

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GREINER ENGINEERING)	
SCIENCES, INC.)	
)	Docket No. MSBCA 1156
Under SHA Contract No.)	
A-519-060-670 and)	
W-520-005-670)	

March 22, 1984

Waiver - The SHA constructively waived its right to strict compliance with the contractually specified procedure for approving final bridge designs where it acquiesced in Appellant's stated intent to proceed with final design work based on an SHA directive to develop final plans.

Estoppel - The SHA was estopped to enforce a contractually specified review procedure where SHA's representatives, knowing that Appellant intended to proceed with final design work based on an SHA directive, failed to inform Appellant that it had not been authorized to proceed.

Notice - The evidence of record demonstrated that authorized representatives of the SHA had knowledge of Appellant's stated intent to proceed to final design pursuant to its understanding of an SHA directive.

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APPEARANCE FOR RESPONDENT:

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OPINION BY MR. KETCHEN

This appeal is taken from a final decision issued by the State Highway Administration's (SHA) Chief Engineer denying Appellant's claim for additional costs in the amount of \$17,536.64 resulting from an alleged change to the work under the captioned contract. By agreement of the parties, only the issue of entitlement is to be considered by the Board.

Findings of Fact

1. On October 5, 1979, SHA and Appellant entered into a cost plus fixed fee contract for consulting engineering services for a portion of the National Freeway, Appalachian Development Highway System, in Allegany and Washington Counties, Maryland. This contract provided for preliminary and

final design services including the preparation of plans, specifications and cost estimates for the highway and bridges ready for bid solicitation. Included within the scope of the services was the design of the High Germany Road bridge and the Golden Road bridge over U.S. Route 48.

2. The contract provided for formal review of each step in Appellant's design of the bridges as follows:

"DIRECTIVE: Each structure on all projects developed in the Bureau of Bridge Design or managed by same, must go through the following review stages and formal approval received before commencing any additional work affected by that review.

1. Pre T.S.&L. [Pre-Type, Size, & Location]
2. T.S.&L. [Type, Size, & Location]
3. Foundation Review
4. Structural Review
5. Final Review
6. P.S.&E. Review [Plans, Specifications & Estimate]"
(Underscoring added)

For each step in the design process, the contract described the plans, data, or type of information required. Any design changes required by SHA's review and comment on the Pre-T.S.&L. design were to be incorporated into the T.S.&L. design which then was to be resubmitted to SHA for review and approval. SHA approval at the T.S.&L. design stage fixes the span (superstructure) and pier (substructure) arrangement on which detailed final plans and specifications are based.¹ SHA's practice has been not to modify the T.S.&L. design revised pursuant to SHA's comments on the Pre-T.S.&L. design. However, it is undisputed that SHA does have the right to make additional changes at the T.S.&L. design stage and in some instances has done so. After T.S.&L approval, the design engineer goes sequentially through Foundation Review, Structural Review, Final Review and P.S.&E. Review, in a similar manner. The ultimate result is a set of documents ready for bid solicitation.

3. On July 8, 1980, Appellant submitted its Pre-T.S.&L. designs for the High Germany Road and the Golden Road bridges for SHA review. Both bridge designs consisted of a four span superstructure resting on a concrete substructure of three piers.

4. By letter dated July 31, 1980, SHA's Bureau of Bridge Design sent Appellant its comments on the Pre-T.S.&L. drawings for both bridges. It did not modify the four span and three pier arrangements.

¹Bridges consist of a substructure, e.g., piers and foundations; and a superstructure, e.g., spans and decks. (Tr. 42).

5. On December 18, 1980, Appellant submitted for approval its T.S.&L. design for the High Germany Road bridge, revised in accordance with SHA's Pre-T.S.&L. design comments.

6. On December 31, 1980, Appellant submitted for approval its T.S.&L. design for the Golden Road bridge, revised in accordance with SHA's Pre-T.S.&L. design comments. In its cover letter, however, Appellant alternately recommended a five span continuous bridge instead of the four span bridge set forth in the T.S.&L. design. (Tr. 33-34, Rule 4, Tab IV, C).

7. Subsequent to submittal of the Golden Road bridge T.S.&L. design for review, SHA changed the minimum median width from 58 feet to 34 feet. Based on this change, during March and April of 1981, Appellant revised the span arrangement, resized the span members, and prepared a new cost estimate for the Golden Road bridge. (Tr. 66; Rule 4, Tab IV, J).

8. On April 9, 1981, SHA advised Appellant that "[t]he [design of the] bridges at High Germany Road and Golden Road should be stopped after T.S.&L. approval." On January 18, 1982, even before T.S.&L. approval, SHA ordered Appellant to cease design work because of a funding deficiency.

9. On February 3, 1982, Appellant furnished SHA copies of the revised T.S.&L. designs for both bridges.

10. On September 9, 1982, SHA's Chief of the Bureau of Highway Design advised Appellant to proceed with the design engineering services which previously had been stopped. SHA's letter informed Appellant that the project had become one of top priority and that Appellant's ". . . cooperation in expediting the development of the contract plans is required to meet the following schedules: . . ." (Rule 4, Tab IV, K; Tr. 42).

