BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of RELIABLE JANITOR SERVICE	)	
	)	Docket No. MSBCA 1247
Under MPA Contract No. 12488-S	)	

February 3, 1986

Equitable Adjustment - Actual Costs - Appellant's contract was determined to be void as a result of its failure to include certain mandatory clauses as required by provisions of the State Finance and Procurement Article and COMAR. Appellant was, nevertheless, entitled to recover costs actually incurred where the evidence adduced at the hearing of its appeal demonstrated that Appellant entered into the contract in good faith without either contributing to the failure of the contract to include the mandatory clauses or having knowledge that the clauses were not contained in the contract prior to award.

Equitable Adjustment - Interest - Predecision interest was appropriate at the rate and from the point in time requested by Appellant in the absence of challenge by Respondent and where the evidence of record demonstrated a relationship between the amount sought as predecision interest and the actual cost to Appellant resulting from Respondent's denial of its claim.

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OPINION BY CHAIRMAN HARRISON

This timely appeal arises out of the denial by the Maryland Port Administration (MPA) procurement officer of Appellant's claim for compensation withheld from it in the amount of $26,492.64 in connection with performance of janitorial services at the World Trade Center. Appellant elected to proceed under the "Accelerated" procedure provided for in COMAR 21.10.06.12. The Board's summary findings of fact and conclusions of law follow.

Findings of Fact

1. In early 1983 Appellant entered into a contract with MPA to perform janitorial services at the World Trade Center for the period January 1, 1983 to December 31, 1984. In 1984 a dispute arose over Appellant's failure to supply the number of hours of labor required by the contract.

2. The contract required Appellant to furnish 1120 hours of labor per week for the duration of the contract. Thus the number of hours required in 1984 amounted to a total of 58,240 hours (1120 x 52 = 58,240). Hours required for the entire two years of the contract amounted to 116,480 hours. Appellant failed to provide approximately 6828 hours of labor in 1984. (Nov. 20 Tr. 74-84; Respondent's Ex. 5). As a result of Appellant's failure to provide the required number of hours, MPA withheld a total of $26,492.64 (derived by multiplying the shortfall of hours by a composite hourly labor rate) from the fixed amount otherwise payable under Appellant's November and December 1984 invoices.

3. MPA in its Response to Appellant's Request for Admission of Facts has admitted it would have paid Appellant the $26,492.64 withheld by it if Appellant had supplied the approximately 6828 hours of labor MPA claims Appellant failed to provide. While it did not supply the number of hours required, the record demonstrates that Appellant otherwise performed the contract in a satisfactory manner.

4. Sometime in late 1983, the MPA police instituted a prehiring security or background check requiring clearance of Appellant's janitorial employees before they could begin to work at the World Trade Center. Apparently employment or background checks had been routinely performed since 1978. However, whatever formal procedures were involved were either ignored or not stringently followed so that normally an individual could begin to work prior to completion of the background check. (Nov. 19 Tr. 29-30, 118-120, 127-128; Nov. 20 Tr. 5-17, 51-54, 60-61). When the MPA police began enforcing the prehiring check in late 1983, it took on the average between 7 and 15 days for the police to clear an individual for employment. At times this procedure took much longer and certain applications were never acted upon at all. (Nov. 19 Tr. 41-49; Nov. 20, Tr. 10-16). However, the record demonstrates that the MPA police could have performed these security checks in a one or two day turn around time. (Nov. 19 Tr. 217).

5. The job market for janitorial help is one in which turn-over is very great. Many of these persons are looking for seasonal or part-time work. (Nov. 19 Tr. 42). A delay of more than two or three days in being able to hire such persons is very detrimental since many will have accepted other work in even this short time frame. (Nov. 19 Tr. 122-123, 133-134). Therefore, any delay occasioned by a prehiring security check will have a very detrimental effect on staffing janitorial jobs. (Nov. 19 Tr. 44-49, 112, 122, 133-134; Nov. 20 Tr. 72-73).

6. Appellant's contract makes no reference to a prehiring security check. (Nov. 19 Tr. 43-44; Appeal File, Tab III).

7. The record contains unrebutted evidence that Appellant's difficulty in fully manning the job with janitorial personnel for the total hours required by the contract was further aggravated by excessive oversight of its janitorial

work force by the MPA police and MPA building and grounds personnel resulting in part from Appellant's complaints about the prehiring security check. (Nov. 20 Tr. 52-64).

