BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DECKER CONSTRUCTION CO., INC.	)	
	)	
	)	Docket No. MSBCA 1359
Under DGS Contract No. U-000-822-001	)	
	)	

APPEARANCE FOR APPELLANT: Howard A. Miliman, Esq.
D'Alesandro, Miliman & Yerman
Baltimore, MD

APPEARANCES FOR RESPONDENT: Allan B. Blumberg
John H. Thornton
Assistant Attorneys General
Baltimore, MD

November 22, 1989

Termination for Default - Burden of Proof - The State bears the burden initially to show prima facie that the termination of a contract for default was appropriate. In the instant appeal, the State failed to carry its burden and the termination for default was thus converted to a termination for convenience.

Termination for Convenience - Under a termination for convenience a contractor may recover compensation (not to exceed the total contract price) for the cost of contract work performed but not paid for prior to the effective date of the termination. However, the contractor is not entitled to recover costs related to work not performed and the State is entitled to a credit for the cost of such work. Similarly, work for which the contractor seeks compensation must have been performed in accordance with the terms of the contract.

PROPOSED DECISION BY CHAIRMAN HARRISON*

Appellant timely appeals a Department of General Services (DGS) procurement officer's decision regarding termination of Appellant's contract for default and alleged monetary damages.

Facts

1. On September 6, 1984, Appellant entered into a contract with DGS for the "Design/Build (Turnkey) general contract for design engineering, demolition and construction services for the conversion of Berwyn Heights Elementary School for Offices for the Maryland Fire and Rescue Institute." The Maryland Fire and Rescue Institute (MFRI) is part of the University of Maryland.[1]

*While the decision was required to be issued as a proposed decision pursuant to COMAR 21.10.06.26, neither party filed exceptions within the time prescribed and thus the decision is final.

[1]For purposes of this decision the University of Maryland or "University" and DGS are considered as one entity constituting the owner or "State."

2. The contract required completion of the work within 294 calendar days (42 weeks) from the date of notice to proceed which was issued to Appellant by letter dated October 3, 1984 with an effective starting date of October 15, 1984. Thus the project was to have been completed by approximately August 5, 1985.

3. To develop the design for the project, Appellant was to contract with an architect, with structural, mechanical and electrical engineers, and with a landscape architect, who (with Appellant) were collectively referred to in the Contract as the "Design Build Team" or the "DBT". The duties of the DBT included:

1. Completion of the building design in substantial conformance with the Contract Documents. Coordinate Design Development with the owner.

2. Correction of all omissions and errors in the Construction Documents.

3. Conformance of Design and Construction Documents with all applicable laws, ordinances, codes and regulations of authorities having jurisdiction over the project.

4. Coordination of design and resolving of discrepancies, conflicts and errors during construction.

5. Preparation of concise minutes of any and all meetings or conferences held relative to the project during its development and construction. These minutes shall state all decisions reached and who made them. The original shall be addressed to the Owner with copies as required to all concerned persons within 7 days of the referenced meeting.

6. Coordination with the Owner during the Design Development and Construction Document phases of the work to ensure conformance with the design criteria; schedule "Ad Hoc" Meetings, if needed, in addition to those other wise specified.

Supplementary Conditions, Section 4C, page 00SC-2. See also Section 01006 of Division 1 of the Specifications. The DBT also was "responsible for preparing complete construction drawings and amendments to the specifications which, when approved by the Owner, [would] become the sole property of the State and a part of the Contract Documents." Supplementary Conditions Section 5, page 00SC-2.

4. Apellant engaged David M. Miles & Associates ("Miles") to act as the architect of the DBT and engaged Associated Designers, Inc. ("Associated Designers") to act as the engineers. These three entities, Appellant, Miles and Associated Designers formed the DBT.

5. The contract contained provisions relating to "fast tracking", which is a method of design and construction by which construction proceeds before the design is finished. Specifically the contract provided:

> 1. During the Design Development Phase, the Owner and Contractor shall review the option to "Fast Track" the project and decide whether it would be advantageous at that time to initiate "Fast Tracking" of any phase of the project.
>
> 2. Any agreement to "Fast Track" shall be a written amendment to the Contract stating that all conditions of the Agreement, including the Contractor's revised construction and construction document schedules, be signed by the Owner and Contractor.
>
> 3. The Contractor shall submit 100% complete, stamped and signed Drawings and Specifications for each phase of the construction to the Owner for review and approval prior (to) the beginning of construction.
>
> 4. Nothing in the Contract Documents shall be interpreted as to require or prohibit the Owner and Contractor to reach an agreement to "Fast Track".

