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PROBLEMS AND PROCEDURE IN HIGHWAY AND BUILDING CONTRACTS WITH THE STATE OF NEW YORK

HOMER E. PETERS *

I. INTRODUCTION

VOLUMES of legal treatises have been written on the law of contracts and, to a lesser extent, on contracts for public improvement. Unfortunately, however, a relatively small amount of material has been published on public improvement contracts with the State of New York. This subject is important and will become even more so in the foreseeable future. The New York Legislature annually appropriates considerable sums for the construction and reconstruction of public buildings and roads. In addition to these appropriations the state participates from time to time in federal grants for national improvement projects, such as the current highway program. New York’s share for participating in the federal highway program alone will amount to at least one billion, seven hundred million dollars. Total public improvement expenditures in New York during fiscal 1956-1957 amounted to over five hundred and sixteen million dollars.

The actual construction on these projects is performed by individuals who contract either directly with the state or, as is more frequently the case, with one of the many public authorities. No attempt will be made in this article to deal with each and every public authority.  Suffice it

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1. For particular appropriation statutes, see N.Y. Sess. Laws 1957, cc. 34, 258; id. 1956, cc. 60, 180; id. 1955, cc. 52, 307. During the fiscal years of 1954-1955, 1955-1956 and 1956-1957, the Legislature appropriated the following sums for public highways and buildings, and the state entered into contracts therefor as follows:

<table>
<thead>
<tr>
<th>Total Appropriation</th>
<th>Number of Contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1954-1955—$259,200,000</td>
<td>994</td>
</tr>
<tr>
<td>1955-1956—$377,900,000</td>
<td>1193</td>
</tr>
<tr>
<td>1956-1957—$516,500,000</td>
<td>842</td>
</tr>
</tbody>
</table>

2. 23 U.S.C.A. §§ 157-67 (Supp. 1957). The federal government in 1956, by the enactment of the so-called “Highway Revenue Act of 1956,” provided for the construction of 41,000 miles of highway to be known as the “National System of Interstate and Defense Highways” by the appropriation and expenditure of twenty-five billions of dollars to be apportioned among the respective states. This sum will supplement the individual expenditures of each state, which should amount to a total of about twenty-seven billion dollars.

3. Some typical examples of such authorities are: Jones Beach Parkway Authority; N.Y. City Parkway Authority; N.Y. Port Authority; N.Y. State Thruway Authority; Niagara Frontier Authority; Power Authority of the State of New York; Westchester Cross-County Parkway Authority; and the Whiteface Mountain Highway Comm’n.

The most important of these authorities is the N.Y. State Thruway Authority. The statutory provisions under which it operates may be found in N.Y. Pub. Auth. Law §§ 350-75.
to say that there are numerous authorities operating under the laws of New York which have as their purpose the carrying out of such govern-
mental functions as may be assigned to them by the Legislature and which the state, for one reason or another, does not wish to assume directly. These authorities may enter into contracts, incur obligations, borrow money, sue and be sued. Since each is created by a separate statute, the rights and liabilities of any one authority can only be determined by examining the particular legislative enactment.

In order fully to comprehend the problems involved in this growing field one must consider the law that affects the awarding, execution and carrying out of the contracts as well as the decisions which interpret some of the more important contract provisions. The basic law providing for the preparation of specifications, contracts and plans, the advertising for sealed bids, the awarding of contracts, their execution, the performance and acceptance of the work, and payment for such work, is contained in the Finance Law, the Highway Law and the Public Buildings Law. These statutes, together with certain others, and some provisions of the state constitution should be considered by any attorney who undertakes

By constitutional provision the people of the state guaranteed the bonds issued by the Authority to the extent of five hundred million dollars. N.Y. Const. art. X, § 6. The Authority operates as an independent agency of the state and may sue and be sued. However, actions against it must be instituted in the New York Court of Claims. N.Y. Pub. Auth. Law § 361(b); Easley v. New York State Thruway Authority, 1 N.Y.2d 374, 135 N.E.2d 572 (1956).

The Comptroller of the State of New York is designated by statute as the agent for the Authority for the purpose of receiving and paying out and investing money of the Authority. Such funds must be kept in a special account and earmarked to the credit of the Authority. N.Y. Pub. Auth. Law § 364.

In accordance with the provisions of Pub. Auth. Law § 359, the engineering work in connection with the construction of the Thruway is carried on by the Superintendent of Public Works, for which the Authority is obligated to compensate the state. All provisions of law applicable to the construction and improvement of state highways are also applicable to the construction, reconstruction and improvement of the Thruway.

The standard form of contract being used by the Thruway Authority is substantially the same as that used on state highway projects. The right of way for the Thruway Authority is acquired by condemnation proceedings on the part of the state in the same manner that the state acquires rights of way for its highways. Id. § 358. The acquisition of this right of way by the Thruway Authority has become a source of considerable litigation in the Court of Claims, and of course, is governed by the recognized principles applicable to condemnation proceedings by the state.

Claims filed in the Court of Claims against the N.Y. State Thruway Authority should, of course, be filed directly against the Authority and not against the State.

Mechanics' liens filed against the money due under any contract with a public authority or public corporation should be filed with the financial officer of the authority or public corporation, and, in addition, with any officer or agency having charge of supervision of the contract work and the approval of payments thereunder. N.Y. Lien Law § 12.

4. E.g., the powers and duties of the Comptroller, N.Y. Const. art. V, § 1. "The
to advise a contractor engaged in a public improvement contract with the State of New York. Such a contractor or his attorney should bear in mind that the state constitution and various statutes have carefully defined the conditions under which contracts may be entered into by state officers, and have carefully set out the conditions under which such contracts must be performed and the obligations of the parties to the contracts fulfilled. State officers, unlike representatives of private industry or private owners, are literally creatures of law. Their powers are carefully defined by the pertinent statutes; any act or commitment beyond the limitations set forth in those statutes, regardless of the good faith of the representatives of the state or the contractor, is invalid, and any alleged obligation resulting from unauthorized activities is unenforceable.

No attempt will be made to distinguish the many differences between New York State public improvement contracts and public improvement contracts with the federal government, although the reader who is familiar with federal contracts will readily appreciate that there are substantial and material differences between the pertinent statutes covering such contracts as well as the provisions of the contracts themselves.

comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, and shall possess the qualifications provided in section 2 of article IV. The legislature shall provide for filling vacancies in the office of comptroller and of attorney-general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor. The comptroller shall be required: (1) To audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. The payment of any money of the state, or of any money under its control, or the refund of any money paid to the state, except upon audit by the comptroller, shall be void, and may be restrained upon the suit of any taxpayer with the consent of the supreme court in appellate division on notice to the attorney-general. In such respect the legislature shall define his powers and duties and may also assign to him supervision of the accounts of any political subdivision of the state, but shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this constitution to the contrary notwithstanding." See also id. art. V, §§ 2, 4; id. art. IX, § 10; N.Y. State Fin. Law § 8.

N.Y. State Fin. Law § 41 provides that: "No state officer, employee, board, department or commission shall contract indebtedness on behalf of the state, nor assume to bind the state, in an amount in excess of money appropriated or otherwise lawfully available. This section shall not apply to a case where a statute expressly authorizes the making of a contract or contracts for a stated maximum amount which exceeds the money appropriated or otherwise available for payments thereon." See also id. §§ 8, 109, 112, 127, 135, 137-40.


