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MADRAS RECORD OFFICE.

Government of Madras.

Public works **DEPARTMENT.**

G.O. No. 148 Press / Mis.-

303-12

Dated 19 1 1871.

Not to be folded or roughly handled

Proceedings of the Madras Government, Public Works Department,
19th January 1871.

Read the following papers:—

No. 303. From the Acting Superintending Engineer, 1st Division, to the Secretary to Government, Public Works Department, dated Dowlaishweram, August 1870.

With reference to G. O. of the 20th June last, No. 1,501, I have the honour to report that I consider the Form of Contract of petty works therein published provides sufficiently for all the kinds of works likely to be given to ordinary contractors.

No. 304. From the Superintending Engineer, 2nd Division, to the Secretary to Government, Public Works Department, dated Bezwarah, 6th July 1870, No. 46.

I have the honour to observe that I have no suggestion to offer regarding the Form of Contract Bond forwarded with G. O., No. 1,501, dated 20th June 1870, the principal amount of work done in this Division being executed as task work.

No. 305. From the Superintending Engineer, 3rd Division, to the Secretary to Government, Public Works Department, dated Camp at Goorumcondah, Voilpaud Talook, Cuddapah, the 21st September 1870, No. 1,381.

With reference to G. O., No. 1,501, of 20th June 1870, I have the honour to inform you that, having taken the opinion of the several Range Officers in this Division, I think I cannot do better than forward a copy of Mr. Fraser's letter on the subject, as it perfectly expresses my views, and also a copy of a circular issued by me about a year ago. In my opinion the bond should be as simple as possible, and as I advocate withholding, at time of payment for work done, a per-centage (say 10 per cent.) of the value of the work, I would suggest a slight alteration of the form of bond circulated with G. O., No. 245, of 27th January 1869, and which is very similar to Form No. 5 in Chapter XVI. of the Madras Public Works Code.

1 Copy of Mr. Fraser's letter.
1 ,, of Superintending Engineer's Circular.

2. Mr. Handley's form of bond apparently applies only to cases where the contractor is in a position to carry out the work to completion before receiving any payment, and for lodging security beforehand. I do not advocate the lodging of any security, but advocate regular and constant payments, and a deduction of 10 per cent., which would be the security for the due execution of the work. It might be considered advisable to lodge some security at first for the commencement of the work within a certain time of the signing of the bond, but this should be returned as soon as some work is done, and we should fall back on the per-centage.

Copy of a letter No. 214, of the 30th August 1870, *from the Officer in charge of the Kurnool Range, to the Superintending Engineer, 3rd Division.*

Referring to your Memorandum No.——* calling for my opinion regarding the proposed form of Contract Bond, I have the honour to state that I did not consider it very necessary that I should give any opinion on the subject, and that the proceedings were sent to me as a matter of course, but that the question would be settled between the Superintending Engineers and the Government Pleader.

* Mislaid.
G. O., No 1,501, dated 20th June 1870.

2. On reading the documents again, I have the following remarks to make :—

It appears to me that two forms of Contract Bond—a complex one for large works, and a simple one for small works—are unnecessary.

One use of a bond is that it may be produced by either of the contracting parties as evidence of what was intended, and the simplest form which will meet this object legally and effectively is the best, and there can be no use in having any other.

3. Another use of Contract Bond is to prevent litigation, or at all events to reduce it as much as possible. I do not think that either of the forms suggested would have this effect. I allude to the clause providing that the amount lodged as security should be treated as *liquidated damages*; and as the following remark has reference to a point of law, I beg to explain that I would not presume to offer an opinion about it, only that I believe Mr. Handley was not aware of certain facts when he drafted the bond.

If I am right, a penal sum would be considered as *liquidated damages* only in cases where, from the complexity of the work, it would be impossible to assess the damages arising from a failure to complete the contract, or where an indefinite time would be required to develope the damage or injury arising from such failure; now, this is not the case with public works generally. The damage sustained by a failure of contract can, in the great majority of cases, be readily ascertained; and, in my opinion, any penal sum would be treated not as liquidated damages but simply as a penalty, and its confiscation would be subject to the restrictions the law provides, even though the parties to the contract had agreed and had expressly stated that it should be considered liquidated damages and not a penalty.

I do not therefore see the use of cumbering the bond with any reference to liquidated damages.

4. Mr. Handley's draft provides for paying the whole amount on the completion of the work. This would suit very few cases—only those of very small works. Few contractors could wait for payment until the whole of a work was done; besides, the usual system is different—contractors are generally paid on account as the work proceeds.

5. There is no form of contract so simple or perfect as *a tender and its acceptance.*

It is a form usually adopted by the Engineers and Surveyors of Government and other Departments in England; it is found to work well, and it might, I think, be adopted with advantage for all public works in this country.

Of course a tender must be to do something in a particular way for a certain amount, and this would lead to the necessity of having a specification for each work; but I do not think that this would cause much inconvenience. Indeed, I believe that a clearly drawn specification provides the best chance of avoiding misconception and troublesome litigation; and I also think that, if an estimate is made so full as to render a specification unnecessary, there is no real saving of time or trouble.

6. I know very well that it would not do to have to draw up a fresh specification for each petty work, and there are other reasons which probably influence Captain Oakes in avoiding the use of specifications, except in the case of works which are sufficiently important to occupy his own attention, but the difficulty may be got over by the use of general specifications carefully drawn out for each class of work and printed, leaving space for the entry of any conditions peculiar to any one work. Besides a description of how the work should be done, these specifications would contain all the necessary protective and penal clauses, and show how payments would be made. They (as also the plans, if any,) would be signed by both the Engineer and the contractor, and all that would then be necessary would be for the contractor to give a tender (which might be on a printed form also) to do the work according to the plan and specification signed by him for a certain sum, and the acceptance of this tender by the Engineer would complete the contract. In such cases it is held that the whole specification becomes a portion of the contract, and it is accepted as evidence of what the conditions were, unless there was a total departure from the plans.

In many cases, and perhaps especially in Tanjore, it would be unnecessary to describe the details of many of the works, a reference to an existing one being sufficient.

Proceedings of the Madras Government. Public Works Department, 19th January 1871.

7. There is an objection to a contractor lodging money as security for the performance of a contract. It deprives him of a portion of his capital, and few contractors in this country can afford that.

In the case of a small work where (according to Mr. Handley's draft) completion of the whole work would be a condition precedent to the payment for any portion of it, what further security need be required.

In this case, if the contractor failed or was about to fail, a protective clause of the specification would come in enabling the Engineer to give notice and complete the work himself, and the contractor could not maintain an action on account of the portion he had done; and here I would remark that if Mr. Handley's draft bond be adopted, I would suggest an alteration in the wording of the concluding passage, where it is stated that, if the Engineer is obliged to complete the work himself, the contractor "shall make good the difference, *which may be deducted from the said sum of*——." In a case where the cost of completion exceeded the amount deposited, it may be argued from this passage that the contractor was liable for the amount of the deposit only, whereas he should be held responsible for the entire cost, so long as the plan and specification were not departed from, and the Engineer had exercised proper economy.

In the case of a large work, which would be paid for by instalments, either at certain intervals of time, or as certain portions of the work were completed in succession, the conditions would be that no payment should be made unless the contractor produced a certificate of approval from the Superintendent or Engineer; and also that of the whole amount due for work done up to date or these deductions might be allowed to accumulate up to a certain amount which should bear a certain relation to the whole estimate cost, or up to the time of final completion and payment.

This is the plan I have myself adopted for many years, and I have always found that it gave me ample control over the contractors, and security for the performance of the work.

The present form of Contractor's Certificate is suitable to this arrangement, as the amount held back appears upon the face of the certificate.

8. Compensation for damages in case of non-completion of contract should be provided for in the specification.

In a District like Tanjore heavy losses might arise from the contractor failing to complete a work within the prescribed time.

I allude to protective works on river and channel banks, where a few days' delay might lead to the destruction of property many hundred times the value of the work, and if such a result arise from the neglect of the contractor he should be held responsible.

In such cases, however, the contractor has generally counter-complaints of hindrance, etc., and it is usual to provide, in the specification, for the settlement of such questions by arbitration.