Supplementary Conditions, page 00SC-4, Section 6N. The University of Maryland decided not to allow fast tracking (Appellant having proposed to fast track the entire project) but the University did grant special permission for the roof work to be done before the design documents were completed. (Tr. 3/21, p. 161).

6. Due to the poor condition of the existing roof of the school, Appellant determined to remove the old roof and install a new roof using foam insulation and a special urethane foam roof coating ("Renu-it").

Removal of old roof and installation of the new roof had begun by the week ending November 9, 1984. On November 21, 1984, DGS stopped the roofing work temporarily because Appellant's roofing subcontractor was spraying urethane foam when outside air temperatures were below the manufacturer's specified minimum allowable temperature for such work of 40 degrees Farenheit.[2] Work resumed and foaming was completed on the west wing roof on November 30, 1984. The west wing Renu-it top coating was completed on December 29, 1984. Installation of foam board on the east wing was started on December 5, 1984 with the top coating completed on March 5, 1985.

7. By mid-February, 1986, the west and east wing roofs were leaking and a 45 ft. long crack had developed in the west wing roof. The March 26, 1986 field report of the University of Maryland on-site inspector, Dennis Hosey, stated that the "Re-Nu-it exterior roof coating is showing accelerated deterioration at the East and West wings and the connecting corridor." Mr.

---

[2]In addition to the temperature limitation, the foam was not supposed to be applied when the wind was beyond a certain speed or when there was any moisture or frost present on the roof.

Hosey's report further stated that the roof was "not acceptable in its present condition." (Rule 4 file, Tab 41). Re-nu-it Corporation President, Rhoda Hardy, informed Appellant by letter dated April 15, 1986 that:

> Laboratory examination and testing found the material was not applied in the proper density, as per specifications of the RE-NU-It Corporation, creating pinholes that allow moisture and water to penetrate the foam destroying the bond between the foam and the resurfacer.

(Rule 4 File, Tab 44).

8. On May 6, 1986, the roof was inspected by representatives of manufacturers of the foam insulation. It was determined at that inspection that the foam used on the roof failed and allowed moisture to penetrate the roof due to "improper installation; foaming over wet and cold foam, thin lifts, [and] improper mix ratio." (Rule 4 File, Tab 45).

9. Appellant submitted a proposal satisfactory to the State for repairing or replacing the roof on August 11, 1986 and work on the roof was again started on September 24, 1986. However, Appellant continued to experience delays in repairing the roof due to improper installation of the insulation boards and leaking and it was not until March 1987 that various defects in the roof installation were all corrected and the roof completed.

10. Appellant's initial progress schedule submitted to the State in October of 1984 showed the entire project being completed in nine months, i.e. by July 1985. This initial schedule showed that Appellant intended to fast track the entire project. Appellant was forced to revise its schedule when the State made the decision not to allow fast tracking except as to the roof. Due to the decision not to permit fast tracking (under which by necessity there was an overlap of design and construction phases) Appellant was not allowed to start construction until the designs had been approved and any construction it did undertake was at its own risk. (Tr. 3/21, pp. 160-161).

¶228

11. By May 3, 1985, the design was approximately 60% complete and the construction approximately 10% complete. By June 7, 1985, the design was approximately 70% complete and construction approximately 15% complete. At the progress meeting on October 18, 1985, it was noted that the final construction drawings were approved by the University, i.e., the design was completed.

12. On or about November 25, 1985, after the design was complete, Appellant submitted a revised construction schedule showing that all construction work would be completed by April 14, 1986.

13. By February 28, 1986, construction was estimated by the parties to be 80% complete and Appellant stated that the building should be ready for a punch list on or about May 1, 1986. As related above, however, problems with the roof caused work on the project to come to a virtual stop during the summer of 1986, although by October 24, 1986, the project was estimated to be 96% complete according to the progress meeting minutes of that date.

14. After several revisions by Appellant as to the estimated completion date, DGS on January 14, 1987 notified Appellant that it was dissatisfied with Appellant's progress towards completion and requested a "realistic schedule" for completion of the project warning that "failure to provide the schedule requested could lead to termination of your contract." (Rule 4 File, Tab 132).

