

1977 S.C. Op. Atty. Gen. 58 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-55, 1977 WL 24397

Office of the Attorney General

State of South Carolina

Opinion No. 77-55

February 11, 1977

*1 TO: Mr. William D. Leeke
Commissioner
South Carolina Department of Corrections

QUESTIONS PRESENTED:

- 1) May the South Carolina Department of Corrections renegotiate certain contracts for the design and construction of regional correctional facilities to include within the original contracts provisions allowing for design of prototypical facilities on a scale twice as large as the original contracts called for?
- 2) In the event the Department cannot legally renegotiate its existing architectural contracts, what architectural fees must be paid the architectural firms at the termination of the contracts?

AUTHORITIES CITED:

- 1) Act No. 237 (1975).
- 2) § 1-455, CODE OF LAWS OF SOUTH CAROLINA, 1962, as amended.
- 3) 64 AM.JUR., 'Public Works and Contracts.'
- 4) 6 C.J.S. 'Architects.'
- 5) [Beacham v. Greenville County, 218 SC 181, 62 S.E.2d 92 \(1950\).](#)

DISCUSSION:

The South Carolina Department of Corrections (hereinafter the Department) has three existing contracts with three different architectural firms for the development of regional correctional facilities. The contract with Lockwood Greene Engineers, Inc. was signed on or about February 19, 1975, and called for the firm to master plan the overall site and design the buildings to be initially constructed for a Regional Correctional Center in Spartanburg, South Carolina. The contract with Freeman, Wells and Major was signed on or about February 19, 1975, and called for the firm to design the Regional Correctional Center in Greenville, South Carolina. The third contract was signed on or about November 25, 1974, with Lucas and Stubbs Associates Ltd. and James C. Hemphill, Jr. and called for the firms to render professional design services for the Upper Savannah Regional Correctional Center in Greenwood, South Carolina. After the architectural/engineering firms had begun work on each of the regional facilities but prior to reaching the Bidding or Negotiation Phase of the projects, the Capital Improvement Bond Funds appropriated for these projects was frozen by Act of the General Assembly. Act No. 237, Part II, § 20 (1975). As a result of the bond freeze, the Department issued a stop work order to each of the architectural/engineering firms in January, 1976. During the freeze period, the Office of Criminal Justice Programs, on behalf of the State, had a study of the State's long term correctional facility needs conducted by the firm of Stephen Carter and Associates. The study findings and forecasts, which show, in part,

a dramatic increase in inmate population over the next ten (10) years, have necessitated a drastic change in the Department's plans for capitol punishments in that the current plans are obsolete even prior to their complete implementation.

The Department, with Budget and Control Board approval, must implement the ten-year capital plan recommended by Stephen Carter and Associates in order to relieve the severe inmate over-crowding conditions at the State's correctional facilities. Phase I of the Ten-Year Plan calls for the development of three prototypical correctional projects—a maximum security facility, a medium/minimum security facility, and a pre-release/work release facility. The prototypical design will be the master design to be used for the building of all of the maximum security, medium/minimum security and pre-release/work release facilities. The existing contracts do not call for prototypical design. Also, these prototypical projects are to be approximately twice as large as those envisioned under the existing contracts. The question has arisen as to whether the existing contracts can be renegotiated, awarding the design of a prototypical project to each of the firms. After reviewing the situation, this Office is of the opinion that the contracts cannot be renegotiated because the subject matter of any architectural/engineering contracts awarded under Phase I is materially different from the subject matter of the existing contracts. Section 1-455, CODE OF LAWS OF SOUTH CAROLINA, 1962, as amended, requires any State agency selecting an architectural or engineering firm to comply with the following procedure:

*2 A description of the proposed project and required services shall be developed by the agency and published at least once in one or more newspapers of general circulation throughout the State. The publication shall request the submission of a resume of qualifications by a specified date from interested architectural or engineering firms. The date for submission shall be not less than fifteen days after publication of the notice.

In addition to newspaper publications, the project description and request may be mailed directly to architectural or engineering firms; provided, however, that all eligible South Carolina firms shall be included in the mailing.

Any attempt to renegotiate the existing contracts would be in violation of § 1-455 because the prototypical projects and the services required therefor would not have been advertised nor would other firms have had an opportunity to submit proposals on the prototypical projects. See: 64 AM.JUR.2d, 'Public Works and Contracts,' § 80. Consequently, this Office is of the opinion that the three existing contracts may not be renegotiated.