Very frequently, however, minor questions of this kind are settled by one or two referees named in the specification.

I have no doubt but that contractors would be willing to submit such questions to the decision of two District Officers.

(Signed) A. S. MOBERLY, Lieut. Colonel, R.E.,
Superintending Engineer, 3rd Division.

Copy of a Circular No. 1,241, *of the* 13*th July* 1869, *from the Superintending Engineer, 3rd Division, published in the Public Works sheet of District Gazettes.*

Specification of Works to be drawn up so clearly as to avoid doubts on any point.—The Superintending Engineer has constantly noticed the loose, meagre, and very unsatisfactory manner in which specifications for works are drawn up; the consequence is that when a work is given out on contract there are constant disputes, because what is required is not clearly entered in the written specification.

2. This should be divided into two heads, first, the conditions of the contract, and, second, the description of the work.

3. The title briefly states the nature and extent of works to be performed, and enumerates the drawings which are to accompany and form part of the written specification.

4. The conditions of the contract can be extracted from the paragraphs of the several sections of Chapter XVI. of the Public Works Code, and besides any special clauses or provisions which are required by the particular circumstances of each case. the following clauses should be inserted:—

1*st*.—The work is to be executed to the full intent and meaning of the drawings and specification, and to the satisfaction of the Executive Engineer or person in charge of the Range for the time being, and his superior officers.

2*nd*.—The contractor to take charge of the works during progress; to receive any materials required for the building, which by the agreement he does not supply, and to be responsible for all losses and accidents until completion.

3*rd*.—The amount of the contract to be paid by instalments, as the works proceed at the rate of per cent. on the amount of work done, and the balance within , from the date of the final certificate granted by the Executive Engineer or person in charge of the Range for the time being.

4*th*.—The works are to be completed within a stated time, under penalties which are enumerated.

5. The description of the works should detail minutely the quantity of the materials, and describe the manner in which every portion of the work is to be executed. Care should be taken that the drawings and specification should together contain every particular that is necessary to be known, in order to make a fair estimate of the value of the work.

6. The chief merit of a specification consists in the use of clear and explicit language, and in the systematic arrangement of its contents, so that the description of each portion of the work shall be found in its proper place.

7. With a clearly drawn out specification and a contract deed, according to the form circulated with G. O., No. 245, (*vide* endorsement No. 82-B., of 6th February 1869,) of 27th January 1869, there can be no difficulty for an unprejudiced person who understands anything of building to decide any disputes that might arise.

(Signed) A. S. MOBERLY, Lieut.-Colonel, R.E.,
Superintending Engineer, 3rd Division.

No. 306. From the Superintending Engineer in charge of 4th Division, to the Secretary to Government, Public Works Department, dated Madras, 29th June 1870, No. 1,398.

I HAVE the honour to acknowledge receipt of G. O., No. 1,501, dated 20th June 1870, calling upon Superintending Engineers to state their views on a form of contract for petty works drawn up by the Government Pleader, and, in reply, to state that I consider one or two modifications desirable in the wording of the proposed agreement.

2. Captain Oakes, in the 3rd paragraph of his form, evidently intends that, in the case of a work having to be taken out of the hands of a contractor, the Government should be reimbursed by the forfeiture of the security money for the risk, delay, trouble, and, occasionally, eventual loss, inflicted by resorting to this measure.

3. Mr. Handley, in paragraph 3 of his letter, says, that such a procedure would be illegal, and that it is objectionable to preclude the contractor from completing the contract, and at the same time to exact the penalty for non-completion.

However this may be, the mere fact of the Superintending Engineer or Range Officer taking the work out of the hands of the contractor according to the terms of the contract shows that the work is wrongly done with bad material, or that it is impossible for the contractor to complete the work within the period specified, for it is on these grounds alone that this course is taken, and it is necessary that a penalty should be inflicted.

4. Though Executive Officers should be careful in ascertaining the character and position of the men they deal with, it sometimes happens that contractors get works given them without their having a competent knowledge of building, and with the object solely of realizing, at the cost of the work, the utmost possible profits out of the contract. In such cases as the work progresses from ignorance of the cost of such works and other causes, they find that the speculation is not likely to be a profitable one, and they delay progress in every possible way until the officer is compelled to take over the work himself, at a risk of loss to Government, to ensure its completion within a reasonable period. It may happen that an irrigation or road work of masonry requires to be completed within a specified time, and before rains or freshes are expected in a river or channel. A defaulting contractor may so delay this work that it is a question whether it can be completed, when taken out of his hands, without loss, and he should be made to pay for any damage accruing to the work.

5. Mr. Handley, in the form of contract appended to his letter, makes provision for the forfeiture of the sum in deposit, as liquidated damages in default of the performance of all or any of the terms of the agreement, and one of the terms of the agreement is shown to be the completion of the work within a specified period; yet, from the last paragraph of the form of contract, it would appear that in case of probable or anticipated failure in the time of completing the work, it is to be taken out of the contractor's hands, and no penalty inflicted but only the payment enforced of the cost of the work over and above the sum entered in the estimate. This extra cost, it is shown in the last sentence of the form, also, is to be deducted from the security in deposit, "in case the same be not forfeited," which would mean that a penalty for non-completion is contemplated.

6. I think an officer should have the power of annulling the contract when neglect or delay to the danger of the work is experienced, and when wrong construction as well as bad material are met with; in all instances a penalty being inflicted on the contractor for default in performance of the contract.

7. In the latter portion of paragraph 3 of his letter, the Government Pleader states that the amount of deposit is supposed to be fixed so as to cover all loss even from total failure of the contractor, and therefore Government cannot be losers by having to pay for work of which they obtain the benefit.

8. A case, however, may occur in which a contractor may have used bad materials quite unfitted for a work, necessitating their removal and the re-construction of the work. In this instance, Government cannot benefit if the amount of deposit does not cover the loss.

No. 307. From the Acting Superintending Engineer, 5th Division, to the Secretary to Government, Public Works Department, dated Sooramungalum, 29th August 1870, No. 106.

In reference to G. O., No. 1,501, dated 20th June 1870, I have the honour to state that the Form of Contract Bond prepared by the Government Pleader appears to me less grotesque in its phrascology, and more suitable for the purpose than that previously ordered. Some provision, however, should perhaps be made to protect Range Officers from civil action when works are peremptorily stopped by Government, and payments are withheld for many months for work actually executed, as was the case during the last official year.

2. The omission, in the new form, of the heading of the old form, namely, "Know all men by these presents," is assuredly an improvement, as a Native contractor could scarcely conceive that such an expression was mere useless verbiage; but he would naturally consider that "these presents" referred to "Nuzzars" of some kind or other to be offered by him, some form of "Khutput" or "Dustoorie" which the late East India Company were at much pains to suppress, but which the Imperial Government were about to revive in common with the Moturpha and other taxes.

3. It is directed in G. O., No. 376, dated 27th April 1870, that in all agreements executed by the officers of the Public Works Department, the words, "by order of the Governor in Council," shall be entered. But this "new form of words" has not been adopted by the Government Pleader in the form under notice.

4. I most earnestly trust, however, that whatever form of contract may be eventually adopted, it may not be compulsory in its issue throughout the length and breadth of this Division, but that Range Officers shall have the latitude conceded to them of putting it into force or not, as appears to them to best suit the exigencies of the case.

5. In the Agricultural Districts of this Division work is carried out on the simple form enclosed, which, executed on "Stamp" paper, appears to be binding on the consciences of the contractors, and is found to work satisfactorily.

6. To all unprejudiced minds it cannot but appear lamentable that our so-called civilization looks contemptuously on a simple form of agreement such as that above quoted, but that an agreement to be binding with us must be hedged round with all kinds of legal technicalities, quibbles, and vain repetitions.

7. Why should the work extend beyond the individual contractor concerned, instead of ceasing with his death? To make it descend to his "heirs or representatives" appears to me to introduce an element of confusion that would better be avoided.

8. In the same way as regards security. In the Agricultural Talooks it is to the manifest interest of the villagers to carry out effectually the repair of their irrigation works. If security be exacted, it will frequently prove a bar to progress with those who are not as a rule overburthened with ready cash; and as no work is to be paid for until completed, it is always within the competence of the Range Officer to cut the contractor's account for delays or bad workmanship, as per agreement.

9. I can only say, in conclusion, that the form of Contract Bond suggested by Captain Oakes, R.E., appears to me, with the reservations above indicated, more

suitable to the country than that recommended by the Government Pleader; and I cannot but deplore the supposed necessity of introducing into the agricultural provinces a form so suggestive of legal quibbles as that prepared by the latter-mentioned officer.

Translation of an Agreement for Petty Work in No. 3 Range, South Arcot.

We, Thandavaroya Conan and Oothemdy Conan, Moonsiff of Valavanthancoopum in the Cullakurchi Talook, South Arcot, do hereby agree in the presence of the Assistant Engineer, No. 3 Range, South Arcot, to repair the tank bank of the above village, and to execute the work within three months, from 1st May 1870, satisfactorily and in accordance with the estimate and the orders of the Overseer, as well as to receive the money in two instalments, the first on one-half of the work being done, and the second after the work is completed.

2. In default of the work not being completed within the specified time, we agree to forfeit 5 Rupees for each day exceeding the three months.

(True Translation.)

(Signed) R. A. ROBERTS, Captain, R. E.,
Actg. Suptg. Engr., 5th Division.

No. 308. From the Superintending Engineer, 6th Division, to the Secretary to Government, Public Works Department, dated Tanjore, 29th November 1870, No. 725.

With reference to G. O., No. 1,501, dated 20th June, I have the honour to observe that the Government Pleader regards the conditions for non-fulfilment of a contract laid down in the form of contract submitted by me as too stringent, and modifies the portion which relates to work which, owing to delay on the part of the contractor, it is manifestly impossible for the contractor to complete within the specified period, and which the Range Officer is compelled to take away from the contractor and to complete departmentally. On such occasions it would appear that the actual excess cost for completing the work is to be recovered from the contractor by deductions from the sum deposited as liquidated damages, but if the work can be, and is, completed within the estimated amount, the contractor forfeits nothing, and hence a contractor who, during the progress of a work, found he was not likely to complete the work within the specified time, would stop work altogether so as to force the Executive Officer to take the work from him and to complete it departmentally or by contract, for then he might lose nothing, namely, if the work were completed departmentally or otherwise within the estimated amount, while at the worst he would probably lose only a portion of the amount of the liquidated damages; but, if the work were not completed by the contractor within the specified time, and if the Range Officer could, without risk, allow him to dawdle on with the work till the contract time had expired, then only could the liquidated damages be recovered.

2. The working season in the 6th Division in the river supplied portions is very limited, and hence it would be necessary for the Range Officer to take a work from a contractor if there was any prospect of his not completing it within the prescribed time, for if a work, such as a sluice, were incomplete when the rivers were flooded, either the land which should be supplied by the incomplete sluice would lose its supply for a season, or the bank in which the sluice was being built might be breached, and the loss to Government and to others might be very con-

siderable indeed, perhaps a hundred times the value of the work under execution, while the liquidated damages cannot be fixed at an amount which would probably cover all contingencies and risks, and hence the highly penal nature of the conditions entered in the form of contract submitted by me. Some modification in the contract appears to be necessary to prevent its being of advantage to a contractor to stop a work altogether if he found he could not complete it within the specified period.

3. The latter part of the form of contract prepared by the Government Pleader is not very clear, namely, from "and it is hereby further agreed that if the said A. B. shall not complete the said work within the said months according to this agreement" * * * * "then it shall be lawful for the Range Officer upon giving days notice of his intention so to do to take the said works out of the hands of the said A. B., and complete the same himself, etc., etc." According to the earlier portion of the contract, the contractor is to forfeit the sum deposited as "liquidated damages" for non-completion of the work within the stipulated period. Is the quotation made above intended to imply that the Range Officer may, if he wishes it, insist upon the contractor completing the work even after the stipulated period for completion has passed? And, if so, may the liquidated damages be recovered in their entirety, or must the sum deposited as liquidated damages be refunded on the completion of the work? Or, in other words, does the fact of the contractor being permitted to complete a work after the period mentioned in the contract altogether invalidate the terms of the original contract, and render the retention of the amount deposited as liquidated damages inadmissible or illegal?

4. It would be of great advantage if forms of contract for petty works could be printed and be stamped at the Collector's office on the payment of the necessary fee.

No. 309. From the Acting Superintending Engineer, 7th Division, to the Secretary to Government, Public Works Department, dated Camp at Bhowany, 19th July 1870, No. 77.

With reference to paragraph 2 of G. O., No. 1,501, of 20th June 1870, I have the honour to report that the form of contract prepared by the Government Pleader appears to meet all that is required in the case of petty contracts.

2. I would note that paragraph 1 of Act XIII. of 1859 sufficiently provides for minor contracts entered into with artificers and labourers.

No. 310. From the Acting Superintending Engineer, 8th Division, to the Secretary to Government, Public Works Department, dated Palamcottah, 8th August 1870, No. 1,314.

I have the honour to reply to G. O. of 20th June, No. 1,501, on the subject of form of Contract Bond for petty works.

2. The form of bond drawn up by the Government Pleader would appear to be well adapted for the purpose, except that a clause for payment by instalments on measurements taken by an Executive Officer during the progress of a work seems preferable to that providing for the payment in a lump sum after the full completion of the work.

3. Some of the Executive Officers in this Division apprehend a difficulty in persuading contractors to deposit security. The practice in the Division for the last few years has been neither to take security nor to draw up any bond at all when giving out work to contractors.

4. Lieutenant Shepherd states, in reply to my reference to him on the subject, that the contractor for the Streeviguntum Anicut Works* even has no legal document to bind him to complete the contract; that he "should have considered it more satisfactory if a proper legal agreement had been drawn up; but Captain Prendergast, R.E., the late Acting Superintending Engineer, disapproved of legal agreements when advances were not given."

* Rupees 8,31,600.

5. My own opinion is that whether security is taken or not some legal agreement should always exist when contractors are employed to execute Government work, especially important work; but in this Division Executive Officers have got into the practice of employing men without generally drawing up any written agreement at all, and they consequently have it in their power to dismiss a contractor summarily and employ another. I do not consider that this system is one that is at all likely to encourage a good class of men to take up Government work, and in this Division some of the work executed under the system in question by men who have been called "respectable" contractors is so very indifferent that a reform is most urgently needed.

No. 311. From the Special Executive Engineer in charge of Wynaad, to the Secretary to Government, Public Works Department, dated Luckadie, Wynaad, 29th June 1870, No. 453.

With reference to G. O., No. 1,501, dated 20th instant, I have the honour to observe that I am in the habit of generally making contracts for petty works in such manner as to bring them under the provisions of the breach of contract law, punishment under which does not destroy power to subsequently sue civilly for recovery of any advances that may have been made; it appears to me that a pecuniary penalty for non-fulfilment of his agreement removes the contractor from liability to the criminal law, and makes the contract simply a civil case, and as such the wording of the bond seems to me sufficiently explicit. In Wynaad, however, it would be utterly inoperative, as contractors, so far from being prepared to deposit security, will never touch a contract without an advance.

2. I take the opportunity of asking the question whether I am right in supposing that a pecuniary penalty either by way of fine or damages inserted in an agreement destroys liability to the criminal provisions of the breach of contract law.

No. 312. Order thereon, 19th January 1871, No. 148.

ESTABLISHMENT, No. 33.

In his letter of the 27th April 1870, No. 107, the Superintending Engineer of the 6th Division brought to notice that the form of Contract Bond received from the Government of India and circulated with G. O., dated 27th January 1869, No. 245, could be made applicable only

to contracts for large works, but that it would not meet the requirements of petty works for which neither specifications are required nor tenders invited. Captain Oakes accordingly submitted a form of agreement which, in his opinion, would be suitable for this class of works, and that form having been forwarded to the Government Pleader for an expression of his views, Mr. Handley gave his opinion in his letter recorded in G. O. of the 20th June 1870, No. 1,501, and submitted an alternative form which he recommended might be adopted with such modifications as might be deemed advisable.

2. Before passing final orders on the subject the Government wished to have before them the views of the several Superintending Engineers on the form of agreement submitted by the Government Pleader, and the correspondence regarding it was accordingly communicated to them.

3. The papers recorded at the head of these Proceedings are the replies to this reference, and from these it would appear that the form submitted by the Government Pleader is generally approved by the Superintending Engineers of the 1st, 2nd, 4th, 6th, 7th, and 8th Divisions, and the Officer in charge of Public Works Operations in Wynaad, some of whom, however, suggest the following modifications:—

4. The Superintending Engineer of the 4th Division is of opinion that the grounds for taking a work out of the hands of a contractor being his inability to finish it within the time stipulated for its completion, or his executing it with bad materials, he should, when recourse is had to such a measure, be subjected to a penalty.

5. The Superintending Engineer of the 6th Division points out that the form of Contract Bond, as modified by the Government Pleader, would be to the advantage of a defaulting contractor, while the damage occasioned by neglect or delay on his part in completing a work within a specified time, might be far in excess of its value and his security taken together. Captain Oakes is therefore of opinion that the form should be modified.

6. The Superintending Engineer of the 8th Division considers that, instead of paying in a lump sum for a work after its final completion, the preferable course would be to make payments during its progress by instalments on measurements taken by Executive Officers.

7. Major Kennedy thinks that a pecuniary penalty attached to the non-performance of a contract renders it a civil case and protects a contractor from criminal prosecution under the provisions of the breach of contract law.

8. The Superintending Engineers of the 3rd and 5th Divisions, who disapprove of the form of Contract Bond drawn up by the Government Pleader, make the under-mentioned suggestions.

9. Not advocating, as is contemplated by the form in question, the deposit of security before the commencement of a work, nor payment for it only after its completion, the Superintending Engineer of the 3rd Division recommends regular and frequent payments with a deduction of 10 per cent. on the value of the work performed, which, in his opinion, is the best guarantee for its due execution. Lieutenant-Colonel Moberly accordingly suggests a slight alteration of the form circulated with G. O., No. 215, dated 27th January 1869.

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19th January 1871.

10. In the opinion of the Superintending Engineer of the 5th Division the form of agreement suggested by Captain Oakes is preferable to that submitted by the Government Pleader, with the reservations noted below:—

1*st.*—That after the death of a contractor his contract should become void instead of its being made binding on his heirs or representatives.

2*nd.*—That, as, from the proposal to pay for a work only after its completion, it will be in the power of a Range Officer to retrench a contractor's account for delays or bad workmanship, it is not necessary to make him lodge security for its due performance.

11. Before further considering the subject His Excellency the Governor in Council is of opinion that the Government Pleader should be afforded an opportunity of being made acquainted with the remarks of some of the Superintending Engineers as well as with the modifications suggested by others, and with this view the papers will be communicated to Mr. Handley with a request that he will submit such observations as he may have to offer, together with such revised draft as he may consider will meet the more important of the objections or suggestions of the various Superintending Engineers.

(True Extract.)

Colonel, R.E.,
Secretary to Government.

To the Government Pleader.

Exd. E. C. Shunker.

Read 1st to the

SUPERINTENDING ENGINEER'S OFFICE, 1ST DIVISION

DOWLAISHWARUM, August 1870.

No.

From

Major J. F. Fischer R.E.

Acting Superintending Engineer

1st Division

To

Colonel C. A. Orr R.E.

Secretary to Government D. P. W.

Madras

SIR,

With reference to G. O. of the 20th June last, No 1501, I have the honor to report that I consider the Form of Contract of Petty Works, thereiu published, provides sufficiently for all the kinds of work is likely to be given to Ordinary Contractors.

I have the honor to be

Sir

Your most Obdt Servant

Wm H Fischer Major R.E

Asst Superintending Engineer 1st Division

No 146

Superintending Engr Office
2d Dn Bayonets
6th July 1870.

From Colonel T. J. Moberly R.E.
Superintending Engineer 2d Dn

To Colonel C. A. Orr R.E.
Secretary to Government &c &c &c
Madras.

Sir

I have the honor to observe that I have no suggestion to offer regarding the form of Contract bond forwarded with G.O. No 1501 dated 25th June 1870. the principal amount of work done in this Division being executed as task work.

I have the honor to be
Sir
Your most Obt Servant
T. J. Moberly Colonel R.E.
Superintending Engineer 2d Dn

Public Works 1870 Establishment
Civil Engineers
No 1545
From
The Secretary to Government
Madras
To
The Superintending Engineer
2nd Division
Dated 24th August 1870
Rec'd 1st Sept

Sir

I am directed to forward for your information a copy of the undermentioned paper and to request that you will favour this office with your opinion thereon.

No 1501 dated 25th June 1870 with enclosure.

Letter from Colonel T. J. Moberly R.E. Superintending Engineer 2d Dn dated 6th July 1870 No 146.

I am &c
(Signed) C. A. Orr
Colonel R.E.
Secretary to Government

No 1484-19 Public

Copy of a Letter No 214 Office of Engineers 10th June 1870
from Major Genl Meade Philadelphia to Lieut Colonel
the Chief of Engineers Washington D.C.
the Superintending Engineer
the Inspecting Engineer

Reference to Previous Letters.

Subject.

For my opinion as to the Legality of the Tenders
that I should enter into Contract with Messrs
Schmidt and Conner of New Mexico that
Schmidt and Conner should furnish
Hall the Materials required for the Building
mentioned in the letter of Lieut Colonel Sitgreaves
the letter of Lieutenant Mac Sitgreaves of the 7th
and the Specification of the Works

I regret that the circumstances of the case
have the Effect of placing me in a position of
difficulty and embarrassment in replying to
your letter of the 3rd inst. I am very reluctant
to give an opinion which may be construed as
a censure on the action of officers who are
entitled to my respect and consideration
but the nature of the case renders it impossible
for me to avoid doing so. I am of opinion that
the letter of Lieut Colonel Sitgreaves of the 7th
of May last, authorizing Messrs Schmidt and Conner
to enter into a contract with them for the supply
of Lumber, Adobes, and Stone, was illegal
and improper, and that the action of those gentlemen
in signing a contract with Messrs Schmidt and Conner
was illegal and improper, and that the Bonds
executed by Messrs Schmidt and Conner are
void and of no effect. I allude to the Clause
in the Bonds which binds the Contractors to
furnishing that the Quantities and Qualities

Nov 16
Rec'd 29th June
from Gen Meade Phila 26th
The Secretary of War
2d Division
The Secretary of War
2d Div
dated 6th July 1870
Rec'd 11th July

Observe that
the Reasons suggested
to officer respecting
the form of Contract
Bonds.

No 148-19 Dec 71

CE 824

should be treated as liquidated damages
and as the following remark has reference
to a point of Law I beg to explain that I
would not presume to offer an opinion about
it, only that I believe Mr Hawkesley was
not aware of certain facts when he drafted
the bond:-

If I am right a penal sum would be considered as liquidated damages only in cases where from the complexity of the work it would be impossible to assess the damages arising from a failure to complete the Contract or where an indefinite time would have to elapse to develope the damage or injury arising from such failure. This is not the case in the Public Works generally. The damage sustained by a failure of Contract can in the great majority of cases be readily ascertained; and in my opinion any penal sum would be treated not as liquidated damages but simply as a penalty and its confiscation would be subject to the restrictions the Law provides, even though the parties to the Contract had agreed and had expressly stated that it should be considered liquidated damages and not a penalty.

I do not therefore see the use of Amendering the bond with any reference to liquidated damages.

4. Mr Hawkesley's draft provides for paying the whole Amount in the Completion of the work. This would suit very few cases only those of very small works. No Contractor could wait for payment until the whole of the work was done; he could in the usual way obtain different Contractors are generally paid on account as the work proceeds.

5. There is no form of Contract or Tender perfect as a Tender and its acceptance.

It is a form usually adopted by the Engineers and Surveyors of Government and other Departments in England. It is found to work well and it might I think be adopted with advantage for all Public Works in the Country.

