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1. MUNICIPALITY — CONTRACT — WHERE PURSUANT TO SECTION 4328 GENERAL CODE, CONTRACT EXECUTED, IT MAY NOT BE AMENDED TO PAY ADDITIONAL MONEYS IN EXCESS OF $500.00 WITHOUT AGAIN COMPLYING WITH PROVISIONS SECTION 4328.
2. WHERE CONTRACT ENTERED INTO BY MUNICIPALITY, CHARTER CITY OR OTHERWISE, TO BE COMPLETED, SPECIFIED TIME, AFTER EXPIRATION OF TERM, CONTRACTOR MAY NOT BE PAID ADDITIONAL SUM TO COMPLETE IMPROVEMENT WITHIN SIXTY ADDITIONAL DAYS — FURTHER ADVERTISING FOR BIDS REQUIRED.

SYLLABUS:

1. A municipality having entered into a contract pursuant to the authority of Section 4328 of the General Code, may not thereafter amend such contract so as to require the municipality to pay additional moneys for the services required thereunder in excess of $500, without again complying with the provisions of such Section 4328 of the General Code.

2. A municipality, whether a charter city or otherwise, having entered into a contract for the construction of an improvement, in compliance with the provisions of Section 4328 of the General Code, to be completed within a specified time after the execution of the contract, may not, after the expiration of such term, without further advertising for bids, enter into an agreement to pay the contractor an additional sum for the completion of such improvement within the period of sixty additional days.

Columbus, Ohio, January 23, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

Your recent request for my opinion reads in part as follows:

"We are submitting herewith a letter and copy of a proposed supplemental contract received this date from officials of the City of Martins Ferry.

Accordingly, may we request that you examine the inclosures and give us your informal or formal opinion in answer to the following question:

Question 1. May the contracting parties, viz., Director of Public Service and Contractor, enter into a supplemental contract under the provisions of sections 4330 and 4331, or any other sections of the General Code, to modify the original contract so as to provide a bonus for completing the construction in a lesser

number of days than specified in the original contract, or to exact a penalty for any failure to complete said construction within the time to be specified in said supplemental contract?"

Accompanying your request is a letter from the city solicitor which outlines the facts giving rise to your inquiry, from which I quote the following:

"The City of Martins Ferry has under construction additions and improvements to the Municipal Light and Power Plant. All enabling legislation is passed by City Council and $385,000.00 appropriated for this purpose.

Bids were accepted by the City on January 1st, 1941 and contracts entered into with four contractors on June 3rd, 1941. The delay in the awarding of contracts was caused directly by the fact that the City's Consulting Engineers, the R Engineering Company, recommending readvertisement for certain bids when the originals were deemed to be unsatisfactory.

Immediately after entering into contracts on June 3rd, 1941, the City was advised by the Office of Production Management that Preference Rating Certificates and a Project Priority Rating would be necessary before any materials and equipment could be delivered to the contractors. Application for a Project Priority Rating was made by the City on July 1st, 1941. On December 22nd, 1941 the City was authorized to proceed on an A 1 A priority basis on extension of that rating by the United States Navy thru the B-K Company. This order superseded an A 10 priority assigned to the project on October 15th, 1941. Because of the delay in obtaining a Preference Rating it was impossible for the contractor to obtain any materials or enter their orders on production schedules of their suppliers.

The B-K Company is engaged in the manufacture of anti-aircraft guns for the United States Navy and as of September 29th, 1941 contracted with the City of Martins Ferry for electrical power to be used in their production. The City has not sufficient generating capacity to meet these new demands, and with the country's urgent need for this defense equipment it is imperative that the Power Plant Project be completed sooner than required in the original contract.

K Construction Incorporated has contracted to complete the construction of a boiler house in 120 days. It is presumed by the R Engineering Company, the City and the contractor that '120 days' shall be construed as 120 days after delivery of all materials and equipment on the project. Delivery is now being expedited by the City, U. S. Navy, B-K Company and the R Engineering Company. Little of the materials are delievered as of this date.

The power bill to be paid to the City by the B-K Company, when in full production will approximate $6,000.00-$8,000.00 monthly. Therefore, definite monetary benefits will accrue to the City if K Construction Incorporated can complete their contract in 60 days after delivery of all materials instead of the original 120 days specified in the original contract.

This, of course, would increase the costs to the K Construction Incorporated, as equipment and labor will be required not necessary in the fulfillment of the original contract.

The R Engineering Company has recommended that an additional amount of $6,000.00 be added to the original contract price to facilitate the completion of the K Construction Incorporated contract in 60 days instead of 120 days after delivery of materials.

