

HIGHWAY COMMISSION: Right to rescind construction contract by mutual consent by paying for work and materials actually furnished; payment of any sum in excess of money actually earned by contractor under a contract is illegal.

February 15, 1941

Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri



Dear Sir:

Your letter of February 8, 1941, is acknowledged and wherein you state:

"On December 19 I wrote you a letter at the instance of Vice-Chairman Gray inquiring if we can legally cancel the contract referred to in said letter. Mr. Gray called me this morning and wants me to change this request for an opinion so that our request will result in asking if such a cancellation can be had when it involves no payment of any consideration other than the unit price of such work as he may have done under the terms of the construction contract.

"Mr. Gray is anxious that this reply can be in Monday and he states he is not interested in getting any other point of law which might be involved in cancellations entailing the payment of considerations therefor. He thinks perhaps the question as originally asked necessitates a longer considera-

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tion before your opinion could be rendered. Therefore, we kindly request, on behalf of the Vice-Chairman, this opinion from your office."

The facts here involved, as gathered from correspondence and memoranda submitted by your Department, are about as follows:

In February, 1940, the Missouri State Highway Commission entered into two contracts with the McDowell Stone Company for certain grading and construction work on State Highway No. 54 in Cole County, Missouri, pursuant to public bidding in compliance with the law. The contractor proceeded to performance of the contracts and had assembled equipment when stopped by labor difficulties. When notified by the Commission on August 13, 1940, to proceed with the work on or before August 28, 1940, the contractor attempted to comply and was again prevented from doing the work agreed upon by labor disputes. Since such time approximately no work has been done in fulfillment of the contracts.

The contractor evidently now asks that its contracts be rescinded and that it be paid not only for the work actually done, but also for expenses incurred in coming in upon the work.

This Department has not been informed that the contracts are "unit price" contracts, that is, contracts wherein definite sums are fixed for each unit of work completed. However, for the purpose of an attempted solution of the question put it will be assumed that they are "unit price" agreements. The question it seems, involves the right of the Missouri State Highway Commission to waive the failure of a contractor to carry out the terms of his contract and to pay such contractor a sum beyond that actually earned. The appellate courts of this state have never directly passed upon the proposition.

In 1928, following the creation of the Missouri State Highway Commission in 1921, the State Constitution was amended

and Section 44a of Article IV took its present form. This section granted to the State Highway Commission wide and extensive power. The latter portion of paragraph 4 of such section authorizes the Commission to expend the moneys of the State Road Fund and concludes with the following:

"* * to locate, establish, acquire, construct, and maintain, as herein-after provided, supplementary state highways and bridges in each county of the State, in addition to those state highways and bridges designated and laid out under existing law, and to acquire materials therefor, and for such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the State Highway Commission may deem proper."

Section 46 of Article IV is as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

While Section 48 of the same Article provides:

"The General Assembly shall have no power 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, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

The two latter quoted Constitutional provisions were in effect many years before the adoption of Section 44a.

Article 12 of Chapter 42, R. S. Mo. 1929 (Art. 13, Chap. 36, R. S. Mo. 1939) truly makes the Commission "a well-nigh autonomous agency" (State ex rel. McDowell v. Smith, 334 Mo. 653). However, all contracts must be let upon public bids but no provision is made for cancelling a contract once let, or releasing the contractor's bond. Section 8094 R. S. Mo. 1929 (Section 8742, R. S. Mo. 1939) provides that the Commission is vested with all the powers and duties specified in the article and "also all powers necessary or proper to enable the Commission, or any of its officers or employees, to carry out fully and effectively all the purposes of this article."

Executory agreements may ordinarily be rescinded or abandoned by mutual consent and generally if the contract has been executed on one side or is fully executed it may be rescinded upon sufficient consideration. 17 C. J. S. 879, 883; Stoedter v. Turner, 237 S. W. 141.

Contracts of state and governmental divisions are generally interpreted as the contracts of individuals and controlled by the same law. 25 R.C.L. 392. However, when a statute or Constitutional provision prohibits extra compensation for work included in a contract by the greater

weight of authority in the United States the payment of extra compensation is not permissible. 59 C. J. 188, 88 A.L.R. 1223. Such provisions prohibiting the Legislature from granting extra compensation bind all of its subordinates, agencies and other departments of government as well.

The Supreme Court of Missouri in the case of *Preiss v. St. Louis County*, 231 Mo. 332, 1. c. 340, held:

"* * * The county court cannot lawfully pay for work done under such a contract a greater price than is therein expressed. In *Anderson v. Ripley County*, 181 Mo. 46, it was held that unless the consideration is expressed in the contract the contractor cannot recover for the work done. In the case at bar the contract calls for grading in the progress of the construction or improvement of the road and it specifies the price to be paid therefor per cubic yard, that is, eighteen cents in one road and twenty-one cents in the other. The county court would have no right, when the work was done, to pay the contractor thirty-six cents per cubic yard in the one instance and forty-two cents in the other, either for all of the grading or for a part of it. * * *"

In passing upon a levee contract and a surety bond executed by a contractor the following was said by the Supreme Court of Mississippi in the case of *Clark v. Miller*, 142 Miss. 123, 105 So. 502, 1. c. 505:

"* * * It is unnecessary for us to here decide the extent of the power conferred by the statute and Constitution upon the levee board, for it

is manifest by section 96 of the Constitution that the broad language in which the power here granted is couched must be restricted so as not to authorize the board to grant extra compensation to any public contractor after the contract is made. The section is as follows:

"The Legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, nor authorize payment, or part payment, of any claim under any contract not authorized by law,' etc.

