

To the Graduate Council:

I am submitting herewith a thesis written by Jack E. Stout entitled "Legal Aspects in State Highway Construction Contracts." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Science, with a major in Civil Engineering.

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LEGAL ASPECTS IN STATE HIGHWAY
CONSTRUCTION CONTRACTS

A Thesis
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ABSTRACT

The purpose of this study was to scrutinize the various legal aspects in a State highway construction contract. The contractual elements are the same as in a non-governmental contract except for one exception--the State is a sovereign entity. At first glance, this may imply that the State government cannot be sued. It is a fact, though, that the State can only be brought to court if so allowed and only under certain conditions as set out by them.

The primary means and procedures used in data assembly for this research involved an analysis of law cases relating to highway construction contracts in the various states of the United States. The main issue of the study involved the legalities of work and material "extras" and their compensation not anticipated in the contractual undertakings.

The major findings of the research were related to contract interpretation. That is, the contractor failed to understand the contract documents (plans, specifications, supplemental agreements, etc.) through his own negligence or through equivocating terms of the documents at the fault of the State.

Construction contracts should be prepared carefully and with great caution in order to decrease ambiguities that may arise. This will insure complete fairness to both contracting parties and hopefully reduce the number of litigations.

Since this study was conducted in Tennessee, certain provisions of their highway specifications are cited at the end of selected sections regarding the various topics covered.

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SECTION I

MATERIAL AND WORK "EXTRAS"

Introduction

Construction projects seldom fail to have "extras" encountered during the course of the work. In most cases, they are necessary and essential to the completion of the job. For example, material estimates in the contract are just as they indicate — "estimates." They are never exact and, consequently, result in extra work. Other times, an unforeseen condition may arise, such as rock in the subsoil. Whatever the cause, the performance of this unanticipated work is imperative in order to produce the desired results.

Most states (if not all) possess highway specifications which contain definite provisions for the handling of extra work and its compensation. These provisions are intended, though, to minimize the likelihood of disputes regarding the contractor's claims for this extra compensation. They are not intended to remedy misjudgment, inefficient management, or other shortcomings attributable to the contractor which may have caused the cost of performance to be greater than originally anticipated. Whether or not these contract clauses are inherently explicit to the contractor is the basis of litigations in this section.

In a New York case,¹ a highway contractor entered into an agreement with the State to reconstruct a portion of roadway. Within two weeks after the pavement was laid, the seams in the pavement started

¹Chemung Contracting Corporation v. State, 42 Misc. 2d 899, 249 N.Y. 5.2d 341 (1964).

to ravel. The contractor was then ordered to clean the loose material from the highway and resurface it. He, consequently, brought suit against the State to recover the extra costs. It was found by the court that all contractual conditions were met, and none of the material was rejected upon placing it; neither the State nor contractor was at fault. It must be emphasized, though, that when one of two innocent persons must sustain a loss, the law casts it upon the one who has agreed to sustain it. Since the contract contained a clause that placed all consequential damages on the contractor, the court held for the State; compensation was, therefore, rejected.

In the above case, extra work was encountered and performed in the fulfillment of a contract, imbursement being desired. Even though it seems that all extra costs should have been borne by the State, the contractor, nevertheless, had to accept the consequences of the specifications wording. Another aspect of the contract that had a bearing on the court's decision is that it was a "results" contract, as opposed to one where the performance methods are specified. It should be pointed out here that in a contract whereby the contractor is to obtain the required results by establishing his own construction methods, he is responsible for those results, regardless of the costs. On the other hand, in a "methods" contract, he is bound to use the methods prescribed to him by the owner. If these methods prove unsatisfactory and fail to attain the desires of the contract, extra costs are the responsibility of the owner, because the contractor fulfilled his obligation. In *Chemung, supra*, the contractor was responsible for producing an acceptable pavement surface. Since he placed the material by using his own methods,

and the pavement subsequently failed, the contractor was obligated to fulfill his part of the contract by redoing and incurring the costs of the work.

Whenever an "extra" arises in state highway projects, some type of written contract revision (supplemental agreement) is usually necessary. The handling of these revisions can sometimes result as a source of troublesome disputes. Cited from the Tennessee specifications:²

104.03—Extra Work. When unforeseen work results for any reason and is not handled as prescribed elsewhere herein, the engineer and the contractor will attempt to agree on equitable prices. When such prices are agreed upon, a supplemental agreement will be executed, and a construction change will be issued by the engineer. When equitable prices are not agreed upon mutually, the engineer may issue a written order that the extra work be completed on a force account and paid for as provided in the Subsection 109.04 (Methods of Payment for Extra Work).

The Tennessee specifications appear to be clear and unambiguous regarding extra work. They insure equitable prices to the contractor in all cases. Even when a price cannot be agreed upon, Subsection 109.04 allows compensation to the contractor on a force account, a reasonable profit included. This will at least prevent the contractor from sustaining a loss.

Availability of Construction Site, Borrow Pit, or Other Construction Materials

In preparing a bid, a contractor usually takes for granted that the necessary rights-of-way and construction materials for the project

² Tennessee Department of Highways Standard Specifications for Road and Bridge Construction, January 1, 1968.

have been acquired in advance. He, therefore, has the right to rely upon this representation in the contract proposal and to bid accordingly. If this were not so, and an uncertainty to the availability of certain rights-of-way existed, the contractor will undoubtedly bid a higher price to cover this uncertainty. It would be, therefore, advantageous to the owner to secure all necessary construction property prior to the bid invitations and include this security in the proposals. In some situations, acquisition problems do arise even after the security insurance has been given to the contractor by the owner. One specific problem concerns the availability of borrow pits to the contractor at the commencement of the job. In *Holloway*,³ a borrow pit, relied upon by the contractor, was, consequently, unavailable at the start of the work. The pit, therefore, had to be substituted by a more distant one which resulted in delays and additional costs to the construction company. The court held that because the borrow pit was indicated in the bid proposal to be immediately available, but failed to be so, the State breached its contractual duty and was liable for the consequential costs and damages.

In the above case, the State was obviously at fault because of its failure to secure the proposed borrow pit. The equitable course of action was undoubtedly to imburse the contractor for the extra costs incurred. See also *Winkelman*.⁴ In a similar case,⁵ a local source of

³*Holloway Construction Company v. State*, 44 Mich. App. 508, 205 N.W.2d 575 (1973).

⁴*D. W. Winkelman Company v. State*, 184 N.Y.S. 661 (1959).

⁵*Atlanta Construction Company v. State*, 103 Misc. Rep. 233, 175 N.Y.S. 453 (1918).

stone material turned out to be unavailable to a construction company. They, too, relied upon its existence and use in preparing their bid. Because of extra costs incurred for hauling the stone from a more distant site, the court again held the State liable for the "extras." See Haggart Construction Company.⁶

In a concluding case,⁷ a contractor met with difficulties in the access of a particular portion of the construction site. Even though the contract contained a provision stating that there should be no damage for delays and for the availability of any part of the site, the court held that the contractor could recover from the State for failure to use diligence in making sites available and, thus, delaying the construction company's work.

