



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**PRICE DANIEL
ATTORNEY GENERAL**

July 30, 1947

Hon. T. B. Warden, Member
State Board of Control
Austin, Texas

Opinion No. V-321

Re: Whether the Board of Control is authorized under Article 5160, V. C. S., to accept a payment bond in lieu of "satisfactory evidence" that all bills for labor and materials furnished the contractor have been paid.

Dear Sir:

The basis of your request for an opinion is an interpretation of the last paragraph of Article 5160, V. C. S., which provides as follows:

"Provided further that after completion and acceptance of completed project all moneys due contractor under said contract shall be held by the State or its counties or school districts or other subdivision thereof or any municipality until such a time that satisfactory evidence is submitted and affidavits made by the contractor that all just bills for labor and material under this contract has been paid in full by the contractor."

According to your letter, you construe the provision for "satisfactory evidence" to require "receipted bills" furnished by the contractor to show that the materials and labor have been fully paid for. You further say that this interpretation results in hardship upon numerous contractors because of their inability to furnish receipted bills for every item purchased and which goes into every project. You give as an example of the hardship referred to, the following set of facts:

"A contractor purchases and pays for a car load of cement. The concrete made

from this car load of cement may go into as many projects as there are sacks of cement in the car load, and it would therefore follow that the contractor would be required to have as many receipts showing that the car load of cement had been paid for. The effect of this requirement has caused many competent contractors to refuse to bid on any State project."

In connection with the above quoted statute and related facts, you ask two questions: (1) Whether it would be possible to take a payment bond executed by a contractor as principal and a solvent surety company to protect labor and material men after acceptance of the completed project. If the payment bond is possible you ask us to prepare the necessary form for such bond. (2) In the event the use of a payment bond is an impossibility, what is the meaning of the term "satisfactory evidence" as used in the quoted part of the Article?

We shall first determine whether in any case the final payment of funds may be made to the contractor without his submitting satisfactory evidence and his making affidavits that all past bills for labor and material under the contract have been paid in full by the contractor.

In addition to offering protection to furnishers of labor and materials, this statute has been held in *Republic National Bank & Trust Company v. Massachusetts Banking & Trust Company*, 68 F (2d) 445, and *Franklin Bros. v. Standard Mfg. Company*, 78 S. W. (2d) 294, error dismissed, to operate as additional security for the surety on the performance bond. In each case the public body (being the State in the latter case) was held liable to the surety on the performance bond for payments made by it on labor and material claims where final payment was made by the public body to the contractor prior to the time allowed for filing such claims under Article 5160 and without requiring the contractor to furnish the required evidence and affidavits of satisfaction of such bills. It therefore appears that the Board of Control would be acting at its and the State's peril in releasing the funds under any circumstances other than as authorized by Article 5160. This it is not authorized to do. We do not mean to hold that a payment bond may not also be accepted; but we find no

authority to require it, nor to accept it in lieu of the requirements of Article 5160.

Since we have concluded that a payment bond cannot be substituted for the procedure under Article 5160, this brings us to your question as to the meaning of the term "satisfactory evidence" as used in the quoted section of Article 5160. In Volume 1 of Jones Commentaries on Evidence, pages 25 and 26, "satisfactory evidence" is defined as follows:

". . . By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest . . .

"That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind . . ."

While most of the authorities cited speak of "satisfactory evidence" in connection with evidence introduced in litigation, nevertheless, the definitions are to our minds consistent with the standard which should be applied by you in connection with your responsibilities under Article 5160. This same meaning has been expressed many times by the Courts. For a series of such definitions, see Words and Phrases, Volume 38, page 266, et seq.

The meaning of the term "satisfactory evidence" is broad in its scope, and as stated "can never be previously defined." It does not mean one specific kind of evidence as applied to a particular situation; it can mean other kinds of evidence -- any that "satisfies an unprejudiced mind beyond reasonable doubt." Applying these rules to the example stated in your letter, "satisfactory evidence" as used in the statute cannot be confined to a single construction as "receipted

bills." That is straining the rule -- rendering it too inflexible to embrace such situations as you have outlined. This is not to say that receipted bills are not satisfactory evidence. It is, or should be in most instances. But where circumstances are different and unusual, other evidence could be just as desirable and work no hardship upon one who bears the burden of proof. The rule is not made to lax the requirements, but is laid down as a flexible guide under which, with proper and reasonable application under varying circumstances, justice can be obtained.

Under the two decisions first referred to herein, the funds required to be held constitute a trust fund and the liability of the State arises upon a misapplication of such funds, contrary to the statute. Since the term "satisfactory evidence" is not susceptible of exact definition, it necessarily follows that the Board of Control must exercise sound discretion in each situation as it arises.

SUMMARY

1. A payment bond executed by a contractor operating under the provisions of Article 5160, V. C. S., may not be accepted by the Board of Control in lieu of satisfactory evidence and affidavits that all just bills for labor and materials have been paid.

2. "Satisfactory evidence" of such payment is such evidence as convinces the Board of Control that the obligations for all labor and material have been satisfied by the contractor.

Yours very truly

APPROVED:

ATTORNEY GENERAL OF TEXAS

Price Daniel

ATTORNEY GENERAL.

By

Charles E. Crenshaw

Charles E. Crenshaw
Assistant.

CEC:jmc