NCHRP
National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

December 1993 — Number 28

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IC Transportation Law, IIA Highway and Facility Design, IIB Pavement Design, Management and Performance, IIC Bridges, Other Structures, and Hydraulics and Hydrology, IIIA Soils, Geology, and Foundations, IIIB Materials and Construction

Preventing and Defending Against Highway Construction Contract Claims: The Use of Changes or Differing Site Conditions Clauses and New York State's Use of Exculpatory Contract Provisions and No Claims Clauses

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Darrell W. Harp. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to *Selected Studies in Highway Law* (SSHL). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, intergovernmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board ($185.00).

APPLICATIONS

The foregoing research should prove helpful to transportation department administrators, design and construction engineers, contracting officers, right-of-way officials, and attorneys. Officials who need to understand why contruction contract claims arise and costs escalate will find this report useful, including those who must justify rising construction contract costs to department heads, governors, and legislatures. Additionally, this material should be useful as background reading to attorneys and contract administrators who process and defend against construction contract claims.

The prevailing view is that claims avoidance and defenses to excessive claims start with design and specification preparation. This report focuses on how to protect governmental agencies without unduly burdening the bidder with unpredictable costs.

CONTENTS

was awarded, a school board obtained a writ of prohibition directing the Department of Highways to cease construction on expropriated school property pending judicial determination of its right to take school property. The Department of Highways was held liable to the contractor for delays occasioned by the writ.

Therefore, whether such provisions will be enforced seems to be within the province of the fact finder.

3. A Labor Boycott, Strike, Picketing or Similar Situation, or a Shortage of Supplies or Materials Required for the Contract Work

Almost universally, public works contracts have exculpatory provisions or the contracts have been interpreted to place the burden for delays caused by a strike or a labor dispute on the contractor.[78] In *Rusciano Construction Corp. v. State of New York,*[79] a 1971 case, there was an exculpatory provision to the effect that the contractor was not entitled to delay damages due to a strike, but it could obtain an extension of time for a national strike. The court found no liability for delay damages on the part of the State for the 3-month period of a local concrete supply strike.

Care should be taken not to evoke a construction acceleration. The contract may provide that the contractor is entitled to an extension of time for certain types of strikes or labor disputes.[80] If government insists on "timely performance" when the contractor is entitled to an extension, a constructive acceleration claim may result. In *Contracting and Material Co. v. City of Chicago,*[81] a 1974 case, the city refused to grant a time extension to a construction contractor who had incurred an excusable delay due to a strike. The contract contained a no damage for delay clause. The court found that because the contractor was entitled to a time extension for the strike delay, the city's action in denying the extension and holding the contractor to the original contract completion date constituted acceleration. The court further found that for the strike or labor dispute to be a valid reason for delay it must be unforeseeable and beyond the control and without the fault of the contractor.

Most highway construction contracts provide that the contractor shall have no delay claim against government for shortage of supplies or materials. But where the contract provides for an extension of time in such circumstances, the failure to grant such an extension may result in an acceleration claim.

In *J. Devereux O'Reilly & Co. v. Police Jury,*[82] a 1923 case, a contract for highway construction provided that government would not be responsible for slow deliveries of materials, which it was obligated to furnish, and that the compensation provided in the contract should be full payment for any expense incurred by the contractor because of any suspension of work. The contractor could not recover damages for the government's delay in furnishing materials, which delay was because of transportation conditions and the inability to get the materials when ordered.

In *American Pipe and Construction Co. v. Harbor Construction Co.,*[83] a 1957 case, the city failed to furnish materials. The court held that a provision in the contract that the contractor should not be entitled to any claim for damages on account of hindrances or delays relieved the city from all liability for delays occasioned by its own act or acts of other contractors in the performance of the contract with the city.

The general rule, even where there may also be a changed or differing site conditions clause in addition to an exculpatory provision, is that the contractor bears the risk of acquiring the materials necessary to complete the contract.[84]

However, in *Nat Harrison Associates, Inc. v. Gulf States Utilities Company,*[85] a 1974 case, the utility owner failed to provide necessary construction materials that it was obligated to supply and the court determined that the utility was responsible for monetary damages to the contractor.

4. Climatic Conditions, Storms, Floods, Droughts, Tidal Waves, Hurricanes, Earthquakes, Landslides, or Other Natural Catastrophes—Acts of God

Climatic conditions, storms, floods, droughts, tidal waves, hurricanes, earthquakes, landslides, or other natural catastrophes are frequently referred to in case studies and public works specifications as "bad weather" or "severe bad weather" situations, or "acts of God."[86] The attempts to so categorize these situations under one heading is unfortunate and loses some very important, although subtle, distinctions that will be explored hereinafter in this section of the article. The most important factor with which one must deal in weather situations is the careful analysis of the facts in relation to the contract provision or provisions being applied.

The cases on this subject appear to almost universally recognize that the contractor must anticipate and reflect in its bid a level of "bad weather" situations.[87] This level may be considered to be an exculpatory provision and to exceed this level it has been stated that the parties intended the situation to be severe "bad weather which by reason of atmospheric conditions such weather is not reasonably fit or proper to permit the performance of the undertaking contemplated."[88] This risk applies to the contractor irrespective of whether or not there is a "bad weather" definition or clause in the contract.[89] In *Donald B. Murphy Contractor, Inc. v. State of Washington,*[90] a 1985 case, despite the absence of a no damage for delay clause in the contract, the State was not liable where the contract provided that neither party was liable to the other for delays due only to adverse weather, and the sole remedy provided in the contract for "bad weather" was an extension of time. The contractor also continues to have the risk for "bad weather" whether the situation involves a compensable damage, time extension, liquidated damage, excusable delay, changed or differing site conditions clause, or no damage clause or exculpatory provision situation. However, because different types of either penalties or contractor compensation (including both monetary and extensions of time) are involved depending on the type of situation, and the degree of "bad weather" risk the contractor assumes varies with the type of situation, the first threshold determination that should be made is to identify the type of "bad weather" being considered. Is it a compensable damage situation,[91] time extension situation, liquidated damage situation, excusable delay situation, changed or differing site condition situation,[92] no claims clause or exculpatory provision,[93] or a combination of one or more of the foregoing? The second determination that should be made is whether the "bad weather" has had an effect on the time for performance of the contract?

It must clearly be understood that, in many of the cases, more than one of the situations, just noted, may be present for the same weather condition and different contract provisions and requirements may apply to the situation.

(i) Compensable damage situations. Several states have clauses that permit compensation for damage by "occurrences" of nature to the project work during performance. Such occurrences include floods, droughts, tidal waves, hurricanes, earthquakes, windstorms or other storms, landslides or other catastrophes. The New York State Department of Transportation limits the definition of occurrence to include "only those floods, droughts, fires, tidal waves, hurricanes, earthquakes, windstorms or other storms, landslides or other catastrophes when such occurrences or conditions and effects have been proclaimed a disaster or state of emergency by the President of the United States and the Governor."[94] The compensable damage is further limited to "the extent that such damage has been determined by the Department to be beyond that which may be anticipated from heavy storms, and also to the extent that such damage is not reimbursable by insurance carried by the Contractor. . . ."[95] When these conditions are met, the contractor may be entitled to payment for only the direct costs of the repair work,[96] or it may be entitled to the direct costs of the repair work as well as the indirect (ripple effect) costs on other items or units of work depending on the contract provisions.[97] Most frequently, the contractor is entitled to an extension of time when the "severe bad weather" situation is present and comes within the terms of the contract specification, in addition to at least the direct costs of the repair work.[98]

(ii) Time extension situations. Public works contracts may provide for extensions of time when unusually severe weather conditions are encountered.[99] In *Missouri Roofing Co. v. United States,*[100] a 1973 case, the contract provided for liquidated damages each day of delay beyond 200 days from the date of receipt of notice to proceed unless the delay arose from unforeseeable causes beyond the control and without the fault or negligence of the contractor, "including but not restricted to . . . unusual weather conditions." The court held the contractor was entitled to extensions of time without assessing liquidated damages for bad weather conditions. Note that the *Missouri Roofing* case involved severe "bad weather" and both an extension of time and a liquidated damage situation.

Moreover, where there is a delay caused by the government, and "bad weather" occurs in an extended period of contract work time necessitated by such delay, the "bad weather" risk will shift and the government will bear the responsibility for further delay caused by bad weather.[101]

In *Portable Rock Production Co., Inc. v. United States,*[102] a 1984 case, where the contractor claimed that it was entitled to additional compensation when it encountered unanticipated wet conditions, the contractor was unable to prove that the conditions were materially different from those indicated in the contract or those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract. The Court also called attention to the fact that underlying data were readily available and were disclosed. The Government did not withhold any information peculiarly within its knowledge, and it was a usual and commonsense consequence that soil conditions were sensitive to rain-weather conditions typical in that region. Furthermore, the Court found that the contractor bargained for extra time in the contract to accommodate such seasonal weather conditions and, in fact, did not use all the additional time allocated.

(iii) Liquidated damages situations. One standard provision in public works contracts may grant time extensions and also waive assessment of liquidated damages when there is an "unusually severe weather" situation. In *S.J. Lemoine, Inc. v. St. Landry Parish School Board,*[103] a 1988 case, the trial court reversed the school board's assessment of liquidated damages for the contractor's delay in completing the project. The appellate court reimposed the liquidated damages, except for one day, because the contractor failed to prove the rain days were not unforeseeable. In *McDevitt & Street Co. v. Marriott Corp.,*[104] a 1989 case, the contractor failed to prove that the bad weather could not have been reasonably anticipated as the rain and snowfall were far from record levels. In *De Armas v. United States,*[105] a 1947 case, the court held that the contracting officer violated a contractual provision that liquidated damages should not be charged for time lost due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor." Severe weather conditions were encountered and that situation came, under that particular contract, within the provisions for relief as "unforeseeable causes."

(iv) Determining whether bad weather supports excusable delay situations. "Bad weather" is often claimed by a contractor as a reason for excusable delay when it presents difficulties in a public works contract. The critical issue in excusable delay is whether the "bad weather" was unusually severe as compared with the normal, average, or reasonably expected weather for a particular locality during a specific season of the year.

The court in *McDonald v. Patterson,*[106] a 1900 case, held that a private contract for the construction of a building, which provided that the contractors would pay a per day amount as liquidated damages for delay except in the case of delay caused by "the unusual action of the elements, or otherwise," showed the intention that the contractors were not to be held liable for delay on account of events which would render the work impracticable and which they could not control, and that the evidence satisfactorily showed that the delay came within the exception and was, therefore, an excusable delay.

In *Cape Ann Granite Co. v. United States,*[107] a 1943 case, the federal contract contained a provision that liquidated damages would not be charged for time lost due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor, including . . . unusually severe weather." The specifications also called attention to the fact that "the work is exposed to severe easterly storms," and the bidders were required to take into account the uncertainty of the weather. In response to the contractor's plea that it was entitled to an extension of time due to the bad weather, the court held that because the weather had not been more severe than that ordinarily encountered, the contractor was not entitled to recover liquidated damages.

Similarly, in *District of Columbia v. Herman Ward, Inc.,*[108] a 1970 case, the Court found the contractor had not established excusable delay. The project engineer was on site during the days claimed by a contractor as being unable to work because of bad weather. The evidence indicated that the work during this period was productive and not limited to bad weather cleanup. The Court found that there had been no testimony before the Contract Appeals Board as to the nonforeseeability of unusually severe weather during this period.

(v) Changed or differing site conditions situations. The following cases, in (a) and (b), dealt with the Federal Changed Conditions Article 4[109] (in later cases it became and is referred to as Clause 4, and it was also substantially modified) and bad weather situations. Where no recovery was allowed, the cases

tor for over $800,000 in delay damages based on a *quantum meruit* theory of recovery.[164] The case was again appealed to the Circuit Court.[165] The Court of Appeals held that the subcontractor acknowledged that the work had to be done at the convenience of the owner and, therefore, could not hold the contractor responsible for the inevitable delays that resulted from actions of the owner, by other subcontractors of the prime contractor, by discovery of asbestos or by weather, absent any guarantee of job performance by the contractor. The court further held that the contractor was responsible only for delays attributable in whole or in part to it.

F. Under Exculpatory Contract Provisions for Delay, Inefficiencies or Interference Situations Where the Contract May Permit Additional Compensation

Even where exculpatory contract provisions or no claims clauses are used to exclude additional compensation, additional compensation may be allowed under contract language like:

> The contractor agrees that the only claims it may make for extra compensation caused by delay, inefficiencies or interference affecting the performance or the scheduling of contract work will be solely limited to those arising out of certain specified instances.[166]

The following are the most commonly covered situations of delay, inefficiencies, or interference for which compensation is allowed by such provisions: the issuance of a suspension of work order relative to a substantial portion of work which significantly affects the scheduled completion of the contract;[167] the unavailability of critical rights-of-way parcels which significantly affects the scheduled completion of the contract; significant changes in the character or scope of the work (usually referred to as a change clause); and unforeseen or unanticipated surface and subsurface conditions.

A "change clause" should not be confused with a changed or differing site conditions clause. The typical contract clause permits the government to change the quantity or amount of work to be performed under the contract. The cases that deal with this contract clause should be separated into: (a) those cases that are additional units of work under the contract terms and the contract will, generally, also establish the method of compensation for the additional units; (b) those situations that require extra work or work eligible for contract adjustment and the contract may or may not establish the method of compensation for such work; and (c) those situations that are significant changes in the character or scope of the work, and not only is there compensation for the work, but there is also possible compensation for delay, inefficiencies, or interference that results to the contractor.[168]

Exculpatory provisions may prevent monetary compensation for delay, inefficiencies, or interference due to: "increases in contract quantities, additional contract work, or extra work."[169] However, if such modifications are so drastic that the character or scope of the work has changed, a factual determination, governmental agencies should make reasonable adjustment to the contractor's compensation. The case of *P.J. Saddler v. United States*,[170] a 1961 case, is an example of a drastic change in the quantity of work. The court determined that the magnitude of the increase in unclassified excavation, an increase from 7,950 cubic yards to 13,000 cubic yards which also required a remobilization of equipment, was beyond the scope of the contract and rendered the change clause and its restrictions on recovery inapplicable. If it is determined that the agency drastically changed the scope and the agency refused to give an adjustment, the contractor will likely prevail in any dispute resolution process or court action.[171] In *E.C. Ernst v. Koppers Co.*,[172] a 1981 case, the contractor encountered enormous construction difficulties which increased the scope of the work by approximately 70 percent but the owner only permitted a 27 percent extension in time. The court allowed recovery of the extra labor costs incurred because it deemed such costs the result of a "crash program" to complete the job.

Generally, where government is the sole cause of the delay because of a large quantity change the contractor is entitled to both an extension in time and recovery of excess costs associated with the delay.[173] The FHWA "significant changes in the character of work" provision[174] requires consideration of monetary adjustments in the specified situation. Also see, 48 C.F.R. § 52.243-4 for the federal clause that deals with changes in the work within the scope of the contract.[175]

In situations where there are broad, but precise, exculpatory provisions, any contract provision permitting compensation unforeseen or unanticipated surface or subsurface conditions would have to be very specific in order to overcome the exculpatory provision. This is probably why the courts that deal with this issue either apply the exculpatory provision as a risk that the contractor had assumed, or they apply the principle that the situation is outside the contemplation of the parties at the time the contract was entered into, or they find breach of contract, or misrepresentation, or fraud, on the part of government, or some similar theory that permits compensation outside of the terms of the contract.

G. Delay or Interference Situations Where Additional Compensation May Be Permitted By a Court or Administrative Tribunal Despite an Exculpatory Contract Provision or No Claims Clause in the Contract

The following types of situations are set forth and briefly discussed to highlight the typical instances where the courts or administrative tribunals either determine that attempts to shift risks to the contractor through the use of exculpatory provisions or no claims clauses are inapplicable, or they disregard the exculpatory provisions.

1. The Adverse Situation Was Neither Known Nor Within the Contemplation of the Parties When the Contract Was Executed

Courts and administrative tribunals generally hold that an exculpatory provision or no claims clause will not preclude a contractor from recovering for delay situations that were not contemplated by the parties at the time they entered into the contract. The situation must be reviewed in light of the relationship of the parties and the objectives of the contract and the attendant circumstances.[176]

2. Presence of a Changed or Differing Site Conditions Clause

The courts and administrative tribunals generally hold that when there is a changed or differing site conditions clause, and conditions are such as to activate the clause, broad general exculpatory provisions will not defeat contract adjustments under the clause.[177] In *Columbia v. Paul N. Howard Co.*,[178] a 1983 case,

when the contractor encountered conditions that materially differed from that indicated in the test boring logs the court permitted recovery, despite the general disclaimer on the boring sheets. In *J. & T. Construction Co., Inc.*,[179] a 1975 case, although there was an exculpatory clause, the court permitted the contractor to recover delay damages because the clay and boulders in the excavated materials differed materially from the conditions indicated in the contract documents and bidding information. In *Scherrer Construction Co. v. Burlington Memorial Hospital*,[180] a 1974 case, the court determined that the changed conditions clause prevailed over the exculpatory provision that provided that the contractor bore the risk for any subsurface conditions. In *North Harris County Junior College District v. Fleetwood Construction Co.*,[181] a 1980 case, the court permitted the contractor to recover, despite general exculpatory provisions, for differing site conditions when the plans and specifications failed to reflect a large amount of subsurface water.

However, in *J.E. Brennaman Company v. Commonwealth of Pennsylvania, Department of Transportation*,[182] a 1981 case, the court held that the changed conditions clause was not applicable, and ruled enforceable an exculpatory clause in a contract to improve the road and bridges along a section of highway, which stated that the subsurface material information given to the contractor was not to be considered part of the contract and should not be relied on by the contractor. Further, the specification required that the contractor warrant that it had sufficient time to examine the worksite and that he had not relied on any subsurface information furnished to it by the Department of Transportation.

3. Unavailability of Right-of-Way

One of the most important and almost absolute obligations on government is to make sure the right-of-way is available for the contractor.[183] See also the discussions in section VII (E)(8).

4. Suspension of Work

If the work stoppage is lengthy and beyond the control of the contractor, and not because of its lack of or poor performance, the courts and administrative tribunals will generally consider providing monetary compensation for suspensions of work.[184] There may, however, be notice or dispute resolution procedure requirements that the contractor must have met in connection with suspensions of work under the contract provisions.

5. Unreasonable Delay

Courts and administrative tribunals generally hold that an exculpatory provision or no claims clause will not preclude a contractor from recovery for delay that is unreasonable in length or duration and, particularly, where it could be deemed an abandonment of the contract by government or justifies the contractor in abandoning the project.[185]

6. Defective or Insufficient Plans and Specifications

When dealing with the issue of defective or insufficient plans and specifications, courts and administrative tribunals have made little distinction relative to whether there is present in the contract a changed or differing site condition clause, or exculpatory provision, or a no damage clause. The cases frequently are concerned with the issue of breach of contract based on contractual misrepresentation by government.[186]

The general rule of liability for contractual misrepresentation by a governmental agency had its first applications around the turn of the century. The general rule of law established is that when a contractor for a public works project accepts representations made in contract plans and specifications as being truly representative of construction conditions, specifically relying on the accuracy of the representations in making its bid, it is entitled to additional compensation for extra work and expense—above that agreed on in the contract—which is necessitated by a discrepancy between the actual conditions encountered on the job site and their representation in the plans and specifications.

In *Cauldwell-Wingate*, the court found that:

> The plans and specifications were its [contractor, Cauldwell-Wingate] only guide, and the measure alike of its duty and its obligations. . . . It did not, however, by any provisions of its contract, assume the risk and loss occasioned by the act of the State, in furnishing to both these contractors misleading, imperfect and defective plans and specifications, wherein and whereby the whole scheme of foundation building had to be revised, new plans and specifications adopted, and the work which was to take three weeks necessarily extended for almost a year.[187]

However, in *Terry Contracting, Inc. v. State of New York*,[188] a 1973 case, the court found that the method of construction required by the State in the plans and specifications was acceptable and not impossible to perform even if it was slow and costly; therefore, there was no interference by the State. In *S.L. Rowland Construction Co. v. Beall Pipe & Tank Corp.*,[189] a 1975 case, there was a no damage for "any hindrance or delay" clause. That clause was observed despite the defective plans and numerous plan changes by the city. In *Conduit & Foundation*,[190] where the contract contained exculpatory contract provisions, the court permitted the contractor to recover only additional direct costs when a redesign requested by the contractor was found to be necessary.

Similarly, in *Howard I. White, Inc. v. Varian Associates*,[191] a 1960 case, the contract required compliance with all building codes. The contractor could not recover for extra costs of installing pipe different from that required by the specifications, but necessary to meet code requirements. Because the contract called for compliance with building codes, this provision prevailed despite defective plans and specifications.

The majority of the cases clearly hold that, where government has prepared the plans and specifications that provide precise measurements, tolerances, materials and other similar information and requirements, there is an implied warranty that such plans and specifications are suitable for the particular purpose.[192] This is especially true where there is no express warranty given by the contractor relative to such plans and specifications.[193] Government must exercise ordinary care and skill to foresee and guard against defects in its plans and specifications.[194] In *McCree*[195] the contractor was held not responsible for the delay that resulted from a soil problem for which the plans and specifications were wholly inadequate and insufficient. The contractor carefully followed the specifications. The court found that "the state's actions in furnishing detailed plans and specifications

controlled not only the particular result to be accomplished but also the particular construction methods to be followed and used, and hence supported an implied warranty in keeping with the intention and expectation of the parties that the plans, specifications, and soil conditions were such as would permit successful conclusion of the work by the time required in the contract."[196]

The contractor's obligations with respect to the plans and specifications are limited to the skills which it needs to perform the work and the soundness of materials used, unless specific materials are provided or specified by the government.[197] Further, the contractor is neither responsible for a failure of the finished product nor for the fact that the structure, as designed by the owner and built by the contractor in accordance with such plans and specifications, will not serve the purposes for which it was intended.[198]

In *Woods v. Amulco Products,*[199] a 1951 case, the contractor was not liable to repair portions of pavement which had cracked because of water intrusion due to insufficient drainage and the condition of the subgrade. The contractor was only responsible for laying the pavement, and it adhered to the plans and specifications for such. In *Henderson Bridge Co. v. McGrath,*[200] an 1889 case, defective plans and specifications permitted the court to find that there was "extra work" not covered by the original contract. In *Pyle v. Kernan,*[201] a 1934 case, the Supreme Court of Oregon found that an adjustment should have been allowed in the cost of the contract under a change conditions clause where the plans and specifications were defective in that they specified a certain type of material, but that material could not be used for the highway construction purposes. The courts have considered and found defective or insufficient plans and specifications and permitted the contractor to recover, for among other things, where there were incorrect notes on the specifications, inaccurate profiles of construction sites, faulty sounding and boring reports.[202]

A real crucial issue that must be faced by the courts in many cases relative to defective plans and specifications, therefore, is to not only examine the "change" clause, "changed conditions" clause, "differing site conditions" clause, "exculpatory" provision, and "no damage" clause, if any, but also to examine the type of construction specifications that the governmental entity is using and determine whether the contractor or the government bears responsibility. To place responsibility on the contractor, the specifications must clearly indicate that performance-related specifications are intended rather than materials and methods specifications. The distinction between these two types of specifications is further discussed in section VI of this article. Under performance-related specifications, the fact finder would have to determine whether or not the contractor was still obligated to produce a result even if there were deficiencies in the overall plans and specifications. The fact finder would also have to address the issue of implied warranty. After all this, the case may be decided on other theories such as the impossibility of performance.[203]

In considering cases dealing with insufficient or defective plans and specifications, care should be exercised. One should be cognizant that courts, in some cases, impose a duty upon the contractor to inquire about obvious contract omissions.[204] *Les Strong, Inc. v. County of Broome,*[205] a 1982 case, is an interesting case where the court denied the contractor additional compensation for items that the contractor knew that the government had made a mistake with respect to the quantities and did not notify government of the mistake in the bidding period.

