

OFFICIAL OPINION NO. 71-12, Highway Contracts; liquidated damages and extension of time to complete contract. Many questions answered.

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Jack Allmon, Director
State Department of Highways
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 71-12

Highway Contracts; liquidated damages and extension of time to complete contract. Many questions answered.

Dear Mr. Allmon:

You have requested my opinion based upon the following factual situation:

In the Standard Specifications and as a part of each contract let for the construction of public highways or bridges, the contractor is given a designated number of working days, or a definite date to complete his duties under the contract. If such project is not completed at such designated time, a designated amount will be deleted from final payment for the contract as "liquidated damages" to the Highway Department. However, due to the uncertainty of working conditions, each contractor may, prior to expiration of the original contract time, or the time to which the completion date is extended, apply to the Highway Commission for an extension of time to complete such project without being liable for stipulated damages. Sections 8.6 and 8.7 of the "Standard Specifications for Roads and Bridges" set forth these provisions in their entirety.

Based upon this briefly summarized factual statement, you have submitted the following questions:

Assume requests for extension of time are received by the Highway Commission considerably before contract time has expired -

1. Is the granting of such an extension by one Highway Commission subject to rescission by a subsequent Highway Commission on the ground such extension was granted prematurely before necessity of such extension of time can reasonably be determined?

Assume requests for extensions of time are received after the contract time has expired -

2. If such extension is granted, is it an authorized extension of time?

3. When contract time expires, and liquidated damages are assessed for completion of the work beyond the contract time, can these liquidated damages be waived?

4. Is the provision in 8.7 of the contract authorizing the Highway Commission to waive liquidated damages if the project is open to the public a valid provision? Has the Highway Commission exceeded its authority by this provision?

5. Must the Highway Commission grant extensions of time prior to the expiration of the contract time, when extensions have been requested prior to expiration of contract time, in order to keep the contract time running, so liquidated damages will not be assessed?

6. Upon expiration of contract time, can the Highway Commission grant an extension of time which was requested while contract time is running, or is this a waiver of liquidated damages?

7. Can extensions of time be granted by the Highway Commission for reasons other than those stated in 8.6 of the Construction Contract?

INTRODUCTION

Before considering the specific questions submitted, certain basic rules of law must be considered.

The provisions for liquidated damages contained in highway contracts at one time were invalid and void as being repugnant to statute, now SDCL 53-9-5. (**Fitzgerald v. City of Huron** (1924) 47 SD 533, 199 NW 755). Subsequently, however, in considering the exact liquidated damages table as used by the Highway Department, in *Fitzgerald v. City of Huron* (1968) 83 SD 160, 156 NW 2d 186, our court overruled the Fitzgerald case and determined that liquidated damages were valid. Therefore, there is no question but that the provisions for liquidated damages are valid.

It is also my opinion that the provision to extend the time to complete a highway construction contract, before liquidated damages become available, is also valid. Because of the uncertainty of weather, labor conditions, and the multitude of other unforeseeable factors that encompass any construction contract, such a provision is customary and allowable.

We must recognize that the money expended by the State Highway Commission comes from public moneys exacted by means of taxes from the citizens and others using our highways. We must also remember that the contract to construct public highways and bridges is between an individual or corporation with the State of South Dakota. Appreciation of this fact is essential, for the reason the expenditures of such public funds for a public purpose are essentially different than if a person expends his own private funds for his own personal purposes.

Likewise, in some of your questions, the legal doctrine of WAIVER and ESTOPPEL is involved.

A waiver is the intentional relinquishment of a known right. The term connotes a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim or privilege, which except for such waiver, the party would have enjoyed. **Meyer v. Nat. Fire Ins. Co.** (1936) 67 ND 77, 269 NW 845.

(This definition is consistent with **Hood v. Sioux Steel Co.** 67 SD 1,287 NW 636.)

... Waiver is the intentional relinquishment of a known right; it is the expression of an intention not to insist upon what the law affords. It is consensual in its nature; the intention may be inferred from conduct and the knowledge may be actual or constructive, but both knowledge and intent are essential elements. Estoppel, on the other hand, is not consensual in character. It is recognized, not to give effect to a presumed intention, but to defeat the inequitable intent of the party estopped. **Seavy v. Erickson** (1955) 244 Minn. 232, 69 NW 2d 895, 52 ALR 1144.

Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention, and estoppel may arise where there is no intent to mislead. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do. Waiver involves the acts and conduct of only one of the parties, estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; an estoppel always involves this element. Estoppel results from an act which may

operate to the injury of the other party; waiver may affect the opposite party beneficially. **Labidee v. City of Pierre** (1920) 43 SD 31,177 NW 499.

There are other elements involved in the doctrine of estoppel which may be considered later.

With these basic principles in mind, we may approach the questions presented.

QUESTION 1: ASSUMING THE REQUEST FOR EXTENSION OF TIME WERE RECEIVED BY THE HIGHWAY COMMISSION CONSIDERABLY BEFORE THE CONTRACT TIME HAS EXPIRED, IS SUCH A REQUEST SUBJECT TO RESCISSION BY A SUBSEQUENT HIGHWAY COMMISSION ON THE GROUNDS THAT SUCH EXTENSION WAS GRANTED PREMATURELY BEFORE NECESSITY OF SUCH EXTENSION OF TIME COULD REASONABLY BE DETERMINED?

This question cannot be definitely answered either YES or NO because of the doctrine of waiver and estoppel.

If we assume the factual situation only involves waiver, it is my opinion that ordinarily the question would be answered YES.

