Contract Administration: The Challenge of Changed Conditions

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• Whether he is building a fallout shelter for his next-door neighbor or a multimillion dollar superhighway for the State, the contractor may encounter changed conditions, extra work, and additional work. There is a distinction between the meaning of "extra work" and "additional work" when used in connection with public construction contracts. The Courts have defined the term "extra work" to mean the performance of work and the furnishing of required labor and materials outside and entirely independent of and not necessary to complete the contract or something done or furnished in excess of the requirements of the contract, not contemplated by the parties and not controlled by the contract. Additional work is that which results from a change or alteration in the work that has to be done under the contract.[1] Extra work usually arises outside of and entirely independent of the contract and not required in its performance whereas "additional work" usually results from a change or alteration in work that has to be done under a contract and might arise from conditions that could not be discovered until the specified work under the contract was actually undertaken.

Under New York State Highway Specifications, additional work is referred to as "contract work," whereas extra work is considered to be any work which is determined by the Superintendent of Public Works not to be contract work. The "disputed work" clause in the Specifications states:

> If the Contractor is of the opinion that any work ordered to be done as contract work by the Engineer is extra work, and not contract work, or that any order of the Engineer violates the provisions of the contract, the Contractor shall promptly notify the Superintendent in writing of his contentions with respect thereto, and the Superintendent shall make a finding thereon; the work shall, in the meantime, be progressed by the Contractor as required and ordered. During the progress of such disputed work the Contractor and Engineer shall keep daily records of all labor, material and equipment used in connection with such work and the cost thereof.
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> If the Superintendent determines that the work in question is contract work, and not extra work, or that the order complained of is proper, he shall direct the Contractor to proceed, and the Contractor must promptly comply. The Contractor's right to file a claim for extra compensation or damages will not be affected in any way in complying with the above directions of the Superintendent, provided the Contractor shall furnish the Engineer with the signed records above referred to. If the Superintendent determines that such work is extra work, not contract work, or that the order complained of is not proper, then the Superintendent shall have prepared, if necessary, a supplemental agreement covering such work, and the supplemental agreement shall be submitted to the Contractor for execution.

Whether "changed conditions" will result in extra work or additional work to be performed by the contractor has been the subject of argument and litigation in various States for many years. The very term "changed conditions" implies that there is a risk to be taken by someone—either the contractor or the owner. The Federal Government has endeavored to reduce this risk by requiring the

[1] Shields v. City of New York, 84 App. Div. 502; Kansas City Bridge Co. v. State, 250 N.W. 343; Blair v. U.S. *et al.*, 66 F. Supp. 405.

following article to be inserted in all Federal Construction Contracts:

> The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof

This reference to changed conditions is expressly applicable to subsurface conditions at the site that are materially different from those shown on the plans and specifications and also to physical conditions that were unforeseen and unknown and, therefore not shown on the plans and specifications. The subsurface or latent conditions, referred to in the first category must be a physical condition and must differ materially from those indicated in the contract and not merely in the drawing or specifications. The conditions covered by the second category must be "physical conditions" at the site. The word "physical" was added to "conditions" in both categories by a fairly recent amendment to the Article and the "contract" was likewise substituted for "plans and specifications."

New York State Highway Construction contracts do not contain a provision similar to the Federal Government's changed conditions article. With respect to the first category relating to subsurface conditions the New York State Public Works Specifications of January 2, 1957, provides the following:

> Whenever subsurface borings or other subsurface information obtained by the Department is available for a bidder's inspection, it is understood that it has been obtained with reasonable care and recorded in good faith with reasonable interpretations placed on the results and character of materials and conditions to be expected. The bidder must interpret this information according to his own judgment and not rely upon it as accurately descriptive of subsurface conditions which may be found to exist. The information is made available to the bidder only in order that the bidder may have access to the identical information available to the Department.

This means in effect that the contractor is expected to accept full responsibility for subsurface conditions encountered on the site except those resulting from faulty design or misrepresentation. The Department cooperates fully with the contractor and makes available to him all information on subsurface conditions that it has available. If subsurface conditions are encountered which depreciate the construction design features, the Department will authorize procedures to adapt the design. Such adaptations are usually in the form of increases in quantities of excavation, foundation piles, sheeting, concrete, or gravel. the bid prices are not modified. The Department endeavors to have a complete engineering design and to have the subsurface investigations fully tested by borings and laboratory tests. What we are actually saying to the contractor is that we put reliance on our boring data but we acknowledge that variations in texture, slope, earth strata and ground water are prevalent and that uniformity should not be surmised; therefore, you should make your own borings and subsurface investigations so that you will be apprised so far as possible of conditions at the site. However, we honestly believe that our borings will show the actual subsurface conditions at the site and we offer to make them available to you together with any other information that we have on the subject.

Of course, there is a gamble of sorts to the contractor but experienced contractors would not have it otherwise. It so happens that sometimes the gamble works to the benefit of the contractor. A competent contractor would not welcome a situation where the risk were completely removed so that any Tom, Dick or Harry with a dump truck and a shovel would be in a position to bid on a job. I do not suppose there are any statistics on the subject, but it would be interesting to know how often a contractor would promptly notify a contracting officer of subsurface conditions at the site differing materially but which would result in a benefit to the contractor. With all due respect to the contractors, we suspect that such reports do not exceed those reports which indicate conditions that will adversely affect the contractor.

It should be pointed out that in New York, the contractor is not without a remedy. I have already referred to the "disputed work" clause in our Standard Specifications which affords the contractor an opportunity to be heard when claiming extra work. The State of New York has waived its sovereign immunity with respect to contract matters and has established a Court of Claims in which an aggrieved person can sue the State and, on proving his claim, recover damages with interest.

The Courts have held that the State cannot insulate itself from liability merely by inserting a provision in the contract that it does not guarantee the correctness of borings when the State had knowledge of subsurface conditions that were not indicated on the plans. On the other hand, such a provision in the contract would protect the State if the material to be excavated proved to be different from what the State believed it to be and when the State had disclosed to the contractor all of the information it had on the subject.[2] In the case of *Foundation Company v. State of New York*[3], the contractor sought to recover for the increased cost of excavating to bed rock because the boring sheet, not made a part of the contract but shown to the contractor for the purpose of enabling him to make up his bid, indicated that bed rock was nearer the surface than it proved to be. It was held in this Court of Appeals case that no recovery could be had because the boring sheet was not a part of the contract, and if the bidder relied on the boring sheet he did so at his own risk, as there was no bad faith, concealment of information, or misrepresentation on the part of the State.

Officials of the New York State Department of Public Works have seriously considered the Federal Government's "changed conditions" clause and while recognizing that it has considerable merit, they have decided, up to this time at least, that it would not work out profitably under existing New York State Laws and procedures. Along with many other States, New York has a tremendous building program in progress. To quote some very recent statistics related to the Highway Program in New York State,

> The value of highway contracts let by the New York State Department of Public Works during the year of 1955 was upwards of $75,000,000. This annual value has grown tremendously each year so that in the year 1961 our Department let highway construction contracts amounting to more than $377,000,000. We anticipate that in 1962 we will reach the $400,000,000 mark. Currently, we have 444 highway projects under construction which are valued at 810.6 million dollars.

It is readily apparent that the administration of a program of such increasing dimensions is in itself a major challenge. Time is of the essence on most projects and completion dates must be strictly adhered to in order to meet program demands. We attempt to keep administrative hearings and conferences at a minimum, and even under existing procedures we often find it difficult to do.

[2] Jackson v. State of New York, 210 A.D. 115.

[3] 233 N.Y. 177.

If we were to invite the administrative work contemplated by the Federal changed conditons article on each of 444 highway projects the staff would find itself woefully undermanned, contract work could reasonably be expected to be delayed pending investigations at the site and additional claims against the State might easily follow.

The disputed work clause in our Standard Specifications is especially applicable to those claims for extra work which result from the condition referred to in the second category of the Federal changed conditions article; *i.e.*, "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in the work of a character provided for in the contract." The "disputed work" procedure requires the contractor to continue with the work pending a determination by the Superintendent as to whether the "unusual conditions" are to be considered contract work or extra work. If the former, the contractor usually continues the work under protest and seeks his remedy in the Court of Claims. If the work in question is determined to be extra work, it can be progressed pursuant to a supplemental agreement therefor. The State Superintendent of Public Works cannot arbitrarily order any amount of additional work to be performed by the contractor. He is bound by the strict requirements of the State Finance Law which requires pre-audit of funds and all contracts including supplementals are subject to the "availability" of funds.