7. *Misrepresentation by Government*

Misrepresentation by government is included in the broad range of wilful wrongdoing that may not be protected by the exculpatory provisions of the contract.[206] *J.A. Thompson & Son, Inc. v. State,*[207] a 1970 case, sets forth the elements contractor must prove in a misrepresentation (breach of warranty) cause of action: (1) representation of facts; (2) the facts prove to be inaccurate or nonexistent; (3) the claimant has relied on the representation; and (4) the claimant has suffered damages because of his reliance on the information given. This analysis is generally followed in other jurisdictions.

In *Public Constructors, Inc. v. State of New York,*[208] a 1977 case, the state's misrepresentation in the contract documents resulted in the contractor's recovery for delay damages. In *Frank P. Ragonese*[209] the court held that silence by government in the pre-bid information did not give rise to a changed condition when water was encountered. In *Conduit & Foundation,*[210] the court found no misrepresentation by the government as to the subsoil conditions since the contract documents instructed the bidders to make their own investigations. Similarly, in *Green Construction Co. v. Kansas Power and Light Co.,*[211] a 1989 case, the requirement to inspect the site and lack of a changed or differing site conditions clause placed the risk of uncertain subsurface conditions on the contractor, even though the pre-bid information supplied to the bidders was substantially inaccurate.

8. *Undisclosed Pre-Bid Information*[212]

Pre-bid information for highway construction contracts includes items like as-built plans for prior projects at the site or near by, climatic conditions, topography information, site surveys, soil tests, groundwater table information, flooding information, borings, test borings, earthwork cross section and quantity sheets, information on necessary specialty equipment, special reports, plans and specifications for the project, other contracts or projects that affect the work of the project, any court action or proceeding that would interfere with performance of the work and other pertinent project data. Various clauses are included in contracts (exculpatory provisions) that require site investigation and set forth disclaimers relative to pre-bid data or information. New York State has the following exculpatory contract provisions relative to pre-bid information:

> The bidder agrees that he has examined the contract documents and the site of the work and has fully informed himself from his personal examination of the same regarding the quantities, character, location and other conditions affecting the work to be performed, including the existence of poles, wires, pipes, ducts, conduits, and other facilities and structures of municipal and other public service corporations on, over or under the site, and that he will make no claim against the State by reliance upon any estimates, tests or other representations made by an officer or agent of the State with respect to the work to be performed under the contract. Particular attention is called to special notes and special specifications in the proposal which may contain contract requirements at variance with standard plans and specifications.
>
> The bidder's attention is also directed to the fact that in addition to his need to examine the contract documents and the site of work, there may be certain supplemental information which is available for his inspection in the Department of Transportation Office having jurisdiction for this project, as identified in the

advertisement for bids. The supplemental information could include, for example, earthwork cross section sheets, various subsurface information, record plans, special reports and other pertinent project data. The proposal will include a list of the information available for inspection prior to the opening of bids.

Boring logs and other subsurface information made available for the inspection of bidders were obtained with reasonable care and recorded in good faith by the Department. The soil and rock descriptions shown are as determined by a visual inspection of the samples from the various explorations unless otherwise noted. The observed water levels and/or water conditions indicated thereon are as recorded at the time of the exploration. These levels and/or conditions may vary considerably, with time, according to the prevailing climate, rainfall and other factors.

The locations of utilities or other underground man-made features were ascertained with reasonable care and recorded in good faith from various sources, including the records of municipal and other public service corporations, and therefore the location of known utilities may only be approximate.

Subsurface information is made available to bidders in good faith so that they may be aware of the information utilized by the State for design and estimating purposes. By doing so, the State and the Contractor mutually agree and understand that the same is a voluntary act and not in compliance with any legal or moral obligation on the part of the Department. Furthermore, insofar as such disclosure is made, the Department makes no representations or warranties, express or implied, as to the completeness or accuracy of this information or data, nor is such disclosure intended as a substitute for personal investigations, interpretations, and judgment of the bidder.[213]

It must be noted that these clauses attempt to disclaim any warranty in regard to subsurface data furnished to the contractor by government. These clauses may or may not be effective in limiting government's liability, depending on their specificity and the federal, state, or case law involved. Such clauses are usually successful in exculpating government from liability for problems that a reasonably experienced and intelligent contractor would have been able to discern as a result of the site investigation. If, however, the government makes a positive and material representation as to a condition presumably within the knowledge of government or fails to disclose information it should have obtained, and upon which the contractor had a right to rely, the government is deemed to have warranted the facts despite a general provision requiring an on-site inspection by the contractor.[214]

If the statements are "honestly made" and may be considered as "suggestive only," the risk of expenses caused by unforeseen conditions may be placed on the contractor, especially if the contract so stipulates.[215]

Morrison-Knudson Co. v. Alaska,[216] a 1974 case, established the following test for imposing a duty on the state to disclose pre-bid information: Did the state occupy so uniquely favored a position with regard to the information at issue that no ordinary bidder in plaintiff's position could reasonably acquire that information without resort to the state?[217] That test is a very difficult hurdle for any contractor to overcome. It must prove a "uniquely favored position with regard to the information," and "no ordinary bidder could reasonably acquire the information without resort to the governmental agency." In *Rusciano*[218] the court applied a similar standard when it found:

> The exculpatory clauses in the contract and in the invitations to bid do not insulate the State from liability where the conditions are not as represented in the contract and inspection by the contractor would not reveal the representations to be false. (Citations omitted.) The State's representative not only knew of the presence of this unsuitable material, but also knew that it was unstable in its wet condition and the State is, therefore, answerable for its failure to put bidders on notice of that condition in the contract proposals.[219]

In determining the contractor's accessibility to the information of which the government was aware, one important factor considered by some courts is the length of the advertising period—first advertisement date to bid letting date. For instance, will a bidder on an excavation contract have time to supplement the government's boring data by drilling its own test holes?[220] Will a bidder on a highway and bridge construction contract have the opportunity to verify the proposal note ("It is anticipated that the foundation material at the site of this structure will consist of varying layers of silt and sand overlying a very compact layer of glacial till which overlies bedrock at varying depths.") against the actual field conditions?[221]

In cases where the court finds that there is a breach of contract on the part of the government or misrepresentation,[222] or where there is a changed or differing site conditions clause and the pre-bid information does not represent the actual conditions,[223] the pre-bid site information exculpatory clauses will generally not be applied. Similarly, courts have refused to apply the pre-bid requirements against contractors where the government's actions constitute "constructive fraud,"[224] or where there is an "impossibility of performance."[225]

As prescribed in 48 C.F.R. § 36.503 for Federal contracts, the contracting officer must insert a specified clause for site investigation and conditions affecting the work in fixed-price construction contracts or fixed-price dismantling, demolition, or removal of improvements contracts.[226]

The enforcement of such pre-bid provisions by the courts and administrative tribunals has been inconsistent. The determining factor has usually been the cause of action alleged by the contractor and the extent to which federal, state, or case law, or explicit contract provisions control. Typically, such clauses have been upheld by the state courts but thrown out by the federal boards of contract appeals that considered pre-1984 contracts.[227] The required clause for federal contracts, 48 C.F.R. § 36.503, will undoubtedly cause a different result at the federal level.

9. Maintenance and Protection of Traffic

Government's use of a lump sum item for maintenance and protection of traffic during highway construction contracts is a type of an exculpatory provision even though it is not traditionally considered to be such. The use of the provision apparently has three primary objectives. The first is the ease of payments for the item—usually as a percentage of completed contract work. The second is the fact that the contractor's operations and sequencing of work may greatly affect the amount of work effort for the maintenance and protection of traffic item. Therefore, the contractor should receive only a fixed amount for the item because it can control, to a large degree, the costs involved. The third is the desire to shift the risk of unknown maintenance and protection of traffic conditions onto the contractor. The difficulty arises when there is considerably more maintenance and protection of traffic effort than the contractor contemplated at the time of

the bid, or there is reliance by the contractor on the pre-bid or other contract document information, and there is misrepresentation on the part of government relative to the conditions. It is difficult to develop general guiding legal principles relative to maintenance and protection of traffic lump sum bid situations other than for the situation where the work of the item is considerably greater than anticipated; in such case, the item may be eligible for adjustment even though it is a lump sum item. The cases should therefore be studied for their particular set of facts and the law that was applied.

10. Coordination Requirements[228]

Coordination requirements imposed on the contractor in highway construction contracts are a type of an exculpatory provision even though, again, it is not traditionally considered to be such. Generally, the party (usually the contractor) that has the obligation under the contract to coordinate activities will be held responsible for such activities in any court action or before any administration tribunal. *Weber Construction Co. v. State of New York,*[229] a 1972 case, involved a grade crossing elimination project. The contractor was delayed approximately one year because of lack of coordination with the railroad. The contractor complained only to the state and made no attempt to contact the railroad during performance of the work. The court held that the contractor did not fulfill its contract obligations to coordinate the work. In *Cooke Contracting Co. v. State,*[230] a 1974 case, the court found that a contractor was not entitled to damages resulting from delay caused by other contractors. The court held that damages for delay starting construction, because of delay by another contractor in completing its project, could not be recovered where there was a "coordinating clause." However, in *Amp-Rite Electric Co. v. Wheaton Sanitary District,*[231] a 1991 case, the court found for the contractor despite the coordination requirement. The court noted that government had the actual control over the other contractors.

11. Unclassified Excavation Items

The unclassified excavation item in highway construction contracts is a removal of materials item without placing such materials in categories like: sand, clay, gravel, rock, boulders, old pavement, and debris—and having separate pay items for such categories. Government's use of unclassified excavation items in highway contraction contracts is a type of an exculpatory provision even though it is not traditionally considered to be such. The use of the provision has three primary objectives. The first is the ease of payments for the item, usually on the cubic yard basis. The second is the belief that the bidders will take the composites of the unclassified excavation and through their ingenuity be able to give a lower price for such item. The third is to shift the risk of unknown subsurface conditions onto the contractor. The difficulty arises when there is reliance on the pre-bid information, such as discussed in section VII (G)(8) of this article, or there is misrepresentation or fraud on the part of the government relative to the conditions, or there is a situation beyond that contemplated by the parties at the time the contract was executed. It is very difficult to develop general guiding legal principles relative to unclassified excavation situations. The cases should therefore be studied for their particular set of facts and the law that was applied thereto.

The following is an overview of several of the leading cases dealing with unclassified excavation item situations that were in dispute.

In *Weaver-Bailey,*[232] a firm fixed-price contract to build beaches, breakwaters, parking areas, boat ramps, and other items, the contractor was allowed delay damages. Most of the required work was earthwork and the contract included an "unclassified excavation" item in the contract. Government's estimate for unclassified excavation was low by 41 percent. Winter weather and the very much larger amount of unclassified excavation caused a delay in completing the contract. The government refused to allow the contractor to demobilize for the winter and return in the spring to the job site; there was also repair work that had to be performed because of the winter erosion on the slopes. The government insisted on the original contract time performance, or it would impose penalties for late performance and for not providing payment for the work damaged by the winter weather. In *Brookhaven Landscape and Grading Co. v. J.F. Barton Contracting Co.,*[233] a 1982 case, there was an unclassified excavation item, but the court allowed recovery, to the subcontractor in its suit against the contractor, for excavation of boulders in excess of those shown in the engineer's plans and within the contemplation of the parties when the contract was signed.

12. As Ordered by the Engineer-in-Charge

Government's use of an "as ordered by the Engineer-in-Charge" clause in highway contraction contracts is a type of an exculpatory provision even though it too was not traditionally considered to be such. The use of the provision apparently has three primary objectives. The first is the ease of making field decisions concerning the project work. The second is to enable quick decisions in the field and, thus, prevent stop work and delay situations on contract while change orders are processed to reflect the actual field conditions. The third is to shift the risk of unknown conditions onto the contractor. Difficulty arises when there is reliance on erroneous contract information, or there is very poor engineering judgment, or there is misrepresentation or fraud on the part of government relative to the conditions, or there is a situation beyond that contemplated by the parties at the time the contract was entered into. Again, it is difficult to develop general guiding legal principles relative to as ordered by the Engineer-in-Charge situations. When confronted with this issue, the cases should be studied for their particular set of facts and the law that was applied.

13. Active Interference by Government

The courts and administrative tribunals generally hold that an exculpatory provision or no claims clause will not preclude a contractor from recovering for delay that results from "active" interference by the government.[234] The only real issue the court or administrative tribunal must decide is whether or not there is sufficient direct, active, or wilful interference by the government to justify recovery by the contractor.[235] In *State v. Feigel,*[236] a 1931 case, the rights-of-way were unavailable because of acts and omissions of the state. The Court found the delay to be caused by the acts of the state and awarded damages despite the facts that (1) the specifications required the contractor to inspect the site, (2) the state's Chief Engineer was empowered to suspend the contract work, (3) the contract

provided that delay was to be compensated for by an extension of time, and (4) the contractor commenced work knowing that rights-of-way were unavailable.[237]

14. Breach of Contract

The courts and administrative tribunals universally permit contractor recovery of compensatory damages where there is breach of contract on the part of the government, despite exculpatory provisions or no claims clauses.[238] From reviewing the cases it appears that, sometimes, where courts find a breach of contract, damages may be determined on either a total cost method, modified total cost method, or apportionment of total costs estimated without the necessity of determining the matter of damages on an item by item, or delay responsibility by delay responsibility basis.[239]

Though there may be an implied warranty that the government will not hinder the work, findings of breach of contract are based on the facts of a particular case. For example, in *C.F. Mentzinger's Son, Inc. v. State of New York,*[240] a 1951 case, the court found that the contractor could not recover under a breach of contract theory where the contract contained a provision that the work of another contractor would progress concurrently with the work of the contract, but it did not do so. The contract also contained an exculpatory provision to prevent additional compensation for delays or hindrances during the progress of the work. The Court found that the statement concerning concurrent progress did not constitute a warranty and, thus, relied on the exculpatory provision.

15. Acceleration

When an acceleration order is issued, but the need for acceleration is not attributable to the inefficiencies or ineffectiveness of the contractor, an equitable adjustment should be made to cover any additional contractor expenses. In most situations the contract requires a written order from the government directing acceleration.[241]

The New York State Department of Transportation has a strict notice provision governing acceleration claims.

> The Contractor may not maintain a dispute for costs associated with acceleration of the work unless the Department has given prior express written direction by the Engineer to the Contractor to accelerate its effort. The Contractor shall always have the basic obligation to complete the work in the time frames set forth in the contract. For purposes of this Subsection, lack of express written direction on the part of the Department shall never be construed as assent.[242]

The items of additional expenses usually considered in these situations include: (a) labor or equipment inefficiencies;[243] (b) premium overtime; (c) material or supply premiums; (d) extra equipment made necessary because of the acceleration; (e) equipment expense adjustments, such as, the equipment is used to a greater extent in the acceleration period without additional expense except for the operating costs; (f) adjustments to overhead items, both home office and field; (g) adjustments to bond or insurance costs; and (h) adjustments to lump sum items.

Beside the ordered acceleration, another recognized theory for recovery for acceleration damages is known as a "constructive" acceleration. The theory of constructive acceleration is dependent on the effects of excusable delays that are authorized in the contract on the contractor's time of performance. When the contractor encounters an excusable delay situation in completing the contract, it is entitled to a time extension to the contract. If government refuses to grant an extension to which the contractor is entitled, the court may find a constructive acceleration of the contract because the contractor effectively has less time than originally promised in which to perform the required work.

The most difficult problem of acceleration for the contractor arises when the contractor has encountered excusable delays and requests extensions to the contract expiration date, but the government refuses to recognize the delays and requires that the contract be completed in a timely fashion. The contractor is then placed in the difficult position of risking contract default,[244] or liquidated damages, if it finishes at a time later than that required by the contract, or of expending additional funds in order to overcome the excusable delay and finish the contract on time.

In order to recover for actual or constructive acceleration damages, the contractor usually must demonstrate the following: (a) the contractor has encountered excusable delay for which it is entitled to a time extension; (b) the contractor specifically requested a time extension from the government according to the contract provisions; (c) the government failed or refused to grant the extension; (d) the government either expressly ordered completion within the original contract time or acted in such a way that it was clear that it required the contractor to complete within the contract time period; and (e) the contractor actually incurred additional costs above those it should have experienced as a result of its acceleration.[245]

Whether there has been a constructive acceleration is determined by the trier of fact. For example, the government's insistence that construction be completed at the earliest possible date, together with declarations of its willingness to pay additional costs has been deemed an acceleration order and cost of overtime work and added expenses of pouring concrete during the winter.[246] In *Siefford,*[247] the contractor sought damages in *quantum meruit* for breach of contract for the government's refusal to grant an extension of time causing the contractor to accelerate its performance. The contractor claimed the government caused unreasonable delay by its acts. Despite acceleration, the "no damage" clause prevented the contractor from recovering under either the theory of breach of contract or acceleration caused by the government's acts. The contractor did receive compensation for the extra work performed and a return of the liquidated damages that had been imposed.

An interesting situation arises when the contractor planned to finish very early and finishes in the contract time, but claims damages because of failures of government in supplying misleading pre-bid information, or negligent design, or some similar act of government. In *Grow Construction Co., Inc. v. State of New York,*[248] a 1977 case, the court permitted a substantial damage recovery to the contractor. The government actions interfered with an early completion. In *Norair Engineering Corp. v. United States,*[249] a 1981 case, the court determined that a contractor who finishes the project within the contract time plus excusable delays is not disqualified as a matter of law from claiming acceleration costs. However, under Article 13 of the New York State Department of Transportation standard form of contract the contractor is prohibited from making a time-related claim when it finishes in the time specified in the contract. Further, for acceleration claims to be considered, there must be written notice to accelerate from the state.[250] Therefore, if the situation of *Norair Engineering*

were to be presented in a New York court, the court may well find that as a matter of law the contractor was not prohibited from making a claim, but under the contract terms (e.g., written notice to accelerate) it was prohibited from making any recovery.

VIII. TYPES OF COMPENSATION PROVIDED FOR IN HIGHWAY CONSTRUCTION CONTRACTS AND EXTRA WORK OR CONTRACT ADJUSTMENTS DETERMINED BY THE COURTS OR ADMINISTRATIVE TRIBUNALS

There are two basic types of adjustments provided for in highway construction contracts for extra work or contract change. These are extensions of time for performance and monetary. Rarely do the contract terms themselves provide for adjustments to performance of the items of work, such as modification (lowering) of the level of performance in meeting the specification. Under the extra work or contract adjustment provisions, "compensation" should be adjusted in accordance with the controlling contract terms.

Since the projects are completed before the courts or administrative tribunals review the matter, they cannot grant extensions of time for performance. The most that they can grant is damages for the additional costs incurred because of the failure of government to grant the extension. It is, therefore, important to understand any review restraints on the courts or administrative tribunals and the types of costs or expenses for which monetary damages are awarded by the courts or administrative tribunals to contractors for claims based on delay, interferences, inefficiencies, suspension of work or stop work orders, acceleration, interferences, and inability of the contractor to progress the work in an orderly fashion or other similar situations where the contractor is hampered in completing the contract work by the government. These monetary awards generally result from the contractor's claims for compensation for equitable or contract adjustments under the contract, for delay damages that are permitted under provisions of the contract, for costs of performing extra work, or for claims that the contract was breached by the other party.

A. Extensions of Time for Performance

Nearly all highway construction contracts have provisions under which the contractor may be granted extensions of time for performance when certain situations arise. The consequences to a contractor who fails to meet the time requirements of the contract can be very serious. Therefore, the decision to grant or deny a time extension is an important task. The circumstances of the contract should be carefully reviewed to accurately determine the excusable delays and those delays caused by government actions for which the contractor is entitled to the extension in time. In *Freeman v. Department of Highways,*[251] a 1968 case, the contract contained a clause which provided that an extension of time should be given for delays caused by the slow approval of work in progress by the agencies charged with such duty, but no additional compensation for such delays would be granted. The Court held that in light of such an exculpatory provision, the contractor was entitled to an extension of time, although it was not entitled to additional compensation for delay damage resulting from the highway department's late approvals. Similarly, in a 1965 federal agency case the court stated: "The grant of an extension of time by the contracting officer carries with it an administrative determination (admission) that the delays resulted through no fault of the contractor."[252]

It is the general rule that in the absence of an exculpatory clause, a contract clause providing for an extension of time in which to complete the contract, in the case of delay caused by the government, does not preclude recovery of damages resulting from delay caused by the government.[253] Neither does acceptance of the time extension by the contractor,[254] nor the contractor's proceeding with the contract work.[255] However, the contract may provide that acceptance of the time extension constitutes a waiver of all other claims for damages attributable to the delay.[256]

As discussed in this article, the failure of the government to grant an extension of time to the contractor that is entitled to the same, may cause acceleration claims to be made by the contractor. Some government contracts have provision that the extension of time may be granted either with or without assessment of engineering charges or liquidated damages. Care should be taken relative to the issuance of the extension of time and the reasons that justify such an extension, as well as to the determination of whether or not engineering charges or liquidated damages will be assessed as such will affect later determinations of adjustments to compensation.

1. *Effect on Engineering Charges*

The governmental agency must determine whether or not the delay is due to the fault or neglect of the contractor and if the delay results from the contractor's actions. Engineering charges[257] are usually assessed in connection with extensions of time if the necessity for the same is due to the contractor's actions or is its responsibility. At the same time, such charges are not imposed or deferred when the contractor is not responsible for the delays, such as when bad weather was encountered. If the delay results from no fault by either the contractor or the government, who is responsible for engineering charges? In that situation, just as the government is not responsible to the contractor for delay damages, engineering charges are usually not assessed against the contractor.

2. *Effect on Liquidated Damage Provisions*[258]

In connection with granting extensions of time, the contracting agency must carefully consider the imposition of liquidated damages. If the delay results from joint responsibility, the contractor and the government, the assessment of liquidated damages generally will not be sustained by any court or administrative tribunal. If the delay results substantially from the contractor's fault or neglect, or is the result of risks that the contractor has assumed under the contract, assessed liquidated damages should survive any challenge before a court or administrative tribunal.

The fact that the government refrains from exercising its right to collect liquidated damages by extending time for performance of the contract, is not tantamount to admitting liability for breach of contract, even though forbearance may raise some question of government-caused delay.[259]

An interesting question is whether the government is entitled to liquidated damages where the contractor abandons the project. In what is perhaps an unusual situation, in a New York case, where the contractor abandoned the

project some 5 months before the contract completion date, the court determined that the city was not entitled to an award of liquidated damages. Liquidated damages must be assessed in accordance with contract provisions. The court found that the applicable contract, which represents an attempt by the parties to anticipate and provide for the specific possibility that contractor's satisfactory completion of the project might be delayed beyond the agreed-upon date, did not contain clear and unambiguous language, indicating that it was also intended to apply to the contractor's outright abandonment of the project. According to the court, the only reasonable interpretation that could be given to the liquidated damage provision is that the liability for the stipulated sum did not accrue until the contractor had fulfilled its agreement, and, consequently, the provision was not available in a case involving a complete renunciation of the contract by the contractor.[260] To overcome this possibility the New York State Department of Transportation added the following sentence to its Standard Specifications: "The contractor is responsible and liable for said liquidated damages even in the event that the contractor abandons the performance of the contract or the contractor's employment is terminated pursuant to the provisions of this contract."