For the above reasons we are submitting the question as to whether the City can enter into a modified contract with the K Construction Incorporated, granting to said Company a bonus of $6,000.00 if said Company completes the work within 60 days after the materials have been delivered. This contract shall also contain a penalty clause at the rate of $100.00 for each and every day over 60 days and up to 120 days as specified by the original contract. The terms of the modified contract have been recommended by the Consulting Engineers, and have been approved by the Director of Public Service, The Board of Controls and the K Construction Incorporated."

In the proposed amended contract, a copy of which you enclose, is contained a recital that the original contract entered into under date of June 3, 1941, provided that the "construction work was to have been completed within one hundred twenty days of the execution of said contract." There is a well established rule of law that a contract once entered into may be modified by a subsequent agreement of the parties thereto, but there is also an equally well established rule that such modification agreement must be supported by an adequate consideration. See Marshall-Van Cleve v. Ames, 11 O.C.C., 363. Consideration sufficient to support a contract may be defined as follows: Consideration is the doing of some act or thing or the promise to do such act or thing which the promisor is not legally obligated to do, or the forbearance or promise of forbearance of doing something which, except for the promise, he otherwise would have the legal right to do. See Irwin v. Lombard University, 56 O.S., 9, 20; 1 Page on Contracts, 841, Section 514; 1 Williston on Contracts, 470, Section 135.

In view of the fact that the K Construction Company was bound by the terms of the original contract, which I assume was a legally enforceable contract, to complete the construction within one hundred twenty days from the date of the execution of the contract of June 3, 1941, the question arises as to whether there could be any consideration moving from the construction company sufficient to support the modification to the contract.

In Warren Tank Car Company v. Dodson, 330 Pa. St., 281, it is

stated in the first branch of the headnotes of the holding of the court that:

> "A promise to carry out a contract subsisting between the parties, or the performance of such contractual duty, is not consideration which will support a contract; it is only when the legal duty is doubtful or the subject of honest and reasonable dispute, that a promise to perform it may serve as consideration for a new contractual obligation."

Similarly, in Johnson v. Hinson, 188 Ga., 639, it is stated in the second paragraph of the syllabus that:

> "An agreement on the part of one to do what he is already legally bound to do is not sufficient consideration for the promise of another."

See also Teele v. Mayer, 160 N.Y.S., 116; Ochs v. Equitable Life Assurance Society, 111 Fed.(2d), 848; Cuneo Press, Inc., v. Claybourn Corporation, 90 Fed.(2d), 233; William Lipstraw Company v. Seufert, 36 O.App., 272.

It may be stated as a general proposition of law that when a person is bound by contract to perform an act or duty, he must perform such act or duty or respond in damage for the injury caused by his failure so to do. Such general proposition is subject to certain recognized exceptions:

1. Where the contract is for personal services, there is a generally implied condition that the performance of the contract is subject to the condition that the obligor shall remain alive and not incapacitated by reason of unavoidable illness.

2. Where the thing upon which the services are to be performed is destroyed, there is an implied exception that the continued existence of such thing was within the contemplation of the parties.

3. If the performance of the contract becomes unlawful, such condition excuses the performance.

4. Where the conditions with reference to which the parties are deemed to have contracted do not in fact exist and such change of conditions could not have been foreseen by the contracting parties, some courts hold that such change excuses the performance of the contract.

As to the fourth exception above mentioned, the courts have held that the mere fact that the changed conditions have made performance more difficult, dangerous or even unprofitable, does not excuse performance. See Elsey v. Stamps, 10 Lea (Tenn.), 709; Graves v. Miami Steamship Company, 61 N.Y.S., 115; Ashmore v. Cox, 1 Q.B. (Eng.), 436; Metropolitan Water Board v. Dick K. and Company, 2K.B. (Eng.), 1; Coal Dist. Power Company v. Katy Coal Company, 141 Ark., 337;

Krulewitch v. National Importing and Trading Company, 186 N.Y.S., 838; London and Lancashire Indemnity Company v. Commissioners, 107 O.S., 51.

As stated in the third and fourth paragraphs of the syllabus of Indemnity Company v. Commissioners, supra:

> "3. An express contract to do an act which is possible in the nature of things and not contrary to law will not be discharged by subsequent events or rules of law which do not render performance physically impossible, but merely make performance more burdensome, expensive or difficult, nor where such subsequent events or rules of law might reasonably have been contemplated.
>
> 4. In order to make available the defense of legal impossibility of performance by reason of governmental interference in the control of production, of labor, and transportation, in the prosecution of the world war, it must be proven that there was either actual seizure or such direct intervention or governmental mandate as prevented further performance."

