

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In re Appeal of: *

Construction Management Services, Inc. * Docket No. 2142

Under SSU Contract No. PO 56923 *

APPEARANCE FOR APPELLANT: Jack A. Willing, Jr., Esq.
 Jones & Bruce, P.A.
 Princess Anne, MD

APPEARANCES FOR RESPONDENT: Anne L. Donahue
 Assistant Attorney General
 Baltimore, MD

Opinion by Board Member Steel

This matter arises out of a contract between Appellant Construction Management Services, Inc. (“CMSI”) and Salisbury State University (“SSU”) for renovation of SSU’s Admissions house.

Findings of Fact

1. SSU issued an invitation for bids for renovation of the Admissions House in February of 1998. Bids were submitted, and CMSI was awarded the contract following approval by the Board of Public Works on May 13, 1998. Work commenced on May 18, 1998, and under the contract, was scheduled to be completed within 150 calendar days, or October 15, 1998.
2. During the course of the project, 24 unsolicited proposed change orders were submitted by CMSI. Ten of the proposed change orders were approved in the form of two change orders drafted and signed by CMSI, for extra framing, masonry and other items, increasing the completion

date by ten days, to October 25, 1998.

3. In addition to completing the work late, the Respondent alleges that CMSI also failed to install three fire extinguishers in recessed wall cabinets, although one fire extinguisher was delivered to the University on January 12, 1999. Therefore, Respondent seeks to deduct \$464.50 for the cost of purchasing and installing the additional fire extinguishers.
4. Twenty eight identical doors with identical hardware were installed during the renovations. Sixteen of them were installed improperly, in that they rattled or otherwise did not have a smooth and balanced movement as called for in the specifications. Respondent seeks \$272.96 for costs related to the adjustment of the hanging of the sixteen doors.
5. CMSI obtained and installed a section of an outside railing that was too short so that the end of the railing was not flush with the wall it was to meet, causing a gap as large as one inch. The gap was filled with caulking material, a solution unacceptable to the University, which seeks \$647.96 for the purchase of a properly cut section of railing and to provide for its installation.
6. Respondent also seeks personnel costs, in that two SSU employees spent between them 44 hours after the date of substantial completion to bring the job to a conclusion. The Respondent claims \$1,460 for payment of wages to these gentlemen for the 44 hours of work.
7. Finally, Respondent seeks 30 days of liquidated damages (at a rate of \$200 per day) since the Appellant substantially completed the work on November 24, 1998, rather than October 25, 1998. Respondent alleges that the delay is entirely attributable to CMSI.

8. Thus, the Respondent has withheld from payment to Appellant \$6,000 in liquidated damages, \$1,385.42 for the cost of completing the work set forth in findings of fact nos. 3, 4 and 5, *supra*, and \$1,460.00 for personnel costs associated with supervision of completion of the work, or a total of \$8,845.42.

Decision

Respondent contends that Appellant's work was substantially complete upon CMSI's finishing of interior wall painting on November 24, 1998. CMSI states that it was substantially complete no earlier than November 13, 1998. Appellant states that it should not be held to the extra 11 days because it was not aware that it was required to paint the basement walls with the primer specified in the contract documents, that the specified primer (was "hard to find", and that it had painted with an acceptable alternative. Repainting with the specified primer caused the delay of the substantial completion date. The Board finds that the specifications did require that the basement walls be painted with "ThoroSeal" and that therefore the date of substantial completion is November 24, 1998.

The contract states the following with regard to liquidated damages:

7.14 FAILURE TO COMPLETE ON TIME/LIQUIDATED DAMAGES

- A. Time is an essential element of the contract and it is important that the work be vigorously prosecuted until completion.
- B. For each day that any work shall remain uncompleted beyond the time(s) specified elsewhere in the contract, the Contractor shall be liable for liquidated damages in the amount(s) provided for in the solicitation, provided, however, that due account shall be taken of any adjustment of specified completion time(s) for completion of work as

granted by approved change orders.

- C. The University shall deduct and retain out of the monies due to or become due to the Contractor hereunder the amount of liquidated damages, and in case the amounts due the Contractor are less than the amount of such damages, the Contractor shall be liable to the University for the difference.

