

OFFICE OF THE ATTORNEY GENERAL



JEFF SESSIONS
ATTORNEY GENERAL
STATE OF ALABAMA

95-00267

This opinion has been modified to the extent that it shall have prospective application from date opinion No. 96-00001, dated 10/4/95, was released.

July 20, 1995

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Honorable Bernard H. Eichold, II
Health Officer
Mobile County Health Department
P.O. Box 2867
Mobile, AL 36652-2867

**Architects - Contracts - Fees
- Funds**

When determining the fees for architectural services under Standard Form ABC 3-D agreement between owner and architect, the cost of the work should not include sales taxes not paid by the public agency.

Dear Dr. Eichold:

This opinion is issued in response to your request for an opinion from the Attorney General.

QUESTION

When determining an architect's fees for a project involving a tax-exempt state agency, does the cost of the work, upon which the architect's fee is based, include sales taxes for materials used in the project?

FACTS AND ANALYSIS

The contract forwarded to this office for review is a standard form contract between owner and architect for architectural services adopted by the Alabama Building Commission. The Alabama Building Commission is empowered, pursuant to Code of Alabama 1975, § 41-9-141, to enter into

contracts to construct, renovate or refurnish such buildings for the use of the State of Alabama or any of its institutions or agencies.

Article 6 of the agreement between owner and architect defines the term "cost of work." Article 6 states that "when labor or material is furnished by the owner below its market cost, the cost of the work shall be computed upon market cost." After the Mobile County Health Department received bids for construction materials, the bid price was negotiated downward through the deletion of sales tax. The Mobile County Health Department is a tax-exempt agency. This portion of Article 6 is not applicable here since the Mobile County Health Department did not furnish the labor or the material in the contract as contemplated by Article 6 but rather merely exercised its tax-exempt status and did not pay sales tax.

The full text of Article 6 of the agreement between the owner and the architect is set out as follows:

"Definition of the Cost of the Work.
For determination of the Architect's basic fees, the Cost of the Work means the cost to the Owner, but such cost shall not include any Architect's or Engineer's fees or reimbursements, or the cost of a Clerk-of-Works, or the cost of fixtures or equipment except built-in or attached equipment included in plans and specifications at the Owner's request, and shall not include construction costs, expenses or fees covered by Articles No. 3 and No. 15. The Cost of the Work shall not include the cost of movable equipment or furnishings unless requested in writing by the Owner and is defined in Article 15 or by amendments to the Agreement.

"No deduction shall be made from the fee for architectural services on account of liquidated damages or other sums withheld from payments to contractors."

As we see from the pertinent part of Article 6, the "Cost of the Work means the cost to the Owner." When the owner is able to take advantage of its tax-exempt status to avoid paying sales tax and negotiates a reduction in the bid price in the amount of the sales tax being deleted from the cost of construction materials, the final amount owed the

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contractor becomes the "cost to the owner" as that term is used in Article 6. Stated differently, the cost to the owner is the actual amount paid to the contractor. As sales tax is deleted from the total contract amount it is not a "cost to the owner" and is not included in the calculation of architect's fees.

CONCLUSION

Cost of the work used to determine the architect's fee cannot include sales tax which was not paid by the Mobile County Health Department due to its exemption as a public agency and its subsequent deduction from the total contract price. Architect's fees are paid on the amount of the cost of work to the owner. As sales tax was not included in the cost to the owner, architect's fees cannot be paid on the amount of the sales tax.

I hope this sufficiently answers your question. If our office can be of further assistance, please contact James R. Solomon, Jr., of my staff.

Sincerely,

JEFF SESSIONS
Attorney General
By:


JAMES R. SOLOMON, JR.
Chief, Opinions Division

JS/JRS/cw
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