

317.

AUDITOR OF STATE—IS JUSTIFIED IN WITHHOLDING PAYMENT FROM CONTRACTOR WHEN SAID CONTRACTOR HAS NOT SUBSTANTIALLY COMPLIED WITH PROVISIONS OF CONTRACT.

SYLLABUS:

Where in carrying out of a contract for moving a building belonging to the state, which contract and the plans and specifications pertaining thereto filed in the office of the auditor of state contemplated the moving of such building substantially as a unit, the contractor tears such building down and rebuilds it upon the new site in such a way that the building as rebuilt differs essentially from the former building, even though such rebuilding is with the consent and approval of the director and consulting engineer of the department in charge of the work, the auditor of state is justified in withholding payment of the balance alleged to be due under said contract until ordered by a court of competent jurisdiction to pay the same.

COLUMBUS, OHIO, April 13, 1927.

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

DEAR SIR:—I wish to acknowledge receipt of your request for my opinion as to whether or not Pitt Construction Company, Inc. have complied with the terms and conditions of a contract entered into on June 25, 1924, for moving and erecting the laundry building at the Girls' Industrial School, Delaware, Ohio.

An investigation of the circumstances in the above matter develops that the following steps leading up to the contract between Pitt Construction Company, Inc., and the state of Ohio were taken. Plans and specifications approved by the director of public welfare were filed in the office of the auditor of state, the plans consisting of a blue print showing the altitudes of the ground by contour lines and showing the location of the laundry building by a foundation outline and the new site by a similar foundation outline. These outlines indicate that the laundry building consisted of a building proper with three wings. On the same blue print is a larger outline of the laundry building showing dimensions and still showing a building with three wings and also a sketch showing a cross section of the walls. My information is that the old laundry building was a one story building with three wings. On said blue print I find the following:

“Note.

Moving contractor shall move Building *in its entirety* starting at bottom of first Story floor Construction to new site and place same on new foundation Walls of which are to be furnished by the State.”

The specifications filed with the plans above referred to contain the following language:

“On Blueprint No. 319, at the Girls' Industrial School, Delaware, Ohio, the Contractor is to do all the excavating, all the necessary concrete for the foundation, placing *the present building* upon said foundation, complete in every detail insofar as the *present condition* of the *present building* is concerned.

The right is given to the contractor in this contract to eliminate the concrete floor, substituting a wood floor of similar design to the other two wings of the building.”

Notice of the acceptance of bids was properly advertised and bids were received and

tabulated. Among the bids was that of Pitt Construction Co., Inc., which reads in part as follows:

"Having carefully examined the entire specifications entitled Specifications for Moving Laundry Building of Girls' Industrial School, prepared for the Department of Public Welfare by the Engineering Division of the Department of Public Welfare, as well as the premises and the conditions affecting the work, the undersigned hereby proposes to furnish all materials (and labor where specified) under the contract as set forth in the specifications for the sum of:—

Moving Laundry Building upon foundation furnished by contractor *as per blue print submitted*; also the moving of the 2-100 H. P. Boilers on cars, freight prepaid—(\$36,747.00) Dollars."

The above proposal was made on the form provided by the engineering division of the department of public welfare and was accompanied by a proper surety bond.

Pitt Construction Co., Inc., being the lowest bidder was awarded the contract which was entered into June 25, 1924. Pitt Construction Co., Inc., was designated as "contractor" in said contract which provided in part:

"That the said contractor in consideration of the fulfillment of the agreement herein made by the owner, agrees with the said owner as follows:

Article 1. The contractor under the direction and to the satisfaction of The Engineering Division of the Department of Public Welfare, acting as Superintendent and..... Architect, acting for the purpose of this contract as agent of said owner, shall and will provide all material and perform all work mentioned in the specifications or shown on the drawings as prepared by said architect for the construction and completion of Moving and Erecting Laundry Building, at Girls' Industrial School, of the Department of Public Welfare, as covered by the proposal of the party of the first part which proposal is made a part of this contract.

These drawings and specifications are identified by the file in the office of the Auditor of State.

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Article 3. *No alterations shall be made in the work shown or described by the drawings and specifications except upon the written order of the architect, and when so made, the value of the work added or omitted shall be computed by the architect and the amount so ascertained shall be added to or deducted from the contract price."*

On or about December 15, 1924, the parties entered into a supplemental contract for extra work and additions to the original contract wherein the contractor agreed for the sum of \$1,667.09 to furnish "all the material and labor to install the outside stairways, lathing stairway, laying floors at stairway landing, erecting chimneys in new cottages." This supplemental contract was made a part of the original contract thereby raising the contract price to \$38,414.09. All of this sum has been paid to the contractor except \$3,504.44, being 5% of the original contract price retained (\$1,835.35) and the amount of the supplemental contract (\$1,667.09).