The court results of all of the above-mentioned cases are elementary in nature and should be obvious to the reader. The State represented the availability of the various sites or sources of materials and, subsequently, breached their contractual duties when, in fact, the sites were not available. In every case, the court conclusively found for the contractor because of his reliability on such representations. Contract clauses that waive the contractor's right to recover damages when sites are not secured will be usually deemed by the court as an insulation provision and disregarded.

Cited from the Tennessee specifications:⁸

107.17—Rights-of-Way. The Department will be responsible for the securing of all necessary rights-of-way in advance

⁶Haggart Construction Company v. State of Montana, 427 P.2d686 (1967).

⁷Carlo Bianchi and Company v. State, 230 N.Y.S. 2d471 (1962).

⁸Tennessee Highway Specifications, 1968.

of construction, except that the contractor waives any and all claims for interference, delay, or damage if he accepts a limited work order or unconditional work order to proceed with the construction knowing that the rights-of-way have been only partially secured or that said rights-of-way are still encumbered.

The above Tennessee provision places the burden of acquiring rights-of-way prior to construction on the State. In the event the right-of-way is not secured at this time, the contractor can accept a limited work order, but, consequently, waives the above claims. On the other hand, if he decides to wait until all construction property is obtained, the subsection implies that the contractor can claim delay damages. Since no specifications should contain any implications in their wording, the right to claim damages should be explicitly stated.

At first glance, the clause appears to insulate the State because of the contractor's waiver-of-claims phrase. But, since there exists a work option (proceed or wait), the contention of its exculpatory nature is deleted. In any event, the contractor should be very cautious before commencing work.

Errors in Material Estimates

Contractors prepare their construction bids on the basis of the information supplied to them by the owners of the project. It is important that this information correctly represent the anticipated conditions without a great variance from the resulting conditions. This is necessary for the purpose of acquiring realistic bids in terms of cost from the contractor. Looking at the situation from a materials-estimate viewpoint, many problems are encountered in estimating the quantities of borrow material in highway

construction projects. When the amount of "borrow" differs substantially from the proposed quantity, the contractor's profit can be altered as a consequence. Therefore, an equitable compensation should be made. In a New York case,⁹ the State overestimated the amount of borrow material by about 600% which, consequently, resulted in extra costs sought by the contractor. The question is whether he has a right to recover such payment. First, it should be pointed out that all State highway construction projects are based on unit-price contracts; that is, each item of the project is separately broken down into terms of cost. If it had been a lump-sum contract, any erroneous approximation (honestly made) of quantities on the part of the State would not result in liability. On the same hand, in a unit-price contract, a "reasonable" variation between projected and actual quantities would not impose liability upon the State. In the present case, even though the contract contained a clause requiring the contractor to satisfy himself as to the quantities and conditions of the site, the court held that he did not have sufficient time to personally check the physical facts and had the right to rely upon the State's representations. Since the magnitude of the error was so great, a recovery for damages was granted to the contractor. See the Hartford Accident and Indemnity Company,¹⁰ but see the Ashton Company.¹¹

⁹John Arborio, Inc. v. State of New York, 41 Misc. 2d 145, 245 N.Y.S. 2d 274 (1963).

¹⁰State v. Hartford Accident and Indemnity Company, 138 Conn. 334, 84 A.2d 579 (1951).

¹¹Ashton Company, Inc. v. State of Arizona, 9 Ariz. App. 564, 454 P.2d 1004 (1969).

In all construction contracts, excavated quantities are termed either "classified" or "unclassified." In a "classified" bid, the owner or State calling for the bids makes the investigation and specifies the estimated quantities of various materials to be excavated, requiring the bids to be made upon such estimates. These bids may have the effect of bringing lower and closer offers from the contractors. In *Powell*,¹² the highway project was originally advertised by the Highway Commission as a "classified" project. Subsequent to such advertisement, the commission changed the project to an "unclassified" job, and the contractor was so notified only a few days before the bids were to be opened, and not in time for him to make a full investigation himself of the terrain over which the contract was to be let, and ascertain for himself the quantity of rock beneath the surface which might be encountered. He did, however, send his foreman to the site of the project who made a hurried examination of it, discussed the matter with the State's resident engineer, who told him that the Highway Department had made soundings and borings on the route; that he thought the quantities of materials as shown in the notices were approximately correct, and that they could be relied upon as a basis for a bid on an "unclassified" project.

Upon completion of the project, it was found that the represented quantities by the State were incorrect. Consequently, the contractor brought suit against the State to recover the extra costs incurred. The plaintiff held that there was a representation and a warranty by

¹²*Powell v. State*, 118 S.W. 2d 960 (1938).

the State upon which he relied that the materials in the quantities indicated only would be encountered. The court entered judgment against the contractor on these grounds:

Even if the quantities of materials indicated in the notice for bids issued by the Highway Department for letting be treated as warranties applied to a classified project; when contractor was advised that such project was to be let as unclassified, in the light of his own testimony he was then put upon notice that he could not so treat them, and must ascertain the facts for himself. This he apparently undertook to do in a cursory and limited manner. Manifestly in the limited time remaining he could not ascertain such facts; but when advised that he must determine these facts for himself, and be bound by his contract in any event, he could have either refrained from bidding or sought additional time in which to make tests of the area himself. Though the contract was not signed until twenty days after he made the bid, and not approved by the Highway Commission until thirty days after that, Powell took no steps to ascertain such facts himself, nor to protect himself against what he admittedly knew the terms of the contract imposed.

It seems from the facts presented here that a contractor should "beware" when bidding an "unclassified" job. Even though the State may include a material estimate in the contract, the contractor should always use his own estimate when preparing a bid.

Cited from the Tennessee specifications:¹³

102.03—Interpretation of Quantities in Bid Schedule. . . . The Department does not guarantee or assume any responsibility that quantities indicated on the plans or given in the estimates of quantities or schedule of prices in the proposal form will hold in the construction of the project and the contractor shall not plead disception or misunderstanding because of variation from these quantities, or of variation of the location, character or any other conditions pertaining thereto. Payment to the contractor will be made only for the actual quantities of work performed and accepted, and materials furnished in accordance with the contract. . . .

¹³Tennessee Highway Specifications, 1968.

Most State highway construction contracts contain quantity estimates and specifications of this sort. The problem with this type of a contract is that these estimates are included in the proposal in hopes that the contractor will use them in his bid; the State will then turn around and disclaim liability in an exculpatory subsection such as the one above. This should give the contractor reason enough to take extreme care when arriving at an estimate.