Under the general doctrine of waiver, when the alleged waiver (in the factual situation here, the time to complete the contract before liquidated damages would be available) is in the future, such waiver is not effective unless there is consideration granted for such waiver. (In law this is the doctrine of "executory waiver")

See: **Clement v. Clement**, 230 NC 636, 55 SE 2d 4591

Am. Locomotive Co. v. Gyro Process Co. (CCA Mich) 185 F 2d) 316.

In my opinion, there is very little likelihood, if any, that a highway contractor asking for such extension of time in the future would in addition offer and give any consideration for such waiver to the State.

However, and what would appear to be more important, and a more common occurrence, is a consideration of whether or not such highway contractor, after applying for such "executory waiver" acted in reliance to such grant of authority to his disadvantage, so that an estoppel would arise, which would restrain the subsequent highway commission from rescinding such grant of an extension of time to complete such contract.

As the **Seavey** case, *supra*, pointed out, while in many cases both a waiver and an estoppel may be present, the moment the court finds an estoppel, there is no reason to determine the validity of the waiver, inasmuch as the estoppel works to defeat any claim made on the part of the party estopped.

It is my opinion that if the elements of estoppel are present that such would act to restrain the Highway Commission from rescinding the grant of extension of time and that Question No. 1, in such a situation, must be answered NO.

Questions 2 through 7: All of these questions are predicated upon the factual situation that the request for the extension of time to complete the contract were received by the Commission after the contract time (or its extension) had expired.

In such a situation, it is my opinion that the Highway Commission cannot legally "waive" the imposition of liquidated damages as provided in such contract. by means of granting an extension of time to complete the project.

Initially, this must be the conclusion because of the settled law of waiver that a person cannot waive any right once such right is "lost" or expired. A good illustration of this principle of law arose in **Makuen v. Elder**, 170 NC 510, 87 NE 334. The facts in such case show that the parties entered an arrangement whereby Makuen was purchasing stock from Elder. The contract provided, however, that Makuen would pay Elder two thousand dollars and receive a partially completed deed to certain property and the shares of stock. This contract was dated December 16, 1908, and provided that any time during one year following its execution, Makuen could return the stock to Elder, whereupon Elder would either reimburse Makuen his two thousand dollars, or complete the deed so as to convey the real property to Makuen. It further provided that if on December 16, 1909, Makuen was satisfied with the stock he would return the incomplete deed to Elder. In 1911 Makuen commenced an action against Elder seeking either the re turn of his money or the deed to the land, claiming he was dissatisfied with the stock and Elder had waived the time limitations within such written contract.

The North Carolina Court, however, pointed out that there can not be a waiver of a right once it was lost. That Elder's rights to return the money or deed the land over to Makuen, and retake the stock expired December 16, 1909, and that in 1911 there was nothing Elder could waive.

Secondly, it is a principle of doctrine of waiver that there can be no waiver of any right based upon public policy.

Meyer v. Nat. Fire Ins. Co., 67 ND 77, 269 NW 845;

Mayer etc. New York v. Manhattan RR Co. 143 NY 1,37 NE 494;

Benane v. Int. Harvester Co., 142 Cal. App (2) 874, 299 P 750;

City of Glendale v. Coquat, 46 Ariz. 478, 52 P 2d 1 178, 102 ALR 831;

Hittson v. Chi. R. I. & Pac Ry. Co., 43 NM 122,86 P2d 1037;

Howard Nat Bank & Tr Co. v. Newman, 115 Vt. 61,50 A 2d 896, 169 ALR 743.

Section 24 of Article III of the South Dakota Constitution provides:

The legislature shall have no power to release or extinguish in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this state, or to any municipal corporation therein.

This expresses the public policy of this state. If the Legislature cannot release an "indebtedness, liability or obligation" to the state, an agency of the state, acting in its behalf in a contractual relationship with the state, as a matter of public policy, cannot release such "indebtedness, liability, or obligation."

There is little question that during the agreed time to complete the public

contract, there is no "indebtedness, liability or obligation" arising from the liquidated damages clause due the state, so that extension of the contract time to complete the contract does not involve public policy. However, after the agreed time to complete the contract has expired, and liquidated damages are available, there is an "indebtedness, liability, or obligation" due to the State of South Dakota, the public policy would forbid any "waiver" of such obligation by means of extending the time to lawfully complete the contract.

Some of the questions present the problem where the highway contractor has actually, during the contract period, requested an extension of time to complete the contract but due to oversight, delay, or action of the Highway Commission, the Highway Commission has not determined whether to grant or deny such request until the contract time had expired. In these situations if the request was a bona fide request on the part of the contractor, and such contractor continued to progress with work under the contract, it is my opinion that the

failure of the Commission to act upon such request with timely promptness should not be used to the disadvantage of the contractor.

With this discussion in mind, it is my opinion that your Questions 2 through 7 should be answered as follows:

QUESTION-2 NO

QUESTION-3 NO

QUESTION 4-As previously explained, if the request is a bona fide request, or properly extended, the Highway Commission may act; however, if such is made at a time after the contract date expires, its action would be illegal. While I can appreciate that the work to be accomplished by the contractor in all probability should be done when such project is opened for public use, this is not always true. The specifications and the contract permit extension of time to be requested at any time prior to the expiration of the contract time. Such is in no way concerned with the public usage of such project.

QUESTION 5-As previously explained, this question may be answered YES. However, if the only purpose of such request is to keep the time for extension of the contract period open, it is my opinion this is not a bona fide request but merely an attempt to circumvent the law. In such case, the answer to the question must be NO.

QUESTION 6 - This is answered the same as Question 5.

QUESTION 7 - NO. The reasons for granting extension as set forth in the specifications and contract are exclusive. They are as exclusive as the provision in the contract providing that for the stipulated services the state will pay a named amount of money.

Respectfully submitted,

Gordon Mydland
Attorney General