

## **Opinion No. 58-147**

July 15, 1958

**BY:** OPINION OF FRED M. STANDLEY, Attorney General

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

### **QUESTION**

#### QUESTION

May the New Mexico State Highway Commission lawfully make final payment to a highway contractor on a road constructed by the said contractor when it now appears that it may be necessary to remove and replace the surface base and subbase of the highway at considerable expense?

#### CONCLUSION

Yes, unless the contractor failed to meet the standard and special specifications which constitute a part of the contract and such failure to follow said specifications resulted in the failure of the highway.

### **OPINION**

#### ANALYSIS

The New Mexico State Highway Commission informs us that on April 26, 1957, they entered into a contract for highway construction of 4.588 miles on U.S. 70 and 80 in Hidalgo County, New Mexico, known as N.M. Project F002-1 (2). The special specifications, Sec. 53 and 54, made a part of the contract, required a plastic index for the base and subbase course of 6 or less. One of the materials making up the "plastic index" was a caliche type of soil. This caliche came from the material pit selected by the Highway Commission for the use of the contractor pursuant to Articles 6.1 and 6.2 of the Standard Specifications. It was known to the Highway Department at the time that the material pit was of a marginal character and that the materials were not of the best but all tests made by the Highway Department from the pit indicated that the said pit would produce a material with a plastic index of 6 or less in conformity with the contract.

The contractor started the job using the materials from the caliche pit provided by the State Highway Department and as the job progressed numerous samples were taken by employees of the Highway Commission from the base and subbase and were sent to the Highway Department laboratory where tests were made indicating that the plastic limit was 6 or less. The contractor and the Highway Commission relied upon these tests and the highway was completed. During the construction, however, many adverse

conditions were encountered, such as unprecedented rainfall and the necessity for traffic to use the road prior to completion. Partial payments were made on the contract as it progressed and final payment was about to be made when numerous weakened portions appeared in the surface to such an extent that it is now deemed necessary to remove and replace the surface base and subbase at considerable expense. Upon evidence of this weakening, new samples were taken and new tests were made which indicate that the plastic index was considerable more than 6 in most instances.

We have been further informed by the Highway Department that in some instances the contractor apparently did not fully comply with "Sheet No. 21" which presumably deals with the processing of the caliche soil and other operations in the materials pit. We have not been informed by the Highway Department as to whether the failure to follow Sheet No. 21 resulted in the failure of this highway.

Based on the foregoing information, we are asked whether the Highway Commission may lawfully make final payment to the contractor and discharge him from liability or whether the Commission should withhold final payment and seek further damages. It is the opinion of this office that a factual determination must be made on the part of the Highway Department as to whether the road failed because of negligence on the part of the contractor in his operations at the material pit or whether, if he had conformed to the specifications, the road would have deteriorated in any event. Such a determination obviously requires an engineering study by persons qualified to make such a technical determination. This office, of course, cannot make such a determination.

As we view this question, the Highway Department is not precluded or estopped by any of its measurements or estimates made during the construction of the road. They are, however, liable to the contractor unless his failure to follow the specifications actually resulted in the break-up of the highway.