

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of BLUE RIBBON)
JANITORIAL SERVICES CORP.)
) Docket No. MSBCA 1502
Under DGS Contract Nos.)
88/29-APB&G and 88/15-APB&G)

January 14, 1991

Termination for Default - Damages - Where a contract is properly terminated for default, the damages are limited to those allowed by the termination for default clause.

APPEARANCE FOR APPELLANT: Michael L. Schwartz, Esq.
Columbia, MD

APPEARANCE FOR RESPONDENT: Michael P. Kenney
Assistant Attorney General
Baltimore, MD

OPINION BY MR. MALONE

This is a timely appeal from a final decision of the Department of General Services (DGS) to terminate for default the above listed contracts of Blue Ribbon Janitorial Services Corp. (Appellant).

Findings of Fact

1. On February 10, 1988, Appellant was awarded contract 88/15-APB&G Janitorial Services by DGS (Respondent) to clean the State Archives and James Senate Office Buildings at the Annapolis State Office Center. This was a three year contract for \$197,000.00.
2. On April 18, 1988, Appellant was awarded contract 88/29/-APB&G Janitorial Services by Respondent to clean the Income Tax, Treasury and Armory Buildings at the Annapolis State Office Center. This was a three year contract for \$367,000.00.
3. Each of the janitorial contracts provided for termination for default which states:
 11. TERMINATION FOR DEFAULT: If the Contractor fails to fulfill its obligation under this contract properly and on time, or otherwise violates any provision of the contract, the State may terminate the contract by written notice to the Contractor. The notice shall specify the acts or omissions relied on as cause for

termination. All finished or unfinished supplies and services provided by the contractor, shall at the State's option, become the State's property. The State shall pay the contractor fair and equitable compensation for satisfactory performance prior to receipt of notice of termination, less the amount of damages caused by Contractor's breach. If the damages are more than the compensation payable to the Contractor, the Contractor will remain liable after termination and the State can affirmatively collect damages.

Pursuant to this provision, Respondent terminated the contracts on February 13, 1990.

The contracts also provide for the method of payment to the Appellant on a monthly basis. This section is read with other sections of each contract which provided for reduction in amount payable for improperly performed work pursuant to a formula. This convoluted method of computation of withholding discussed in Findings of Fact No. 8 below contributed to the break down of communications between the parties.

The contracts also provided that if reductions are made pursuant to the above methodology, the dispute arising from the reductions can be appealed by Appellant to the Building Services Supervisor and ultimately to this Appeals Board.

4. Subsequent to the award of the contracts, and performance, complaints were made by Respondent's tenants concerning the janitorial services provided by Appellant. The details of these complaints and evaluations of Appellant's performance are replete in the record which includes letters to Appellant from Respondent along with Janitorial Inspection Reports. Based on this information, Respondent began a process of reviewing monthly payments to Appellant for failure to provide services. As a result of such review reductions were authorized by Gerald P. Walls, Respondent's Building and Grounds Superintendent.

The reductions in payment are summarized below as follows:

Date	Amount	
5/89	\$ 4,241.27	7/28/89
8/89	6,398.90	10/6/89
9/89	4,307.13	10/16/89
10/89	440.44	11/20/89
11/89	605.64	12/12/89
1/90	4,405.97	2/19/90
2/90	1,405.97	3/13/90
Total	\$21,805.05 ¹	

5. There was substantial dialogue and correspondence between the parties over the problem with services. The record contains hundreds of pages of details relating to Appellant's performance in the cleaning of various items. Most of the poor performance resulted from lack of manpower.

6. Appellant does not deny that it had problems in providing the services. While Appellant admits that some services were not provided, it argues that the Respondent overreacted and withheld amounts in excess of those allowed by the contracts.

7. The Appellant further contends that the Respondent did not administer the contract properly citing as an example that the Respondent required Appellant to clean the Snack Bar area which was specifically excluded from the contracts. The Appellant claims \$1,930.00 for cleaning this area. Appellant also contends Respondent required cleaning in other areas not covered by the contracts and made deductions from payment in excess of those allowed by the contracts.

¹This amount was stipulated to by the parties at the commencement of the hearing.