B. Monetary

Most highway construction contracts contain clauses permitting monetary adjustments under certain conditions. The clause may permit: (a) the use of the unit or item bid price to make adjustments; (b) a force account (cost reimbursement) type determination for such adjustments; (c) a reasonable value/cost determination to be made; (d) equitable adjustments to be made; and (e) a combination of two or more of (a) through (d). The following are some of the more controversial traditional types of methods that are or may be used to determine the amount of the compensatory adjustments.

1. Total Cost Method Adjustment

The total cost method for a contract compensatory adjustment is a calculation of the contractor's total costs, including appropriate markups, of all work performed from which is subtracted the payments the contractor has received. In some cases, because of contract changes that involve reductions—either the estimated cost of performance or the bid prices for the work performed are used in place of the payments received. It would, however, be extremely unusual for a governmental contract to provide for the use of a total cost method to determine compensation for equitable compensatory adjustments.

As a matter of fact even courts and administrative tribunals have been reluctant to accept the total cost method as an equitable means of determining compensation to a contractor.[261] The basic reasons for this are that (a) the total cost method conflicts with the "lowest responsible bidder" requirement for public works contracts because this method calls for the adjustment to the total price of the contract and the items that were the subject of the bidding process; (b) the time or unit bid prices of the contractor may have been unrealistically low; (c) the total cost method will most likely include delays for which the contractor should only be entitled to time extensions; (d) the total cost method will include ripple effect items or units; and (e) the total cost method will undoubtedly include costs that should be attributed to the contractor rather than the government since there is no effective way of sorting out the contractor's responsibility for costs in the calculation. The total cost method, however, has been used in court awards and administrative tribunals' determinations and will therefore be discussed further, in section IX, concerning contractor compensation determined by the courts or administrative tribunals.

2. Modified Total Cost Method

After determining the total cost, the modified total cost method determines compensation based on an appropriate credit for the contractor's responsibility with proper accounting for such charges. It comes closer to the real costs to the contractor for delay, contract adjustments, or extra work than does the total cost method or a percentage of total costs. However, the burden of proof shifts to the government for establishing the extent of the contractor culpability, whereas the burden of proof is normally on the contractor in claims. Further, it still may include situations that the contractor would be entitled to only a time extension and the ripple effect items.

3. Item or Partial Item or Unit Cost Adjustments

An item or partial item or unit cost adjustment looks at the reasonable costs of only the items or units or portions thereof affected by the delay, contract adjustment, or extra work. This cost approach will be discussed in greater detail in subpart 5 hereof, but is mentioned here because it so sharply contrasts with the total cost methods.

4. Requirement of Unit Price Information with Bid Submission

Some states such as Washington, Oregon, Montana, South Carolina, and New Jersey have a requirement, on certain contracts, that the contractor must escrow the original bid workup material in connection with the bid. With respect to the State of Washington provision, it has been stated:

> The purpose of the specification is to preserve the contractor's bid documents with an escrow agent, usually a bank, for use by the agency in any litigation arising out of the contract. Bid documentation as used in the specification means all take-offs, calculations, quotes, notes and other information committed to hard copy or magnetic media that a bidder used to arrive at the prices contained in the bid. Manuals standard to the industry that were used by the contractor may be included in the bid documentation by reference. Safeguards are built into the specification to assure completeness of the information and legibility. The bid documents of the low bidder are inspected by agency personnel shortly after contract execution. Completeness is assured by comparing the documents to an affidavit signed by the contractor which lists all of the documents used in preparing the bid. The specification requires the contractor to submit any missing or illegible documents. The specification provides sanctions, including termination for default for noncompliance.[262]

In addition, the New Jersey Department of Transportation has a requirement that the contractor cannot pursue a claim against the state if it has not fully complied with the escrow requirement. For all such states, this escrowed material can then be used in connection with determining the amount of monetary contract

adjustments. This type of clause therefore is an important tool that can be used in cost control efforts.

5. Adjustments to Only Items or Units Affected by the Delay, Contract Adjustment, or Extra Work

When such matters are being litigated it may be difficult for the parties or the court or administrative tribunal to separate out the costs and expenses for the delay, contract adjustment, or extra work on an item by item and responsibility by responsibility basis. Where the court or administrative tribunal requires such precision, the burden of proof falls on the contractor claiming the damages.[263] The courts have consistently held that in all contract actions, the burden of proving the damages is on the contractor. When a claim is made for damages for delay, contract adjustment, or extra work the contractor must show that the government was responsible for the delay, contract adjustment, or extra work; that these delays, contract adjustment, or extra work caused additional costs in the completion of the contract and the contractor must eliminate overlapping or duplication of costs; that the contractor has suffered damages as a result; and that the contractor must furnish some rational basis for the court to determine or estimate the damages.[264] In *Manshul v. Dormitory Authority* (a 1981 case) the court found:

> More difficult are the questions of . . . the measure and amount of damages, if any. On these questions, plaintiff's claims are largely vitiated by the fact that the trial court found the plaintiff's evidence as to delay damages largely not credible. The trial court said that plaintiff's claim was grossly exaggerated, and parts of it were illusory, based on double billing, invited unfounded speculation, and not supported by the preponderance of the credible evidence. Plaintiff has not persuaded us that these criticisms are incorrect.[265]

However, in *Terry Contracting, Inc. v. State of New York,* a 1973 case, the court found delay on the part of the state, then found:

> . . . it impossible to allocate specific amounts of damage to each item of delay. The impossibility of establishing a precise formula for computing damages should not prevent claimant from recovering a reasonable amount for its loss caused by the delay.[266]

6. Adjustments to Lump Sum Items

Most highway construction contracts provide that there will be no adjustments to the lump sum items in the contract. However, the risk of modification of the lump sum items is not absolute on the contractor. The modifications to the contract work must have been within the general scope of the original contract or the contractor may be entitled to an adjustment to the lump sum items if considerable additional work under the lump sum items is required. Such adjustments should be made on the basis of actual or reasonable cost. When courts or administrative tribunals are considering the issue of excessive quantities over contract requirements, recovery is usually granted to the contractor, despite exculpatory provisions.[267]

7. Adjustments to Both Items Affected by the Extra Work and Those Collaterally or Indirectly Affected (Ripple Effect)

Many situations are found in the review of cases or disputes or claims before the governmental agency, where the courts or administrative tribunals provide recovery for both the items directly affected and those collaterally or indirectly affected. Examination of the specifications should be made to determine whether or not this matter is addressed in detail.

Under the FHWA Differing Site Conditions clause, "[n]o contract adjustment will be allowed under this clause for any effects caused on unchanged work."[268] There is no such ripple effect prohibition in the Suspensions of Work clause[269] nor in the Significant Changes in the Character of Work clause.[270] However, the Suspensions of Work clause excludes profit and the Significant Changes in the Character of Work clause excludes loss of anticipated profits.

8. Equitable Adjustments

A contract clause may provide that under certain circumstances the contractor is entitled to an equitable adjustment. This means that the equitable amount must be determined and that amount will be the compensation to which the contractor is entitled under the contract provisions. In *United States v. Callahan-Walker Construction Co.,*[271] a 1942 case, the court found that equitable adjustment is the determination of a fair allowance for the work performed under the circumstances plus the reasonable and customary allowance for profit. In *General Builders Supply Co., Inc. v. United States,* a 1969 case, the court discussed the meaning of "equitable adjustment" as follows:

> The concept of an "equitable adjustment" has had a long history in federal procurement, going back for about fifty years. See United States v. Callahan Walker Constr. Co., 317 U.S. 56, 63 S.Ct. 113, 87 L.Ed. 49 (1942); United States v. Rice, 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53 (1942); Ribakoff, Equitable Adjustments Under Government Contracts, in Government Contracts Program. The George Washington University, Changes and Changed Conditions 26, 27 (Gov't. Contracts Monograph No. 3, 1962). First used in the standard "changes" and "changed conditions" articles, the term has been taken over for other clauses, such as the "suspension of work" and "government-furnished property" provisions. See J. Paul, United States Government Contracts and Subcontracts 430 (1964). The consistent practice appears to have been that an "equitable adjustment", as that phrase is used in these articles, can cover an allowance for a profit on work actually done, but does not encompass unearned but anticipated profits. See United States v. Callahan Walker Constr. Co., supra, 317 U.S. at 61, 63 S.Ct. 113; Bennett v. United States, 371 F.2d 859, 864, 178 Ct.Cl. 61, 69–70 (1967); cf. Bruce Constr. Corp. v. United States, 324 F.2d 516, 163 Ct.Cl. 97 (1963). This is far from an unnatural interpretation since, in these clauses, the "equitable adjustment" is usually tied by express words to an increase or decrease in the contractor's costs.[272]

Unless the contract specifies how additional compensation or equitable adjustments are to be determined, the determination of what elements should be included in an equitable adjustment may be difficult, whether under the dispute resolution process, contract adjustment provisions, or by a court or administrative tribunal.[273] A proper technique of contract interpretation for the application of an adjustment

is for the court or administrative tribunal to place itself into the shoes of a "reasonable and prudent" contractor and decide how such a contractor would have acted in the situation.[274]

C. Review of Breach of Contract Claims, the Most Common Cause of Action upon Which Court Awarded Compensation Is Based

Contractors typically claim that the government breached the contract in order to overcome contract exculpatory provisions that may prevent recovery. A breach of contract may be based on governmental actions which delay and interfere with progress; government-provided inadequate or defective design; the unavailability of rights-of-way, the government's failure to coordinate activities; undisclosed subsurface conditions; suspension of work or stop work orders; an acceleration order; and the government's misrepresentation or fraud.

In those cases that sustain the breach of contract cause against the government, it appears that because of the facts peculiar to the case the fact finder has considered that it would be inequitable to impose the contract provisions against the contractor for situations that the contractor could not and did not control. It is the duty of the court to scrutinize the facts to determine which party to the contract is responsible for the breach.[275]

In breach of contract claims, where the contractor contributes substantially to the delay, the government is generally not held liable for damages resulting from the contractor's delay.[276]

Care should be exercised to analyze the real reason why recovery to the contractor was or was not made in the breach of contract claims. For instance, in *Terry Contracting, Inc. v. State of New York,*[277] a 1973 case, the contractor alleged interference, extra cost items, additional quantities, and delays incurred as a result of intervention and indecision on the part of the State. The court found a breach of contract, but awarded delay damages for extra costs for labor, materials, and equipment, plus overhead and profit.[278]

D. Methods of Determining and Items Included in Compensation

Various methods are used by the court or administrative tribunal to determine monetary compensation to the contractor. Some of these will be discussed briefly hereafter.

1. Compensation Based on the Total Costs of the Contractor

When a total cost method is used by the court or administrative tribunal to determine compensation, the compensation is computed as the difference between the contractor's total costs, including markups, incurred for the project less the payments received from the government. Generally, the courts and administrative tribunals use the method only as a last resort when there is no other practical way to determine compensation to the contractor.[279] The acceptability of the total cost method hinges on proof that (a) the nature of the particular losses makes it impossible or highly impracticable to determine with a reasonable degree of accuracy, (b) the contractor's bid prices for the items or units were realistic, (c) the contractor's actual costs were reasonable, and (d) the contractor was not responsible for the added expenses.[280]

The total cost method usually does not place a value on the contractor's failures that may have caused or contributed to the cost overruns. From the government's perspective, the method fails to recognize many cost and expense factors that should be attributed to the contractor. The courts or administrative tribunals have considered such items as an unrealistic bid by the contractor, contractor inefficiencies, poor contractor supervision or management of resources, contractor's lack of sufficient working capital and undertaking mitigation measures; and contractor's unbalancing of the original bid.[281]

In *Scherbenske Evacuating Inc. v. North Dakota State Highway Department,*[282] a 1985 case, the Court found the total cost method appropriate where the state highway department was found to have breached the contract by unjustifiably delaying the contractor from completing the work on schedule, and the contractor's damages could not be ascertained with certainty.[283] However, in *Joseph Sternberger v. United States,*[284] a 1968 case, a total cost basis was presented by the contractor and the court dismissed the contractor's claim because it failed to prove that its additional cost was caused by delay or changes of government.

The recent trend, particularly in New York State, is that, where the delay is attributable to both parties, under the application of a total cost method the court apportions the delay damage sustained by the contractor and awarded to the contractor a pro rata share equivalent to the amount of delay attributable to the government.[285]

2. Compensation Based on Modified Total Cost Method

The modified total cost method makes adjustments to the costs and expenses of the contractor and recognizes most or all of the contractor's failures (*cf.* New York).[286] In order to ascertain the value of the contractor's failures the following processes should be helpful: (a) The contractor's bid workup sheets should be examined to determine how the contractor put the bid together.[287] The examination should be made in order to determine whether or not the bid was prepared in a reasonable manner. Sometimes the review includes a comparison of the contractor's bid prices to those of the other bidders. However, this may only identify whether or not the contractor has unbalanced its bid rather than determining whether or not it is reasonable. The contractor may have unbalanced the items or units that seriously overran or underran and that information would be helpful in the analysis. (b) The contractor's records should be examined to determine whether or not the contractor performed the work in an efficient manner and minimized the costs to government for the work for which additional compensation is claimed. (c) A similar item by item comparison should be made. The cost of the nonimpacted items of work, compared to the similar impacted items of work should provide valuable information on the contractor's performance.

From the foregoing processes (a through c), the government should be able to determine when the contractor is trying to obtain additional compensation for mistakes or errors in judgment that the contractor made in its original bid. The amount of the contractor's failures should be subtracted from the consideration of additional compensation based on the total cost method. The remaining amount may still not be all the responsibility of government. For the government, the most difficult aspect of the modified total cost method is the fact that the burden of proof in the matter is shifted from the contractor to the government. Further, the risks that are assigned to the contractor and the contractor's monetary increase in its bid for the risks are not properly accounted for.

3. Compensation Based on Quantum Meruit

Quantum meruit is an equitable doctrine that permits compensation to be based on the reasonable value of the work performed or the services provided: when such has been provided by a contractor; where there would be an unjust enrichment of the receiving party; and when there is no contract provision specifically authorizing payment for such work or services. Courts or administrative tribunals use this method of determining compensation in a situation where it finds for the contractor, on the basis of a determination of breach of contract, impossibility of performance and unreasonable delay caused by government.[288] The court stated in *Port Chester Electric Construction Corp. v. HBE Corp.*,[289] a 1991 case, after discussing that the plaintiff had the burden to prove that the defendant's conduct caused the damage:

> Plaintiff may, however, proceed under its "alternate theory," quantum meruit. Under New York law, if Port Chester establishes that HBE has breached the subcontract by inordinate delays affecting Port Chester's ability to complete its obligations under the subcontract, Port Chester "may disregard the contract figures and proceed on a quantum meruit basis."... The customary method of calculating damages on a quantum meruit basis in construction contract cases both on completed contracts and contracts terminated before completion is actual job costs plus an allowance for overhead and profit minus amounts paid.[290]

This case was remanded to the District Court.[291] The District Court applied the *quantum meruit* theory suggested by the Circuit Court and found an amount of $831,776.81 owed to the subcontractor. The matter was again appealed to the Circuit Court[292] and despite its earlier ruling on the use of the *quantum meruit* theory, the Court again remanded the matter and directed "the District Court to determine which, if any, of the alleged delays were attributable in whole or in part to HBE, and limited Port Chester's recovery accordingly."[293]

In *D'Angelo d/b/a Triple Cities Construction Co. v. State of New York*,[294] a 1976 case, the appellate court broke with traditional methods of determining damages and directed the *quantum meruit* method be used to determine damages when the contractor lacked records of its costs for delays caused by the state.

4. Compensation Based on Individual Items or Units of Work as Set Forth in the Claim

The determination of compensation based on individual items or units of work as set forth in the claim is the method most favored by the courts and administrative tribunals. It places the burden of proof of establishing an entitlement to damages clearly on the contractor and, although it is time consuming, it usually is the most accurate method of determining actual damages.

For example, in *Phillips Construction Co. v. United States*,[295] a 1971 case, the court limited compensation to items of delay because of insufficient design of the drainage system and barred contractor's recovery for delay due to abnormally severe weather because of contractor's assumption of risk by contract provisions.

5. Eichleay Formula for Overhead

The Eichleay formula[296] is a calculation of overhead charges based on the contract billings, divided by the contractor's total billings for the full contract period, times the total overhead charges for the full contract period, which will determine the amount of overhead to be attributed to the particular contract. That figure is then divided by the number of days the contract actually took to perform. This will determine the daily rate of overhead for the contract; and this rate is then multiplied by the number of days of delay to give the Eichleay calculation. In several federal cases, the Eichleay formula was used to determine the overhead amount in contractor's delay claims.[297]

However, in *C.B.C. Enterprises, Inc. v. United States*,[298] a 1992 case, the Court rejected the use of the Eichleay formula to estimate extended home office overhead for a contract extension because adequate compensation for overhead expenses can usually be calculated more precisely using a fixed percentage formula. The Court declared that the Eichleay formula is an extraordinary remedy limited to contracts affected by government caused suspensions, disruptions, and delays of work.

In *Berley Industries v. City of New York*,[299] a 1978 case, the court rejected the use of the Eichleay formula when the contractor failed "to prove that the formula was logically calculated to produce a fair estimate of actual damages." The court stated:

> The case before us readily reveals how the mechanical imposition of a formula akin to the one advanced by the plaintiff can all too easily bring a harsh daily penalty when only compensatory damages are warranted or even when the doctrine of *damnum absque injuria* is in order. For all practical purposes, it would completely ignore the safeguards against overreaching and arbitrariness to which the law of evidence has long been committed.... The damages computed under the "Eichleay formula" would be the same in this case whether the plaintiff had completed only 1% or 99% of the job on the scheduled completion date of May 7, 1971. This rather bizarre result is caused by the fact that the "Eichleay formula" focuses on the length of the delay to the exclusion of many other important factors bearing on actual damages. If, on May 7, 1971, the plaintiff was merely required to spend $100 to complete the job, the "Eichleay formula" would still require that the defendant pay $19,262 for the 335-day delay.... I can only conclude that the mathematical computations under the "Eichleay formula" produce a figure with, at best, a chance relationship to actual damages, and at worst, no relationship at all.[300]

The major drawbacks of the Eichleay formula are, as follows: (a) It may result in a distorted overhead figure because the time period used in the calculation includes the delay period. (b) The calculation assumes that the overhead items are fixed in costs, when in fact they are variable. (c) There may be little or no relationship of the overhead costs being accumulated for the particular contract under the formula during the delay period and the overhead costs for all of the work of the contractor. (d) It may include normal construction shut-down periods, such as winter weather or end on the construction season periods, where the contractor would normally be idle anyway.

There is some indication that the formula will not be as readily accepted and may be rejected in jurisdictions other than New York.[301]

6. Fraudulent Claims

In order to prevent fraudulent claims against the Federal Government, 41 U.S.C. § 604 provides:

> If a contractor is unable to support any part of his claim and it is determined

that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection [section] shall be determined within six years of the commission of such misrepresentation of fact or fraud.

7. The Items for Which Monetary Damages Are Claimed and/or Awarded[302]

The following, subparts a through m, are items for which contractors have sought compensation.

When monetary compensation is determined to be due, the contractor will recover the direct costs, attributed to and permitted by the terms of the contract. However, the manner that direct costs are calculated can be controverted, particularly for items like equipment. An important consideration is whether the dispute or claim is being adjusted within the terms of the contract, or whether the matter is being considered as a breach of contracts.[303]

(i) Labor. Labor costs should be easy to determine from payroll records. It is the basic hourly rates plus the fringes that the contractor pays to the employees on the project. However, tying the labor costs to the specific contract adjustment or extra work items can be difficult, as well as separating out the supervision personnel costs that should belong in overhead items. The indirect labor costs may not be easily determined, but the payroll and accounting records should provide much of the necessary information.

a. Direct labor. Extra direct labor costs, including fringe benefits, for the contract adjustment or extra work items or units are universally included when compensation is determined to be due. The fringe benefits involve payroll taxes, employer contribution to social security, unemployment insurance, worker's compensation insurance, pension plans, health and welfare funds, vacation pay, sick time, holidays, and other fringe items.

b. Indirect labor. In addition to the direct labor costs, there are other expenses that are variously referred to as the "labor surcharge," or "indirect labor costs." The labor surcharge or indirect labor costs involve supervisory personnel required by the union contracts or statute, work rules, apprenticeship programs, and other similar items. Some of these costs may be required under labor agreements or by statute. At times, the calculation of such costs is based on the direct labor payrolls or the number of employees on the job.

c. Inefficient labor. The contractors frequently claim that they have experienced losses due to inefficient labor use because of extra work, delays, or interference by government. Most times this is set out as the projected labor use of the contractor at the times of the bid versus that experienced on the project. In *Manshul* the court found that the contractor's calculations "... of labor inefficiency damage were arrived at by a comparison of its precontract estimate (perhaps only a partial estimate) of what its labor cost actually turned out to be. Claims of damage based on precontract estimates are impermissible. (Mount Vernon Contr. Corp. v. State of New York, 56 AD2d 952; Whitmyer Bros. v. State of New York, 63 AD2d 103, 108, affd 47 NY2d 960.) We are not persuaded that the trial court was wrong in rejecting the separate item of labor inefficiency."[304]

The preconstruction estimated labor versus actual labor cost method has the same shortcomings set forth in the discussion in section VIII (B)(1) on the total cost method; principally, it fails to recognize a poor bid by the contractor and its poor use of its labor force.

Inefficient labor costs are most frequently found in acceleration disputes or claims by contractors. In *Luria Brothers & Company, Inc. v. United States,*[305] a 1966 case, the court permitted the contractor to recover for labor inefficiency (loss of labor productivity) after it established that the government had repeatedly interfered with the progress of the work.

d. Premium pay. Premium pay is the extra labor costs and fringe benefits paid above the normal rates for overtime work and work outside of normal work hours, usually night work. In *Public Constructors,*[306] the trial court awarded to the contractor nearly all of the premium time the contractor paid on the contract. The appellate court struck down the award because the contractor made no showing that the premium time was in response to a state-caused breach. At times, when premium pay is recovered by the contractor, the contract provisions prohibit overhead or profit to be added to the amount of the premium.

(ii) Equipment. The equipment charges in a delay, contract adjustment, or extra work situation can be a high percentage of the costs. Many contracts establish how the equipment charges are to be determined and specify reference equipment costing guide manuals that are to be used. The requirements for equipment costs vary greatly from jurisdiction to jurisdiction. Therefore, careful review of the claims for equipment costs in relation to the contract specifications is essential.

a. Owned. The contract terms usually control the costs that are permitted for owned equipment. Sometimes, the contract specifies the use of standard equipment costing guide manuals. Other times the owner's actual cost or the standard equipment costing guide manuals, whichever are lower, are specified. For instance, 48 C.F.R. § 31.105(d)(2)(i)(A) essentially provides that actual costs, both equipment ownership and operating costs, *shall* be used and when such costs cannot be determined, the governmental agency may specify the use of a particular equipment rate schedule.[307] Even when standard equipment costing guide manuals are specified, some contracts provide that the total allowed for equipment costs cannot exceed the original costs of the equipment. Equipment cost factors include: operating costs, including fuel, oil, grease, minor repairs, and other minor expenditures to operate the equipment; and ownership costs, including capital cost of the equipment, major overhauls, major repairs, interest, taxes, storage, and insurance.

b. Rented. Invoices usually control rented equipment cost, but it should not exceed the standard equipment costing guide manuals or original cost. Most specifications require rented equipment to be acquired with an arms-length transaction.[308] Further, 48 C.F.R. § 31.105(d)(ii)(A), applicable to federal contracts, permits certain "costs, such as maintenance and minor or running repairs incident to operating such rented equipment, that are not included in the rental rate are allowable" costs to be added to the rental

costs. However, 48 C.F.R. § 31.105(d)(ii)(B) disallows "costs incident to major repair and overhaul of rental equipment. . . ."[309]

c. Idle. Not all equipment on highway construction contracts is in use at all times. Therefore, claims for idle or standby equipment must be examined very carefully. Particular attention should be given to the type of equipment and its normal use, the time of the year the claim is made (e.g., shut-down periods where the equipment would have been idle anyway), equipment downtime due to breakdowns, and other equipment affected by the downed equipment (e.g., a crane is broken and several other pieces of equipment dependent on the crane cannot work, or trucks that cannot work because a loader is broken).[310]

(iii) Materials. The cost of materials for the delay, contract adjustment, or extra work items should be easy to determine from paid invoice amounts. The materials invoice, however, may not include shipping, handling or storage charges, or placement costs. In some delay, contract adjustment, or extra work situations the contractor's bid price is used to compensate for extra items or units. The prices should be checked to see that they are reasonable. The contract terms may control how the bid prices in such situations are to be used. Further, if the price for the item or unit is an "in place" price, there may have to be an adjusted to material cost if the extra work does not involve placement.

