

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ERIK K. STRAUB, INC.

) Docket No. 1390  
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Under DGS Contract No.  
F-020-792-316

December 7, 1989

Burden of Proof:- The Respondent failed to meet its evidentiary burden to show in its counterclaim for additional fees paid to a third party for construction administration services that such fees were the responsibility of the contractor, since the record failed to demonstrate what portion of the additional fees was for work performed after the original contract completion date.

APPEARANCES FOR APPELLANT:

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APPEARANCES FOR RESPONDENT:

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OPINION BY CHAIRMAN HARRISON

This is an appeal from a Department of General Services (DGS) procurement officer's final decision allowing the State's claim for additional architect's fees<sup>1</sup> incurred during construction of a timber pile pier.

Findings of Fact

1. On June 4, 1986, Appellant entered into a contract with the State of Maryland for the construction of a timber pile pier known as K Pier at Somers Cove Marina in Crisfield, Maryland.

2. The work to be done by Appellant under the contract included all pile driving and pier framing necessary to construct a timber pier at the marina.

3. Based on the contract drawings and specifications, and test pile results, Appellant ordered 35 foot production piles, mobilized its equipment to install 35 foot piles, and began installation on September 22, 1986.

4. On September 23, 1986, Appellant notified DGS that it was encountering extremely erratic subsurface conditions, and that many of the 35 foot production piles would not achieve design bearing when driven in an uninterrupted manner per the

<sup>1</sup> The fees in question were in the nature of fees for construction administration services and have been described by the parties as "architect's fees."

contract specifications.

5. By letter dated February 4, 1987, Appellant requested additional compensation for the delays encountered related to pile installation based on alleged differing site conditions. On August 11, 1987, Appellant requested a final decision from the Procurement Officer regarding its claim for additional compensation, which final decision was rendered by letter dated December 22, 1987, denying the claim. Appellant filed a timely appeal with the Board which was docketed as MSBCA 1371.

6. The State filed a claim (counterclaim)<sup>2</sup> with the procurement officer seeking \$2,497.00 from Appellant for additional architect's fees. In a final decision dated June 22, 1988, the procurement officer determined that Appellant was liable to reimburse the State in the amount of \$2,497.00. Appellant timely appealed this determination.

8. The appeals were consolidated for hearing. On August 14, 1989, the Board issued an opinion denying Appellant's claim for additional compensation. However, the opinion, which is incorporated herein by reference, failed to address DGS's claim for recoupment of the additional architect's fees.

#### Decision

DGS seeks to recover from Appellant \$2,497.00 for additional architect's fees allegedly incurred for construction administration services performed after the original contract completion date.

To provide ongoing construction administration services during construction of the piers, DGS approved a lump sum agreement with George, Miles & Buhr (GM&B) in the amount of \$7,500.00. It was estimated that the services would be performed prior to the estimated completion date of the pier of January 15, 1987. The services were broken down into four categories as follows:

1. Construction site visits on a unit price basis of \$275.00 per trip not to exceed \$5,500.00.
2. Review of shop drawings and certification on a lump sum basis of \$500.00.
3. General consultation during construction on an hourly rate basis not to exceed \$1,050.00.
4. Preparation of as-built drawings on a lump sum basis of \$450.00.

DGS claims additional visits and consultations were required after the originally scheduled date for completion of the pier of January 15, 1987.

The record indicates that on May 27, 1986, GM&B submitted a fee proposal for

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<sup>2</sup> It cannot be ascertained from the record when this claim was filed.

construction services totalling \$9,750.00. As noted above, however, the State authorized only \$7,500.00 in total fees. By October 20, 1986, GM&B had overrun the authorization in the general consultation during construction category by over \$500.00. By November, 1986, the overrun in this category exceeded \$900.00. All of these "extra" costs were incurred well before the original completion date of the job and based on events occurring in the summer and fall of 1986, GM&B on October 24, 1986 requested a total fee increase to \$10,500.00.

GM&B's final invoice of January 22, 1988 indicates that it billed a total of \$10,272.00 for its services and was paid \$9,997.00.

DGS argues that the difference between the original upset limit in the GM&B contract of \$7,500.00 and the amount actually paid to GM&B of \$9,997.00 (yielding \$2,497.00) is the responsibility of the Appellant. Its argument in this regard is based on the assertion that the \$2,497.00 amount represents work performed by GM&B after the original contract completion date.

The original upset limit of \$7,500.00 was increased by DGS to \$12,700.00 by letter dated February 4, 1987 in which the extension of Appellant's contract completion date by sixty days (from January 15, 1987 to March 15, 1987) was also approved. The invoices submitted by GM&B that are dated prior to January 15, 1987 reflect billings within the various upset and lump sum limits of \$4,575.00 and claimed costs (without regard to the upset limits) total \$5,347.00. Invoices dated subsequent to January 15, 1987 reflect total billings of \$4,925.00.

The invoices filed after January 15, 1987 are dated January 22, 1987, February 17, 1987, March 18, 1987, April 22, 1987, May 20, 1987, June 18, 1987, October 26, 1987 and January 22, 1988. These post January 15, 1987 invoices do not set out specific time frames indicating when the work was performed. Noting that the project was substantially completed in March 1987 and accepted in April 1987 and noting that GM&B requested a fee increase to \$10,500.00 in October, 1986 well before the original completion date, we find that DGS has not established what specific portion of the asserted additional fees of \$2,497.00 that exceed the original \$7,500.00 upset limit represent fees for work performed subsequent to January 15, 1987 rather than work performed before January 15, 1987.

We find this deficiency to be fatal to DGS's counterclaim. We also observe that the record does not reflect that the sixty day time extension for contract completion granted by DGS to Appellant was conditioned on Appellant paying any additional architect's fees occasioned thereby. The Appellants' appeal is therefore sustained.

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