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MADRAS RECORD OFFICE.

Government of Madras.

Public Works DEPARTMENT.

G.O. No.	552	Press
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Dated	16-3-	1866

Not to be folded or roughly handled

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*Proceedings of the Madras Government, Public Works Department,
for the month of March 1860.*

No. 73. Read the following letter from J. R. BOYSON, Esq., Government Solicitor, Madras, to T. PYCROFT, Esq., Chief Secretary to Government, dated 25th February 1860, No. 138 :—

1. I have the honor to acknowledge the Proceedings of Government noted in the margin, and the printed copy of Contract which accompanied them.
2. I submitted same for the consideration of the Advocate General, and I also conferred with him thereon.
3. I now forward a copy of his Opinion and return the enclosure above noted.

Proceedings of Government, dated
17th February 1860, No. 362.

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OPINION.

I am clearly of opinion that the “ painting certain portions of the structure with two coats of paint,” which the Chief Engineer considers desirable “ in order to *the better preservation* of the same,” can in no way be considered as coming under the description of “ any matter or thing *necessary for the completion*” of the Pier ; and these are the only words in Clause 15 of the Contract, to which the remark in paragraph 3 of Colonel Bell's letter can apply.

This is my answer to the question put to me, but it may perhaps be well to add that I am disposed to think that the remarks contained in paragraph 5 of Colonel Bell's letter are well founded, but if so, they appear to me to apply with equal force to the whole structure of the Pier, as to “ the iron railing at each side of the Pier to which Colonel Bell seems to limit his remarks. It may, therefore, be cheaper to the Contractor, though not legally obligatory on him, now to paint any portion of the work liable to deterioration, than to be obliged to replace that portion of the work with entirely new materials, when he makes over the Pier. If Government paint the work now, it would be merely saving the Contractor from this eventual risk. At the same time, I think it desirable to bring it to the early and special notice of Government, with respect to this remark of Colonel Bell's and paragraphs 4, 14 and 15 of the Contract, and the Specification all read together in connection with Colonel Bell's remark that there seems to me to be a very great degree of indefiniteness and uncertainty, and a wide opening for future disputes and litigation, which it would be for the interests of both parties (i.e. Government and the Contractor), to take into their immediate consideration, with a view to such a fair and liberal adjustment as may prevent so disagreeable a result.

Colonel Bell's remark indicates that in his opinion, unless “ galvanized iron well painted” is used in certain parts of the Pier, the Pier, when completed, *two years hence*, “ will not then be,” (at least as to parts of it), “ sufficiently *sound* to be safe” and that, therefore, the Certificate required under Clause 4 of the Contract cannot then be given.

The Contractor will probably reply, I am aware of the terms of the 14th and 15th Clauses, but still the Specification must be read along with and as part of the Contract, the Specification only mentions “ solid wrought iron,” and no where speaks of “ galvanized iron” or “ painting.” I have provided “ solid wrought iron” “ of the best description” as required by Clause 15, with this I have “ executed” the “ works” and *each* part *when so executed* was “ executed in a substantial, sound and workman-like manner,” and I have fully completed my Contract. True it is that the earlier portions of the work now shew signs of decay, but I contend that this is only *fair wear and tear*, to which all work is liable, particularly iron work in salt water. “ If you, the Madras Government wanted galvanized iron, you should have said so, and I would then have charged a higher price.”

The rejoinder might be “ true it is that neither galvanized iron nor paint are stipulated for in the Specification, but Clause 15 expressly provides that “ *any other materials*” *not mentioned* “ in this Contract,” and which were *not* considered requisite at the time of signing the Contract *but* “ which shall be found requisite during the progress of the works,” “ shall be of the best description.” This clearly shews that the Contracting parties meant that materials “ *not mentioned and specified*” in the Contract *might* “ during the progress of the works” “ be found *requisite*” for a “ substantial and *sound*” execution of the work. This being the case, our

Proceedings of the Madras Government, Public Works Department,
for the month of March 1860.

Engineer early in the "progress of the work" gave you notice that the "solid wrought iron" used by you, *though* of "the best description," shewed such symptoms of early decay that it clearly was not such material as "during the progress of the works" was "*sound requisite*" for the "substantial and sound" execution of the work. It might also be contended that the words (Clause 15) "further *any matter or thing* not herein particularly specified, but which shall be "necessary for the completion of the works, &c. &c. in a fair and complete manner shall, nevertheless, be *done* and performed," &c. but the answer would probably be two-fold; 1stly, neither galvanized iron or paint are "necessary for the *completion* of the work," but only for its better preservation; 2ndly, the words "matter or thing to be *done* or performed" point clearly to *work* and *not* to *materials*, as "materials" can neither be "*done*" nor "*performed*." And *this* objection would I think prevail.

Clause 10, it might also be contended, gives Colonel Bell power to reject all but galvanized iron as "improper and unfit" for the Pier, as proved by the "test" of salt water and experience "during the progress of the works."

I can only indicate the above as opening a wide door for future disagreement on the occurrence of the event which Colonel Bell anticipates in paragraph 5 of his letter, and suggest that if "galvanized iron well painted" be considered necessary for the satisfactory completion of the work, it seems desirable that a new agreement should be entered into upon fair and reasonable terms.