The words on the plans, specifications and proposal, quoted above, show that it was within the contemplation and understanding of the parties to move said laundry building substantially as a unit and that when the moving was completed, the building would be the same in type as it had been before, viz., a one story building with

three wings. However, according to information furnished by the department of public welfare, when the contractor started work under the contract it was found that due to a flooding of the building the walls had been so weakened that it was found impracticable if not impossible to move it as a unit. The contractor then proceeded to wreck the building intending to rebuild it upon the new site. However, at the suggestion of the superintendent of the Girls' Industrial School and with the approval of the director and consulting engineer of the department of public welfare the contractor constructed and erected a building which was entirely different in type from that which it had been originally, that is, the new building is a two story building with two wings. It is conceded that the new building is essentially different in type from the old building although it is said by the department of public welfare to be better adapted to the purposes for which it is being used, has a greater amount of floor space, is more substantial and did not involve additional cost except the \$1,667.09 covered by the supplemental contract above referred to.

As above pointed out, the contract provides that no alterations shall be made in the work shown or described by the drawings and specifications except upon the written order of the architect. No such written order was made although the changes made were made with the knowledge, approval and consent of the director and consulting engineer of the department of public welfare.

Section 2321 of the General Code provides:

"After they are so approved and filed with the auditor of state, no change of plans, details, bills of material or specifications shall be made or allowed unless the same are approved by the state building commission (director of highways and public works). When so approved the plans of the proposed change, with detail to scale and full size, specifications of work and bills of material shall be filed with the auditor of state as required with original papers. If such change affects the price, the amount thereof shall likewise receive such approval." (Matter in parenthesis mine.)

The procedure laid down in Section 2321, supra, was not followed. Plans and specifications covering the laundry building as constructed by the contractor were filed in the office of the auditor of state on or about February 17, 1925, but this was a long time after the work had been completed. The section above quoted contemplates such filing before the work is done.

The purpose of bidding for work on state buildings is to put such work on a competitive basis, and to prevent favoritism being shown to contractors. We have no right to assume that had the plans and specifications in the first instance contemplated what was finally done in this case that no greater number of contractors would have been interested in the work and that no lower bids would have been received. It is altogether possible and probable that, had the plans and specifications originally filed in the office of the auditor of state contemplated the wrecking of the old laundry building and the erection of the present laundry building with the same materials, a greater number of contractors might have been interested in the project and might have submitted bids lower than the one submitted by Pitt Construction Company.

I do not believe that the change of plans referred to in Section 2321, supra, contemplates a change such as was made in the present instance. In my opinion it refers to minor changes which would not materially affect the type of construction or the nature of the work to be performed.

For the reasons above stated, it is my opinion that the fact that the building when moved and erected upon the new site was entirely different from that contemplated by the plans and specifications originally filed with the auditor of state, and the fact that such alterations were made without first obtaining the written order of the proper officer as required by law and the express terms of the contract, such alter-

ations being made without complying with the terms of Section 2321, General Code, supra, operates as a violation of the express terms and conditions of the contract and of the law relating to the construction of public buildings, and that the auditor of state is justified in withholding payment of said sum until ordered by a court of competent jurisdiction to pay the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

318.

APPROVAL, LEASE ON OHIO CANAL LANDS.

COLUMBUS, OHIO, April 13, 1927.

Department of Highways and Public Works, Division of Public Works, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter dated April 13, 1927, in which you enclose the following lease in triplicate, for my approval:

OHIO CANAL		Valuation
Main Street Akron Amusement Company	Land Lease	\$49,444.45

I have carefully examined said lease, find it correct as to legality and form, and am therefore returning same, with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

319.

GAME REFUGE LEASES—5 APPROVED—1 DISAPPROVED.

COLUMBUS, OHIO, April 13, 1927.

Department of Agriculture, Division of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of April 1st, 1927, in which you enclose the following Game Refuge Leases, in duplicate for my approval:

No.	Name.	County.	Township.	Acres.
953	H. M. Gardner,	Guernsey,	Oxford,	220
754	E. E. Anderson,	Trumbull,	Brookfield,	111
955	D. J. Lewis,	Trumbull,	Brookfield,	72
916	John P. Phillips,	Ross,	Union,	446
956	B. P. O. E. Lodge,	Trumbull,	Brookfield,	3

I have examined said leases, find them correct as to form, except Lease No. 956, and I am therefore returning the same with my approval endorsed thereon.

I am returning herewith Lease No. 956 unapproved, for correction, for the following reasons: