



**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN

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ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable D. C. Greer
State Highway Engineer
Austin, Texas

Dear Sir:

Opinion No. O-3239

Re: Authority of State Highway Department
after lapse of more than four years from
date of filing of claims under Article
5472-a and 5472-b, to pay moneys to
contractors without regard to claims
of materialmen.

We have your request for an opinion from this department upon the following question:

May the State Highway Department after the lapse of more than four years from the date of the filing of claims under Articles 5472-a and 5472-b, proceed to pay moneys to contractors without regard to the claims of materialmen?

Article 5472-a reads as follows:

"That any person, firm or corporation, or trust estate, furnishing any material, apparatus, fixtures, machinery or labor to any contractor for any public improvements in this State, shall have a lien on the moneys, or bonds, or warrants, due or to become due to such contractors for such improvements; provided, such person, firm, corporation, or stock association, shall, before any payment is made to such contractor, notify in writing the officials of the State, county, town or municipality whose duty it is to pay such contractor of his claim."

Article 5472-b reads:

"That no public official, when so notified in writing, shall pay all of said moneys, bonds or warrants, due said contractor, but shall retain enough of said moneys, bonds or warrants to pay said claim, in case it is established by judgment in a court of proper jurisdiction."

Vernon's Revised Civil Statutes, Article 5472b-1 provides for the filing of a bond by the contractor with the officials of the State, county, town or municipality, and for the release and discharge of the lien fixed upon the moneys in the hands of the official by the filing of said bond and its approval

by the proper official. This Article also provides that no action shall be brought on such bond after the expiration of six months from the date of the filing of the same.

It is the opinion of this department that the mere lapse of time will not authorize the Highway Department to release to the contractors the moneys upon which liens have been fixed by the filing of claims as prescribed by the foregoing Articles. It seems that the release of moneys is authorized only when bond is furnished, as provided by Article 5472b-1, or when satisfactory evidence is submitted and affidavits made by the contractor that all just bills for labor and material have been paid in full by the contractor. Vernon's Revised Civil Statutes, Article 5160. Mere lapse of time, though it be for more than four years, does not, in our opinion, justify the Highway Department in releasing the moneys without regard to the claims of the materialmen. It may be, of course, that as respects individual claims suits against contractor to enforce the obligation out of which the claim arises may be barred by the statutes of limitations; but the statute of limitations, in our judgment, is a defense peculiar to the contractor and one which may be waived by him, and, in any event, whether the statute of limitations has run any particular case may be a question of fact.

Your question is therefore answered in the negative.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

s/ R. W. Fairchild

By

R. W. Fairchild
Assistant

RWF:db/law

APPROVED MAY 22, 1961
s/ GROVER SELLERS
FIRST ASSISTANT
ATTORNEY GENERAL

APPROVED OPINION COMMITTEE
BY B. W. B.
CHAIRMAN