

CITY OF ATLANTA  
DEPARTMENT OF LAW  
2614 FIRST NATIONAL BANK BUILDING  
ATLANTA, GEORGIA 30303

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September 9, 1969

Mr. A. P. Brindley  
Parks Engineer  
Department of Parks  
City of Atlanta  
Atlanta, Georgia 30303

Dear Mr. Brindley:

I have in hand a copy of the letter from R & G Construction Company to you dated August 25, 1969. Without restating the contents of the whole letter, I make reference to paragraph 3 thereof which reads as follows:

"We continue to get several areas that are washing out due to the flooding of the South River. I understand that Atlanta has had five - fifty year rains already this year. I realize that this is abnormal but we cannot continue to re-plant these areas due to an Act of God. A turf has been established in these areas twice. If flooding does not occur again soon, I think there is enough grass to eventually cover these areas. Again, Mr. Nations looked at this with us and made note of same."

The letter itself is somewhat uncertain as to whether or not the existing grass is bad or whether or not they are saying that they will not grass again should it rain again. In either event, I think that the opinion I am giving you contained herein will suffice.



To begin with, I have before me the contract between R & G Construction Company and the City of Atlanta dated November 25, 1968, which covers the subject matter of the letter.

The contract is silent on the specific subject of the inquiry raised in the letter, although certain portions of the general conditions (paragraphs 11, 12, 17, 18, 20 and 22) support the proposition that the Contractor is entitled to no additional compensation.

Inasmuch as there are no Georgia cases specifically on the point, we must refer to the general law to determine whether or not the facts set forth in the letter are sufficient to either (1) authorize the Contractor to take the position that there is an impossibility of performance or (2) to authorize additional compensation for the Contractor.

To begin with, ". . . (1) it has generally been deemed clear that any unprecedented flood or sudden inundation which no human power could stay and no foresight or prudence could anticipate is an 'act of God.' 1 Am Jur 2d p. 680. Therefore, there is some question in my mind as to whether or not this is in fact an act of God. In addition to the above general proposition of law, there is another legal proposition which I feel is presented in this case and which answers the question adversely as to the position of the Contractor. This proposition is as follows:

"The question whether nonperformance is excused or the person who must bear the loss where performance has been made more difficult or expensive by an act of God must be distinguished from the question whether nonperformance is excused where performance is made impossible by such cause. Where an unconditional contract is to do a thing which is possible in itself, the nonperformance is not excused by an act of God. Performance of an express contract is not excused by the occurrence, after the contract was made, of an unforeseen event beyond the control of the contracting party except when the unforeseen event renders performance of the contract impossible.

Accordingly, even in a jurisdiction where an act of God may excuse the nonperformance of a contract, it must appear, to bring the case within that principle, that the thing to be done cannot by any means be accomplished." 1 Am Jur 2d p. 684.

I am answering this question in a legal context; however, I feel that there might be some area here for equitable adjustment. To this end, I am requesting that you contact the architect, lay the problem before him and ask him what normally is done in similar circumstances.

If I can be of any further assistance to you in this matter, please feel free to call upon me. I return herewith the contract above referred to.

Very truly yours,



Thomas F. Choyce  
Associate City Attorney

TFC/lp

cc: Jack C. Dalius  
Honorable Ivan Allen, Jr.

Enclosure