Of course a tender must tie to do something in a particular way for a certain Amount, and this would lead to the impropriety of having one specification for each work, but I do not think that this would cause much inconvenience. Indeed I believe that a Clearly drawn specification provides the best chance of avoiding misconception and thereby misunderstanding and litigation, and I also think that when an Estimate is made to suit as to render a Specification unnecessary there is no real saving of time or trouble.

6. I know very well that it would be hard to draw up an Office specification for each petty work, and that the other plan which probably influences Captain Douglas to avoid the use of specifications except in the case of works which are sufficiently important to occupy his own attention, but the difficulty might be got over by the use of general specifications carefully drawn with

for each class of work and printed, leaving space for the entry of any conditions peculiar to any one work. Besides a description of how the work should be done, these specifications would contain all the necessary protective and penal clauses, and show how payments would be made. They (as also the plans if any) would be signed by both the Engineer and the Contractor, and all that would then be necessary would be for the Contractor to give a tender (which might be in a printed form also) to do the work according to the Plan and Specification signed by him for a certain sum, and the acceptance of this tender by the Engineer would complete the Contract. In such cases it is held that the whole Specification becomes a portion of the Contract, and it is accepted as evidence of what the conditions were, unless there was a total departure from the plans.

In many cases, and perhaps especially in Japan, it would be unnecessary to describe the details of many of the works, a reference to an existing one being sufficient.

There is an objection to a Contractor lodging money as security for the performance of a Contract. It deprives him of a portion of his capital, and few Contractors in this Country can afford that.

In other cases of a limited nature, according to Mr Handley's draft, Completion of the whole work would be a condition precedent to the payment for any portion of it, what further security need be required?

In other cases if the Contractor failed or was about to fail, a protective clause in the Specification would be necessary, enabling the Engineer to give notice and complete the work himself; and the Contractor could not maintain an action on account of the portion he had done. And here I would remark that if Mr Handley's draft bond be adopted, I would suggest an alteration in the wording of the concluding passage; where it is stated that if the Engineer is obliged to complete the work himself the Contractor shall make good the difference which may be deducted from the said sum if ... shall exceed the amount deposited it may be argued from this passage that the Contractor was liable for the amount of the deposit only whereas he should be held responsible for the entire cost so long as the Plan and Specification were not departed from, and the Engineer had exercised proper economy.

In the case of a large work which would be paid for by instalments either at certain intervals of time or as certain portions of the work were completed, the Conditions would be that no payment should be made unless the Contractor produced a Certificate of approval from the Superintendent or Engineer, and also, that of the whole amount due for work done up to date 10, 15, 20 or any other percentage should be retained until the time of paying the next instalment, or there deductions might be allowed to accumulate upto a certain amount which should bear a certain relation to the whole Estimate cost, or upto the time of final Completion and payment.

This is the plan I have myself adopted for many years, and I have always found that it gave me ample control over the Contractor, and security for the performance of the work.

The present form of Contractors' Certificate is suitable to this arrangement, as the Amount held back appears upon the face of the Certificate.

8. Compensation for damages in cases non-Completion of Contract should be provided for in the Specification.

In a District like Sangine heavy losses might arise from the Contractor failing to complete a work within the prescribed time.

I allude to protective works on River and Seacoast, where a few days delay might lead to the destruction of property to many hundred times the value of the work, and if such a result arise from the neglect of the Contractor he should be held responsible.

In such cases, however, the Contract has generally some Compliants of hindrance &c; and it should provide in the Specification for the settlement of such questions by Arbitration.

Very frequently, however, minor questions of time would not be disputed, or two Referees named in the Specification.

I have no doubt but that Contractors would be willing to submit such questions to the decision of two District Officers.

W. Hutton Lt Col RE
Supdg Engineer &c &c

From
The Superintending Engr
3rd Divn
To
The Secretary to Govt
P.W.D.

Dated 21st Sept 1870
Rec.d

Copy of a Circular No 1241 of the 13th July 1869 from the Superintending Engineer 3rd Division published in the P.W. Sheet of District Gazette.

Specification of Works to be drawn up so clearly as to avoid doubts on any point.

The Superintending Engineer has constantly noticed the loose meagre and very unsatisfactory manner in which specifications for works are drawn up: the consequence is that when a work is given out on Contract there are constant disputes because what is required is not clearly entered in the written Specification.

2. This should be devided into two heads 1st, the Conditions of the Contract and 2nd, the description of the work.

3. The title briefly states the nature and extent of works to be performed and enumerates the drawings which are to accompany and form part of the written Specification.

4. The Conditions of the Contract can be extracted from the paragraphs of the general sections of Chapter XVI of the P. W. Code and besides any special clauses or provisions which are required by the particular circumstances of each case, the following clauses should be inserted.

1st The work is to be executed to the full intent and meaning of the drawings and specification and to the satisfaction of the Executive Engineer or person in charge of the Range for the time being and his Superior Officers.

2nd The Contractor to take charge of the

works during progress to receive any materials required for the building which by the agreement he does not supply, and to be responsible for all loses and accidents until Completion.

3. The amount of the Contract to be paid by instalments as the works proceed, at the rate of ——— per Cent on the Amount of work done and the balance within ——— from the date of the final Certificate granted by the Executive Engineer or person in charge of the Range for the time being.

4. The works are to be completed within a stated time under penalties which are enumerated.

5. The description of the works should detail minutely the quantity of the materials and describe the manner in which every portion of the work is to be executed. Care should be taken that the drawings and Specification should together Contain every particular that is necessary to be known in order to make a fair estimate of the value of the work.

6. The Chief merit of a specification consists in the use of clear and explicit language and in the systematic arrangement of its contents so that the description of each portion of the work shall be found in its proper place.

7. With a clearly drawn out specification and a Contract deed, according to the form Circulated with G. O. No. 245 (Vide Endorsement No. 82 B, of 6th February 1869) of 27th January 1869, there can be no difficulty for an unprejudiced person who understands any thing of building, to decide any

0° 293

No. 1381.

Superintending Engineer's Office.
3rd Division.
Camp Goorumconda, Vellpaud Talook
Cuddapah District.
The 21st September 1870.

From,
The Superintending Engineer
3rd Division.

To,
The Secretary to Government
Public Works Department
Fort Saint George.

Enclosures.
1 Copy Mr Fraser's letter
1 " Sydney Sign's "

Sir,

With reference to G. O. No 1501 of 20th June 1870 I have the honor to report upon that, having taken the opinion of the Several Range Officers in this Division, I think I cannot do better than forward a copy of Mr Fraser's letter on the subject, as it perfectly expresses my views, and also a copy of a Circular issued by me about a year ago. In my opinion the Bond should be as simple as possible and as I advocate withholding, at time of payment for work done, a percentage (say 10%) of the value of the work I would suggest a slight alteration of the form of Bond Circulated with G. O. No 246 of 27th January 1869 and which is very similar to Form No 5 in Chapter XVI of the Madras P. W. Code.

From
The Collector Sys.
3rd Division.
To
The Secy: to Govt
P.W.D.

Dated 21st Sept: 1870.
Rec.
PW 3775/70

Copy of Circular from the Collector Sys. 3rd Division dated 21st Sept: 1870 to all the Range Officers under his Charge.

1870.11.

2. Mr Standley's form of Bond apparently applies only to cases where the Contractor is in a position to carry out the work to Completion before receiving any payment, and for lodging Security beforehand – I do not advocate the lodging of any Security but advocate regular and Constant payments and a deduction of 10 per cent which would be the Security for the due execution of the work. It might be considered advisable to lodge some Security at first for the Commencement of the work within a certain time of the signing of the Bond, but this should be returned as soon as some work is done and we should fall back on the percentage.

I have the

[illegible] Lt Col RE
Superintending 3rd Div

No. 1398 Superintending Engineer's Office
Madras 29th Sept. 1870.

No. 31 //

From
Lieut. Colonel J. A. Dyas R.E.
Superintending Engineer
3rd Division.

To
The Secretary to Government
Public Works Department
Fort St. George.