One can again conclude that this type of provision in highway specifications are nothing more than an insulation against claims that may arise. It is a fact, though, that if a contractor suffers a great detriment in relying upon these estimates (in good faith) supplied by the State, the court will usually waive these provisions and render judgment in favor of the contractor, provided the contract is a "classified" one.

Other relevant cases:

Charles J. Rogers, Inc. v. State of Michigan (1971), 194 N.W. 2d 203.

McDonald v. State, Wisconsin (1931), 235 N.W.1.

Faulty Designs and/or Defects in Plans

When the engineer prepares the design drawings and specifications, it is taken for granted by the contractor that these are correct and, if carefully followed, will produce the desired results.¹⁴ If it later

¹⁴Therefore, the engineer is considered to be responsible for their accuracy unless he specifically states in the contract documents that the drawings are to show general features only, and that they are not in any sense "warranted."

develops that the design drawings contain errors, the contractor obviously is not at fault, provided he did the work properly and neither knew nor should be expected to know of the defects.

It is not the contractor's duty to check the design drawings. In the owner's interest, however, the contractor should call something that he thinks is incorrect to the engineer's attention. This action may strengthen the contractor's hand if the questioned feature ultimately develops trouble. The contract should state that, if the contractor discovers an obvious error in the drawings or specifications, (1) he is to orally report it promptly to the engineer, (2) he is to confirm it in writing soon thereafter, and (3) he is not to proceed with the affected work until directed to do so by the engineer.

On the same hand, when a design for construction work proves to be faulty, the contractor cannot be held liable for remedial costs if, at the time of construction, he is ignorant of these facts. In the McCree case,¹⁵ the plaintiff contractor encountered problems with the embankment material--the specified compaction could not be achieved under the State's plans and specifications without the State's authorization to deviate therefrom. Plaintiff brought these facts to the attention of the State's engineer as soon as the conditions were discovered shortly after commencement of the job and suggested the corrective action needed. No change orders were executed to correct these conditions until three months after they were reported, one month before the job was to be completed under the terms of the contract.

¹⁵McCree and Company v. State, 91 N.W. 2d 713 (1958).

Because of the delay due to the unforeseen wet and plastic soil condition, the plaintiff was forced to carry over through the winter. He had to provide and spread gravel for winter protection, incur expenses for extra labor and extra use of equipment which could otherwise have been avoided. The contractor failed to receive such costs and brought suit against the State to recover. The court, subsequently, entered judgment for the contractor by stating in part:

. . . It is generally held and this by the great weight of authority that the act of the owner in furnishing the plans and specifications amounts to a warranty of their fitness and that, where one party furnishes specifications and plans for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purposes implicit therein and whether the builder has been damaged in proceeding with the work in reliance on such an implied warranty or whether he was damaged in relying on the warranty in making his bid, he may recover.

In McCree, supra, it was apparent that the design was faulty because of the contractor's inability to compact the embankment material to the specified density. In other cases, though, design defects are a little more difficult to prove, even when these assertions are so alleged. In a New York case,¹⁶ a flood damaged a partially constructed highway that was being built by the plaintiff contractor. The contractor demanded a supplemental contract to provide compensation for restoration work, which the State refused to give. It was the claim of the plaintiff that the highway was improperly designed in that adequate drainage facilities were not provided for, and that this was the cause of the damage. When the State refused to execute a supplemental contract,

¹⁶Michael v. State, 276 App. Div. 806, 93 N.Y.S. 234 (1949).

the contractor elected to consider the original agreement breached and filed a claim for damages on the basis of a quantum meruit.

The court simply held that the highway was not improperly designed, and that the contractor was not justified in refusing to proceed with the work because of the dispute as to liability for the cost of restoration. Being an appealed case, the judgment was affirmed, without costs.

Not all judges concur with the findings of a court. Even though the residing judge's decision is final, others sometimes dissent, and their opinions are usually printed at the end of the published cases. In the above situation, one such dissension was found. This judge stated:

. . . The findings that the highway was not improperly designed does not obviate the findings that the re-performance of the completed work, occasioned by the flood, was extra. The flood was a matter which was foreseen by the State when it designed the new highway. The contractor constructed it as designed and specified and excavated the river channels as directed. It was not foreseen that the flood would undo what had been completed. Thus in any view of the evidence extra work came into being. Being extra work, the contractor was not obligated to risk its demanded performance under protest and later take his chance on recovering payment thereof. . . .

In Michael, supra, the damaging flood could be considered by some to be "an act of God." It would not be fair, then, to the owner of a construction project if it was contended that damages caused by an act of God were the result of a faulty design. Consequently, some construction projects contain exculpatory clauses that protect the owner in this situation. It would, therefore, be the contractor's responsibility to consider this contingency when bidding.

Cited from the Tennessee specifications:¹⁷

105.04—Coordination of Plans and Specifications. . . . The contractor shall take no advantage of any error or omission in the plans or specifications or of any discrepancy between the plans, specifications, or any other of the contract documents which may apply. In the event the contractor discovers any error or discrepancy, he shall immediately call upon the engineer for his interpretation and decision; such decision shall be final. At the contractor's request, such decision may be had in writing.

The Tennessee specifications are very concise regarding mistakes, discrepancies, or omissions in the plans or other contract documents. They simply point out the procedures to follow if these errors are found. Not only should this be standard practice in State projects, but all construction projects. It is the only equitable action to pursue in this situation. This, in turn, will insure good relations between the contractor and owner.

The specifications above fail to mention anything about design defects. Since they are not mentioned, one can conclude, by implication, that any faulty design will not be the responsibility of the contractor (absent his knowledge of the faulty design during construction), and any remedial costs are to be borne by the State. Because of this implied conclusion, it should be pointed out that this potential aspect should be explicitly stated in the specifications.

Other relevant cases:

Rizzuto et al. v. State, New York (1944), 48 N.Y.S. 2d 135.

Hopkins v. State, New York (1953), 125 N.Y.S. 2d 379.

¹⁷Tennessee Highway Specifications, 1968.

Changed Conditions in Contract

Contract changes or revisions are sometimes necessary during the course of a construction project. These changes could be a result of an unforeseen site condition not anticipated in the original design or, when conditions so allow, a result of simply desiring to reduce the costs where appropriate. Whatever the case, one should bear in mind that the contractor performing the work should never be neglected or forced to sustain a loss when such an alteration is made.