II. PREPARATION AND FORM OF CONTRACT

A. The Roles of Superintendent of Public Works, State Architect, Particular State Departments

The form of both highway and building construction contracts of the state, as well as the plans for the buildings and the highways, are the responsibility of and are prepared by the Superintendent of Public Works. But in the drafting of plans and specifications for building contracts, the department or other agency for which the building is being constructed may adopt, modify or reject any drawings and specifications prepared by the Superintendent of Public Works.

The first step in the chain of events leading from the appropriation of money by the Legislature for construction of a building or highway to the completion of the project begins with the drafting of the plans and specifications for a building or highway by the Superintendent of Public Works, who is assisted in building projects by the head of the state department for which the building is to be constructed.

Before the plans and specifications for a particular project are drafted, or simultaneously with the drafting of them, surveys and inspections of the contract site are usually made by representatives of the Department of Public Works. Information obtained from such surveys is, of course, submitted to the person or persons charged with the drafting of the specifications and plans. Frequently such information is made available to prospective bidders, particularly in the case of subsurface explorations. It is advisable procedure for all contractors who intend to bid on any public improvement contract work with the state or its agencies to ascertain before submitting their respective bids whether information obtained by the survey is available. If it is, prospective bidders should carefully examine it, making a record for future reference of the time and place of the examination. If prospective bidders desire to ascertain whether these facts are available for their examination, it is better procedure to seek the information by a letter addressed to the appropriate officer in the Department of Public Works.

7. N.Y. State Fin. Law § 127(1): "As used in this section, the term 'departments having jurisdiction' shall be deemed to mean the departments referred to in section one hundred twenty-five of this act.

1. All plans and specifications for the construction, alteration, repair and improvement of buildings for institutions reporting to the departments shall be prepared by the department of public works. The department having jurisdiction shall adopt or reject any such plans or specifications, and no such work shall be begun until the plans and specifications therefor have been adopted, but before the adoption thereof, the departments having jurisdiction shall submit the same to the board of visitors of the institution, if any, and shall allow such board a period of not more than thirty days in which to submit a statement of their opinions and suggestions in regard thereto."

The Architect of the State of New York supervises building construction contracts, while the Division of Construction headed by the Chief Engineer supervises the construction of highway contracts. Both officers perform their functions through the various District Engineers, ten of whom are located at various points throughout the state.\(^9\)

**B. Sources of Contract**

The contracts themselves are more or less standard in form, containing certain required clauses. These clauses are generally taken from the State Finance Law, Public Buildings Law, Highway Law and Labor Law, and are usually set forth in printed form.

All building contracts entered into by the state, as required by statute, contain clauses providing in substance that the contracts shall be deemed executory to the extent of the money available and that no liability shall be incurred by the state beyond the money available for the contract.

The Labor Law and even the state constitution contain provisions\(^{10}\) dealing with either the employment or payment of wages to persons working on state construction projects. The constitution, for example, prohibits the employment of any person on a public improvement contract carried on in the state from working more than eight hours per day or five days per week.\(^{11}\) However, by chapter 851 of the Laws of 1947, a dispensation to work a longer period may be granted by the Industrial Commissioner of the State of New York. In most instances such dispensation is granted prior to the advertisement for bids, thereby informing prospective bidders of the conditions under which they will be permitted to employ labor in the performance of the proposed work. The prohibition against working more than eight hours per day or five days per week is constitutional in New York and cannot be circumvented.


\(^{11}\) N.Y. Const. art. I, § 17; N.Y. Lab. Law § 220-22.
except by strict compliance with the provisions of the statute in question. The constitutional provision itself permits a longer work day or week only in case of an emergency. The Industrial Commissioner may find that such an emergency exists because of the unavailability of laborers willing to work only five days a week or eight hours a day during the short work season which normally exists on most construction projects by reason of the climatic conditions in the state.

The Labor Law provides, in particular, for payment of the prevailing rate of wages to persons on state construction work; prohibits discrimination by reason of race, color or creed; requires the filing of affidavits by employers attesting to payment of all wages due, and permits the Comptroller to withhold moneys from a contractor where claims have been filed alleging wages to be unpaid.

In the case of building contracts the standard clauses common to all such contracts appear under the heading of "General Conditions," which may be found in the State Architect's Standard Mechanical Specifications of Nov. 1, 1955, and in the case of highway contracts under the heading of "Information for Bidders," in the Public Works Specifications of Jan. 2, 1957. In all highway construction contracts the current Public Works Specifications is, by reference in the proposal for the work, made a part of the contract documents, and must be considered in every instance by any person in construing or evaluating the rights and liabilities of the parties to such a contract. In the case of building contracts the contract provisions, unless otherwise indicated, are all contained in a paper-bound volume, frequently consisting of several hundred pages, which are physically made a part of each contract.

Highway contracts are unit price in form, unless stated otherwise. The contracts themselves consist of numerous items of work, separately numbered and defined, setting forth the estimated quantities of work under each item. The bidder is required to specify in his proposal a price for which he will perform each unit of the contract. For example, a proposal for a highway contract may specify that there is an estimated 500,000 cubic yards of excavation for which a bidder is required to specify a unit price per cubic yard. The total amount bid under a proposal is determined by totaling the sums bid by each contractor upon all of the items. Upon the completion of all the work, measurements

12. Ibid.
15. Id. § 220(e).
16. Id. § 220(a).
17. Id. § 220(b).
18. N.Y. H'way Law § 38(2).
are taken by the State Engineer to determine the quantity of work performed, and a final adjustment is made. The contractor is then credited with the amount of work performed under each item and a supplemental agreement is entered into between him and the state in accordance with the actual quantity of work performed. In arriving at the final amount due the contractor, the state is credited with all payments on account made pursuant to the previous estimate, and the contractor is paid the balance due.

Where the entire cost of a building project exceeds the sum of twenty-five thousand dollars, separate specifications must be prepared, and separate proposals received, for plumbing, heating and electrical work. This means that, as distinguished from federal projects, in preparing contracts entered into with the State of New York, there are usually four contractors on each project; that is, a contractor for the general construction, together with separate contractors for the heating, plumbing and electrical services. These latter are sometimes referred to as the "mechanical trades."

III. Award of Contract

A. Procedure

After the preparation of the proposed form of contract and the plans and specifications, the state officials are in a position to enter into a contract for the work in question. However, to procure such a contract, it is first necessary to publish in newspapers and sometimes in trade journals of the construction industry, an invitation to bid upon the proposed work. Such an advertisement contains a brief description of the work to be undertaken, together with a statement of the time and place that proposals will be received and opened. Following such a public advertisement the bids received are placed in a receptacle, opened and read publicly. These bids must be accompanied by a draft or certified check for a sum specified by the applicable statute. After all proposals have been reviewed, an award is generally made to the lowest responsible and reliable bidder. But any or all bids may be rejected in the discretion of the Superintendent of Public Works.