15. On January 19, 1987, Appellant responded in writing, advising DGS that the project would be 100% complete on Febuary 6, 1987. (Rule 4 File, Tab 134).

16. At a meeting held on-site on January 30, 1987, Appellant stated that the bulding was ready for punch-out and a punch list inspection was scheduled for February 4, 1987. (Rule 4 File, Tab 140). However, the building was not

completed by this date and on February 5, 1987, Mr. Miles informed Appellant that the roofing membrane was cut too short from the edge of the roof. (Rule 4 File, Tab 144).

17. The various problems with the roof were resolved within the next several weeks and Appellant continued to make progress toward completion of the project. However, on April 3, 1987, DGS sent Appellant, by certified mail, a letter containing 31 pages of punch list items. The letter which was received by Appellant on April 7, 1987 stated in part:

> Your contract for this project was awarded to you on September 6, 1984 and and you were notified to proceed on October 15, 1984. The original contract completion time was 294 calendar days making the contract completion date to be August 5, 1985. As of April 1, 1987, the amount of time consumed is 603 days and you have not completed the project....
>
> All punch list items incomplete work and other contract items listed above must be complete by the close of business on Friday, May 1, 1987....the State is serving notice that any incomplete work not finished by the date stipulated above will be completed by the State by whatever means available in accordance with the provisions of Section 7.12 - TERMINATION FOR DEFAULT — DAMAGES FOR DELAY — TIME EXTENSIONS and any other rights and remedies provided by law or under this contract. Any monies expended by the State to complete the work will be deducted from monies remaining to be paid to Decker under this contract.

(Emphasis in original) (Rule 4 file, Tab 7).

18. A meeting was held on April 24 to discuss Appellant's progress. At that time, Appellant was told again that the project had to be finished by May 1, 1987 in accordance with the above letter of April 3, 1987. At this meeting Appellant asserted that certain items included in the punch list were not a part of its contract.

19. On April 29, 1987, Appellant sent a letter to the State detailing those punch list items that Appellant considered either complete, repetitious or not a part of its contract and requested a hearing on the disputed items. (Rule File, Tab 183).

¶228

20. On May 8, 1987, DGS sent Appellant a letter terminating its contract for default for failure to complete all the items on the punch list. (Rule 4 File, Tab 9). Appellant departed the project site on or about May 12, 1987.

21. After Appellant's contract was terminated, DGS attempted to complete the project by contracting out the unfinished punch list work to various contractors. At the time the contract was terminated the total contract price including approved change orders was $1,492,650.16. Of this amount Appellant had been paid $1,383,067.00.

22. By letter to the procurement officer dated May 15, 1987, Appellant challenged the appropriateness of the default termination and alleged that a substantial portion of the delays were caused by the State and that the punch list contained several items which were not a part of Appellant's contract. By letter to the procurement officer dated June 19, 1987, Appellant reasserted its challenge to the default termination and also asserted entitlement to the balance of its contract price.

23. Appellant filed an appeal with this Board on November 25, 1987. To cure a procedural defect, the Board remanded the matter to DGS on February 4, 1988 for further consideration by the procurement officer. The procurement officer issued a final decision on May 19, 1988 upholding the default termination and denying Appellant's monetary claim and the appeal was restored to the Board's docket and proceeded to hearing.

24. Following the hearing, the matters that remain in controversy are (1) whether the State properly terminated Appellant's contract for default, (2) a monetary claim of $109,583.16 representing the difference between the total contract amount (original contract and approved change orders) of

$1,492,650.16 and the amount paid to Appellant of $1,383,067.00, and (3) a claim of $4,000.00 for a quantity of oversized bricks left on the project which the State would not permit Appellant to remove.