8. These contracts contained sections for the administration of janitorial services which were unfamiliar to Appellant's supervisory personnel. As noted above the contracts provided a convoluted method for computation of deductions for unsatisfactory work which was set forth in Sec. III par. 7 and provided:

- 7.1 The following Schedule of Reductions shall be used in adjusting the contractor's invoice when the contractor fails to perform any task required in these specifications or performs any task below the standards as required in these specifications.
- 7.2 The percentages indicated for each task are to be applied to the annual bid price of the contract as a reduction for each occasion of non-performance or sub-standard performance of the tasks as described in these Detailed Specifications.

7.3 TASK # AND DESCRIPTION	% REDUCTION
D-1 Empty Trash Cans and Remove Trash	.0003
D-1 Clean Cigarette Urns	.0002
D-3 Clean Glass and Mirrors	.0003
D-4 Spot Clean Building Surfaces	.0002
D-5 Clean and Disinfect Water Fountains	.0001
D-6 Spot Clean Lobby Furniture	.0001
D-7 Refill Paper Towels, Toilet Tissue and Liquid Hand Soap	.0003
D-8 Clean and Disinfect Basins	.0003
D-9 Dust Mop Followed by Wet Mop All Ceramic Tile, Quarry Tile, Brick, Terrazzo and Resilient Tile Floors	.0003
D-10 Buffing All Terrazzo and Resilient Tile Floors	.0002
D-11 Vacuum All Carpeted Areas	.0003
D-12 Vacuum All Carpeted Areas	.0001
D-13 Spot Clean Carpet Stains	.0001
W-2 Dust Vertical Surfaces	.0006
W-3 Waxing All Resilient Tile Floors	.0020

Q-1 Refinish All Resilient Tile Floors	.0125
Q-2 Clean and Shampoo Carpeting	.0150
A-1 Clean All Lighting Fixtures	.0200
A-2 Clean Venetian Blinds	.0200

This complex method required the State to check each area of work and each section of the area. For example, the inspection of a bathroom with six (6) basins would require theoretically the inspector to record the satisfactory level of cleanliness of each basin. If one of the six basins was not clean then under D-8 take 1/6 of .003 for that task to determine the withholding level. The record reflects that where the State did withhold money a janitorial inspection report would support that the work was unsatisfactory and therefore the percentage allowed for that task description was properly withheld. Respondent's witnesses testified uniformly that there were many other items of partially satisfactory work which were paid for in full. The Appellant had no written reports of the inspections to contradict the janitorial inspection reports of Respondent. The contracts provided for a procedure to complain of excessive deductions. However, Appellant kept no records of the inspections and rarely accompanied DGS employees during inspections. Respondent admits that some over deductions were made due to an improper interpretation of the contract whereby 100% was deducted for an item rather than a percentage as set forth in the Schedule of Reductions. However, these errors were corrected and payment made to Appellant for the over deductions prior to the hearing of the appeal.

9. The contract also provided for manning level charts for each contract. Contract 88/15 called for the number of nine (9) personnel and contract 88/29 called for sixteen (16) personnel. Appellant admits it never manned either

contract as required by the manning charts submitted with its bid. Appellant also stated that the work force it originally provided was part time labor. As the contract progressed and Respondent's complaints mounted, Appellant hired full time personnel in an attempt to secure more motivated workers but never hired enough workers to fully man either contract.

Appellant in its bid on these contracts had agreed to man the contracts as outlined above. During the hearing, Appellant did not dispute that the manning levels agreed to in its bid documents were reasonable.²

10. The contract provided for an inspection form to be used by Respondent to grade Appellant's work. While there is evidence in the record of other inspection reports not required by the contract only those provided for under the contract have been considered by the Appeals Board.

11. The inspection reports issued pursuant to the contracts and provided to the Appellant demonstrate a continuing and persistent pattern of complaints by Respondent for the months of May, August, September, October, November of 1989 and January and February of 1990. The details of these reports are numerous, and as they are provided in the record, will not be recited here.³

12. The contracts also provided for trash compaction. Appellant admits that this was not done arguing that it was provided the wrong size bag. However, after Appellant was given the correct size, compaction was not performed as required.

