Opinion No. 52-5607

November 26, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. L. D. Wilson Administration Engineer State Highway Department Santa Fe, New Mexico

*{*319}* You have asked the opinion of this office in your letter of January 8 as to whether you may legally issue warrant for the payment of a claim of Felipe Alderete in the sum of $ 850.00. The facts concerning the claim appear to be that on May 9, 1950, the State Highway Commission entered into an "Agreement For Material Pit" with Felipe Alderete *{*320}* and Flora T. Alderete, his wife. By this agreement, the Alderetes agreed to ingress and egress and to the right of the removal of surfacing materials from their land for the use on State Road 42 known as Federal Aid Project S-36(2). This agreement provided for "payment for the materials to be made at the rate of three ($ .03) cents per cubic yard upon completion of the construction and the quantities for which payment shall be made are to be based upon the contractor's final estimate."

This agreement was executed by the Commission by virtue of the provisions for such agreement in the eminent domain statutes, Sec. 58-207(e), 25-915, and 25-901, N.M.S.A., 1941, and standing alone can only be construed as an agreement by the State Highway Commission to pay for the property taken or to be taken from the Alderetes.

On July 19, 1950, after study of the plans and specifications in which this agreement for material pit was included, T. J. Lizar, Jr., and Tom H. Donaldson submitted their proposal to the State Highway Department and secured the contract for the construction of Project S-36(2). Their proposal schedule included a price of 45 [cents] per ton for stabilized surface course, and estimated 50,530 tons. This contract incorporated the plans and specifications as part thereof, and the specification F-1 provided:

"To assist the Contractor in locating materials for surfacing or concrete aggregate the Engineer may designate on the Plans the location of acceptable material but in so doing does not obligate the State in any manner. The Contractor is not released from furnishing the materials or of any expenses connected therewith.

The Contractor shall assume all responsibility for purchase price of surfacing material and concrete aggregates and shall make payment for same directly to property owner on whose land material pit is located. This purchase price shall be included in unit price bid for surfacing material or concrete."

The contract has been completed and accepted by the State Highway Engineer and a complete disbursement of the funds has been made, except for the amount of $ 850.00 retained until settlement of the Alderete claim. The contractors' final estimate has been

received. It appears, however, that although this purchase price was included in the unit price bid in the contractors' proposal, the contractors did not make payment direct to the property owner, nor was any arrangement whatsoever made between the contractors and the Alderetes. On the contrary, the Alderetes looked to the State Highway Commission for payment under their agreement, and the contractors certified to the State Highway Commission that all labor and material claims for which they were obligated had been paid, and denied any agreement with Alderete for the payment of the materials and that the bonding company, assuming this a disputed claim, has refused to assume responsibility until it has been adjudged a legal liability of Lizar and Donaldson.

In Opinion No. 5395 rendered your office on August 3, 1951, involving the same contract, I concluded that the provision for retention of funds was for the protection of the State and the contractors' surety in the event of the contractors' default and to assure completion of the contract in the event of its abandonment by the contractors, and that the State had no obligation to laborers and materialmen and subcontractors with reference to the retainage monies. In this case, however, the Alderetes did not file a claim within the 90 days required by Sec. 6-514, N.M.S.A. 1941, so as to permit their recovery against the bonding company as a materialman, nor are there now any outstanding claims for which the bonding company might be liable. It is doubtful if the Alderetes could recover against the contractors or their *{*321}* bondsmen. Their agreement was with the State Highway Commission.

The contractors, however, had not complied with specification F-1 above quoted where he had agreed to make payment directly to the property owner for materials used, and had left the State with this outstanding liability to the Alderetes because of his failure to so comply. There is little question that in such a situation the State could deduct the amount of its liability from the contract price as in ordinary building contracts. 17 C.J.S. 834 states:

"The amount of compensation to which a builder is entitled may be subject to deductions or offsets in favor of the owner for expenses incurred or damages sustained by reason of the builder not performing in accordance with the terms of the contract."

and provision for this eventuality was made by Sec. I-6 of the specifications which were part of the contract, and which reads:

"* * * From each current estimate 15 percent of the total amount shall be deducted and held by the State until 'acceptance and final payment,' and the contractors shall be paid the balance, unless the **engineer should elect to withhold or otherwise apply such payment because of some default by the contractor in complying with the terms hereof.**

I conclude, therefore, that payment may be made direct to the Alderetes by the State, based on the contractors' final estimate for the materials used on this project at 3 [cents] per cubic yard and that the warrant at present made payable to the contractors in this

sum may be cancelled and a new warrant issued to the Alderetes in payment of this claim.