Decision

The State contends that completion of the project was delayed by Appellant's failure to properly construct and repair the roof, by Appellant's failure to prosecute the work diligently and properly man the project and by Appellant's bad faith in refusing to complete in a timely manner certain items Appellant claimed were not part of its contract. Appellant denies that it is responsible for delay in completion, asserts that it properly completed virtually all work required and argues that the termination of its contract for default should be converted to one for convenience.[3]

---

[3] Appellant's argument in this regard is based on Subsection E of Section 7.12 of the General Conditions of the contract which provides:

> If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the State, be the same as if the notice of termination had been issued pursuant to the clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the State, the contract shall be equitably adjusted to compensate for the termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

Section 7-11 of the General Conditions dealing with the State's right to terminate for its convenience provides in part that:

> A. The performance of work under this contract may be terminated by the State in accordance with this clause in whole, or from time to time in part, whenever the Procurement Officer shall determine that such termination is in the best interest of the State. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

The State bears the burden initially to show prima facie that the termination of the contract for default was appropriate. See Northside-Danzi Construction Co., Inc., ASBCA No. 22316, 79-2 BCA ¶14,021 (1979). The State terminated Appellant's contract pursuant to Subsection A of Section 7.12 of the General Conditions of the contract which provides in pertinent part that:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within this time, the State may, by written notice to the contractor, terminate his right to proceed with the work or the part of the work as to which there has been delay. In this event the State may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work the materials, appliances, and plant as may be on the site of the work and necessary therefor.

The project by the terms of the contract was to be completed by approximately August 5, 1985. The completion date was never formally extended. However, the project was plagued with delays from the beginning. It took Appellant from mid October 1984 to mid October 1985, well beyond the original contract date for completion of both design and construction, to complete the design alone and obtain approval of construction drawings. The University's decision not to allow fast-tracking meant that Appellant could not begin work on the project prior to approval of the construction drawings without accepting the risk of performing unapproved work. The University itself was responsible for a certain amount of delay in the early phase of the project due to a reorganization of the MFRI which required revisions to the layout of the building during the period from mid October 1984 through early

---

Section 7.12 dealing with termination for default and Section 7.11 dealing with termination for convenience contain the mandatory language required for such terminations in construction contracts as set forth in COMAR 21 .07.02.07 and COMAR 21.07.02.09.

February 1985 to accomodate this reorganization. Minor delays during the design phase also occurred in the spring of 1985 as a result of the necessity to accomplish unanticipated asbestos abatement work.

Additional delays occurred in the approval process for the construction drawings. Mr. Stephen Cordaro, a University employee and project manager for the State for the instant project, testified:

> The University turned around their submittals with their comments on the drawings in as expeditious a manner as they could, considering the fact that the majority of the comments were not often incorporated and that the mechanical and electrical drawings were generally a step behind the architectural drawings that were submitted in terms of currency of information, so that the review process for the University was made longer due to the coordination effects that had to be done between the different trades.... whenever anything was submitted that was a deviation from the specifications, as required a selection such as color or type, where the users had to have direct input, it took longer than normal to get their input on that. (Tr. 3/21, pp. 176-178).

However, the most serious setback to timely completion of the project were the delays associated with failure of the Renu-it coating used in the roof work. The Renu-it roof coating was proposed by Appellant in its submittals and approved by the University. The failure of the Renu-it coating was caused by two factors. One, the roof coating was installed at the wrong time of the year. The Renu-it coating was installed in the fall. Bad weather conditions forced delays in the application of the coating since the coating was not supposed to be applied when the temperature fell below a certain temperature, when the wind was beyond a certain speed or when moisture was present on the roof. Two, the Renu-it was not the correct type of coating that should have been used. Mr. Cordaro testified:

> The Renu-it is a cementitious material that doesn't have any elasticity or "give" to it. The proper coating should have been an elastamerit coating of some sort that would be able to give, to expand and contract with the temperature extremes that the roof would experience.

(Tr. 3/21, p. 49).

While the record reflects that Appellant is partially responsible for the delay associated with the roof work the State has not established that the delay is solely attributable to Appellant or that it resulted from a failure to prosecute the work or bad faith on the part of the Appellant. The Renu-it coating was approved by the University for this project and it thus bears some responsibility for delays caused by its application and its failure.

The project was delayed another five to six months after the failure of the roof in February 1986 and before a plan to correct the roof was approved. During this period, work on the project was slowed since certain of the mechanical and electrical work could not effectively proceed until the roof problem had been corrected. Nevertheless, the project progress meeting minutes for September 5, 1986 (two weeks prior to the start of the roof repair) reflect that the project was estimated to be 90% complete. The project progress meeting minutes for October 24, 1986, reflect that the project was 96% complete. Similarly, the minutes for December 19, 1986, reflect that the project was 99% complete. It is clear that despite the various delays and problems as set forth above that Appellant was continuing to make progress on the project and it was nearing completion.

