Contract Administration: Problems of Enforcement

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• Personnel in the Bureau of Public Roads are seeking to relate the results of general legal research to the basic causes of daily legal problems and, thereby, derive some cumulative benefit from the whole situation. Any who have worked in the advisory area of contract administration will recognize the need for this kind of an approach to some of these problem areas.

Rex M. Whitton, Federal Highway Administrator, in his remarks at the 41st Annual Meeting of the Western Association of State Highway Officials at Seattle, Wash., described four problem areas with which he is primarily concerned in the administration of the highway program. Three of these problem areas relate directly to contract administration and problems of enforcement: (a) nonuniformity in contract specifications, (b) research (insofar as it pertains to better contract requirements) and (c) integrity in dealing with public funds.

Each of these problem areas is, at least to some material degree, derived from the facts that (a) we have rather recently embarked on the construction of the Interstate System, which Mr. Whitton describes as "the greatest construction work in human history" and (b) we are presently engaged in this massive task during a period of rapid technological progress in the development of design criteria and in the development of the construction materials, methods and equipment used by the highway construction industry.

These developments generate new engineering problems, and they also generate new legal problems. The engineers are reckoning with the engineering problems arising from conversion from obsolete specifications to modern specifications which are based on improvements in design and in construction methods and equipment. Going from specified methods to specified end results is one of the things that is characterizing these changes in specifications.

Of course, the solution of the engineering problems will not resolve the legal problems involved. These legal problems are new to our program, but not to the body of Government contract law. It may be that our difficulties are arising from the fact that, in the pressures of the expanding program, with its new developments, we have lost sight of the guiding legal significance of the oft-quoted phrase of Justice Holmes, "Men must turn square corners when they deal with the Government."[1] Vast public works programs, such as the Interstate Highway System, are not merely ends in themselves, and the legislatures are generally concerned with more than the mere technical sufficiency of the end product from an engineering viewpoint. Rather, the legislatures, in authorizing such programs, are also concerned with the economic and social needs of the country, as well as the fiscal integrity of the Government. Thus, special conditions to be met in the performance of the Government public works contracts are enacted as statutory requirements precedent to the use of the public funds involved. These statutory requirements limit the personal discretion of the public officials and employees, and may well be viewed by the engineer, whose sole concern is to produce a technically acceptable product, as be-

[1] Rock Island R.R. v. U.S.; 254 U.S. 141 (1920).

ing unduly restrictive or burdensome. Nonetheless, they are statutory requirements which must be met and which cannot be compromised in conducting the programs to which they apply.

This discussion is addressed to the Federal requirements which are established as conditions to Federal-aid participation in highway construction projects, and will discuss some of the resultant problems of administration and enforcement.

The first and fundamental requirement to consider is that currently codified in section 112 of title 23, U.S. Code, which requires the following:

(a) In all cases where the construction is to be performed by the State highway department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. All such findings shall be reported promptly in writing to the Committees on Public Works of the Senate and the House of Representatives.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section 117 of this title. Added Pub.L. 85-767, §1, Aug. 27, 1958, 72 Stat. 895.

This requirement is implemented by section 1.15 of the Regulations for Administration of Federal Aid for Highways,[2] which is further supplemented by Public Roads Policy and Procedure Memorandum 21-6.

This requirement for competitive bidding is a Federal requirement. Hence, to establish the full scope of this requirement, we must turn for guidance to the opinions of the Comptroller General of the United States, and of the Federal Courts. Of course, it is also a requirement in most of the States.[3] In the Federal-aid highway programs, both Federal and State requirements must be satisfied.[4]

The personnel in the General Counsel's office are concerned with some relaxed attitudes which exist in the administration and enforcement of highway construction contracts. As an aside, in dealing with a landowner on land acquisition, you are dealing with a man who is not coming to the State agency to do business with the State; you are going to him. You put yourself into a business relationship with him because you have to, not because either of you wants to. In

[2] 23 C.F.R. 1.15.

[3] COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW. (1961), p. 1ff.