Most State highway construction contracts contain a "changed conditions" clause (sometimes referred to as a "differing site" clause) which gives the resident engineer the exclusive right to make contract changes as he deems necessary or if he so desires. These clauses set forth a permissible limit by which the alterations can be made without a price adjustment. When they do exceed the limit (increased or decreased), an adjustment is made and accompanied by a written supplemental agreement which requires the signature of both the engineer and contractor. In the Black case,¹⁸ these contract conditions were set forth. The clause stated that no adjustment would be made for any increase or decrease in the cost of any item unless the quantity was so increased or decreased by more than 25 percent. The State gave an oral order to reduce the quantity of filler used in the highway construction project which resulted in a 40 percent overall reduction. Even though the contractor failed to conform in the

¹⁸E. E. Black, L.T.D. and Kuwaye Brothers, Inc. v. State of Hawaii, 439 P. 2d 213 (1968).

requirements that he proceed with altered work only upon written order by the engineer, the court held the State liable for the increased costs caused by the excessive filler reduction. In a similar case,¹⁹ the State altered the contract by employing an additive in the asphalt cement on an experimental basis. The additive turned out to be contaminated, and, as a consequence, the construction company was required to undo and then redo the work which had already been done. This caused a delay in the company's outside work and resulted in a higher cost to repair the defective asphalt. The contractor brought suit against the State for the additional costs incurred and for damages sustained when the State refused to compensate thusly. The court, consequently, held the State liable for consequential damages caused by the additive and entered judgment for the contractor.

It must be emphasized that even though the "changed conditions" clause gives an engineer the authority to alter or change the contract when necessary, he should never do so in a fraudulent or faithless manner. In a Georgia case,²⁰ the State's engineer refused to obtain necessary options on borrow pits in a highway construction project. This forced the contractor to expend more funds for labor, machinery, equipment, and fuel in moving to a more distant borrow pit. The State then refused to acknowledge this "move" as extra work or a change in the contract and, consequently, would not enter into a supplemental contract. The contractor, subsequently, brought suit against the State

¹⁹Green Island Contracting Corporation v. State, 53 A.D. 2d 712, 384 N.Y.S. 2d 215 (1976).

²⁰Western Contracting Corporation v. State Highway Department, 125 Ga. App. 376, 187 S.E. 2d 690 (1972).

to recover for these extra costs. The defendant State placed heavy reliance upon an admittedly conspicuous notation appearing in the plans, to wit: "Note: These Pits are Shown as Possible Sources of Material." The court held that the plaintiff was entitled to rely upon this notation in a positive manner when bidding for the job, and that "Where construction of a contract is required, it is to be construed most strongly against the party who formulated it." The court also stated that the engineer acted in bad faith in rejecting the borrow pits, and therefore, entered judgment for the contractor.

In most instances, contract changes are imperative; they are employed with expediency in mind. Nevertheless, these changes are annoying at best; sometimes, they are very troublesome indeed.

Cited from the Tennessee specifications:²¹

104.02—Alterations in Plans or in Character of Construction. The Department reserves the right to make, at any time, such alterations in the plans, or in the character of the construction, as may be considered necessary or desirable to fully and satisfactorily complete the project, and such alterations shall not be considered as a waiver of any conditions of the contract, nor to invalidate any of the provisions thereof. . . .

In case alterations are made which will exceed the permissible limits, as herein-above provided (20%), a supplemental agreement shall be entered into covering any increase or decrease in cost caused by such alterations.

Today, the "changed conditions" clause has to be included in all governmental construction contracts. Its presence is of great importance to both contracting parties. The clause is a basis for price adjustment when contract conditions result in a manner which were not initially anticipated. Its main purpose is to settle price disputes outside

²¹Tennessee Highway Specifications, 1968.

the court. This situation is not always ideally so. When a claim is brought to court, the judge or jury will always look to this clause for a remedy, regardless of any exculpatory provisions the owner may include in the contract for his protection. It is important then that the owner (State) prepare this clause in a concise manner and employ it in an equitable way. Then, maybe, any claims can be settled without the use of a law court.

Other relevant cases:

Garofano Construction Company v. State of New York (1954),
134 N.Y.S. 2d 749.

Cunningham et al. v. State, Indiana (1932), 182 N.E. 95.

Sondkay Construction Company v. State of Montana (1965),
399 P. 2d 1002.

Material Misrepresentation

Litigations in construction contracts involving some type of misrepresentation on the part of the owner or engineer (in this paper, the State) is a common allegation found in all law courts today. Whether these alleged misrepresentations are of a fraudulent nature or not, or whether they even exist is always a complex matter for a court to resolve. To prevail when the charge is one of fraud, the plaintiff must prove (1) that the defendant made a false, material statement of fact, (2) that the defendant either showed a disregard for the truth or knew that what he advanced as true was actually false ("scienter"), (3) that the defendant intended to induce reliance by the plaintiff, (4) that the plaintiff did with justification rely upon the accuracy of the statement, and (5) that the plaintiff was

damaged in consequence of such reliance. Note that (2) through (5) are not difficult assertions in which to prove, but (1) "holds a different light" to the situation. In the case where a test report is submitted to a contractor specifying the subsoil conditions of a particular job site, it would be hard to prove that the report constituted a false document, even though the actual conditions verify it to be such. The reason is that this type of testing usually covers only a minimal area and, at times, may not produce representative samples of the actual conditions.

In some instances, the engineer will include in the contract clauses that require the contractor to inspect the site and satisfy himself of the conditions, even though the contract contains test results of the site material. This is simply an insulation clause to protect the engineer from extra costs if the test reports prove to be contradictory to the actual conditions. In the *Rusciano* case,²² the court stated in part:

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

See also the *Michigan* case,²³ but see *Wunderlich*.²⁴

²²*Rusciano Construction Corporation v. State of New York*, 37 A.D. 2d. 745, 323 N.Y. Supp. 2d 21 (1971).

²³*Hershey Gravel Company v. State*, 305 Mich. 333, 9 N.W. 2d 567.

²⁴*Wunderlich v. State*, 56 Cal. Rptr. 473, 423 P. 2d 545. The court stated that the material statements were suggestive only; therefore, the contractor was held liable.

In *Rusciano*, supra, the State representative knew of the unstable material, but withheld this information from the bidders. The question can now be asked, "Is it lawful for an engineer to withhold relevant information that may aid a contractor in bidding for a job?" This, too, is a common practice in construction contracts. In some instances, it is evident that this act is for the purpose of keeping the project cost down to a minimum. That is, if the engineer knows of the presence of rock on a job site but fails to disclose this information to the contractor for bidding purposes, the contractor undoubtedly will quote a lower excavation cost in his bid, not anticipating the presence of rock. But, one can ask, "Is this an equitable practice?" The subject of withholding material information was confronted in a Missouri case.²⁵ The contractor encountered rock during excavation which was not entailed in the contract and brought suit seeking damages for breach of warranty of plans and specifications. In the meantime, the State had in its possession reports of test drillings taken earlier that substantiated the fact that rock was present. The court held that since the contractor did not seek additional information about the site conditions, the State was not obligated to give the reports to the contractor.

. . . In this case, there was no affirmative representation of subsoil conditions. Appellant was required to make his own inspection of the site, and it did so. It made no request for the report on test borings made by the State. In these circumstances, the trial court properly held that there was no warranty by the respondent that the plans disclosed all information known to respondent and no warranty that rock would not be encountered on the project.

²⁵*Schmelig Construction Company, Inc. v. Missouri State Highway Commission*, 543 S.W. 2d 265 (1976).