While the various delays as set forth above were significant, the record reflects that the State acquiesed therein, although never formally extending the contract completion date, until January 14, 1987. On January 14, 1987, the State sent Appellant a letter expressing dissatisfaction with Appellant's progress. In this letter, the State informed Appellant that over 200% of contract time had been consumed, requested a "realistic" schedule for completion of the project and warned that "failure to provide the schedule requested could lead to termination of the contract." Appellant provided the

requested schedule on January 19, 1987 and advised the State that the project would be complete on February 6, 1987. The work was not complete on February 6 due in part to a problem with the roof membrane. However, Appellant continued to make substantial progress toward completion.

Nevertheless, two months later on April 3, 1987 the State notified Appellant of its intention to terminate the contract. After acquiesing in delay of approximately 20 months beyond the original contract completion date, the State sent Appellant a letter giving Appellant less than thirty days, until the close of business on May 1, 1987, to complete the project. Appellant received the letter and attached punch list on April 7, 1987. In a meeting with the State on April 24, 1987, Appellant objected that a number of the items on the punch list were not part of its contract. Pursuant to the State's request, Appellant put those objections in writing in a letter dated April 29, 1987 and requested a hearing on the objections. The State did not respond to Appellant's objections and instead, terminated Appellant's contract 9 days later, on May 8, 1987.

Appellant made a reasonable request for clarification of the punchlist items and was entitled to a response. While neither substantial completion nor completion subject to certain punch list work serves as a bar to termination for default, Mark Smith Construction Company, Inc., ASBCA Nos. 25058, 25328, 81-2 BCA ¶15,306 (1981) at 75,792, the State presented no evidence as to why it was necessary to terminate Appellant at that particular time. Delays had occurred at the start of the project and continued throughout. The State permitted these delays to continue for nearly two years. The record does not reflect any compelling reasons for the State to insist upon completion when it did and to terminate Appellant's contract for default.

Mr. Cordaro, the State's project manager and the person perhaps best able to assess actual responsibility for delay on the project and the reasonableness of a default termination testified as follows:

Q Mr. Cordaro, would you turn to tab 185 of the Rule Four File, please?

A Yes.

Q Have you ever — did you receive a copy of this document when you were acting as project manager for the Berwyn Heights Project?

A I remember seeing this document.[4]

Q Who is Gene Whittenburg?

A Gene Whittenburg is the Director of the Department of Engineering and Architectural Services.

Q For what agency?

A For the University of Maryland, College Park.

Q Are you —

A He was one of my bosses.

Q Did you have any discussions with Mr. Whittenburg, contemporaneous with the sending of this telegram, I guess it is?

A He discussed it with us, with all the people involved with the project, getting updates on the status and where things stood, what was still remaining to be done on the punch list.

Q Did he ask for a recommendation from you as to what should be done on the project?

A I believe I recommended not to terminate at that time.

(Tr. 3/22, pp. 80-81).

---

[4]The document in question (Rule 4 File, Tab 185) is a mailgram from Mr. Whittenburg to DGS dated May 1, 1987.

As noted above, the State bears the initial burden to demonstrate that the termination for default was appropriate. Based on the testimony of the State's project manager that as of May 1, 1987 he would not recommend that the contract be terminated and the record as a whole, we find that the State had constructively extended, through acquiesence in the delay, the contract completion date at least through May 1, 1987. The record reflects that there was a legitimate dispute concerning the appropriateness of certain items on the punch list and the clear inference of Mr. Cordaro's testimony which we accord great weight is that Appellant should have been given a reasonable time beyond May 1, 1987 to attempt to resolve the disputed items on the punch list and complete the project. Thus the State has not met its burden to show that the Appellant was in default under the termination for default clause; i.e., Subsection A of Section 7.12 of the General Conditions. We shall therefore treat the termination of Appellant's contract as one for convenience pursuant to Subsection E of the clause; i.e., Subsection E of Section 7.12 of the General Conditions, and turn to an examination of Appellant's monetary claims.

Appellant contends that it is owed $109,503.16, representing the unpaid balance left on the contract. Additionally, Apellant contends it is owed $2,400.00 for brick left on the site which it was not permitted to remove. The parties have stipulated that $109,583.16 is the unpaid balance or the difference between the contract price (including all approved change orders) and the amount paid to Appellant prior to termination. The State contends that it is entitled to credits and set-offs that exceed the contract balance; it has not, however, sought liquidated damages.