All that remains to be discussed is the compensation due the firms as a result of the termination of the contracts. Since these contracts are being terminated without fault on the part of the architectural/engineering firms involved, the firms are entitled to be paid for the work they have performed based on the terms set forth in the contract. Therefore the work performed under each contract must be considered separately. The Standard Form of Agreement Between Owner and Architect executed by Lucas and Stubbs Associates Ltd. and James C. Hemphill, Jr. for the design and construction of the Upper Savannah Regional Correctional Center sets architectural/engineering fees at 6.22% of construction costs ranging from \$1,800,000.00 to \$2,200,000.00. The estimated construction cost for the project is \$1,900,000.00. This figure represents the estimated cost agreed to by the Department and the figure has not been revised. Paragraph 6.1.2 of the contract provides a scale for the payment of fees based on the percentage of work performed under the contract. In the Upper Savannah Project, the architectural/engineering firms, as their invoices to the Department show, have completed 15% of the Schematic Design Phase of the contract. Therefore, the firms should receive \$17,727.00. This figure is exactly what the firms have been paid on the project. Therefore, there is no more money due and payable to the two firms.

Freeman, Wells and Major's Standard Form of Agreement Between Owner and Architect sets architectural/engineering fees at 6.27% of construction costs estimated to range from \$1,500,000.00 to \$1,800,000.00 for the construction of Oaklawn Regional Correctional Center at Greenville. The initial cost estimate for construction was \$1,200,000.00. Of the original work required, Freeman, Wells and Major had completed the Construction Documents Phase or 75% of the work and are entitled to 75% of their total fee based upon the \$1,200,000.00 construction estimate or \$56,430.00. In addition to the initial construction estimate, the firm estimated that another \$978,385 would be required to add an administration building and service buildings to Oaklawn. The second estimate was made with the consent of the Department and approved by the Department and the billing statements of the firm, they have completed through the Design Development Phase and are entitled to 35% of their fee based on a percentage

of 6.22 of a construction cost of \$978,385.00 or \$21,299.44. The total fee owed by the Department to Freeman, Wells and Major is \$77,729.44. In that this is the total the firm has been paid to date, the Department owes them nothing further.

*3 Lockwood Greene Engineers, Inc. executed a Standard Form of Agreement Between Owner and Architect setting the fee for services at 6.2% of the estimated construction cost of the Appalachian Regional Correctional Center, which original estimate was \$1,900,000.00. However, in January, 1976, Lockwood Greene increased their construction cost estimate to \$3,173,813.00. This was done without consent of or knowledge on the part of the Department. Courts have repeatedly held that where actual construction costs far exceed estimated costs the architect cannot claim compensation based upon the excessive cost since it is brought about by his own error. 6 C.J.S. Architects 36.

A case decided by the Supreme Court of this State, Beacham v. Greenville County, 218 SC 181, 62 S.E.2d 92 (1950), supports the proposition cited above. The facts in Beacham were as follows:

An architect contracted to design the remodeling of the Greenville County Courthouse for a fee based on 6% of the construction cost (which cost was not estimated in the contract) plus an initial payment of \$3,600 for preliminary plans. The General Assembly later appropriated \$400,000 for the project, and the architect not surprisingly estimated it could be constructed for that figure. However, when the bids were received the lowest bid was \$863,000, and the project was abandoned. The architect contended he was entitled to a fee based on 6% of the low bid and sued to collect it.

The Court held, first, that the architect was not entitled to a fee based on the low bid (\$863,000) because that bid was excessive; and second, that neither was he entitled to a fee based on the estimated \$400,000 because the project could not be built for that sum and the plans were worthless to the county.

The Court stated, 'Where an architect is employed to prepare plans for a building to cost not more than a certain sum, or on condition that the building can be erected for a certain sum, it has usually been held that the architect is not entitled to compensation unless the building can be constructed for the stipulated amount.' And the Court went on to observe that 'where an architect is employed by the State or by a political subdivision thereof, it has generally been held that he may not recover compensation for preparing plans for a structure which will cost more to erect than such government unit is permitted by law to expend for the purpose.'

Applying this case law to the Lockwood Greene situation, the Department could perhaps go so far as to say that the firm was entitled to no fee since their estimated construction costs has risen from \$1,900,000.00 to \$3,173,813.00 and since the Budget and Control Board has, in essence, withdrawn its approval for construction of the Appalachian project. Of course, while the 'no fee' position is legally supportable and might be resorted to if litigation ensues, the more reasonable position would be to allow a fee based upon the \$3,173,813.00 estimate since the Department tacitly approved this increase by paying architectural fees based on the revised estimate. According to the information furnished this Office, Lockwood Greene has finished approximately 88% of the work required under the Construction Documents Phase.

*4 Therefore, the firm is owed 88% of 75% of 6.2% of the construction cost estimate of \$3,173,813.00 or \$129,872.42. This is what they have been paid to date and are due no more.

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