

MAINE STATE LEGISLATURE

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November 16, 1973

Keith Percival, Acting State Pur. Agent

Bureau of Purchases

Martin L. Wilk, Assistant

Attorney General

Milk Contracts

This will respond to your memorandum addressed to George West dated October 31, 1973, requesting our opinion with respect to the following two questions:

"Is it legal to add a codicil to an existing contract, granting an increase in price by agreement with all successful contractors (6)?"

"Would it be more proper and ethical to cancel the contract and put out to bid again with provisions for escalation of prices? At present there is no provision for cancellation of contract in our bid terms, so how much notice should be given before cancellation?"

For the reasons which follow, it is our opinion that it would not be proper to permit an increase in the contract price by amendment. While we do not have sufficient information to determine whether it would, at this time, be proper to "cancel" the contract, if cancellation was warranted, the cancelled contract should be put out to bid again. Any provision with respect to price escalation in a new invitation for bids is a matter for the state purchasing agent's discretion.

Generally speaking, in the absence of a contractual provision calling for the payment of increased costs or expenses, or extraordinary circumstances, the state is under no obligation to reimburse a public contractor for such expenses.

"Justice and equity do not require the state or a municipality, or other public body with whom he has contracted, to reimburse a contractor for a public improvement, for increased expenses due merely to unexpected conditions encountered in the work making performance more difficult than anticipated, increased cost of materials, increased cost of labor and the like

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"In the absence of any claim of deception, inequality, or inequity, a contractor for public work is bound by the terms of his contract, and takes the risk of

all such contingencies unless provision is made in the contract to protect him against them." 65 Am. Jur. 2d "Public Works and Contracts" § 176, p. 57.

There is no provision in the contract in question relating to increased milk costs. To the contrary, the request for bids underlying the contract in question expressly provides that:

"Bid prices are to be firm prices for one year from 7-1-73 through 6-30-74."

And, paragraph 5 of the Conditions and Instructions to Bidders provides:

"Bids, amendments thereto or withdrawals of bids received after the opening date and hour will not be considered." (Emphasis provided)

Accordingly, it is clear that it would not be proper for the parties to agree among themselves to amend the contract to provide for the passing along of further milk increases.

Whether the state can "cancel" the contract presents a different question. There is no provision in the contract expressly permitting cancellation. However, paragraph 24 does offer the contractor some relief in the event of failures of performance arising from "strikes, fires, Act of God, or any other cause(s) which by reasonable diligence could not be prevented." In such cases the contractor suffers no liability for failure to fulfill his contract.

Whether an unforeseen rise in milk prices (in a contract where prices are to be firm for one year) constitutes a "cause which by reasonable diligence could not be prevented" within the meaning of paragraph 24 is not a matter resolved simply. The contractor has indicated that the rising costs of raw milk have cut its "gross margin of profit" from 6.26¢ per qt. in May to 2.72¢ per qt. in November, 1973. We have no information with respect to whether profits on other items such as cheese and cream have similarly been eaten away by rising costs or whether the contractor will suffer a net loss on the entire contract or merely receive lower profits than anticipated.

Under the circumstances, we do not have sufficient information upon which to base an opinion on the question of cancellation. We would observe, however, that the total contract to Old Tavern Farm is approximately \$145,000, and the company is evidently still making

a profit. Under the circumstances, we have our doubts whether the rising milk costs present the kind of contingency contemplated by paragraph 24.

We recognize that there is some authority for the proposition that a contractor may be reimbursed for increased costs when he or it is confronted with circumstances not contemplated when the contract was made which render performance unduly onerous. 65 Am. Jur. 2d "Public Works and Contracts" § 174, p. 55. Whether rising milk prices at some point become so high that performance of the contract could properly be characterized as unduly onerous is a matter for the sound discretion of the purchasing agent. We reiterate, however, that as long as the contractor is still making a profit, it is doubtful that performance of the contract is "unduly onerous." We also note in this connection that none of the other five suppliers of milk to the State have, to date, asked to be relieved from their contracts.

In response to your question regarding the inclusion of a clause permitting the passing on of increased costs in any future invitation for bids, it is our opinion that such a provision would be permissible during a period of extraordinary price fluctuations. However, we caution the use of such provisions and urge you to carefully consider the language of any such provision so as to avoid any problems in determining the lowest responsible bidder.

Martin L. Wilk
Assistant Attorney General

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NOT A FORMAL OPINION