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1. ARCHITECT'S CONTRACT—TO PLAN AND SUPERVISE CONSTRUCTION, NEW RESIDENTIAL SCHOOL FOR BLIND—ENTITLED TO 75% OF FEE, COMPUTED AT 5½% OF ESTIMATED COST OF PROJECT, UPON COMPLETION AND APPROVAL OF WORKING DRAWINGS AND SPECIFICATIONS—AFTER WORK PROGRESSED ARCHITECT ENTITLED TO 100% OF FEE BASED ON 5½% OF SUMS PAID CONTRACTOR.
2. ADDED COMPENSATION—SUPPLEMENTAL CONTRACT.

SYLLABUS:

1. Pursuant to the terms of the contract submitted governing the employment of an architect to plan and supervise the construction of the New Residential School for the Blind, said architect was entitled upon completion and approval of the working drawings and specifications, to 75% of his fee computed at 5½% of the estimated cost of said project. After the award of contracts, and as work on said project progressed, said architect was entitled to 100% of his fee based upon 5½% of sums paid to contractors.

2. Pursuant to the terms of the contract submitted, which contract provided that said architect should receive such added compensation for supervision as might be agreed upon in the event that said project was not completed by the time fixed for its completion, said architect is not required to continue supervision beyond the fixed completion date without a supplemental contract.

Columbus, Ohio, February 9, 1953

T. C. Holy, Chairman for New Residential Schools
for the Blind and The Deaf
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Commission for New Residential Schools for the Blind and Deaf respectfully request written opinions of your office in regard to legal interpretations of the contract attached hereto, being between Commission for New Residential Schools for the Blind and the Deaf and Outcalt, Guenther and Associates, dated October 19, 1949. Pursuant to plans made by the Architects, the Commission entered into contracts for construction of this project providing for a completion date of July 15, 1952.

"We desire written opinions regarding the following questions:

"1. As of July 15, 1952 the completion date, were the Architects entitled to full payment of fees set up under the contract based on the contract awards and subsequent change orders?"

"2. Are the Architects required to supervise construction subsequent to July 15, 1952, the completion date, without a supplemental contract?"

The contract which you have attached to your request contains the following provisions bearing on the questions which you have raised.

"* * * 1. THE STATE OF OHIO does, under the conditions named below, hereby employ the Architect for the rendition to it, under the direction, subject to the orders and to the satisfaction of the Commission of the following services with respect to said improvement, to-wit:

- (1) To prepare drawings, specifications, bills of material, and estimates of cost.
- (2) To inspect the materials going into said improvement previous to their incorporation into the same.
- (3) To supervise the construction of said improvement.
* * *

"2. SUPERVISION OF THE WORK

"The supervision to be furnished by the Architect shall be held to mean daily and continuous supervision either by the Architect himself or by representatives in his employ, except as herein otherwise stated. The Commission shall employ one Clerk of the Works who shall be acceptable to both the Commission and the Architect and who shall work under the direction of the Architect.

"This supervision shall be adequate at all times and shall be satisfactory to the Commission.

"The Architect shall supervise the work under construction, to ascertain whether it is in compliance with the terms of the contracts and shall aid the contractors in obtaining full performance of their contracts, without delays or errors, apprising the Commission of the progress and condition of the work. The Architect shall keep a record of accounts with contractors and shall audit the contractors' application for payments before they are submitted to the Commission.

"In the event that superintending the construction of the improvement should extend beyond the time fixed by the Com-

mission for its completion by the contractor, the Architect will receive such added compensation for supervision as may be agreed upon by the Commission and the Architect. * * *

"3. SPECIAL PROVISIONS.

"If at any time in the judgment of the Commission, the services of the Architect are unsatisfactory, the State of Ohio, acting by said Commission, may terminate his services, allowing him such reasonable compensation, if any, as in the judgment of said Commission, may then be due such Architect, and in case of abandonment or suspension of the improvement, the Architect will be allowed as compensation for partial services such amount as may in the judgment of the Commission be reasonable and proper. * * *"

"4. PAYMENTS.

"The State of Ohio agrees to pay the Architect as full compensation for his services as aforesaid, and any and all expenses incurred by the Architect in performing said services, except as otherwise provided in *Supervision of Work*, page 4, paragraph 4, and *Special Provisions*, page 5, paragraph 4, a fee equal to 5½ per cent of the amount paid out by the State of Ohio under and on account of contracts entered into by the State for the construction of said improvement. When labor or material is furnished by the State of Ohio, the actual cost to the State of Ohio shall be taken as the basis for computing the Architect's compensation. The Architect's compensation will be paid by vouchers issued in his favor by the Auditor of State, and approved by the Commission and such compensation shall become due and payable in the following order: * * *

"Upon completion and approval of the working drawings and specifications, a sum sufficient to increase the payments to seventy-five per cent (75%) of the fee, computed upon the same estimated cost as the preliminary drawings.

"After the award of contracts, and as the work progresses, a sum sufficient to increase the payments to one hundred per cent (100%) of the fee, based on payments made to contractors. All payments shall be based in the first instance on the estimated cost, and are to be treated as installment payments on the entire fee based upon the actual cost."

One additional fact is inherent in the questions which you have presented but is not specifically set out in your request: namely, that although the contracts for construction of the schools called for a completion date of July 15, 1952, they were not completed on that date and are in fact not yet completed.

Your first question concerns the amount of money that was due the architect on July 15, 1952, the completion date. Since it is a fact that the working drawings and specifications have been completed by the architect and approved by your Commission, the architect, upon that approval, was entitled to 75 per cent of his fee based upon estimated cost of the improvement. Since it is also a fact that on July 15, 1952, a substantial amount of the construction had been completed and payments had been made to the contractor, the architect was also entitled to payments up to a full $5\frac{1}{2}$ per cent of the payments actually made to contractors if that amount exceeded the amount which became due upon the approval of the plans.

It is possible that on the completion date the project might have been abandoned or suspended, or it might have been altered to provide smaller payments than the contracts originally awarded. Because of such eventualities, it cannot be said that on completion date the architect was automatically entitled to his full fee based upon the original contract awards and change orders.

Your second question asks whether the architect was required to supervise construction subsequent to the established completion date without a supplemental contract.

While it is true that the contract requires in general terms that the architect shall supervise the project until it is completed, it is my opinion that the agreement of the parties concerning the question which you have raised is embodied in the following language of the contract:

“In the event that superintending the construction of the improvement should extend beyond the time fixed by the Commission for its completion by the contractor, the Architect will receive such added compensation for supervision as may be agreed upon by the Commission and the Architect.”

It is my opinion that although not set out specifically in the contract, it is a necessary corollary to the above language that if a supplemental agreement is not entered into, the architect is not required to continue supervision beyond the fixed completion date. I am strengthened in this conclusion by a consideration of Section 2331, General Code, which provides as follows:

“All contracts under the provision of this chapter shall contain provision in regard to the time when the whole or any speci-

fied portion of work contemplated therein shall be completed and that for each and every day it shall be delayed beyond the time so named the contractor shall forfeit and pay to the state a sum to be fixed in the contract, which shall be deducted from any payment or payments due or to become due the contractor."

This section appears to me to have been intended to protect the state against possible increased costs which might be incurred because of just such delays as are involved here.

This conclusion also is in agreement with Opinion #3278, Opinions of the Attorney General for 1931, page 741, in which the question of supplemental payments was discussed.

In specific answer to your questions it is my opinion that:

1. Pursuant to the terms of the contract submitted governing the employment of an architect to plan and supervise the construction of the New Residential School for the Blind, said architect was entitled upon completion and approval of the working drawings and specifications, to 75 per cent of his fee computed at $5\frac{1}{2}$ per cent of the estimated cost of said project. After the award of contracts, and as work on said project progressed, said architect was entitled to 100 per cent of his fee based upon $5\frac{1}{2}$ per cent of sums paid to contractors.

2. Pursuant to the terms of the contract submitted, which contract provided that said architect should receive such added compensation for supervision as might be agreed upon in the event that said project was not completed by the time fixed for its completion, said architect is not required to continue supervision beyond the fixed completion date without a supplemental contract.

Respectfully,

C. WILLIAM O'NEILL
Attorney General