THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

August 31, 1954

Hon. D. C. Greer
State Highway Engineer
Texas Highway Department
Austin, Texas

Opinion No. MS-150

Re: Several questions relating to the applicability of Articles 6674h, 6674m, and 5472a, V.C.S., to a specific fact situation arising out of a defaulted highway construction contract with the Highway Department.

Dear Mr. Greer:

Your request for an opinion of this office is as follows:

"During the latter part of 1953 the State Highway Department advertised for bids for the construction of State Highways in various parts of the State. The Stone Construction Company was low bidder on five or six of the advertised projects and was awarded contracts for their construction. Recently, the Stone Construction Company discontinued the prosecution of the work upon its contracts without authority, and the Engineers gave the notices in writing to the contractor and his Surety as is provided in Item 8.7 of the General Provisions of the Standard Specifications in each contract. After the contractor's failure to proceed with the work in a satisfactory manner within a period of ten days after such notices, and upon the Engineers' certifications of that fact, the State took the prosecution of the work under the contracts from the hands of the contractor and declared the contracts in default. The Contractor's Surety tendered to the Department Mr. John T. Leslie, a contractor who they advise, is ready, able and willing to complete each of the contracts defaulted by the Stone Construction Company, and to furnish bond with another bonding company as surety.

We are advised that the unit prices to be paid to John T. Leslie under the proposed contract between the State and Leslie would be in excess of the unit prices in the Stone Construction Compan's contracts. However, the Stone Construction Company's Surety agrees to assume and pay to the State whatever loss would be thus sustained by the State under the valid provisions of its contracts with Stone Construction Company.

"Under the above statement of facts and in the light of Article 6674h, Texas Civil Statutes and Item 8.7 of the General Provisions of the Contract Specifications we would be pleased to have you give us your opinion and advice in response to the following questions:

"(1) Can the State legally enter into a contract with John T. Leslie for the completion of the Stone Construction Company's contracts based upon the proposed contract to be submitted by the Bonding Company without the State submitting such contracts to competitive bids?

"(2) If the first question is answered in the affirmative, then is the State required, as a matter of law, to enter into such a contract with Leslie?

"(3) If the State does not enter into the contract with Leslie as proposed by the Bonding Company for completion of the Stone Construction Company's contracts, is Stone Construction Company's Surety released from further liability to the State under its bond or is such liability in any manner reduced?

"(4) With or without the Bonding Company's consent, could the State, without taking bids on the incompleted work, enter into a contract with a contractor who was willing and able to complete such defaulted contracts?

"(5) With the Bonding Company consenting to the terms and conditions of the Stone Construction Company contracts, especially Item 8.7 of the General Provisions of the Contract Specifications, can the Bonding Company exercise any control over

the completion of the contracts after default by Stone Construction Company except to pay to the State the cost to the State of completing the defaulted contracts, over and above what it would have cost had such work been completed under the original contracts?

"(6) Laborers working for Stone Construction Company in the completion of its contracts with the State and certain materialmen who have furnished materials to the Stone Construction Company for use under such contracts have filed claims with the State as is provided under Article 5472a, Revised Civil Statutes, and the State has withheld from monies due the contractor such funds as the contractor has now earned. The amount of the claims are greatly in excess of the amount that has been earned and withheld. Will you please advise us if unpaid funds earned under Stone Construction Company's contracts and retained on account of labor and materialmen's claims, must be used by the State to reduce the liability of Stone Construction Company's Surety under its bonds furnished to the State as part of Stone Construction Company's contracts, or should such funds be retained by the State to protect laborers and materialmen's claims?"

Article 6674h, Vernon's Civil Statutes, in part, reads as follows:

"All contracts proposed to be made by the State Highway Department for the improvement of any highway constituting a part of the State Highway System or for materials to be used in the construction or maintenance thereof, shall be submitted to competitive bids. ..."

The applicability of this article to contracts for completion of work remaining to be done under a defaulted contract has been previously ruled on by this office. Attorney General's Opinion No. O-3361 (a copy of which is enclosed) reads in part as follows:

> "Analysis of the instant situation reveals that the contract was originally let and entered into under the authority of and in compliance with the applicable statutory provisions, bond in the amount of the contract being furnished by the American Bonding Company. Although the contractor has defaulted the State is fully protected by the bond and there is no occasion for the submission of competitive bids as required under Article 6674h, supra, before arrangements are entered into for the completion of the project. The Highway Department is authorized by Item 8.7 of the contract specifications to assume completion of the contract in whatever manner is acceptable under the existing circumstances. No contrary provision appears in the statutes and no method of procedure is there suggested. Article 6674h having already been complied with and the safeguards provided in that and the succeeding articles having already been brought into existence there would appear to be no necessity for the remission of competitive bids." (Emphasis added throughout.)

Therefore, in conformity with this prior opinion, the answer to your first question is in the affirmative.

In regard to your second question, we are unable to find any statute or court decision which would, under the instant facts, as a matter of law require the State to accept the proposed contract with Mr. Leslie as outlined in your letter; consequently, the answer to your second question is in the negative.