(Signed) THOS. SYDNEY SMYTH,
Advocate General.

(True Copy.)

(Signed) J. R. BOYSON,
Government Solicitor.

No. 74.

ORDER THEREON, 16th March 1860, No. 552.

Communicated to the Chief Engineer with reference to the Order dated 17th February 1860 No. 362, with the request that he will favor the Government with his views on the points noticed by the Advocate General.

(Signed) J. D. BOURDILLON,
Secretary to Government.

Copy Opinion.

I am clearly of opinion that the painting certain portions of the structure with two coats of paint which the Chief Engineer considers desirable in order to the better preservation of the same can in no way be considered as coming under the description of "any matter or thing necessary for the completion" of the Pier, and these are the only words in clause 15 of the Contract to which the remark in Para 3 of Colonel Bell's letter can apply.

This is my answer to the question put to me but it may perhaps be well to add that I am disposed to think that the remarks contained in Para 5 of Colonel Bell's letter are well founded but if so they appear to me to apply with equal force to the whole structure of the Pier as to the iron railing at each side of the Pier to which Colonel Bell seems to limit his remarks. It may therefore be cheaper to the Contractor though not legally obligatory on him now to paint any portion of the work liable to deterioration, than to be obliged to replace that portion of the work with entirely new materials, when he makes over the Pier. If Government paint the work now

now, it would be merely saving the Contractor from this eventual risk. At the same time I think it desirable to bring it to the early and special notice of Government with respect to this remark of Colonel Bellis and Paras 14 and 15 of the Contract and the specification all read together in connection with Colonel Bellis' remark that there seems to me to be a very great degree of indefiniteness and uncertainty and a wide opening for future disputes and litigation which it would be for the interests of both parties (i.e. Government and the Contractor) to take into their immediate consideration with a view to such a fair and liberal adjustment as may prevent so disagreeable a result.

Colonel Bellis' remark indicates that in his opinion, unless "galvanized iron well painted" is used on certain parts of the pier, the Pier when completed two years hence will not then be "at least as to parts of it" sufficiently sound to be safe and that therefore the Certificate required under clause 14 of the Contract cannot then be given.

The Contractor will probably reply I am aware of the terms of the 14th and 15th clauses but still the specification must be read along with and as part of the Contract the specification only mentions "solid wrought iron" and nowhere speaks of galvanized iron or "painting".

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"painting". I have provided "solid wrought iron" of the best description as required by clause 15 with this I have executed the works and each part when so executed was executed in a substantial sound and workmanlike manner and I have fully completed my Contract. True it is that the earlier portions of the work now show signs of decay but I contend that this is only fair wear and tear to which all work is liable particularly iron work in salt water. If you the Madras Government wanted galvanized iron you should have said so and I would then have charged a higher price.

The rejoinder might be "True it is that neither galvanized iron nor paint are stipulated for in the specification, but clause 15 expressly provides that any other materials not mentioned in the Contract and which were not considered requisite at the time of signing the Contract but which shall be found requisite during the progress of the works shall be of the best description". This clearly shows that the Contracting parties meant that materials not mentioned and specified in the Contract might during the progress of the works be found requisite for a substantial and sound execution of the work. This being the case our Engineer early in the progress of the work gave you notice that the solid wrought iron used by you though of the best.

best description" showed such symptoms of early decay that it clearly was not such material as "during the progress of the works" was found requisite for the substantial and sound "execution of the work. It might also be contended that the words / Clause 10, "further any matter or thing not herein particularly specified but which shall be necessary for the completion of the works &c &c and in a fair and complete manner shall nevertheless be done and performed" &c but the answer would probably be two fold - 1st Neither galvanized iron or paint are necessary for the completion of the work but only for its better preservation. 2nd The words "matter or thing to be done or performed" point clearly to work and not to materials as "materials" can neither be "done" nor "performed". And this objection would I think prevail.

Clause 10, it might also be contended, gives Colonel Bell power to reject all but galvanized iron as "improper and unfit" for the pier as proved by the "test" of salt water and experience "during the progress of the works."

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Bell anticipates in Para 5 of his letter and suggest that if "galvanized iron well painted" be considered necessary for the satisfactory completion of the work, it seems desirable that a new agreement should be entered into upon fair and reasonable terms.

1 signed, Thos Sydney Smyth
Advocate General

1 Truecopy,
Shayson.
Govt. Secy.

No 138.

From The Government Solicitor, Madras.
To The Chief Secretary to Government.

Madras 25th February 1860

- Sir
1. I have the honor to acknowledge the Proceedings of Government. dated 17th February 1860 No 362. } noted in the margin and the printed Copy of Contract which accompanied them.
 2. I submitted same for the consideration of the Advocate General and I also conferred with him thereon.
 3. I now forward a Copy of his Opinion and return the Enclosure above noted.

I have the honor to be
Sir,
Your most Obedient Servant,

M. J. S.

Sout. Secy.

P.

A certain question arising out of the Contract between St. John's and the Secretary of State for India in Council for the purchase of a piece of land at Madras.

10/3/60

Copy to Mr. C. B. Paul, Esq.

In letter No 138 from the Government to the Chief Secretary dated 25th February 1860