Sir

I have the honor to acknowledge the receipt of your No. 1501 dated 20th June 1870 forwarding for my information and guidance a copy of a letter from the Secretary to the Government of India in the Public Works Department No. 1148-19 "Land" dated 16th June 1870 and to request that I may be favored with a copy of the Circular issued by the Bombay Govt. describing the manner in which land is to be given on Contract.

I have the honor to be
Sir
Your most obedient servant
J. A. Dyas
Lieut. Colonel R.E.
Superintending Engineer
3rd Division.

From, The Superintending Engineer 3rd Division. No. 1381 Dated 21 September 1870. Received 28 September 1870.

Subject: Land for Railway purposes.

Requests copy of Bombay Circular regarding manner in which land is to be given on Contract.

No. 148-19 "Land" 16th June 1870.

No. 305

security money, for the risk, delay, trouble, and, occasionally, eventual loss, inflicted by resorting to this measure.

3 Mr Handley in paragraph 3 of his letter says that such a procedure would be illegal, and that it is objectionable to preclude the Contractor from completing the Contract and at the same time to exact the penalty for non completion. However this may be, the mere fact of the Superintending Engineer or Range Officer taking the work out of the hands of the Contractor, according to the terms of the Contract, shows that the work is wrongly done with bad material or that it is impossible for the Contractor to complete the work within the period specified, for it is on these grounds alone that this course is taken, and it is necessary that a penalty should be inflicted.

4 Though Executive Officers should be careful in ascertaining the character and position of the men they deal with, it sometimes happens that Contractors get works given them without their having a competent knowledge of building, and with the object solely of realizing, at the cost of the work, the utmost possible profits out of the Contract. In such cases, as the work progresses, from ignorance of the cost of such works and other causes, they find that the speculation is not likely to be a profitable one, and they delay progress in every possible way, until the Officer is compelled to take over the work himself, at a risk of loss to Government, to ensure its completion within a reasonable period. It may happen that an irrigation or road work of masonry requires to be completed within a specified time and before rains or freshes are expected in a river or channel. A defaulting Contractor may so delay this work that it is a question whether it can be completed

when

when taken out of his hands, without loss, and he should be made to pay for any damage accruing to the work.

5. Mr Handley in the form of Contract appended to his letter makes provision for the forfeiture of the sum in deposit as liquidated damages, in default of the performance of all or any of the terms of the agreement, and one of the terms of the agreement is shown to be the completion of the work within a specified period, yet from the last paragraph of the form of Contract, it would appear that, in case of probable or anticipated failure in the time of completing the work, it is to be taken out of the Contractors hands and no penalty inflicted but only the payment enforced of the cost of the work over and above the sum entered in the estimate. This extra cost it is shown in the last sentence of the form, also, is to be deducted from the security in deposit "in case the same be not forfeited" which would mean that a penalty for non completion is contemplated.

6 I think an Officer should have the power of annulling the Contract when neglect or delay to the danger of the work is experienced and when wrong construction as well as bad material are met with, in all instances a penalty being inflicted on the Contractor for default in performance of the Contract.

7 In the latter portion of paragraph 3 of his letter, the Government Reader states that the amount of deposit is supposed to be fixed so as to cover all loss even from total failure of the Contractor, and therefore Government cannot be losers by having to pay for work of which they obtain the benefit.

8. A case however may occur in which a Contractor may have used bad materials quite unfitted for a work, necessitating their Removal and the Reconstruction of the work. In this instance Government cannot benefit if the amount of deposit does not cover the loss.

I have the honor to be
Sir
Your most obedient servant

Wm Lieut Col RE
Asstg Engr in Ch. 9th Dn

Translation of Conn Agreement for Petty Works in No 3 Range, South Act.—

37

We, Shandonagha Commissioners and Others hereby Convey to Thomas Conn in the Ballahuaghi Valuation Section of the Assistant Engineer, No 3 Range, South Act, to repair the South bank of the above village and to guard the work within 3 months from Michaelmas 1870, Satisfactorily and in accordance with the Estimate and the orders of the Overseer as well as to receive the money in Six instalments, the 1st on the 15th of the month being done, and the 2d after the work is completed.

In default of the works not being completed within the specified time, we agree to forfeits unless the such day; according to the 3 months

True Translation

Peter A. Corbett
Clerk
Ag. Assistant Engineer

Dft 1870 Depart
Pro. of Govt for Conv
From No 2595

The Lieut Lieutenant in Ch
to Dec

To
The Secretary to Govt
Pt Depth

Dated
Rec'd 29 Dec 1870

No 1398

Giving his views
on the form of Contract
bond for petty
works drawn up
by the Government
Engineer.—

No 1481 - 19 Dec 1870.

No 306

C 4115

No 106. Superintg. Engineer's Office, 5th Division,
Sooramungalum, 29th August 1870.

From,
Captain R.A. Roberts, R.E.
Ag. Superintg. Engineer, 5th Divn.,

To,
Colonel Charles A. Ort, R.E.,
Secretary to Government, P.W. Deptt.

Sir,

In reference to G.O. No. 1501 dated
Enclosure 1. 20th June 1870, I have the honor to state
that the Form of Contract Bond prepared
by the Government Pleader appears to me
less grotesque in its phraseology and
more suitable for the purpose than that
previously ordered.- Some provision, however,
should, perhaps, be made to protect Ranga
officers from Civil action, when works are
peremptorily stopped by Government, and
payments are withheld for many months
for work actually executed, as was the case
during the last official year.—

2. The omission in the New Form,
of the Heading of the old Form, viz: "Know
all men by these presents" is assuredly
an improvement, as a native Contractor
could scarcely conceive that such an

Enclosure in letter
No. 106 dated 29th August
from Supt. Engr. 5th Divn.
to the Secy. to Govt.

Translation of an
Agreement for Settling
Work in No 3 Jungle
South Arcot.—

expression was mere useless verbiage, but he would naturally consider that "these presents" referred to "Nuzzars" of some kind or other, to be offered by him, some form of "Khirkpat" or "Dustoorie" which the late East India Company were at much pains to suppress, but which the Imperial Government were about to revive in common with the Motumpha and other taxes.—

3. It is directed, in G.O. No. 316, dated 24th April 1860, that in all agreements executed by the officers of the Public Works Department, the words, "by order of the Governor in Council" shall be entered.— But this "new form of words" has not been adopted by the Government Pleader in the Form under notice.—

4. I most earnestly trust, however, that whatever Form of Contract may be eventually adopted, it may not be compulsory in its issue throughout the length and breadth of this Division, but that Range officers shall have the latitude conceded to them of putting it into force, or not, as appears to them to best suit the exigencies of the case.—

5. In the Agricultural Districts of this Division work is carried out on the simple Form enclosed, which, stamped on "Stamp" paper appears to be binding on the consciences of the Contractors, and is found to work satisfactorily.—

6. To all unprejudiced minds it cannot but appear lamentable that on so called Civilization looks contemptuously on with a simple form of agreement such as that above quoted, but that an agreement to be binding with us must be hedged round with all kinds of legal technicalities, quibbles, & vain repetitions

7. Why should the work attend beyond the individual Contractor concerned, instead of ceasing with his death?— To make it descend to his "heirs or representatives" appears to me to introduce an element of confusion that would better be avoided.

8. In the same way as regards Security.— In the agricultural talooks it is to the manifest interest of the villagers to carry out effectually the repair of their irrigation works.— If security be exacted, it will frequently prove a bar to progress with those who are not, as a rule,

overburthened

overburthened with ready cash.- And as no work is to be paid for until completed, it is always within the competence of the Range officer to cut the Contractor's account, for delays or bad workmanship, as per agreement.—

P.S. — I can only say, in conclusion, that the Form of Contract Bond suggested by Captain Oakes R.E. appears to me, with the reservations above indicated, more suitable to the country than that recommended by the Government Leader.- And I cannot but deplore the supposed necessity of introducing into the Agricultural Districts a Form so suggestive of legal quibbles as that prepared by the latter mentioned officer.

I have the honor to be
Sir
Your most obedient Servant.

Rich. H. Roberts Captain R.E.
Actg. Superintg. Engineer.

No 725.

Supg Engs Office 6th Division
Sangor 29th November 70.

From,

Captain R. F. Oakes RE
Superintending Engr 6th C

To,

Colonel C. A. Orr RE
Secretary to Govt P.W.D.
Madras.