Consistent with COMAR 21.07.02.09, Section 7.11E of the General Conditions of the contract sets out the amount recoverable by a contractor in the event of termination for convenience in relevant part as follows:

> 1. With respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of -
>
> (a) the cost of such work;
>
> (b) the cost of settling and paying claims arising out of the termination of work under subcontracts or orders ... exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor before the effective date of the Notice of Termination of work under this Contract, which amounts shall be included in the cost on account of which payment is made under (a) above; and
>
> (c) a sum, as profit on (a) above, determined by the Procurement Officer, to be fair and reasonable; provided, however, that if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (c) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and
>
> * * *
>
> The total sum to be paid to the contractor under (1) above shall not exceed the total Contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of the work not terminated....

Under such provisions, Appellant can recover compensation (not to exceed the total contract price) for the cost of contract work performed but not paid for prior to the effective date of the termination. The State is entitled to a credit for work not performed by Appellant or stated another way, Appellant cannot be paid for work it did not do; and with respect to work Appellant did perform, such work was required to be done in accordance

with the terms of the contract. See Stamell Construction Co., Inc., DOT CAB No 68-27E, 74-2 BCA ¶10,927 (1974). Compare M&M Hunting Preserve, MSBC 1279, 2 MSBCA ¶145 (1987) (supply contract).

Appellant presented no evidence concerning its actual costs to perform the work it did complete prior to termination. It simply asserts that it properly performed virtually all work required under the contract and thus is entitled to be paid $109,583.16 representing payment of the entire contract price of $1,492,650.16 less the $1,383,067.00 it had already been paid at the time of termination. The State claims on the other hand that Appellant did not perform certain required work at all and performed certain work improperly which was required to be corrected to conform to the requirements of the contract. While the record reflects that Appellant substantially completed the work properly, there were certain required items that in fact were not completed or not completed properly and which the State had to complete or correct. Such work was as follows.[5]

A. Fire Alarm System

Section 16010-3(B8) of the electrical specifications provides that the fire alarm system is to be installed "per University of Maryland standards." Section 16721-1 entitled Fire Alarm and Detection states (at A), "The work of this section consists of a complete non-coded interrupted signal, electric double supervised annunciated fire alarm system." (emphasis added). A double supervised system, known as Type A, is a four-wire system. Appellant installed a single supervised, Type B, two-wire system. Appellant contends that the State approved a Type B system when it approved the fire alarm submittal which referred to some equipment compatible with a Type B system and incompatible with a Type A system. However, Appellant was required to

[5] Dollar amounts are rounded to the nearest whole dollar.

give specific notice of this change and the mere references to incompatible equipment in the fire alarm submittal did not suffice to constitute specific notice of the change. See Rivera Construction Co., Inc., ASBCA Nos. 29391 and 30207, 88-2 BCA ¶20,750 (1988).

The specifications clearly require a double supervised system. Appellant cannot bind the State to accept anything other than what the contract called for unless the State expressly approved the deviation pursuant to Section 5.03 of the General Conditions. Since there was no approval of the deviation, the State can set off the cost of converting the fire alarm from Class B to Class A. The record reflects that the reasonable cost to the State of this conversion amounted to $10,880.00.

B. Sprinkler System

The State had to install additional sprinkler heads and relocate a number of sprinkler heads due to potential interferences or blockages by lights and mechanical ducts. The work was completed by Fire-Mak, Appellant's subcontractor. The State contracted with Fire-Mak directly and did not competitively bid this work in order to preserve the warranties due the State. Fire-Mak charged the State an additional $716.00 (above its subcontract price with Appellant) to relocate obstructed sprinkler heads. The State determined this was a fair price and the record supports this determination. We also reject Appellant's legal argument that Fire-Mac's price to the State could not exceed Fire-Mak's subcontract price with Appellant.

