

**OPINION
61-58**

June 8, 1961 (OPINION)

COUNTIES

RE: County Roads - State Highway Department - Performance Bonds

This is in reply to your letter of June 5, 1961, concerning a highway improvement in Traill County.

You state that the State of North Dakota has let a contract with a construction company (Project No. F 267(19)) in Traill County, North Dakota. Under this contract the contractors will be using about six and one-half miles of county highway as a haul road. You ask if the performance bond that the contractors must execute will protect Traill County so that in case the contractor does not keep the road in as good condition as it was when they started work that Traill County would have recourse against the contractor on the performance bond.

We note that section 24-02-34 of the North Dakota Century Code provides:

PREPARATION OF STANDARD CONTRACT FORMS. The commissioner may prepare, adopt or amend uniform standard forms of contracts, bonds, estimates and other forms and documents deemed essential for the efficient administration of highway matters within the department."

The authorization for the highway department to require a bond is found in section 24-02-23 of the North Dakota Century Code which provides in part:

he successful bidder shall be required to furnish a suitable bond in at least the amount of the contract and with such surety as may be determined by the department and as shall be approved by it."

The form of bond adopted by the highway department and which has been executed with reference to Project No. F 267(19) provides that the contract and incorporated plans and specifications are made a part of the bond "as fully and with the same force and effect as if set forth in full herein." The bond is conditioned, among other things, upon the performance of "all the terms, covenants and conditions of said contract;" and upon the payment of "all bills and claims against the principal or any subcontractor on account of labor or services performed and all materials, equipment or supplies furnished, whether directly or indirectly arising out of the performance of said contract;"

We further note that Section 7 of the Specifications for this contract provides, among other things, that: "The contractor shall properly maintain public roads and streets, except rural State Highways, which he uses for haul roads while constructing the

project. The contractor shall be responsible for damage to State Highways due to accident or improper operation of his equipment. After the hauling is completed the contractor shall leave said haul roads in as good a condition as they were before hauling began. Such maintenance or reconditioning will not be measured and paid for directly, but will be considered incidental to the other items in the contract."

It is our conclusion, based upon the applicable statutes and the contract and bond in effect on Project No. F 267(19) that if the contractor failed to properly maintain the haul road in as good a condition as it was before hauling began, Traill County would have a cause of action against the contractor on his bond even though they are not named specifically as party to the contract. Such conclusion is, of course, predicated on the doctrine of third party beneficiary.

We are enclosing a copy of the bond and Section 7 of the Specifications in this matter for your consideration.

LESLIE R. BURGUM

Attorney General