(iv) Field supervision. Extra field supervision costs are usually allowed. Such cost, however, must be truly "extra," and over and above that which is normally involved in the performance of the contract.

(v) Overhead.[311] Many contracts contain a specified percentage amount for overhead and profit, without specifying that the overhead does or does not include all home office and field overhead items. Such a limitation on the amount of overhead is part of the agreement with the contractor and, unless a breach of contract is determined, should be sustained by the courts or administrative tribunals. In disputes or claims, however, the overhead items are usually required to be broken down into either home office or field charges and are subject to the contractual limitations, if any. Contractors have argued that the overhead theoretically included in the contract price is overhead incurred before the scheduled completion date and, thus, with respect to work done after the scheduled completion date, the overhead has *pro tanto* been incurred again, and therefore an additional overhead award may be justified.[312]

a. Home office overhead. The costs, which can properly be assigned to the delay, contract adjustment, or extra work, for the extended home office overhead, unless included in other categories of compensation or prohibited by the terms of the contract, should be paid in delay, contract adjustment, or extra work situations.[313] The home office overhead charges that are generally recoverable include office rent, office insurance, heat, electricity, office supplies, furniture, telephone and FAX machines, salaries of home office executives, supervisors and employees, and similar items.[314] Each claimed expense should be carefully examined and documented.

The contractor may not be able to recover unabsorbed home office overhead during a suspension of work, if it cannot prove that the suspension had an economic impact on the contractor's overall operations.[315] There is a difference between unabsorbed home office overhead and extended home office overhead. The first is for the period the contractor is idle and the second is for the period the contract performance is extended because of extra work or contract adjustments. In acceleration disputes or claims, there may be a credit due to the government for home office overhead costs because the project is finished sooner.

b. Field overhead. The cost of extended field office overhead is usually included in the contractor's dispute or claim. The field office overhead charges generally include field office rent, any separate field office insurance, heat, electricity, office supplies, furniture, telephone and FAX machines, salaries of supervisors and field office employees, and similar items. The extra costs of the extended field office overhead (over and above the normal field office overhead costs for the regular work or added work of the contract) are generally allowed by the court or administrative tribunal.[316] Care should be taken to separate out those charges that are actually the responsibility of the government, and not include those that are the responsibility of the contractor or are adjusted under a contract item or contract provisions such as a change clause or changed or differing site conditions clause. The fact that these field office overhead charges were incurred after the scheduled completion date does not necessarily mean that they were additional.[317]

In acceleration disputes or claims there may be a credit due to the government for field office overhead costs because the project is finished sooner.

(vi) Profit. In examining the allowability of profits, particular attention should be placed on the type of situation being considered and the contract language that covers the issue.

"Moreover, apart from the question of contract damages, profits can properly be included as one of the elements of an equitable adjustment pursuant to the contract terms."[318] However, in *J.D. Hedin,*[319] the court stated:

> Plaintiff [contractor] claims it is entitled to a profit of ten percent on those excess costs included in (1) costs incident to changes in foundations, (2) maintenance of temporary roads, and (3) temporary heating and snow removal except for the amounts of payroll taxes and insurance included therein. We have held in the past that a contractor is not entitled to profit on the amount of damages arising from a breach of contract. Oliver Finnie Co. v. United States, supra. [279 F.2d 498, 150 Ct.Cl. 189 (1960)[320]] We see no reason why we should depart from our prior holding. Therefore, plaintiff is not entitled to recover profits.

In *Manshul*[321] the court stated:

> We cannot see however why a second full profit on the direct cost should be allowed as part of damages for this work, nor why the profit allowance presumably included in the contract price for the work done during the delay period should itself form a basis upon which a further percentage of profit should be allowed.

(vii) Interest on monies. There is a real cost to the contractor for the time its money is tied up. While the dispute or claim is awaiting resolution, the contractor will argue that its cash and credit is unavailable to it and interest should be paid on that money. Usually statutes, regulations, or the contract specifications determine whether or not interest is allowed to be added to the compensation for delay, contract adjustments, or extra work.[322] Except for those instances where the contractor is able to clearly establish that the money was borrowed to run the job, with a direct connection to the disputed item or items, rarely is interest permitted by the court or administrative tribunal to be paid on

such money. However, such has not stopped contractors from frequently making claims for interest on the monies they claim or on borrowed capital funds.[323]

(viii) Claim preparation costs. Occasionally, the claim preparation costs are presented as a part of the dispute or claim for damages for delay, contract adjustments, or extra work. No cases were found where such was allowed as a part of the recovery.

(ix) Attorney and litigation costs.[324] Attorney and litigation costs are sometimes included in contractor claims. However, unless a statute specifically permits attorney and litigation costs, or it is a court imposed sanction, rarely have attorney or litigation costs been included in the amount of the claims adjustment. On the federal level the Equal Access to Justice Act may permit recovery of attorney fees.[325] Also, some jurisdictions permit recovery of attorney fees for a wrongful termination.[326] One should carefully examine the statutes and common law of one's state, as well as the contract provisions, to determine if this applies in the state.

(x) Additional bond and insurance costs. In some instances the contractor's cost of public liability insurance and property damage insurance is based on the direct labor costs. More often, however, such insurance premiums, as well as the cost of surety bonds, are based on the actual cost of the project. If the costs of the project go up through delays, contract adjustments, or extra work, it is likely that the cost of the insurance and bonds will increase. Such increased costs, unless included within other categories of compensation, should be considered in adjusting the compensation to the contractor.[327] Likewise, if the contract price is decreased, government should receive a credit.

(xi) Loss of bonding capacity. Occasionally, the loss of bonding capacity is presented as a part of the dispute or claim for damages for delay, contract adjustments, or extra work. Then, an anticipated profit claim is made on the "projects the contractor lost because of lack of bonding capacity." Such is very speculative. No cases were found where such was allowed as a part of the recovery.

(xii) Surety investigation of claims' costs. Occasionally, when a surety is involved in the matter, particularly when government is questioning the contractor's performance, the surety's cost of investigation of the claims is presented as a part of the dispute or claim for damages for delay, contract adjustments, or extra work. No cases were found where such was allowed as a part of the recovery.

(xiii) Subcontractor claims. The subcontractor claims are frequently presented as a part of the contractor's dispute or claim for damages for delay, contract adjustments, or extra work. Such are generally allowed, subject to the same limitations that are imposed on the contractor, and include such expenses as direct labor, materials, equipment, and the like, plus subcontractor markups for overhead and profit. The contractor may also be able to add a contractor's markup on the subcontractor's claim, usually about 5 percent.[328]

With respect to all of the foregoing items, except for breach of contract situations, such costs can be controlled by clear and concise exculpatory provisions.

IX. COMPLIANCE WITH EXTRA WORK CLAIM OR CONTRACT ADJUSTMENT PROCEDURES[329]

Compliance procedures are a type of exculpatory provision and should be considered just as effective as the clauses described in Section VII of this article. In many cases the contractor's compliance with the extra work or contract adjustment procedures is the only issue decided by the court or administrative tribunal. Generally, the contractor's failure to follow the contract adjustment procedures will prevent its recovery even when it appears that the contractor has a good case on the merits. On occasion, the government has been deemed by its actions to have waived compliance with contract adjustment procedures, or is estopped from asserting such noncompliance as a defense.

A. Degree of Compliance with the Contract Dispute or Claim Procedures

The degree of compliance with the contract dispute or claim procedure will many times determine whether or not the contractor retains the right to administratively proceed with a dispute or claim for extra work or a contract adjustment. In examining the compliance issue, it must be observed that government has the right to know that it may be obligated to pay additional costs with respect to a particular contract situation. At the same time the actions of the agents of government may be such that the contractor has the right to rely thereon relative to meeting any notice requirement.

1. Notice as a Precondition

Statutes, regulations, and the highway construction contracts contain procedural requirements specifying how and when notice must be given relative to situations that affect project cost and scheduling adjustments. These include the requirement for notice, to whom the notice must be given, any time limits for the notice, and other procedures that must be followed. These notice provisions are generally enforced by the courts unless it is determined that the party to the situation which is asserting lack of notice in some way waived the notice requirement. Most notice provisions require that the contractor must inform the government, usually in writing, when conditions are such that there is a claimed modification to the cost of the project or the contractor seeks an extension of time to complete the work. This also includes situations where there is a contract time acceleration directed or ordered by the government. Generally, a claim will be asserted under a contract provision, such as the change clauses, changed or differing site conditions clauses, stop work provisions, extra work situations, or other similar contract adjustment clauses. The basic rationale for enforcing notice requirements is that the lack of timely notice may be prejudicial to the government since it may effectively prevent verification of the contractor's claim. Also, notice enables the government to keep detailed records of the costs of an operation that could lead to a claim. The lack of notice also may prevent the use of any alternative remedial process.[330]

When determining whether the contractor has complied with contract adjustment procedures, three basic facts must be established. First, does the notice provision apply? Second, was required notice given? Third, was the notice requirement waived or was there estoppel against government? *Plumley v. United States*[331] is a landmark case relative to strict interpretation of the notice requirement. The court, in *Plumley*, held that when the contract requires written notice, a formal writing is the only form of communication that will meet the requirements. In addition, many cases involving the application of state law or state contract provisions for forfeiture of claims for extra compensation for failure to give

written notice have been enforced.[332] In *Glynn v. Gloucester,*[333] the contractor may have been entitled to a contract adjustment for unexpected subsurface rock conditions, but failed to follow the contract provisions for recovery. However, *Hoel-Steffen Construction Co. v. United States*[334] holds that the notice requirements can be considered mere technicalities, and the court can avoid strict enforcement based on legal doctrines such as waiver or estoppel.

(i) Written. Notice provisions generally provide that notice must be in written form, otherwise, there is likely to be extensive debate over whether notice has been given. This requirement is intended to eliminate any arguments as to whether or not notice was given. The result of the notice should be to give government time to investigate the matter to determine the nature and extent of the problem; to develop appropriate means to resolve the problem; to monitor the contractor's performance and assemble documents relative to the resources the contractor used to perform the work; and to attempt to remove situations that may limit the contractor's ability to perform the work.

(ii) Knowledge. The government's knowledge of the situation can take two forms; actual notice or constructive notice.

a. Actual. Actual notice includes not only written notice, but also oral conversations with and visual observations of the agents of government.

b. Constructive. Constructive or implied knowledge results from implication or necessary deduction from the circumstances such as correspondence or the conduct of the parties. Courts in some cases hold that strict compliance with the notice provisions will not be applied to defeat a contractor's dispute or claim. Such holdings are usually based on acts of the government, or the course of conduct between the contractor and government has been such that the enforcement of a strict written notice provision would be inequitable. Such notice is referred to as constructive notice. For example, it has been held that the failure of the contractor to give written notice (it did give timely notice in the field, although it was not written) of a changed or differing site condition, as required by the changed conditions clause, will not necessarily preclude contractor recovery, if the government was aware of the condition.[335]

Another case in point is *Frederick-Snare Corporation v. Maine-New Hampshire Interstate Bridge Authority*[336] (1941). The contractor brought suit to recover additional compensation for unforeseen excavation work concededly made necessary when the contractor encountered subsurface conditions other than those anticipated by the parties. The evidence established that the government was fully aware of the difficulties encountered by the contractor after discovering the unexpected conditions, but sought to defend against the claim for unforeseen work on the ground that the contractor had failed to furnish written notice of changed conditions, as required by the terms of the contract. The court held that the government had actual (constructive) notice of the changed conditions and was estopped from asserting contractor's noncompliance with the notice requirement.

2. Strict Compliance

Beside the *Plumley* case,[337] many cases hold the contractor to strict compliance relative to notice. For example, in *Allen-Howe Specialties Corporation v. U.S. Construction, Inc.,*[338] a 1980 case, the contractor brought an action to recover damages for delay caused by crowded work site conditions. The contract provided that any "claim of the Contractor arising out of any alleged interference due to the conduct of such other work shall be made to the Owner in writing within five (5) days of the occurrence of the alleged interference and shall be deemed to have been waived unless so made."[339] The Court ruled that such provision of the contract was controlling, and that by reason of the failure to submit its claim within the prescribed period, the contractor was conclusively presumed to have waived its claim for damages for delay due to interference with work conditions at the job site.

In *Johnson Controls, Inc. v. National Valve & Manufacturing Company,*[340] a 1983 case, the court ruled that under Oklahoma law, strict compliance with unambiguous contract provisions was required. In *Blankenship Construction,*[341] the contractor encountered unexpected amounts of rocks and pursuant to the changed conditions clause would have been entitled to recover for the additional costs. However, the contractor failed to give proper notice of the changed condition and failed to keep detailed records to support the claim. The court stated: "The notice and record-keeping procedures of these provisions are not oppressive or unreasonable; to the contrary, they are dictated by considerations of accountability and sound fiscal policy."[342]

3. Waiver or Estoppel

Where courts or administrative tribunals refuse to strictly enforce notice requirements, the contractor has asserted and the courts have relied on the doctrines of waiver or estoppel.

The case of *Reif v. Smith,*[343] a 1982 case, is an interesting and useful decision that sets forth many of the fact situations in which the courts in various jurisdictions have determined constitute a waiver or create an estoppel. In *Reif,* the Defendants "repeatedly visited the construction site, and . . . they were aware of the problems created by the plans and the changes . . . none of the changes or additions were made pursuant to written change orders as specified in . . . the contract."[344] The Court specified these facts as being significant to the determination of whether or not the owners' action constituted a waiver or an estoppel. In addition, the following principles can be adduced from the *Reif* case: (a) knowledge by the government of a change and that extra work was being performed; (b) failure on the part of government to object to the change and performance of the extra work; (c) the fact that the contractor was led to expect additional compensation for the change and the extra work; (d) the fact that the extra work was an unforeseen necessity or obvious for proper performance of the contract; (e) the fact that the extra work was verbally ordered by the government; (f) the concurrence of the contractor in carrying out the change verbally ordered by government as constituting a verbal agreement between the parties to modify the written terms of contract; and (g) the conduct of both the contracting parties during performance of the contract as establishing a pattern of continuing disregard for the written provisions of contract.

In *L.B. Samford, Inc. v. United States,*[345] a 1969 case, the government's inspector, who lacks the authority to bind the government, verbally agreed with the contractor that the method of measuring boulders should be changed from that in the specifications. The court, however, permitted the changed conditions to be considered even though there was no written notice to the government.

However, compare *Schnip Building*,[346] a case in which the contractor alleged that the subsurface conditions were materially different from what was represented on the contract drawings. The contractor failed to give notice to the government of the differing site conditions and claimed constructive notice because the changed conditions were obvious. The court was not persuaded and found that the contractor had not met the notice requirements that were prerequisite to asserting the claim because the government employees were unaware of the conditions.

4. Certification of Claim

The Federal Acquisition Regulation requires certification of claims over $50,000 by a senior company official in charge at the contract job site, or by an officer or general partner having overall responsibility for the conduct of the contractor's affairs.[347] Some states also require certification of disputes or claims.[348]

B. Effects of Noncompliance with Extra Work or Contract Adjustment Claim Procedures

As set forth previously, the most drastic effect on the contractor for noncompliance with extra work or contract adjustment claim procedures is to be prevented from asserting a claim. The contractor's noncompliance with extra work or contract adjustment claim procedures may result in various ways the claim is allowed to proceed. The following is a discussion of some of the effects.

1. Loss of Any Further Consideration of Claim, Both Administrative and in the Courts

Where the notice requirements are jurisdictional, the universal rule is that, unless a waiver or estoppel against government is found, the contractor will lose its right to assert a claim when it does not comply with the extra work or contract adjustment claim procedure.

2. Loss of Further Administrative Consideration of Claim, but Court Action Still Possible

Where the notice requirements are not jurisdictional, the universal rule is that unless a waiver or estoppel against the government is found, the contractor will lose its administrative claim when it does not comply with the extra work or contract adjustment claim procedure.

X. OTHER AREAS AND CONCEPTS THAT AFFECT EXCULPATORY CONTRACT PROVISIONS OR NO CLAIMS CLAUSES AND CHANGED OR DIFFERING SITE CONDITIONS CLAUSES IN HIGHWAY CONSTRUCTION CONTRACTS

The proper use of exculpatory contract provisions or no claims clauses, change clauses, and changed or differing site conditions clauses, together with appropriate cost control provisions, in highway construction contracts to complement each other will facilitate resolution of contract disputes and claims when they arise. The use of such provisions or clauses similar to those reviewed in this article, together with the recommendations and suggestions set forth in section XI, should more precisely define the guidelines, rules, and requirements that the respective parties to highway construction contracts must adhere. The use of these clauses and provisions should assist in obtaining the goal announced in the United States Senate Report to improve on the effectiveness and efficiency of the contract dispute resolution and claim adjustment systems now in use.[349] Such use should also assist in obtaining the secondary announced goal of providing that the initiative and interaction in dispute and claim matters be placed with the proper people and at the appropriate level.[350]

In connection with Congressional consideration of the legislation that became the Administrative Dispute Resolution Act,[351] it was reported by the Senate Committee that the legislation "encourages agencies to consider potential ADR uses and requires them to develop a specific policy to implement such uses. The bill calls for each agency to appoint a dispute resolution specialist and to establish an appropriate personnel training program in the use of negotiation and other dispute resolution methods."[352] Further, the published articles of the Associated General Contractors of America (AGC) have advocated the Association's objective of litigation avoidance.[353]

The commitment by both government and contractors is, therefore, present so that future public works projects can be undertaken with greater attention placed on reducing contract dispute and claim litigation.

A. Further Consideration of Objectives of Highway Construction Contracts

One of the main objectives of the administrators of highway construction contracts is to have the contract performed in accordance with the specifications, with as little conflict (disputes or claims) as possible. Clear contract clauses and provisions and uniform administration thereof in the field will greatly reduce the conflicts.

B. The Effect of Incentive and Disincentive Provisions[354]

Many highway construction contracts contain disincentive provisions such as penalties or liquidated damages, or reduced payments for failure to meet performance standards. In recent times, highway construction contracts have provided for incentive as well as disincentive provisions. Such incentive provisions provide bonus (incentive) payments for better than expected performance. For contracts that have only disincentive provisions, the contractor must consider putting a contingency in the bid in order to cover the possibility of the disincentive. For contracts that contain both incentive and disincentive provisions, the government can anticipate three positive results: (1) the contractor may lower its bid because it believes it can obtain the incentive; (2) the disincentive provision will be more enforceable in any court action because the disincentive is less likely to be considered a forfeiture; and (3) the contractor performance may be greater than specified because the contractor wants to make sure it obtains the incentive for a better than expected performance.

C. Cost Control Measures and Features During Construction

The following material sets forth certain construction and cost control measures and features that should assist both in reducing construction costs and contract conflicts (disputes or claims).

1. *Use of Progress Schedules and Critical Path Method (CPM)*

For federal construction contracts, 48 C.F.R. § 36.515 establishes progress schedule requirements.[355] Similarly, the New York State Department of Transportation has the following requirements:

> The contractor shall within five days after date of commencement of work, or within such time as determined by the Regional Director, prepare and submit to the Engineer for approval, a progress schedule showing the order in which the contractor proposes to carry on the work, the date on which he will start the major items of work (including but not limited to excavation, drainage, paving, structures, mobilization, etc.) and the critical features (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The chart shall show the order in which the contractor proposes to carry on the work. The chart shall be in a suitable scale to indicate graphically the total percentage of work scheduled to be completed at any time. The Department may require that the progress schedule, at a minimum, include the following items: (a) major work items and activities to be performed; (b) seasonal weather limitations; (c) time and money curve, and (d) phase duration or milestone events, if applicable.[356]

Often contractors use a Critical Path Method (CPM) of scheduling. The Critical Path Method is a procedure that was developed especially for time management in construction projects. In discerning CPM and its usefulness, the Court, in *Haney v. United States*,[357] a 1982 case, observed:

> Essentially, the critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. (E.g., one could not carpet an area until the flooring is down and the flooring cannot be complete until the underlying electrical and telephone conduits are installed.) The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the "critical path." A delay, or acceleration, of work along the critical path will affect the entire project.

Today most CPM schedules are computer generated. Developing the schedule involves the analysis of the sequence of work and the time characteristics involved in the projects that are monitored by CPM. The work schedule has a network of the activities and shows the relationship and interdependency between each activity. The CPM monitors the actual work sequence and the related activities. It is used not only to identify critical sequential steps, but also to identify many other essential steps of processes involved with the critical items. These include items such as necessary labor and equipment requirements, any required permits, licenses, or approvals, shop drawings, approval of shop drawings, determinations of materials to be used, material acquisitions, material production or fabrication schedules, inspection of materials, approval of materials, delivery of materials, knowledge of the schedules of work by subcontractors and other contractors, plans and specifications modifications, any notices to other parties, scheduling of future contract work and tracking of work actually performed. This permits the contractor to be involved with all monitoring, planning, and scheduling of the work. The CPM usually requires weekly adjustments as critical sequential items and their controls need to be modified as the work is progressed.

When complete and comprehensive time management systems are developed, they provide a basis for informed decision-making for the project work. As observed, the CPM commences at the very early stages of project work planning. The contractor must identify the critical items of work that are necessary to achieve completion of the project in a timely fashion. The CPM establishes the order in which the critical items must be done and through computer graphics will display this information in the form of flow charts. The system, therefore, permits easy adjustment as the work is actually accomplished. It also rapidly identifies potential delay, inefficiency, or interference situations.

The application of the CPM process to make an analysis of disputes or claims can also be very valuable. It must be remembered that the soundness of the CPM that is developed for such use is dependent on the source data and the capabilities of the persons inputing. Unfortunately, the CPM has been misused in some court actions. It has, on occasion, been used to make a presentation to the court or administrative tribunal on how the project could have been constructed, rather than as a planning tool and construction control measure for performance of a project. *Weaver-Bailey*[358] was a case where the government tried to justify delays by establishing a CPM for the project based on project records that the CPM expert reviewed and used at the trial. The expert was never on the project, never used the CPM on the project to monitor actual performance, and drew his own conclusions as to what the records meant. The court found relative to the expert's testimony: "Mr. Berkey's [the CPM expert] critical path analyses merely distract from defendant's [government] real argument concerning the effect of the 41% underestimate of unclassified excavation."[359]

The cases reviewed demonstrate that where a government-approved CPM is available and there is a government-caused failure in the timing of a critical path item or items, the contractor will recover resultant delay damages.[360]

If the CPM is not used, the contract should require that a progress schedule be submitted by the contractor prior to the start on the work.[361] The schedule will serve different purposes as between government and the contractor. In the evaluation of the adequacy of the schedule both will have looked, and be looking, for their own needs. A realistic schedule that is updated on a regular basis is important to the contractor, the government, the subcontractors, and the suppliers. The schedule, taken together with preconstruction and other project meetings, should at least show how and when the project will be constructed, illustrate the relationship between the separate activities, present the contractor's sequencing of events for coordination purposes, assist the contractor in manpower and equipment leveling to create efficiency within a specific project, provide a basis for preparing submittals (like shop drawing) for approval, provide the government a basis for cash flow and payment analysis, and provide a baseline schedule for analyzing contract change or adjustments that may occur.