C. Electrical Work and Security Lighting

Kelly Electrical ("Kelly") was awarded a competitively bid contract for completion of the security and building perimeter lighting amounting to $17,475.00. Prior to the termination of Appellant's contract, the State had

issued a change order with a sketch showing the locations where security lights should be installed on the ends on the buttresses. The sketch became a part of the contract which Appellant was required to follow. Appellant, however, had mounted the exterior security lights on the walls between the buttresses which stick out four or five feet from the building. This resulted in voids or areas of darkness between the buttresses thus defeating the purpose of security lighting. The record supports a finding that the work performed by Kelly for completion and correction of the security lighting was required by the contract and that the cost thereof was reasonable.

Additionally, numerous minor corrections to various parts of other electrical systems were required which the record reflects reasonably cost $25,899.00. Finally, we find that the record supports as necessary and at a reasonable cost a change order issued to Kelly in the amount of $1,870.00 for additional conduit and trenching.

D. Mechanical and Plumbing Work

Appellant's failure to complete or complete properly certain mechanical and plumbing work required replacement of undersized drip pans under fan coil units, resealing of duct insulation, repair of damages to a frozen fan coil unit, minor corrections to the HVAC system and replacement of an undersized pump to correct hot water circulation problems.

Appellant contends that these are warranty related items and that its subcontractors should have had the opportunity to resolve the items at no cost to the State. We disagree. The State was not in privity of contract with Appellant's subcontractors and was under no obligation to deal with these subcontractors. The State competitively bid the work and the record reflects that the cost of these items, $26,178.00, was reasonable.

F. Cleaning

After termination of Appellant's contract the State hired a cleaning service to clean the building. The cost of these services was $6,493.00. The State contends that the building had not been properly cleaned by Appellant. We find these cleaning services were in fact required and that the costs were reasonable.

G. Power Distribution

The State contracted for installation of a power distribution unit (transformer) for the computer room with ACESS, Inc. Appellant alleges that a power distribution unit was not a part of the contract since it was not included in the specifications. The power distribution source was added to the drawings by the State. The contract clearly provides that drawings, even though developed after the job was bid and the contract awarded, became part of the Contract Documents in accordance with which the project was to be completed. The cost to the State of $2,725.00 for installing a power distribution unit for the computer room was a necessary and reasonable one.

H. Utility Bill

When Appellant left the project it left a balance past due and owing to Maryland Natural Gas, which then terminated service to the property. In order to get service restored so the project could be completed, the University was forced to pay the outstanding bills of Appellant to Maryland Natural Gas in the amount of $6,045.00. That bill states that it is for service during the period May 12, 1987 to June 10, 1987. However, $5,807.00, the bulk of the charges on the bill, is clearly identified as "Balance from previous bill" which would be for the time prior to May 12, 1987 when Appellant was still

on the job. Appellant should not be responsible for gas charges after it left the site. Therefore Appellant is only responsible for the $5,807.00 which predates termination of its contract.

I. Kitchen Heating Hook-up

Change Order No. 13 required Appellant to provide a connection of piping to an existing heater in the east wing kitchen. The change order was approved on April 23, 1987 prior to Appellant's termination. The State is entitled to a credit for this work in the amount of $2,288.00 reflecting the cost of the work as performed by the University with its own forces.

J. Light Fixtures

Appellant failed to install 62 light fixtures which were shown on the contract drawings. Appellant admitted that the fixtures were not installed adding that they were omitted "in order to accomodate sprinkler heads and mechanical equipment as existing conditions allowed." (Rule 4 File, Tab 168). The State is entitled to a fair and reasonable credit for the omission of these 62 fixtures which we find to be $125.00 per fixture, for a total of $7,750.00.

The above items A through J total $108,081.00 all of which we find represents the reasonable cost of work not done or correction of work improperly done and thus such amount must be deducted from Appellant's claim. Subtracting this amount from Appellant's total claim of $109,583.16 leaves a balance of $1,502.16. However, as noted above, Appellant presented no evidence supporting any of its costs incurred up to the date of termination of its contract. Thus there is no basis to award Appellant the balance of $1,502.16 and its claim in the amount of $109,583.16 is therefore denied in its entirety.

The Appellant's claim for $4,000.00 for oversized brick left on the project also is denied. The Appellant concedes that the brick was not required to be used in completion of the project. Appellant's Post Hearing Brief at p. 7. Appellant also failed to address the cost of such brick in its proof of costs. Finally, there is no conclusive evidence that any brick was actually converted by the State for its own use.

In summary, DGS erred in terminating Appellant's contract for default. In all other respects Appellant's appeal is denied.