Sir,

With reference to G.O. No. 1501, dated 20th June, I have the honor to observe that the Government Pleader regards the conditions for non-fulfilment of a Contract laid down in the form of Contract submitted by me, as too stringent and modifies the portion which relates to work which, owing to delay on the part of the Contractor, it is impossible for the Contractor to complete within the specified period and which the Range Officer is compelled to take away from the Contractor & to complete departmentally.

On

Dr 1870 Dec 1st
to Govt Law Dept
From No 3414
The Actg Supdg Engr
5th Division
To,
The Secty to Govt
P. W. Department.

Dated 29th
Recd 30 August 1870.

No 106. Encl.

Contract Bond.—
Giving his opinion on the Form of Contract Bond proposed by the Government Pleader.

No 148-19 Sangor 1/10.

No 807

On such occasions it would appear that the actual Services Cost for Completing the work is to be recovered from the Contractor by deductions from the sum deposited as liquidated damages, but if the work can be & is completed within the Estimated Amount the Contractor forfeits nothing, and hence a Contractor who, during the progress of a work, found he was not likely to complete the work within the specified time, would stop work altogether so as to force the Executive Officer to take the work from him & to complete it departmentally or by Contract, for then he might lose nothing. Viz. if the work were completed departmentally or otherwise within the Estimated amount, while at the worst he would probably lose only a portion of the Amount of the liquidated damages; but, if the work were not completed by the Contractor within the specified time and if the Range Officer could, without risk, allow him to dawdle on with the work till the Contract time had Expired then only could the liquidated damages be recovered.

2 —— The Working Season in the 6th Division in the Rivers supplied portions is very limited and hence it would be necessary for the Range Officer to take a work from a Contractor if there was any prospect of his not completing it within the prescribed time, for, if a work, such as a Sluice, were incomplete when the Rivers were flooded either the land which should be supplied by the incomplete Sluice would lose its supply for a Season or the bank in which the Sluice was being built might be breached and the loss to Government & to others might be very considerable indeed, perhaps, sometimes, the value of the work under Execution, while the liquidated damages cannot be fixed at an Amount which would probably Cover all Contingencies and risks & hence the highly penal nature of the Conditions

Returned

entered in the form of Contract submitted by me — Some modification in the Contract appears to be necessary to prevent its being of advantage to a Contractor to stop a work altogether if he found he could not complete it within the specified period.—

3 —— The latter part of the Form of Contract prepared by the Government Pleader is not very clear. viz from , and it is hereby further agreed that if the said A.B. shall not complete the said work within the said months according to this Agreement x x x x then it shall be lawful for the Range Officer upon giving days notice of his intention so to do to take the said works out of the hands of the said A.B. & complete the same himself &c &c —

According to the earlier portion of the Contract the Contractor is to forfeit the sum deposited as liquidated damages for non-completion of the work within the stipulated period. In the quotation made above intended to

51 21

to imply that the Range officer may if he wishes it, insist upon the Contractor completing the work even after the stipulated period for completion has passed? and if so, may the liquidated damages be recovered in their entirety or must the sum deposited as liquidated damages be refunded on the completion of the work? or in other words does the fact of the Contractor being permitted to complete a work after the period mentioned in the Contract altogether invalidate the terms of the original Contract and render the retention of the amount deposited as liquidated damages inadmissible or illegal.—

4 —— It would be of great advantage if forms of Contract for Petty works could be printed and be stamped at the Collectors' Office on the payment of the necessary Fee.—

I have the honor to be
Sir,
Your most Obd.t Servt.
H. F. Oates Capt.n R.s.—
Supt Engineer 6th Division

No 47 Supp. Engineer Officer's
to Division
Camp Bhamo 19th July
1870

From Major H. Fenwick R.E.
Off. Engr. & Surveyor

To The Secretary to Govt. of Madras
Madras -

Sir, With reference to Para 2 of G.O.
No 1501 of 20th June 1870, I have the honor
to submit that the form of Contract
prepared by the Govt. of Madras appears
to me well adapted for the Petty Contracts
of Petty Contracts -

2. I would note that Para 1 of Act
XIII of 1869, sufficiently provides for
Minor Contracts entered into with Artizans
and Labourers - I have the honor to be
Your most obedient Servant
H. Fenwick Major
Engr. & Surveyor

No 1870 Dept
Genl. of Govt for January
From No: 485
The Secy Engineer
to Govt
6 Divn
To The Secretary to Govt
P.W.D
Dated 29th
Rec'd 1st Dec. November 70
No 725

Replies to G.O.
No 1501 of 20 June 1870
regarding the form of
Contract - Bond for
Petty works -

No 908 No 145 19 Dec 1870

No. 1314

Palamcottah 23

8th August 1870

From

Major G. H. Payne

Ag. Superintending Engineer 8th Div.

To

Colonel C. A. Orr R.E.

Secretary to Government P.W.D.

Sir

I have the honor to reply to G.O. of 20th June No. 1501 on that subject of form of contract bond for petty works.

2 The form of bond drawn up by the Government Pleader would appear to be well adapted for the purpose, except that a clause for payment by instalments on measurements taken by an Executive Officer, during the progress of a work seems preferable to that providing for the payment in a lump sum after the full completion of the work.-

3 Some of the Executive Officers in this Division apprehend a difficulty in persuading Contractors to deposit security.- The practice in the Division for the last few years has been neither to take security nor to draw up any bond at all when giving out work to Contractors.-

4 Lieut. Shephard states in reply to my reference to him on the subject, that the Contractor for the Trivigentum Anicut works even has no legal document to bind

x Rs. 83,600

P.W. 1870 Department
From Ag. Supdg. Engr. 8th Div.
No. 2846.

The Agt. Supdg. Engineer
1st Div.

To
The Secretary to Govt.
P. W. D.
Madras

No. 77

Dated 19th
Rec'd 23rd July 1870

Reports that the form of Contract prepared by the Govt. Pleader appears to meet all that is required in the case of Petty Contracts.

No. 148 - 19th Jany/71

LD 319

him to complete the contract that he should have considered it more satisfactory if a proper legal agreement had been drawn up, but Captain Spindergast R.E. the late Acting Superintending Engineer disapproved of legal agreements when advances were not given."—

5 My own opinion is that whether security is taken or not some legal agreement should always exist, when Contractors are employed to execute Government work, especially important work, but in this Division Executive Officers have got into the practise of employing men without generally drawing up any written agreement at all, and they consequently have it in their power to dismiss a Contractor summarily, and employ another— I do not consider that this system is one that is at all likely to encourage a good class of men to take up Government work, and in this Division some of the work executed under the system of requesting by men who have been called "respectable Contractors" is sorry indifferent stuff a person as must urgently needed.

I have &c.

J. M. Pape Major

A/ Superintending Engineer 8th Div.

Special Ex. Engineer's Office
Suckadie, Wynaad, 29th
June 1870.

No. 453.

From
The Special Ex. Engineer
in charge Wynaad

To
The Secretary to Government
P. W. Dept.
Madras.

