BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeals of STANDARD MECHANICAL CONTRACTORS OF MARYLAND, INC.	)	
	)	Docket Nos. MSBCA 1145 & 1165
Under DGS Contract No. BA-000-795-102	)	

March 27, 1986

Implied Warranty - Specifications - Drawings - There was no breach of an implied warranty regarding the location of existing underground utilities and obstructions which were not located exactly as shown on the contract drawings as: (1) the contract drawings and specifications expressly stated that the information relating to existing underground utilities and obstructions was schematic and not guaranteed; (2) the specifications and drawings contained a composite of both design and performance requirements for installing new steamlines; and (3) the contract, including the specifications and drawings, clearly made the contractor responsible for locating existing underground utilities and obstructions and installing the new steamlines consistent with the existing location of those underground utilities and obstructions.

Contract Interpretation - The specifications and drawings, when read as a whole, established a 5' elevation below grade to be used only as a guideline during the installation of the new steamlines because the specifications and drawings warned bidders that the location of existing underground utilities and obstructions was neither accurately represented on the drawings nor guaranteed, and placed the responsibility on the contractor to install the new steamlines consistent with the existing location of underground utilities and other obstructions.

Contract Interpretation - Drawings - The contract drawings were not so inaccurate as to be misleading so as to entitle the contractor to additional compensation for a change or changed condition where the location of the new steamlines as actually installed did not differ materially from their location as represented on the drawings. New steamlines actually installed at various elevations from 3' below grade to eleven feet below grade to avoid existing underground utilities was not installed at a location that differed materially from the 5' elevation below grade shown for the new steamlines on the drawings.

Superior Knowledge - The contractor is not entitled to an equitable adjustment based on the theory of superior knowledge where as-built drawings in DGS' possession, although not provided to the contractor or other bidders, contained elevations of existing underground utilities and other obstructions that were thought to be inaccurate and, therefore, unreliable.

Superior Knowledge - Information regarding elevations of existing underground utilities and obstructions shown on drawings not provided to bidders because assumed to be inaccurate and, therefore, unreliable was not special information vital to the contract in the context of a claim based on superior knowledge.

Termination For Default - Waiver - Notice - DGS waived its right to terminate the contract for the contractor's failure to complete performance by the specified completion date when it permitted the contractor to continue performance and failed to preserve any right to terminate by notice that was assented to by the contractor.

Termination - Waiver - Where DGS waived its right to terminate the contract for failure to complete the work by the specified completion date, DGS could not thereafter assert that its own actions in suspending the work for an unreasonable time period were excused by the contractor's failure to complete the work on time.

Change - Suspension of Work - DGS' communications to the contractor indicating that it was to stop contract work during the Maryland legislative session and the contractor's actions taken to stop work in reliance on those communications was a suspension of work performance for an unreasonable period of time. DGS' actions amounted to a constructive change entitling the contractor to an equitable adjustment under the terms of the contract.

Equitable Adjustment - Unexcused Delay - The contractor was not entitled to an equitable adjustment for impact and delay costs for the initial period of time following the specified contract completion date that was attributable solely to its unexcused failure to complete the work on time.

Delay Costs - The contractor was not entitled to additional compensation for delay that either was not substantiated by the evidence or was concurrent with other critical work being performed. However, the contractor was entitled to a two day time extension for delay for the DGS change order issued regarding the chilled water lines.

Delay - Burden of Proof - The contractor failed to sustain its burden of proving that accelerated work to re-open a street to traffic for which it was paid increased compensation pursuant to a change order delayed the overall progress of the work entitling it to additional compensation.

Change - The contractor is not entitled to additional costs as a change to keep a city street open where the specifications required the street to remain open to minimize traffic disruption and the City of Annapolis, Maryland, not DGS, was the sole authority responsible for traffic control.

Delay - Delay of the installation of a mechanical pit that was concurrent with delay caused by the weather and with delay caused by the contractor's own actions is not compensable under the contract. However, Appellant was entitled to a two day time extension for delay to work on Manhole No. 1 and to the pipe tie-in at the House of Delegates Building.

Equitable Adjustment - Direct Costs - Burden of Proof - The contractor was entitled to reimbursement for the direct costs it could show were caused by DGS' suspension of work.

Equitable Adjustment - Idle Equipment - Burden of Proof - Although the contractor's performance period was extended by DGS' suspension of the work for an unreasonable period of time, the contractor failed to establish that it was entitled to the costs of idle equipment during the period of suspended work.

Equitable Adjustment - Mitigation of Damages - The contractor was not entitled to an equitable adjustment for its superintendent's idle time during the suspension of work period attributable to DGS where the contractor failed to establish that it made a reasonable attempt to mitigate its superintendent's salary costs by providing him with other work he was qualified to do during that period.