[4] 23 U.S.C. §114.

that framework, it is interesting to note the procedures that you use to protect your interest in your case, and to assure that you are dealing with him at arm's length so that, in effect, this one individual landowner does not get more than that to which he is entitled. On the other hand, with the construction contractor, we do not find this attitude. There, the State or Federal Government goes out with their solicitations for bids on a particular job, and the contractor comes to the State and Government because he wants to do business with them. His intention is to make a profit. Yet we have a completely different attitude in many cases toward the contractor as distinguished from the attitude and relationship we have with the landowner. It is not nearly so much at arm's length. It is a much closer relationship, and in all too many cases we have too much concern for the welfare of the contractor. The Comptroller General has pointed out the following:

> . . . to permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are open would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. The strict maintenance of such procedure, required by law, is infinitely more in the public interest than obtaining an apparently pecuniary advantage in a particular case by a violation of the rules.[5]

It can be readily seen that what would be a farce at the bid opening stage can become a tragedy if the contractor is permitted to vary his actual performance from the terms of the contract on which he bid, unless such change is essential to the sound accomplishment of the project.

It is elemental that the terms and conditions of a contract are fixed at the time of execution of the contract. Perhaps I should qualify that. Actually the terms of a public contract awarded by competitive bidding are fixed at the time the bids are opened. It is not then an executed contract, but you are then in a position that no change can be made in the terms without complying with the requirements of the laws which are designed to protect the expenditure of public funds under the concepts of competitive bidding. Therefore, it is the obligation of the contracting agency to insure that its plans and specifications properly define the nature and scope of the work contemplated by the project, so that the Government gains the true advantage of competition. The vast number of change orders, modifications, etc., are indicative of need for revision and updating of our plans and specifications, to define more adequately our technical requirements.

In terms of these modifications to contracts, including the so-called field modifications, the plans and specifications of properly prepared contracts represent the cumulative result of considerable coordinated and specialized engineer work done in advance of the publication of the specifications. If those are to be changed after the contract is awarded, it seems at least that the proposed change in requirements ought to have comparable consideration. Too many changes may be due to the fact that the plans and specifications are not completely geared to the job. Sometimes a change is made because a particular situation was not taken into consideration in the preparation of the plans and specifications prior to advertising for bids. You cannot insure against the necessity for changes of this sort. But it does seem that if the volume of changes that you have in your plans and specifications appears to result from the fact that the engineering is incomplete until you get out on the job and under way, there is some need for reviewing the situation in order to remedy that error and get your plans and specifications in such shape that it will be the unusual situation that will require a change.

Anything that tends to blur the definition of the work which the contractor is required to perform, or the method of measurement for payment.

[5] 17 Comp. Gen. 554, 558-9.

undermines the effectiveness of competitive bidding; for example, (a) ambiguous or conflicting contract specifications, (b) undisclosed or inaccurate information that is pertinent to bidding, (c) specific but uncertain requirements such as "as may be directed by the project engineer," (d) provisions for changes, changed conditions, time extensions and claims without precise criteria as to how these matters will affect price and time for performance, and (e) undefined procedures and criteria for handling claims, appeals and litigation, and undue volume of contract modifications. That problems can and do arise in all of these areas is well recognized. That problems in these areas do undermine the integrity assured by the competitive bidding system is not so generally recognized.

When you enter into the area of adjusting contract requirements, including prices, manner of performance, and time of performance on a negotiated basis, as you do when you are handling change orders, changed conditions, and time extensions, unless you have relatively fixed criteria for processing those matters you are subjecting your contract to a noncompetitive re-alignment of the contract requirements and the contract price. To that extent, you are undercutting the effectiveness of the competitive bidding system to assure that the State or Federal government obtains the full results of competitive bidding; *i.e.*, the lowest price for the specified work.[6]

The more recent audits of Federal-aid administration in the various States conducted by the General Accounting Office, and the examination of certain State contract administration and enforcement practices by the Blatnik Committee, illustrate the continuing and pressing necessity for improved contract administration and enforcement standards by the State highway department.