21. N.Y. H'way Law § 38(2); N.Y. Pub. Bldgs. Law § 8(3); N.Y. State Fin. Law § 127(2). Proposals submitted in connection with contracts to be performed under the Highway Law must be accompanied by a deposit of at least 5% and not more than 6% of the amount of the bid. In the instance of other proposals the amount of the deposit to accompany the bid is determined by the department having jurisdiction of the work.
B. Posting of Bond

In most cases a successful bidder is required to file with the state at the time of his acceptance of the contract a bond guaranteeing faithful performance of his contract and another bond guaranteeing payment of all labor and material in connection with the contract.\(^{24}\)

The rights under the labor and material bond are enforced by filing, and foreclosing if necessary, a mechanic's lien in accordance with the Lien Law of the State of New York.\(^{25}\) Recovery may be had under such a bond for labor or materials furnished to a subcontractor even though the prime contractor is not indebted to him at the time the notice of lien is filed.\(^{26}\)

In the case of highway contracts, a performance bond may be dispensed with. However, in such a case, instead of the usual amount retained from each progress payment, namely, 10 per cent up to and including 50 per cent of the contract work, 20 per cent is retained from each payment. This precludes, as a practical matter, following such a procedure because of the financial burden placed on a contractor to finance his work.\(^{27}\)

C. Relief from Mistakes in Bids and Arbitrary Rejection

It is upon the opening of bids or at the time of awarding of a contract that problems leading to litigation may develop. At this point one of two events may occur. The contractor may for the first time discover that through error or mistake he has submitted an erroneous or unintended bid; or the Superintendent of Public Works may reject the lowest bid and award the contract to the next higher bidder.

As to the first possibility, the law is well settled in New York that any bidder for a contract may rescind his proposal, be relieved of his bid and recover any deposit made by him to insure his entering into a contract in accordance with his proposal, if the bidder can establish that he has made an honest mistake, without gross or willful negligence on his part, in the preparation and submission of his proposal; and that if he were required to perform the contract upon which he submitted such a bid, he would suffer irreparable loss, that is, an actual out-of-pocket loss as distinguished from loss of profit.\(^{28}\)

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\(^{24}\) N.Y. State Fin. Law §§ 127(2), 137; N.Y. H'way Law § 38(7); N.Y. Pub. Bldgs. Law § 8(2).
\(^{25}\) N.Y. State Fin. Law § 137.
\(^{27}\) N.Y. H'way Law § 38(7).
\(^{28}\) The Attorney General has ruled that the Superintendent of Public Works, without resort to litigation, may relieve a bidder from an erroneous or unintended bid. N.Y. Ops.
Until 1954 it was presumed that judicial relief from a mistaken bid could be obtained in the proper instance by the bidder. However, in that year the Court of Appeals, in *Psaty v. Duryea*, held that the state had not consented to be sued in such an action and that no remedy existed for a contractor who had submitted a proposal which was in law and fact an erroneous and unintended one beyond an appeal to the discretion of the Superintendent of Public Works.

Attempts to overcome this decision by legislation have been consistently opposed by the Superintendent of Public Works, apparently upon the ground that his decision in this field, unlike any other public official, should be beyond judicial review.

The only practical remedy now available to a contractor who has been unfortunate enough to have submitted an erroneous bid and to have had his request for relief denied by the Superintendent of Public Works is to attempt to secure legislation in the form of a so-called “Enabling Act” conferring jurisdiction on the Court of Claims to hear and determine his claim. A proceeding under article 78 of the New York Civil Practice Act to review an adverse ruling by the Superintendent of Public Works is impractical, because pending the institution of such a proceeding and its determination the proceeds of a bidder’s deposit would be declared forfeit and the funds would be deposited in the general fund of the state from which the deposit may not be withdrawn except by legislative appropriation.

Rejection of a bid by the state has also resulted in litigation seeking to compel the award of a contract pursuant to the bid or to review the alleged wrongful rejection. Courts are loath to grant relief in such instances except upon a very clear showing that the decision of the state official was capricious or arbitrary.

**D. Administrative Approval of Award**

When the Superintendent of Public Works determines who is the lowest responsible bidder, he may inform the bidder that a contract has been awarded to him in accordance with his proposal. Thereafter, a formal
contract is submitted to the bidder for his signature and filed with the Superintendent of Public Works. Once these steps have been accomplished, the contract is executed on behalf of the state by the Superintendent of Public Works in the case of highway contracts, or in the case of building contracts by the head of the department for which the construction is to be performed. The contract is then forwarded to the Comptroller. Any contract entered into by any state department, board, officer, commission or institution, or by a railroad for grade crossing eliminations, in excess of five hundred dollars, must, before it becomes effective, be approved by the Comptroller of the state and filed in his office. Without such approval no valid claim exists against the state for any work, labor or services performed thereunder. Accordingly, work performed by a contractor under a contract which has not been approved by the Comptroller is done at the contractor's risk and as a volunteer.

IV. INTERPRETATION AND EXECUTION OF CONTRACT

A. Rules of Construction

Most litigation in this field arises and most legal problems are presented after the public improvement contract has been duly executed and the work begun. At this point the officers of the state first begin to enforce the obligations which they contend are imposed upon the contractor, and the contractor in turn frequently finds himself confronted with attempts on the part of the state officers to impose obligations upon him which he may believe are not provided for by the contract.

While the standard form of both building and highway contracts contains clauses conferring jurisdiction on the State Architect or the Superintendent of Public Works to resolve any ambiguity or interpretation of the plans and specifications, such clauses do not prevent or bar the courts of the state from reviewing any decision made by a state official if such a decision involves a question of law as distinguished from a question of fact.

34. N.Y. State Fin. Law § 112. See also Long Island R.R. v. New York, 135 Misc. 646, 57 N.Y.S.2d 163 (Ct. Cl. 1945), and authorities cited therein.

35. In interpreting and construing the obligations imposed upon the parties to a state public improvement contract, the same principles are applicable that exist in construing contracts between private individuals. Reading Steel Castings Co. v. United States, 263 U.S. 186 (1925); Jackson v. New York, 210 App. Div. 115, 205 N.Y. Supp. 653 (4th Dep't 1924); Heating Maintenance Corp. v. New York, 206 Misc. 605, 134 N.Y.S.2d 71 (Ct. Cl. 1954). A general summary of many of these legal principles may be found in Shore Bridge Corp. v. New York, 186 Misc. 1005, 61 N.Y.S.2d 32 (Ct. Cl. 1946).

36. State Architect's Standard Mechanical Specifications of Nov. 1, 1955, General Conditions art. 12:

"52. Corrections. Should any portion of the drawings or specifications be obscure or in dispute, they shall be referred to the State Architect and he shall decide as to the true mean-
Accordingly, when a dispute arises under a building or highway construction contract entered into with the state as to whether certain work is called for or required under the plans and specifications, the contractor is not precluded by a ruling of the state officer in charge of the work from appealing to the courts for what amounts to judicial review.\(^3\)

**B. Delays**

Both highway and building construction contracts contain clauses which in substance provide that if a contractor is delayed in the performance of his work by any act or neglect of the state or by reason of any change ordered in the work, or from "any cause whatsoever," he will be compensated by an extension of time equivalent to the period of the delay, and he will not have any claim or relief for damages arising from the delay.\(^3\) These clauses are frequently referred to as "delay clauses" and are a frequent source of litigation.

The delay clauses are designed to exculpate the state from responsibility for delays of any nature arising during the contract work. Any delay in

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\(^3\) State Architect's Standard Mechanical Specifications of Nov. 1, 1955, General Conditions art. 21. "88. If the Contractor is delayed in the completion of his work by any act or neglect of the State, or by changes ordered in the work, or by any cause which the State Architect shall deem to justify the delay as being beyond the Contractor's control, then the time of completion shall be extended for such reasonable time as the State Architect may decide.

