BEFORE THE

MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MARYLAND TECHNICAL STONE ERECTORS, INC.	)	
	)	Docket Nos. MSBCA 1801 & 1837
Under MPA Contract No. 194010-H2.	)	

January 27, 1995

Differing Site Condition - A differing site condition clause is required to be included in State construction contracts by 13-218(b) of the State Finance and Procurement Article and COMAR 21.07.02.05 and will be read into such contracts whether or not the clause actually appears therein.

Site Investigation - A site investigation clause is required to be included in State construction contracts by §13-218(b) of the State Finance and Procurement Article and COMAR 21.07.02.06 and will be read into such contracts whether or not the clause actually appears therein.

Termination for Default - A contract may be terminated for default where the contractor does not properly perform its work not withstanding that the poor workman ship may in part be caused by a differing site condition. In giving the notice to cure the defective work, the State may require the contractor to take reasonable steps to ensure that the corrective work is accomplished properly.

APPEARANCE FOR APPELLANT: Michael C. Warlow, Esq.
Reisterstown, MD

APPEARANCE FOR RESPONDENT: Deborah M. Levine
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

This timely appeal involves Appellant's contract with the Maryland Port Administration (MPA) to install marble tile flooring on the twenty-eighth floor of the World Trade Center which was terminated for default. Appellant timely contested the validity of the termination and filed a claim for damages in the amount of approximately $40,000.00. Additionally, Appellant timely contests the claim of the MPA for $7,788.90 for alleged re-procurement and other costs arising out of the termination.

Findings of Fact

1. On the morning of July 2, 1993, the date scheduled for bid opening for the subject contract, Appellant's President, accompanied by the Appellant's office secretary, observed the area where the title was to be installed on the twenty-eighth floor of the World Trade Center in connection with Appellant's determination to submit a bid.[1]

2. Appellant submitted a bid of $21,500.00. Appellant's bid was the low bid. The bid was found to be responsive and Appellant was found to be a responsible contractor. Accordingly, Appellant was awarded the contract.

3. The location and configuration of the titles to be installed were depicted on contract drawing A3 from the separate renovations contract (contract No. 63911-C) for the twenty-eighth floor of the World Trade Center.

4. Actual tile installation work commenced on August 26, 1993.[2] Sometime prior to September 1,1993 the Parties Agreed that the concrete subfloor or substrate was out of tolerance in certain locations where the marble tile flooring was to be placed.

5. The parties agreed that the Appellant would perform bush hammering of the concrete substrate which was in the worst condition in front of the three elevator doors on the twenty-eighth floor. This work was performed o September 2, 1993 and also included some flash patching of these areas. Corrective work was not performed on other areas of the substrate which were out of tolerance.

6. Sometime between September 4, 1993 and September 8, 1993 the marble floor work was completed by Appellant.

7. By Letter Dated September 22, 1993, MPA rejected the work and directed that the marble tile flooring be completely replaced.

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[1]This was the second bid opening relative to the referenced project. Appellant had submitted a bid under the original invitation. All bids submitted under the original invitation were rejected because the bids exceeded the budget for the project and a re-solicitation was undertaken.

[2]The contract called for the work to be completed within "5 calendar days from August 9, 1993 until August 13, 1993 inclusive." Time was stated to be of the essence the contract completion to be completed not later than August 13, 1993. Apparently issuance of notice to proceed was delayed and the time for completion was extended. Sometime shortly after work commenced, MPA requested the joint width between tiles to be one-eighth inch and authorized the substitution of one-eighth inch brass strips for a previously specified one-quarter inch brass strips

8. The condition of the marble tile floor as it existed on September 20, 1993 was described by an expert in tile installation retained by MTA in September of 1993 in a contemporaneous report dated September 20, 1993 as follows:
At the request of the Maryland Port Administration, on September 20, 1993, I conducted an on-site investigation of the marble tile flooring installed on the twenty-eighth floor Elevator Lobby and adjoining Conference Rooms. Three types of marble tiles are installed with thin-set epoxy adhesive on the floors, green Taiwan Express 'A', Negro Marquina and Rosa Antico. The marble is 3/8 inches thick, in 012 inch squares, 6 x 12 inches and cut pieces to make the borders and inlays.

The size of the Elevator Lobby is approximately nineteen by thirty-nine feet. The floor is divided into three fourteen foot squares, each surrounded by six inch wide, Negro Marquina borders. Rosa Antico tiles are placed just inside the borders, then Empress 'A'. A diamond, consisting of Rosa Antico and Negro Marquina is in the middle of each ten foot Empress 'A' square. Empress 'A' and Negro Marquina tiles form the borders around the Elevator Lobby. Negro Marquina is also used as inlays in-between the three squares.

The two Conference Rooms are bordered with one to two rows of Empress 'A' tiles. The joints between tiles in the Conference Rooms align with joints in the Elevator Lobby. One-eighth wide brass strips are used between each color of tile.

PROBLEM:

Tiles have excessive lippage, joints and tiles are not straight, tiles are not aligned and there is an excessive number of tiles that sound unbonded.

OBSERVATIONS:

1. *A ten foot long straight edge was used to check the variation in the plane of the finished marble. Along the wall, the floor slopes roughly 1/2 to 3/4 inches upward from the elevators, to a point three feet from the elevator wall. At the west end, there is a hump in the middle of the floor. There are other areas where the floor slopes as much as 1/4 inch in ten feet. In general, it appears that the majority of the floor is level within 1/8 to 3/16 inch in ten feet.*
2. *Tile layout is not straight. Joints are not straight or even width. Joint width varies between 1/16 inch and 1/4 inch. Joints are crooked and tiles are not aligned with one another.*
3. *Corners of tiles are not aligned. Corners of many tiles are noticeably offset from adjacent tiles, causing grout joints to be crooked and of different width.*

3. *Edges of many tiles are chipped and have jagged edges. Edges of many tiles are also rough and chipped from the saw-cutting operation, evidence that cut edges were not rubbed or smoothed. There are cut tiles where the saw cut too far into the marble. Saw cuts were not made accurately, leaving gaps and wide grout joints between tiles, and between tiles and brass strips.*

4. *Small triangular tiles, installed next to large diamond insets are broken and displaced, evidence that they were not properly installed. Many tiles around diamonds and insets are improperly cut without adequate tolerances, leaving joints that are too wide, and a poor fit between tiles.*

5. *Brass strips used between different colors of tiles are generally lower than the face of the tiles. Many are at least 1/16 inch, or more, too low. There are grout stains on the top of many brass strips. Corners of brass strips do not align, leaving gaps. 1/8 inch wide brass strips were substituted for 1/4 inch brass strips.*

6. *Grout is missing from certain joints. There are soft and punky spots in the grout, where it can be readily scraped out of the joints.*

7. *Corners and edges of tiles are not flush and level with corners and edges of adjacent tiles. There is excessive lippage throughout the entire floor, including the Conference Rooms. Lippage was checked with a 1/32 inch thick shim, which is the maximum lippage allowed by the Marble Institute of America. It was also checked with other thicknesses of shims. It is estimated that more than twenty percent of the tiles have lippage exceeding 1/32 inch. Many others have lippage exceeding 1/16 inch. And a high number exceed 1/8 inch lippage. Most of the lippage appears to be related to workmanship and not variations in the plane of the existing concrete substrate.*

8. *The marble tile flooring was sounded by dragging a chain over the tile surfaces and tapping with a steel chisel according to ASTM D4580 to determine whether the tiles sound bonded, or partially bonded.*

   There are ten Negro Marquina tiles that sound completely unbonded and many other tiles with hollow sounding spots where they are not bonded. There are tiles that are cracked, or broken. Portions of cracked tiles also sound unbonded.

9. There are epoxy stains and grout stains on the surfaces of many tiles.

10. Exposed area of the Conference Room floors are covered with remainder of old resilient tile and carpet adhesives. No tiles were removed to determine whether such adhesives were removed prior to installation of the new marble tiles.

* * * [3]

12. According to Universal Marble, who supplied the marble tiles, the importer, or fabricator, of the green Taiwan Empress 'A' marble recommended that it be installed with epoxy to keep it from warping during installation. Epoxy adhesive, rather than thin-set epoxy mortar, was used to install all of the marble tiles.

9. MTA's expert drew the following conclusions and made the following recommendations in his September 20, 1993 report:

1. In my opinion, the marble floor installation is substandard and does not conform with requirements of specified TCA and ANSI installation standards. In addition, it does not conform with Marble institute of America (MIA) requirements. MIA references the TCA Handbook and ANSI installation standards for installation of marble tiles. This fact is recognized in the TCA Handbook.

Epoxy adhesive, used to install the tiles on the floors, is not designed for leveling. It is too soft. Epoxy mortar, which contains fine aggregate, such as silica sand, can be built up and would be a better choice for installing green marble that is susceptible to curling and warping when it comes in contact with water in cementitious setting materials.

2. In my opinion, the Elevator Lobby floor is not repairable. If repairs were attempted, joints would still be crooked and vary in width. Replacing tiles with excessive lippage would not correct the lippage problem. Some of the worse cases could be replaced. Grinding and repolishing

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[3]Paragraph 11 of this report sets forth a portion of the contract specifications and is omitted from this text.

the surface could correct the remainder of the tiles with lippage. However, so many tiles have lippage of 1/16 inch or more that grinding down the surface would remove the eased edges, causing wider variation in the widths of grout joints. In addition, grinding and polishing the surface of the tiles would not correct the variations from plane inherent in the floor. Rather, it would exaggerate the unevenness of the floor.

Generally, grinding and repolishing 3/8 inch thick marble tiles is not recommended. They are too thin to begin with. Removing up to 1/8 inch thickness to correct lippage, makes the tiles too fragile, and highly susceptible to damage and breaking from normal pedestrian traffic and maintenance operations.

3. *Replacing tiles with excessive lippage in the Conference Rooms would make the green marble acceptable in those areas, only if the joints in those tile would align with joints of new tiles in the Elevator Lobby.*

4. *In my opinion, the entire Elevator Lobby Floor should be removed and replaced in a manner so that the installation conforms with specified requirements, including MIA requirements.*

10. In the MPA letter of September 22, 1993, rejecting the work and directing replacement of the floor, certain conditions were set forth which were required to be met or the Appellant's contract would be terminated for default. In regard to these conditions the letter provided:

This is formal notice that your work under this Contract has been rejected in total. MPA is offering you a final opportunity to cure your poor performance. The list of deficiencies remains unchanged and includes, without limitation, lippage throughout floor area, cracked tiles, misalignment and varyin

The attached print illustrates the specific tile deficiencies not including misalignment and varying width joints. In MPA's judgement, the only responsible and satisfactory method to cure this floor area is with complete replacement of the subject marble tile flooring.

Due to the need to correct this problem in a timely manner, you are hereby directed to deliver your response, in writing, no later than 4:00 PM on Friday, September 24, 1993. Your response should include a plan that spells out all steps that you will take, the time for each step, and the manpower you will commit. You must furnish us the qualifications of the installation technicians who will perform the corrective work. We will reject your plan if the personnel you assign are considered unqualified; we believe that the persons that were responsible for the poor installation lacked adequate experience and we will not tolerate a repeat situation. Your installation technicians must have done comparable interior marble tile installations within the last 18 months and we expect you to identify specific installations so that we may verify their experience and workmanship. Most important, your plan should show that all corrective work can and will be complete and acceptable no later than October 10, 1993.

We must proceed with the timely and reasonable solution of this problem. If you fail to respond by September 24, 1993 at 4:00 PM, or if your response is not acceptable to the MPA, the MPA will terminate your contract for default under Clause 12 of the Purchase Order Terms and Conditions. We then will proceed to contract with a competent contractor to correct the deficiencies and will hold your firm responsible for the additional cost of the corrective work.

11. By letter dated October 3, 1993, MTA advised Appellant in relevant part as follows:

[Due] to the need to rectify this situation immediately... you are instructed to deliver, in writing, no later than 2:00 PM on Tuesday, October 5, 1993, the following information:

1) The proposed list of installation technicians and supporting information... and

2) A revised schedule that will detail the progress of work with a completion date of no later than October 10, 1993.

If you fail to respond by October 5, 1993 at 2:00 PM, or if your response is not acceptable to the

MPA, you leave MPA with no other choice but to terminate your contract for default under Clause 12 of the Purchase Order Terms and Conditions. We then will proceed to contract with a competent contractor to correct the deficiencies and will hold your firm responsible for the additional cost of the corrective work.

12. By letter (Fax Transmission) dated October 5, 1993 the MPA terminated the Appellant's contract for default. This letter provided in relevant part as follows:

> *We have received your faxed response to our letter dated October 4, 1993. Your response did not address the requirements of our letter to provide a list of qualified installers and a schedule to complete installation by October 10, 1993. Your response states that you need MPA's determination on the substrate. This is contrary to our understanding. Mr. Lange, MPA Project Manager, has informed you that as the contractor and expert you must furnish us with your evaluation of the substrate and steps needed to make the substrate suitable for marble installation. This has not been done to date. MPA has, therefore, determined that your response is unsatisfactory and unacceptable.*
>
> *Effective immediately, this letter serves as notice that MPA is proceeding with Termination for Default as provided in Clause 12 of the contract documents....*
>
> *MPA will follow up with a more detailed letter outlining the circumstances of termination for default.*

13. On October 7, 1993, MPA issued the more detailed letter outlining the circumstances of the termination for default. This letter provided:

> *Pursuant to our letter dated October 5, 1993 in which Maryland Technical Stone Erectors ("MTS") was terminated from the above referenced job, this letter shall serve to detail the circumstances of Termination for Default. Maryland Technical Stone Erectors was Terminated for Default as provided for in Clause 12 of the contract documents. The chronology is as follows:*

* *MPA's letter dated September 22, 1993 formally notified your firm that its work under the above referenced contract has been rejected in total and that your firm would have the opportunity to cure the poor performance.*

  You were instructed to submit a plan for successful completion of the project as well as a list of the installation mechanics, along with their qualifications and references, to MPA. This was deemed necessary because of the poor workmanship in the initial installation of the marble tile. Your response dated September 23, 1993 was judged to be not responsive because you failed to specifically identify those persons who would be performing the remedial work. This prompted MPA's letter dated September 27, 1993.

* *MPA's letter dated September 27, 1993 instructed your firm to submit a list of those persons who would actually perform the remedial installation along with their specific interior marble tile qualifications, references for similar work, and similar installation that could be visited and inspected by MPA. Your response dated September 27, 1993 requested MPA to be flexible to allow MTS more time in order to choose those persons most qualified to perform the remedial work. This prompted MPA's letter dated September 29, 1993.*

* *In MPA's letter of September 29, 1993, MTS's request for flexibility was granted in the interest of affording the contractor the opportunity to cure the poor performance.*

  MPA's letter instructed MTS that they may proceed with the demolition if a plan for execution of same was submitted and approved by MPA. However, MPA would have to approve those installation mechanics that would perform the remedial work before any marble could be installed.

  Your response dated September 29, 1993 was judged to be responsive and acceptable to MPA. The demolition was approved and performed.

* *In MPA's letter dated October 1, 1993, MTS was advised that only one person had been approved to install marble title and that MTS had not satisfied our repeated requests for information on the installation mechanics. MPA authorized marble installation on the condition that the installation mechanic who was previously approved by MPA be used to do the work. As of Monday October 4, 1993, the remedial installation work had not started. This prompted MPA's letter of October 4, 1993.*

* *In MPA's letter dated October 4, 1993, MTS was advised that the issue of whether the floor was "out of spec" was, in fact, an open issue, but it was an issue which you were advised was not to delay the continuation and completion of the project. MTS was advised to submit a list of installation mechanics who would perform the work, and the job was to have been completed by October 10, 1993. Further, MTS was to submit a plan by 2:00 p.m. on October 5, 1993 outlining a plan for completion of the work as well as a list of the installation mechanics. MTS's response to these requests for various information was to raise a question about the substrate. Therefore, MTS's response was judged to be unsatisfactory and unacceptable. This prompted MPA's letter of Termination for Default dated October 5, 1993.*

* * *

You have the right to seek redress in accordance with COMAR 21.10.04.02.

14. Clause 12 of the contract documents (purchase order terms and conditions) provides:

12. <u>Termination for default</u>

When the Contractor has not performed or has unsatisfactorily performed the contract, payment shall be withheld at the discretion of the State. Failure on the part of a Contractor to fulfill contractual obligations shall be considered just cause for termination of the contract and the Contractor is not entitled to recover any costs incurred by the Contractor up to the date of termination.

15. The language of COMAR 21.07.03.15, entitled Termination for Default, one of the mandatory terms and conditions for purchase orders over $10,000, most closely resembles the language of the Termination for Default clause as set forth above that actually appears in the contract. COMAR 21.07.03.15, however, contains additional language directing that termination for default is to be governed by the provisions of COMAR 21.07.01.11B, a long form termination for default clause applicable to all State contracts.[4]

16. We find COMAR 21.07.01.11B would thus govern the appropriateness of the termination of Appellant's contract for default. It provides in relevant part:

B. Alternate Clause--Termination for Default (long form).

> *"(1) The State may, subject to the provisions of paragraph (3) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following Circumstances: (a) If the Contractor fails to perform within the time specified herein or any extension thereof; or (b) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the procurement officer may authorize in writing) after receipt of notice from the procurement officer specifying such failure.*
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> *"(2) In the event the State terminates this contract in whole or in part as provided in paragraph (1) of this clause, the State may procure substitute performance upon terms and in whatever manner the procurement officer may deem appropriate, and the Contractor shall be liable to the*

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[4] The instant contract is a construction contract. A comparison of the provisions of COMAR 21.07.02.01 dealing with mandatory construction contract clauses makes clear that termination for default in construction contracts is governed by the provisions of COMAR 21.07.01.11A (short form) or B (long form) termination for default clauses.

State for any excess costs for substitute performance; provided, that the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

"(3) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the State in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform shall be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if the default arises out of causes beyond the control of both the Contractor and subcontractor, without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform unless substitute performance for the subcontractor was obtainable from another source in sufficient time to permit the Contractor to meet the performance schedule.

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17. Appellant's President testified at the hearing that certain of the work in the area in front of the conference rooms was "out of specifications" and needed to be redone. The tiles covered by this acknowledgement are marked or outlined in a pink color on Appellant's Exhibit 7 and constitute approximately 10% of the total number of tiles placed. Appellant's President attributed this faulty work to the short time constraints placed on completion of the project which required work to be done hurriedly and resulted in poor workmanship.

18. However, the record also reflects MPA's admission, as noted in the correspondence set forth above, that the work was adversely affected by the condition of the substrate and reflects that the bush hammering of areas of the substrate in front of the elevators authorized by MPA did not correct the

tolerance deficiencies in other areas of the substrate where the tile work was to be performed.

19. The Board finds that the tile flooring when originally completed was as described by MPA's expert in his report of September 20, 1993. The Board further finds that both the uneven condition of the substrate and poor workmanship contributed to the necessity to remove and replace the tile flooring.

20. In its appeal filed in MSBCA 1801 Appellant asserts that upon the alleged wrongful termination of its contract it incurred costs of $6,433.91 in removing its equipment and materials from the job site. Appellant also asserts that upon the wrongful termination of its contract it was neither paid its contract price of $21,500.00 nor $8,495.33 in alleged labor and material costs incurred during the course of the work resulting from alleged changed conditions or deviations from the specifications.

Decision

Appellant argues that the actual condition of the substrate constituted a differing site condition, asserting that the physical condition of the substrate differed materially from that indicated in the contract documents and that such difference was not observable or discoverable through a site investigation or ordinary diligence prior to bid opening. The contract does not contain a differing site condition clause. However, the contract at issue we find to be a construction contract. A differing site condition clause and a site investigation clause are required to be included in State construction contracts by §13-218(b) of the State Finance and Procurement Article and COMAR 21.07.02.05 (differing site) and COMAR 21.07.02.06 (site investigation) and will be read into such contracts whether or not the clauses actually appear therein. See Department of General Services v. Harmans Associates Limited Partnership, 98 Md. App. 535, 547-551(1993). Therefore, the required clauses shall be read into the Appellant's contract. The Differing Site Conditions Clause, COMAR 21.07.02.05, provides:

.05 Differing Site Conditions.

Mandatory provision for all construction contracts:

"Differing Site Conditions

"(1) The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The procurement officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(2) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (1) above; provided, however, the time prescribed therefor may be extended by the State.

"(3) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

The Site Investigation Clause, COMAR 21.07.02.06, provides:

.06 Site Investigation.