When problems arise, the contract schedule that is used can be analyzed to determine what delays or other impacts may result from the situation. To assist in this effort the New York State Department of Transportation requires that, after giving notice of a dispute for time-related damages, the Contractor shall prepare and submit to the Engineer, if requested, weekly written reports until complete resolution of the dispute, which shall be available at the next scheduled

job meeting, providing the following information: (a) potential effect to the Contractor's schedule caused by the time-related dispute; (b) identification of all operations that have been affected or delayed, or are or may be affected or delayed; (c) explanation of how the Department's act or omission affected or delayed each operation, and estimation of how much more time is required to complete the project; and (d) itemization of all extra costs being incurred (including an explanation as to how those extra costs relate to the effect or delay and how they are being calculated and measured, identification of all project employees for whom costs are being compiled, and identification of all manufacturer's numbers of all items of equipment for which costs are being compiled).[362]

2. *Avoiding Delays for Approvals*

During contract performance, the contractor must obtain numerous approvals. The approvals that are made in the field, and any exceptions thereto, should be carefully documented. Careful tracking of the approvals and the dates the documents are received or submitted, whether or not they were complete and accurate, and when approvals are granted is essential when there is an issue of delay caused by an approval process. If the contract does not specify a time when approvals must be returned, the approvals must be returned in a reasonable time.

The New York State Department of Transportation has the following provision concerning approvals:

> Approval by the Department of shop drawings, methods of installation or contractor's construction detail does not relieve the contractor of the responsibility for compliance with the contract specifications, or relieve the contractor of the responsibility for providing proper adequate, quality control measures and does not relieve the contractor of providing proper and sufficient materials, equipment and labor to complete the approved work in accordance with the contract proposal, plans and specifications.[363]

This is an exculpatory provision that attempts to shift certain risks and responsibility to the contractor. If the state is responsible for the failure (e.g., the shop drawing approval is unreasonably slow, or the specifications provide for improper construction methods, or the specified materials fail, or similar situations), it is doubtful that the state would prevail in a dispute or claim involved with such an approval exculpatory provision.[364]

(i) Shop drawings. Government specifications may permit a review period for shop drawings.[365] If such are read literally the review could exceed the contract completion time. Courts or administrative tribunals tend to look at industry practice or customary periods for such a review as being the actual period that should be allowed to the government—even when the specifications establish the number of days the government has to review the shop drawings. Therefore, unreasonable delay, slow or untimely approval of shop drawings may result in the contractor recovering for the resultant delay.[366]

(ii) Plans or specification modifications. When it is determined that the plans have to be modified, it must be done in a reasonable time period. If the parties expend considerable time arguing about whether the government or the contractor is responsible for preparing the plan or specification modifications, the government may well be responsible for the delay period, or precluded from assessing liquidated damages against the contractor. Therefore, unreasonable delay, slow or untimely but necessary modifications to the specifications, may result in the contractor recovering for the resultant delay. Exculpatory clauses generally will not aid the government when there are defective plans or specifications, but may aid when there are changed or differing site conditions.

(iii) Requirement for orders for additional work to be in writing. Some jurisdictions require written orders for extra work as a condition precedent to the payment of any compensation for the performance of additional work. Where the provisions of a highway construction contract specifically provided that change orders must be in writing, it was held, in *Van Deloo v. Moreland*,[367] a 1981 case, that a claim for extra compensation alleged to be due and owing under a construction contract could not be asserted where the evidence established that there had been a failure of compliance with the express provisions of the contract that required written orders for extra work. The same result is found in *Comet Heating & Cooling Co., Inc. v. Modular Technics Corp.*,[368] a 1977 case, where a contract provision barring compensation for extra work, unless ordered in writing, precluded recovery where the contractor failed to establish that the alleged extra work had been ordered in writing. Further, in *A. Teicheret & Son, Inc. v. State*,[369] a 1965 case, the court held that such provisions could not be avoided by oral modification of the contract, and hence a claim for additional compensation for alleged extra work could not be asserted absent a showing that the claim was based on a change order executed in writing.

Security Painting Company v. Commonwealth, Department of Transportation,[370] a 1975 case, involved a contract for bridge painting. The Court found that the claim for additional compensation was barred by failure to comply with the requirement that change orders be reduced to writing. The applicable provisions of the contract in the case specified that:

> . . . no claim for extra work . . . will be allowed by the Secretary of Transportation . . . unless such work is ordered in writing by the chief highway engineer. . . . Any such work or material which may be done or furnished by the contractor without such written order first being given shall be at said contractor's risk, cost and expense and he hereby covenants and agrees that without such written order he shall make no claim for compensation for work or material so done or furnished.[371]

In holding that the failure of the contractor to secure a written change order from the engineer for alleged extra work performed under the bridge painting contract operated to bar a claim for additional compensation the Court observed that:

> One contracting with the Commonwealth often does so at great risk. Before submitting his bid, a contractor should become aware of all contractual provisions and their ramifications. A failure to do so is often a prelude to disappointment or financial loss.[372]

3. *Orders or Directions Given in the Field*

The specifications should include a provision requiring orders or directions given in the field to be in writing. Field orders should be followed expeditiously with necessary contract modification documents. Field staff should be warned not to make any admissions against the government's interest in such documents.

4. *Quality Control During Construction*

Quality control during construction is very important and must be implemented to assure that the work is accomplished in accordance with the specifications. The governmental agency establishes the standards and specifications for construction. The governmental agency's quality control program monitors the contractor's compliance with these standards and specifications. Typically, a quality control program would involve the inspections and testing, and documentation of the control of the quality of materials, workmanship, procedures, and construction methods used by the contractor. As with many elements of performance of the highway construction contract, the approach used by the individuals implementing quality control may actually lead to disputes or claims.

If the contract has primarily disincentive provisions versus a contract with both incentive and disincentive provisions (discussed in subsection B hereof), the contractor will be attempting to obtain minimum required results, at the lowest cost. Add to this the difference in the personalities and abilities of the engineers-in-charge (EIC) and their inspection teams from project to project, and quality control becomes a major variant in the highway construction contract process.

Performance of the work is approached totally differently by government and the contractor. The EIC are insisting on their interpretation of the contract specifications, while the contractor is attempting to get results at the lowest possible cost. When work has to be redone because it fails to meet the contract standards, there are frequently disputes or claims relative to who is responsible for the failure and which disputes or claims may, in part, be due to the type of specification being used by the government. Such a conflict will also cause a breakdown in the overall relationship between the EIC and the contractor.

On the government side, uniformity of contract specification interpretation and application is an excellent goal. To assist in uniformity, not only is training of the government personnel essential, but the use of standard specifications that have national or at least regional application, as well as national standards relative to testing procedures, testing methods, and performance characteristics would greatly assist in such a uniformity goal. On the contractors' side, production of a quality finished result, as well as paying attention to the maintenance and protection of traffic and job site safety requirements, is an excellent goal. If the contractors are able to approach final results of their efforts with a sense of pride of accomplishment, as well as the good-will that evolves from a better than expected performance, the quality goal may be obtainable. Unfortunately, the cost to government of providing such uniformity and quality has become a major deterrent to obtaining these goals in recent years.

5. *Contract Adjustments Cost Controls*

Whether or not the costs that the contractor incurs for extra work or contract adjustments are reasonable is an important issue that must be determined. For federal contracts, 48 C.F.R. § 31.201-3 (FAR), provides in part:

> No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

Roscoe-Ajax Construction Co., Inc. v. United States,[373] a 1972 case, discusses the situation where an adjustment is due, but it must be determined: (a) whether the contractor would have been obligated to incur the claimed expenses if the changed condition had not been encountered, and, if so, those expenses are not recoverable as a part of equitable adjustment; and (b) whether the contractor could reasonably have handled the changed condition with a less expensive method or equipment.

Some state contracts provide that extra work shall be paid at unit or item prices, or if not covered by items or units in the schedule of prices, the work will be paid on an agreed upon price (reasonable cost) or cost reimbursable basis.[374] Where government finds it necessary to make a change in the specifications or contract because of defects or there is a contract adjustment or there is extra work performed by the contractor, the contractor may recover the reasonable value of additional work necessitated by the change or extra work.[375] If the contractor has miscalculated in its bid estimate and it may have to absorb some of the costs over its original estimate, it does not automatically result in the contractor recovering nothing on its claim for adjustment based on the changed or differing site condition.[376]

(i) The data required from the contractor. In order to protect the interests of both government and the contractor, the project records should clearly reflect the problems of delay, contract adjustment, or extra work, and the entries should be clearly identified and accurate. In New York, the following is the record-keeping requirement for a contractor when it is submitting a dispute or claim:

> In all instances, for any claim asserted, the contractor shall keep detailed written records of the costs and agree to make them available at any time for purposes of audit and review. The submission of the claim shall include:
>
> a. A detailed factual statement of the dispute providing all necessary dates, locations and items of work affected by the dispute.
>
> b. The date on which actions resulting in the dispute occurred or conditions resulting in the dispute became evident.
>
> c. A copy of the "notice of dispute" required for the specific dispute by the contract.
>
> d. The name, function, and activity of each Department official or employee or agent involved in, or knowledgeable about facts that gave rise to such dispute.
>
> e. The name, function and activity of each Contractor or Subcontractor official, employee or agent involved in or knowledgeable about facts that gave rise to such dispute.
>
> f. The specific provisions of the Contract which support the dispute and a statement of the reasons why such provisions support the dispute.
>
> g. The identification of any pertinent documents and the substance of any material oral communications relating to such dispute.
>
> h. A statement as to whether the additional compensation or extension of time requested is based on the provisions of the Contract or an alleged breach of Contract.
>
> i. If an extension of time is also requested, the specific days for which it is sought and the basis for such request as determined by an analysis of the construction schedule.

j. The amount of additional compensation sought and a breakdown of that amount shall conform to the requirements of the contract.

k. If the claim exceeds $50,000 the contractor shall certify that the information provided is accurate and the claim is justified under the terms of the contract.[377]

(ii) Fiscal controls. Generally, when the government finds it necessary to make a change in the specifications, or there is extra work performed by the contractor, the contractor may recover the reasonable value of additional work necessitated by the change or extra work.[378] However, governments may impose an exculpatory provision type cost control in the highway construction contract that restricts the contractor from recovering all costs and expenses that it incurs. One example of such a clause:

> The parties agree that, in any dispute for delay damages, the state will have no liability for the following items and the contractor further agrees he shall make no claim for the following items: (a) Profit, in excess of 10%; (b) Loss of anticipated or unanticipated profit; (c) Labor inefficiencies and loss of productivity; (d) Home office overhead in excess of 10%; (e) Consequential damages, including but not limited to interest on monies in dispute, including interest which is paid on such monies, loss of bonding capacity, bidding opportunities, or interest on retainage or investment, or any resultant insolvency; (f) Indirect costs or expenses of any nature; (g) Direct or indirect costs attributable to performance of work where the contractor, because of situations or conditions within its control, has not progressed in a manner satisfactory to the state; (h) Attorneys fees, or claims preparation expenses.[379]

The contractor may then be faced with an exclusive remedy provision like:

> With respect to the dispute compensation provisions, the parties agree that the state shall have no liability to the contractor for expenses, costs, or items of damage other than those which are specifically identified as payable. In the event any legal action is instituted against the state by the contractor on account of any such dispute for additional compensation, whether on account of time related dispute, delay, acceleration, breach of contract, or otherwise, the contractor agrees that the state's liability will be limited to those items which are specifically identified. The contractor further agrees to make no claim for expenses other than those which are specifically identified as compensable. Nothing herein is intended to create any liability of the state not existing at common law or pursuant to the terms of this contract.[380]

These provisions are enforceable provided the court does not determine that the government has breached the contract.[381] It must be remembered that the contractor has a duty to mitigate the damages and government must prove that the damages could have been avoided. These provisions provide an agreed to way of determining contract adjustments or extra work costs within limits that are understood by both the government and the contractor.

D. Other Matters That May Affect Exculpatory Contract Provisions or No Claims Clauses and Changed or Differing Site Conditions Clauses in Highway Construction Contracts and Governmental Use of Certain Controls That Should Assist in Reducing Contract Cost Overruns

It is important to provide quality controls over designs, to understand some of the bidders' techniques to win projects, and to understand how such may affect cost overruns or adjustments in highway construction contracts. The following matters and concepts are, therefore, briefly set forth to provide a basic review of certain subjects that may assist in providing more effective cost controls in highway construction contracts.

1. Pre-Bid Information[382]

Government's obligation to disclose pre-bid information for highway construction contracts was thoroughly discussed in subsection G, section VII of this article. Pre-bid information for highway construction contracts includes items such as as-built plans for prior projects at the site or near by, climatic conditions, topography information, site surveys, soil tests, ground water table information, borings, earthwork cross section and quantity sheets, information on necessary specialty equipment, special reports, plans and specifications for the project, other contracts or projects that affect the work of the project, any court action or proceeding that would interfere with the performance of the work and other pertinent project data.

In view of the large sums being sought by the contractors as damages for lack of pre-bid information and changed or differing site conditions situations, the principles established by the *Wunderlich*[383] case (discussed earlier in section IV) cannot be underemphasized for those whose job it is to protect the public interest. The elements that are distinguishable in *Wunderlich* (e.g., the absence of a positive representation as to the site conditions, actions required of the contractor by specific provisions in the contract, and a specific disclaimer of responsibility on the part of the State for the accuracy of the pre-bid test data) are important not only to the defense of claims against the government, but also in advising and counseling as to steps necessary to provide cost control protection to the governmental agency in the preparation and award of construction contracts. These considerations must, however, be balanced against probable higher bids to compensate the contractor for the risks of lack of adequate pre-bid information.

2. Competitive Low-Bid Concept

The competitive bid concept was initiated in the public works contracting process to curb corruption, inefficiency, and mismanagement by government officials. Over the years, through social and economic pressures, the additional qualification of lowest "responsible" bidder and an "in the public interest" determination were added to statutes which control the authority to award public works contracts.

One reason most often asserted to support the low-bid concept is that it protects the taxpayer from extravagance, corruption, and other improper practices by public officials in connection with the award of government contracts, with the side effect of protecting the public official from the demands of those who seek political favors by obtaining such contracts. The bidding requirement is also intended to provide the taxpayers with the benefits of America's free enterprise system by delivering adequate, safe and efficient highway facilities at the lowest price that responsible, competitive bidders can offer.

The principles of competitive bidding generally require preparation of plan specifications for the work; public advertisement to bidders inviting submission of proposals; formal submission of proposals to the contracting agency; submission of financial security by the low bidder guaranteeing acceptance of the award; and consideration of proposals under uniform criteria and award to successful bidders.

The administrators of highway construction contracts should be aware that contractors in the competitive low-bid atmosphere may be able to use the design, specification writing (risk assignment) or bidding process itself to win contracts. For example, where the contractor bidder is aware that government has made a large mistake (usually called a "bust") in the estimated quantities and there is a "significant change in the character of work" clause or a "changed conditions" clause or a "differing site conditions" clause, the contractor may use the "bust" item to its advantage to win the bid. There is, however, an interesting case where the court denied the contractor additional compensation for items when the contractor knew that the government had made a large mistake with respect to the quantities, and did not notify government of its mistake in the bidding period.[384] These type of situations demonstrate the need for thorough bid analysis to spot high and low bids in relation to the engineer's estimate, any "bust" items, and other important bidding and bidders' data.

3. The Unbalanced Bid

Highway construction contracts may specify that unit or item prices are to be set forth in the bid proposal. The governmental agency establishes the estimated quantities for each unit or item. The bidders must competitively bid the estimated units or items and a calculation of the total price is made therefrom. The intent is to provide a simple way of determining the lowest bidder as well as an easy and equitable way of paying contractors for work actually performed. Highway construction contracts are generally awarded to the contractor submitting the lowest total bid price based on the estimated units or items. The final total payment, however, often varies from the total bid price because it is a reflection of the actual quantities or units of work performed under the contract. The exception to this variant is the lump sum bid items that are submitted for some units or items.

Contractors, on the other hand, try to offset uncertainties that may be inherent in the highway construction contracts, and also attempt to "money manage" the project. Therefore, they frequently bid by a process that is referred to as the unbalanced bid. An unbalanced bid is one that significantly deviates above or below the engineer's price estimate for the units or items appearing in the bid proposal.

In performing the unbalancing, a contractor is frequently "front-end loading" the bid in order to receive high payments for work performed during the early phases of work. While unbalancing may have some advantages to the contractor, it also has serious disadvantages relative to adjustments that may have to be made as the work progresses. It may also affect the sequencing of the bidders if there is a quantity "bust" in the bid proposal that is not discovered until after the bids are received. When the governmental agency recalculates the bid using the corrected estimated units, the sequence of the bidders may be altered. The unbalanced items may also affect whether or not the contractor is being reasonably paid for units or items which become part of approved extra work or contract adjustments. Typically, the highway construction contract provides that for extra units or items up to certain thresholds (e.g., 15 percent, 25 percent, etc.), the contractor will be compensated at the unit or item bid price of the contractor. If the contractor has unbalanced that unit or item so that it is higher than normal, the contractor will receive a windfall. If the contractor has unbalanced that unit or item lower than is normal, the contractor may be performing the work at a much lower cost than would be reasonable for the unit or item.

A principal factor that must be kept in mind relative to the unbalanced bid is that it could affect the equitable adjustments under either changed or differing site conditions clauses or under significant changes in the character or scope of the work of the project. As previously discussed, various clauses are included in highway construction contracts that seek to shift the risk for encountering certain different site conditions for work (other than those covered by a changed or differing site conditions clause or a change clause) from the government to the contractor. These clauses may include categories, such as contract unit or item bid price requirements for extra work or contract adjustments, which may also affect the lump sum items such as broad-based unclassified excavation items or maintenance and protection of traffic items. The unbalanced bid therefore may affect those lump sum categories and similar categories of work.

It is not the intent of this article to advocate whether or not unbalanced bids should be unacceptable to governmental agencies, but it should be recognized that an unbalanced bid can present some problems in the administration of highway construction contracts and is therefore an indicator that further review of the bid should be undertaken. At the same time it must be recognized that contractors often find that they have to unbalance units or items in order to compensate themselves for risk management, early payments for materials, indirect costs of maintaining project offices, salaries of supervisors and managers, the cost of insurance, and numerous other home and field office overhead costs. The unbalanced bid, however, may have a significant effect on the actual cost to perform the highway construction project.[385]

XI. RECOMMENDATIONS AND SUGGESTIONS

The following are some recommendations and suggestions relative to exculpatory provisions or changed or differing site conditions clauses that may strengthen the highway construction contracting process to prevent claims and reduce additional costs:

- Determine whether, in light of risk assignment objectives, exculpatory clauses are appropriate for your agency. If so, carefully choose those clauses designed to accomplish your objectives.
- Insofar as the general exculpatory provisions relative to pre-bid matters are concerned, the most effective means of making the same binding is to require in clear and unequivocal language that the contractor shall, on the basis of its own independent investigation, be satisfied that actual subsurface conditions are the same as represented. It is particularly useful to require the contractor to attest that it has so satisfied itself on the basis of its own independent investigation in connection with preparing its bid.

- Care must be taken to make sure the exculpatory provisions (risk assigned to the contractor) do not conflict with changed or differing site conditions clauses of the contract.
- Care should be taken to avoid ambiguities and inconsistencies in the plans and specifications and other contract documents that may be construed against the government and in favor of the contractor.
- When using exculpatory provisions, care should be taken to avoid presenting pre-bid information in such manner that it is subject to being interpreted or construed to be a positive assertion of fact.
- At the same time, equal care must be taken to avoid the pitfall of nondisclosure of pre-bid information. Failure to disclose pertinent information in possession of the government has proven to be costly in numerous cases.
- Many situations that cause difficulty in the performance of the contract work, such as "severe bad weather" and other similar situations, that will activate clauses that entitle the contractor to additional monetary compensation, should be clearly defined and carefully set forth in the contract documents.
- The contract should contain a specific disclaimer of the accuracy of particular representations because a disclaimer that relies on a general exculpatory provision covering the whole project will not be given as much weight as a specific one by the courts or administrative tribunals.
- Requiring the contractor to furnish its bidding data will greatly assist in adjusting costs during the contract performance.
- Requiring notice of a dispute or claim as well as record-keeping for such disputes and claims is essential to properly adjust costs for the contracts.
- Requiring the contractor to receive written instructions prior to proceeding with the extra work should assist in reducing unnecessary contract adjustments.
- Providing for contract adjustments without appropriate record-keeping requirements will make the determination of reasonable costs for adjustments very confrontational and difficult.
- Government should know the percentage of its losses in relation to its capital program in order to better understand how it should undertake appropriate measures to reduce such losses.
- No one system of contracting is perfect and, therefore, the system that is used must be continually and carefully monitored and appropriate adjustments made thereto in order to obtain the desired results.
- The use of exculpatory provisions must be carefully considered in relation to their effects on bids and performance by the contractor. The tendency will be that the greater the number of risks assigned to the contractor, the higher the bid will be to cover the risks.
- Using exculpatory provisions, rather than changed or differing site conditions clauses, tend to cause greater conflict because compensation is dependent to a large degree on determining who is responsible for the particular event. However, exculpatory provisions may be necessary to carefully establish responsibility for the performance of the contract.
- The use of changed or differing site conditions clauses with appropriate controls over costs that the government bears will give governments the greatest chance that a dispute will be decided with heavy reliance on the contract provisions rather than the contractor's resort to a claim based on a breach of contract theory.

XII. CONCLUSION

In conclusion, adjustments to costs for highway construction contracts throughout the United States involve hundreds of millions of dollars annually. Controls over such additional cost should be a major concern to government administrators. The vast majority of these costs involve changed or differing site conditions clauses and provide an opportunity for the use of exculpatory provisions. If the governmental contracting system were to be improved only a portion of a percentage point over that which is currently being experienced, the government would save thousands or millions of dollars annually. Understanding the totality of the highway construction contracting systems is a difficult job, but it is essential in preventing and defending highway construction contract claims.

APPENDIX

Definitions of major terms or phrases as used in the article, in addition to those defined in the text, are as follows:

Compensation. Compensation as used in the article includes, in appropriate instances, in addition to monetary compensation, adjustments to contract performance, particularly time extensions.

Contracts of adhesion. A contract of adhesion is one where there exists an unequal bargaining power between the parties and one party can control all of the terms and make the contract available on a take it or leave it basis.

Differing site conditions. Subsurface or latent physical conditions that are encountered at the project site that differ materially from those indicated in the contract. Unknown physical conditions of an unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent in the work of the contract.

Significant changes in the character of work. Alterations or changes in quantities or items of work that also significantly change the character or scope of the work in the contract.

Suspensions of work. A direction from the owner for the contractor to cease all operations or to stop particular portions of contract work. Such a suspension may be required because of field conditions that are present or are encountered during the work and, therefore, in that case, a direction from the owner may be unnecessary.

BIBLIOGRAPHY

The following TRB articles and A.L.R. reports relate to the subject of the article:

Aiken, *Burden of Proof in Cases Before United States Court of Claims Involving Renegotiation of Government Contracts Pursuant to Renegotiation Act of 1951*, 31 A.L.R. Fed. 591.