"90. No charges or claim for damages shall be made by the Contractor for any ordinary delays or hindrances, from any cause whatsoever, during the progress of any portion of the work embraced in this contract. Such delays or hindrances shall be compensated for by an extension of time as above provided."

Public Works Specifications of Jan. 2, 1957 contains in pertinent part the following provisions: "The Contractor in submitting his bid hereby agrees that he shall have no claim against the State of New York for any damages due to such delays or interference other than extended time in which to complete the work." Id. at 47.
performance of a construction contract is costly, and these costs increase proportionately with the extent of the postponement. Through long experience, the drafters of these contracts are aware that such delays occur, and that unless appropriate clauses are inserted, the state may be held responsible for damages.

Such clauses do not necessarily relieve the state from any delay which it may impose upon a contractor. However, these clauses are interpreted by representatives of the Department of Public Works when issuing change orders or supplemental agreements, as precluding any payment for delays or consequential damages arising out of the work embraced in the change order or supplemental agreement. Accordingly, it is important for a contractor, if he believes that he will be subjected to loss or damage for which he cannot be compensated as such in the change order or supplemental agreement, to accept the instrument under protest stating his reason. This written protest should be submitted at the time a change order or supplemental agreement is tendered to the contractor, or at the time he is requested by a state representative to submit an estimated cost statement for the purpose of preparing a change order or supplemental agreement. This places the state on notice that the contractor is not accepting the consideration set forth in the change order as full compensation for the work imposed. The contractor may still pursue his right for further compensation after completion of the work by filing and prosecuting a claim in the Court of Claims. This protest, of course, should be renewed in writing at the time the final estimate is submitted to the contractor for his approval. Care should also be taken in accepting a change order or supplemental agreement modifying an existing contract that prior breaches are not waived by its execution.

It is better practice for a contractor, if there is any possibility that he will be delayed by work imposed on him, either by verbal or written order, change order or supplemental agreement, to proceed under a protest expressed in writing, and to sign all subsequent change orders and supplemental agreements under protest, thereby precluding any defense or contention on the part of the state that the alleged delay was waived by some subsequent act on his part.

Delays occur from many causes. The state may fail to appropriate

41. Some judicial authorities illustrating the types of delay and the circumstances under which they may occur are as follows: Cauldwell-Wingate Co. v. New York, 276 N.Y. 365, 12 N.E.2d 443 (1938); Rusciano & Son Corp. v. New York, 278 App. Div. 999, 105 N.Y.S.2d 719 (3d Dep't 1951); R. H. Baker Co. v. New York, 267 App. Div. 712, 48 N.Y.S.2d 272 (3d Dep't 1944), aff'd mem., 294 N.Y. 698, 60 N.E.2d 847 (1945); John Weil Plumbing Corp.
enough property to provide a site for the performance of the work; or the state may make drastic changes in design or scope, requiring the


Cauldwell-Wingate Co. v. New York, supra, involved a claim for damages resulting from delays imposed upon the contractor as the result of the failure of the state to furnish a foundation contractor charged with the construction of the foundation of the building with plans adequately designed to enable the work to progress under the conditions found to exist. As a result the claimant, whose work followed the foundation contract, was delayed and damaged. The Court of Appeals held that the so-called delay clauses did not bar a recovery. The court predicated its reasoning upon the premise that the delays resulted from misrepresentation and direct interference on the part of the state. If either or both of the latter conditions are present and damages result therefrom, recovery may be had against the state under the existing form of building contract.

Rusciano & Sons Corp. v. New York, supra, involved damages for delay when the state required a contractor to proceed with his work on a highway job when the state knew or should reasonably have anticipated the unavailability of the work site. This, the court held, was an active interference and constituted a breach of contract on the part of the state.

R. H. Baker Co. v. New York, supra, involved a claim for delays imposed on the contractor as the result of the failure of the state to require another independent contractor to carry on certain preliminary work on a tunnel in the ordinary and customary manner. The court held that such failure constituted, in legal effect, an active interference on the part of the state in the claimant's work thereby entitling the contractor to damages.

John Weil Plumbing Corp. v. New York, supra, so far as is pertinent, involved an unnecessary delay of approximately twenty-one months imposed on a plumbing contractor by failing to require a general contractor to progress reasonably and expeditiously with his work.

Charles Smith & Sons Constr. Co. v. New York, supra, involved delays imposed on a building contractor by the failure of the state to require a plumbing contractor to carry on his work in the normal and customary manner, thereby delaying the general contractor and entitling him to recover damages for breach of contract.

John L. Hayes Constr. Co. v. New York, supra, involved delays imposed upon a contractor as the result of the failure of the state to cause or require the removal of certain utilities, houses and barns from the contract site, as well as the completion of two bridges. The court held that under the provisions of the standard form of highway contract, such delays were within the contemplation of the parties and were not caused by the direct interference on the part of the state and accordingly there could be no recovery.

Wright and Kremers, Inc. v. New York, supra, involved a claim whereby the contractor sought to recover in the Court of Claims for alleged delays imposed upon him by reason of changes made in the plans and specifications after the contract had been entered into. In addition, the contractor sought compensation for damages allegedly imposed upon him by reason of the state's delay in removing a pile of coal and certain structures from the building site. The contract contained the clauses quoted above (see note 38 supra) from the "General Conditions." The Court of Appeals held that the clauses in question exculpated the state from the claim for changes since there was no showing that there was any unreasonable
contractor to suspend all or a portion of the work while changes are
effected and plans drawn. Another cause for delay, particularly in the
case of highway contracts is the failure of municipalities or public utility
corporations to re-locate facilities within the right of way. In the case of
building contracts the failure of the state to require other contractors to
progress with their work at a reasonable pace is one of the greatest single
causes for delays. This problem seldom, if ever, arises on federal con-
tracts because the general contractor is charged with the responsibility
of installing the electric, plumbing and heating work necessary to furnish
a complete structure. The courts construe these clauses as a defense if it
can be said that the delay was a reasonable one; or one which the parties,
when they entered into the contract, should have taken into consideration,
that is, "the delays were . . . within the contemplation of the
parties. . . ."42 On the other hand, if the delay is an unreasonable one or
one which the parties could not reasonably foresee at the time the contract
was entered into, and if the state caused the delay, then a contractor may
recover for the resulting damage.43 The courts will not enforce a clause
barring a claim for delay, if in doing so they would in effect permit the
state to perpetrate a constructive or actual fraud upon the contractor,44
as would be the case where a contract provides for the performance of
certain work, and the state fails to provide the necessary site.

When a contractor is aware that he may be delayed by some condition
which he feels may be the responsibility of the state, or by some extra or
additional work not provided for in the contract, better practice dictates
that prompt notice be given, in writing to the state engineer in charge, of
the possibility or actuality of the delay. At the same time, the contractor
should include the statement that he expects to be compensated for any
loss or resulting damage. By so doing, he places the state on notice that
a claim may be presented. This notice is an essential element in his
ultimate right to recover for the delay.45

As a matter of subsequent proof it is advisable to put the notice in
writing. A copy of this written notice should be forwarded to the District
Engineer and to the Superintendent of Public Works. In this connection
it is advisable for the contractor to keep a daily record of the costs im-
delays in making the changes; but as to the delay imposed by reason of the state's failure to
move the structures and the pile of coal from the site where the contractor was to erect a
building, the court held that did not constitute any defense.

