

2486.

ROADS AND HIGHWAYS—CERTAIN COST PLUS CONTRACT PASSED UPON—CERTAIN CLAUSES IN SAID CONTRACT DO NOT PRECLUDE PAYMENT OF COMMISSIONS ON CERTAIN ITEMS.

HELD, as to a contract submitted for examination, that certain clauses therein do not preclude the payment of commissions on certain items.

COLUMBUS, OHIO, October 18, 1921.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have recently submitted to this department a copy of a contract, designated Contract No. 1426-X, entered into by former State Highway Commissioner Taylor, upon the concurrence of the then highway advisory board, covering the completion of the work embraced in a construction contract on which the original contractor had defaulted; and with the copy in question you have made these two inquiries:

“Question 1. Construing Article IX.

Does the established price as set forth in this article preclude the paying of 20 per cent commission as allowed on other items incident to the construction of this road?

Question 2. Construing article XIV.

The relation of this article to article IX, particularly what part of article IX does this except?”

Briefly described, said Contract 1426-X is a so-called cost plus contract. Under its terms, the contractor among other things agrees to

“supply all tools, machinery, equipment, facilities and supplies, except as otherwise provided herein and in contracts supplemental hereto, and perform all the work required for the construction and completion”

of the original contract work; and to act as the agent of the state

“in employing all teams, laborers, foremen and other employes necessary in the completion of the work.”

Articles IX and XIV of the contract, to which your questions make reference, read respectively:

“ARTICLE IX.

In case sufficient teams are not available, the party of the second part agrees to furnish at the option of the party of the first part motor trucks for use in connection with any part of the work.

The party of the first part agrees to pay the party of the second part two dollars (\$2.00) per hour rental for Ford one ton trucks, four dollars (\$4.00) per hour for trucks from three tons up to five tons capacity, and five dollars (\$5.00) per hour for trucks from five tons up to and including seven tons capacity, for each hour each motor truck is actually in use on the work.

It is further agreed that in consideration of the foregoing rentals

of two dollars (\$2.00), four dollars (\$4.00) and five dollars (\$5.00) per hour for each motor truck, the party of the second part shall bear the entire cost of operating said motor trucks including driver, gasoline, oil, renewals, depreciation, and all other items incident thereto, and further will maintain said motor trucks in good working condition for use at all times. Party of first part reserves right to furnish own trucks and automobiles for which party of second part shall receive commission only on actual cost of the operating expenses of said trucks and automobiles including the cost of drivers, mechanics, gasoline, oil, etc., or upon the rental prices as above stated or agreed upon at the option of the party of first part."

ARTICLE XIV.

"As full compensation of all equipment, tools, supplies and appliances furnished, and expenses incurred and services rendered under this contract, (except as set forth in Article IX in reference to motor trucks) including all salaries and expenses incurred in conducting the general branch office of the party of the second part, and all general overhead expenses of any kind, the party of the first part agrees to pay to the party of the second part a fee of twenty (20%) per cent for all work done and material incorporated into the improvement.

The amount of money to be paid by the party of the first part to the party of the second part as fee shall be determined by computing the percentage from amounts paid by the party of the first part on account of:

First. All laborers, teams and foremen and superintendents employed for the party of the first part by the party of the second part, except as provided in articles VIII and XVIII and those necessary for the maintenance and repair of equipment, tools and appliances the property of said second party.

Second. All materials purchased by or for the party of the first part entering into the completed work including all blasting materials and necessary form lumber, etc., used on bridge and culvert construction. This does not include supplies, fuel, oil and other materials necessary for the operation of motor trucks except as provided in article IX for state owned trucks and automobiles; nor does it include any materials, fuel and supplies entering into the construction and maintenance of camps; nor any charges for demurrage as provided in article XX.

Third. All rentals or operating expenses of state owned motor trucks and automobiles as stipulated in article IX. The amount of said article XIV fee not to exceed the sum of \$38,052.78, the same being twenty per cent of the revised estimated cost of construction of \$190,263.88 prepared May 14, 1920, and now on file with said party of the first part, a copy of which revised estimate is hereto attached."

Since article XIV says in so many words that the amount of money which the state is to pay the contractor *as fee*

"shall be determined by computing the percentage from amounts paid by the party of the first part (the state) on account of:

* * * * *

* * * * *

Third. *All rentals* * * *,"

and since the only rentals which are to be paid the contractor (unless and until after he defaults as mentioned in article XII) are those specified in article IX, it is clear beyond argument, and you are accordingly advised in answer to your first question, that the established price named in article IX does not preclude the payment of the twenty per cent commission on the motor truck rentals specified in said article IX. If any support for this conclusion were needed in addition to a reading of the plain terms of the contract as last above quoted from article XIV, it would be found first, in the further provisions of the paragraph designated "Third" in article XIV, to the effect that when state-owned trucks are used, the contractor receives commission on the operating expenses; second, in the provisions of the paragraph designated "Second" in article XIV, to the effect that materials for the purposes of allowing commissions are not to include supplies, etc., purchased by the contractor for the operation of motor trucks under the arbitrary rental arrangement set out in article IX, and third, in the provision of article IX, to the effect that when the state furnishes its own trucks and automobiles, then the contractor

"shall receive commission *only* on the actual cost of the operating expenses of said trucks and automobiles."

from which three provisions the implication clearly arises that when the state, by requiring the contractor to furnish motor trucks, calls into play the arbitrary rental scale specified in article IX, the contractor receives commission on the amounts paid him according to said scale.

The foregoing discussion shows generally the relation between articles IX and XIV, and hence really makes unnecessary an answer to your second question. However, as a matter of information in response to your second question, it may be said that the clause enclosed in parenthesis in article XIV,

"except as set forth in article IX in reference to motor trucks,"

was evidently inserted for the purpose, and has the effect, of making plainer, so to speak, what is already plain as pointed out in answer to your first question; in other words, the parenthetical clause quoted shows that "except" (or "other than") his commission, the contractor is to be paid the rentals named in article IX, if the state calls on him to furnish trucks instead of itself furnishing the trucks. The further clause in article XIV,

"except as provided in article IX for state owned trucks and automobiles,"

indicates, when read in its context, that in so far as he uses state-owned trucks the contractor gets commission on amounts paid by the state for

"supplies, fuel, oil and other materials necessary for the operation of motor trucks"

in contrast to commissions on rentals when he is using other than state-owned trucks, provided, however, that in calculating commissions even as to state-owned trucks, the state may, *at its option*, (see last sentence of article IX) use as the basis either the rental scale set out in article IX, or the actual operating expense described in article IX.

Respectfully,
JOHN G. PRICE,
Attorney-General.