"It is true that the Legislature only is mentioned in this section of the Constitution, but nevertheless it binds not only the Legislature but all subordinate state agencies created or controlled by it; for what the Legislature cannot do directly it cannot do indirectly by delegating the power so to do to a subordinate agency. * * * * *

In considering and holding invalid a compromise agreement upon the claim of a contractor based upon inadequate estimates, the Supreme Court of Massachusetts (Fuller Co. v. Commonwealth, 21 N. E. (2d) 529, l. c. 532) wrote:

"* * * Such an agreement in a limited sense is ancillary and related to the original construction contract, but in its primary and ultimate effect, if enforceable, would serve the purpose of creating a new and independent obligation binding upon the Commonwealth,

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irrespective of the terms of the original contract and unimpeachable except perhaps for fraud. * * * * *

We are not impressed by the argument advanced by the petitioner that by the exercise of such authority the Commonwealth, through the department, may, to its advantage, settle large claims for small amounts. If there is such advantage, we think it is outweighed by the dangers involved in the exercise of the power, and unless the power is either expressly given or required by necessary implication, it ought not to be found. * * *

California's Constitutional Section 32 of Article IV is the same as Missouri's Section 48 of Article IV and its provisions were determined in the case of Highway Commission v. Riley, 218 Pac. 579, 192 Cal. 97. In that case the Supreme Court of California had for determination the cancellation of an agreement of the Commission and one Pollock, a contractor who had agreed to build a certain highway. Subsequent to the construction contract the Commission and Pollock mutually agreed to cancel the contract and end the work thereunder. The Commission was indebted to Pollock in the approximate sum of \$12,000 and the Commission agreed to pay him that sum and an approximate additional sum of \$120,000 for expenses incurred in undertaking the work, or, a total of approximately \$132,000, as consideration for a full release. The State Comptroller refused to pay the sum agreed upon, for expenses - \$120,000, but offered to pay for the work actually done - \$12,000, upon the filing of a proper demand for that sum.

The decision invalidated the compromise agreement and the court said, l. c. 108:

"* * * By the execution of such an authorized contract the state acquires certain legal rights and

incurs certain liabilities which are fixed and ascertained, or ascertainable. Thereafter no one can either increase or diminish the rights of the state or increase or reduce its liabilities thereunder unless he has been vested with authority so to do by express grant or clear implication. The state having directed or authorized the making of the contract contemplates its performance and, as in the case of private individuals, the authority to breach such a contract is not to be implied from the mere grant of authority to execute the same. When, as here, the contract has been lawfully executed and has been performed in part, the amount which the contractor is entitled to receive for the work done is fixed by the terms of the contract. For the Commission to pay him more than the contract calls for would, therefore, be to make him a gift of public moneys, unless the Commission has the power and authority to first breach the contract."

In addition it was held, l. c. 111:

"* * * We are unable to escape from the conclusion that of the money here proposed to be paid to the contractor the major portion represents not compensation for the construction work heretofore performed or hereafter to be performed by him, but compensation for the relinquishment by him of his rights under the subsisting contract, and cannot therefore be regarded as used for the acquisition, construction or improvement of a state highway."

The Commission is a subordinate branch of the Executive Department (Bush v. State Highway Commission, 46 S. W. (2d) 858, 329 Mo. l. c. 853) and has the right to sue and be sued. It is a legal entity for which the State of Missouri cannot be substituted as a party in a suit. State ex rel. v. Surety Company, 221 Mo. App. 68, 294 S. W. 123.

As the Commission institutes actions upon contracts in its own right it follows that the Commission has the authority to waive a breach of a contract by failing or refusing to take action. A decision by the Commission to forego a breach of contract is within its discretion and is not subject to control by the courts. Bash v. Truman, 335 Mo. 1077, 75 S. W. (2d) 840; State ex rel. Shartel v. Humphreys, 338 Mo. 1091, 93 S. W. (2d) 924.

It is the sole right and responsibility of the Commission to determine its course with respect to suit upon contracts or the forbearance of action thereon. Likewise the Commission may cancel contracts by mutual agreement and pay the contractor the sum actually earned. However, the payment of any sum in excess of that actually due for work and materials as provided by the contracts would be illegal and could be recovered by suit.

CONCLUSION.

It is the conclusion of this Department that the Missouri State Highway Commission has the authority to rescind a contract by mutual consent and to pay the contractor for the work actually performed under such contract, but that the payment of any sum in excess of the work actually performed would be unlawful and such excess over the amount actually earned could be recovered by proper action.

Respectfully submitted,

APPROVED:

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VCT:CP