11. On December 1, 1982, SHA's Chief of the Bureau of Bridge Design wrote to Mr. P. A. Grill, Appellant's Project Manager, as follows:

We had previously instructed you to stop work on the subject structures after completing T.S.&L. Now, on authority of Mr. William K. Lee, III, Chief Engineer, we hereby request that you develop Final Plans, Special Provisions, and the Engineer's Estimates on High Germany Road over U.S. Rte. 48 and Relocated Golden Road over U.S. Rte. 48. You should be prepared to adhere to the Advertising Schedule as determined by Mr. Edward Loskot, Chief, Bureau of Highway Design.

If you have any questions, please contact Mr. William F. Malone, Jr. of this Bureau at 659-1347.

12. On December 9, 1982, Appellant submitted a schedule to SHA's Bureau of Highway Design showing that Appellant had scheduled the period from December 1982 through February 1983 to complete the final design for both bridges.

13. On December 16, 1982, Appellant submitted a written request for boring logs to SHA's Mr. Malone. Boring log data, necessary for final design of the bridges' substructures, customarily is furnished to the design engineer by SHA based on an approved T.S.&L. design which fixes the pier locations. During discussions with Appellant's Mr. Grill in December 1982, Mr. Malone

expressed concern that SHA had not given final approval of the T.S.&L. designs for the two bridges. However, even though Mr. Grill understood that he did not have formal T.S.&L. approval, he explained to Mr. Malone that he was proceeding with final design of the superstructures² for the bridges based on SHA's directive in its December 1, 1982 letter. (Tr. 41-42, 46; 52-55). Neither Mr. Malone nor anyone else representing SHA told Appellant to stop the final design work or otherwise advised Appellant that it was proceeding at its own risk. (Tr. 58).

14. On January 3, 1983, Appellant submitted to Mr. Malone, at his request, copies of the revised T.S.&L. drawings previously submitted on February 3, 1982. This letter noted that Appellant had not received T.S.&L. approval.

15. In early January 1983, SHA modified Appellant's T.S.&L. drawings. These modified drawings were circulated for approval within SHA's Bureau of Bridge Design on January 18, 1983. Appellant was not informed, however, that modifications to its T.S.&L. design were being considered.

16. In a meeting with SHA's Bureau of Highway Design on January 19, 1983, Appellant advised SHA that it was trying to expedite the completion of the contract plans. SHA indicated that the Bureau of Bridge Design would be advised of this.

17. In its contract status report of January 24, 1983 to SHA's project engineer, Appellant again noted that it was continuing with the final superstructure designs for both bridges and accounted for the time that had been spent on this work. Appellant's report reiterated its request to SHA for boring log data necessary for final substructure designs.

18. By letter dated February 7, 1983 at the request of SHA's Bureau of Bridge Design, Appellant furnished SHA with background information regarding the revised T.S.&L. drawings submitted a year earlier. In this letter, Appellant reiterated that "[b]ased on the above, and the letter from SHA dated December 1, 1982, we have proceeded with the final design and drafting of the superstructure for these structures. Obviously, substructure design will depend on the receipt of boring data."

19. Appellant's progress report of February 9, 1983 directed to SHA's Project Engineer again noted that it was proceeding with final superstructure design for the two bridges. Appellant again requested boring log information for both bridges.

20. By letter dated March 7, 1983, SHA notified Appellant of its formal approval of the T.S.&L. designs for the two bridges. The T.S.&L. designs received by Appellant on March 10, 1983, however, eliminated the piers on the outside shoulder areas of U.S. Route 48. These changes differed considerably from Appellant's version of the span length and pier arrangement

²Once the span lengths and pier locations are fixed for a bridge, final design of the superstructure may proceed independently of the design of the substructure. (Tr. 49). However, final design of the substructure cannot proceed without the boring logs.

for both bridges submitted a year earlier for T.S.&L. approval. SHA's modifications obviated most of the final superstructure design work Appellant had completed on the two bridges. In addition, new general plan and elevation prints were required to develop a new boring log request.

21. On March 30, 1983, Appellant filed a claim for additional work in the amount of \$17,536.64 for the final design work completed on the superstructures up to the time SHA gave formal approval of the modified T.S.&L. designs.

22. SHA denied Appellant's claim for an equitable adjustment in a final decision issued on July 7, 1983. Appellant noted a timely appeal on July 19, 1983.

Decision

The issue in this appeal concerns whether Appellant appropriately relied on SHA's December 1, 1982 letter (Findings of Fact No. 11) as a direct instruction under the contract's terms to proceed to the final design of the Golden Road and High Germany Road bridges. Appellant contends that its action was justified because this letter directed it to develop final plans. SHA, however, contends that its December 1, 1982 letter merely notified Appellant that it was removing the instruction given a year and a half earlier barring any design work beyond the T.S.&L. design stage. The issue for resolution concerns the effect of the parties' actions based on SHA's December 1, 1982 letter.