(3d Dep't 1933), aff'd mem., 279 N.Y. 755, 18 N.E.2d 695 (1939).
1944), aff'd mem., 294 N.Y. 693, 60 N.E.2d 347 (1945).
44. See note 41 supra.
45. Borough Constr. Co. v. City of New York, 200 N.Y. 149, 93 N.E. 460 (1910); Novak &
posed upon him as a result of the delay, and to take photographs, if necessary, from time to time. A daily job log or record setting forth a running account of the events relating to the delay should be kept by an employee who has personal knowledge of the facts. It is always advisable for any contractor who has a contract with the state to keep a daily diary or log since the state engineer on the job does so, and if litigation results, the existence of a log is invaluable in refreshing the recollection of witnesses and in strengthening their testimony.

C. Extra Work

Another principal cause for claims under contracts with the state arises from so-called "extra work, material or expense." Both the highway and building construction forms of contract, as well as the provisions of pertinent statutes, provide for changes or alterations under certain conditions to meet exigencies which arise in the course of the work.40

40. State Architect's Standard Mechanical Specifications of Nov. 1, 1955, General Conditions art. 29, contains the following pertinent provisions for increase or decrease in the quantity of work: "131. The State, without invalidating the contract, may make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly. All such work shall be executed in conformity with the terms and conditions of the original contract, unless otherwise provided in the order for same. Any claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

"132. No instructions, either written or verbal, shall be construed as an order for changes unless it be in the form of an Order on Contract, bearing the signed approval of the State Architect and the signed acceptance of Contractor, except in the case of disagreement as to value of changes, when the Contractor's signature to the order will not be mandatory. Order on Contract shall describe or enumerate the work to be performed and state the price, if any, to be added to or deducted from the contract sum. If the nature of the work is such that an Order of Contract, as above, cannot be issued until the work has been advanced sufficiently to obtain exact quantities, said work will be authorized in writing by the State Architect, with the accompanying statement that an Order on Contract will be issued when the necessary information is at hand.

"133. Except as provided in the above paragraph, no change shall be made, unless in pursuance of an Order on Contract, and no claim for an addition to the contract sum shall be valid unless so ordered. If the Contractor believes that any instructions, by drawing or otherwise, involve extra cost under his contract, he shall give the State Architect written notice thereof and await instructions before proceeding to execute such work.

"134. The value of any change shall be determined by one or more of the following methods:

(a) By prices specifically named in the specifications or proposals.
(b) By acceptance in a lump sum.
(c) By estimate of the cost of labor and materials plus overhead and profit, cost to be determined as the work progresses.
(d) By cost of labor and materials, plus overhead and profit, cost to be determined as the work progresses.
(e) By estimate of quantities of labor and materials deducible from the detailed estimate."

The Public Works Specifications of Jan. 2, 1957, applicable to highway contracts, also contains a similar provision providing in part as follows: "Extra work, Deductions and
Section 18 of the Public Buildings Law, and paragraph 9 of section 38 of the Highway Law in effect confer authority upon the appropriate state officials to make changes in the work provided for in the contract documents. Attention is invited to the fact that in each instance the approval of the State Comptroller must be obtained before any change order or supplemental agreement becomes effective as imposing an obligation upon the state.47

It will be noted from reading the quoted portions of standard form contracts applicable to highway and building construction that where additions involve work of the same character for which a contract price has been established by the pertinent contract, the price is to be used as a measurement for compensation to the contractor. However, where there is no applicable unit price or cost provided for by the pertinent

Supplemental Agreement. At any time during the progress of the work, the State may alter the plans or omit any portion of the work and shall make allowances for additions and deductions as hereinafter provided, without constituting grounds for any claim by the contractor for damages or for loss of anticipated profits or for any variations between the approximate quantities and the quantities of the work as done.

"No instructions, either written or verbal, shall be construed as an order for change unless it be in the form of a supplemental agreement bearing the signed approval of the Superintendent and the signed acceptance of the contractor, and such supplemental agreement shall not be effective until it has first been approved by the Director of the Budget and also by the Comptroller and filed in their respective offices. The supplemental agreement shall describe the nature of the work to be performed and the variations of quantities shown by the alterations, increases or decreases, additions or omissions from the plans and specifications and an estimate of cost of any extra work.

"When a supplemental agreement provides for similar items of work or materials which increase or decrease the itemized quantity provided for in the contract, the price to be paid therefor shall not exceed the unit bid price in the proposal for such items.

"Agreed prices for new items of work or materials may be incorporated in a supplemental agreement, and these prices will be used in computing the final estimate. Agreed prices must be supported by a complete price analysis on the supplemental agreement.

"Where there are no applicable unit prices for extra work ordered pursuant to this specification and agreed prices cannot be readily substantiated, the contractor shall be paid the actual and reasonable cost of:

(1) Necessary materials (including transportation to the site); plus
(2) Necessary direct labor including payroll insurance; plus
(3) Payments required to be made to labor organizations under existing labor agreements; plus
(4) Sales taxes, if any, required to be paid on materials incorporated into the work under the supplemental agreement; plus
(5) Rental, which includes maintenance and operation (including gas, oil, coal, electric current, etc.) of necessary plant and equipment other than small tools; plus
(6) Necessary installation and dismantling of such plant and equipment (including transportation to and from the site), if any; plus
(7) Fifteen per cent (15%) of the total of material and direct labor only as compensation for profit and overhead." Id. at 58-59.

contract, then compensation to the contractor is to be measured by actual cost, plus a percentage for overhead and profit or by a predetermined and agreed upon price. These same provisions provide for circumstances under which credits shall be allowed the state in the event that work is deducted from the contract. Whether the work is added to or deducted from a contract, the contractor should, as has been pointed out above, be careful to assert any incidental cost which may be imposed upon him by the change, particularly as to delays. And if the state, as is usually the case, refuses to compensate the contractor in dollars and cents for this incidental cost, the change order or supplemental agreement should be accepted under written protest.

Unless the procedure provided for by the statute and the contract is followed, the state is not liable to the contractor for any extra labor or services resulting from the change in the manner of performing the work, except where there is an honest controversy between the representative of the state and the contractor as to whether the work imposed on the contractor constitutes a change within the terms of the contract. If an honest dispute exists and the state refuses to compensate the contractor for the cost of the extra work, the contractor may proceed under protest. Upon completion of the work and before final payment, the contractor may assert a claim for the fair and reasonable cost of the extra work. As in the case of delays, the contractor may express his protest either verbally or in writing to the engineer in charge before undertaking the work. This places the state on notice that the contractor is not voluntarily performing the work and precludes any contention on the part of the state that the contractor has waived his right to compensation for the performance of the alleged extra work. From an evidentiary point of view, it is advisable that the protest be made in writing, and forwarded to the engineer in charge with copies addressed to the appropriate District Engineer and the Superintendent of Public Works. Public Works Specifications of Jan. 2, 1957 sets forth the procedure which may be followed by a contractor if he deems that any work ordered is extra work or not within the terms of the contract.


50. “Disputed work. 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 contention 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
Under such circumstances the contractor should notify the Superintendent of Public Works in writing. The Superintendent is then required to make a finding in regard to the contractor's contention, while the contractor progresses with the work keeping a daily record in conjunction with the engineer in charge of the work, of all labor, material and equipment used.