Mandatory provision for all construction contracts:

"Site Investigation

"The Contractor acknowledges that he has investigated and satisfied himself as to the conditions affecting the work, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during prosecution of work. The Contractor further acknowledges that he has satisfied himself as to

the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all explanatory work done by the State, as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to acquaint himself with the available information may not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The State assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available by the State."

The contract documents do not portray the uneven condition of the substrate. MPA argues, however, that a reasonable site investigation would have revealed the uneven condition of the substrate. The Board finds that the uneven condition of the substrate would not have been revealed by a pre-bid site investigation or otherwise through exercise of reasonable pre-bid inquiry. The extent of the problems with the substrate could not be determined without a survey and it would be unreasonable to require bidders to incur the time and expense of a survey of the substrate given the overall relatively small cost and scope of the type of work to be performed. See Raymond International, Inc. v. Baltimore County, 45 Md. App. 247, 252-260(1980); cert. den. Ct. of App. July 3, 1980; cert. den. 449 U.S. 1013(1980). See also Martin G. Imbach, Inc., MDOT 1020, 1 MICPEL ¶52 (1983). Compare Glover Contracting Company, ASBCA No. 24973, 84-1 BCA ¶16,994 (1984).

Appellant encountered a work site differing from that represented; i.e. a substrate out of tolerance in certain locations rather than in tolerance throughout the area where tiles were to be placed. Appellant reported this condition to MPA and was paid for certain corrective work (bush hammering and flash patching) in the floor area in front of the elevators. While other areas of the floor still remained out of tolerance, the Board finds from the record as a whole that the Appellant's poor workmanship was a major contributor to the necessity to remove and replace the tile

flooring upon rejection of Appellant's work. Appellant's President admitted that approximately 10% of the tiles placed were out of specification as a result of faulty workmanship and needed to be replaced. MPA's expert concluded that the floor installation was substandard and not in conformity with industry recognized installation standards. Appellant was thus in breach of the contract and default termination would have been appropriate.

The explanation given Appellant for the reasons for termination of its contract for default were that after the work was rejected Appellant failed to submit a plan for successful replacement of the floor and a list of personnel proposed to perform the remedial work for approval by MPA. The tile flooring needed to be replaced. The rejection of the work and the need for replacement was caused in part by poor or faulty workmanship and in part by the condition of the substrate. It is not possible from the record to allocate with precision the degree to which the need to replace the floor was attributable to Appellant's poor workmanship and the degree to which the need for replacement was attributable to the condition of the substrate. However, the record reflects that Appellant's poor workmanship was a significant factor that led to the need to remove and replace the tile flooring. Such poor workmanship would have justified terminating Appellant's contract for default under COMAR 21.07.01.11B for being in breach as a result of a failure to properly perform the work.

However, as noted, Appellant's contract was not terminated for this breach. MPA elected to allow Appellant an opportunity to cure its defective workmanship. The conditions placed upon Appellant before it would be allowed to go forward with the corrective work were reasonable. Given that Appellant's original workmanship had been poor it was prudent for MPA to insist that Appellant demonstrate it had a workable plan and the personnel to properly implement such plan to insure installation of a new floor that complied with specifications and would thus be acceptable. Compliance with these two conditions became contract requirements

relative to cure of Appellant's breach which Appellant failed to meet.

Appellant argues, however, that MPA already had a corrective plan as submitted by MPA's expert prior to Appellant's termination[5] and that the requirement for Appellant to produce a plan was therefore unreasonable. However, the Board finds that it was reasonable for MPA to require Appellant to submit a plan to make sure Appellant understood how to install the flooring properly in light of its prior poor workmanship.

Appellant also contends that it proposed a solution to the uneven substrate that was similar to the MPA expert's recommendation for dealing with the uneven substrate prior to installation of the original flooring but that such plan was rejected due to cost and time constraints and requirements of the specifications. MPA disputes that such recommendations were made by Appellant. Such recommendations, if made, were made orally by Appellant's job foreman to an MPA project engineer responsible for renovation work to include the instant work on the twenty-eighth floor. We find the record does not substantiate Appellant's contention that it proposed a solution to dealing with the uneven substrate that, had it been accepted, would have led to a workmanlike acceptable job, thus excusing Appellant's poor workmanship and reprocurement costs. Based on the record, the Board finds that the termination for default was appropriate and denies Appellant's appeal thereof. Because default termination was justified, Appellant's claim for damages for wrongful termination is also denied.

