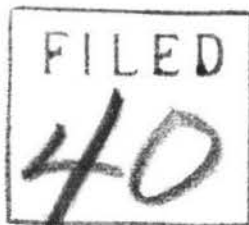


DIVISION OF PENAL INSTITUTIONS: Provision for "delayed shipment"
CONTRACTS: incorporated in contract for purchase
of raw materials by reference is valid.



April 28, 1953

Mr. C. M. Hill
Superintendent of Industries
Division of Penal Institutions
Jefferson City, Missouri

Dear Mr. Hill:

Reference is made to your letter requesting an official opinion of this department. The letter of inquiry is quite lengthy and contains matter not germane to the legal question involved, and we, therefore, have summarized its content as follows:

On the second day of December, 1952, a contract was entered into between yourself, as Superintendent of Industries, Division of Penal Institutions, Department of Corrections of the State of Missouri, and a firm dealing in raw materials used in the operation of the Missouri State Twine Company manufacturing plant. The particular contract related to the purchase of approximately three hundred tons of sisal. It was and will be hereinafter referred to as the "Short Form Hard Fibres Contract." It provided for shipment to be made in the months of December, 1952, and January, 1953. The contract contained the following provision:

"This is a short form of the current Standard Form of Hard Fibres Contract as amended of the Hard Fibres Association. All the terms and conditions of the current Standard Form * * * are

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made a part of this contract as if set forth here in full. * * *

The current "Standard Form" referred to contains the following provision:

"Seller is not liable for delay or failure in shipment due to any laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (civil or military) of the United States or any foreign government whether made prior or subsequent to the making of this contract or to any contingencies whatsoever beyond Seller's control whether or not similar to the foregoing and whether or not now in contemplation of either of the parties hereto and if Seller shall thereby be unable to ship all or any portion of the goods, (hereinafter referred to as the 'delayed delivery') within the time specified, the time for shipment of such delayed delivery shall automatically be extended for a period of 60 days; * * *"

(Emphasis ours.)

The shipment was not made in either of the months mentioned in the original contract due to factors alleged by the contracting vendor to put into force the last quoted portion of the Standard Form. Shipment was made from the point of origin within the sixty day extension period.

No question is presented as to the form of the contract except as noted below, nor as to the authority of the purported agent or agents of the State of Missouri to execute the same.

Upon the foregoing facts, the sole question presented and the only question which this

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opinion is to be construed as passing upon is whether or not the provision for "delayed shipment" became a part of the original contract by reason of reference thereto in such original contract.

The general rule with respect to the incorporation of matters not appearing in a contract, by reference to such extraneous matter in such original contract, is stated thusly in 17 C.J.S., page 716:

"Sec. 299. Writings which are made a part of the contract by annexation or reference will be so construed; but where the reference to another writing is made for a particular and specified purpose such other writing becomes a part of the contract for such specified purpose only.

"Reference is sufficient without actual annexation."

That the holdings of the appellate courts of Missouri in regard to this part of the law of contracts is in accord with the general rule quoted appears from *Spitcaufsky v. State Highway Commission of Missouri*, 159 S.W. 2d 647, from which we quote, i.e. 657:

"When the above testimony and the appropriate table were tendered, and again when the Commission made an offer of proof, respondent's counsel objected on the ground that the mere reference to the weighted tables in the contract documents did not make them a part of the contract; that no copy thereof was given to respondent, and there was no proof that he knew of them. We are unable to see any merit in this objection. The table, though a separate document, could be incorporated in the construction contract by reference, 12 Am. Jur., Sec. 245, p. 781; 13 C.J., Sec. 126, p. 304, Sec. 588, p. 530; 17 C.J.S., Contracts, Sec. 58, p. 408; 17 C.J.S., Contracts,

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Sec. 299, p. 716. Clause 13 of respondent's proposal or bid agreed 'to complete the work within the specified number of weighted time units'; and Clause 14 declared that if changes in the plans for the work required more time for its completion, 'a reasonable extension of time based upon the weighted time units will be allowed.' Sec. I-7 of the Specifications stated that if extra or additional work was ordered by the engineer, an extension of contract time would be allowed based upon the weighted time tables. The same section in another place recited that the tables were on file in the offices of the Commission. Undoubtedly the table used was a part of the contract and admissible as such, and also to show respondent had not completed the project in the contract time."

(Emphasis ours.)

To the same effect are the cases of Killman v. City of Garthage, 247 S.W. 992, State ex rel. Central States Life Insurance Company v. McElhinney, 90 S.W. 2d 124, and Swinney v. Insurance Company, 8 S.W. 2d 1090.

We, therefore, reach the view that the provision relating to "delayed shipment" found in the current Hard Fibres Association Standard Form, Hard Fibres Contract, was incorporated in the original contract by reason of having been referred to in such original contract, and that such provision is and was valid under the law of Missouri.

CONCLUSION

In the premises, we are of the opinion that the contract referred to in your letter of inquiry and in the foregoing opinion, contained as a valid part thereof the provision

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permitting the contracting vendor to delay shipment of the subject matter of the contract for a period of not to exceed sixty days from the shipment date provided in the original contract, for any of the causes enumerated in Section 17 of the Hard Fibres Association Standard Form, Hard Fibres Contract.

We have no knowledge as to the facts claimed by the contracting vendor to authorize "delayed shipment" on its part, and therefore do not assume to pass upon the question as to whether such facts constitute a lawful excuse for failure to ship the subject matter of the contract within the time prescribed in the original contract.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

WFB/lrt/fh