at 68. [Emphasis supplied]

In Koch v. Board of Regents of Northwest Missouri State College, 256 S.W.2d 785 (Mo. 1953), the court, in considering its jurisdiction over the case, concluded as follows with regard to the legal status of a state college:

> ". . . Under section 174.040, the Board is a legal entity or a quasi-public corporation with 'perpetual succession, with power to sue and be sued, complain and defend in all courts. . . ." Id. at 788.

As pointed out by the Missouri Supreme Court in the Laret case, the definition of "municipal corporation" in its broader sense includes quasi-public corporations designed for the performance of an essential public service. Certainly, state colleges provide such an essential public service. Therefore, we conclude that a state college is included within the broader meaning of "municipal corporation." Because "municipal authority" as used in Article III, Section 39(3) is certainly as broad as--and probably broader than--"municipal corporation," the General Assembly could not grant to a state college any authority prohibited by Section 39(3).

Having reached this conclusion, does Section 39(3) prohibit the college from paying for the curbing mistakenly installed by the contractor in question. We believe that it does.

In Spitcaufsky v. State Highway Commission, 349 Mo. 117, 159 S.W.2d 647 (1942) and Sager v. State Highway Commission, 349 Mo. 341, 160 S.W.2d 757 (1942), the Missouri Supreme Court considered claims by two contractors for extra compensation.[1] In both cases, the State Highway Commission based its defense in part on the predecessor of Section 39(3) (the first clause of Article 4, Section

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[1]In passing, it is interesting to note that in both Spitcaufsky and Sager the Missouri Supreme Court assumed that the first clause of Section 48, Article IV, Constitution of 1875 (now Section 39(3)) covered the State Highway Commission. Apparently, no issue was raised as to whether the Highway Commission was a "county or municipal authority."

48, Missouri Constitution, 1875). In Sager, the court commented as follows on the language of that part of Section 48 which subsequently became Section 39(3):

> "This court held, in the Spitcaufsky case, that the first clause of Section 48 prohibits the Highway Commission from paying extra compensation to a contractor outside the terms of a legal contract; that is, compensation for doing work, for which the legal contract does not provide, or for any claims different from those any other bidder at the letting could have legally asserted in the same circumstances if the contract had been awarded to him. . . ." Id. at 759.

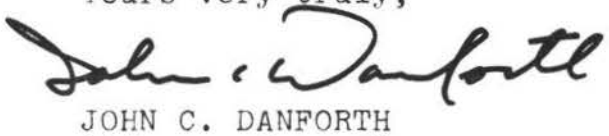
In the instant case, the contractor's claim is precisely what the court in Sager said was prohibited by Section 39(3), i.e., "compensation for doing work for which the legal contract does not provide."

CONCLUSION

Therefore, it is the conclusion of this office that Section 39(3), Article III, Missouri Constitution of 1945, prohibits the Missouri General Assembly from authorizing Northeast Missouri State College to pay for extra work done by a contractor which was not provided for by the contract between the college and the contractor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



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