The authority of the Superintendent of Public Works to recognize extra work arising from unforeseen conditions and to enter into supplemental agreements for the performance of such work is found in Section 38, Subdivision 9 of the State Highway Law which states as follows:

> Contingencies and extra work. Whenever the superintendent of public works determines that from any unforeseen cause the terms of any contract should be altered to provide for contingencies or extra work, he may enter into a supplemental contract therefor with the contractor. The estimated expenditure pursuant to the supplemental contract shall not be an increase over the estimated expenditure pursuant to the primary contract unless the latter estimated expenditure shall have been amended by the superintendent of public works and a duplicate of such amendment shall have been filed with the comptroller.
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> When such supplemental contract provides for similar items of work or materials which increase or decrease the itemized quantity provided for in the primary contract, the price to be paid therefor shall not exceed the unit bid price in the primary contract for such items. Agreed prices for new items of work or materials may be incorporated in a supplemental agreement as the superintendent of public works may deem them to be just and fair and beneficial to the state.
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> Whenever the superintendent of public works also determines that in the cases herein provided it is impracticable for him to ascertain in advance the just and fair price to be paid by the state for new items of work or materials, the supplemental contract therefor may provide for performance of the work and the furnishing of the materials and equipment, in which event the contractor shall keep and shall make available at all times to the superintendent of public works such accounting records, data and procedure as may be required by the superintendent of public works. An estimate of the value of such work and the furnishing of materials and equipment shall be submitted by the superintendent of public works to the state comptroller who is hereby empowered to approve such estimate. Partial and final payments shall be made upon proper records and data itemized as hereinbefore indicated.
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> Before any supplemental contract shall become effective, it shall first be approved by the director of the budget and also by the comptroller, and filed in their respective offices.

This section of Law provides some measure of relief to the contractor faced with changed conditions on the contract site. Although the procedure under the section has proven satisfactory for many years, we now find during this period of accelerated construction programs that further streamlining of the procedure is desirable. To that end we are currently studying proposed legislation that would lessen the so-called "red-tape" to a much greater extent.

In conclusion, this paper has not attempted to make a case against the use of the Federal changed conditions article. We recognize that it is designed to meet conditions under which the Federal system operates. Apparently for those purposes, it works very well since it has been in existence for many years. What I have attempted to do is to outline the procedures followed in New York State in dealing with changed condition problems of both categories. Our present procedure cannot be expected to be perfect. We do not maintain that it is the best possible one. We do feel it is adequate for our purposes at this time without causing an injustice to our contractors. We have an open mind and an alert eye for any changes of procedure in this area which will be in the best interests of the State without working a hardship on the contractor.

DISCUSSION

Banister. — In connection with changed conditions, we have had some trouble in Louisiana where, surprisingly enough, one contractor found rock in Louisiana, and our own borings had failed to find rock. When he made his checkborings he used the same spots we did. Apparently both sets of borings hit holes in the rock despite the fact that there was quite a layer of it. But this must have been what happened. The last I heard on that case we refused to recognize this as a changed condition.

In another case we were building a tunnel and an accumulation of cypress stumps and logs that had been there for a long time was struck. It posed quite a problem to the contractor but our specifications had thrown this burden on him and we did not revise it.

I appreciate the burden that rests on the project engineer. We recently conducted schools for our project engineers on the interpretation of the standards and specifications. I am happy to say that this was well received and our project engineers did very well. We also have an inspection team composed of one project engineer and a lawyer who is also a trained investigator. They tour the State and hit projects without warning to check on everything pertaining to the job.

Lindas.—We had a sad experience with a changed condition clause, and after I tried the case we decided to take it out of our contract form.

Here we had a ridge and a sidehill cut of 200-ft depth. On the side of the hill were outcroppings of sandstone throughout. Our plans called for a 1:1 slope and when the contractor got into this cut he ran into sandstone, as might be expected. He had intended to rip everything necessary to make this cut, but when he got into it he found he was going to have to shoot it. This cost him about $250,000 more than he had planned, so he went to the engineer and asked to be allowed to make the slopes steeper. The engineer, without consulting the legal department, told him to go ahead and make them a ratio of ¼:1.