The primary advantage of following the procedure outlined above in the case of highway contracts is that compliance will enable the contractor to accept payment under protest at the time a final estimate is submitted to him, without waiving his claim for the extra work.\(^{64}\)

The principal exception to the right of a contractor to proceed under protest with the performance of extra work is that if the alleged extra work is of such a character that it is clearly beyond the scope of the contract, the contractor may not proceed with such work after protest, and thereafter recover damages against the state.\(^{52}\) This is to prevent

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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.

"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." Public Works Specifications of Jan. 2, 1957, pp. 57-58.

51. "Acceptance of Final Payment. The acceptance by the Contractor, or by anyone claiming by or through him, of the final payment shall constitute and operate as a release to the State from any and all claims of any liability to the Contractor for anything theretofore done or furnished for or relating to or arising out of the work done thereunder, and for any prior act, neglect, or default on the part of the State or any of its officers, agents, or employees, excepting only a claim against the State for the amounts deducted or retained in accordance with the terms and provisions of the contract, and excepting a claim for delay or one arising from Disputed Work as set forth in a preceding paragraph and filed in a signed statement form with the Superintendent.

"The Contractor is warned that the execution by him of a release in connection with the acceptance of the final payment, containing language purporting to reserve claims other than those herein specifically excepted, or for claims for amounts deducted by the Comptroller, shall not be effective to reserve such claims, notwithstanding anything stated to the contrary, orally or in writing by any officer, agent or employee of the State.

"Should the Contractor refuse to accept the final payment as tendered by the Comptroller, it shall constitute a waiver of any right to interest thereon." Id. at 61.

the contractor and the state officers charged with supervision of the construction work from imposing upon the state a claim for work which the Legislature never intended should be undertaken, and to prevent circumvention of statutory provisions relating to creating contractual obligations upon the state.\footnote{Examples of what may or may not be considered to be valid claims for extra work for both building and highway contracts, together with a brief description of the pertinent facts are set forth in the authorities cited.}{53}

Examples of what may or may not be considered to be valid claims for extra work for both building and highway contracts, together with a brief description of the pertinent facts are set forth in the authorities cited.\footnote{Stanton v. New York, 103 Misc. 221, 175 N.Y. Supp. 568 (Ct. Cl. 1918).}{53} 


The extra work involved in John Well Plumbing Corp. v. New York, supra, for which recovery was not allowed, involved the cutting back by the plumbing contractor of masonry walls around twenty-four sanitary wall fixtures. This work was expressly within the jurisdiction of the general construction contractor. The Court of Appeals held that the work was entirely beyond the scope of the plumbing contract and hence the plumbing contractor could not recover against the state.

The extra work involved in Borough Constr. Co. v. City of New York, supra, for which recovery was not allowed was the construction of an elevator to assist city officials in inspecting a sewer constructed by the contractor. The court determined that where the question is fairly debatable whether the work is within or without the limits of the contract, a contractor, proceeding in good faith, may perform work under protest, and thereafter bring an action to recover damages for the extra work. On the other hand, if the requirements imposed upon him are clearly beyond the limits of the contract, the contractor may not even proceed under protest. The court held, however, that the contractor might recover for certain extra cement furnished and placed at the direction of the City Engineer since this question was one fairly debatable as to whether the work was within or without the terms of the pertinent contract.

Potter-DeWitt Corp. v. New York, supra, involved the removal and replacement of asphalt material placed in the top portion of a macadam highway. The court held that the work was properly performed in the first instance, and if the desired result was not obtained, this was due to the fault of the state and no fault of the contractor. The extra work was performed under protest.

R. H. Cunningham & Sons Co. v. New York, supra, involved extra work and material in connection with the construction of a highway, and since all of the extra work was performed under protest and was beyond the terms of the contract, recovery was allowed.

Seglin-Harrison Constr. Co. v. New York, supra, involved extra work in repairing cracks in floors which had not been properly designed, and the installation of reinforced steel in basement walls which was not provided for in the contract, although so interpreted by the Chief Engineer of the Department of Public Works, after he had reversed a previous ruling thereon. Recovery was allowed in both since the work was done under protest and was beyond the scope of the contract.
Before deciding whether the facts of a particular litigated claim are applicable to the facts of his client's claim, an attorney should obtain the record on appeal (presuming that the judgment of the Court of Claims has been appealed) and study the findings of fact made by both the trial court and the appellate court. If the claim has not been appealed, then such findings should be examined in the office of the clerk of the Court of Claims. Obviously, space will not permit a detailed discussion of each and every problem which may arise under the existing form of state contracts. It is sufficient to say, however, that there are innumerable situations which have arisen in the performance of these contracts. Each case must be considered on its own merits, in accordance with the standard rules of contract construction, as applied by the courts of New York.\textsuperscript{55}

\textbf{D. Defaults}

1. Of the Contractor

Provisions are made both by statute and by the terms of the contracts themselves for a procedure to be followed in the event of a default by the contractor.

Article 11 of the Sample Form of Contract Agreement for highway contracts incorporates section 40 of the Highway Law which provides for the right to suspend work and cancel the contract if the contractor is in default.\textsuperscript{56}

Article 26 of the "General Conditions" of standard building contracts provides for the procedure to be followed in the event a contractor is not progressing with the work or performing the work in accordance

\begin{footnotesize}
\begin{enumerate}
\item Young-Fehlhaber Pile Co. v. New York, supra, involved extra work and material on a contract for reconstruction of a state highway. A large part of the extra work resulted from the misrepresentation of subsurface conditions by the state. Recovery was allowed as a result of this misrepresentation.

The extra work involved in Turner Constr. Co. v. New York, supra, was the requirement to use special jointing tools to make specially shaped joints on exterior brick work and the alleged wrongful rejection of terra cotta tile. Recovery was had on both of these items.

\item For a detailed analysis of many construction claims see Davidson, Claims Against the State of New York (1954).

\item N.Y. H'way Law § 40, provides in pertinent part as follows: "If the superintendent of public works shall determine that the work upon any contract for the construction or improvement, maintenance, repair or reconstruction, of a state highway, is not being performed according to the contract or for the best interests of the state, the execution of the work by the contractor may be temporarily suspended by the superintendent of public works, who may then proceed with the work under his own direction in such manner as will accord with the contract specifications and be for the best interests of the state; or he may cancel the contract and either readvertise and relet as provided in section thirty-eight, or complete the work under his own direction in such manner as will accord with the contract specifications and be for the best interests of the state. Any excess in the cost of completing the contract beyond the price for which it was originally awarded shall be charged to and paid by the contractor failing to perform the work."
\end{enumerate}
\end{footnotesize}
with the provisions of the contract. Generally a so-called "Seven Days Notice" may be served in writing by the state upon the contractor and his surety requiring him to show cause at a time and place not earlier than seven days after the date of the notice why the contract should not be cancelled. In the event the contract is cancelled, the state may relet the uncompleted portion of the work after public notice and advertisement, or it may complete it with its own forces, or call upon the surety to complete. The usual procedure in the case of building construction contracts is to call upon the surety to complete. In the case of a highway contract, the work is normally relet and completed under a separate contract with any additional cost charged against the defaulting contractor and his surety, although the Superintendent of Public Works may, if he deems it in the best interest of the state, permit the surety to complete.

