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OFFICIAL OPINION NO. 77

December 31, 1952.

Mr. Walter R. Mybeck,  
Director of Public Works & Supply,  
Room 404, State House,  
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion concerning the construction of the contract now existing between the State of Indiana and the successors to Walker and Weeks, architects, in regard to the legality of certain fees paid the architects for professional services rendered in the design of Building "C" and "D" of the Indiana World War Memorial Structures. Questions regarding this same problem have been brought to my attention by the State Board of Accounts, and it is noted that the Attorney General considered them also in October and November of 1948 at the request of the Board of Trustees of the Indiana World War Memorial.

The subject contract was properly executed on September 22, 1945, and under it the architects agreed to prepare preliminary studies and drawings, make complete scale working drawings and specifications, and supervise the work after the award of contracts for the actual construction. It should be noted here that the architects' connection with the Indiana World War Memorial began in 1923 when the firm of Walker & Week was declared the winner of the national competition instituted to select suitable plans for the Memorial. Under contracts other than the one here considered, the architects designed and supervised the construction of both Building "A," the central Memorial structure, and Building "B," now used as headquarters for the Indiana Department of the American Legion.

Under the 1945 contract the architects were to accomplish the work above described for the construction of a Building "C," which was to house the national headquarters of the American Legion, and a Building "D" which was to complement and be located adjacent to the present Building "B." The preliminary studies and drawings were completed and

approved by the Board of Trustees, and working drawings and specifications were prepared.

Bids were then taken on all phases of the proposed work, and the total of the low bids as publicly opened on May 14, 1947, was in the amount of \$4,049,300.00. Since this amount substantially exceeded the appropriation of the 1945 General Assembly, which was in the amount of \$2,500,000.00, the Board of Trustees rejected all bids and employed the architects under a separate contract to make revisions. Revisions were made abandoning Building "D" altogether and changing Building "C," and new bids were taken on June 3, 1948, to bring the project well within the appropriation. Building "C" was then constructed and completed. In addition to the special payment for revision of plans, the architects were paid 60% of their contract fee based upon the amount of the original low bids and the remainder based upon the actual cost of the work. This division of fee was in accordance with the paragraph of the contract which provides that 60% of the fee shall be paid when preliminary sketches and contract drawings are completed and approved and the remaining 40% as the work progresses. The separate contract under which the revised plans were drawn supplements but does not supersede the contract here in question and is not pertinent to this opinion.

It has been suggested that the fee for preparing preliminary and working drawings should have been based upon the actual cost of the work after revision instead of upon the cost reflected by the original low bids before revision. Thus, instead of receiving 3% of \$4,049,300.00, it is suggested that the architects should have received 3% of \$2,380,952.38. The contract provision regarding the architects' fee is as follows:

"The first party shall pay the architect for his services for the entire cost of work as described in items 1, 2, 3, 4, 5, 6, 7, 8 and 9, a sum equal to 5% of such cost. It is understood by the architect that all expenses incurred in the erection and completion of such structures included in this contract and all contracts made in connection with the erection and completion of said buildings can not exceed the amount of the appropriation of \$2,500,000.00 above mentioned, and

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that all compensation to be paid the architect for services rendered heretofore or hereafter in connection with the designing, planning or erecting of said buildings is to be paid from said appropriation under the terms of this contract.

*“Payments to be paid as follows:* When preliminary sketches as described in item one (1) are completed, the trustees shall pay the architect a sum equal to one-fifth ( $1/5$ ) of the approximate fee based on agreed estimate. (20% of fee as per standard American Institute of Architects’ Contract.)

“When contract drawings are finished as described in item two (2) an additional sum equal to two-fifths ( $2/5$ ) of approximate fee based on estimate. (60% of fee as per standard American Institute of Architects’ Contract.)

“The trustees shall pay the architect the balance of the fee (two-fifths ( $2/5$ ) of entire fee) in monthly installments based upon certificates of payment issued to contractors as the work progresses.

“Final payment shall be made when work in complete.”

Payment was made to the architects of the amount equal to 3% of \$4,049,300.00 on the theory that the architects had designed a structure of that value. The project as originally designed was then abandoned, and a new project of smaller scope was substituted in its place. The architects were then paid for designing the new project under a separate contract and were paid 2% of the cost of the limited project for their supervision of the actual construction.

If this contract should be construed as giving rise to an architects’ undertaking to supply plans and specifications of a building not to cost in excess of a specified amount, then it would be my opinion that the architects were not entitled to payment based on the higher amount and perhaps were not entitled to any payment at all. On the other hand, if the contract should be construed as binding the architects to supply plans and specifications for a specified building over

a specified area, it would necessarily be my opinion that the payments were properly made.

