1976 S.C. Op. Atty. Gen. 125 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4309, 1976 WL 22929

Office of the Attorney General

State of South Carolina
Opinion No. 4309
March 24, 1976

***1 Re: Article 3, § 30, SOUTH CAROLINA CONSTITUTION**

Mr. S. N. Pearman
Chief Highway Commissioner
S. C. State Highway Dept.
P. O. Box 191
Columbia, South Carolina 29202

Dear Mr. Pearman:
This letter is in response to your request for an opinion as follows:
'Does the above-cited constitutional provision [Article 3, § 30] act as a complete bar to the Highway Department's paying any sums to a contractor where it has been determined that the Highway Department is otherwise liable under any one or several of the following legal theories:
(a) Mutual mistake;

(b) False misrepresentation;

(c) Breach of implied warranty; or

(d) Unjust enrichment?'

Article 3, § 30, reads as follows:
'The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrection.'

The South Carolina Courts have not spoken on effect of Article 3, § 30, on construction contracts. The cases in South Carolina that address themselves to Article 3, § 30, of the CONSTITUTION concern 'payments under any contract not authorized by law,' e.g., Lyon v. Patterson, 102 S.C. 525, 87 S.E. 306 (1919), or are cases involving an increase in an official's compensation, e.g., Bynum v. Barron, 227 S.C. 339, 88 S.E.2d 67 (1955).

It is apodictic that the prohibition of Article 3, § 30, is aimed at the giving of gratuities, the making of payments to public officials or contractors beyond that which they are entitled to by law or a valid contract, e.g., Blakeslee v. Water Comrs., 139 A. 106 (Conn. 1927).

A reading of Article 3, § 30, quickly determines that the term 'extra compensation' must be defined.

In Weston v. State, 286 N.E. 197 (N.Y. 1933), the Court said:
'Extra compensation is compensation over and above that fixed by contract for work agreed to be done.'

See also, T.J.W. Corporation v. Bd. of Higher Education of City of New York, 251 App. Div. 405, 296 N.Y.S. 693 (1937).

Other courts have defined 'extra compensation' substantially the same. Extra compensation is compensation in addition to, in excess of, or larger than the compensation prescribed by law or settled by contract. McGovern v. Mitchell, 63A 433 (Conn.). Extra compensation is any sum in addition to the contract price, though the value of the work is in excess of the amount so paid. Carpenter v. State, 39 Wis. 271.

The basic principle can be formulated and stated as follows:
No additional sums can be paid over and above the contract price for work agreed to be done under the contract.

You have asked what effect Article 3, § 30 has upon the above cited legal theories where the Department is otherwise liable; this opinion, therefore, is not in any manner based upon factual determination nor does it make any conclusions as to issues of fact.

***2** A contract founded upon mutual mistake may be defined as:
A contract founded upon a condition economically impractical of performance because of the assumption of the existence of a fact not known to both parties at the time of the instrument.

McClintock on Equity, § 96 (1948); 27 Am. Jur. 2d, Contracts, § 31, et seq. (1966); cf. South Carolina Code 10–2.302 (1962). It is obvious that any request for additional sums based upon mutual mistake is a request for additional funds for work agreed to be done under the contract and concerns itself with economic possibility. Weston v. State of New York, supra, is directly on point when it holds that there is no moral or equitable obligation to give public money to disappointed contractors. See also Annot., 88 A.L.R. 1223 (1933, Supp. Vol. 1–4). Article 3, § 30, bars any recovery on the theory of mutual mistake.

Unjust enrichment is an equitable theory defined as follows:
Unjust enrichment is a modern designation for the older doctrine of quasi contracts and means that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity. Restatement, Restitution, § 1, et seq.

Here again to allow the state to pay a sum because of unjust enrichment would be to admit that work was agreed to be done under the contract but that the cost of such was underestimated. Again the Weston principles apply. Article 3, § 30, bars any recovery on the theory of unjust enrichment.

The next legal theory involves 'false representation.' This is defined as:
A false representation, in order to be actionable, must consist of a statement of fact or conduct which is untrue, such statement must have been made with the intent to defraud and for the purpose of inducing another to act upon it, and he must have relied upon such statement or conduct and must have been induced thereby to act to his injury or damage.

37 Am. Jur. 2d, Fraud and Deceit, § 41, et seq.

The case law in this area seems to be that Article 3, § 30, might not apply in misrepresentation. In State v. Hartford Accident & Indemnity Co., et al., 70 A.2d 169 (Conn. 1949), the court held that a judgment for damages against a state on

the ground of misrepresentation by the State Highway Department is not obnoxious to a constitutional provision such as Article 3, § 30. In Cauldwell-Wingate Co., et al. v. State, 12 N.E.2d 443 (N.Y. 1938), the court allowed recovery when the contractors' loss was occasioned solely because of the state; the state had misled the parties as to foundation of contract.

If the facts of a case show that the state was solely at fault and misled the contractor by false representation. Article 3, § 30, might not apply.

The last legal theory of concern is breach of implied warranty. Some courts have used this theory interchangeably with misrepresentation, e.g., Furton v. City of Menasha, 31 F. Supp. 568 (1947); Chris Nelson & Son, Inc. v. Monroe, 60 N.W.2d 182 (1953). However, a close reading of the cases shows that misrepresentation concerns extra compensation for work contemplated under the contract, while breach of warranty contemplates compensation for extra work.

***3** In Maney v. City of Oklahoma City, 300 P. 642 (1931), the plans and specifications set forth a maximum amount of rock to be excavated; during the work, the contractor was required to remove a great quantity of rock. The Court found that the contract warranted a certain amount of rock to be removed and that anything additional would be extra work under the contract.

The two cases which best distinguish misrepresentation and breach of warranty are Wunderlich v. California, 423 P.2d 545 (1967) and E. H. Morrill Company v. California, 423 P.2d 551 (1967).

Wunderlich was an action upon alleged breach of warranty with respect to the source of on-site material for use by contractor. The Court found that the contract plans and specifications did not warrant the conditions so as to allow payment for extra work. The work performed by the contractor was under the original contract.

In E. H. Morrill Company, the claim was based upon misrepresentation. The Court pointed out that in Wunderlich there was no positive assertion of fact as to conditions. In E. H. Morrill Company the state made positive assertions and represented working conditions to be considered in bidding.

These conditions were apparently false. The Court in E. H. Morrill Company said false representations would be actionable.

In summary, to have a breach of implied warranty the contract and specifications would have to impliedly specify the quantity, type and character of work contemplated and the bid would have to be based upon such. If the quantity, type and character of work required is changed, then the contractor could apply for compensation for extra work. It is important under implied warranty to recognize that the contract must set forth well defined and positive limitations on what is required before such a theory is applicable. When the contract gives indefinite conditions and thereby delegates the responsibility to the contractor to determine the amount of work necessary, the theory of implied warranty does not apply. Whether or not an implied warranty has been made as to quantity, type and character of the work to be performed is a question of fact which must be determined in each case.

Article 3, § 30, does not apply to a theory of implied warranty based upon my conclusion that such a theory is merely another name for a contractor claiming for extra work outside the original contract and as defined in Carolina Mechanical Contractors v. Yeager Construction Co., 261 S.C. 1, 198 S.E.2d 224 (1971).

Very truly yours,

Daniel R. McLeod
Attorney General

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