The trial court, therefore, concluded correctly that no cause of action based upon breach of warranty had been made.

See also Rock Hill Asphalt,²⁶ where the judge stated in part ". . . In my view, if the commission 'affirmatively' represents or warrants matters on which the contractor is entitled to rely, and then breaches that representation, it is liable for such breach" (emphasis added).

In the Walla Walla case,²⁷ the contractor did request additional information. That is, he specifically requested for a copy of the Dames and Moore report, which gave information about the site's soil condition and borings made. The engineer stated that the report was not readily available at that time, but he said it did not provide any additional information that would be helpful. The engineer also stated that all information needed was included in the plans. Consequently, the contractor did encounter materials not proposed in the contract and sought recovery. The court held that the contractor was entitled to rely on the implied representation of the owner that it fully disclosed all relevant information and knowledge in its possession concerning the subsoil conditions. It also contends that there was a failure to disclose superior knowledge, because the Dames and Moore report would have changed the bidding conditions.

It seems from the cases presented thus far that the courts do not always conclude that all information should be presented to a

²⁶Rock Hill Asphalt and Construction Company v. State Highway Commission, 452 S.W. 2d 810 (1970).

²⁷Walla Walla Port District v. Palmberg, 280 F. 2d 237 (1960).

contractor before bidding. In another Missouri case,²⁸ the court contended that the commission was under no duty "to disclose all known conditions or conditions that could have been known by making a reasonable preliminary investigation." On the contrary, in *A. S. Wikstrom*,²⁹ the court held that the State was under the duty "to show bidders boring tests and other subsurfacing information that was assembled by the State in the bidding documents." It should be pointed out here that the duty to disclose information or not is not a duty of law, but one of equity. The relevant law point in the above-mentioned cases is that if the contract contains an "implied representation" that the State fully revealed all pertinent information and knowledge, the State is, therefore, held liable for breach of warranty if the conditions are not as indicated in the contract. Consequently, the contracting party should take great precautions in preparing his contract documents in order to protect himself in case this situation arises. But, on the other hand, if all known information is disclosed initially, the contracting party need not worry. Therefore, he should present all test documents for his safety, not to mention for fairness to the contractor.

The importance of complete and comprehensible specifications and contract documents cannot be overemphasized. In a Michigan case,³⁰

²⁸*Webb-Boone Paving Company v. State Highway Commission*, 351 Mo. 922, 173 S.W. 2d 580 (1943).

²⁹*A. S. Wikstrom, Inc. v. State of New York*, 52 A.D. 2d 658, 381 N.Y. Supp. 1010.

³⁰*W. H. Knapp Company v. State*, 311 Mich. 186, 18 N.W. 2d 421.

the contractor brought suit against the State to recover damages caused by misleading specifications concerning subsoil conditions. The court held that the information supplied was of such a nature that only a highly trained, experienced soils engineer could understand. It was, therefore, the duty of the State to provide all the available information in terms that would readily be understood by the average road contractor. Consequently, the State was held liable for the extra expenses incurred by the contractor. One can see that nothing was withheld here, but because of the technical wording, the specifications misled the contractor, which was deemed by the court as a failure to disclose.

Cited from the Tennessee specifications:³¹

102.04—Examination of the Site of the Work, the Plans, and the Specifications. The bidder shall examine carefully the site of the work including the surrounding terrain, and access facilities. He shall examine in detail the plans, specifications, and all other documents making up the proposal. It is mutually agreed that submission of a bid shall be considered prima facie evidence that the bidder has made such examinations and has fully familiarized himself with the character, quality, and quantity of work to be performed, and of materials to be furnished.

106.02—Material Information. When the Department has readily available test reports on materials from local sources near the project, copies thereof will be furnished to the contractor, covering each source concerning which specific request is made. In furnishing such reports, the Department acts as an agent of the contractor and will not be responsible to him if the materials should fail to conform to the test reports either as to quality or quantity.

Once again we see two examples of exculpatory clauses in the above Tennessee specifications. Subsection 102.04 requires that the

³¹Tennessee Department of Highways Nashville, Standard Specifications for Road and Bridge Construction, January 1, 1968.

contractor examine the site carefully and satisfy himself as to its conditions. Though not specifically stated, the provision implies that the State disclaims all liability when unanticipated conditions do arise. Similarly, subsection 106.02 contends that the State is not responsible for unconforming test reports. Even though it, too, is a disclaimer clause in that respect, it does insure that all readily available test reports will be submitted to the contractor, but only on request. Even so, all relevant test reports should be supplied to the contractor, absent his request, that may aid in bidding for the job. This is the only equitable and ethical thing to do.

As stated before, when disputes arise concerning these two provisions, regardless of their content, the "changed conditions" clause should be used as a remedy, when claims are first encountered. This will save time and expenses if litigation occurs, because the court will undoubtedly take advantage of its use.

Other relevant cases:

W. H. Knapp v. State, Michigan (1945), 18 N.W. 2d 421.

County Asphalt, Inc. v. State of New York (1972), 337 N.Y.S. 2d 415.

Kiely Construction Company v. State of Montana (1970), 463 P. 2d 888.

J. A. Thompson and Son, Inc. v. State of Hawaii (1970), 465 P. 2d 148.

SECTION II

DUTY OF THE ENGINEER AND INSPECTOR

Many construction contracts contain a clause to the effect that the engineer has the power to make final and binding decisions in the settlement of various types of disputes that arise in the execution of the contract. This power is not to be unlimited. It should be defined carefully.

The engineer in charge of a construction contract has no implied power to bind the parties by his interpretations; but express provisions in the contract that any dispute about the construction of the language used shall be submitted to the engineer (whose decision shall bind the parties) have been upheld. Not infrequently, a contract will stipulate that, in the absence of fraud, the decision of the engineer shall be final on any question submitted--such as what constitutes "satisfactory" performance. This authority to make certain final decisions places the engineer in a position that gives him a quasi-judicial function.

There are all-inclusive statements that are sometimes used in the specifications; for example, "as directed by the Engineer," "to the satisfaction of the Engineer," or "as approved by the Engineer." These phrases again appoint the engineer as the governing head in construction matters such as accepting or rejecting certain materials or work performances, or making minor changes as he deems fit. This does not allow him, though, to make changes which would alter the terms

of the contract as made, unless done so as to conform to the "changed conditions" clause. In a Texas case,³² the engineer ordered that more trees be left on the right-of-way than was stipulated in the contract. The contractor incurred a loss caused by the remaining trees, because there was not enough room between the remaining trees to use his heavy equipment for excavation (its use being originally anticipated), and therefore, had to use costly hand devices for digging. He then brought action against the State to recover for the increased costs. The lower court held for the State, but upon appeal, the appellate court reversed the lower court's decision on the grounds that the engineer changed the contract terms by a material alteration. The court felt that he had no authority to do so, even though there was an express provision in the contract allowing him thusly. The case was taken further in proceedings to the Supreme Court of Texas.³³ The court again reversed the judgment and reinstated the lower court's findings by stating that, because of the express clause, "the decision of the highway engineer shall be final and conclusive, absent partiality, fraud, misconduct, or gross error." Since the plaintiff could not prove that the engineer did not act in good faith, and since the contractor did not submit the appropriate order for extra expenses, the contractor was not entitled to the amount requested. See also *Neyland*³⁴ and *Cobb*.³⁵

³²*Martin Brothers v. State*, 146 S.W. 2d 782 (1940).