In Gordon v. New York, 233 N.Y., 1, the court had under consideration the question as to whether increased costs resulting from the "first world war" were sufficient to justify the payment of additional compensation to a road contractor who had entered into a contract for the construction of a pavement over 6.06 miles of highway at a unit price. In holding that such additional compensation could not be granted, the court pointed out that on the date of the contract (November 15, 1915) the contractor entered into the contract in competition with other contractors for the performance of the work and the furnishing of the labor and material necessary therefor; that at that time he was familiar with the nature of the work to be performed and of his obligations to perform the work or respond in damages; that to him should be attributed knowledge of the fact that for some time prior to the date of the contract the powers of Europe had been engaged at war; that the nature of the conflict was such that the United States might become involved therein; and that "a continuance of the war, and particularly the entry of this country into the conflict, would necessarily result in a scarcity of labor, increased cost of the same, and increased cost of material, with continued business depression." The court then points out that "confronted with that condition and outlook, claimant proposed to undertake the work under the contract. To say that he did not appreciate the risk, and that his proposal to perform the work was not made in contemplation of the abnormal conditions then extant and danger of an increase of the same, would be a serious reflection upon his sagacity as a business man."

Numerous cases arriving at the same conclusion might be cited but would serve no useful function. In applying such reasoning to the facts in the case at bar, it would appear that at the time of the execution of the original contract on June 3, 1941, the construction company knew or should have known that European nations were engaged in a war which might possibly involve this government, and, if the knowledge of such fact is imputed to him and the deductions described in the case of Gordon v. New York, supra, were applicable at the time of the first world war, the contractor at the present time having such recent knowledge of the effect of a war upon the obtaining of labor and materials with which to perform his contract, it would seem that the original contract placed a duty upon him to complete his contract within one hundred twenty days, even though the effect of the war caused it to be more difficult and more expensive. Since he had the legal duty to complete the contract before the date of entering into the proposed amendment, it is difficult to perceive by what line of reasoning there could exist any consideration for an agreement to pay him $6,000 for the doing of that which he was already required to do under the terms of the contract.

However, if I were in error as to my reasoning as above outlined, other considerations would, it seems to me, lead to the same conclusion. I have not been informed whether the city in question is a charter city, but, be that as it may, it would appear that in the enactment of the present Constitution the following provision was inserted in Section 13 of Article XVIII:

> "Laws may be passed to limit the power of municipalities to * * * incur debts for local purposes * * *"

In Section 4328 of the General Code, the General Assembly has limited the power of municipalities to incur debts for local purposes and to contract for the expenditure of moneys. (Phillips v. Hume, 122 O.S., 11.) Such section contains the following language:

> " * * * When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

I assume, for the purposes of this inquiry, that the original contract was let in the manner prescribed in such section. It is undoubtedly true that the lowest and best bidder is not necessarily the lowest bidder. Altschul v. Springfield, 48 O.App., 356. It would likewise seem that the

converse of such proposition might also be true, that is, that the best bidder may not necessarily be the lowest and best bidder.

It is difficult for me to perceive by what authority a municipality, after having made an examination of competitive bids and having determined that one of the bids was the lowest and best bid and for such reason entered into a contract at the bid figure, thereafter, without further competition among bidders, might add the figure of $6,000 to the competitive bid and then deduce that the contract entered into at such increased figure was legally the lowest and best bid. It may be possible that if the bid were to be made at this time some competing contractor, equal in merit, might be willing to perform the contract of construction at a figure less than the sum of the accepted bid plus $6,000. As pointed out in Phillips, ex rel. City of Lima, v. Hume, 122 O.S., 11, Section 4328 of the General Code is an express limitation upon the power of municipalities, both charter and otherwise, to incur indebtedness. Such case further holds that a pretended obligation for the payment of money purported to be incurred by a municipality in any other manner than in compliance with Section 4328 of the General Code is void and of no effect. In view of such decision, it would seem to me that before the city could become bound to pay an additional $6,000 for the construction of the improvement in question, there must be a readvertisement of bids and a re-letting of the contract for the improvement.

Specifically answering your inquiry, it is my opinion that:

1. A municipality having entered into a contract pursuant to the authority of Section 4328 of the General Code, may not thereafter amend such contract so as to require the municipality to pay additional moneys for the services required thereunder in excess of $500, without again complying with the provisions of such Section 4328 of the General Code.

2. A municipality, whether a charter city or otherwise, having entered into a contract for the construction of an improvement, in compliance with the provisions of Section 4328 of the General Code, to be completed within a specified time after the execution of the contract, may not, after the expiration of such term, without further advertising for bids, enter into an agreement to pay the contractor an additional sum for the completion of such improvement within the period of sixty additional days.

Respectfully,

THOMAS J. HERBERT
Attorney General.