²Testimony showed that Appellant believed 1 worker per 3,000 sq. ft. per hour is a standard manning level for this type of janitorial service. Dividing the total number of square feet to be cleaned results arithmetically with 16 workers for contract 88/29 and 9 workers for contract 88/15.

³At the hearing the parties presented their factual presentation by way of examples. Both parties worked from Respondent's answers to interrogatories which contained the janitorial inspection reports. The appeal was presented this way, since to do otherwise would have required examination of an inordinate number of alleged acts or omissions.

13. Appellant admits that it was at fault on certain items of work but introduced extenuating evidence that many of the complaints of Respondent were not completely the fault of Appellant. For instance the evidence reflects that the poor condition of the buildings when the contract began took time for Appellant to bring the buildings up to their cleaning standards, and that there was construction ongoing in the area which caused excess dust and dirt to accumulate which made proper cleaning more difficult.

14. Notwithstanding the Appellant's documented failures to properly clean the facilities, it was the failure of Appellant to fully man each contract which led to its eventual termination for default.

Decision

The record is clear that the Appellant failed to fully man the contracts as required and therefore materially breached the contracts. The lack of manpower resulted in overall poor performance as discussed above which is repeatedly demonstrated in the Janitorial Inspection Reports. Based on the failure to properly man the job, the Board finds the termination for default of the contracts by Respondent was proper.

Appellant has claimed the full amount of the deductions made by Respondent in the stipulated amount of \$21,805.05.

Appellant's witnesses generally stated that the withholding was excessive. However, Appellant kept no contemporaneous records of excessive withholdings and was not able to establish a specific amount.⁴ In general, no specific amounts were given for the examples used during the hearing.

⁴Throughout the hearing Appellant's witnesses gave general answers on quantum. However, when questioned as to a specific amount it was unable to provide the Appeals Board with any specific amount. Mr. Pickett Thomas, J.D., was candid on this topic admitting that Appellant could not give a specific amount. The Appellant did state the specific amount of \$1,699.90 withheld in August, 1989 for the rug in the Comptroller's Office was improper. However, the evidence supports this deduction as reasonable in light of the damage to the carpet.

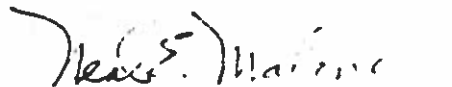
Respondent, however, demonstrated that where the deductions were made, the inspections supported the entire amount of the deduction. The Respondent's evidence was consistent in this regard and credible. The record also supports the Respondent's contention that other deductions could have been made but were not in an attempt by the Respondent to work with Appellant's supervisors to avoid termination of the contract.

Appellant also claimed \$1,938.00 for extra work⁵ not paid for in cleaning the Snack Bar. The evidence is clear that the Snack Bar was extra work and the amount claimed by Appellant reasonable, and is therefore entitled to \$1,938.00.

Appellant further demands attorney fees, IRS interest and penalties and lost profits. Since none of these damages are allowed by the contract they are denied.⁶

Respondent made no affirmative claim for damages in this case and it is therefore not necessary to consider any setoff for re-procurement cost.

Dated: 1/14/91



Neal E. Malone
Board Member

⁵The detailed specification for scope of work excluded "snack bars." The State afterward added "2A. Dining Areas are to be cleaned." However, this unilateral act constituted extra work since it enlarged the scope of work for which the Appellant is entitled.

⁶COMAR 21.09.01.19E. prohibits costs of litigation against the State. COMAR 21.09.01.11 prohibits the inclusion of fines and penalties incurred as a result of violations or failure to comply with federal, State, and local laws and regulations. Lost profits are not allowed under the termination for default clause.

I concur:

Robert B. Harrison III
Robert B. Harrison III
Chairman

Sheldon H. Press
Sheldon H. Press
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1502, appeal of BLUE RIBBON JANITORIAL SERVICES CORP., UNDER DGS CONTRACT NOS. 88/29-APB&G AND 88/15-APB&G.

Dated: 1/14/91

Mary E. Priscilla
Mary E. Priscilla
Recorder