There is ample proof in the records that the legal significance of these requirements is being ignored in the relationships between some contractors and contracting agencies during the construction of our projects. Such an attitude cannot be justified by the argument that so long as the end product is satisfactory from a technical, engineering viewpoint and the funds budgeted for the project are not exceeded, the rights of the Government are adequately protected. This argument would place the engineer's estimate in a status that is superior to the statutory requirement that the contract be awarded by competitive bidding.

Returning to Justice Holmes' concept of "square corners," Justice Frankfurter applied it to Government contract matters:

> . . . the oft-quoted observation that "men must turn square corners when they deal with the Government" . . . does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the Public Treasury.[7]

What Justice Frankfurter saw as a duty of the courts, is, of course, an even stronger duty on the part of the agents of the Government who are charged with the responsibility of administering these laws, because it is the administrative people, including the engineers who are handling these contracts, who are actually making the expenditures against these contracts who are creating the obligations, and who are charging the public funds. It is the rare case that gets to court.

In administering Federal-aid contracts, those in Public Roads have an obligation, flowing from the responsibility to protect Federal-aid funds, to insure that these square corners are met. We have been reasonably vigilant in this regard in reference to the advertising and awarding stages, but we may not have been as vigilant in demanding standards of contract administration and enforcement necessary to preserve the full

[6] For an excellent article, see L. Spector, "Confusion in the Concept of the Equitable Adjustment in Government Contracts." 22 Fed. Bar J. 1.

[7] Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947).

benefits of the competitive bidding system.

What then are these corners governing Federal-aid contracts? First, we have a requirement in Title 23, U.S. Code, §114, that the construction of any highway on a Federal-aid system shall be undertaken by the respective State highway departments or under their direct supervision subject to inspection and approval by the Secretary of Commerce in accordance with the laws of the State and the applicable Federal laws. This contemplates that the Secretary would assure that the benefits of competitive bidding system would be preserved in the actual performance of the contract.

Although those in Public Roads have in recent years been vigilant in the enforcement of engineering standards, they are now striving for more uniform and clearer specifications and related requirements and better enforcement of the contract rights of the Government. One area of particular concern in the enforcement of these rights arises in the execution of change orders, modifications, and the assessment of delays and liquidated damages.

The general rule in reference to such contract matters is that "a contract may not be modified prejudicially to the interest of the Government without adequate consideration therefor,"[8] the principle being, as stated in *Pacific Hardware Company v. United States*, 49 Ct. Cls. 327, 335:

"It is unquestionally true that an official of the Government is not authorized to give away or remit a claim due the Government," and in *Bausch & Lomb Company v. United States*, 78 Ct. Cls. 584, 607, where there was an attempt by supplemental contract to change the rights of the parties prejudicially to the United States for which no consideration moved to the Government, that:

> If the claim was not based on such a contract it was invalid and unenforceable against the United States and could not be vitalized into a legal claim by a subsequent contract. Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it.[9]

This conclusion is founded on the principle that public officials are creatures of the law, whose powers are carefully defined by the pertinent statutes, and whose acts beyond the scope of their authority as defined in these statutes, regardless of their good faith, are invalid, and any obligation resulting from their unauthorized activities is unenforceable.[10] It will be found, in one expression or another, in the case law of all the States. But, even if it were not, we are of the opinion that, insofar as the establishment of an obligation against Federal-aid funds is concerned, these principles would still apply.

These principles require that the contracting agency must ensure that contractors perform their contracts in conformity with the plans and specifications; they preclude modifying contracts when the sole purpose is for the benefit of the contractor, with no real benefit flowing to the Government; and, in general, they require the Government agents to act in a more affirmative manner to protect the public interests in such contracts.