In most cases a percentage is retained from each progress payment made under both building and highway contracts. In the event of default the money retained may be used, if necessary, to defray the completion costs if the state completes by its own forces, relets the work to another contractor, or calls upon the surety on the original contractor's bond to complete. This is true even though notices of mechanics' liens have been filed against all moneys due or to become due under the contract prior to its default. The reason is that at the time the surety executes its performance bond guaranteeing the faithful performance of the contract, an equity exists in its favor, and the surety of a defaulting contractor stands in the position of the obligee of the performance bond, namely, the state. Accordingly, the surety is entitled by reason of its superior equity to have the retained percentages applied to the completion costs.

2. Of the State

In the event of the state's default, the contractor may elect to consider the contract as terminated and refuse to perform any further work. The contractor may file and prosecute a claim in the court of claims for loss of profit or for the fair and reasonable value of the work performed up to the time of default, after he had credited the state with all payments already made. For example, the state's failure to pay an esti-

57. N.Y. H'way Law § 38(8); N.Y. State Fin. Law § 139.
as provided by the terms of a contract, or any act on the part of
the state evidencing an abandonment of the contract, such as failure over
a long period of time to furnish a site for the performance of the work,\(^6\)
would constitute a breach.

**E. Disputes**

Some disputes between a contractor and the state may be resolved
administratively.\(^6\) The statutory authorization is contained in para-
graph 9(a) of section 38 of the Highway Law. The settlement of dis-
putes by this means is limited to the determination of questions of fact.
The amount involved may not exceed five thousand dollars or 5 per cent
of the final estimate, whichever is greater. By submitting to such an
adjustment, the contractor waives his right to file and prosecute a claim
in the Court of Claims. As a practical matter this procedure is seldom
followed because most questions which arise under a contract involve
questions of law as well as of fact.

As in the case of the federal government, an administrative officer of
the state has no power to settle or adjust a claim for unliquidated dam-
ages or breach of contract. In both instances questions of law are
inherent.\(^6\)

Frequently, questions arise during the performance of a contract
which may be informally resolved by the contractor asking for a change

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\(^{61}\) Ibid.

\(^{62}\) People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. 125, 133 N.E. 419 (1921).

\(^{63}\) N.Y. H'way Law § 38(9)(a); "Adjustment of disputes. Notwithstanding the pro-
visions of any general or special law, and in case of a dispute between a contractor and
the superintendent of public works concerning questions of fact which may arise under a
contract, the contractor may, at any time before the final estimate is rendered, petition the
superintendent of public works for a hearing in relation thereto, provided (1) the amount
involved therein as shown by such petition does not exceed five thousand dollars or five per
centum of the final estimate of the completed contract, whichever is greater, (2) the con-
tractor has complied with all provisions of the contract that relate to the filing of any pro-
test and also of any statement concerning the subject-matter thereof, and (3) the contractor shall
expressly agree in such petition that any determination as hereinafter provided, shall be final
and conclusive upon all parties thereto. If the superintendent of public works grants such
petition, he shall, within a reasonable time, mail a notice to the contractor which shall
specify the place of such hearing and the date thereof which shall be within thirty days after
the mailing of such notice. Within ten days after such mailing, the superintendent of public
works shall also mail a copy of the petition and of such notice of hearing to the attorney-
general, who together with the superintendent of public works, shall constitute a board to
(a) hear such dispute, either personally or by any duly authorized officer or employee of their
respective departments, and (b) determine the issues thereof.

"Any amount fixed in the determination to be paid to the contractor shall be deemed to be
a special item to be incorporated in a final supplemental contract and shall be payable from
monies available for construction and reconstruction of state highways, on the audit and
warrant of the comptroller on vouchers approved by the superintendent of public works."

\(^{64}\) N.Y. Const. art. V, § 1; id. art. IX, § 10; N.Y. State Fin. Law § 41.
order or supplemental agreement which would compensate him for work that he believes to be beyond the terms of the contract. If the Superintendent of Public Works concedes that the contractor is entitled to such an instrument, an amendment of the contract may be made by following the procedure heretofore referred to and described in connection with the issuance of change orders and supplemental agreements.

F. Payments

1. Highway Contracts

Payments under state highway and building construction contracts, including the final payment, present numerous legal problems particularly where disputes exist between the parties to the contract. Both the Highway Law and the Public Buildings Law, as well as the contracts themselves, provide for payments for work performed as it progresses. Highway contract payments are made monthly, based upon estimated quantities of work previously performed and not paid for. Generally speaking, the determination of the amount due is arrived at by multiplying the unit price applicable to each line item of the contract by the estimated quantity of work performed under each such item. It is the practice of the engineer in charge of the work to prepare and approve, in the first instance, each estimate and to pay the contractor something less than the amount due for the actual quantity of work performed in the estimated bid. This procedure is followed because otherwise an overpayment to the contractor might be made which would result in the contractor being indebted to the state at the completion of the contract when the exact quantity of work performed is measured by field surveys.

Such a procedure does not result in a breach of the contract since the actual quantity of work in most instances cannot be determined with complete accuracy but must be estimated, based on the judgment and opinion of the person responsible for the preparation and approval of the estimate.

2. Building Contracts

Progress payments are also made in the case of building contracts. However, since building contracts are lump sum in form, as distinguished from the unit price based on estimated quantities type applicable to highway contracts, a different method for measurement of the quantity of work performed during each estimate period is provided for by the “General Conditions” of the standard building contract. Before any payment is made, a contractor is required to prepare and to submit to

the State Architect, on a form furnished by the state, a detailed estimate of the quantity and price of all labor and material provided for by the contract, which total must equal the contract sum. The purpose of this estimate is to provide a measurement or yardstick for making payments to the contractor as the work progresses. Before it becomes effective for payment purposes, the estimate must be approved by the State Architect and Comptroller, either of whom may revise the estimate as he deems necessary to make the various items conform to the true value.67

To illustrate the practical aspect of such an estimate, the contractor with the state’s approval, might estimate that he must lay 100,000 face brick to perform a certain phase of the work. In any particular month or payment period, when he has laid some portion of the brick, for example 20,000 brick, he is credited with having performed 20 per cent of this work and is paid 20 per cent of the sum allocated less the amount to be retained as provided for in the contract. Change orders adding or deducting work are set forth as amendments to the detailed estimate.

3. Retained Percentage

Both highway and building construction contracts provide for the retention from each progress payment of 10 per cent of the amount thereof until the contractor has completed 50 per cent of the work, after which no money is retained.68 When a highway contract is completed and accepted, the Superintendent of Public Works, pending the payment of the final estimate, releases an amount not to exceed 50 per cent of the amount retained.69 In the case of a building construction contract, the Superintendent may, when the work is substantially complete, if he finds that an injustice to the contractor would otherwise result, direct the State Architect to include in the final account the uncompleted items of the work and pay the contractor the price stipulated in the detailed estimate upon the contractor’s depositing with the Superintendent of Public Works securities equal to double the value of the uncompleted work.70

4. Final

Both highway and building construction standard form contracts provide in substance that acceptance of final payment by the contractor waives all claims under the contract except a claim against the state for amounts deducted or retained in accordance with the terms of the contract.71 Final payment is made in the case of building contracts after a