Upon termination of Appellant's contract, a follow-on contract to remove and replace the flooring was awarded to the second low bidder who had submitted a bid for the work for the July 2, 1993 bid opening. This contractor's total contract amount including changes was $29,679.00. Appellant's bid to do the work originally

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[5] MPA's expert by letter to MPA dated September 21, 1993 made specific recommendations for removing and replacing the tile flooring.

was $21,500.00. MPA submitted a claim for the excess reprocurement costs to include the fee of its expert. The Procurement Officer (and agency head) made the following final determinations concerning MPA's affirmative claim.

> *After considering the Maryland Port Administration's (MPA") Notice of Claim filed April 4, 1994 and the response by Maryland Technical Stone Erectors, Inc. ("MTS") dated April 26, 1994, I have decided to approve portions of the claim filed by the agency and to deny one portion of the claim.*
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> *Regarding the need to retain an expert consultant to inspect the floor installed by MTS, I shall grant the agency's claim. The work performed by MTS prior to the inspection by the consultant on September 20, 1993, was defective. MPA had questioned a number of MTS's installation techniques and the results of its work. While MPA should have been in a position to rely upon MTS's expertise in determining what efforts would be necessary to improve the job as of September 20, 1993, MPA was quite justified in seeking the expert advice of a consultant, rather than rely upon MTS which had not demonstrated expertise in the area of marble tile installation. I, therefore, grant the agency's claim for $2,347.90 for payments to the expert consultant.*
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> *Regarding the agency's claim for $6,575.00 as the additional amounts paid to the contractor who completed the job, Winfield Tile, I shall reduce the amount claimed by $1,134.00 for an amount of $5,441.00. Specifically, I deny the request for the amounts paid to Winfield Tile for floor preparation, since those amounts would have been granted by the agency if in fact MTS had made such a request during the period it was installing the floor. I am granting the balance of the amounts claimed ($5,441.00) for the following reasons:*
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> a. *The difference in costs between MTS's proposal and the costs paid to Winfield Tile ($2,165) was paid to Winfield Tile because MTS was unable to complete this job in a workmanlike manner.*
>
> b. *Because of the delay caused by the poor workmanship of MTS, the MPA was forced to pay additional night differential in the amount of $1,215.00.*

c. MPA was justified in terminating its contract with MTS; therefore, the demolition performed by Winfield Tile was required in order to properly reinstall the tile. The additional cost ($1,461.00) should be borne by MTS.

d. The extra cost for the brass strips ($324.00) is a result of the price differential in the costs of brass strips between the time MTS was performing the project and the time Winfield Tile was performing the work. Also, it became necessary to ship the strips by airfreight because of the need to complete the project in a timely fashion. The delay was caused by MTS's inability to complete the project properly. The cost of the airfreight was $279.00.

The claim by the MPA for payments of $8,922.90 is therefore approved except for the amounts claimed for floor preparation ($1,134.00). The claim is therefore approved but only in the amount of $7,788.90.

COMAR 21.07.01.11B(2) provides that a contractor may be liable to the State for the excess cost of substitute performance. At the hearing of the appeal, Appellant conceded that, assuming the default termination was appropriate, the reprocurement costs were fair and reasonable. Exception was taken, however, to payment of all of the fee of the MPA expert consultant because (1) a portion of the fee would have related to recommendations in the expert's report as to how to repair the floor that the State did not adopt, and that (2) "since [Appellant] agreed that the floor was deficient and stated his willingness to repair it that . . . his [expert's] consultation was not necessary." The Board, however, finds based on the entire record that the services of the MPA expert were necessary to determine the nature and extent of the problems with the work (Appellant having only agreed to replace approximately 10% of the work) and that the fee remains reasonable even though MPA did not adopt all the recommendations. Accordingly, the Board denies the appeal of Appellant concerning the affirmative claim of MPA.

Wherefore, it is ORDERED this 3rd day of March, 1995, that the appeals in MSBCA 1801 and 1837 are denied.

Dated: March 3, 1995

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;

(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or

(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1801 & 1837, appeal of Maryland Technical Stone Erectors, Inc. under MPA Contract No. 194010-H2.

Dated: 3/3/95

Mary F. Priscilla

Mary F. Priscilla
Recorder