³³*State v. Martin Brothers*, 160 S.W. 2d 58 (1942).

³⁴*Neyland v. State*, 151 S.W. 2d 331 (1941).

³⁵*State Highway Department v. W. L. Cobb Construction Company*, 111 Ga. App. 822, 143 S.E. 2d 500 (1965).

When an engineer is allowed the right to make changes that comply with contract provisions, he is to do so in a just manner without malice to the contractor. When these decisions can be proved to be of an arbitrary nature, the contractor can justly "call a foul." Webster's New World Dictionary defines the term "arbitrary" as "based on one's preference or whim." The engineer is not allowed to base his decisions in this manner. The change should be a necessary one and for the benefit of both contracting parties. In the Goodrum case,³⁶ the resident engineer refused to approve, as a source of material, another stone pit, when the original pit was depleted, unless the contractor signed a letter agreeing to withdraw claims for any extension or credit in working time. The contractor signed under duress, because the project could not be completed without the approved pit. The project failed to be completed on time, and the engineer ordered a certain amount deducted, as liquidated damages, from the final payment. The contractor brought action to recover such deductions. The court entered judgment for the contractor on the grounds that the engineer acted in an arbitrary and unreasonable manner, with costs awarded for consequential delays and damages thereof. See also Knox-Rivers.³⁷

Now turning to the duty of an inspector, it is clear that his functions, like that of the engineer, are to see that the work is done in accordance with the terms of the contract. He is representing the engineer, while both are, in this case, representing the State.

³⁶Goodrum v. State et al., 158 S.W. 2d 81 (1942).

³⁷State Highway Department v. Knox-Rivers Construction Company, 117 Ga. App. 453, 160 S.E. 2d 641 (1968).

The inspector has many duties to perform. He may have to keep accounts of time spent, materials furnished, and work done by the contractor. He cannot be everywhere at once, and, depending upon the character of the work, he may not have to be on the job continuously. He has to learn what to watch for and how things should be done. He should be able to detect developing, as well as existing, troubles and uncertainties. He should report such matters to the engineer at once, so that the latter can make any necessary decisions promptly. He should remember that delay on his part may cause loss for the owner (State).

Is a contractor held liable when an inspector fails to perform his above-mentioned duties, thus causing the contractor to incur extra expenses? In a Minnesota case,³⁸ the contractor was supplying asphalt cement for a State highway project. On a particular day, a defective mixture was suspected by one of the contractor's employees. He stated that the mixture contained too much oil. The plant, however, was not shut down at the time, because the State inspector assured the contractor's employees that he had made a "spot check" and had found the oil percentage in the mix to be proper, if not slightly low. The plant was later shut down, though, because it turned out that there was excessive oil in the mix. The material already placed was, consequently, rejected by the State, the contractor ordered to replace the defective material at his expense. The contractor then brought suit to recover the extra expenses by claiming that he relied upon the

³⁸Megarry Brothers, Inc. v. State of Minnesota, 188 N.W. 2d 919 (1971).

inspector's representation. The method used by the inspector to check the oil percentage was a theoretical one. That is, it only revealed whether the amount of oil in the mix conformed to the machine setting but could not indicate that the setting itself was incorrect. In the meantime, the contractor alleged that the inspector complied with the Bituminous Plant Inspector's Manual in correctly measuring the oil, but the contractor's employees contended that they had knowledge of the theoretical method the inspector was using. Because of these findings and the clause in the contract that stated ". . . No advice which the inspector may give the contractor shall be construed as binding upon the State nor will such advice release the contractor from the fulfillment of the terms of the contract," the court found for the State and held the contractor liable for the extra expenses.

Even though the inspector is an agent for the State and certain clauses in most contracts insulate him (in the course of State work) from liability, he should in no way act in an apathetic or indifferent manner toward his duty as an inspector.

Cited from the Tennessee specifications:³⁹

105.01—Authority of the Engineer. The engineer will have full professional and executive charge of supervision of the work. He will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed, as to the rate of progress, and the amount of work which has been performed at any given time, and all questions which may arise as to the interpretation of the plans and specifications, and as to the acceptable fulfillment of the contract by the contractor. In all of these manners, the decision of the engineer will be final and binding; decisions which are of a purely contractual or

³⁹Tennessee Highway Specifications, 1968.

legal nature, will be subject to appeal in writing by the contractor to the commissioner.

The engineer will have the authority to suspend the work, wholly or in part, if the contractor furnishes materials or uses workmanship which are not fully acceptable, or if he fails to comply fully with any orders or with any provisions of the contract. The engineer also will have the authority to suspend the work, wholly or in part, for such periods as he may deem necessary, due to unsuitable weather, or for any other conditions considered unsuitable for the prosecution of the work, or as deemed to be in the public interest.

105.10—Authority and Duties of Inspectors. Inspectors employed by the Department will be authorized to inspect all work done and all materials furnished. Such inspection may extend to any part or to all the work and to the preparation, fabrication, or manufacture of materials to be used. The inspectors will have the authority to reject defective materials and to suspend any construction that is being improperly done, subject to final decision by the engineer. Inspectors will not be authorized to revoke, alter, enlarge, or relax the provisions of the specifications, nor will they be authorized to approve or accept any portion of the completed project, or to issue instructions contrary to the plans and specifications. On the request of the contractor, instructions from an inspector may be had in writing on important items.

In the cases presented here and the above Tennessee specifications, the engineer and inspector have the omnipotence to suspend any work not conforming to the contract. On the other hand, some contracts contain clauses that allow the State to disclaim liability in case of erroneous advice given by either of these agents. This appears contradictory in nature. If the contractor has to accept the engineer's or inspector's decision on rejected work and suffer delay damages, why does the former again have to claim liability when any advice given to him by these State employees results in error? If they are given this all-powerful position, they should have to accept any consequences thereof.

Other relevant cases:

State Highway Department v. Wright Contracting Company,
Georgia (1963), 131 S.E. 2d 808.

Southeastern Contracting Corporation v. State Highway Department,
Georgia (1973), 202 S.E. 2d 520.

Wilson Contracting Company, Inc. v. State of Delaware et al.
(1965), 243 A.2d 65.

England et al. v. State, South Dakota (1933), 246 N.W. 628.