In fact, §13-218(A)(4) of the General Procurement law requires that each procurement contract include various clauses, including a liquidated damages clause. There is no evidence in the record from which the Board could find that the \$200 daily amount in this contract is not appropriate, nor that generally it would be inappropriate for the State to provide for liquidated damages for this type of work. Assessment of liquidated damages is not dependent upon proof of actual damages¹, and there is no evidence in this record that the \$200 per day charge is unreasonable. Thus, the Board finds that the Respondent is entitled under the contract to 30 days of liquidated damages at a rate of \$200 per day as set forth in the contract for a total of \$6000.

Appellant further argues that a portion of the delay attributed to it by Respondent (approximately 15 days) arose from extra work that it was required to do on the masonry. Respondent contends, and the Board agrees, that any delay resulting from extra masonry work was compensated for in the ten day time extension incorporated in the change orders granted by the Respondent, and that therefore the Appellant is not excused for the claimed

¹Appellant alleges that there has been no showing of any actual damages on the part of the University resulting from the 30-day delay since it did not move back into the building until mid-January of 1999.

15 days delay in masonry work out of the 30 days total the project was behind schedule.

Appellant further excuses its delay by stating that the University failed to return a paint schedule submitted by Appellant in July indicating the University's color selections until November 7, 1998. Appellant states that without the approved schedule and color selections, it was unable to start painting until November 7, 1998. Evidence produced at the hearing shows, however, that the schedule with paint selections was returned to Appellant on September 8, 1998.

The Board finds that Appellant fell behind incrementally from the early stages of the project and never caught up. In light of the short time frame set forth in the specifications for completion of the job, Appellant was not able to recover from its initial delays, and under the contract, the Respondent is entitled to liquidated damages in the amount of \$6,000.

In addition to the liquidated damages, the University claims an additional \$1,385.42 for work that CMSI was required to do under the contract but did not, as set forth in findings of fact nos. 3,4 and 5, *supra*. Appellant alleges that pursuant to section 4.11 of the contract documents, written notice must be given to CMSI before SSU can deduct any monies to cover the cost of such work. Section 4.11 of the contract states:

4.11 UNIVERSITY'S RIGHT TO DO WORK

If the Contractor should neglect to prosecute the Work properly or fail to perform any provision of this contract, the University after three (3) days' written notice to the Contractor may make good such deficiencies and may deduct the cost thereof from the monies then or thereafter due the Contractor.

The Respondent has acknowledged that it did not give this written notice to the contractor. Therefore, Respondent may not deduct the amounts of \$464.50 and \$202.96 for the work described in findings of fact nos. 3 and 4, *supra*. However, with regard to finding of fact number 5, the University has not yet replaced the outside railing which was cut one inch too short, and the spirit of section 4.11 has been met by the notice provided in the course of this litigation through the briefs and argument and testimony at the hearing. There is no doubt that the railing is too short, and that Respondent intends in the future to replace that railing at an expense of \$647.96. Therefore, the Board finds that the Appellant is entitled to a return of \$737.46 (\$1,385.42- \$647.96). In addition, the Board finds that the personnel costs (represented to be \$1,460.00) associated with completion of the project after substantial completion are not directly provided for under the contract, and will therefore be disallowed.

Therefore, the Board finds that the Respondent is entitled to withhold from the Appellant \$6,000 for liquidated damages, and \$647.96 for cost of a new external railing, but must release the \$1,460.00 for personnel charges and \$737.46 for the fire extinguishers, extinguisher recesses and door adjustments, or release of a total 2,197.46 to the Appellant.

Wherefore, it is Ordered this day of June, 2000 that the appeal is granted in part and denied in part.

Dated:

Candida S. Steel
Board Member

I concur:

Randolph B. Rosencrantz
Acting Chairman

Robert B. Harrison III
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of

Contract Appeals decision in MSBCA 2142, appeal of Construction Management Services, Inc., under Salisbury State University Contract No. PO 56923.

Dated:

Mary F. Priscilla
Recorder