Bernstein, *Construction Contractor's Liability to Contractee for Defects or Insufficiency of Work Attributable to the Latter's Plans and Specifications*, 6 A.L.R.3d 1394.

Brunner, *Validity and Construction of "No Damage" Clause with Respect to Delay in Construction Contract*, 74 A.L.R.3d 187.

Contractual Provision for Per Diem Payments for Delay in Performance as One for Liquidated Damages or Penalty, anon., 12 A.L.R.4th 891.

Foster, *Modern Status of the Rules Regarding Impossibility of Performance as Defense in Action for Breach of Contract*, 84 A.L.R.2d 12.

Harlow, *Construction and Effect of "Changed Conditions" Clause in Public Works or Construction Contract with State or Its Subdivision*, 56 A.L.R.4th 1042.

Harp, "Liability for Delay in Completion of Highway Construction Contract," *Selected Studies in Highway Law*, Vol. 3, pp. 1495–1524; supplemented, 1980 pp. 1524-S1–1524-S-17; supplemented, 1988 pp. 1524-S19–1524-S39.

Holliday, *Equipment Leasing Expense as Element of Construction Contractor's Damages*, 52 A.L.R.4th 712.

Hursh, *Liability of Building or Construction Contract for Liquidated Damages for Breach of Time Limit Provision Where He Abandons Work After Time Fixed for Its Completion*, 42 A.L.R.2d 1134.

Jacklin, *Sufficiency of Notice to Public Works Contractor on United States Project Under Miller Act*, 98 A.L.R. Fed 778.

Jhong, *Effect of Stipulation, in Public Building or Construction Contract, That Alterations or Extras Must Be Ordered in Writing*, 1 A.L.R.3d 1273.

Keefe, *Validity, Construction, and Application of "No Damage" Clause with Respect to Delay Appearing in the Contract*, 10 A.L.R.2d 801.

Marvel, *Construction and Effect of a "Changed Conditions" Clause in a Public Works or Construction Contract*, 85 A.L.R.2d 211.

Netherton, "Construction Contract Claims: Causes and Methods of Settlement," *National Cooperative Highway Research Program Synthesis of Highway Practice 105*, 1983.

Oliveiri, *Timeliness of Notice to Public Works Contractor on Federal Project, of Indebtedness for Labor or Materials Furnished*, 69 A.L.R. Fed. 600.

Roberts, *Application of 28 USCS § 2561(a) to Government Contractor's Claim for Interest Expense or for Loss of Use of Its Capital Caused by Delay Attributable to Government*, 59 A.L.R. Fed. 905.

Sarno, *Enforceability of Voluntary Promise to Additional Compensation Because of Unforeseen Difficulties in Performance of Work Required Under Contract*, 85 A.L.R.3d 259.

Sarno, *Public Contracts: Duty of Public Authority to Disclose to Contractor Information, Allegedly in Its Possession, Affecting Cost or Feasibility of Project*, 86 A.L.R.3d 182.

Schopler, *Judicial Review Under Wunderlich Act (41 USCS §§ 321, 322), of Federal Administrative Decisions Made Under Standard "Disputes" Clauses in Government Contracts*, 2 A.L.R. Fed. 691.

Schwartz, *Construction and Application of Truth in Negotiations Act (10 USCS § 2306(f), Requiring Prime Contractors and Subcontractors to Submit Cost or Pricing Data, Certified to Be Accurate, Complete, and Current, Respecting Certain Government Contracts*, 24 A.L.R. Fed. 317.

Thomas, *Application to Determination of Government's Liability Under Public Contract, of Doctrine of "Constructive" Invocation of Clause Authorizing Termination for Convenience of Government—Modern Cases*, 104 A.L.R. Fed. 661.

Vance, "Enforceability of the Requirement of Notice in Highway Construction Contracts," *Selected Studies in Highway Law*, Vol. 3, pp. 1524-N1–1524-N30; also found in National Cooperative Highway Research Program *Research Results Digest 152*, February 1986.

Vance and Jones, "Legal Effect of Representation as to Subsurface Conditions," *Selected Studies in Highway Law*, Vol. 3, pp. 1471–1494; also found in National Cooperative Highway Research Program *Research Results Digest 39*, 1972; report supplemented, Vol. 3, pp. 1494-S1–1494-S7.

Walley and Vance, "Legal Problems Arising from Changes, Changed Conditions, and Disputes Clauses in Highway Construction Contracts," *Selected Studies in Highway Law*, Vol. 3, pp. 1441–1469; supplemented, Vance, 1980 pp. 1470-S1–1470-S6.

Zitter, *Amount of Appropriation as Limitation on Damages for Breach of Contract Recoverable by One Contracting with Government Agency*, 40 A.L.R.4th 998.

Zupanec, *Construction Contract Provision Excusing Delay Caused by "Severe Weather,"* 85 A.L.R.3d 1085.

[1] *E.g.*, New York state courts strictly enforce exculpatory provisions and no claims clauses, particularly in those cases that involve public works construction. *See* Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377 (1983); Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986); *on remand*, 123 A.D.2d 571, 507 N.Y.S.2d 146 (1986); and Davis Construction Corp. v. County of Suffolk, 149 A.D.2d 404, 539 N.Y.S.2d 757 (2d Dept. 1989); *appeal denied*, 74 N.Y.2d 615 (1989), 549 N.Y.S.2d 960, 549 N.E.2d 15.

[2] Fattore Company, Inc. v. Metropolitan Sewerage Commission of the County of Milwaukee, 505 F.2d 1 (7th Cir. Wis. 1974), this case is a *remand* of 454 F.2d 537 (7th Cir. Wis. 1971), *cert. denied*, 406 U.S. 921, 92 S. Ct. 1779, 32 L. Ed. 2d 120.

[3] 180 Mont. 248, 590 P.2d 125 (1978).

[4] *Id.* at 252, 590 P.2d at 129.

[5] For example, a contract that provides for changed conditions adjustments for subsurface situations and also contains specific clauses relative to the contractors' obligations to inspect the work site and perform subsurface testing in connection with submission of the bid. *See* Blount Brothers Corp. v. United States, 424 F.2d 1074, 191 Ct. Cl. 784 (1970), where changed conditions clause was not applied because exculpatory provision specified that certain elevations would be established by subsequent information.

[6] 435 F.2d 873, 887, 193 Ct. Cl. 587, 613–614 (1970).

[7] 23 C.F.R. § 635.131. Note: The federal statute, 23 U.S.C. § 112, provides that the precise federal clauses are not applicable if a state adopts or has adopted by statute a formal procedure for the development of similar contract clauses, or state law prohibits their use.

[8] 72 Wis. 2d 365, 370, 241 N.W.2d 371, 376 (1976).

[9] Frank P. Ragonese v. United States, 120 F. Supp. 768, 128 Ct. Cl. 156 (1954).

[10] United Contractors v. United States, 368 F.2d 585, 177 Ct. Cl. 151 (1966).

[11] 435 F.2d 873, 881, 193 Ct. Cl. 587, 604 (1970).

[12] The clause is set forth in 48 C.F.R. § 52.236-2 (Federal Acquisition Regulation) (FAR).

[13] *See* "Legal Problems Arising from Changes, Changed Conditions, and Disputes Clauses in Highway Construction Contracts," Walley and Vance, *Selected Studies in Highway Law*, Vol. 3, pp. 1442–1443, for an excellent discussion on why the changed conditions clauses have gone through many changes throughout their use.

[14] It should be noted that the courts' role in interpretation of the application of contract documents is a question of law in federal contracting situations.

[15] *See* Nager Electric Company v. United States, 442 F.2d 936, 194 Ct. Cl. 835 (1971).

[16] *See* United States v. Spearin, 248 U.S. 132, 39 S. Ct. 553, 63 L.Ed. 166 (1918); and Miller v. City of Broken Arrow, 660 F.2d 450 (10th Cir. Okla. 1981).

[17] 412 F.2d 1325, 188 Ct. Cl. 1062 (1969).

[18] *See* Foster Wheeler Corporation v. United States, 513 F.2d 588, 206 Ct. Cl. 533 (1975). It should be noted that, in most jurisdictions, the contractor does not have to show impossibility of performance in order to activate a changed conditions clause. The clause is activated by the conditions being present and is normally a "no fault" type matter.

[19] *See* Interstate Markings, Inc. v. Mingus Constructors, 941 F.2d 1010 (9th Cir. 1991).

[20] *See* Stock & Grove, Inc. v. United States, 493 F.2d 629, 204 Ct. Cl. 103 (1974).

[21] 178 Cal. App. 2d 348, 2 Cal. Rptr. 871 (1960).

[22] *See* Peterson v. Container Corp. of America, 218 Cal. Rptr. 592, 172 Cal. App. 3d 628 (1985).

[23] *See* Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 309, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986); *on remand*, 123 A.D.2d 571, 507 N.Y.S.2d 146 (1986); and Peterson v. Container Corp. of America, 218 Cal. Rptr. 592 (Cal. App. 1985).

[24] Farina Brothers Co., Inc. v. Commonwealth, 357 Mass. 131, 257 N.E.2d 450 (Mass. 1970).

[25] 56 Cal. Rptr. 473, 423 P.2d 545 (1967).

[26] "Legal Effect of Representations as to Subsurface Conditions," Vance and Jones, *Selected Studies in Highway Law*, Vol. 3, p. 1483.

[27] *See* E. H. Morrill Co. v. State, 56 Cal. Rptr. 479, 423 P.2d 551 (1967).

[28] 58 N.Y.2d 377 (1983).

[29] *Id.*

[30] *Id.* at 385.

[31] 67 N.Y.2d 297, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986), *on remand*, 123 A.D.2d 571, 507 N.Y.S.2d 146 (1986).

[32] *Id.* at 312.

[33] *Id.* at 312–313.

[34] *Id.* at 314.

[35] 40 Ct. Cl. 117 (1904).

[36] Ericksen v. Edmonds School Dist., 13 Wash. 2d 398, 125 P.2d 275 (1942).

[37] *See e.g.*, Cauldwell-Wingate Co. v. State of New York, 276 N.Y. 365, 12 N.E.2d 443 (1938). For cases on right-of-way situations with a no damage clause in the contract, *see* Christhilf v. Baltimore, 152 Md. 204, 136 A. 527 (1927).

where the Court held that a no damage clause precluded delay damage for failure to provide right-of-way. In this case, the contractor knew at the time the contract was made that the city did not possess the right-of-way. *But cf.* Wilson & English Constr. Co. v. NYCRR Co., 240 A.D. 479, 269 N.Y.S. 874 (1934), where a no damage for delay clause was held inapplicable when the owner failed to disclose that the right-of-way was not available; and Nix, Inc. v. Columbus, 111 Ohio App. 133, 171 N.E.2d 197 (1959), where the no damage for delay clause was held inapplicable because both parties to the contract were mistaken in assuming that legal title to the right-of-way had been acquired.

[38] *See* Ippolito-Lutz, Inc. v. Cohoes Housing Auth., 22 A.D.2d 990, 254 N.Y.S.2d 783 (3d Dept. 1964).

[39] *See* Southeastern Highway Contracting Co. v. State Highway Dep't, 130 Ga. App. 160, 202 S.E.2d 520 (1973); Wilson & English Constr. Co. v. NYCRR Co., 240 A.D. 479, 269 N.Y.S. 874 (1934); and Psaty & Fuhrman Inc. v. Housing Auth. of Providence, 76 R.I. 87, 68 A.2d 32 (1949).

[40] *See* Cubic Corp. v. Marty, 185 Cal. App. 3d 438, 229 Cal. Rptr. 828 (4th Dist. 1986); and Keating v. Superior Court, 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982).

[41] Perdue v. Crocker National Bank, 38 Cal.3d 913, 216 Cal. Rptr. 345 (1985).

[42] 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940).

[43] *Id.* at 126.

[44] *See* Ace Construction Co. v. United States, 401 F.2d 816 (Ct. Cl. 1968), where the contractor did not recover for changed conditions and was held to contract specifications for "waste areas" with the fill to be carried out "as approved by the contracting officer." This matter is discussed in section VII(E)(4)(i) of this article.

[45] *See* "Construction Contractor's Liability to Contractee for Defects or Insufficiency of Work Attributable to the Latter's Plans and Specifications," Bernstein, 6 A.L.R.3d 1394. The New York State Department of Transportation, Standard Specifications, January 2, 1990, provide: "Unacceptable work, whether caused by poor workmanship, defective materials, damage through carelessness or any other cause found to exist prior to the final acceptance of the work, shall be removed immediately and replaced in an acceptable manner irrespective of the presence of, or lack of, a Department Inspector or representative. This clause shall have full effect regardless of the fact that the defective work may have been done or the defective materials used with the full knowledge of the Inspector. The fact that the Inspector or Engineer may have previously overlooked such defective work shall not constitute an acceptance of any part of it."

[46] 253 Minn. 295, 91 N.W.2d 713 (1958).

[47] New York State Department of Transportation, Standard Specifications, January 2, 1990.

[48] *Id.*

[49] *See e.g.*, MacKnight Flintic Stone Co. v. New York, 160 N.Y. 72, 54 N.E. 661 (1899) where the contractor furnished and placed material exactly as required by contract and there was failure. The contractor was held to be not responsible for the failure.

[50] *See e.g.*, Sunbeam Constr. Co. v. Fisci, 2 Cal. App. 3d 181, 82 Cal. Rptr. 446 (1969) where the contractor was not liable for a leak when it placed the roof in a good and workmanlike manner and in exact conformance to plans and specifications furnished by owner.

[51] "Construction Contract Claims: Causes and Methods of Settlement," Netherton, *National Cooperative Highway Research Program Synthesis of Highway Practice* 105, p. 13 (1983).

[52] 23 C.F.R. § 635.131 provides:

> Differing site conditions, suspensions of work and significant changes in the character of work.
>
> (1) Differing site conditions.
>
> (i) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before they are disturbed and before the affected work is performed.
>
> (ii) Upon written notification, the engineer will investigate the conditions and if he/she determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of his/her determination whether or not an adjustment of the contract is warranted.
>
> (iii) No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.
>
> (iv) No contract adjustment will be allowed under this clause for any effects caused on unchanged work.
>
> (2) Suspensions of work ordered by the engineer.
>
> (i) If the performance of all or any portion of the work is suspended or delayed by the engineer in writing for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the contractor believes that additional compensation and/or contract time is due as a result of such suspension or delay, the contractor shall submit to the engineer in writing a request for adjustment within 7 calendar days of receipt of the notice to resume work. The request shall set forth the reasons and support for such adjustment.
>
> (ii) Upon receipt, the engineer will evaluate the contractor's request. If the engineer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by conditions beyond the control of and not the fault of the contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather, the engineer will make an adjustment (excluding profit) and modify the contract in writing accordingly. The engineer will notify the contractor of his/her determination whether or not an adjustment of the contract is warranted.
>
> (iii) No contract adjustment will be allowed unless the contractor has submitted the request for adjustment within the time prescribed.
>
> (iv) No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided for or excluded under any other term or condition of this contract.
>
> (3) Significant changes in the character of work.
>
> (i) The engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not validate the contract nor release the surety, and the contractor agrees to perform the work as altered.
>
> (ii) If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the contractor in such amount as the engineer may determine to be fair and equitable.
>
> (iii) If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.
>
> (iv) The term "significant change" shall be construed to apply only to the following circumstances:
>
> (A) When the character of the work as altered differs materially in kind or nature from that involved or in-

cluded in the original proposed construction or

(B) When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

Note: The federal statute, 23 U.S.C. § 112, provides that these precise federal clauses are not applicable if a state adopts or has adopted by statute a formal procedure for the development of similar contract clauses, or if the state law prohibits their use.

[53] 23 C.F.R. § 635.131.

[54] AASHTO, "Guide Specifications for Highway Construction," § 104.02.

[55] This provision, Subsection b, Section 13 of General Conditions, was present in the contract in Siefford d/b/a/ Beall-Siefford Construction Co. v. Housing Authority of Humboldt, 192 Neb. 643, 223 N.W.2d 816 (1974).

[56] New York State Department of Transportation, Standard Specifications, January 2, 1992, Sample Form of Agreement, Article 13.

[57] TRB Task Force A2T51. The Task Force Report (*TRB Circular 386*) was issued December, 1991.

[58] Similar to the New York State Department of Transportation, Standard Specifications, January 2, 1990, Sample Form of Agreement, Article 13.

[59] Similar to the New York State Department of Transportation, Standard Specifications, January 2, 1990.

[60] *Id.*

[61] *Id.*

[62] 245 App. Div. 535, 283 N.Y.S. 577 (3d Dept. 1935).

[63] The actual exculpatory provision reads: "It is anticipated that the main piers will be sufficiently completed to permit the erection of the towers to be started on the dates above given. In case of delay in such dates, the contractor will be given a corresponding extension of time in the dates of completion. It is expressly understood and agreed that no claim shall be made against the State for any damage due to delays in the completion of the Main Piers which are constructed under another contract."

[64] 365 N.W.2d 485 (N.D. 1985).

[65] 274 N.W.2d 304 (Iowa 1979).

[66] *Id.* at 305.

[67] 261 App. Div. 288, 291, 25 N.Y.S.2d 437 (1st Dept. 1941), *aff'd*, 287 N.Y. 669, 39 N.E.2d 290.

[68] 37 A.D.2d 232 (3d Dept. 1971), *aff'd*, 30 N.Y.2d 631 (1972).

[69] 379 A.2d 344 (R.I. 1977).

[70] 149 A.D.2d 404, 539 N.Y.S.2d 757 (2d Dept. 1989); *appeal denied*, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 15 (1989).

[71] 38 A.D.2d 609, 326 N.Y.S.2d 246 (3d Dept. 1971), *aff'd*, 30 N.Y.2d 836, 335 N.Y.S.2d 81, 286 N.E.2d 465 (1972).

[72] *Id.*

[73] *See e.g.*, Ozark Dam Constructors v. United States, 127 F. Supp. 187, 130 Ct. Cl. 354 (1955); and Heating Maintenance Corp. v. State, 47 N.Y.S.2d 227 (Ct. Cl. 1944).

[74] *See e.g.*, American Bridge Co., Inc. v. State of New York, 245 App. Div. 535, 283 N.Y.S. 577 (3d Dept. 1935), where government directed the contractor's performance despite the long delay of the substructure contractor; and Gasparini Excavating Co. v. Pennsylvania Turnpike Com., 409 Pa. 465, 187 A.2d 157 (1963), where government was guilty of interference with the contractor's performance by directing it to start work when it knew that other contractors would be occupying the same area to the exclusion of such contractor.

[75] *See e.g.*, People *ex rel.* Wells & Newton Co. v. Craig, 232 N.Y. 125, 133 N.E. 419 (1921).

[76] 56 A.D.2d 952, 392 N.Y.S.2d 726 (3d Dept. 1977), *appeal dismissed*, 42 N.Y.2d 889, 366 N.E.2d 881, 397 N.Y.S.2d 794 (1977).

[77] 277 So. 2d 500 (La. App. 1973), *writ denied*, 281 So. 2d 740, no error.

[78] For contract interpretation of such a provision, see Kleinhans, d/b/a/ Interboro Co. v. State of New York, 17 A.D.2d 905, 233 N.Y.S.2d 134 (4th Dept. 1962).

[79] 37 A.D.2d 745, 323 N.Y.S.2d 21 (3d Dept. 1971), *modified*, 37 A.D.2d 789.

[80] In considering the granting of time extensions, the New York State, Department of Transportation, gives due consideration to: "Any industry-wide labor boycotts, strikes, picketing or similar situations, as differentiated from jurisdictional disputes or labor actions affecting a single or small group of contractors or suppliers." New York State Department of Transportation, Standard Specifications, January 2, 1990, supplemented, pp. 1–44.

[81] 20 Ill. App. 3d 634, 314 N.W.2d 598 (1974).

[82] 154 La. 57, 97 So. 296 (1923).

[83] 51 Wash. 2d 258, 317 P.2d 521 (1957).

[84] *See* WRB Corp. v. United States, 183 Ct. Cl. 409, 411–12 (1968).

[85] 491 F.2d 578 (5th Cir. 1974).

[86] Acts of God was defined in the case of Barnard-Curtiss Company v. United States, 257 F.2d 565, 568 (10th Cir. 1958), as "an unprecedented and extraordinary occurrence of unusual proportions and could not have reasonably been foreseen by the parties."

[87] *See* Shea-S & M Ball v. Massman-Kiewit-Early, 606 F.2d 1245 (D.C. Cir. 1979).

[88] Roger Johnson Constr. Co. v. Bossier City, 330 So. 2d 338, 341 (La. App. 1976).

[89] In Roger Johnson *supra* note 88, the court declared that although the "contract contains no definition of 'severe weather,' " the parties' obviously intended usage was "bad weather which by reason of atmospheric conditions such weather is not reasonably fit or proper to permit the performance of the undertaking contemplated."

[90] 40 Wash. App. 98, 696 P.2d 1270 (1985), *reh'g denied*, 103 Wash. 2d 1039.

[91] *See e.g.*, Weaver-Bailey Contractors, Inc. v. United States, 19 Ct. Cl. 474 (1990), *reh'g denied*, 20 Ct. Cl. 158 (1990), where winter weather delayed placement of rip-rap and the contractor recovered for delay damages including for the winter weather period.

[92] *See Construction and Effect of a "Changed Conditions" Clause in a Public Works or Construction Contract*, Marvel, § 9 at 229, 85 A.L.R.2d 211, for cases where severe weather was considered in connection with a changed condition clause.

[93] *See Validity and Construction of* "No Damage" Clause with Respect to *Delay in Construction Contract*, Brunner, 74 A.L.R.3d 187, for discussion of situations where weather may excuse delay and the validity and construction of no damage clauses in such situations.

[94] New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–40.

[95] *Id.* Also note that many contractors carry Completed Operations Insurance to cover damages to completed items of work.

[96] If a federal-aid (FHWA) contract is involved and the bad weather comes within the Differing Site Conditions clause, the provisions thereof will prevent indirect (ripple effect) recovery for items or units of work not involved with the bad weather situation. 23 C.F.R. § 635.131 (1) (iv) provides: "No contract adjustment will be allowed under this clause for any effects caused on unchanged work."

[97] *See e.g.*, Donald B. Murphy Contractors, Inc. v. State, 40 Wash. App. 98, 696 P.2d 1270 (1985), *reh'g denied*, 103 Wash. 2d 1039, where the court held that heavy rains did not constitute a changed condition within the changed conditions clause of a contract. The contractor was attempting to recover indirect costs under a public contract with the state for highway construction projects related to extra work required when unusually heavy rains caused flooding.

[98] *See e.g.*, Weaver-Bailey Contractors *supra* note 91.

[99] *See* New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–44, an extension of time may be granted for "[u]nusually severe storms of extended duration or impact, other than heavy storms or climatic conditions which could generally be anticipated by the bidders, as well as floods, droughts, tidal waves, fires, hurricanes, earthquakes, landslides, or other catastrophes."

[100] 357 F. Supp. 918 (D.C. Mo. 1973).

[101] *See e.g.*, Weaver-Bailey Contractors *supra* note 91.

[102] 4 Ct. Cl. 495 (1984).

[103] 527 So. 2d 1150 (La. App. 3d Cir. 1988).

[104] 713 F. Supp. 906 (E.D. Va. 1989).

[105] 70 F. Supp. 605, 108 Ct. Cl. 436 (1947).

[106] 186 Ill. 381, 57 N.E. 1027 (1900).