SECTION III

SOVEREIGN IMMUNITY

The doctrine of sovereign immunity seldom arises as a defense in State highway construction litigations because of the remote liabilities involved. That is, it is only applicable in a few situations. Not all State judicial systems contain this doctrine, but for the ones that do, certain criteria have to be met before it can be employed. Litigations that involve the doctrine are usually between the State and some outside party--a property owner. At first glance, one might conclude that this type of legal action does not relate to a construction contract at all, but in the cases presented here, damages alleged are the result of such a contract.

In some states, the doctrine can be applied when a State agent or employee commits a tortious act in his line of work,⁴⁰ while in some, immunity is upheld when injury arises as a result of an oral misrepresentation by such employee, regardless of the nature of his intent. In a Utah case,⁴¹ the latter applied. A resident brought action against the State for damages to his property whose access was allegedly destroyed as a result of a road construction project. An agent for the State insured the owner that construction would not impede or injure

⁴⁰Milon M. Boyce v. State of Utah, 26 Utah 2d 138, 486 P.2d 387 (1971).

⁴¹Thomas G. Hurst v. Highway Department of the State of Utah, 16 Utah 2d 153, 397 P.2d 71 (1964).

his property's access, when, in fact, it did. Because of the above-mentioned statute regarding an oral misrepresentation, the action was barred by the State's immunity, the charges, consequently, dropped. See also Hurst, *supra*.

In another Utah case,⁴² a property owner and his wife brought suit against the State occasioned by a construction project. It was alleged that the construction activities had been conducted in such a negligent manner that their property had been damaged by vibration caused by the operation of equipment, by the deposit of excessive amounts of dust, by excessive noise, and by the cracking of walls and ceilings in their home. In addition both claimed damages for extreme mental anguish and emotional distress. The lower court dismissed the case on the ground of sovereign immunity. Upon appeal, the Supreme Court affirmed the findings. In the case, though, there was a second cause of action alleging a substantial and material impairment of access to their property, constituting a "taking." The Supreme Court found that the lower court erred in dismissing this count because of the inapplicability of the doctrine of sovereign immunity. Therefore, the judgment was reversed and remanded for further proceedings in order to determine whether the plaintiff's property had actually been taken by denial of their free and convenient access to their property. See also Morrill.⁴³

⁴²Richard P. Hampton and Patricia L. Hampton v. State of Utah, 21 Utah 2d 342, 445 P.2d 708 (1968).

⁴³E. H. Morrill Company v. State, 56 Cal. Rptr. 479, 423 P.2d 551 (1967).

The doctrine of sovereign immunity is a necessary defense in most cases in order to subdue the number of petty suits against the State that may arise. Of course, to the party involved, the suit may not be so trivial; the damages alleged may be very injurious. In the Hampton case, *supra*, the plaintiff alleged that his house was damaged as a result of construction equipment. It seems very harsh that an adverse judgment was given to him. Similarly, Hurst, *supra*, was also denied damages. Whether judgment is harsh or not, the guidelines for the doctrine have to be established somewhere; that is, where it can and cannot be applied. As stated before, these guidelines may differ from state to state. Whatever they may be, the findings of a court must be accepted as standard law.

Cited from the Tennessee specifications:⁴⁴

107.18—Personal Liability of Public Officials. In carrying out any of the provisions of these specifications, or in exercising any power of authority granted to them by or within the scope of the contract, there shall be no liability upon the commissioner, engineer, or their authorized representatives, either personally or as officials of the State, it being understood that in all such matters they act solely as agents and representatives of the State.

107.19—Claims Against the Department. No claims against the Department will be considered except those filed in exact accordance with Subsection 105.16 (Claims for Adjustment and Disputes).

Subsection 107.18 of the Tennessee specifications addresses the issue regarding personal liabilities of State employees. The provision implies that sovereign immunity will bar any action against these agents personally but fails to regard the doctrine's applicability against the

⁴⁴Tennessee Highway Specifications, 1968.

State as an entity. One can then deduct that immunity will not apply when litigation involves claims by a contractor against the State. It appears that the provision concerns only those liabilities within the contract itself; that is, between the contracting parties. But, what about third party claims, such as a property owner? Though not explicitly stated, it seems that this same specification includes everyone, whether it be the contractor or a resident. Whatever the case, the provision disallows personal liabilities of the State's agent. Does it mean that any employee of the State can carry out his duty in any manner possible? Apparently not. These agents can only act within the scope of power granted to them. If these exceed the limits, then it appears they will be personally liable if claims so arise, not the State itself.

The doctrine of sovereign immunity is a very complex statute. At times, its application seems harsh and severe, while in the majority of the cases, its presence prevents just anyone from making a "buck" off the State. In essence, one can conclude that the State can only be sued when it so allows.

SECTION IV

CONCLUSIONS

It is not the intent of this study to point out and discuss remedies of every legal problem that may arise in State highway construction contracts, but just to familiarize the reader with the problems that do exist. Even though the legal aspects of the studied cases were, at times, complex, the litigations were usually the result of contract structure and its corresponding interpretation. That is, the contract documents were either equivocal and ambiguous which caused the contractor to be misrepresented, or the contractor failed to take the contract as a whole in his interpretations.

A contract contains many parts, and each part is of equal importance, but the specifications in a construction project may be considered to be the Bible, the basis of the job. The drawings specify the sizes and dimensions, but the specifications entail the work methods,⁴⁵ material qualities, and the imbursement methods. Therefore, complete and informative specifications are of great importance in order to fulfill the contract requirements and acquire the desired results.

As stated by Dunham and Young,⁴⁶ specifications are to be a clear, concise description of what is to be required of the contractor

⁴⁵For cases involving contractor's choice of work methods, see *MacDougland Construction Company v. State*, 188 S.E. 2d 405 and *Fehlhaber Corporation v. State*, 312 N.Y.S. 2d 123.

⁴⁶Clarence W. Dunham and Robert D. Young, Contracts, Specifications, and Law for Engineers (New York: McGraw-Hill Book Company, 1971), pp. 148-49.

as far as materials and workmanship are concerned. Their size and comprehensiveness will generally vary with the magnitude and importance of the project. They should be as extensive as necessary, but they should not contain irrelevant material; neither should they repeat what is shown on the drawings or what is covered by the contract clauses.

As explained previously, the specifications are only one part of the contract documents. Normally they are supplemented by drawings. Between the specifications and the accompanying drawings, the materials for, and the character and details of, the work to be done are to be made clear and definite for all concerned. The specifications as such are to cover whatever features can best be described in words. Thus, the specifications are most suitable for describing the qualities of the materials and of the workmanship to be required.

It bears repeating that the reader should keep in mind that the specifications are to give detailed information regarding each and every thing and operation within the scope of the contract, to serve as a single and definite basis for competitive bidding, and to constitute a book of instructions for all concerned with the work. Some basic requirements for proper specifications are (1) technical accuracy and adequacy, (2) definite and clear stipulations, (3) fair and equitable requirements, (4) format such as to permit easy use during operations, and (5) careful preparation to the end that they will be legally enforceable.

