STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

December 6, 1977

ATTORNEY GENERAL OPINION NO. 77-381

Mr. Donald E. Martin
City Attorney
Ninth Floor - Municipal Office Building
One Civic Center Plaza
Kansas City, Kansas 66101

Re: Cities--Contracts--Competitive Bidding

Synopsis: A claim of $14,957.34, representing a cost increase of 65.8% over the amount bid for the project through a competitive bidding process, and representing a claim for payment for substantial work in excess of that called for by the contract, should not be honored by the city either as based on an express contract or as based on implied contract.

* * *

Dear Mr. Martin:

You request our opinion whether the City of Kansas City, Kansas, may, under the facts and circumstances related here, pay a claim of $14,957.34 which has accrued on a public improvement project.

You advise that on April 7, 1977, the city received bids on Community Development Project No. 48B, the construction and reconstruction of sidewalks, curbs and gutters on Grandview Boulevard, North 14th Street, North 16th and 17th Streets. On April 14, 1977, the board of city commissioners accepted a bid in the amount of $22,729.00 as the lowest and best bid. During the course of the project, additional costs, totalling a 65.8% increase, were incurred, as a result of various changes which were authorized verbally by the city's field representative during construction, which increased the scope of the project. These additional costs,

you advise, were for additional work; the cost of work specified in the original contract was not increased. The additional work was required, you advise, because of errors found in previously completed field work notes, the failure of the original field study to comply with state statutory requirements regarding ramps for the handicapped, and a conflict which was discovered only immediately before initiating the project, with a proposed project of the Water Pollution Department of Kansas City, Kansas. Upon completion of all the work, a change order, no. 1, in the amount of $14,957.34 was submitted by the capital improvements division of the Department of Community Development.· Prior to submission of the change order, the project underwent final inspection and was accepted, on June 24, 1977. No written change orders were processed prior to final inspection.

You advise that it is the opinion of the coordinator of the capital improvements division and of the acting city engineer that the workmanship was of excellent quality, that work was performed at prices equal to the unit prices actually bid, and that due to increased labor, equipment and materials costs, the additional work was done at a realistic and reasonable cost.

The question which you raise is whether authorization of a change order which so extensively increases the amount of an original contract may be construed to violate Charter Ordinance No. 72 of the Code of the City of Kansas City, Kansas, exempting the city from K.S.A. 13-1017 and providing substitute provisions therefor. You refer to an opinion by Attorney General Robert Londerholm, dated Ocober 4, 1966, appearing at p. 77 of Vol. 5, Opinions of the Attorney General, concerning the necesssity of competitive bids for construction of an extension of a facility being built with the proceeds of industrial revenue bonds, at a cost equal to or more than that of the original facility, which was not yet then completed or accepted by the city. It was argued that construction of the extension could be authorized by a change order and the cost negotiated. The Attorney General concluded that "the requirements . . . relating to advertising for bids and public letting of contracts are mandatory when additions to public improvements of the size and magnitude as here contemplated are to be constructed." You advise that it is your view that this principle is controlling, and that Charter Ordinance No. 72 was violated by the actions of the city field representative in verbally authorizing such extensive work to be done, without resort to the competitive bidding process therefor.

As indicated above, the additional cost totals 66.8% of the original contract price. The amount of the additional cost, the proportion

which it bears to the original contract price, and the obvious substantial extent of additional work reflected thereby supports, in my judgment, your conclusion that the additional work should have been contracted for through the competitive bidding procedures required by Charter Ordinance No. 26 and should not have been contracted for through negotiated change orders. I concur in your judgment on this question entirely. There is authority that where additional expenditures, in themselves reasonable, are conscientiously viewed as being in fulfillment of the original undertaking rather than as a departure therefrom or substantial alteration thereof, that it would be contrary to the public interest to halt the work in order to call for new bids with respect to the additional work entailed by incidental alterations. *See, e.g., Home Owners Const. Co. v. Borough of Glen Rock*, 34 N.J. 305, 169 A.2d 129 (1961). However, I have reviewed a status report regarding the Grandview sidewalk project, enclosed with your letter, which indicates a very substantial enlargement of the quantity of work done over that called for by the contract itself. For example, sidewalk removal involved 435 square yards in excess of the 1033 square yards called for by the contract, an increase of approximately 40%, and a like increase in sidewalk replacement. Curb reconstruction was extended by over 300 per cent over the contract quantity. Tree stump removal was more than doubled over the contract quantity. These enlargements of the work done over that called for by the contract do not appear on their face to be merely incidental alterations in the work called for by the contract, but a material and substantial extension of the contract to cover work not called for by it.

However, you raise the further question, whether the city is authorized or, indeed, obligated to pay for the work which has been actually completed and accepted by the city under *Ritchie & Sons v. City of Wichita*, 99 Kan. 663 (1917), in which the court stated thus:

> "A majority of the court are of opinion that the case at bar falls within the general principle that where a municipal corporation receives a service, or property, or an improvement, which it retains and uses, common honesty requires that it make payment therefor, where the matter is not tinctured with moral turpitude nor altogether beyond the statutory power of the corporation to acquire or procure." 99 Kan. at 669.

That case did not involve any question of noncompliance with a competitive bidding procedure. In *Williams v. City of Topeka*, 85 Kan. 857 (1911), the court stated, concerning a statutory requirement that contracts be awarded to the lowest responsible bidder, in pertinent part as follows:

> "The purpose of this provision is to insure competition in letting contracts for such improvements, to protect the taxpayers and the public. . . . A contract made in violation of its requirements would be illegal . . . and such requirements are generally held to be mandatory. . . ." 85 Kan. at 861.

An amendment to or enlargement of an existing contract via a change order at a negotiated cost when the subject of the amendment or enlargement is so extensive and substantial and of such a magnitude as to require the use of competitive bidding procedures for the additional or enlarged work is an unlawful avoidance of competitive bidding procedures, and the resulting claim is void, whether based upon an express or implied contract. At 10 McQuillin, *Municipal Corporations*, § 29.41, the writer states thus:

> "If a contract required to be let on competitive bidding is let without bidding or if the requirements of the statute are not in substance complied with, it is invalid and cannot be the basis of any liability against the municipality, the general rule being that no recovery can be had on an implied contract, even though the municipality has received the benefits of the contract." [Footnote omitted.]

Although the writer indicates that not all authorities are in accord with this general rule, the Kansas courts have not, so far as my research discloses, departed from the general rule so far as regards the claim of a contractor against the city for work undertaken in violation of any applicable competitive bidding requirements.

Accordingly, in my judgment, the claim of the contractor for the additional compensation should not be honored either as a claim

based on an express contract, *i.e.*, lawfully executed change orders, or as a claim based on implied contract.

Yours truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj