BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of KASMER ELECTRICAL CONTRACTING, INC.	)	
	)	Docket No. MSBCA 1065
Under State Highway Administration Contract No. P-323-004-385	)	

January 12, 1983

Jurisdiction - Scope of Review - The parties to a State contract may not restrict the Board's statutory jurisdiction to resolve contract disputes de novo.

Jurisdiction - Review of Arbitration Decisions - Under Maryland law, only the courts have the inherent power to review an arbitration decision for fraud or gross error. If the parties to a State contract clearly agree to binding arbitration, the Board has no power to review.

Breach of Contract - Implied Obligation - Affirmative Duty - The SHA did not breach either its implied obligation not to interfere with the contractor's performance or its affirmative duty to provide reasonable assistance.

Delays - Assumption of Risk - Where timely performance under a State contract was dependent upon the cooperation of a third party with the contractor and the contract neither warranted performance by the third party by a certain date nor provided for damages in the event of delays by the third party, the contractor, in obligating itself to coordinate its work with the third party, assumed the financial risk of non-cooperation.

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OPINION BY MR. KETCHEN

This is a timely appeal from the Department of Transportation, State Highway Administrator's final decision dated February 18, 1982 denying Appellant's request for additional compensation resulting from 129 days of delay to contract performance. The delay is alleged to have been caused by the Chesapeake and Potomac Telephone Company (C & P) in its installation of the telephone line interconnections necessary for the operation of the traffic signal system required under the captioned contract. Appellant has

elected to proceed under the Board's accelerated procedures (COMAR 21.10.06.12 B(2)) and the parties have asked that both entitlement and quantum issues be resolved.

Findings of Fact

1. Contract No. P-323-004-385 in the amount of $400,055.00 was awarded by the State Highway Administration (SHA) to Appellant on November 30, 1978. This contract provided for the reconstruction and modification of a traffic signal system to control fourteen intersections along U.S. Route 1 between Maryland Route 410 and Interstate 95 in College Park, Maryland.

2. The traffic signal system required under the contract consists of a master computer, control units, sampling stations, loop detectors and traffic lights. Each of these items contractually was to be provided and installed by Appellant. The equipment was to be interconnected by telephone lines (interconnects or interconnections) which were to be provided for Appellant's use by C & P.

3. Loop detectors[1] are embedded in the road pavement to sense the flow of traffic at each controlled intersection. This information is transmitted to a designated sampling station along with similar information from other intersections. The master computer then receives the traffic flow information from each sampling station in the system and regulates the timing and sequence of traffic lights through local control units (controllers) at each intersection.

4. Following the connection of its equipment to C & P telephone lines, Appellant contractually was required to test the entire system for 30 days before final acceptance by SHA. (General Specifications, SP-15-5(a-f)). Appellant also was responsible for maintaining the newly installed equipment until completion of this 30 day system test and final acceptance. (SP-11-G(a-b); SP-15-5(a)).

5. The contract special provisions describe the responsibility for coordination with C & P as follows:

> "TELEPHONE CONNECTION.
>
> All fourteen (14) intersections and four (4) sampling stations are to be interconnected into a coordinated system by use of C & P Telephone Lines. The C & P Telephone Company is to supply their cable to a cabinet at each sampling station, local controller and master controller... Immediately after receiving the notice to proceed, the Contractor is to arrange a

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[1] "Loop detectors" were described as loops of wire placed in the pavement which detect or sense traffic passing over them. (Tr. A.29-30). The transcript is referenced as follows: Tr. A.___ (August 9, 1982 a.m.); Tr. B.___ (August 9, 1982 p.m.); and Tr. C.___ (August 10, 1982). Appellant's exhibits are designated A-___. SHA's exhibits are designated R-___. Joint exhibits are designated J-___.

meeting with the C & P Telephone Company representative through the Project Engineer to establish a suitable schedule for the telephone line connections.

At this time, the Contractor is to ascertain from the C & P Telephone Company the method of entrance whether aerial or underground." (Underscoring added.)

(SP-7-G (a-b), pp. 68-69).[2]

6. The special provisions further describe the responsibility for installation of the C & P interconnects as follows:

"TELEPHONE INTERCONNECTION

This item covers the providing of telephone interconnection from the utility company's source to the traffic signals and sampling station controllers. The interconnect will be run to twelve of the fourteen traffic signal installations and the four sampling station locations.

The C & P Telephone Company will be responsible for providing interconnection to the points shown on the plans for each location. The Contractor will receive these lines at these points taking it into the controllers in order to place these locations into systems operation.

* * *

(SP-8-GT (a)).

7. SHA notified Appellant to proceed with the work on or before January 8, 1979. By letter dated January 18, 1979, however, Appellant requested that the work in progress be temporarily suspended, so that material and equipment could be delivered to the job site. This request was granted and the project remained partially shutdown until June 6, 1980.[3] (Tr. A.19-22).

8. In a letter dated February 6, 1979, Appellant also requested that it not be required to conduct a 30-day system test prior to final acceptance. (A-1). Appellant's concern was that it would have to maintain equipment installed under the contract for an unreasonably long period in the event of delays by C & P. By letter dated February 15, 1979, the SHA District Engineer replied that the contractually required 30-day system test would have to be met as a condition of final acceptance, but that SHA would

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[2]The special provisions also provided that the contractor would coordinate its work with other public utilities as necessary. (SP-9-G (a-c)).

[3]The "partial shutdown" was issued consistent with the provisions of Section 10.08-6 of the Specifications for Materials, Highways, Bridges and Incidental Structures, March, 1968, Second Edition, as supplemented May, 1975.

consider accepting equipment for maintenance purposes after satisfactory completion of the required 7-day equipment tests. The SHA District Engineer further stated that:

> "[t]o avoid lengthy delays by C & P, may we suggest that you maintain contact with their organization to ensure that they install their work as promptly as possible." (J-7; see J-55, Exh. D).

9. From February 1979 to February 1980, little work was accomplished because of the temporary suspension of work. Appellant did not coordinate with or otherwise contact C & P concerning the interconnections during this time. In both December 1979 and February 1980, the SHA District Engineer apprised Appellant of its concern over the lack of progress on the project. Further, because Apppellant only had been charged six working days[4] in the 13 months since the notice to proceed due to excusable delays and problems, the Engineer requested Appellant to submit, "a list of unresolved problems, if any, that we can assist you with, or have responsibility to solve." (Rule 4, Tab IV, C, D).

10. Appellant did not order the traffic controllers and related telemetry equipment from its supplier, Econolite Control Products, Inc. (Econolite), until February 14, 1980.

11. Appellant's progress schedule, submitted on March 12, 1980, indicated project completion by September 1980. This progress schedule, however, had not been discussed with C & P.

12. On March 24, 1980, Appellant sent the contract drawings showing the terminal points for the installation of C & P wiring to the Econolite office in California. In May and June of 1980, Appellant attempted to have Econolite expedite the wiring information needed to establish the number of interconnects that C & P would have to install at these terminal points. Appellant acquired this wiring information from Econolite on July 3, 1980,[5] and Appellant's Project Manager prepared plans therefrom (J-54) showing the number of telephone line interconnects required. On July 29, 1980, these plans were submitted to Econolite for approval.

13. At a meeting on August 14, 1980 with the Appellant and representatives from SHA and C & P, the interconnect drawings (J-54) were delivered to C & P. C & P estimated that it could complete the interconnection work by November 1, 1980. Appellant's Project Manager, however, understood that C & P had to order special cable for the work and that its completion date thus was not firm.

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[4]A working day is one on which, in the opinion of the Engineer, weather and soil conditions are such that the Contractor can advantageously work more than half of his current normal force on a major contract item or the remaining principal work to be done. (Specifications, Section 10.01-1.)

[5]The contract required Appellant to submit the requisite wiring diagrams (J-53) for the telemetry equipment to SHA for approval within 30 days of issuance of the notice to proceed. (SP-15-5(d)).

14. In early October 1980, C & P still was projecting completion of its work by mid-November 1980. This projected date was changed, in late October 1980, to January 1981. (Rule 4, Tab IV, E).

15. On October 27, 1980, Appellant requested that the project again be suspended for 60 days because (a) the C & P interconnections were not completed, (b) weather conditions had affected the normal installation of the loop detectors and sampling stations, (c) PEPCO had stopped work at one intersection, and (d) the utility service requirements at another intersection were not known.

16. Although the temporary suspension of work issued in October 1980 still was in effect, Appellant scheduled a number of dates in December 1980 for start of the 30-day system test in an attempt to expedite the work. These dates were scheduled based on later information received from C & P concerning when it would complete its interconnection work. However, these dates continually were rescheduled and eventually cancelled because C & P was unable to complete the interconnection work at this time. Throughout this period both SHA's and Appellant's Project Engineers attempted to hasten C & P's progress in installing the interconnections. (Tr. A.57).

17. In December 1980, Appellant learned that C & P was installing two wire pair[6] telephone lines (i.e., the interconnections) in lieu of the four wire pairs the Appellant thought it had detailed on the drawings it gave C & P in August 1980. (Tr. B.13-14; Rule 4, Tab IV, G). This wiring was incompatible with the Econolite equipment purchased by Appellant. (Tr. B.13,52,56-58). This error in installation occurred because the drawings prepared by Appellant were ambiguous with respect to the number of wire pairs required. (Tr. B.56-58; C.48-54). In order to avoid the anticipated delay of three to four months which would have been required for C & P to provide the additional interconnections needed, Appellant and Econolite made modifications to their equipment so that the two wire interconnects could be used. This modification took approximately three weeks and was completed on January 6, 1981.

18. Even had C & P completed installation of the interconnections in November or December 1980, the 30-day system test still could not have begun (Tr. B.8) because (a) several intersections had not been activated as of November 1, 1980, (b) sheathed cable for sampling station No. 4 was still being installed by Appellant on December 29, 1980 (Tr. B.5-8), and (c) missing or defective equipment and equipment malfunctions would have prevented start of the test procedure. (A-7; J-29; Tr. A.61.; Tr. B.11, B.32, B.35)[7]

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[6]A telephone line, or interconnect, consists of two wires generally referred to as a pair, or sometimes, a wire pair. (Tr. B.18-19; SP-36-1(a)).

[7]During this period, SHA gave Appellant its own traffic controllers for use on an interim basis while Appellant's defective controllers were being repaired and tested, or modified to fit the C & P interconnections. (J-30; J-49).

19. Although the final adjustment to the C & P interconnections was scheduled for February 20, 1981, Appellant's Project Manager inexplicably cancelled the C & P work order. This work order later was reinstated on February 26, 1981, and the interconnection work was completed by C & P on March 6, 1981.

20. After completion of the contractually required 30 day system test, the project was accepted by SHA on June 4, 1981. Liquidated damages were not assessed against Appellant.

21. On June 15, 1981, Appellant submitted a request to the SHA for additional compensation in the amount of $53,956.22. This sum was said to represent the costs incurred during the 129 days it was delayed by C & P.

22. On February 18, 1982, the State Highway Administrator issued his final decision denying Appellant's claim based on his determination that Appellant had failed to demonstrate that SHA was responsible for the alleged delay caused by C & P in the installation of the telephone interconnections.

Decision

I. The Board's Scope of Review

The contract incorporated by reference the March 1968 edition of the "State Roads Commission Specifications for Materials, Highways, Bridges and Incidental Structures" (Specifications). Section 10.05-1 of these specifications provides as follows:

> 1. To prevent misunderstanding and litigation, the Engineer shall decide any and all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the manner of performance and rate of progress of said work, and shall decide all questions which may arise as to the interpretation of any or all plans relating to the work and of the Specifications, and all questions as to the acceptable fulfillment of the Contract on the part of the Contractor; and the Engineer shall determine the amount and quantity of the several kinds of work performed and materials which are to be paid for under the Contract, and such decision and estimate shall be final and conclusive, and such estimate, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money due under the Contract. Any doubt as to the meaning of or any obscurity as to the wording of these Specifications and Contract, and all directions and explanations requisite or necessary to complete, explain or make definite any of the provisions of the Specifications or Contract and to give them due effect, will be interpreted or given by the Engineer.
>
> 2. The decision of the Engineer shall be final and he shall have executive authority to enforce and make effective such decisions and orders as the Contractor fails to carry out promptly. (Underscoring added.)

SHA initially contends[8] that this clause reflects a contractual agreement to submit all contractor disputes to the SHA Engineer whose decision thereon is to be final and conclusive. The Board's jurisdiction, therefore, is said to be necessarily limited to a determination as to whether the SHA Engineer's decision was fraudulent, or so grossly erroneous as to imply bad faith.

Preliminarily, we must address the question of whether the present dispute is one which was required to be submitted to the SHA Engineer pursuant to Specification Section 10.05-1. In this regard, we note that Appellant's claim concerns the SHA's contractual responsibility for alleged delays encountered by Appellant as a result of other work being performed by C & P, a third party. Put another way, Appellant alleges that its planned manner of performance and progress were affected by C & P and that SHA contractually failed in its duty to coordinate the work. We conclude that such a claim falls within the broad language of Specification Section 10.05-1 which expressly authorized the SHA Engineer to decide any and all questions which may arise as to "... the manner of performance and rate of progress ..." of the contract work.

Having established that Specification Section 10.05-1 is relevant to the instant dispute, we turn to the question of its application. Our concern in this regard is fostered by the existence, at the time of contract, of statutory language giving the Maryland Department of Transportation (MDOT) Board of Contract Appeals the following jurisdiction:

> (A) The Board shall hear and determine all disputes within its jurisdiction.
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> (B) The Board shall have jurisdiction over all disputes other than labor disputes arising under a contract with the Department, or as a result of a breach of a contract with the Department ...."[9]

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[8]This issue was raised by a Motion For Summary Affirmance. Although the Board permitted the parties an opportunity to separately brief and argue the issues raised by SHA's Motion, the Board elected to reserve its ruling until the present time so as not to unduly protract the accelerated procedure requested by Appellant.

[9]See § 2-603 of Ch. 418 of the Laws of Maryland of 1978. This statutory language was repealed, effective July 1, 1981, when Chapter 775 of the Laws of 1980 created the new Maryland State Board of Contract Appeals (MSBCA). The MSBCA has jurisdiction over this appeal pursuant to § 25 of the foregoing Act.

Under SHA's interpretation, Specification Section 10.05-1 conflicts with this statutory language in that it deprives the MDOT Board, and ultimately this Board, of jurisdiction to resolve disputes de novo and purports to give this Board appellate jurisdiction to review the SHA Chief Engineer's decision.

At the outset we conclude that the parties cannot by private compact abridge or enlarge the jurisdiction of an administrative agency. Compare Md.-Nat'l Cap. P. & P. Comm'n. v. Washington Nat'l Arena, 282 Md. 588, 608, 386 A.2d 1216, 1230 (1978). This may be accomplished solely by statute. Accordingly, this Board by law has jurisdiction only to hear and resolve contract disputes de novo. If the parties clearly agreed to settle their disputes by using the SHA Engineer as a final arbiter, only the Courts may review the resulting decision for fraud or gross error.