It should be noted here that the architects were directed by the contract through the provision concerning the duties of the architects to "take all such data as the trustees or their representatives may furnish, together with such program as outlined by the American Legion or their authorized agent, and proceed to prepare preliminary studies and drawings. \* \* \*" Also the contract contains the following preamble: "WHEREAS, the Board of Trustees of the Indiana World War Memorial have adopted plans to erect three additional units or structures, two of which shall be joined together for practical use and utility, such joined units to be known as Building "C" and a similar to "B," now erected, in character and appearance, and located as originally provided for in the general plan by Walker and Weeks, Architects, and as shown and indicated by the attached diagram. \* \* \*" It is clear from the foregoing that the architects contracted to design a certain type of structure with a certain predetermined appearance and size, and that they had very little discretion left to them regarding those elements of construction that most heavily effect cost. Presumably, since the architects were mandated to design structures of a certain "character" and "appearance," they could not even specify cheaper materials in an effort to reduce costs. It must, therefore, be my opinion that the architects did not undertake by the subject contract to supply plans and specifications of a building with a limited cost and therefore did not condition their right to compensation upon the construction bids' falling within the \$2,500,-000.00 appropriated. The State received and still owns plans and specifications for a \$4,049,300.00 building, and for these plans and specifications their authors were entitled to be paid the designated percentage.

The Supreme Court of Indiana upheld a similar payment in *Weatherhogg v. Board of Commissioners of Jasper County, et al.* (1902), 158 Ind. 14, 62 N. E. 477. In that instance the County Commissioners employed an architect to prepare plans and specifications and to superintend the building of a court house, the contract providing that the plans and specifications "shall be for a building that shall not exceed in cost the sum of one hundred thousand dollars," and for the payment of an

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architect's fee amounting to 5% of the cost of the work. The architect did design a building which could have been built within the limited amount, but thereafter the commissioners ordered certain changes that raised the cost to almost \$150,000.00. It was held that the architect was entitled to compensation based upon a percentage of the higher amount in spite of the contract prohibition against exceeding \$100,000.00. Other cases in other jurisdictions both denying and affirming payments to architects under like circumstances may be found in annotations beginning at 20 A. L. R. 1356 and 127 A. L. R. 410 and in citations appearing in 3 Am. Jur. 1000 *et seq.* There seems to be no point in discussing these decisions here since they are all based upon special factual circumstances and varying contractual provisions. However, it is noted in all jurisdictions which have considered the question that the architect's rights to compensation has been upheld in each case where the plans were prepared according to details dictated by the owner, regardless of the fact that the plans when completed called for a building which would have cost more to erect than the owner expected, or was willing, to pay.

It has been suggested that since the architects here estimated the cost of the erection of Buildings "C" and "D" to be \$2,500,000.00 they should be held to the estimate given. However, the contract expressly provides in its first paragraph under "Duties of the Architect" that "the architect does not guarantee such estimate," and it should be further noted in this regard that the estimate of \$2,500,000.00 was first given by the architects in November of 1944, bids not being taken until two and one-half inflationary years later.

The appropriation act, which is Chapter 204 of the Acts of 1945, also does not invalidate this payment. Chapter 204 at Section 2, page 670 provides as follows:

"For the purposes of this act there is hereby appropriated the sum of two million five hundred thousand dollars out of the general fund in the state treasury not otherwise appropriated.

"Said appropriation of two million five hundred thousand dollars shall be expended in the construction and the creation of such structure or structures as

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provided for in this act and for any and all other expenses connected herewith or otherwise provided for herein, and any part of such amount so appropriated remaining shall be used in the beautifying and maintaining such memorial place.

“No contract shall be made in excess of the amount of the appropriation. All contracts made for any purpose under the provision of this act and all expenses incurred in the erection and the completion of such structure or structures shall not exceed the total sum of two million five hundred thousand dollars, of said appropriation. \* \* \*”

The subject contract does not violate the statutory mandate against contracts in excess of the amount of the appropriation, the total architects' fee amounting to far less than \$2,500,000.00.

In view of the foregoing, it is my opinion that the successors to Walker & Weeks were not over paid under the contract for services in preparing the plans and specifications for Buildings “C” and “D” of the Indiana World War Memorial structures, and it is my recommendation that any moneys now due the architects for subsequent services be paid.

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OFFICIAL OPINION NO. 78

December 26, 1952.

Hon. Sam. J. Bushemi,  
State Representative,  
House of Representatives,  
State House,  
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion of the following question:

“Is Chapter 240 of the Acts of 1949 applicable to special charter insurance companies?”