An essential of a contract is a "meeting of the minds" between the two parties involved. When the contract documents are clear and unambiguous, this requirement can more easily be met.

In concluding, it is apparent that in order to have a litigation-free construction contract, legal and moral equity between the contracting parties is of the essence. Therefore, presented now is a list of moral requirements and remedies that the State or contractor must do in order to potentially remain clear of legal proceedings:

(1) The contractor should familiarize himself with all contract requirements and responsibilities.

(2) The State should make available all construction rights-of-way prior to the commencement of work.

(3) The contractor should not rely solely on the State's materials estimate when bidding; they are only approximate values.

(4) The contractor should not take advantage of any errors in the construction plans; he should report all such errors to the engineer. The State should be responsible for any faulty design, absent the contractor's knowledge during construction. If the contractor suspects a faulty design, he should again report it to the engineer.

(5) Any changes in the contract should be in compliance with the "changed conditions" clause.

(6) All material representations, especially subsoil conditions, should be made available to the contractor, absent his request.

(7) The engineer and inspector should always act within the scope of their power. The contractor should familiarize himself with such power.

(8) The State should have complete respect for all property owners' land adjacent to construction rights-of-way.

(9) The contractor should receive "just" compensation for all work performed.

A State highway construction contract is a series of complex documents. When taken seriously and with equity in mind, fewer claims and disputes will arise.

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APPENDIX

APPENDIX

GLOSSARY

abatement of nuisance. The term is applied to the extinction or termination of a nuisance whether affected physically by or under the direction of the party injured by the nuisance, or by suit instituted by him for that purpose.

abrogate. To repeal; to make void; to annul.

appellant. A person who files an appeal.

appellee. A party against whom a cause is appealed from a lower court to a higher one.

arbitrary decision. A decision rendered by a court, or judge, or other officer exercising judicial functions which is based upon the will of the officer alone, and not upon any course of reasoning and exercise of judgment.

bona fide. A legal, technical expression to which the law of England and this country has annexed a certain idea. It is used in statutes in both countries and means a thing done really, with good faith, without fraud, or deceit, or collusion.

breach of contract. The failure of a party to a contract to comply with the duty which he has assumed by the obligation of the contract; a party's refusal to recognize the existence of a contract, or the doing of something inconsistent with its existence, may be treated as a breach thereof.

claimant. One who claims; in admiralty, one defending a suit against goods in which he claims an interest.

concur. To agree with.

consideration. One of the chief essentials of every valid contract and consisting of either a benefit to the promisor, or a loss or detriment to the promisee.

contract. An agreement by which a person undertakes to do or not to do a particular thing. Within the meaning of the contract clause of the Federal Constitution, the term includes not only contracts as the word is ordinarily understood, but all instruments, ordinances and measures, by whatever name known, which embody the inherent qualities or purposes of contracts and carry like them their reciprocal obligations of good faith.

defendant. One who opposes a claim or an action; one who pleads in defense of an action; one who contests an action suit or proceeding.

demurrer. An objection, by many courts itself called a pleading, made by one party to his opponent's pleading, alleging that he ought not to answer it, for some defect in law in the pleading.

deposition. An affidavit; an oath; the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity, in response to interrogatories either oral or written, and where an opportunity is given for cross-examination.

dissent. To disagree with another or with others; to render a minority opinion in the decision of a case.

duress. Overpowering of the will of a person by force or fear.

eminent domain. The right or power of the government to take private property for public use on making just compensation therefore.

estoppel. That state of affairs which arises when a person executes some deed, or is concerned in or does some act, either of record or in pais, which will preclude him from overruling anything to the contrary.

express warranty. An express statement of some thing which a party undertakes shall be a part of the contract, and, though part of the contract, collateral to the express object of it.

implied warranty. An implied warranty of something which a party undertakes shall be a part of the contract, and, though part of the contract, collateral to the express object of it. An implied warranty arises by operation of the law, and exists without any intention of the seller to create it.

liquidated damages. A certain sum of money per day stipulated in a contract to be paid in the event completion of the work is not accomplished on schedule (not a penalty).

mutuality. That essential of every contract to make it binding upon both of the parties at the same time. It is a rule of law that there must be mutuality in a contract; it must be binding upon both parties at the same time, if it is to be deemed valid and enforceable as to either.

non obstante veredicto. Notwithstanding the verdict of the jury.

novation. In modern law, it is a mutual agreement between all parties concerned, for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another, or a like agreement for the discharge of a debtor to his creditor by the substitution of a new creditor.

per curiam. By the court; by the court as a whole.

plaintiff. A person who brings a suit, action, or bill, or complaint.

proposal. An expression of intention or design, either written or oral.

punitive damages. Exemplary or vindictive damages, that is, those damages which are awarded in the enhancement merely of the ordinary damages, on account of the malicious or oppressive character of the acts complained of.

quantum meruit. That amount which is deserved.

remand. To order back; to send back a cause to the court from which it came for further proceedings therein.

rescind. As the word is applied to contracts, to rescind in some cases means to terminate the contract as to future transactions, while in others it means to annul the contract from the beginning.

respondent. The defendant in an action; a party adverse to an appellant in an action which is appealed to a higher court.

sovereign immunity of state. The doctrine that a state cannot be sued in its own courts, or in any other, unless it has expressly consented to such suit.

statute of limitations. The respective periods of time within which various actions or proceedings in law or equity must be brought, under the provisions of statutes of limitation.

summary judgment. A judgment entered against the sureties in a bond in a summary proceeding which is authorized by the code or by statutory provisions of some of the states.

supra. Above mentioned; in addition to.

surety. One by an accessory agreement called a contract or suretyship, binds himself with another, called the principal, for the performance of an obligation in respect to which such other person is already bound and primarily liable for such performance.

tort. An injury or wrong committed, either with or without force, to the person or property of another (aside from breach of contract).

waiver. The intentional relinquishment of a known right. It is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on.

VITA

Jack Eugene Stout was born in Elizabethton, Tennessee on March 5, 1956. He attended elementary schools in that city and was graduated from Elizabethton High School in May, 1974. The following September he entered The University of Tennessee in Knoxville, and in August, 1978, he received a Bachelor of Science degree in Civil Engineering.

In the fall of 1978, he accepted employment with The Tennessee Department of Transportation in Knoxville as an Engineer I, where he worked for one year.

After receiving a federal grant from the National Highway Institute, a branch of the Federal Highway Administration, he entered the Graduate School of The University of Tennessee, Knoxville, in September of 1979 as a full-time student. He received a Master of Science degree with a major in Civil Engineering in June, 1980.

Mr. Stout will continue employment with The Tennessee Department of Transportation after graduation.

He is married to the former Susan Stout of Elizabethton, Tennessee.