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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Joey Hargrove
Chairman, Lawrence County Commission
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County Commissions - Change
Orders - Public Works Law -
Contracts - Extraordinary
Circumstances - Projects

If the county commission determines that the facts are as outlined and that the changes are necessary for the proper completion of the project, it can also find that the circumstances are extraordinary and justify a change order in excess of 30 percent.

Dear Chairman Hargrove:

This opinion of the Attorney General is issued in response to your request on behalf of the Lawrence County Commission.

QUESTION

Can the Lawrence County Commission, under certain extraordinary circumstances, justify a change order without violating the Public Works Law?

FACTS AND ANALYSIS

This Office understands that the Lawrence County Commission ("Commission") is in the process of renovating its historic 1940s-era courthouse and constructing a courthouse annex to alleviate overcrowding in the courthouse that has resulted in violations to the fire code. This Office further understands that the annex will be a separate building about

a block from the courthouse. The Commission has entered into a contract for the construction of the annex for \$3,584,074. The contract calls for a three-story building with two floors of office space and the third floor for storage. The Commission intended to move the county offices into the annex while leaving the court system and district attorney in the courthouse. The revenue commissioner has moved to an inadequate temporary office pending completion of the project.

The Commission has not yet entered into a contract for the renovation of the courthouse. At the time that the Commission entered into the annex contract, it obtained an estimate for the courthouse of \$4,000,000 to \$5,000,000. The high estimate was because of the removal of structural walls to increase office space and to accommodate the public in the courthouse.

The Commission now wishes to convert the third floor of the annex to office space and retrofit the office space on the second floor so that the court system and district attorney can be moved to those floors instead. The cost of these changes is \$1,500,000 to \$2,000,000. Shifting more employees and the public from the courthouse to the annex would eliminate the need to remove walls in the courthouse, decreasing the courthouse estimate to \$1,500,000. The savings on the courthouse renovation could be used to meet other county needs, such as the purchase of property for parking for the annex and future growth and a new building for the sheriff's office.

The contract manager reports that the current contract will have to be terminated before the county offices on the second floor of the annex are finished if the changes have to be bid. Otherwise, those offices will have to be demolished and reconfigured to accommodate the court system and public. The renovation of the courthouse cannot begin until the work on the annex is complete and employees in the courthouse can be moved to the new building.

A change order was recommended by the architect because it will be less expensive than rebidding. The savings will come from not having to make changes to the architectural plan to finish the shell of the building to protect it while it is vacant during the time it takes for rebidding, from merely making changes to the plan rather than developing a more expensive completely new plan to use as a basis for bids, and from not having to relocate equipment, among other factors. The delay in rebidding prolongs the violations of the fire code in the courthouse, putting

the safety of the public attending court at risk, as well as the time that the revenue commissioner has to work in inadequate office conditions.

This Office has consistently opined that change orders of 30 percent or more can be made under certain circumstances. Opinions to Honorable Alfred C. Lackey, Mayor, Town of Steele, dated March 22, 2002, A.G. No. 2002-182; Honorable William M. Bouldin, Attorney, City of Russellville, dated February 28, 2000, A.G. No. 2000-098; Honorable Barbara Coffey, Mayor, City of Moulton, dated January 8, 1993, A.G. No. 93-00105; Honorable Bruce Etheredge, Chairman, St. Clair County Commission, dated November 15, 1991, A.G. No. 92-00049; and to Honorable Wayman G. Sherrer, Attorney for the Utilities Board of the Town of Blountsville, dated May 29, 1991, A.G. No. 91-00279. Most recently, the *Lackey* opinion explained the justification for a change order as follows:

“Change orders are not provided in the Competitive Bid Law or the Public Works Law, but have been allowed pursuant to guidelines articulated by this Office in the interpretation of the legislative intent in formulating the Competitive Bid Law. Each fact situation must be examined individually, keeping in mind the Alabama Supreme Court’s holding:

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.

White v. McDonald Ford Tractor Co., 287 Ala. 77, 248 So. 2d 121, 129 (1971).

This Office has held that changes in amounts greater than 10% are allowable under *extraordinary circumstances*. Opinions to Honorable Barbara Coffey, Mayor, City of Moulton, dated January 8, 1993, A. G. No. 93-00105, and Honorable Wayman Sherrer, Attorney for the Utilities Board of the Town of Blountsville, dated May 29, 1991, A. G. No. 91-00279.”

Lackey, at 3-4, quoting *Bouldin*, at 2 (emphasis added).

This line of opinions turned on the savings involved in the utilization of grant funds and in using the original contractor. Moreover, this Office has recognized that a delay in construction that affects the public interest may constitute an extraordinary circumstance justifying a change order. Opinion to Honorable G. R. Swift, Jr., Secretary, Alabama Corrections Institution Finance Authority, dated April 29, 1987, A.G. No. 87-00153. That opinion addressed contracts to build two prisons, stating as follows:

The necessity of new penal institutions to house state inmates is a matter of public concern. Although there is currently no court order requiring the immediate providing of additional prisoner beds, the number of prison beds in the state is subject to the close scrutiny of the federal courts and sufficient prisoner beds must be provided on a regular basis. If change orders to the original contracts for the construction of the two prisons are not permitted, *there will be a significant delay in the occupancy of the prisons due to the time required for bidding and negotiating new contracts* for the proposed changes in the prisons. There would be logistical problems if other construction companies or contracts became involved in the building of the prisons. The proposed changes were deemed desirable for the betterment of prison construction by the Corrections Institution Finance Authority and the Department of Corrections. Furthermore, as stated in your request, the costs of the two contracts are not in excess of the total bond funds available.

Id. at 3 (emphasis added).

The procedure to obtain a change order was also stated in the *Lackey* opinion as follows:

“The facts presented in this request are very similar to the facts presented in the *Sherrer* opinion in which this Office found that a change order in excess of 30% in a sewer construction

project funded by a grant from ADECA constituted an extraordinary circumstance. In that opinion, this Office stated, attached to each change order should be a signed statement from the project engineer containing the following:

- (1) A statement of what the change order covers, who instituted the change order, and why it is necessary or desired;
- (2) A statement of the reason for using the change order method rather than competitive bids;
- (3) A statement that all prices have been reviewed and found reasonable, fair and equitable and recommending the approval of the same.”

Opinion to *Sherrer* at 3.

If the awarding authority, the City in this case, determines that the facts are as outlined, the changes are, in fact, necessary for the proper completion of the project, and the grant can be retained by this method, the City can find that the circumstances are extraordinary and justify a change order in excess of 30%.

Lackey, at 4-5, quoting *Bouldin*, at 2-3.

CONCLUSION

If the county commission determines that the facts are as outlined and that the changes are necessary for the proper completion of the project, it can also find that the circumstances are extraordinary and justify a change order in excess of 30 percent.

Honorable Joey Hargrove

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I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH

Chief, Opinions Division

LS/GWB

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