

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS
WASHINGTON, D.C. 20591

May 22, 1968

CIRCULAR MEMORANDUM TO: Regional Federal Highway Administrators
and Division Engineers

FROM: G. M. Williams, Director of Engineering and Operations
32-34

GMW.

SUBJECT: Adoption of specifications to preclude third party
beneficiary claims under construction contracts

Discussions at meetings held by the Joint Cooperative AASHTO-AGC Committee indicate a rather serious problem is faced by contractors by the exclusion from their liability insurance coverage of third party beneficiary claims asserted against them and arising out of highway construction contracts. This exclusion results from various court decisions holding that the type of public contracts between governmental bodies and contractors requiring the contractor to bear all damages to property resulting from the work of construction, allows third parties to recover from the contractor under the contract, as third party beneficiaries, regardless of whether the damages were or were not caused through the negligence or legal fault of the contractor.

In view of the committee's concern, the adoption of a specification provision indicating it is not the intention of the State to create a third party beneficiary in the terms of the contract appears desirable. The Texas State Board of Insurance states that the Joint Forms Committee of the national rating bureau fears that the alternative to such a specification provision would be the payment of an additional, and perhaps prohibitive premium by contractors for endorsements removing the third party beneficiary exclusion. Our Chief Counsel has reviewed this problem and he perceives no legal objection to the recommendation; however, he expresses no opinion as to the efficacy of a disclaimer of intent in all cases.

In consideration of the foregoing, the division engineers should encourage their respective State highway departments to consider, if they have not already done so, ways and means to alleviate this problem. This office recommends adoption of the following Special Provision which is similar to the one being used by the Texas Highway Department.

It is specifically agreed between the parties executing this contract that it is not intended by any of the provisions of any part of the contract to create the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to this contract to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this contract.