The answers to your third, fourth and fifth questions depend largely upon the provisions of the original contract with the Stone Construction Company. Item 8.7 of the contract specifications provides that in the event of abandonment of work or default of the contract by the contractor, the Highway Department may take over the prosecution of work, appropriate or use any and all material and equipment on the ground as may be suitable, and enter into an agreement for the completion of the contract according to the terms and provisions thereof, or use such other methods as in the opinion of the Engineer may

be required for the completion of the contract in an acceptable manner. It is our understanding that the Bonding Company consented to the terms and conditions of that contract including Item 8.7 of the specifications. There is no doubt that the contract gives the State the right to complete the work called for in the defaulted contract free from the exercise of any control on the part of the Bonding Company, and if the Engineer deems it necessary, the State can reasonably contract for the completion of such work with or without the consent of the Bonding Company. However, in completing such work, whether by doing it itself or by contracting to have it done, the State is bound by the general rule of law that in contracts of this nature, where the original contractor abandons a contract, the owner of the property is required to minimize the damage occasioned by the abandonment of the contract and use reasonable diligence to protect the sureties on the bond. Hillyard v. Crabtree, 11 Tex. 264, 62 Am. Dec. 475 (1854); Mass. Bonding & Ins. Co. v. Davis, 274 S.W. 230 (Tex. Civ. App. 1925, error dism.); City of San Antonio v. Marshall & Co., 85 S.W. 315 (Tex.Civ.App.1905, error ref.); Mills v. Paul, 30 S.W. 558 (Tex.Civ.App. 1895); Houston & T.C.Ry.Co. v. Mitchell, 38 Tex. 85 (1873).

We are not unmindful of the case of Detroit Fidelity and Surety Co. v. Pippins and Clarkson, 47 S.W.2d 886 (Tex.Civ. App. 1932) which applied the above general rule to the facts before that Court and relieved the surety from all liability over and above that which it would have incurred if the State had made the contract tendered. However, in that case the State had arbitrarily refused the proposed contract with the contractor tendered by the surety and then immediately thereafter entered into a contract with that same contractor under much more onerous terms than the originally tendered contract. The holding in that case is limited to the particular fact situation presented in the case and should not be taken as holding that the surety can, by merely tendering a proposed contract and willing contractor, thereby limit its liability in every case where the State refuses to accept such contract or contractor. Our position is strongly supported by the decision in Detroit Fidelity & Surety Co. v. Moberly, 52 S.W. 2d 298 (Tex. Civ.App.1932) modified Detroit Fed. & Surety Co. v. State, 124 Tex. 145, 76 S.W. 2d 492 (1934) where the State had refused a proposed contract and willing contractor tendered by the surety, and later contracted with another person to complete the work at a greater cost than under the terms of the contract tendered by the surety. That court overruled the surety's contention that its liability was thereby limited to that amount for which it would have been liable if its proposed contract had been accepted. Therefore, in answer to the third question, it is

the opinion of this office that the State's refusal to enter into the proposed contract with Mr. Leslie as proposed by the Bonding Company for completion of the defaulted contract does not necessarily release the surety from further liability to the State under its bond nor does such refusal, of itself, reduce such liability. Completion of the Stone Construction Company's contract in a manner which would unreasonably increase the cost of such work would, however, limit the surety's liability as above discussed. Your fourth question is answered in the affirmative; and the fifth question in the negative.

In regard to your sixth question, Attorney General's Opinion O-4089 (a copy of which is enclosed) sets out the order of priority for the allocation of funds withheld by the Highway Department for the satisfaction of labor and materialmen's liens as provided in Articles 5472a and 6674m, V.C.S., when the cost of completing a defaulted contract will be greater than the original cost on the contract. In such a situation, Opinion O-4089 holds that the State should retain the money withheld until after the completion of the work required under the provisions of the defaulted contract. Such funds should then be allocated, first, to the payment of all claims of the Highway Department against the original contractor for materials furnished him prior to the abandonment of said contract; second, to liquidated damages arising under the provisions of said contract, and any balance then remaining to the difference in the contract price with the original contractor and the cost of completing the work with the subsequent contractor.

It is our opinion that should the work be completed on a defaulted contract, at a cost equal to or for less than the original contract price, the funds withheld under the provisions of Articles 6674m and 5472a should be retained until the ultimate completion of the work required under the original contract, and said funds then should be used first to satisfy any claims of the State against the original contractor, and then to satisfy laborers' and materialmen's claims properly filed with the Highway Department.

In the instant case, to hold otherwise would be to defeat the purpose for which Article 5472a was enacted, i.e., to provide an additional security to those who furnish labor or material for public improvements. Texas Co. V. Schriewer,

38 S.W.2d 141 (Tex.Civ.App. 1931) (modified on other grounds, Tex.Civ.App.53 S.W.2d 774); Joe Higgins Lumber Co. v. Goosecreek Independent School District, 133 S.W.2d 207 (Tex. Civ.App. 1939), Huddleston and Work v. Kennedy, 57 S.W.2d 255 (Tex. Civ.App. 1931).

The application of this opinion, of course, is limited to the specific fact situation presented in your letter.

Yours very truly,

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Encls.