[107] 100 Ct. Cl. 53 (1943); *cert. denied*, 321 U.S. 790, 64 S. Ct. 785, 88 L. Ed. 1080 (1944).

[108] 261 A. 2d 836 (D.C. 1970).

[109] Article 4, Changed Conditions. Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

[110] 96 Ct. Cl. 77 (1942).

[111] 103 Ct. Cl. 688 (1945), *cert. denied*, 326 U.S. 752, 66 S. Ct. 90, 90 L. Ed. 451, *reh'g denied*, 326 U.S. 808, 66 S. Ct. 166, 90 L. Ed. 493.

[112] *See Construction and Effect of a "Changed Conditions" Clause in a Public*

Works or Construction Contract, Marvel, 85 A.L.R.2d 211, § 9 "Weather Conditions" at 229, for a discussion on this subject.

[113] 87 Ct. Cl. 563 (1938).

[114] 132 F. Supp. 698, 132 Ct. Cl. 645 (1955).

[115] *See e.g.*, Rock Hill Asphalt & Constr. Co. v. State Highway Comm'n, 452 S.W.2d 810 (Mo. 1970).

[116] *E.g.*, an "occurrence" entitles the contractor to monetary compensation for the repair cost and also and extension of time, without assessment of liquidated damages.

[117] *Supra* Roger Johnson Construction note 88.

[118] *But see* Weaver-Bailey Contractors *supra* note 91, where the court used the Federal "Default" clause (48 C.F.R. § 52.249-10) with the Federal "Differing Site Conditions" clause 48 C.F.R. § 52.236-2, in part with winter weather, to justify delay recovery to the contractor.

[119] *Id.*

[120] State of New York Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–43.

[121] Unreported, Court of Claims, Claim No. 64853, Judge Louis C. Benza, filed June 28, 1991.

[122] New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–20.

[123] For federal-aid transportation projects and federal contracts change clauses, *see* 23 C.F.R. § 635.131 (3) and 48 C.F.R. § 52.243–4, respectively.

[124] New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–20.

[125] 351 F.2d 651, 173 Ct. Cl. 302 (1965).

[126] 65 A.D.2d 119 (3d Dept. 1978).

[127] 153 Ill. App. 3d 918, 106 Ill. Dec. 858, 506 N.E.2d 658 (1987).

[128] 238 So. 2d 458 (Fla. 1970).

[129] 528 F.2d 1392, 208 Ct. Cl. 639 (1976).

[130] 140 N.J. Super. 289, 356 A.2d 56 (1975).

[131] *Supra* note 85.

[132] 257 Ga. 269, 357 S.E.2d 593 (1987).

[133] 149 Mont. 422, 427 P.2d 686 (1967), no wilful misrepresentation found.

[134] *Id.* at 425, 427 P.2d at 687.

[135] *Id.* at 425, 427 P.2d at 687.

[136] 392 F.2d 841 (3d Cir. Del. 1968).

[137] 56 Pa. Commw. 210, 424 A.2d 592 (1981).

[138] *Id.* at 214, 424 A.2d at 595.

[139] *Id.* at 214–5, 424 A.2d at 596.

[140] *Id.* at 218, 424 A.2d at 598; *see also*, Yonkers Contracting Co., Inc. v. N.Y.S. Thruway Authority, 45 Misc. 2d 763, 257 N.Y.S.2d 781 (1964), which allowed contractor to recover where N.Y.S. Thruway Authority did not reveal results of soil survey and misrepresented necessary information, where contractor lacked opportunity to conduct own inspections.

[141] 52 N.Y.2d 1064 (1981).

[142] The following is the exculpatory provision that was present in the case:

> SUBSURFACE INFORMATION. Boring logs and other subsurface information made available for the inspection of bidders were obtained with reasonable care and recorded in good faith by the Department.
>
> The soil and rock descriptions shown are as determined by a visual inspection of the samples from the various explorations unless otherwise noted. . . .
>
> Subsurface information is made available to bidders in good faith so that they may be aware of the information utilized by the State for design and estimating purposes. By doing so, the State and the contractor mutually agree and understand that the same is a voluntary act and not in compliance with any legal or moral obligation on the part of the Department. Furthermore, insofar as such disclosure is made, the Department makes no representations or warranties, express or implied, as to the completeness or accuracy of this information or data, nor is such disclosure intended as a substitute for personal investigations, interpretations, and judgment of the bidder.

[143] 676 F.2d 516 (11th Cir. 1982).

[144] 179 A.D.2d 850, 578 N.Y.S.2d 921 (3d Dept. 1992). *But cf.*, Fattore Company *supra* note 2; and Roscoe Ajax Construction Co., Inc. v. United States, 458 F.2d 55, 198 Ct. Cl. 133 (1972), that discuss dewatering situations where a changed or differing site conditions clause was involved.

[145] 151 F. Supp. 817, 138 Ct. Cl. 571 (1957), *cert. denied*, 355 U.S. 877, 78 S. Ct. 141, 2 L. Ed. 2d 108 (1957).

[146] *See e.g.*, 23 C.F.R. § 635.131 (2); and for reference to federal contracts, see 48 C.F.R. §§ 52.212-12 and 52.212-13. § 52.212-12 provides:

> Suspension of Work
>
> (a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.
>
> (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.
>
> (c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

Section 52.212-13 provides:

> Stop-Work Order
>
> (a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—
>
> (1) Cancel the stop-work order; or
>
> (2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.
>
> (b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if—
>
> (1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
>
> (2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal submitted at any time before final payment under this contract.
>
> (c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.
>
> (d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

[147] *See e.g.*, Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431, 192 Ct. Cl. 848 (1970).

[148] *Note:* If a suspension of work or a stop work clause is present in the contract, it may control the suspension situation. If a significant change in the character of work or change in the scope of work clause is present in the contract, the situation may come within the terms of such a clause.

[149] Ryan v. City of New York, 15 App. Div. 105, 143 N.Y.S. 974 (1913).

[150] 56 A.D.2d 952, 392 N.Y.S.2d 726 (3d Dept. 1977), *appeal dismissed*, 42 N.Y.2d 889, 366 N.E.2d 881, 397 N.Y.S.2d 794 (1977).

[151] *See Amount of Appropriation as Limitation on Damages for Breach of Contract Recoverable by One Contracting with Government Agency*, Zitter, 40 A.L.R.4th 998.

[152] 41 U.S.C. § 12 provides:

> No contract to exceed appropriation.
>
> No contract shall be entered into for the

erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

[153] *See e.g.*, 48 C.F.R. § 43.105 Availability of Funds.

(a) The contracting officer shall not execute a contract modification that causes or will cause an increase in funds without having first obtained a certification of fund availability, except for modifications to contracts that Are conditioned on availability of funds; or Contain a limitation of cost or funds clause.

[154] New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–9.

[155] *See* Thomas O'Connor & Co. v. Medford, 16 Mass. App. Ct. 10, 448 N.E.2d 1276, *appeal denied*, 389 Mass. 1104, 451 N.E.2d 1167 (1983); and Bates & Rodgers Const. Co. v. Boards of Comm'rs., 274 Fed. 659 (D.C. Ohio 1920), where contractor prevailed. *Cf.* Marlborough v. Cybulski, Ohnemus & Associates, Inc., 370 Mass. 157, 346 N.E.2d 716 (1976), where contractor lost.

[156] 63 Op. Comp. Gen. p. 308 (1984).

[157] 41 U.S.C. §§ 601–613.

[158] 325 F.2d 241, 242, 163 Ct. Cl. 420, 423 (1963).

[159] 56 A.D.2d 95, 391 N.Y.S.2d 726 (3d Dept. 1977).

[160] State of New York Department of Transportation, Standard Specifications, January 2, 1990, supplemented.

[161] 894 F.2d 47 (2d Cir. 1990).

[162] *Id.* at 48. *Also see, e.g.*, Gross v. Sweet, 49 N.Y.2d 102, 106, 424 N.Y.S.2d 365, 400 N.E.2d 306 (1979).

[163] *Supra* note 161 at 49.

[164] Port Chester Elec. Const. Corp. v. HBE Corp., 782 F. Supp. 837 (S.D.N.Y. 1991).

[165] Port Chester Elec. Const. Corp. v. HBE Corp., 978 F.2d 820 (2d Cir. 1992).

[166] New York State Department of Transportation, Standard Specifications, January 2, 1990, Sample Form of Agreement, Article 13.

[167] *See* 23 C.F.R. § 635.131 (2) and 48 C.F.R. §§ 52.212-12 and 52.212-13, *supra* note 138, which relate to suspension of work and stop work situations.

[168] *See e.g.*, Weaver-Bailey *supra* note 91; Glassman Construction Co. v. Maryland City Plaza, Inc. 371 F. Supp. 1154 (D.C. Md. 1974), *aff'd*, 530 F.2d 968 (4th Cir. 1975), and Dravo Corp. v. Municipality of Metropolitan Seattle, 79 Wash. 2d 214, 484 P.2d 399 (1971).

[169] New York State Department of Transportation, Standard Specifications, January 2, 1990, Sample Form of Agreement, Article 13.

[170] 287 F.2d 411, 152 Ct. Cl. 557 (1961).

[171] *See also*, Weaver-Bailey *supra* note 91, where the court used the Federal "Default" clause (48 C.F.R. § 52.249-10) with the Federal "Differing Site Conditions" clause 48 C.F.R. § 52.236-2, in part with a 41 percent overrun in the unclassified excavation item, to justify delay recovery to the contractor; and Nat Harrison Associates *supra* note 85, where the changes in the contract were considered beyond the scope of the contract and inconsistent with the "changes" provision.

[172] 520 F. Supp. 830 (W.D. Pa. 1981).

[173] *See* William F. Klingensmith, Inc. v. United States, 731 F.2d 805 (Fed. Cir. 1984); and G.M. Shupe, Inc. v. United States, 5 Ct. Cl. 662 (1984). However, if the delay is caused jointly by government and the contractor, *see e.g.*, *supra* note 129 and accompanying text, as to what the contractor must prove in order to recover.

[174] 23 C.F.R. § 635.131.

[175] 48 C.F.R. § 43.205(d) requires the following clause:

§ 48 C.F.R 52.243-4 Changes.

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the Government-furnished facilities, equipment, materials, services, or site; or

(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

[176] *See* E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 551 F.2d 1026 (5th Cir. Ala. 1977); *reh'g granted on other grds.*, 559 F.2d 268 (5th Cir. Ala. 1977); *cert. denied*, 434 U.S. 1067, 98 S. Ct. 1246, 55 L. Ed. 2d 769 (1978), where contractor alleged owner failed to properly coordinate and supervise activities on job site; and John E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co., 500 F. Supp. 910 (E.D. Mich. 1980), where construction manager continually and intentionally interfered with contractor's work and contractual relationship between contractor and owner; *but cf.* Owen Constr. Co. v. Iowa State Dept. of Transportation, 274 N.W.2d 304 (Iowa 1979), where the contractor could not recover damages from the date for a delay in grading the road that was caused by the failure of another contractor to complete a culvert in a timely fashion.

[177] *See e.g.*, Phillips Construction Co., Inc. v. United States, 394 F.2d 834, 184 Ct. Cl. 249 (1968); Morrison-Knudsen Co. v. United States, 397 F.2d 826, 184 Ct. Cl. 661 (1968); and Fattore Co. v. Metropolitan Sewerage Commission 454 F.2d 537 (7th Cir. Wis. 1971), *cert. denied*, 406 U.S. 921, 92 S. Ct. 1779, 32 L. Ed. 2d 120 (1972).

[178] 707 F.2d 338 (8th Cir. Mo. 1983), *cert. denied*, 464 U.S. 893, 104 S. Ct. 238, 78 L. Ed. 2d 229.

[179] B.C.A. 75-2, (CCH) ¶ 11,398 (1975).

[180] 64 Wis. 720, 221 N.W.2d 855 (1974).

[181] 604 S.W.2d 247 (Tex. Civ. App. 1980).

[182] *Supra* Brennaman note 137.

[183] See section VII (E) (8), in this article, for further discussion on right-of-way cases.

[184] *See e.g.*, Merritt-Chapman & Scott *supra* note 147, where the court found that the suspension of work was for such a long time, even without government fault, that the risk could not be placed on the contractor.

[185] *See* E.C. Ernst *supra* first case note 176; *cert. denied*, 434 U.S. 1067, 98 S. Ct. 1246, 55 L. Ed. 2d 769 (1978); and John E. Green Plumbing & Heating Co., Inc. v. Turner Constr. Co., 500 F. Supp. 910 (E.D. Mich. 1980); *but cf.* Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986); *on remand*, 123 A.D.2d 571, 507 N.Y.S.2d 146 (1986).

[186] Vance and Jones, *Selected Studies in Highway Law*, Vol. 3, p. 1473.

[187] *Supra* first case note 36 at 372.

[188] 42 A.D.2d 619 (3d Dept. 1973).

[189] 14 Wash. App. 297, 540 P.2d 912 (1975).

[190] *Supra* note 141.

[191] 178 Cal. App. 2d 348, 2 Cal. Rptr. 871 (1960).

[192] *See e.g.*, United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918); Natus Corp. v. United States, 371 F.2d 450, 178 Ct. Cl. 1 (1967); and Laburnum Construction Corp. v. United States, 325 F.2d 451, 163 Ct. Cl. 339 (1963).

[193] *See* Trustees of First Baptist Church v. McElroy, 223 Miss. 327, 78 So. 2d 138 (1955).

[194] *See* Moore v. United States, 46 Ct. Cl. 139 (1910).

[195] *Supra* note 46.

[196] 6 A.L.R.3d pp. 1408–09.

[197] State v. Commercial Casualty Ins. Co., 125 Neb. 43, 248 N.W. 807 (1933).

[198] Walsh Constr. Co. v. Cleveland, 271 F. 701 (D.C. Ohio 1920), *aff'd on other grounds*, 279 F. 57 (1922).

[199] 205 Okla. 34, 235 P.2d 273 (1951).

[200] 134 U.S. 260, 10 S. Ct. 730, 33 L. Ed. 934 (1889).

[201] 148 Or. 666, 36 P.2d 580 (1934).

[202] *See e.g.*, *supra* note 46 and accompanying

text, where the government provided inadequate soil information.

[203] *See* Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916); *But cf.* Natus Corp. *supra* second case note 177.

[204] *See e.g.,* Beacon Const. Co. v. United States, 314 F.2d 501, 161 Ct. Cl. 1 (1976); U.S. Fidelity and Guaranty Co. v. Jacksonville State University, 357 So. 2d 952 (Ala. 1978); and Charles Carter and Co. v. Dixie Electric Membership Corp., 380 So. 2d 632 (La. 1979). *But cf.,* Southern New England Contracting Co. v. Connecticut, 165 Conn. 644, 345 A.2d 550 (1974).

[205] 88 A.D.2d 1037, 452 N.Y.S.2d 701 (3d Dept. 1982).

[206] *See* Cauldwell-Wingate *supra* first case note 37, for discussion about misrepresentation.

[207] 51 Hawaii 529, 465 P.2d 148 (Hawaii 1970).

[208] 55 A.D.2d 368, 390 N.Y.S.2d 481 (3d Dept. 1977).

[209] *Supra* note 9. The court stated: "The plans and specifications . . . said nothing one way or the other about subsurface water. It, therefore, cannot be said that the contractor encountered subsurface or latent conditions materially differing from those specifically shown on the drawings or indicated in the specifications."

[210] *Supra* note 141.

[211] 717 F. Supp. 738 (D. Kan. 1989).

[212] *See* 86 A.L.R.3d 182 for an excellent and lengthy article on the duty of the governmental contracting agency to disclose to bidders the information it has that may affect the cost or feasibility of constructing a project.

[213] New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1–8. Most other states have similar provisions.

[214] *See e.g.,* Woodcrest Construction Co. v. United States, 408 F.2d 406, 187 Ct. Cl. 249 (1969), where government failed to show on the core boring logs the high ground water table and the court found that the contractor should have been entitled to an extension of time because of the changed conditions; and Hollerbach v. United States, 233 U.S. 165, 34 S. Ct. 553, 58 L. Ed. 898 (1914), which is an early case where the court permitted the contractor to recover despite general exculpatory provisions.

[215] *See e.g.,* Morrison v. State, 225 Ore. 178, 357 P.2d 389 (1960), where contractor was to construct a highway across a field during irrigation season knowing that water would be turned into the field. The Court pointed out that contractor knew of, and provided in its bid for, possible interruption because of irrigation and stated that the "complaint that the amount of water was unexpected applies only to the proportion and not to the character of the condition."

[216] 519 P.2d 834 (1974).

[217] *Id.* at 844. *However, cf.* Helene Curtis Industries, Inc. v. United States, 312 F.2d 774, 160 Ct. Cl. 437 (1963); and Hardeman-Monier-Hutcherson v. United States, 458 F.2d 1364, 198 Ct. Cl. 472 (1972), where government did not disclose its "superior" knowledge.

[218] *Supra* note 79. Note: The state made available to the bidders 71 test borings and withheld another 657 test borings.

[219] *Id.* at 746.

[220] *See e.g.,* A.E. Ottaviano, Inc. v. State, 202 Misc. 532 (1952), where the court held that the state had breached its contract by withholding from the contractor information in its possession regarding subsurface conditions. The court emphasized the short advertising period of only 2 weeks. *See also,* Yonkers Contracting Co. v. New York State Thruway Authority, 45 Misc. 2d 763, 257 N.Y.S. 2d 781 (1964), where the Court ruled that a general exculpatory clause would not bar a claim for misrepresentation where no adequate opportunity for conducting an independent study of subsurface conditions had been allowed the contractor.

[221] *See* Grow Construction Co., Inc. v. State of N.Y., 56 A.D.2d 95, 391 N.Y.S.2d 726 (3d Dept. 1977), where the contractor claimed it would have taken 6 months to perform the testing and the court did not apply the exculpatory provision to bar contractor recovery.

[222] *See* Cauldwell-Wingate *supra* first case note 37, where the court found the state misrepresented the severe subsurface conditions the contractor would and did encounter causing a delay. *But see, supra* note 141 and accompanying text, where the court found no misrepresentation by government as to the subsoil conditions since the contract documents instructed the bidders to make their own investigations. For early cases that do not contain explicit exculpatory provisions where recovery was based on breach of contract, see Christie v. United States, 237 U.S. 234, 35 S. Ct. 565, 59 L. Ed. 933 (1915); and United States v. Atlantic Dredging Co., 253 U.S. 1, 40 S. Ct. 425, 64 L. Ed. 735 (1920).

[223] *See e.g.,* Fattore Company *supra* note 2.

[224] *See* Bank v. Board of Educ. of City of N.Y., 305 N.Y. 119 (1953) where failure to award two of four separate contracts for addition to a building was considered to be "constructive fraud."

[225] *See* Miller *supra* second case note 16.

[226] The Federal Acquisition Regulation, 48 C.F.R. § 36.503, requires the following:

48 C.F.R. § 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (April 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

[227] The following cases had exculpatory clauses and the contractor lost: Highland Construction Co. v. Stevenson, 636 P.2d 1034 (Utah 1981); Dravo Corp. *supra* third case note 168; McNaulty, Inc. v. Village of Newport, 187 N.W.2d 616 (Minn. 1971); and Wunderlich *supra* note 25. Cases in which contractors have prevailed include: Fattore Company *supra* third case note 177, where changed conditions clause was applied for different site conditions and recovery was not defeated by broad exculpatory provisions; Scherrer Const. Co. v. Burlington Memorial Hospital, 64 Wis. 2d 720, 221 N.W.2d 855 (1974); Robert E. McKee, Inc. v. City of Atlanta, 414 F. Supp. 957 (N.D. Ga. 1976); Sornsin Construction Co. v. State of Montana, 180 Mont. 248, 590 P.2d 125 (1978); Golomore Associates v. New Jersey State Highway Authority, 173 N.J. Super. 55, 413 A.2d 361 (1980); Andrew Catapano Co. v. City of New York, 116 Misc. 2d 163, 455 N.Y.S.2d 144 (1980).

[228] *E.g.,* in the case of Northeast Clackamas County Electric Co-op. v. Continental Casualty Co., 221 F.2d 329, 335 (9th Cir. 1955), the following typical coordination clause was present: "The time for completion shall be extended for the period of any reasonable delay . . . which, . . . is due exclusively to causes beyond the control and without the fault of the Bidder, including . . . acts or omissions of the Owner with respect to matters for which the Owner is solely responsible; . . . provided further that no delay . . . which results from any of the above causes . . . shall result in any liability on the part of the Owner."

[229] 37 A.D.2d 232, 323 N.Y.S.2d 493 (3d Dept. 1971), *aff'd,* 30 N.Y.2d 631, 282 N.E.2d 331, 331 N.Y.S.2d 442 (1972).

[230] 55 Mich. App. 479, 223 N.W.2d 15 (1974).

[231] 220 Ill. App. 3d 130, 580 N.E.2d 622 (1991).

[232] *Supra* note 91.

[233] 676 F.2d 516 (11th Cir. 1982).

[234] *See* E.C. Ernst *supra* first case note 176; Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377 (1983); Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986); *on remand,* 123 A.D.2d 571, 507 N.Y.S.2d 146 (1986); and Christiansen Bros., Inc. v. State of Washington, 90 Wash. 2d 872, 586 P.2d 840 (1978).

[235] *See* Cauldwell-Wingate *supra* first case note 37.

[236] 204 Ind. 438, 178 N.E. 435 (1931).

[237] *See also* Gasparini Excavating Co. v. Penn. Turnpike Comm'n, 409 Pa. 465, 187 A.2d 157 (1963).

[238] *See* Nat Harrison Associates *supra* note 85; *but see* Buchman Plumbing Company, Inc. v. Regents of the University of Minnesota, 215 N.W.2d 479 (Minn. 1974), where the court enforced the notice provision and found that the notice of extra work provision was a condition precedent to an action for breach of contract.

[239] *See e.g.,* Public Constructors *supra* note 208, where the court found that the state had breached the contract and then determined total

costs and applied percentages to get to the damages it awarded; and Westcott v. State of New York, 264 App. Div. 463 (3d Dept. 1942), where the court found that the state had breached the contract and then determined total costs less payments to the contractor as the measure of damages. *But cf. supra* note 79, and accompanying text, where the court stated: "While the fact of delay appears in this record, there was insufficient evidence upon which the trial could reasonably determine the effect of it or allocate responsibility for it." The court then rejected the trial court's 65 percent state and 35 percent contractor allocation of the total costs.

See also, Volentine and Littleton v. United States, 169 F. Supp. 263; 144 Ct. Cl. 723 (1959). After finding that the government breached the contract, the court determined that relying upon contractors' cost (after being delayed) to calculate damages "is neither good logic nor good law." It further found that "in view of condition of the evidence, we can only estimate the recoverable damages, and we find them to be $40,000." At 169 F. Supp. 265.

[240] 278 App. Div. 1019, 106 N.Y.S.2d 108 (4th Dept. 1951).

[241] *See* 48 C.F.R. § 52.243-4; and New York State Department of Transportation, Standard Specifications, January 2, 1990: "The Contractor may not maintain a dispute for costs associated with acceleration of the work unless the Department has given prior express written direction by the Engineer to the Contractor to accelerate its effort."

[242] New York State Department of Transportation, Standard Specifications, January 2, 1990, supplemented.

[243] Note: Idle equipment claims for these situations, if any, should be placed under the equipment inefficiencies category.

[244] *See e.g.*, Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180 (1965), for discussion about the contractor's dilemma when the orderly progression of the project gets into trouble, even though it involved a change clause situation.

[245] *See e.g.*, Norair Engineering Corp. v. United States, 666 F.2d 546, 229 Ct. Cl. 160 (1981); and Siefford *supra* note 55, where the contractor should have been granted an extension of time, but was not so granted. The no damage clause prevented recovery. The court found that if it had allowed recovery it would be for both direct and indirect (ripple) costs.