Other statutory requirements which govern Federal-aid contracts relate in general to the socio-economic conditions established by Congress for such contracts. Illustrative of these conditions is the requirement of Section 114 (b) of Title 23, United States Code, prohibiting the use of convict labor in the construction of the Federal-aid highways. Section 113 of Title 23, United States Code, requires that the Secretary of Commerce take such action

> . . . as may be necessary to insure that all laborers and mechanics employed by con-

[8] United States v. American Sales Company, 27 Fed.2d 389, *affirmed*, 22 Fed.2d 141 and *certiorari denied*, 280 U.S. 574.

[9] 15 Comp. Gen. 25, 26; also, 37 Ops. Atty. Gen. 253, 255.

[10] See Marlboro Constr. Co. v. N.Y., 201 Misc. 697, 112 N.Y.S 2d 794 (Ct. Cl. 1952).

tractors or subcontracts on the initial construction work on highway projects on the Interstate System . . . shall be paid wages at rates not less than those prevailing on the same type of work in similar construction in the immediate locality as determined by the Secretary of Labor in accordance with . . . the Davis-Bacon Act (40 U.S.C. see 276).

The Attorney General has ruled that the responsibility for promulgating regulations and interpretations under this section of our code was tranferred to the Secretary of Labor pursuant to Reorganization Plan Number 14 of 1950 (5 U.S.C. 133z-15).[11] Accordingly the Bureau of Public Roads, while primarily responsible for the administration and enforcement of this section of law, must do so in conformity with the regulations and interpretive material published by the Secretary of Labor. Most here are somewhat familiar with the problems that have been encountered in this area. At least it is now clearly resolved that the Secretary of Labor issues the rulings, regulations, and interpretive decisions which a Federal agency is bound to follow, and which, in turn,—the supervisory agency over the construction of the Interstate System (to which these requirements are applicable) must also follow.

The Federal-aid highway construction project is also subject to the "Copeland Anti-Kickback Act"[12] which requires weekly payment of full wages to employees on such projects, without kickback or rebate, provides for the submission of certified payrolls verifying such payments, and which makes the extraction of kickbacks or rebates from such employees, or the falsification of the payrolls, a violation of the Federal Penal Code.

Pursuant to section 1.24(d) of the Secretary of Commerce Regulations for Administration of Federal Aid for Highways, contracts for the construction of projects other than Interstate projects must contain provisions requiring payment to the laborers and mechanics at a rate not less than that established in the contract as predetermined under State law, or, in the absence thereof, by the State highway department.[13]

These statutory socio-economic conditions of the Federal-aid contracts represent an area of laxity in contract administration by the contracting agencies. These too are statutory requirements. They stand in the same status as the basic authorization to construct the highway program. They do not have a lesser status and they cannot be ignored if we are to comply with the requirements laid down by Congress. They are among the "square corners" which must be complied with in transacting business with, and for, the Government.

RECOMMENDATIONS

The personnel in the General Counsel's Office are concerned with the extent to which contract legal actions are submitted for legal consideration without any accompanying expression of the legal opinion of counsel for the State highway department. We urge you to make your voices heard in providing guidelines for your contracting officers, more particularly for your project engineers.

The project engineers need your counsel. Their roles as contract administrators need to be defined and emphasized. The limits of their authority should be well known to them and the contractors with whom they deal. They should have ready guidelines to permit them to assemble information in contract disputes, and provisions should be available to assist them in recognizing such disputes.

To assure effective contract inspection and administration, your system should provide for forwarding all legal problems with accurate information to those who are responsible for making contracting officer decisions. If it does not, you may find that you have a "de facto" contract-

[11] Ops. Atty. Gen. Vol. 41, OP No. 82, Sept. 26, 1960.

[12] 40 U.S.C. 276c, and 18 U.S.C. 874.

[13] 23 C.F.R. 1.24 (d).

ing officer out in the field who may actually be modifying contract requirements, through relaxed enforcement, without even realizing that he is doing so. It is a dangerous situation—not because the man himself is dangerous, but because he has been placed in an extremely hazardous position both for himself and for the State when he has to make these decisions alone.