Equitable Adjustment - Unabsorbed Overhead- Eichleay Formula - Use of the "Eichleay Formula" is a reasonable method in this appeal for calculating the contractor's unabsorbed overhead costs attributable to an extended contract performance period. The "Eichleay Formula" establishes a daily or monthly overhead rate for the contract performance period, including both the period of performance specified by the contract and the period of delay during which the contract was not absorbing its share of the contractor's overhead costs. The overhead rate determined in this manner is then applied to the period of delay attributable to the State to calculate the unabsorbed overhead costs due the contractor for the period of extended contract performance.

Equitable Adjustment - Interest - Predecision and post decision interest were recoverable as part of the contractor's equitable adjustment.

Counterclaim - The Board refused to consider an affirmative claim, labeled a recoupment claim, raised by DGS shortly before the hearing was to begin. Litigation of this DGS counterclaim would have unduly prejudiced the contractor because of the short time remaining before the hearing, and this recoupment claim was not properly before the Board by appeal of a procurement officer's final decision that addressed the merits of the issue raised.

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OPINION BY MR. KETCHEN

These appeals are taken from two final decisions[1] issued by the Department of General Services' (DGS) procurement officer denying Appellant's claims for additional costs in the amount of $61,990.98 resulting from alleged delay and changes to the work under the captioned contract. Both entitlement and quantum are at issue.

Introduction

The work under this contract involved installation of new, underground steamlines between the Maryland House of Delegates Building and the Central Services Building, located in Annapolis, Maryland. Contract performance, as it occurred, covered three phases. The first phase covers the initial contract period from the notice to proceed issued on June 1, 1981 to the specified contract completion date of October 28, 1981. During this period, Appellant conducted the survey work, and the necessary piping was ordered and received. During the second phase, little or no work was done as the contract work was shutdown. The second phase covers the time from October 28, 1981, the specified contract completion date, to April 26, 1982, when contract work recommenced. The third phase of contract work covers the period from April 26, 1982, to August 13, 1982, during which time the work was substantially completed. This decision resolves the claim based on a consideration of these three phases of the work and their interrelationship.

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[1]On May 3, 1983, Appellant filed a notice of appeal of the DGS procurement officer's final decision denying its claim in the amount of $61,990.98 plus interest for the cost of changes to the work and for impact and delay costs. This appeal was docketed as MSBCA No. 1145. Appellant's complaint filed on August 13, 1983 raised issues that had not been treated by the procurement officer in his final decision. DGS objected to consideration of these issues on the ground that they were not properly before the Board by appeal of a procurement officer's final decision. By stipulation of the parties, on August 5, 1983, Appellant requested a final decision on the issues that had not been considered by the DGS procurement officer. The DGS procurement officer issued his final decision on these additional issues on September 15, 1983; shortly thereafter, Appellant filed another notice of appeal which was docketed as MSBCA No. 1165. The two appeals were consolidated for both hearing and decision purposes.

I. Phase 1 - Initial Contract Period

Findings of Fact

Background Information

1. On April 16, 1981, Appellant and DGS entered into Contract No. BA-000-795-102 (contract) in the amount of $350,000 for the replacement and installation of underground steamlines between the House of Delegates Building and the Central Services Building in Annapolis, Maryland. During construction, two change orders were issued which increased the contract price to $383,137.81. The contract completion date was October 28, 1981, within 150 days of the notice to proceed, which was issued on June 1, 1981. All time limits stated in the contract were "of the essence."

2. The contract consisted of the construction agreement; drawings M-1, M-2, AM-3, and SP-1; specifications, including general conditions and general requirements; Addendum No. 1 dated January-1981; and Addendum No. 2 dated March 2, 1981. DGS provided Appellant with the plans and specifications upon which it based its bid.

3. The contract provided that the contractor would furnish all labor, material, equipment, and services necessary for, and reasonably incidental to, replacing the existing steamline and condensate return line with new lines ("steamlines", "lines" or "piping"), and making the associated piping alterations in the Central Services Building and valve vaults, all as shown on the drawings. The new lines were to be insulated and protected by a minimum of three feet of cover. In addition, the contract required Appellant to excavate, backfill, restore the finished grade, install new curbs, gutters, and sidewalks, pave the parking lot, and provide landscaping. The Invitation for Bids (IFB) required bidders to submit bids on one Add Alternate for the possible construction of a mechanical pit in the basement of the Central Services Building, if it turned out that the new steamline would enter the building below the basement slab. However, this work was not included in the contract as originally awarded.

4. The scope of work generally represented by the drawings showed a steamline and condensate return line running under the sidewalk from the House of Delegates Building along Bladen Street. These lines included some expansion loops. The lines cut across Parking Lot "B" at a right angle to Bladen Street and entered the Central Services Building.

5. The drawings that were part of the contract contained both "schematic" and "scaled" drawings. A "schematic" drawing is a three-dimensional representation of an area of work to be performed. A schematic drawing represents the subject in a diagrammatic manner. A "scaled" drawing, on the other hand, is drawn to a specific scale and sets out specific detailed information. The scale is shown on the drawing or detail and represents the ratio between the dimensions shown and the actual dimensions.