[246] Standard Construction Co. v. National Tea Co., 240 Minn. 422, 62 N.W.2d 201 (1953).

[247] *Supra* note 55.

[248] 56 A.D.2d 95, 391 N.Y.S.2d 726 (3d Dept. 1977).

[249] *See* 666 F.2d 546, 229 Ct. Cl. 160 (1981).

[250] New York State Department of Transportation, Standard Specifications, January 2, 1990, as supplemented.

[251] 253 La. 105, 217 So. 2d 166 (1968).

[252] J.D. Hedin Construction Co., Inc. v. United States, 347 F.2d 235, 245, 171 Ct. Cl. 70 (1965). *But cf.* Langevin v. United States, 100 Ct. Cl. 15 (1943).

[253] *See e.g.*, Seldon Breck Constr. Co. v. Regents of Univ. of Mich., 274 F. 982 (E.D. Mich. 1921); and Edward E. Gillen Co. v. John H. Parker Co., 170 Wis. 264, 171 N.W. 61 (1919), *modified*, 174 N.W. 546 (1919). Usually the contractor is entitled to such recovery for the delay under contract provisions like the change clause or a changed or differing site conditions clause.

[254] *See e.g.*, Seldon Breck *supra* first case note 253.

[255] *See e.g.*, Mansfield v. N.Y. Cent. & H.R.R. Co., 102 N.Y. 205, 6 N.E. 386 (1886). *See also* 115 A.L.R. 90.

[256] *See e.g.*, Hansen v. Covell, 218 Cal. 622, 24 P.2d 772 (1933).

[257] In New York State as in other jurisdictions, engineering charges are imposed separately from liquidated damages and may be imposed even when liquidated damages are not.

[258] See the following articles on the subject of liquidated damages: "Liability for Delay in Completion of Highway Construction Contract," Harp, *Selected Studies in Highway Law*, Vol. 3, pp. 1495–1524; supplemented, 1980 pp. 1524-1–1524-17; supplemented, 1988 pp. 1524-S19–1524-S39. "Contractual Provision for Per Diem Payments for Delay in Performance as One for Liquidated Damages or Penalty," anon., 12 A.L.R.4th 891; and "Liability of Building or Construction Contract for Liquidated Damages for Breach of Time Limit Provision Where He Abandons Work After Time Fixed for Its Completion." Hursh, 42 A.L.R.2d 1134.

[259] *See* J.D. Hedin *supra* note 252, at 245.

[260] City of Elmira v. Larry Walter, Inc., 150 A.D.2d 129 (3d Dept. 1990), *aff'd*, 76 N.Y.2d 912 (1990).

[261] *See* Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority, 506 N.E.2d 658 (Ill. App. 2 Dist. 1987), for a discussion on the "total cost" method, which method the trial court considered inappropriate under the circumstances. *But cf., e.g.*, the following New York cases that approved the total cost method as being an appropriate way to determine damages: D'Angelo d/b/a/ Triple Cities Construction Co. v. State of New York, 41 A.D.2d 77 (3d Dept. 1973), *retrial*, 46 A.D.2d 983 (3d Dept. 1974), *aff'd*, 39 N.Y.2d 781 (1976); and Westcott v. State of New York, 264 App. Div. 463 (3d Dept. 1942).

[262] "Construction Claims and Damages, Entitlement, Defenses, and Some Procedural Considerations," by William G. Boland, Esq., Assistant Division Chief, Transportation Division, State Attorney General's Office, Olympia, Washington, published in the Administrative Subcommittee on Legal Affairs of the Standing Committee on Administration, *AASHTO Annual Meeting Proceedings*, 1991, at 58.

[263] *See* Weaver-Bailey Contractors *supra* note 91; and Merritt-Chapman *supra* note 129, where the contractor had and sustained the burden of breaking out the damages and responsibility issues.

[264] *See* Manshul v. Dormitory Auth., 79 A.D.2d 383 (1st Dept. 1981).

[265] *Id.* at 388.

[266] 42 A.D.2d 619, 621 (3rd Dept 1973), contractor awarded damages plus 15 percent for overhead and profit. *Cf.* Weaver-Bailey Contractors *supra* note 91, where the court with "precision" calculated damages and awarded 15 percent for profit.

[267] *See e.g.*, Rusciano *supra* note 79, where the trial court awarded additional compensation for clearing and grubbing that was a lump sum item and there were exculpatory provisions in the contract.

[268] 23 C.F.R. § 635.131 (1) (iv). However, a state may choose to expand the clause and allow for impacts on unchanged work. Whether or not the FHWA will participate in such an expansion is uncertain.

[269] 23 C.F.R. § 635.131(2).

[270] 23 C.F.R. § 635.131(3).

[271] 317 U.S. 56, 63 S. Ct. 113, 87 L. Ed. 49 (1942).

[272] 409 F.2d 246, 249, 187 Ct. Cl. 477 (1969).

[273] *See e.g.*, Joseph Sternberger v. United States, 401 F.2d 1012, 185 Ct. Cl. 528 (1968), where the contractor sought equitable adjustment to its contract and the administrative tribunal determined that the contractor failed to prove that its additional costs were due to any specific delay or change by government.

[274] H.N. Bailey & Associates v. United States, 449 F.2d 387, 196 Ct. Cl. 156 (1971); Hegeman-Harris & Co., Inc. v. United States, 440 F.2d 1009, 194 Ct. Cl. 574 (1971).

[275] Weber Constr. Co. v. State of New York, 37 A.D.2d 232, 323 N.Y.S.2d 493 (3d Dept. 1971), *aff'd*, 30 N.Y.2d 631, 282 N.E.2d 331, 331 N.Y.S.2d 442 (1972).

[276] Edward Edinger Co. v. Willis, 260 Ill. App. 106 (1931).

[277] 42 A.D.2d 619 (3d Dept. 1973).

[278] See also section VII (E)(4)(n), in this article, for additional discussion on this subject.

[279] *See* J.D. Hedin *supra* note 252, for a discussion on when the court could use the total cost method. *See also, e.g.*, Phillips Construction Co., Inc. v. United States, 394 F.2d 834, 184 Ct. Cl. 249 (1968); Moorhead Const. Co., Inc. v. City of Grand Forks, 508 F.2d 1008 (8th Cir. 1975); and John F. Harkins Co., Inc. v. School District of Philadelphia, 460 A.2d 260 (Pa. 1983). *But cf.* E.C. Ernst *supra* note 172, where the court permitted a total cost approach to determine delay damages, after all the delay had been established to be the fault of the owner; and Peterson v. Container Corp. of America, 218 Cal. Rptr. 592 (Cal. App. 1985), where the court permitted the application of the total cost method to determine the contractor's damages.

[280] *See* WRB Corporation v. United States, 183 Ct. Cl. 409, 426 (1968); and Urban Plumbing & Heating Co. v. United States, 408 F.2d 382, 187 Ct. Cl. 15 (1969), *cert. denied*, 398 U.S. 958, 90 S. Ct. 2164, 26 L. Ed. 2d 542 (1970).

[281] *See e.g.*, Teledyne McCormick-Selph v. United States, 588 F.2d 808, 218 Ct. Cl. 513 (1978), where the Armed Services Board of Contract Appeals used a standard of proof approaching beyond a reasonable doubt and denied contractor equitable adjustment. The Court of Claims permitted a total cost method of determining equitable adjustment and held that the contractor had met its burden of proving that the costs incurred were due to constructive changes caused by government's defective specifications; Oliver-Finnie Co. v. United States, 279 F.2d 498, 150 Ct. Cl. 189 (1960), where the court used a total cost method and found that the fact that the damages may not be definitely ascertained did not preclude recovery for breach of contract against government where the fact of the damage was clearly established and it was determined that the total cost method was a reasonable basis of computation of the amount.; Brasel and Sims, 688 P.2d 871 (Wyo. 1984), where judge used the total cost method in the award of damages while reducing the amount by a deduction for overmanning; and J. & T. Construction *supra* note 179, where contractor's bid was found to be realistic and reasonable. *Cf.* Namekagon Dev. Co., Inc. v. Bois Forte Res. Hous. Au., 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975), where the contractor underestimated labor costs and provided inadequate supervision and coordination of work force and total cost method was not applied; R. C. Hedreen Company, B.C.A. 78-2 (CCH) ¶ 13,475 (1978), where bid was not

proven to be realistic and total cost method was not applied.

[282] 365 N.W.2d 485 (N.D. 1985).

[283] *See also, e.g.,* James A. Boyajian v. United States, 423 F.2d 1231, 191 Ct. Cl. 233 (1970) for a review of total cost method decisions.

[284] 401 F.2d 1012, 185 Ct. Cl. 528 (1968).

[285] *See e.g.,* Camarco Contractors Inc. v. State of New York, 22 A.D.2d 833, 253 N.Y.S.2d 827 (1964); and Rusciano *supra* note 79.

[286] For a total cost-percentage case, *see e.g.,* Public Constructors *supra* note 208, where the court determined total costs and then multiplied these percentages by the total cost to determine damages to the contractor.

[287] Some states such as Washington, Oregon, Montana, South Carolina, and New Jersey have a requirement, on certain contracts, that the contractor must escrow the original bid workup material in connection with the bid.

[288] *See e.g.,* Smith Engineering Co. v. Rice, 102 F.2d 492 (9th Cir. 1939).

[289] 782 F. Supp. 837 (S.D. N.Y. 1991).

[290] *Id.* at 845.

[291] Port Chester Elec. Const. Corp. v. HBE Corp., 782 F. Supp. 837 (S.D.N.Y. 1991).

[292] Port Chester Elec. Const. Corp. v. HBE Corp., 978 F.2d 820 (2d Cir. 1992).

[293] *Id.* at 822.

[294] 41 A.D.2d 77 (3d Dept. 1973), *retrial,* 46 A.D.2d 983 (3d Dept. 1974), *aff'd,* 39 N.Y.2d 781 (1976).

[295] 440 F.2d 429 (1971).

[296] The formula came out of Eichleay Corp., 60-2, B.C.A. (CCH) ¶ 2688, (1960), *aff'd on reconsideration,* 61-1 B.C.A. (CCH) ¶ 2894 (ASBCA 1961).

[297] *See e.g.,* Luria Brothers. & Co., Inc. v. United States, 369 F.2d 701, 177 Ct. Cl. 676 (1966); Fred R. Coombs Co. v. United States, 103 Ct Cl. 174 (1945); and J.D. Hedin *supra* note 252.

[298] 978 F.2d 669 (Fed. Cir. 1992).

[299] 45 N.Y.2d 683, 412 N.Y.S.2d 589, 385 N.E.2d 281 (1978).

[300] *Id.* at 688–689.

[301] Capital Electric Co., GSBCA No. 5316, 83-2 B.C.A. (CCH) ¶ 16,548; and Savoy Construction Co., ASBCA No. 21218, 80-1 B.C.A. (CCH) ¶ 14392, *aff'd* 2 Ct. Cl. 338 (1983).

[302] For federal contract situations, *see* The Contract Disputes Act of 1978, 41 U.S.C. §§ 601–613. *See also* 48 C.F.R. part 33—Protests, Disputes, and Appeals for the implementing regulations.

[303] For example, if the matter is being adjusted as a breach of contract matter and the contract terms relative to limits or constraints on compensation are not applied by the court or administrative tribunal.

[304] *Supra* note 264 at 388.

[305] 369 F.2d 701, 177 Ct. Cl. 676 (1966).

[306] *Supra* note 208.

[307] *See* Meva Corp. v. United States, 511 F.2d 548, 206 Ct. Cl. 203 (1975), where the court did not permit the use of the AGC schedule when the actual equipment costs were available.

[308] 48 C.F.R. § 31.105(d)(ii)(C) provides: "The allowability of charges for construction equipment rented from any division, subsidiary or organization under common control will be determined in accordance with 31.205-36(b)(3)."

[309] Such should be included in ownership costs.

[310] Idle or standby equipment charges were a part of the costs considered in Weaver-Bailey *supra* note 91.

[311] See section VIII (D) (5), in this article, for a discussion on the Eichleay formula for overhead.

[312] *See e.g.,* Fehlhaber Corp. & Horn Constr. Co. v. State of New York, 65 A.D.2d 119, 130 (3d Dept. 1978), where the court found that the fixed costs and overhead were, in fact, incurred twice—once in the performance of the original contract when, because of delays caused by the state, the full allocation for fixed costs and overhead was expended to accomplish only 75 percent of the contract work; and the second time in the actual performance of the work under the cost-plus modification agreement. Therefore, the award reimbursed the contractor for expenses actually incurred.

[313] *See* Weaver-Bailey *supra* note 91.

[314] See section VIII (D) (5), in this article, for a discussion about the Eichleay Formula for determining home office overhead.

[315] Daly Construction Co. v. United States, ASBCA No. 34322 (1991).

[316] *See* Weaver-Bailey *supra* note 91.

[317] *Supra* note 264 at 389.

[318] Moorhead *supra* third case note 279.

[319] *Supra* note 252, at 259–260, 171 Ct. Cl. at 109.

[320] *See also* Torres v. United States, 112 F. Supp. 363, 126 Ct. Cl. 76 (1953).

[321] *Supra* note 264 at 391.

[322] *See e.g.,* 41 U.S.C. § 611 provides: "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof."

[323] *See* Oliver Finnie Co. v. United States, 279 F.2d 498, 150 Ct. Cl. 189 (1960), where the contractor sought interest on borrowed capital for a piece of specialized equipment.

[324] *See* 48 C.F.R. § 31.205 (FAR) for the types of costs that are allowed, or not allowed in claims against the Federal Government.

[325] 5 U.S.C. § 504, 28 U.S.C. § 2412(d).

[326] *See e.g.,* Grumman Aerospace Corp. v. United States, 579 F.2d 586, 217 Ct. Cl. 285 (1978).

[327] *See* Weaver-Bailey *supra* note 91.

[328] The practice of adding 5 percent markup on the subcontractor's claims that are presented by the contractor (the same as is allowed for contract adjustments) is found in New York State matters. Some other jurisdictions use a markup on subcontractor's claims to some extent on contractor's claims. For example, the Army Corps of Engineers uses subcontracting costs in its guide in its Weighted Guideline method for allowance of profit on disputes and claims.

[329] *See* "Enforceability of the Requirement of Notice in Highway Construction Contracts," Vance, *Selected Studies in Highway Law,* Vol. 3, pp. 1524-N1–1524-N30; see also National Cooperative Highway Research Program, *Research Results Digest 152,* February 1986, for further discussion on the subject.

[330] Schnip Building Co. v. United States, 645 F.2d 950, 227 Ct. Cl. 148 (1981).

[331] 226 U.S. 545, 33 S. Ct. 139, 57 L. Ed. 342 (1913). The rule of Plumley was discussed and applied in General Bronze Corporation v. United States, 338 F.2d 117, 168 Ct. Cl. 176 (1964).

[332] *See e.g.,* Blankenship Construction Company v. North Carolina State Highway Commission, 28 N.C. App. 593, 222 S.E.2d 452 (1976), *cert. denied,* 290 N.C. 550, 230 S.E.2d 765; State Highway Department v. Hewitt Contracting Company, 113 Ga. App. 685, 149 S.E.2d 499 (1966); and Massachusetts Department of Public Works before the Court in State Line Contractors, Inc. v. Commonwealth.

[333] 21 Mass. App. 390, 487 N.E.2d 230 (1986), *review denied,* 396 Mass. 1106, 489 N.E.2d 1263.

[334] 456 F.2d 760, 197 Ct. Cl. 561 (1972).

[335] *See e.g.,* Bignold v. King County, 65 Wash. 2d 817, 399 P.2d 611 (1965); and Weeshoff Construction Co. v. Los Angeles County Flood Control District, 88 C.A. 579, 152 Cal. Rptr. 19 (1979).

[336] 41 F.Supp. 638 (D.C. N.H. 1941).

[337] *Supra* note 331.

[338] 611 P.2d 705 (Utah 1980).

[339] 611 P.2d 705, 708 (Utah 1980).

[340] 569 F. Supp. 758 (E. D. Okla. 1983).

[341] *Supra* Blankenship first case note 332.

[342] *Id.* at 603, 222 S.E.2d at 462.

[343] 319 N.W.2d 815 (S.D. 1982).

[344] *Id.* at 817.

[345] 187 Ct. Cl. 714, 410 F.2d 782 (1969).

[346] *Supra* note 330.

[347] 48 C.F.R. § 52.233-1. *See* Appeal of Rodgers Construction, Inc. IBCA No. 2777 (1991), where the Interior Board of Contract Appeals found that the person who signed the certificate did not have sufficient presence on the project to qualify him to make the certification.

[348] For example, Washington and New York.

[349] S. REP. No. 101-543.

[350] *Id.*

[351] Pub. L. No. 101-552.

[352] S. REP. No. 101-543, p. 2.

[353] See the AGC publications "Introduction to Total Quality Management"; "Partnering—A Concept for Success"; and "Partnering: A Pound of Prevention," *The Low Bidder,* May/ June 1992, AGC New York State Chapter, Inc.

[354] For a thorough discussion on this subject, see Orrin F. Finch, "Legal Implications in the Use of Penalty and Bonus Provisions of Highway Construction Contracts: The Use of Incentive and Disincentive Clauses as Liquidated Damages for Quality Control and for Early Completion." *Selected Studies in Highway Law,* Vol. 3, p. 1582-N63.

[355] 48 C.F.R. § 52.236-15 provides:

> Schedules for Construction Contracts.
>
> As prescribed in 36.515, the contracting officer may insert the following clause in solicitations and contracts. . . . This clause should not be used in the same contract with clauses covering other management approaches for ensuring that a contractor makes adequate progress.
>
> SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984)
>
> (a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval

of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting Officer. If in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

[356] New York State Department of Transportation, Standard Specifications, January 2, 1990, p. 43-1, § 108-01, supplemented.

[357] 676 F.2d 584, 595, 230 Ct. Cl. 148, 167-68 (1982).

[358] *Supra* note 91.

[359] *Id.* at 481.

[360] *See e.g.*, Donald M. Drake, ENG B.C.A. No. 1634 (Sept. 6, 1980); Teacon Corp., ASBCA No. 6069, 62 B.C.A. ¶3529 (1962)

[361] New York State Department of Transportation, Standard Specifications, January 2, 1990, supplemented, provides: "The contractor shall within five days after date of commencement of work, or within such time as determined by the Regional Director, prepare and submit to the Engineer for approval, a progress schedule showing the order in which the contractor proposes to carry on the work, the date on which he will start the major items of work (including but not limited to excavation, drainage, paving, structures, mobilization, etc.) and the critical features (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The chart shall show the order in which the contractor proposes to carry on the work. The chart shall be in a suitable scale to indicate graphically the total percentage of work scheduled to be completed at any time. The Department may require that the progress schedule, at a minimum, include the following items: (a) major work items and activities to be performed; (b) seasonal weather limitations; (c) time and money curve, and (d) phase duration or milestone events, if applicable.

The purpose of this scheduling requirement is to ensure adequate planning and execution of the work and to evaluate the progress of the work."

[362] New York State Department of Transportation, Standard Specifications, January 2, 1990, supplemented.

[363] New York State Department of Transportation, Standard Specifications, January 2, 1990, supplemented. Compare this clause with the clause in the American Institute of Architects, *General Conditions of the Contract for Construction*, 14th Edition: "2.2.4 Information or services under the owner's control shall be furnished by the owner with reasonable promptness to avoid delay in the orderly progress of the work."

[364] *E.g.*, in Mansfield v. New York Central & Hudson River Railroad Co., 102 N.Y. 205, 6 N.E. 386 (1886), the court said that the contract "implies an understanding by all parties that they were to be unrestricted in the employment of means to perform it, and that nothing which it was the duty of the owner to do to enable the contractor to perform, should be left undone. It is unreasonable to suppose that the parties intended to enter into obligations, providing for the performance of work by one party under a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion." This legal obligation would seem to override the exculpatory provision where government was unreasonable with respect to giving approvals.

[365] For example, 2 days per sheet.

[366] *See e.g.*, C.W. Schmid v. United States, 351 F.2d 651, 173 Ct. Cl. 302 (1965); and Grow Construction Co., Inc. v. State of New York, 56 A.D.2d 95, 391 N.Y.S.2d 726 (3d Dept. 1977).

[367] 84 A.D.2d 871, 444 N.Y.S.2d 744 (3d Dept. 1981).

[368] 57 A.D.2d 526, 393 N.Y.S.2d 573 (1st Dept. 1977).

[369] 238 Cal. App.2d 736, 48 Cal. Rptr. 225 (1965).

[370] 24 Pa. Commw. 507, 357 A.2d 251 (1975).

[371] *Id.* at 512-513, 357 A.2d at 254.

[372] *Id.* at 513, 357 A.2d at 254, 255.

[373] 458 F.2d 55, 198 Ct. Cl. 133 (1972).

[374] See, for example, New York State Department of Transportation, Standard Specifications, January 2, 1990, pp. 1-47–1-50; and 48 C.F.R. § 31.201.3 (b) that provides:

> (b) What is reasonable depends upon a variety of considerations and circumstances, including—
>
> (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
>
> (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;
>
> (3) The contractor's responsibilities to the government, other customers, the owners of the business, employees, and the public at large; and
>
> (4) Any significant deviations from the contractor's established practices.

[375] *See e.g.*, R. J. Daigle and Sons Contractors, Inc. v. Sampley Brothers, General Contractors, Inc., 424 So. 2d 270 (La. App. 1982). *Note:* If the adjustment is being made pursuant to contract provisions, the provisions themselves may provide for no recovery for ripple effect (23 C.F.R. § 635.131 (1)(ii)), or no recovery for profit (23 C.F.R. § 635.131 (2)(ii)), or no recovery for loss of anticipated profits (23 C.F.R. § 635.131 (1)(ii) and (3)(ii)).

[376] Roscoe-Ajax Construction Co., Inc. v. United States, 458 F.2d 55, 198 Ct. Cl. 133 (1972).

[377] Substantially taken from the requirements in the New York State Department of Transportation, Standard Specifications, for the submission of dispute or claim.

[378] *See* R. J. Daigle *supra* note 375.

[379] Similar to provisions found in the New York State Department of Transportation, Standard Specifications, January 2, 1990. *See also* 23 C.F.R. § 635.131 (2)(ii) excludes profit; (1)(ii) excludes ripple effect costs; and (1)(ii) and (3)(ii) excludes loss of anticipated profits.

[380] Similar to provisions found in the New York State Department of Transportation, Standard Specifications, January 2, 1990.

[381] In New York these clauses have been applied in dispute resolution situations and claim settlements, but to date no written decision on the exact point of their enforceability has been rendered.

[382] *See* "Public Contracts: Duty of Public Authority to Disclose to Contractor Information, Allegedly in Its Possession, Affecting Cost or Feasibility of Project," Sarno, 86 A.L.R.3d 182 for an article on the duty of the governmental contracting agency to disclose to bidders the information it has that may affect the cost or feasibility of constructing a project.

[383] *Supra* note 25.

[384] *Supra* note 205 and accompanying text.

[385] A technique that some states use to attempt to reduce the problems of unbalanced bids is to establish as a bid item a "mobilization," "move in," or "set-up" item, subject to some controls as to amount that should reduce the need for unbalancing. This enables the contractor to receive the early money it needs and reduces to some extent the temptation to radically unbalance its bid to receive early money. California, New York, and other state contracts contain a clause prohibiting unbalanced bids—but no cases were found where a low bid was rejected because it was unbalanced.

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Marilyn Newman, Boston, Massachusetts; Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.