We have held that a party may administer a contract in such a way as to give a reasonably intelligent and alert opposite party the impression that a contract requirement has been waived. The requirement then cannot be suddenly revived to the prejudice of the party who has changed his position in reliance on the supposed waiver. Granite Construction Co., MDOT 1012 (December 5, 1980), at p. 9; Hoffman v. Glock, 20 Md. App. 284, 288-89, 315 A.2d 551, 554 (1974). In this regard, a party may be estopped to assert a right to performance in accordance with a specific contract provision if he fails to act when such is warranted. Mohr v. Universal C.I.T. Credit Corp., 216 Md. 197, 140 A.2d 49 (1958).

We initially discuss Appellant's conclusion based on the December 1, 1982 letter that it was authorized to proceed with final design of the bridges. Here, the design work under the contract had lain dormant for some time when in September 1982 Appellant was told that the project had become one of top priority to SHA and that Appellant was to cooperate in expediting development of the contract plans. Appellant knew that in practice SHA normally did not modify bridge designs submitted for T.S.&L. stage review, although in this case the Golden Road bridge T.S.&L. design differed from the design SHA had approved at the Pre-T.S.&L. stage. In addition, Appellant understood that SHA had the authority to direct Appellant's method of

proceeding.³ Under these circumstances, we believe Appellant reasonably concluded that SHA's December 1, 1982 letter directing it to develop final plans was an instruction to begin final design work on the bridges without formal T.S.&L. approval.

Appellant advised SHA officials several times from December 1982 through February 1983 that it had begun and was continuing with final design work on the superstructures based on SHA's December 1, 1982 letter. At the same time, Appellant acknowledged that it did not have formally approved T.S.&L. designs. SHA never told Appellant to stop its design work or that it was proceeding at its own risk based on an erroneous interpretation of the December 1, 1982 letter.⁴ In the meantime, in January 1983, SHA considered and approved modifications to the T.S.&L. design which affected the final design work being performed by Appellant. Appellant was not informed of SHA's design modifications, however, until it received the marked up T.S.&L. drawings on March 10, 1983. Under the circumstances, we find that SHA had an affirmative duty to inform Appellant that it was not authorized to proceed with final design based on the December 1, 1982 letter. By remaining silent and, in effect, acquiescing in Appellant's continued performance, SHA waived its right to strict compliance with the contract's approval procedure and is estopped from enforcing this procedure to Appellant's detriment. Granite Construction Co., supra, p. 9; compare Dahl v. Brunswick Corp., 277 Md. 471, 487, 356 A.2d 221, 230 (1976); Dana Corporation v. United States, 200 Ct.Cl. 200, 220-21, 470 F.2d 1032, 1045 (1972).

In arriving at our finding, we recognize that SHA's Bureaus of Highway Design and Bridge Design are separate departments. Although SHA argues that Appellant did not notify the appropriate departmental representatives within the Bridge Design Department that it was proceeding with final design work, we disagree. The Bureau of Bridge Design's designated representative, Mr. Malone, was notified of Appellant's understanding and intent in December 1982. Further, the Chief of the Bureau of Bridge Design was told on February 7, 1983 that Appellant was developing final designs. In addition, SHA officials responsible for overall contract administration, including the project engineer, were kept apprised of what Appellant was doing. Under the circumstances, we find SHA bound by Appellant's notice to SHA's authorized representatives that it was undertaking final design work based on SHA's December 1, 1982 letter. Compare Mass Transit Administration v. Granite Construction Corporation, No. 554, (Md. App., filed March 6, 1984), at p. 14; Dana Corporation v. United States, 200 Ct.Cl. 200, 220-21, 470 F.2d 1032, 1045 (1972).

³The contract provided that SHA had the right to direct Appellant to modify the manner in which Appellant was to provide its services. Contract Section II, General Conditions For Consultant Agreements, para. 6; Scope of Consultant Services, page II-11; Tr. 91-92.

⁴Appellant's testimony in this regard stands un rebutted. Neither the Chief, Bureau of Bridge Design, who authored the December 1, 1982 letter, nor Mr. Malone, designated as SHA's representative to respond to any questions raised by this letter, testified concerning its meaning or the actions they took based on Appellant's interpretation of it.

In summary, the Board finds that SHA's December 1, 1982 letter directing Appellant to develop final plans and SHA's subsequent acquiescence in Appellant's stated intent to proceed with final design constructively waived the contractually specified review procedure for the bridges' design work. In effect, SHA authorized Appellant to develop final plans for the bridge superstructures based upon the submitted T.S.&L. design. Appellant therefore is entitled to those costs reasonably incurred in the final design of the bridges after December 1, 1982.

For these reasons, the appeal is sustained. In accordance with the parties prehearing stipulation, this appeal is now remanded to the SHA Administrator for negotiation of an equitable adjustment.