67. Ibid.
68. N.Y. H’way Law § 38(b); N.Y. State Fin. Law § 139(1).
69. N.Y. H’way Law § 38(b).
70. N.Y. State Fin. Law § 139(4).
71. State Architect’s Standard Mechanical Specifications of Nov. 1, 1955, Sample Form
final estimate has been prepared by the Department of Public Works, accepted by the contractor and approved by the Superintendent of Public Works or his representative. This estimate is in fact a statement of the final account and when approved by the Superintendent of Public Works constitutes acceptance of the work.\footnote{72} In the case of highway contracts a final estimate is also prepared and submitted to the contractor for approval, but, in addition, an instrument known as a final supplemental agreement is simultaneously prepared and submitted to the contractor for signature. This supplemental agreement must thereafter be approved by the District Engineer in charge of the work and by the Superintendent of Public Works. The purpose of the final supplemental agreement, as has been pointed out, is to set forth the actual quantity of work performed in relation to each line item, and to apply the unit prices in order to ascertain the exact amount due the contractor.\footnote{73} The completed work on highway contracts is inspected by a representative of the Superintendent of Public Works, and if he approves the work as completed, he issues an official order accepting it.\footnote{74} This order is normally filed in the office of the District Engineer in charge and in the office of the Department of Public Works in Albany. Such an acceptance normally precedes, sometimes by several months, the actual preparation and execution of the final estimate and final supplemental agreement.

Since by either of the above procedures, an accounting results which in fact constitutes a statement of the final account between the contractor and the state, a contractor, who intends to file and prosecute a claim in the Court of Claims for some additional amount, should accept such payment with a written protest reserving his right to file and prosecute a claim in the Court of Claims.\footnote{75} If a contractor intends to pursue his claim, he should file a claim within six months of the date of receipt of Agreement: \textit{"The acceptance by the Contractor of the last payment on this contract as hereinbefore provided, shall be and shall operate as a release to the State of New York and each official, agent, representative and employee thereof, from all claim and liability to the Contractor and all sub-contractors for anything done or furnished for or relating to the work, or for any act or omission of the State of New York, its officials, agents, representatives and employees, relating to or affecting the work, except only the claim against the State of New York for the remainder, if any there be, of the amounts kept or retained as provided in this contract."} See also note 51 supra.

\footnote{72} Id. art. 24, \textsection 103: \textit{"The final certificate will constitute the acceptance of the work by the State, except as to work thereafter found to be defective. The date of such certificate shall be regarded as the date of acceptance of the work."}

\footnote{73} N.Y. H'way Law \textsection 38(9); Public Works Specifications of Jan. 2, 1957, Sample Form of Contract Agreement art. 10.

\footnote{74} N.Y. H'way Law \textsection 44.

ing the final estimate with the clerk of the Court of Claims, and serve a copy on the Attorney General.76

Prior to the inclusion of clauses providing that acceptance of the final payment waived further claims under the contract, it was the custom and practice of contractors, where an unsatisfied claim existed against the state, to follow the procedure described to preserve the right to file and prosecute a claim in the Court of Claims. The inclusion, however, of the clauses dealing with the acceptance of final payment as constituting a waiver of all claims has been held by the courts of New York to preclude the preservation of a claim by a reservation attached to the final estimate, if payment of the final estimate is accepted by the contractor. Such a viewpoint is based on the theory that the contractor, by the terms of the contract itself, has agreed that his acceptance of the final payment will bar any further claim.77

It is the present practice of contractors who desire to obtain reasonably prompt payment of the amount due them under the terms of the final estimate to execute the final estimate itself under protest, reserving the right to file and prosecute a claim in the Court of Claims, and to refuse to accept a check or draft for the final payment. Simultaneously, a claim should be filed with the clerk of the Court of Claims containing, among other things, a separate cause of action for the amount due under the terms of the final estimate. A motion is then made for immediate trial on this cause of action. The motion is normally granted, and proof offered and not contested by the state as to the amount due under the terms of the final estimate. A judgment is then granted by the Court of Claims directing payment of this amount. Usually this procedure takes only two or three weeks after the filing of the claim.78

V. ASSIGNMENT OF CONTRACT

The State Finance Law, as well as the provisions of both highway and building construction contracts, prohibit the assignment or subletting of a contract without the written consent of the department or official awarding the contract.79 Violation of this provision requires the Superintendent of Public Works to revoke and annul the contract, and the state is relieved of all responsibility and obligations under the contract to the assignee or subcontractor. The contractor making an unauthorized assignment.

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76. N.Y. Ct. Cl. Act §§ 10(4), 11.
78. An illustration of this procedure may be found in the records in the office of the clerk of the Court of Claims in the case of Hudson Contracting Corp. v. New York, 284 App. Div. 1033, 135 N.Y.S.2d 891 (3d Dep't 1954).
assignment also forfeits all money assigned except to such extent as he may be required to pay his employees. However, there is a distinction between the assignment of a contract and the assignment of money due under the contract. There is no prohibition in the existing statute or in the contract form against the assignment of money due under the contract. Such an assignment, in order to be enforceable against a third party, must comply with provisions of the Lien Law, both as to filing and form. A covenant must be included to the effect that any money advanced to the assignor by the assignee will be applied first to the payment of claims arising out of the improvement by subcontractors, architects, engineers, supervisors, laborers, and materialmen.  

VI. SUBCONTRACTS

A. Authority and Procedure

Very few general contractors are qualified or have the know-how to perform all phases of a contract with the state. As a general rule some portion of the work is performed by subcontractors specializing in the particular type of work that they undertake to perform. For example, among the many items of work on a highway contract the installation of guard rails and guide railings is normally sublet, and on a building contract the ornamental iron work or window work is sublet.

The subletting of any portion of the contract work without the consent in writing of the department or official awarding the contract is prohibited. In addition the Public Works Specifications, by reference to section 138 of the State Finance Law, prohibit subletting without written consent of the Superintendent of Public Works. Article 6 of the standard form of building contract provides that no portion of the contract may be sublet without the approval in writing of the State Architect.

The Department of Public Works, however, will in most instances approve the subletting of a portion of the contract work if requested to do so in writing by the contractor. In the case of highway contracts, permission should be requested of the District Engineer having charge of the work; in the case of building contracts, permission should be sought from the State Architect.

B. Rights of Subcontractor

Failure to obtain the approval of the Department of Public Works to the subletting of a portion of the contract work does not necessarily

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preclude the general contractor from enforcing a claim for extra compensation arising out of the subcontract work, if it can be established that the state representative in charge of the work knew or should have known that the subcontractor was performing the work in question, and thereafter accepted the benefits of such work. In addition, a subcontractor under a highway or building construction contract with the state has no privity of contract with the state and accordingly cannot directly sue the state in the Court of Claims. A subcontractor may, by an agreement in writing with the prime contractor, confer jurisdiction on the Court of Claims to hear his claim against the prime contractor. The subcontractor must agree to be bound by the determination of the Court of Claims and waive his right to sue in a court of general jurisdiction.

VII. Conclusion

As we have seen, when one attempts to counsel a contractor on a state highway or building project he must closely examine the terms of the particular contract and the pertinent statutes discussed herein, as well as the numerous decisions and rulings of the courts and administrative officers of the state.

With the recent increase in expenditures for public improvement, the law, as it affects the rights and liabilities of public improvement contractors, assumes paramount importance. Implementation of projects already authorized, in addition to those planned for realization within the next decade, will naturally necessitate the execution of contracts, considerable in number and detailed in scope, as well as an extensive amount of litigation in the Court of Claims.