
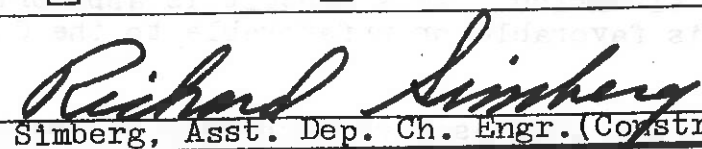


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TO: Director, Preliminary Plan Review Bureau	PREL. TRANSMISSION DIVISION RECEIVED DESIGN SUBDIVISION APR 26 1974	 ENGINEERING INSTRUCTION NEW YORK STATE DEPARTMENT OF TRANSPORTATION
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SUBJECT: DISPUTED WORK ON CONSTRUCTION PROJECTS		Subject Code: 7.30
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The following discussion has been excerpted from internal instructions within the Construction Subdivision. It is presented as a guideline for Regions and other department elements who have input into disputed work findings.

"The Commissioner's rulings regarding contractor disputes represents the highest level of review and decision available to contractors during the life of a contract. In addition, they stand as prime evidence in any future court decision. Therefore, it is the established policy in this Subdivision that such letters should be of the utmost clarity and should stand by themselves without the need for other documents or searches to convey their significance and reasoning to the reader.

"A disputed work letter will almost always consist of four basic sections:

1. An opening paragraph defining the authority of the respondent and a very brief description of the dispute.
2. The facts and the situation concisely and objectively presented in such a manner that the problem is readily apparent to the reader. Statements by the contractor and departmental units should be separately identified.
3. Quotation of relevant parts of the contract documents which specifically pertain to the particular dispute as described by the facts. Lengthy quotations should be avoided through judiciously presenting only the most relevant portion of the specification. By necessity, pertinent plan details need not be directly presented but can be incorporated by reference.
4. Presentation of the findings should be logical and tied with logical statements to the above facts and contractual considerations. There should be no doubt of what the finding is or the necessary action required.

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It is often appropriate in leading to the findings to show the reasonableness of such findings in relationships to a prospective bidder who through bidding has voluntarily accepted the contract and made economic decisions regarding uncertainties when determining the amount of his bid in a competitive bidding situation. This concept is appropriate whether the ruling is favorable or unfavorable to the Contractor.

"Many disputes center about increases or decreases of contract quantities with the contractor contending that such changes have negated his unit bid price for the work. This office and the courts have long held that increases or decreases of quantities of any magnitude which do not significantly affect the nature of the work itself must be compensated solely by unit contract bid price. Reference is made to Article V of each contract. The amount of the contractor's unit bid price has absolutely no bearing in this determination. However, most disputes are not so straightforward. Many of them include items which involve more than one type of work or materials and series of operations. These are often referred to as 'composite' items. In such cases, determinations should be based upon whether or not the increase or decrease significantly altered the ratio of those two items. For example, Item 2 may include pavement removal as well as general excavation. Should the pavement removal work be increased from 10 to 80% of the total Item 2, it would likely be considered a significant alteration of the contract bid item. Should the pavement excavation be increased from 10 to 15% of the total contract, Item 2, it would probably be considered as within the uncertainty which could reasonably be anticipated by a prospective bidder in his bid prices. Remember that we usually receive disputes only when such changes are in the favor of the State and not the Contractor. The judgment of reasonableness must be predicated upon the individual circumstances.

"Contracts often include one or more lump sum items such as project survey and stakeout. When a bidder accepts the contract he does so with full knowledge that additions or deletions of contract items will be made. Therefore, it is unreasonable for a bidder to expect that lump sum items will be varied each time unit items are increased or decreased. However, when new work lying distinctly outside the work described by the contract is added or such work is added near the completion of the job in such a way as to be considered as separate and distinct to the original contract, additional reimbursement beyond the lump sum payments should be considered. In addition, it would not be reasonable to expect a bidder to anticipate any extraordinary added increase in the amount of work under the item. As in composite items, judgment must be made in the individual circumstances.

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"In general, this office and the courts have held that the State is not responsible for the actions of third parties which affect the contract. The contractor must expect and is responsible to cooperate fully with utility companies and will not be compensated for costs resulting from their failure to keep according to its schedule. However, the State is also expected within its limited powers to mediate and remove obstacles to the work.

"It should be apparent from the above that drafting of disputed work letter replies requires an exhaustive detailed search for the facts, judgment in considering which portions of the contract documents apply, and a clear, precise, and orderly presentation. The decision often appears very gray when the various documents are first reviewed. However, I have often found that upon logical presentation of the facts and contract provisions that many letters tend to almost "write themselves".

"The overall goal for resolution of any dispute is an objective ruling bounded by the contract provisions but at the same time reasonably within those same provisions. "

RNS:LG