Excessive delegations of authority to project personnel may place them in the position of having to make decisions without the benefit of the staff coordination that would be applied to the same problems were they presented to the headquarters office. The need for such staffing should be considered in making or reviewing delegations of authority. In all cases where authority for making decisions is delegated, it should be accompanied by clearly defined criteria for making such decisions, and by a clear definition of the scope of the authority. You cannot expect your project engineer to conform to undefined standards. If you leave your project engineer to carry on alone without adequate guide lines for resolving problems of contract enforcement, or modification, and his decisions begin to come in for staff review, you may be tempted to question the soundness of his judgment. I suggest there may be nothing the matter with the project engineer. His decisions may indicate a weakness in a system that does not provide him with a basis for saying that this is the way it is because it is in the contract and it is backed up by the State highway department and its legal advisors. A man with this basis for his decisions is much more effective than the project engineer who cannot support his decisions on any other basis than his own authority.

When you have a legal problem that indicates that the project engineer is engaging in minor irregularities in favor of the contractor, it is a caution to review his whole situation to determine whether your system of field administration effectively cuts him off from those to whom he is legally responsible, leaves him without guidelines, and makes him feel personally responsible to the contractor for the difficulties that the contractor professes to be having in meeting the contract requirements. Under such conditions, it is a short step from "supervising construction" to "helping the contractor get the job done." This shift in attitude from one of public contract administration (inspection and enforcement) to one of construction management (which is clearly the exclusive responsibility of the contractor) may be attributed to some of the causes already indicated. Such a shift of concern from the immediate interest of the State or Government to the welfare of the contractor obviously endangers the effectiveness of the contract requirements as a part of the competitive bidding system. It is most likely to show up in those contract modification actions which originate in the field: changes, time extensions, changed conditions and other claims, and in weak enforcement of technical specifications or labor standards requirements.

CONCLUSION

At the 41st Annual Meeting of WASHO, Mr. Whitton pointed out:

> We in Public Roads are answerable to the people, through the Congress, just as you are through your State legislatures. We cannot sit on the sidelines through the whole game, hoping for the best but doing nothing while the score piles up against us I say this because we are on the AASHO team, but in certain respects we are being held responsible as coach, too. We don't want to call the plays necessarily, but we do feel justified in giving some guidance and advice.

The criticisms to which our highway programs have been subjected primarily relate to a breakdown in the field of contract administration. We urge you, as counsels to the highway departments to exert yourself in providing legal guidance to the solution of these problems. We are sure you will find a challenging area for action.

This is a large field which is in need of much attention. However, such attention can be highly productive in improving criteria for contract administration. Such improvement can eliminate much confusion and many troublesome recurring problems.

DISCUSSION

Abrahams.—What do you do about a suspicious claim of error in a low bid? We have had that problem very seriously. It is easy enough to manufacture some evidence afterwards to support a claim of error, and we are afraid our whole bidding practice may be called into question.

Walters.—Do you have in mind a phony bid or a phony claim by the contractor?

Abrahams.—Here is an example: A bid is put in considerably lower than any other, and is accepted. Then, later, the contractor comes in and says that the reason his bid is so low is because he forgot to add in some of the items on which he bid. Under New York law, and probably the law generally, if a claim of error is established, there is a legal right to withdraw it. You cannot hold the bidder to his bid under those circumstances. But it is so easy to adduce evidence which has simply been manufactured after the bidder has decided that he does not want to go through with the job for his price bid.

Walters.—That is one thing that the comptroller general has been highly suspicious of, and he rather prefers that when claims of this sort come in they be referred to the comptroller general for a decision unless they are clear-cut cases, in which case there is no reason why the contracting agency should not handle it.

I do not know what criteria the comptroller general uses in these cases to decide whether he thinks there is a valid or fictitious claim of error. It is essentially a factual problem for him, and sometimes an extremely difficult factual problem.

W. H. Donham.—The same question has come up in Arkansas, and we have felt that the weight of authority in the law is that an honest error gives the bidder a right to renege. As a result, and to protect ourselves, we sue on the contractor's bid bond and let the court determine whether there is a legitimate right to withdraw.