

Opinion No. 51-5436

October 2, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Burton G. Dwyre State Highway Engineer Santa Fe, New Mexico

{*141} This is in reply to your letter of September 10, in which you requested an opinion from this office as to whether in the case of the particular contractor you mentioned, the State Highway Department may return a portion of the 15% retainage being withheld from his contract. You point out that the work has not yet been completed, but that very unusual circumstances have arisen, in the inability of the contractor to procure certain necessary materials because of national defense requirements. You also ask whether the State Highway Department may grant a 'partial acceptance' of the work.

First of all let us consider the retainage provision of your Standard Specifications, which are by reference included in the contract and bond. Section I, I-6 of these Specifications provides as follows:

"From each current estimate 15% of the total amount shall be deducted and held by the State until 'acceptance and final payment' and the contractor will be paid the balance . . ."

It is obvious that this language provides that 15% of each progress estimate shall be withheld by the State, and that none of this amount is to be given to the contractor until the time of 'final payment'. What must be accomplished before final payment is made is clearly set out in Section I, I-2 of the Specifications. Therefore, before the contractor can be paid a portion of the retainage sum, it will first be necessary for the Department to waive the retainage provision of the contract, Section I, I-6 of the Standard Specifications. If the Department wishes to make such waiver, it is my opinion that it could properly do so without incurring any liability to unpaid materialmen, or laborers, or the bonding company. Inasmuch as the original contract was undoubtedly solemnized by seal, I suggest that any such waiver provision also be made under seal. Further on in this opinion I will discuss the statutory authority for paying a portion of this retainage sum to the contractor. First, however, I will elaborate further on the waiver of the contract retainage provision and the statement I have made above on the liability to unpaid laborers, materialmen and the bonding company.

In Attorney General Opinion No. 5395, dated August 6 and addressed {*142} to your office, I pointed out the nature and portent of a retainage provision phrased in general language such as we find in Section I, I-6 of the Standard Specifications. I stated that such a provision gave no lien or vested interest in such retainage sum to unpaid claimants. On page 4 of that opinion, I said:

"Funds retained under general provisions calling for retention of a stipulated percentage of the contract price provide not only funds to be used in the event of the contractor's default in his obligations to the body, but funds out of which the contractor's surety may be paid in the event the latter is compelled to make good defaults of the contractor or to complete the contract upon his abandonment of it."

In the case we are now considering, I understand that the Surety Company will consent to a release of a portion of the retainage fund to the contractor. If the surety gives such consent, he cannot thereafter claim the portion of the retainage sum released. It is further my opinion, as I have indicated above, that the language of the retainage provision makes no specific provision for laborers and materialmen. The contractor's bond, on the other hand, is specifically conditioned upon the payment of all just claims for labor performed and materials supplied. Therefore, the laborers and materialmen would have a specific remedy for the payment of all just claims, by bringing action upon the bond.

In addition, in my opinion there is further authority for waiver of the retainage provision of the contract. In Attorney General Opinion No. 5395 the question considered was whether a waiver could be made of the provision of a contract which stated that final payment would not be made to the contractor until all laborers and materialmen had been paid. Quoting from 43 Am. Jur. 801, I said on page 3 of that Opinion:

"In the absence of any controlling legislative provision, where the retention by public authorities of moneys due the contractor until laborers and materialmen have been paid **is a matter of contract** between the contractor and the public body, it seems clear that the public authorities may waive the provision and pay the contractor without incurring any liability to the laborers, materialmen and subcontractors." (Emphasis supplied.)

It is my opinion that the same rule should apply to the waiver of the retainage provision of a contract. The question therefore resolves itself as to whether there is any such 'controlling legislative provision' in the New Mexico Statutes which would prevent a waiver of the retainage provision of the contract and the payment to the contractor of a portion of the retainage sum. I will consider next this question.

§ 58-237, N.M.S.A., reads in part as follows:

"Partial payments may be made on any contract for highway improvement, under the provisions of this Act as the work progresses. Progress estimates shall be based on materials in place and labor expended thereon, but no more than 85% of the contract price of the work shall be paid in advance of the full completion of such contract and its acceptance by the State Highway Engineer . . ."

This section is controlling and must be complied with. It is clear, however, in my opinion, that its requirements are much more liberal than those found in Section I, I-6 of the Standard Specifications. It does not require that 15% be retained from each progress estimate, but merely that nothing in excess of 85% of the total contract price be paid the

contractor before full completion and acceptance of the job. I am given to understand {*143} that in the instant case, paying the contractor \$ 50,000 of the retainage sum, in addition to what he has already received, will bring his total payment to 76% of the contract price.

To summarize, in my opinion a waiver of the retainage provision of the contract may be made by the Department. Also, a portion of the retainage sum may be paid to the contractor, provided that such a payment does not raise the total sum paid to a figure in excess of 85% of the total contract price for the project. It is further my opinion that a 'partial acceptance', such as you mention, is not authorized by either your contract or the statutes, and should not be made. Also, in view of what I have said above, it is in no wise necessary.

I hope that this opinion answers all your questions on this subject.