

OFFICE OF THE ATTORNEY GENERAL



81-00049

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STATE OF ALABAMA

OCT 31 1980

ADMINISTRATIVE BUILDING
64 NORTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205), 634-5150

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Honorable John M. McMillan, Jr.
Commissioner
Department of Conservation and Natural Resources
64 North Union Street
Montgomery, Alabama 36130

Department of Conservation and Natural
Resources - Contracts - Competitive Bid Law

Contract cannot be amended to include
change orders in excess of 10 percent of
the contract price.

Dear Sir:

This letter is in response to your letter of recent date which is as follows:

"On January 11, 1979, the Department of Conservation and Natural Resources executed a contract with Bradley Construction, Inc., for the construction of certain improvements at Wind Creek State Park. The contract amount was \$2,696,675.75.

To date change orders have been executed totaling \$194,868.03.

The contractor has requested another change order seeking an additional \$108,435.00 to compensate him for the drastic increase in the price of asphalt that has occurred during the past 12 to 15 months. The consulting engineer has recommended that the requested change order be granted.

The contract does not contain an escalation clause since it was executed prior to the opinion issued by your office in March of this year.

Your official opinion is requested to the following question:

May the Department of Conservation and Natural Resources execute the change order requested by the contractor in order to compensate him for the abnormally high increase in the price of asphalt?"

Your question is answered in the negative.

In an opinion to you by this office dated October 7, 1980, it was stated that once a bid is accepted as responsible and a contract signed by a public entity pursuant to the competitive bid law, the contract should be performed according to the terms of that contract without material change. That principle is hereby reaffirmed by this opinion.

In an opinion of this office dated June 15, 1979, to Mr. W. A. Stevenson, Director of Technical Staff, State Building Commission, a copy of which is enclosed for your convenience, it was held that change orders could not exceed 10 percent of the original contract price. Since the change order proposed in your letter would place the total of change orders in excess of 10 percent of the contract price, it is my opinion that the Department of Conservation and Natural Resources is without legal authority to execute same.

If I may be of any further assistance to you in this matter, please let me know.

Very truly yours,

CHARLES A. GRADDICK
Attorney General
By -

DON E. LAWLEY
Assistant Attorney General

DEL/dc

Enclosure

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*Building
Commission*

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June 15, 1979

Mr. W. A. Stevenson
Director of Technical Staff
State Building Commission
800 South McDonough Street
Montgomery, AL 36104

Contracts - Competitive Bid Law -
Educational Institutions

Negotiated reductions of the
contract with the low bidder
and change orders authorized
under certain conditions.

Dear Mr. Stevenson:

This opinion is written to clarify some apparent confusion arising out of an opinion of this office under date of March 20, 1978, relative to the authority of educational institutions to negotiate a reduction in the contract price with the low bidder when there are not sufficient funds available to fund the project at the low bid price and to execute change orders to existing contracts. That opinion is modified to the extent that it conflicts with the matters set out herein.

This office has issued opinions in the past allowing negotiation with the low bidder to reduce the total contract price to bring the cost of the project within available funds when certain specified conditions are satisfied. It is

Mr. W. A. Stevenson
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recognized that rapid inflation makes it increasingly difficult for awarding authorities and architects to project the costs of construction projects. It is not uncommon for bids to be received when the low bid exceeds the funds available for the project. In such instances the awarding authority has two options. These are to redesign the project and rebid it or to negotiate with the low bidder to bring the cost within available funds. The delay involved to redesign and rebid the project could result in a less desirable building at an increased cost. This is not in the public interest. The purpose of the competitive bid statutes is to prevent fraud and mismanagement in construction contracts. It is imperative to insure that the public interest be protected and that public funds are spent as efficiently as possible. If negotiations with the low bidder can reduce the cost of the project without materially altering or changing the nature and scope of the project and the plans and specifications therefor negotiations with the low bidder are permissible if the following criteria are met:

- (1) There must be an actual shortage of funds available to fund the project at the low bid price;
- (2) the awarding authority must disclose such shortage of funds and recommend the changes involved in the negotiations;
- (3) the architect must approve same and certify that the changes do not involve any material or substantial changes to the original plans and specifications to the extent that the scope of the project would be altered or extended, and that the price has been reviewed and found to be reasonable and fair;

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- (4) there must be evidence that the contractors submitting base bids have no objections to the negotiated change;
- (5) that the project and the changes thereto are in the public interest and that time is of the essence for its completion;
- (6) that a redesign of the project and a rebidding would result in delay and additional cost for the project;
- (7) that there be no evidence of any collusion, fraud, or unjust enrichment evidenced by such change;
- (8) that the price of the negotiated changes must not exceed 10% of the base bid.

The opinion referred to previously did not deal specifically with change orders but to avoid confusion and misunderstanding, I am listing guidelines which provide criteria for approving change orders to existing contracts. Set out as follows are the types of change orders which will be allowed:

- (1) Minor changes for a total monetary value less than required for competitive bidding;
- (2) changes for matters relatively minor and incidental to the original contract necessitated by unforeseeable circumstances arising during the course of the work;
- (3) emergencies arising during the course of the work on the contract;

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- (4) changes or alternates provided for in the original bidding where there is no difference in price of the change order from the original best bid on the alternate;
- (5) changes of relatively minor items not contemplated when the plans and specifications were prepared and the project was bid which are in the public interest and which do not exceed 10% of contract price.

There should be attached to each change order a signed statement from architect containing the following:

- (1) a statement of what the change order covers and who instituted the change order and why is it necessary or desired;
- (2) there must be a statement stating the reasons for using the change order method rather than competitive bids;
- (3) there must be a statement that all prices have been reviewed and found reasonable, fair, and equitable and recommending approval of same;
- (4) the local owner shall either endorse the architects statement and recommendations or submit a separate statement covering the foregoing items.

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The amount of changes approved shall not exceed 10% of the contract price whether made through negotiations with the low bidder or by change order. This limit applies to each individual negotiation and each change order and to the cumulative total for each project. This means that the total of negotiations and/or change orders shall not exceed 10% of the contract price for each project.

It should be pointed out that the above criteria for negotiations with a low bidder and change orders are guidelines only and each factual situation must be decided on the facts and merit of each case.

The Technical Staff of the State Building Commission has the authority and responsibility to review plans and specifications of all projects involving state funds. This staff is composed of individuals, including architects and engineers, who have the expertise to determine the full nature and extent of proposed changes. It is incumbent upon the Director of the Technical Staff to make sure that all proposed changes comply with the requirements hereinabove set forth insofar as they involve technical matters before he gives his recommendation of approval of such changes. The determination of legality of such proposed changes rests with the legal advisors to the various awarding authorities.

As stated previously, the purpose and intent of competitive bid statutes are to prevent fraud and mismanagement of public funds. The most important ingredient in the approval of negotiated changes or change orders is the good faith of the officials executing the change. The Supreme Court in White v. McDonald Tractor Co., Inc., 287 Ala. 77, 248 So. 2d 121 (1971),

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which dealt with the interpretation of the State Competitive Bid Law stated:

"The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law. A bad motive, fraud or gross abuse of discretion will vitiate an award..."

The Court in the White case went on to say that public officials should be allowed discretion in administering the Competitive Bid Law and that this discretion should not be interfered with unless it was exercised arbitrarily or capriciously or in violation of law.

It is my opinion that as long as public officials act in good faith, act in the public interest, and follow the above stated guidelines that they are allowed to execute contracts negotiated with the low bidder and change orders.

Sincerely yours,

CHARLES A. GRADDICK
Attorney General
By-


JAMES R. SOLOMON, JR.
Assistant Attorney General

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