

MAINE STATE LEGISLATURE

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May 16, 1946

To State Highway Commission
Re: Cancellation of Contract Impossible of Fulfilment

This department acknowledges receipt of your communication relative to Federal Project, Bridgewater, Maine, and your inquiry is whether the Commission is authorized to cancel the contract awarded in 1941 to W. H. Hinman Company, Inc., and advertise for bids to complete the project. In arriving at our determination we accept the facts as your Chief Engineer has narrated them, with the dates of the award, the beginning of the work, the suspension of the work, and then the final revocation of the preference rating order by the War Production Board.

In brief, the facts stated by you are that the contractor entered upon the performance of the construction of a section of a bituminous road in the town of Bridgewater and diligently pursued the work and had reached the stage where they were ready to pave the highway by the application of the crushed stone and the bituminous material. You also say that, due to war conditions, and without fault of the contractor, it became impossible, due to governmental restrictions, to obtain these materials in the early fall of 1942, and on December 1, 1942, the rating was revoked by the War Production Board. You also say that it was contemplated to begin the paving of the highway in the fall of 1942, which would have had to be suspended, due to cold weather, about October or November, and to resume the completion of it in the spring of 1943.

Ordinarily, one who contracts to perform certain work and labor and furnish materials, where there is no provision in the contract which would excuse performance in case of certain contingencies, is obliged to complete his contract or be answerable in damages for its non-completion. There are, however, exceptions to this rule, namely, where by governmental action due to war, material involved in the performance of the contract is "frozen" by the government and it becomes unlawful to use it, or materials are requisitioned by the government for the production of arms and other means of waging war successfully. When an occasion of this kind arises, the parties are excused from either performing or completing performance of a contract.

We think that the contractor could have, when these materials were frozen, cancelled the contract, in which event he would have been entitled to receive compensation for that portion of it performed up to the time of cancellation. While this was not done in this case, and the work was suspended, yet at the time of suspension the freeze order of the government was not of a temporary nature, but rather of an indefinite and uncertain duration,

The Public Roads Administration of the federal government has indicated in writing that it would approve cancellation of the contract and the advertising for bids.

The department is of the opinion that, without regard to whether the Commission would have authority under ordinary circumstances to cancel a contract and relieve a contractor from the performance of it, in this case the Commission may do so, since they would be doing no more than what the law has already done when performance became impossible by reason of interference by the government resulting in the frustration of further performance. This will enable the Commission without further delay to complete the stretch of highway which is now in the uncompleted state in which it was left when the work was suspended.

I believe that the suggestions of the District Engineer of the Public Works Administration in his letter of February 8, 1946, should be followed in making the adjustments with the contractor on the cancellation of the contract for the materials now at the project.

Abraham Breitbard
Deputy Attorney General

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