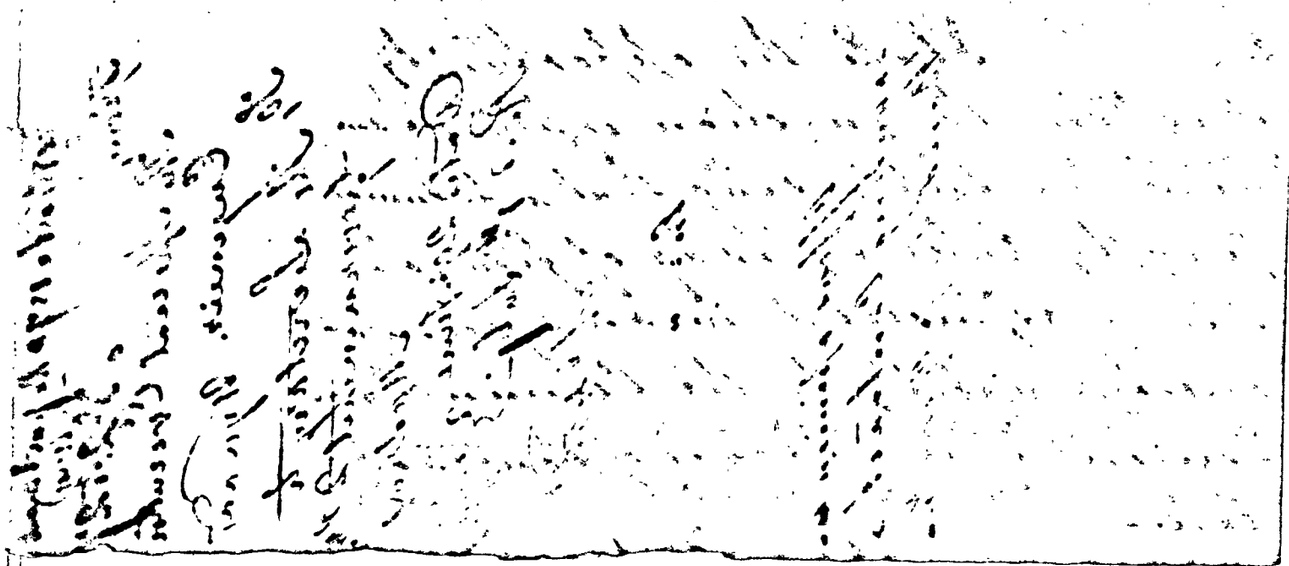
Sir,

With reference to G. O. No. 1501 dated 20th instant, I have the honor to observe that I am in the habit of generally making contracts for Petty works in such manner as to bring them under the provisions of the Breach of Contract Act, punishment under which does not destroy power to subsequently sue civilly for recovery of any advances that may have been made; it appears to me that a pecuniary penalty for non-fulfilment of his agreement removes the Contractor from liability to the Criminal law, and makes the Contract simply a Civil Case, and as such the wording of the bond

seems

P.W. 1870 Aug. 5
Pro. No. ... Irrigation
No. 3131
The Ag. Superintg. Engr.
8th Division
To
The Secretary to Govt.
P.W.D.
Dated 8th August 1870
Received 12 "
States his views on the form of Contract bond referred to in G.O. No. 1501 of 20th June 1870
No. 148-19 Jany/71.
Ap 310

seems to me sufficiently explicit,
In Maynard, however, it would be
utterly inoperative as Contractors
so far from being prepared to de-
-posit security will never tender
a Contract without an advance.
2. State the opportunity
of asking the question whether Govt
might, in supposing that a pecuniary
penalty either by way of fine, or
damages, inserted in an agreement
destroys liability to the Criminal pro-
-visions of the Breach of Contract
Law.
Shall the Report to be,
for
Your most obt Servant
Rbt. G. Hewett Capt.
Asst. Engineer Maynard



Public Works Department

No 1485

Proceedings of the Madras Government

Under date the 19th July 1870.

Read the following

From The Acting Supt Engr 1st Dn H.E. No 1570 of 8th August 1870

Do Do 2d Dn " " " 46 " 6th July " "

Do Do 3d Dn " " " 1381 " 21st September "

Do Do 4th Dn " " " 1398 " 29th June "

Do Do 5th Dn " " " 106 " 29th August "

Do Do 6th Dn " " " 725 " 29th November "

Do Do 7th Dn " " " 77 " 19th July "

Do Do 8th Dn " " " 1314 " 8th August "

Do Do Do Engineer Wynaad " " " 453 " 29th June "

From The Special Exr

In his letter of the 27th April 1870, No 107, the Superintending Engineer of the 6th Division brought to notice that the Form of Contract "B" No 2 of the Book of Forms received from the Govt of India and circulated with G.O. dated 27th January 1869, No 245 could be made applicable only to Contracts for large works, but that it would not meet the requirements of petty works for which neither Specifications are required nor tenders

Pub. Works 1870 Reinstated from Fin. Dept. Proceedings of 29th June 1870

From The Secretary to Government Public Works Dept.

To The Superintending Engineer 6th Division

Madras 29th June 1870

No 453

Sir,

I am directed by the Governor in Council to request that you will favour this Department with your opinion as to the expediency of introducing the Form of Contract "B" No 2 for petty works, and to state whether you would propose any modifications in the Form.

I have &c.

(Signed) W. Chamier

Secretary to Government

No 311

No 1485 dated 19th July 1870.

rivided. Capt. Baker accordingly submitted a form of agreement which in his opinion would be suitable for this class of works, and that form having been forwarded to the Govt. Pleader for an expression of his views, Mr Handley gave his opinion in his letter recorded in Gr. O of the 20th June/70, No 1501, and submitted an alternative form which he recommended might be adopted with such modifications as might be deemed advisable.

Before passing final orders in the subject the Govt. wished to have before them the views of the several Supt. Engineers on the form of agreement submitted by the Govt. Pleader; and the correspondence regarding it was accordingly communicated to them.

The papers recorded at the head of these Proceedings are the replies to this reference, and from these it would appear that the form submitted by the Govt. Pleader is generally approved by the Supt. Engineers of the 1st, 2nd, 4th, 6th, 7th and 8th Divisions and the Officer in charge of P.W. Operations in Wynaad, some of whom however suggest the following modifications.

The Supt. Engr. Nth 4th Division is of opinion that the grounds for taking a

work out of the hands of a Contractor being his inability to finish it within the time stipulated for its completion, or his executing it with bad materials, he should, when recourse is had to such a measure, be subjected to a penalty.

The Chf Engineer of the 6th Division points out that the form of Contract Bond as modified by the Govt Reader would be to the advantage of a defaulting Contractor, while the damage occasioned by neglect or delay on his part in completing a work within a specified time, might be far in excess of its value and his security taken together.

2/67

Capt Oakes is therefore of opinion that the form should be modified.

The Chf Engr of the 6th Division considers that instead of paying as a lump sum for a work after its final Completion, the preferable course would be to make payments during its progress by instalments on measurements taken by Executive Officers.

Major Kennedy thinks that a pecuniary penalty attached to the non-performance of a Contract tendering it a Civil case and protects a Contractor from Criminal prosecution under the provisions of the Breach of Contract Law.

The Supt Engineers of the 3rd and 5th Divisions who did approve of the form of Contract Bond drawn up by the Govt Pleader, make the undermentioned suggestions.

Not advocating, as is contemplated by the forms in question, the deposit of security before the commencement of a work, nor payment for it only after its completion, the Supt Engr of the 3rd Division recommends regular and frequent payments with a deduction of ten per cent on the value of the work performed which, in his opinion, is the best guarantee for its due execution. Cert Ok.

Moberly accordingly suggests a slight alteration of the form circulated with by. O. No. 275 dated 27th January 1869.

In the opinion of the Supt Engr of the 5th Division the form of agreement suggested by Capt. Oakes is preferable to that submitted by the Govt Pleader with the reservations noted below:—

1st. That some provision should be made to protect Range Officers from Civil Actions in the event of works being peremptorily stopped by Govt and payments withheld for many months for work actually executed.

2d. That after the death of a Contractor his Contract Bond become void instead of its being made binding on his heirs or representatives.

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2d That, as, from the proposal to pay for a work only after its completion, it will be in the power of a Range Officer to retrench a Contractor's account for delays or bad workmanship, it is not necessary to make him lodge security for its due performance.

Before further considering the subject His Excellency the Governor in Council is of opinion that the Garr. Pleader should be afforded an opportunity of being made acquainted with the remarks of some of the Chief Engineers as well as with the modifications suggested by others, and with this view the papers will be communicated to Lt. Handley

with a request that he will submit such observations as he may have to offer, together with such revised draft as he may consider will meet the more important of the objections or suggestions of the various Supt. Engineers.

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To The Govt Pleader

Despe 20/1/71.

1/No 3175, 2656, 3799, 2515, 3414, 4559, 2846, 3131 & 2527.

Govt. of Madras.

PUBLIC WORKS.

To The Government Pleader

Dated

Recd. Encl. 3

G. O. 19 Jany 1870. No. 148.

19

Nos. 311 & 312

Submitted. Letter to the Secretary to Govt. Public Works Department, with instructions.