

OFFICIAL OPINION NO. 69-17, Contractor's Request for Additional Payment for \$400.00 for Roof Insulation on the Geology Storage Building, University of South Dakota, Vermillion, South Dakota

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

February 20, 1969

Alfred B. Kemper  
State Engineer  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 69-17

**Contractor's Request for Additional Payment for \$400.00 for Roof Insulation on the Geology Storage Building, University of South Dakota, Vermillion, South Dakota**

Dear Mr. Kemper:

Your request for an official opinion relating to the captioned matter has been received. Your letter of inquiry presents the following factual situation and specific question:

"Contractor requested \$400.00 additional payment for an extra one inch of roof insulation which was installed on the subject project. The specifications for the construction of the Geology Storage Building, Vermillion, South Dakota, called originally for one inch of insulation in roof, the specifications were changed, previous to bid letting, however, architects did not show the changes, calling for two one inch layers of insulation in all of the specifications, although he did on some. Contractor claims he made bid on basis of one inch of insulation but was required to install two inches at an added cost of \$400.00 to him."

"Should the \$400.00 request for insulation be paid out of the project funds?"

Your contention and arguments read as follows:

"Specifications, Page 35, paragraph 6-05, state the use of 1" insulation only and also state that 2" insulation should be bid as an alternate. This 1" insulation, the architect has stated, should have been eliminated when the roof design was changed, but was overlooked by the architect. An Alternate No. One does appear in the specification as bid, but has nothing to

do with the roof insulation. If it does not appear on the proposal form, it is not a bid item in our estimation. The plans call out 2" insulation several times on different details, and should have indicated the intent of the designer.

"General Conditions Section GC-39 covers "Disputes" and is self-explanatory. There was a decision from the State Engineer as per letter dated February 1, 1968 (copy attached). If there is any question about the payment for the additional insulation, it is our contention that the liability does not fall on the State, but is a problem that should be worked out between the architect and the contractor.

"Reference Specifications (1) Index-Alternate 1; (2) Proposal Form; (3) GC-16, **Disputes**; (4) GC-37, **Errors or Omissions**; (5) GC-41, **Mutual Responsibility of Contractors**; (6) SC-5 **Intent of Documents**; (7) SC-6 **Discrepancies** (8) 6-05 **Roof Insulation**."

I agree with your contention that the responsibility for this payment does not fall on the state, but is a problem that should be worked out between the architect and the contractor.

I have carefully researched the provisions of Chapter 65.07 and acts amendatory thereto relating to public corporation contracts and public buildings. I have, also, carefully checked the plans and specifications relating to the Geology Storage Building, Project #86601, Dated September 10, 1966, Revised March 1, 1967, and September 15, 1967, Messrs. Aslesen & Herrmann, 300 N. Broadway, Watertown, South Dakota.

I draw your attention to the case of **Schull Construction Company v. Board of Regents**, which case is reported in SD 79, 487, 113 N.W. 2d 663. On page 494 of the opinion it is written:

"While most of these statutes were also set out in the specifications, persons doing business with the state or public bodies must take notice of the scope of their powers and prescribed manner of exercise. State ex rel. Cleveland Trinidad Pav. Co. v. Board of Public Service, 81 Ohio St. 218, 90 N.E. 389, 392; Campbell Bldg. Co. v. State Road Commission, 95 Utah 242, 70 P. 2d 857, 865. The purpose of these statutes is for the protection of the public rather than that of bidders. Tri-State Milling Co. v. Board of County Commissioners, 75 S.D. 466, 68 N.W. 2d 104."

On page 10 of the Specifications, Sec. GC-1G **Disputes** provide that except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be tried by the State Engineer, etc.

In your letter addressed to the architect, under date of August 28, 1968, relating to the Change Order G-2, the architect in his letter under date of September 3, 1968, stated that he was in agreement with your contention. It appears that the contractor has not complied with GC-37 relating to **Errors or Omissions** as provided in said Specifications.

In my opinion the contractor's request for payment of an additional \$400.00 **should not be paid.**

Your specific question is answered in the NEGATIVE.

Respectfully submitted,

Gordon Mydland  
Attorney General