CONTRACTS: Substantial change in a contract which, in effect, did away with the time limit provisions by implication of law gave reasonable time for performance of such work.

January 25, 1940.

FILED 69

Dr. Harry F. Parker
Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Dr. Parker:

We desire to acknowledge a request for an opinion made by your assistant, Mr. John W. Williams, Jr., on January 24, 1939, which reads as follows:

"From time to time, we have been receiving assistance from your office on legal matters relative the construction of the Trachoma Hospital at Rolla, Missouri, toward which we received an outright grant from the PWA.

"On December 9, 1939, the State Board of Health extended by resolution the contract of the J. E. Williams Construction Company, contractors on the Trachoma Hospital, PWA Docket Mo. 1418-F, to and including November 30th, and waived the assessment of liquidated damages which are provided for in the contract at $5.00 per calendar day for each and every day overrun.

"We would like our action in this matter supported, if possible, not only for the benefit of this organization, but it will readily assist the PWA in passing thereon; as you unstand, under our agreement with the Federal Government, all changes in contract revisions must have their approval.

"After the original contract for the construction of this hospital was approved, it

was discovered that certain changes were deemed essential, and other changes were requested which were job conditions which had to be met. All of these changes were first approved by the architect, approved by the governing body, the State Board of Health, known as the owner, and submitted to the PWA office at Omaha and approved by them. The gist of the problem in this instance is the contractor is claiming certain delays for extra work, which the State Board of Health, through their architect failed to make a part of the contractor's proposal for such extra changes, and as a consequence, have not heretofore obtained PWA approval for extra time on these extra work items.

"All of the delays claimed by the contractor are set out in the resolution of the State Board of Health on December 9, 1939, copy of which is attached.

"Will you please let us have an opinion as to whether or not the contractor is legally entitled to these delays by the laws of the State of Missouri."

F. W. A., P. W. A., P. W., 91820, Letter of Instruction No. 202 of September 12, 1939 is, in part, as follows:

"Therefore, where an Owner requests our concurrence in its determination to absolve the contractor from the payment of liquidated damages for an overrun in time caused by inclement weather, the Regional Director should disapprove such request unless (1) the record shows that the inclement weather complained of was so abnormal and unprecedented for such place and time that it could not have been reasonably anticipated when the contract was entered into, or (2) the contract can be interpreted under the law of the particular jurisdiction as otherwise relieving the contractor from the payment of liquidated damages for such overrun in time.

"Each case, however, must be studied in the light of its own peculiar and attendant circumstances. Whether liquidated damages can be collected depends upon the interpretation of the contract under the law in the particular jurisdiction in which the Owner is located."

Therefore, we presume that it is agreed that in construing the above contract with reference to any matter other than delay for inclement weather, as well as all supplemental contracts thereto depends upon decisions of the particular jurisdiction, i. e., the State of Missouri. The bond, under its terms, makes such the lex loci.

Section 4, A-10, of the Rolla Trachoma Hospital Contract, providing for changes, is as follows:

"Changes: Payment. The owner, upon proper action by its governing body, may authorize changes in the work to be performed or the materials to be furnished pursuant to the provisions of the contract.

"Adjustments, if any, in the amounts to be paid to the contractor by reason of any such change shall be determined by one or more of the following methods:

"(a) By unit prices contained in the contractor's original bid and incorporated in the construction contract;

"(b) By a supplemental schedule of prices contained in the contractor's original bid and incorporated in the construction contract;

"(c) By an acceptable lump sum proposal from the contractor:

"(d) On a cost-plus-limited basis not to exceed a specified limit (defined as the cost of labor, materials and insurance

> plus a specified percentage of the cost of such labor, materials and insurance; provided the specified percentage does not exceed 15 per cent of the aggregate of the cost of such labor, materials and insurance and shall in no event exceed a specified limit).
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> "No claim for an addition to the contract sum shall be valid unless authorized as aforesaid. In the event that none of the foregoing methods are agreed upon with the contractor, the Owner may perform the work by force accounts."