6. Each drawing included notes, most of which stated that the drawings in general were schematic, even though some details were drawn to scale. A synopsis of the notes on the drawings that are relevant to the appeal follows:

DRAWING	NOTE
SP-1	Refers to brick paving.
M-1	Notes 1 and 2 clearly state that the exact locations of existing utilities are not guaranteed. They provide that existing piping, valves, utilities, and equipment are schematically located and that the contractor is to provide all necessary offsets to accommodate existing field conditions, including establishing the exact location of existing piping, ductwork and other utilities. Note 5 makes the general notes on Drawing AM-3 applicable.
M-2	The detail does not depict the elevation of the existing piping below the surface. It generally depicts piping schematics for connections to valve vaults and pipes in the basement of the Central Services Building. The general notes from AM-3 are applicable.
AM-3	Section A-A on drawing AM-3 notes that the elevation from the top of the brick paver to the bottom of the new steamline will be 5'-0" +/- VARIES. It also refers back to Drawing M-1 and M-2 for size and location of the new steam pipe. Section B-B states that the exact location of the existing pipes must be established. The general notes for this section state unequivocally that the existing piping, valves, utilities, and equipment are schematically located. (Underscoring added).

7. Drawing AM-3 is a schematic drawing although it contains a cross-section detail of the new steamline. The steamline invert[2] dimension is depicted as follows:

5' - 0" +/- VARIES

8. Section 15B-07K of the specifications provides that the steamline and condensate return lines should be installed as shown on the drawings or as may be required by the existing field conditions as follows:

> "The depth of the trenches and the necessary conduit offsets shall be established by the contractor in the field as required to clear existing utilities."

9. Section 15B-02 of the specifications alerts the contractor that:

> "In general, the drawings are diagramatic and do not show piping in its true position."

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[2]The invert of an underground pipe is the elevation of the bottom of the pipe.

10. Section 15A of the contract specifications, pertaining to mechanical work, puts the onus of locating existing utilities and pre-construction survey work on the contractor and provides in pertinent part as follows:

15A-02. Examination of Site

a. Intending Bidders shall visit and inspect the site prior to submitting their proposals . . . and shall thoroughly familiarize themselves with all existing conditions, check drawings and specifications and satisfy themselves as to the accuracy and completeness of same and the nature and extent of all work described and shall be prepared to execute a finished job in every detail without extra charge.

b. The work shall be generally installed where shown as possible. New and existing piping, and equipment including new piping connections are schematically located. The bidders shall carefully check in the field locations and elevation of the existing work and new piping connections prior to bidding and shall include in the bid an allowance for a complete installation of the work including connections to the existing work as required for continuous satisfactory operation. The Contractor shall make all adjustments and re-arrangements as may be required to the work due to existing field conditions without additional cost to the State. No extras will be allowed to the Contractor due to his misunderstanding of work involved or due to the required relocation of existing conditions. (Underscoring added).

11. Appellant's superintendent, Mr. Bitzer, made a cursory pre-bid site investigation, as required by Section 15A-02 of the contract (Rule 4, Tab 3; Tr. 19, 91-92, 149-150), but Appellant also relied upon, and based its bid on, the information provided by DGS in the contract plans and specifications. (Tr. 149).

12. Both Appellant and Mr. Grodzinsky, the DGS engineer, anticipated that two to three weeks would be sufficient time to verify the existing conditions by performing a survey of the work area. (Tr. 33, 58, 106, 155, 559-560).

13. Appellant believed that it would have to dig only a few, six foot deep, test holes where the drawings indicated that new lines crossed existing utilities. (Tr. 30, 560-561).

Work in 1981

14. Section 15A-05 of the specifications (Rule 4, Tab 8) states in pertinent part:

b. Complete shop drawings and material lists shall be submitted by the contractor . . . No work shall be fabricated or ordered by the Contractor until approved by the Engineer.

15. Although Appellant had received shop drawings for the pipe from the manufacturer (TPCO)[3] by May 4, 1981, it did not submit them to DGS for the required approval until May 19, 1981. On May 25, 1981, John Hartlove, the DGS Chief Construction Engineer, approved the drawings. Mr. Grodzinsky, who wrote the letter signed by Mr. Hartlove, testified that this approval was given solely to expedite the work, and that he had an understanding with Appellant that a profile for the pipe (part of the complete shop drawings) would be submitted as soon as possible - it never was. (Tr. 545, 559).

16. By June 12, 1981, almost two weeks after the notice to proceed, Appellant had dug only three test holes, which worried the DGS inspector assigned to this project. (Rule 4, Tab 114; Tr. 710).

17. At that time, Appellant realized it was necessary to perform an extensive profile, before ordering the "Ric-wil" pipe from TPCO. (Tr. 155). The profile was necessary because the obstructions made it impossible to install the pipe at a consistent depth. Instead, Appellant had to install the line generally deeper than it anticipated and with many directional changes (in order to avoid trapping condensate). At one point, near Manhole Number One, Appellant had to run the pipe at a higher elevation than five feet below grade. This required a waiver from DGS of the three foot minimum cover specification.

18. After a meeting with DGS representatives on June 17, 1981 to discuss the lack of progress on the job, J.R. McCrone, Inc. (McCrone) was finally ordered by Appellant to perform a detailed survey and profile. (Rule 4, Tab 46; Tr. 53, 57). The survey work required by the contract was not completed until July 30, 1981 (Rule 4, Tabs 48, 49), so that Appellant could not release the pipe for fabrication until July 31, 1981. (Rule 4, Tab 49).[4]

19. Appellant could not order the pipe until McCrone completed all of the survey work because TPCO would not manufacture pipe in a piecemeal fashion. (Tr. 280-281, 303). Due to revisions to the profile in August 1981, TPCO could not begin fabrication until after August 27, 1981 (Rule 4, Tabs 51, 52, 57; Tr. 173, 303), although TPCO sent the shop drawings, then in its possession, to its fabrication plant on August 19, 1981 to schedule fabrication of the pipe.

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[3]TPCO, Inc. (TPCO) is the manufacturer and supplier of the brandname "Ric-wil" insulated steamlines and condensate return lines required by the specifications. Contract General Requirements, Section 15B-07. The contract required Appellant to install the piping in accordance with the directions of TPCO representatives and with their approval. Contract General Requirements, Section 15B-07r.

[4]Appellant encountered several difficulties in performing its survey work. The drawings provided by DGS showed an electrical conduit entering the front of the House of Delegates Building when in fact it was located to the rear of the building. (Tr. 44, 107-108, 634-635). Almost all of the existing utilities that were uncovered during contract performance were at a greater depth than anticipated, requiring Appellant to redo much of its construction plan. (Tr. 157). For example, the actual location of the chilled water lines proved to be in the direct path of the construction work, and not out of the way, as shown on the drawings. (Rule 4, Tab 3; Tr. 38-39).

20. As a result of the pipe being ordered late, it was not delivered until after the original contract completion date of October 28, 1981. (Rule 4, Tab 56). The pipe was delivered in three shipments between November 6 and November 9, 1981. (Rule 4, Tabs 28, 59, 60).

Discussion

Appellant first maintains that it is entitled to a time extension and impact and delay costs because the drawings were defective. Appellant maintains that it bid the contract based on a reasonable interpretation of, and reliance on, the representations made in the plans and specifications. Due to the defective drawings, it contends that its survey work was delayed by ten weeks which, in turn, prevented completion of the work by the date specified. Appellant, thus, insists that it is entitled to a compensable time-extension of fifty-six calendar days. (App. Ex. 1). In addition, Appellant has requested additional compensation for its extended profile work in the amount of $3,436.80.

Appellant estimated that it would take two weeks to complete its survey and profile work. However, there is no disputing the fact that it took Appellant from June 1, 1981, the date the notice to proceed was issued, to August 27, 1981 to complete its survey and profile work and that the delay in this preliminary phase of the work caused delay in the completion of the job. What is in question is who is responsible for this preliminary delay. Each party blames the other.

The drawing notes were clear that the information shown was schematic and lacked any implied warranty that they accurately represented the location of existing piping, valves, equipment, utilities, or other obstructions (utilities) where Appellant was to place new steam pipe. In this regard, the notes contained on Drawing No. M-1 (App. Ex. 10) expressly state:

> 1. The existing underground utilities are shown according to the best information available for reference only, as indication of possible obstruction to the new work. The exact location, size and elevation of the various existing utilities is not guaranteed.
>
> 2. The contractor shall coordinate the routing and elevation of the new underground steam conduits with the existing underground utilities prior to commencing his work. The elevation of all new piping shall be established after all existing conditions are disclosed in the field to prevent conflicts and insure proper grading installation. (Underscoring added).

Similarly, Drawing No. AM-3 (App. Ex. 14b) states:

> 1. New and existing piping, valves, utilities and equipment including new piping connections and alterations are schematically located. The contractor shall establish in the field the exact location of the existing piping, ductwork, and utilities and accordingly determine the route of the new piping and conduits prior to commencing his work.

2. The installation of the new work must be fully coordinated with the existing field conditions. Provide all necessary offsets in an approved manner to accommodate the existing field conditions.

3. Conduits and piping shall be cut, fabricated and installed according to measurements taken in the field by the contractor. (Underscoring added).

Here, the specifications, drawings, and drawing note instructions were akin to performance type requirements. While they contained a composite of both design and performance requirements, by clear and unambiguous language they imposed on Appellant the responsibility to use his judgment and experience in locating the existing underground utilities and to lay the new steamlines so as to avoid the existing underground utilities. The contract thus was fraught with warnings that the representations on the drawings regarding underground utilities or other obstructions were schematic and that the contractor was responsible for locating existing underground utilities and for laying the new steamlines based on what it uncovered in the field by survey. Accordingly, there was no implied warranty regarding location of the existing underground utilities and obstructions as set forth in these specifications or drawings that was breached by DGS resulting in prejudice to Appellant such that it is entitled to additional compensation or a time extension.[5] See: Granite Construction Co., MSBCA 1014 (December 20, 1983); Utility Contractors, Inc. v. United States, 8 Cl.Ct. 42 (1985); United States v. Spearin, 248 U.S. 132 (1918). See also: Calvert General Construction Corp., MDOT 1004 (March 4, 1981).

Here, the drawings and drawing notes indicated that (1) both new and existing piping were schematically located, (2) the new steamline had to be routed at elevations to avoid existing underground utilities that Appellant had to locate, and (3) new steamline was to be laid at depths varying from a nominal depth of 5'. This information specifically warned Appellant that the locations of the existing utilities may not be accurate thus affecting the proposed placement of the new steamline as shown on the drawings. When read as a whole the drawings informed Appellant it was to use 5' only as a guideline depth to install the new steampipe. Actual depth would vary depending on the location of existing underground utilities. Bidders thus could only rely upon the details on the drawings to represent that the new pipe should be installed at five feet below grade if there were no existing underground utilities or other obstructions in the path of the work.

Appellant next argues that it is entitled to an equitable adjustment for changes to the work and for compensable delay since the drawings were so inaccurate as to be misleading. It contends that the actual location of existing utilities and the proposed location of the new steamline differed materially from the locations as shown by the drawings. The drawings were inaccurate and misleading and thus the work actually required at the site entitle it to an equitable adjustment as a change or changed condition.

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[5]The contract does not contain a differing site conditions clause or a changed conditions clause, although it could be argued that Appellant would be entitled to compensation pursuant to Contract General Conditions, Art. 12, "Claims for Extra Cost," under appropriate circumstances.

Steamline under the sidewalk represents approximately two-thirds of the total installation. This steamline was installed at an elevation of approximately 3 feet; or only one foot from where Appellant anticipated installing it. Appellant installed the steamline that ran across the parking lot to the Central Services Building from approximately 7' to 11' below grade elevation at the Central Services Building, a maximum variation of 5' from its interpretation that the drawings required it to install steamline between elevations 4'-1" and 5'-11" below grade.[6] This variation in installation from the dimensions of Section AA shown on the contract drawing, indicating "5 - 0+/-VARIES," was not a material one given that the drawings and specifications required Appellant to locate existing utilities and route the new steamline around them. Under these circumstances, we find that the actual placement of the new steamlines based on existing utility location did not differ materially from what the specifications and drawings represented and, thus there was no change or changed condition at the site because of defective drawings entitling Appellant to additional compensation. Robert E. McKee, Inc. v. City of Atlanta, 414 F. Supp. 957 (ND Ga. 1976) at 960. See: B.D. Click, Co., Inc., ASBCA No. 24586, 84-3 BCA ¶17,542 (existing waterlines located as much as twenty-seven feet from that indicated on the drawings was not a materially changed condition).[7]

Appellant next contends that DGS had superior knowledge of the underground conditions existing at the work site which DGS withheld and that this resulted in prejudice to Appellant.[8] Testimony elicited from Mr. Grodzinsky demonstrates that DGS did possess as-built drawings which had more information than the drawings contained in the contract. However, this information was never given to Appellant or the other bidders. (Tr. 587-595, 620-636, 997-999). Neither of these facts, however, is sufficient to hold DGS legally responsible for Appellant's failure to finish the work by the contract completion date.[9] Mr. Grodzinsky's withholding of the as-built drawings was intentional. He did not provide these drawings because he was unsure of their reliability since the information contained on these drawings was thought

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[6]Appellant interpreted the "5' - 0" +/- VARIES" detail of Section AA on Drawing AM-3 (Rule 4, Tab 3) as requiring it to install pipe approximately between an elevation of 4' 1" and 5' 11". (Tr. 23, 596-97).

[7]As we noted above, the instant contract does not contain a differing site conditions clause and some would argue that Appellant thus assumed the risk of the varying condition. However, Appellant would be entitled to recover under the contract's extra work clause (Contract General Conditions, Art. 12) had it been able to show that there were material defects in the drawings and that it was misled by these defects.

[8]DGS objects to Appellant's "superior knowledge" argument since it was not litigated, and was raised for the first time in Appellant's posthearing brief.

[9]As we found above, the contract drawings were not inaccurate or misleading since they were not intended to be detail requirements. They were intended to be used as a general indication of the location of the underground utilities. All of the drawings were labeled schematic, except for isolated section representations, and they contained sufficient warning that the information was not to be relied on as representing detail requirements. As we also found above, the contract placed the responsibility on Appellant to locate existing underground utilities and to place the new pipe accordingly.

to be in error and thus not material to the information contractors would need for their performance, and he was afraid they only would have confused bidders. (Tr. 639). In this regard, Mr. Grodzinsky's actions in withholding drawings containing inaccurate information is fully consistent with the clear intent of DGS expressed in the contract specifications and drawings that the contract placed on Appellant the responsibility for locating existing underground utilities and obstructions and properly installing the new steampipe based on what it uncovered. Thus, even if the as-built drawings in DGS's possession may have been helpful to Appellant in locating these underground obstructions during contract performance, Appellant was not legally prejudiced by DGS's withholding of potentially inaccurate as-built drawings during the bidding process or thereafter. See: Utility Contractors, Inc. v. United States, supra; B.D. Click, supra. See also: N.L. Larsen & Son, Inc., AGBCA No. 85-201-3, 85-3 BCA ¶18,256; C.M. Moore Division, K.S.H., Inc., PSBCA No. 1131, 85-2 BCA ¶18,110; Cam Construction Co., MSBCA 1088 (October 25, 1983); Dominion Contractors, Inc., MSBCA 1041 (January 9, 1984).

In addition, Appellant did not show that "it was misled to its detriment through the contracting agency's failure to disclose special information vital to the contract and not otherwise reasonably available, which the agency was aware the contractor lacked." C.M. Moore Division, K.S.H., Inc., supra, at 90,917. In the context of a contract which required the contractor to assume the burden of locating existing underground utilities and obstructions in order to properly lay the new steamline, information regarding the location of underground utilities that DGS assumed to be inaccurate and unreliable was not special information vital to the contract.

Further, it should be noted that from the time of the pre-bid site investigation, conducted by Appellant's representative, through the eventual completion of the project, Appellant's approach to the work seems poor. For example, Appellant waited almost three weeks after the notice to proceed had been issued to commence the survey work.

Under the above circumstances, we find that DGS cannot be held responsible for the delays experienced by Appellant in performing the survey work that obviously was required by the specifications and drawings (Drawing No. AM-3, notes 1 & 2). Appellant thus is neither entitled to a compensable time extension of fifty-six calendar days nor $3,436.80 for the additional survey costs on the grounds that the contract drawings were defective or that DGS had superior knowledge.

II. Phase 2 - Suspension of Work

Findings of Fact

21. Appellant notified DGS by a letter dated July 31, 1981, that pipe delivery would be late. (Rule 4, Tab 9). While this letter faulted the contract drawings and specifications for the delay, the Board finds that delay in pipe delivery was the sole responsibility of the Appellant. In a memorandum written on July 29, 1981, Mr. Herbig, the DGS District Engineer, notified Mr. Hartlove, DGS Chief Construction Engineer, that the pipe would not be arriving until some time near the end of October. (Resp. Ex. 5). In it, he also stated "that the work [should] not be allowed to proceed until after the next session of the General Assembly." (Resp. Ex. 5). Mr. Grodzinsky

also suggested to Mr. Hartlove, in an August 5, 1981 memorandum, that work be postponed until the spring of 1982. (Resp. Ex. 4). Dr. R.S. Nietubicz, DGS Director of Baltimore and Annapolis Public Buildings and Grounds, also requested that no work be performed during the 1982 session of the General Assembly, but he had no authority to make a final determination as to the progress of the work. (Tr. 663). These DGS representatives did not want the work to be performed after November 1, 1981 because activity surrounding the General Assembly session begins sometime in November and continues until mid-April. If the work was performed during the winter months, traffic and pedestrian flow in Annapolis would have been terribly disrupted. Mr. Hartlove was responsible for making the final decision regarding a work stoppage. (Tr. 177-178, 667-697).

22. Appellant also notified DGS of the potential post-October 28, 1981 completion date by letter dated August 11, 1981. (Rule 4, Tab 13). In response, Mr. Hartlove requested, in a letter dated August 26, 1981, that Appellant submit a schedule with a November 1, 1981 completion date and a plan for ceasing work until April 15, 1982. (Rule 4, Tab 14). A meeting was held on August 27, 1981, at which time Mr. Hartlove also requested that Appellant submit fall and spring work schedules. (Tr. 179-180).

23. On September 10, 1981, Appellant submitted the requested schedule proposals. Although the proposed schedules did not include cost estimates for work under a spring schedule, they did notify DGS that there would be increased costs due to the suspension of work. (Rule 4, Tab 16). In a letter to Appellant on September 29, 1981 DGS acknowledged the possibility that additional costs would be incurred if the work was suspended. (Rule 4, Tab 18).

