

LEGAL SUGGESTIONS RESPECTING ROAD CONTRACTS.*

By William Law Bowman, C.E., LL.B., New York City.

ETYMOLOGICALLY and technically the word "contract" should mean an agreement enforceable by law. "The Law of Contract may be described as an endeavor of the State . . . to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average rightmindedness." How do our present public contracts for road construction and their interpretation by officials satisfy these old definitions? As a part of the great work of properly linking our states and their cities and towns with uniformly good roads, it is incumbent upon us to better and if possible make uniform the contract conditions respecting the construction work and to secure that co-operation and esprit-de-corps between officials, engineers and contractors which alone will give us the best roads for the least money with a minimum of trouble and wasted energy. It has been wisely remarked that "you get only what you pay for" and in the long run that is as true in road construction work as in any other field.

Let us first consider some general principles respecting states, municipalities and roads which should be known in order to appreciate the special subjects which will be considered.

The state is a sovereign body and as such is not responsible by action at law or in equity. There are a few isolated cases holding that when a state goes outside its governmental capacity, it may then be used in the Federal Court. No dependence, however, can be placed upon these decisions by a contractor. The result is that a contractor with a state has no way to enforce his contract rights nor to secure redress against official oppression unless the state legislature has provided therefor. The best and usual plan is the formation by the legislature of a court or board of claims to hear and determine claims against the state, its departments and boards. One state allows a contractor to sue it, provided the legislature passes a special bill for the specific matter. The value of that right is well illustrated by a statement made to the writer by an offending official that when he got through with the matter I would have to have more political influence than he thought I had in order to get such a bill through the legislature. It is also the general rule that in such instances the offending official himself is beyond the legal reach of the contractor. Thus it is that except in those states having a court or board of claims, official oppression and even financial ruin can be honestly or dishonestly caused without any hope or prevention or redress for the contractor. A so-called agreement where the contractor depends solely upon the action of an official and his engineer should not be called a contract. It violates the true meaning and our understanding of that term. This inability of a contractor to enforce his contract rights or even to demand fair play and justice cannot but be detrimental to good economical road construction. Under such circumstances the work becomes political—only favorites dare bid or accept contracts—and the other results of political work naturally follow.

Due to this fact that most states could not and still cannot be compelled to live up to their contract condi-

tions, the terms of a state contract have been considered practically unimportant by the contractor. He knew that he must follow the direction the plans and specifications called for. While conscientious and honest officials and engineers predominate in state work, yet they at times need the restraint which a chance to be heard by the contractor affords. Furthermore, the atmosphere and the mental attitude of all concerned is bad in such a situation. Those opposed to granting the contractor this right to properly and legally present his claims before a disinterested court or party will be interested to know that even so great a sovereign as Emperor William of Germany last year lost an action to one of his tenants in the German Supreme Court over the value of certain improvements. Therefore, unless a state has a board or court of claims open at all times to those contracting with the state, its departments and boards, or unless it provides for a submission to an impartial and disinterested arbitrator or arbitrators any changes in the present state contracts that are discussed or suggested will, of course, be useless except as they may influence the controlling official. In this connection it has been very noticeable that both the judges and the juries favor the state or municipality when they are sued. This is even found where it is necessary to construe the iron-clad terms and conditions of our present day one-sided agreements which are required to be signed by those desiring to engage in public work and where it would be expected there would be some sympathy for the contractor. In all seriousness, then, it is submitted that there seems to be no logical reason why the contractor should not be given an opportunity to get a square deal if he believes he is not being fairly or honestly dealt with.

Municipalities are the legal creatures of the legislature, and their powers and rights must be found in the law creating them. Throughout this paper the term municipalities will signify cities, counties, towns, boroughs, road districts, etc. As a governmental agent, a municipality is immune in respect to mere errors of judgment, but in its ministerial capacity it is liable for consequences of negligence and maladministration. As regards plans for public improvements some courts attribute negligence to a municipality in the adoption of a defective plan and the test of the liability of a municipality which causes injury is not the fitness of the engineer, but the efficiency of the work. Where a defective plan is the result of bad faith or oppression or is so clearly unreasonable as to inflict needless injury, a court may enjoin performance, or, if the work is completed, hold the municipality responsible.

Roads are in the control of the state. In doing road work a municipality acts as the agent of the state performing a public duty imposed by law. On this account those dealing with either roads or municipalities must ascertain the legislative acts pertaining thereto as a basis for any serious investigation. In determining the powers or rights conferred by such statutes the investigator must remember that the wording of the law will be strictly adhered to and that the tendency is to restrict powers granted and to deny any implied powers or rights.

Since a contract may be either wholly void or voidable at the option of the state or municipality unless certain preliminary steps are properly taken, and since in such instances it usually results in a total or partial loss to the contractor of his compensation for work done and material furnished it is essential that a brief warning in this regard should be given.

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