According to your opinion request, the parties herein did not rely upon the original contract as to "changes", but entered into a supplemental agreement which said supplemental agreement included additional work and perhaps material and, as you stated to me verbally, mentioned no extension of time to perform such extra work.

In a supplemental contract dated July 26, 1939, wherein the contractor permitted the Board of Health, at its request, to use the basement before completion and in Section 7 thereof, it is provided:

> "7. That the owner, in the exercise of such occupancy, shall in no manner interfere with the construction program of the contractor."

Whether such occupation caused delay of completion is a matter of fact. However, if a breach of such condition caused delay certainly the contractor would not be liable for the time caused by such delay.

The supplemental proposal was made upon the basis that: "certain changes were deemed essential and other changes were requested which were job conditions which had to be met" as stated in your letter.

The original proposal not providing for the "certain changes" which "were deemed essential" and the supplemental

proposal providing for such changes, certainly created a presumption that the contractor would be given reasonable additional time for such additional changes, absent a provision in the original proposal controlling the question of extra time with reference to extra work embodied in the supplemental proposal. We are unable to find such a provision.

In giving a statement of facts and stating the rule in a case similar to this case, the court in, Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 620, said:

> "Plaintiff did not complete the viaduct by the 15th of July as agreed. It was not completed until the 15th of November. To excuse the delay it was shown that one of the steel piers, on demand of the railroad, had to be differently placed from that provided by the specifications. There was a conflict in the evidence as to the time necessarily lost by this delay, though it is clear that it was a substantial period. There was evidence tending to show that defendant did not furnish the lumber at the time agreed upon. So there was evidence that plaintiff did not begin the work until near thirty days after contract time in which it was to have been finished.
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> "We think defendant to be right in his insistence that mere acceptance of the work and paying for it will not waive a claim for damages in not completing it in the time specified. (Redlands Orange Ass'n. v. Gorman, 161 Mo. 203.) As bearing upon the same principle see Atkins Bros. v. Grain Co., 119 Mo. App. 119.
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> "But here the case shows that the parties themselves made a substantial change in the contract which, in effect, did away with the time limit provision, which left a reasonable time, implied by law, for the performance of the work.
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> "In such circumstances it will not do to say that the contractor should yet be held to the time limited by the contract with an allowance

> of the time necessary for the changed conditions of the work. That might result in great injustice to the contractor. (Dannat v. Fuller, 120 N. Y. 554.) If that was desired it should have been inserted in the contract that any change of the work requiring longer time should not affect the time limit any further than necessary to do the changed work or meet the changed conditions." (Underscoring ours)

The same rule is restated in the case of Wentzel vs. Lake Lotawana Dev. Co., 226 Mo. App. 960, 983:

The time limit in the contract having been thus removed or waived by the act of the owner, there is substituted therefor an obligation on the part of the contractor to complete the building, extra work included, within a reasonable time, unless otherwise stipulated in the contract. (Cornish v. Suydam, 99 Ala. 620; Harrison v. Trickett, 57 Ill. App. 515; Bridges v. Hyatt (Sup. Ct.) 2 Abb. Pr. (N. Y.) 449; Greene v. Haines, 1 Hilt (N. Y.) 254; Lloyd on Building (2 Ed.), sec. 39; 30 Am. and Eng. Ency. Law (2 Ed.), 1257, 1258.)

CONCLUSION

Therefore, it is the opinion of this department that the parties to the contract making a substantial change in the same which, in effect, did away with the time limit provision, the contractor, by implication of Law, was entitled to a reasonable time for performing the additional or extra work and such contractor would not be liable therefor.

Respectfully submitted,

APPROVED:

S. V. MEDLING
Assistant Attorney General

W. J. BURKE
(Acting) Attorney-General

SVM:LB