8. Despite a shortfall in hours every month during 1984, MPA honored Appellant's monthly invoices until the invoices for November and December 1984 (the last two months of the contract period). (Nov. 20 Tr. 89-94).

9. At a meeting in March of 1984 attended by representatives of Appellant, MPA and the MPA police, Appellant's shortfall in hours for January and February 1984 was discussed. It was determined that the cause of Appellant's shortfall in hours was the time required for the MPA police to conduct the security checks since applicants would find other work or otherwise become unavailable in the interim. It was agreed at this meeting that the MPA police would attempt to reduce the turn around time from the two to three weeks required in many instances to one week. After similar discussions in October of 1984 the MPA police agreed to reduce the turn around time to 3 to 4 days. (Nov. 19 Tr. 83-86; Nov. 20 Tr. 54-55). Appellant at all relevant times contended that even these reduced time frames would make it difficult if not impossible to staff the job and requested permission to hire personnel pending the security check, which request was denied. (Nov. 19 Tr. 43, 72-86; Nov. 20 Tr. 53-57, 60-61). Despite these difficulties, Appellant attempted throughout all of 1984 to comply with the hours of labor requirements of the contract including performance of overtime work by supervisory personnel at a higher hourly salary rate and occasional overstaffing at the nonsupervisory level. (Nov. 20 Tr. 60-74, 103-105).

10. While Appellant did not supply the number of hours required, the record reflects that Appellant substantially performed under the terms of its contract particularly with respect to the standard of cleanliness required (the essence of the contract) and that its overall performance of the contract notwithstanding the shortfall of hours was regarded as satisfactory by MPA. MPA suffered no damages as a result of the shortfall in labor hours.

11. During the period December 1984 - November 1985, Appellant borrowed approximately $26,500.00 from the Union Trust Bank pursuant to its line of credit under an accounts receivable arrangement and has been paying interest thereon at the rate of 2% over prime. Appellant's unrebutted testimony was that these borrowings were directly related to MPA's withholding of $26,492.64 under the subject contract. (Nov. 19 Tr. 38-41; Appellant's Ex. 2). MPA made its determination to withhold payment in mid-October 1984 and so advised Appellant on or about October 22, 1984. At MPA's suggestion, Appellant attempted in good faith to negotiate a settlement of the matter to no avail through early 1985. (Nov. 19 Tr. 214-231; Nov. 20 Tr. 103). Appellant seeks to recover $26,492.64 plus predecision interest at 10% from December 30, 1984.

12. At the hearing of the appeal, as a result of an evidentiary objection pressed by Appellant, it was discovered that the contract failed to include certain mandatory provisions required by Article 21 of the Annotated Code[1] and COMAR. (Nov. 19 Tr. 152-186). The parties were given the

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[1]References are to Article 21 under which the instant procurement was conducted rather than to the presently effective counterpart provisions of the

opportunity to brief the legal effect of the failure of the contract to include mandatory provisions pursuant to Section 2-201 of Article 21 and COMAR 21.03.01. Appellant filed a brief on this issue on January 22, 1986. MPA elected not to file a brief.

The Board finds that as a result of the failure of the contract to contain mandatory clauses required by Article 21 and COMAR the contract is void pursuant to Section 2-201 of Article 21 and COMAR 21.03.01. However, the record demonstrates that Appellant entered into the contract in good faith without either contributing to the failure of the contract to include the mandatory provisions or having knowledge of their omission prior to award. Section 2-201(b) of Article 21.

Decision

As a result of an evidentiary objection pressed by Appellant at the hearing of the appeal, it has been determined that the contract in this matter was void since it did not contain certain mandatory provisions required by law and regulation. However, it was also determined that Appellant entered into the contract in good faith without either contributing to the failure of the contract to include the mandatory provisions or having knowledge that these provisions were not contained in the contract prior to award. Therefore, Appellant is entitled to be compensated for costs actually incurred. Section 2-201(b) of Article 21.

Based on the evidence of record concerning Appellant's borrowing of funds and payment of overtime compensation in an attempt to fully staff the job, we find that costs actually incurred by Appellant include what it seeks to

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State Finance and Procurement Article. Absent from the contract, among others, were clauses required by Section 5-101 regarding termination for convenience and default and changes or modifications to the contract.

recover in its appeal. Accordingly, its right to compensation is not adversely affected by the fact that the contract is void.[2] We next consider whether Appellant is entitled to recover.

The issue in this appeal is whether Appellant's failure to provide some 6828 hours of labor in 1984 (less than 6% of total hours of labor required for the two year contract) justified MPA in withholding from Appellant's invoices for November and December 1984 the amount of $26,492.64 related to such shortfall.

Appellant contends that its failure to provide these hours resulted from the imposition in late 1983 of a prehiring security check. This made it impossible for Appellant to fully staff the job in 1984 because it could not actually hire applicants until completion of the sometimes lengthy check and the high turnover in the janitorial employee work force necessitates employment at the earliest possible time after application. The Board finds that the imposition of the prehiring security check in fact prevented Appellant from staffing the contract for the required number of hours in 1984. We also find that (1) despite MPA's action, Appellant nevertheless attempted to supply the requisite number of hours, (2) Appellant satisfactorily performed the essence of the contract in maintaining an appropriate level of cleanliness in the building, and (3) MPA suffered no damages as a result of the shortfall in hours.

Based on these findings, Appellant was entitled to be paid the full contract price. See: William F. Klingensmith, Inv. v. David H. Snell Landscape Contractor, Inc., 265 Md. 654, 665 (1972); Schackow v. Medical-Legal Consulting Service, Inc., 46 Md. App. 179, 187-193 (1980).

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[2]In its brief on the issue of the effect of a finding that its contract was void, Appellant argued that this Board has no jurisdiction to raise the issue of voidness sua sponte and also argued that since it substantially complied with the terms of the contract, as demonstrated at the hearing of the appeal, the contract was not void. In view of the disposition we make of the appeal, despite our finding that the contract is void, we need not discuss these contentions except to note that we (1) reject the argument that the Board does not have jurisdiction to raise an issue of voidness where the issue arises as a result of an evidentiary objection by one of the parties, and (2) likewise reject the argument that substantial compliance with the terms of a contract overcomes the failure of the contract to contain mandatory provisions or clauses.

Appellant also asserts that the parties stipulated to the incorporation of all necessary contract clauses at the hearing of the matter citing the provisions of Section 2-301(c) of Article 21 whereby a mandatory contract provision may be incorporated by reference by the consent of all parties, which incorporation may be made "at any time without the necessity of consideration passing to either party." We think the record fails to support Appellant's assertion concerning a stipulation of the parties on the matter; more importantly, we do not believe that the cited statutory language regarding incorporation by mutual consent is intended to apply to contracts no longer in existence.

We, therefore, find that Appellant is entitled to be paid the $26,492.64 withheld by MPA and sustain the appeal.[3]

Appellant seeks predecision interest on the principal amount sought at the rate of 10% from December 30, 1984. MPA has not challenged this rate as being inappropriate and, in view of the evidence concerning Appellant's borrowings, we shall not disturb it. In determining when predecision interest shall begin to run, the Board looks to the time at which a claim became liquidated and the obligation to pay actually arose. See generally: Md. Port Adm. v. C. J. Langenfelder & S., 50 Md. App. 525, 537-545 (1982). The testimony in this case regarding payment of Appellant's invoices is that Appellant's November invoice for a sum certain was paid in part on or about December 15, 1985 and its December invoice for a sum certain was paid in part on or about January 15, 1986. (Nov. 19 Tr. 223-224). MPA had no right to withhold monies from these monthly invoices. The obligation to pay the entire amount of the November invoice arose in mid-December 1984 and the obligation to pay the entire amount of the December invoice arose in mid-January 1985. Accordingly, we find it appropriate to assess predecision interest as requested from December 30, 1984 to date.

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[3]MPA's assertion that the result we reach provides Appellant with a windfall ignores the unrebutted testimony that Appellant was required to borrow funds equivalent to that withheld by MPA at the rate of 2% above prime. (Finding of Fact No. 11).