After it was all over the contractor sued us for $250,000 because this was a changed condition and our plans had been guaranteed by our changed conditions clause. Our plans had shown a 1:1 slope indicating that we ourselves believed this was going to be diggable material, and when we found out it was not diggable we allowed him to make the solid rock slope steeper.

We had a clause similar to the Federal clause, and when I did my research I found forty-seven Court of Claims cases that made everything a changed condition.

We hired one welldriller to sink one hole in this ridge. We did not then and do not now guarantee our information about subsurface conditions. But our court held that if the contractor does not have time to bore his own hole, then we do guar-

antee ours. This welldriller's log said there was everything but sandstone, so this for practical purposes fixed our case, despite the fact that the contractor had walked over the site and seen the sandstone outcroppings.

After that we took the changed condition clause out of our contract form. It has been out about seven years, and we cannot see where it has changed our bidding one iota. The presence of a changed condition clause is supposed to mean that you will get lower bids because the contractor knows that if he runs into new conditions he can get an adjustment. But we cannot see where it has made any difference. Our courts have held that we do not guarantee our plans, and that the contractor takes a calculated risk after he looks the job over. We have one case in which the estimate of the number of yards of material to be moved was way off, but the plans had the right computations. The court held here that the contractor could have taken this information and figured out for himself what he had to cope with, so he could not recover.

We think we have had less trouble since we took our changed conditions clause out of the contract.

Canada.—A few years ago we started to reduce our plans photographically and distribute them. When we started this we did not think much about the consequences of it. Our plans have scales shown on them to indicate their reduction. For several years no one paid much attention to this. Then one contractor made a bid on a contract without figuring the scale. He got the contract and went to work, but about half-way through the job he started pulling his men off. When asked what the matter was he said he was finished, not realizing that he had overlooked that the plans he bid on were reduced by one-half.

At that point the contractor may have made a mistake, if I correctly understand some of the recent cases, because he said he would go ahead and finish the job and put in a claim for extras. He did, but the claim had to be litigated and we successfully defended against his charge that the scale shown on the plan was not accurate because of the reduction. The court held he was liable for discovering this fact for himself.

The moral of this story is that immediately after this case we started putting cover sheets on our photographic plans, and on this cover we say that contractors are warned that these plans are reduced one-half.

Abrahams.—Do you have any estimate as to how many claims you have had under your changed conditions clause, and how many you have paid?

Bennett.—I do not have exact figures but I do not believe it is very much. We do pay a substantial amount for "additional work." We have a unit price bid on highway construction. For example, our engineers recently took a highway through an abandoned cemetery of which there was hardly any record. To be on the safe side they thought they ought to tell the contractor about it and instruct him to preserve any human remains so that they could be relocated. They thought that there would be from 25 to 50 graves that would be encountered. When the contractor got through, however, he had evidence of several hundred. Thus at the unit price bid, the contractor collected a substantial amount of money. I do not know that this is anybody's fault.

A number of interesting questions are involved here. In the case of cemeteries, what is a grave? And what is a human remain? When highways are put through cemeteries that are hundreds of years old, as some of them in New York State are, the contractor has to make the decisions regarding these questions, and he is also the first one to have to face the question of whether something may be extra work or additional work under his contract.

Lehmann.—We have run into the same problem in Maryland, but we have encountered a variation. Before going through a cemetery we try to

find the official register of graves, and determine from that record how many graves will have to be moved. But occasionally we find these records are very inaccurate because of burials that have been made without any official record or permission.

Amey.—I think this matter of change of conditions points up the larger problem that is involved in contract administration; should the contractor work under the instructions of the project engineer in charge of directing the project, or should the contractor merely be held responsible for ultimately producing an end product that meets the contract specifications?

Some time ago I had occasion to do some research into this subject, and the best case I found from the highway department's point of view was either from Washington or Oregon, and arose out of a situation in which the contractor's failure to follow specifications in the material used for construction of a bridge resulted in the bridge falling apart after a short time.