For the following reasons, however, we conclude that the parties did not clearly agree to submit disputes to the SHA Engineer for purposes of binding arbitration. In this regard, we note the general rule in Maryland that subsisting laws enter into and form part of a contract as if expressly referred to or incorporated in its terms. See Downing Development Corporation v. Brazelton, 253 Md. 390, 398, 252 A.2d 849, 854 (1969). Accordingly, the disputes procedure prescribed by the Legislature was incorporated into the contract and must be read together with Specification Section 10.05-1. These two provisions may be read harmoniously as requiring disputes to be submitted initially to the SHA Engineer whose decision will be final unless appealed to the Board of Contract Appeals. Although SHA contends that Specification Section 10.05-1 constituted a waiver of Appellant's statutory right to appeal to the Board of Contract Appeals, we disagree. There is nothing in Specification Section 10.05-1 which indicates that it constitutes a waiver or relinquishment of the statutory disputes procedure. In the absence of clear language expressing a voluntary, informed waiver of this statutory procedure, we reject the SHA's interpretation of the contract and assume jurisdiction to resolve the present dispute de novo.

II. Responsibility for Delay

The central substantive issue in this appeal concerns whether SHA contractually is liable to Appellant for any delay costs which may have been incurred as a result of C & P operations. Appellant contends that SHA breached the contract by failing either to fulfill its duty to compel the cooperation of C & P, or to take other reasonable steps to insure C & P's timely completion of the interconnect installation. SHA argues that: (1) it could not compel C & P to perform at a specific time, (2) it did not warrant C & P's timely performance, and (3) Appellant assumed the risk of any delay in performance by C & P.

In every contract there is an implied obligation that neither party will do anything to unreasonably interfere with the performance of the other party, either directly or through its fault or negligence. Calvert General Contractors Corp., MDOT 1004 (March 4, 1981). Compare Dewey Jordan, Inc. v. The Maryland-National Capital Park and Planning Commission, 258 Md. 490, 265 A.2d 892 (1970); Star Communications, Inc., ASBCA No. 8049, 1962 BCA ¶ 3538; George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 69 F. Supp. 409, 411 (1947). An affirmative duty also is imposed upon an owner to take any steps reasonably necessary to assist in the contractor's performance. If SHA breached either of these implied obligations, Appellant can recover

any delay costs incurred. Calvert General Contractors Corp., supra, p. 35; Glassman Construction Co., Inc. v. Maryland City Plaza, Inc., 371 F. Supp. 1154 (1974), aff'd 530 F.2d 968 (4th Cir. 1975); L. L. Hall Construction Company v. United States, 177 Ct. Cl. 870, 379 F.2d 559 (1966); Lewis-Nicholson, Inc. v. United States, 213 Ct. Cl. 192, 550 F.2d 26 (1977).

In considering SHA's actions, the record does not show either that SHA had a contractual right to direct C & P's performance in accordance with a specific timetable, or that it delayed Appellant directly or through its fault or negligence. To the contrary, in February 1980, SHA vigorously attempted to get Appellant moving on the project and offered to assist Appellant in coordinating its work efforts with those of C & P. (Finding of Fact No. 9). SHA also attempted during the course of this contract to get C & P to complete expeditiously its installation of the interconnections. (Tr. A.57; A-2). Further, SHA made equipment and facilities available for Appellant's use when its own equipment malfunctioned during the period from November 1980, to March 1981. In these regards, SHA thus met its affirmative duty to reasonably assist Appellant's performance.

With regard to the express terms of the contract, SHA did not represent or otherwise warrant that C & P would perform its work by a specific date. Instead, Appellant and other bidders were told that it would be the contractor's responsibility to coordinate its work with that of C & P so as to assure timely performance. The risk of such an obligation thus was obvious; timely and efficient performance was dependent upon the cooperation of a third party. Despite this risk, the contract terms provided only limited relief. In the event of delay which was beyond the fault or negligence of a contractor, SHA could temporarily suspend the work, reducing the contractor's exposure to liquidated damages. Accordingly, we conclude that when Appellant entered into the captioned contract it did so with the clear understanding that any delay by C & P would be excusable but not compensable. It thus assumed the financial risk involved in the undertaking. Compare State v. Dashiell, 195 Md. 677, 689-90, 75 A.2d. 348, 354-55 (1950).

For the foregoing reasons, the appeal is denied.