24. Mr. Hartlove testified that as of the end of August 1981 when he realized that Appellant would be unable to complete the work on time, he had four options: "One was termination; one was suspension until April 15; the other option was to try to finish . . . the project in November or December; and the other option was to allow the contractor to work through the winter months." (Tr. 669). However, he agreed that despite the availability of four options in his mind, only two options were discussed with Appellant's President, Mr. Beever: either finish in the fall or shut down until the spring. (Tr. 693).

25. Mr. Hartlove testified that he could not determine the best course of action to take unless he had a cost break-down in front of him and that since no such proposal was ever submitted, he could not, and did not, suspend the work.

26. When the pipe arrived in early November 1981, Appellant's crew was directed by a DGS engineer to off-load the pipe at a location away from the site. (Tr. 61, 181, 382-383). DGS maintains that the pipe would have been stored away from the construction site regardless of whether Mr. Hartlove decided to suspend the work for the winter because it would have interfered with parking and pedestrian traffic if placed next to the site. (Tr. 676). To the Appellant, however, this direction implied that the pipe was being stored for the winter, which was another indication of DGS's intention to suspend the work until April 1982. (Tr. 61, 181, 382-383).

27. Appellant commenced work again on April 26, 1982. The work was substantially completed by August 13, 1982.

Discussion

The issue here is which party is responsible for the work shutdown from October 28, 1981 to April 26, 1982 and the effect of such a shutdown. Appellant, under its theory of the case, maintains that DGS is responsible for the entire delay period from October 28, 1981 to August 13, 1982 because of the defective drawings. However, we have held above that the drawings were not defective and that the pipe was not ordered early enough for reasons attributable solely to Appellant. The issue thus becomes one of determining the effect of the parties' actions surrounding Appellant's failure to complete the work on time.

It quickly became obvious to DGS officials in the summer of 1981 that Appellant would be unable to finish working by the contract completion date because the pipe was not ordered early enough to have it installed before the contract deadline. While DGS did not issue a formal written directive suspending Appellant's work for the winter months in November 1981 when Appellant failed to complete the work by October 28, 1981, it is clear that DGS, for its benefit, did not want Appellant working during the 1982 session of the General Assembly.

DGS argues that it did not suspend work under Appellant's contract. However, should the Board find that DGS did suspend the work, DGS contends that it is not liable to Appellant since it had a right to terminate the contract[10] because of Appellant's failure to complete the work on time. Since it had the right, as well, to refrain from exercising its right to terminate for Appellant's default, DGS maintains that it could suspend the work as an alternate remedy available to it without liability for Appellant's increased costs resulting from the suspension. Although DGS strongly argued this theory in its posthearing brief, the record reflects that in the latter part of October 1981, when the contract was supposed to be completed, DGS was unsure whether it wanted to terminate the contract, or had sufficient grounds to terminate it given the facts and circumstances existing at that time. In fact, DGS did not terminate the contract or attempt to give notice to Appellant that it had a right to terminate but was declining to do so. In any event, we do not accept DGS's view of the effect of its actions.

In this regard, DGS by its actions waived its right to terminate Appellant's contract, if that right existed, and decided for reasons beneficial

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[10]Contract General Conditions, Art. 18 in pertinent part, provides:

"State's Right To Terminate Contract

a. If the Contractor should be . . . guilty of a substantial violation of any provision of the Contract, then the Department of General Services, upon proof that sufficient cause exists to satisfy such action may, without prejudice to any other right or remedy, and after giving the Contractor seven days' written notice, terminate the employment of the Contractor and . . . finish the Work by whatever method may be deemed expedient. . . ."

to the State to permit Appellant to continue performance, albeit in April 1982 after the end of the legislative session. See: Robeson Associates, Inc. v. Gardens, 226 Md. 215, 223, 172 A.2d 529 (1961); National School Studios, Inc. v. Mealey, 211 Md. 116, 130, 126 A.2d 588 (1956).

In this regard, the Court of Appeals in Robeson stated:

> "There are few principles of contract law better established, or more uniformly acknowledged, than that a party to an executory bilateral contract, who keeps the same in existence after a known breach by the other party and accepts further performance from the party who has committed the breach, waives the breach, in the absence of an assertion of his intention to retain the rights accruing to him as a result of said breach, assented to by the other party; and if the injured party thereafter does not make good his promises of performance, he is responsible for such failure. 3 Williston, Contracts (Rev. ed.), §688 states it thus:
>
> > 'The principle is general that whenever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to.'"

Robeson, supra, at 222.

While DGS never gave Appellant a written directive to shut down the work until the spring, it is clear that that was the only option available and that DGS's position that the job was to be shut down during the winter of 1982 was communicated to Appellant by DGS letters and conversations during contractor conferences. Such actions on the part of DGS amount to a constructive change and entitle Appellant to recover damages pursuant to the terms of the contract for that part of the shutdown period that Appellant was not responsible for, i.e., the portion of the shutdown period for the

winter of 1982 that was solely for the State's convenience.[11] See: Hott and Miller, Inc., ASBCA No. 80-198-4, 82-2 BCA ¶15,974 (suspension of performance of work for an unreasonable period of time is compensable).

Here, we find that Appellant is not to be compensated for the initial period from October 28, 1981 to January 17, 1982, since we find that this period of delay is solely attributable to Appellant's unexcused failure to complete the work on time.[12] In order to arrive at this period of time, we have determined that eighty-one (81) days was a reasonable time, after October 28, 1981, for Appellant to have completed the work assuming that the shutdown had not occurred. This was the amount of time that elapsed between April 26, 1982 when Appellant was able to begin work again and July 15, 1982, the date when the parties agreed that the rescheduled work would be completed. It thus is a reasonable measure of the amount of time that Appellant would have taken to complete the contract after October 28, 1981. The period of shutdown following January 17, 1982 until April 26, 1982 is, therefore, found to be solely for DGS's convenience and allowable and

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[11]Contract General Conditions, Art. 11 provides for payment to the contractor for changes to the work. Contract General Conditions, Art. 14, "Delays and Extension of Time," provides, in pertinent part, as follows:

> a. If the Contractor be delayed at any time in the progress of the Work by an act or neglect of the State or the Architect, or by any employee of either, or by any separate Contractor employed by the State, or by changes ordered in the Work or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties, or any causes beyond the Contractor's control, or by any cause which the Architect shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the Architect may decide.
>
> * * *
>
> d. This article does not exclude the recovery of damages for delay by either party under other provisions in the Contract Documents. (Underscoring added).

[12]Contract General Conditions, Art. 12, "Claims for Extra Cost," provides in pertinent part:

> "b. Under no circumstances will overhead or profit be permitted as items of a claim when such overhead or profit are for periods during which a 'Stop Work' order is in effect due to an act, error or omission for which the Contractor is responsible.
>
> c. No profit or overhead which includes rental of equipment and the salaries of supervisory personnel will be allowed the Contractor for stoppage of Work when written notice of such stoppage, or impending stoppage, is not given reasonably in advance to prevent such stoppage. (See also ART. 14).
>
> d. No claim for extra will be granted which includes cost of delays or work stoppage due to strikes, lockouts, fire, avoidable casualties or damage or delay in transportation for which the State or its agents are not responsible. (See also ART. 14)." (Underscoring added).

allocable costs reasonably attributable to this latter period are compensable to Appellant. See: Fruehauf Corp. v. United States, 218 Ct.Cl. 456, 587 F.2d 486 (1978).

III. Phase 3 - Start-Up and 1982 Work Delays

A. Start-Up and Chilled Water Line Delays

Findings of Fact

28. Throughout the discussions between DGS and Appellant, April 15, 1982 was used as the start-up date following the winter shut down because this was the last day of the session of the General Assembly. (Tr. 188-189). Although Appellant was ready to begin working on that day, DGS directed Appellant to accommodate the City of Annapolis by not digging up the area prior to the City Fair. (Tr. 189-190, 336-337, 433). Thus, work could not begin until April 26, 1982.[13]

29. Appellant subcontracted the excavation, installation of the pipe, and welding of the pipe to Luers Associates. The plan was to begin work near the House of Delegates Building, excavate for the main line along Bladen Street, and across the parking lot to the Central Service Building. (Tr. 20-21, 64, 152). The planned work sequence was to remove the brick, excavate an area, and then lay a section of pipe. After welding several sections of pipe, there was to be a test to ensure that the welds were successful. If successful, the insulation casing would be installed and tested for leaks; finally Appellant would backfill. (Tr. 868).

30. On May 21, 1982, Appellant ran into the existing chilled water lines which were in the path of its work, where it intended to cross Parking Lot "B" from Bladen Street. (Tr. 67, 190-191). Drawing M-1 (Rule 4, Tab 3) represented that these lines were not in Appellant's intended path. (Tr. 67, 191-192). Mr. Herbig issued a field directive directing Appellant to re-route the new pipes around the existing ones. (App. Ex. 3). Later DGS issued Change Order Number 2 (CO No. 2) (Rule 4, Tab 6) for the direct labor costs involved. Appellant claims 26 days for delay as a result of this work.

31. We find that Appellant should be compensated for only two delay days (May 25 and June 7) based on the following:

Date	
5/21	Change work concurrent with change order work to open Bladen St. (Rule 4, Tab 156)
5/22	No work, rain (Resp. Ex. 13)
5/23	Sunday, no work (Resp. Ex. 13)
5/24	Rain out, too wet (Resp. Ex. 13)

[13]On April 20, 1982, Appellant submitted to DGS its additional costs for the spring schedule. (Rule 4, Tab 21). DGS then requested additional information which was submitted on May 24, 1982. (Rule 4, Tab 23; Tr. 186-187). The supplemental information submitted by Appellant increased the claim from $15,000 to $61,990.98 (Rule 4, Tab 23; Tr. 695-696).

5/25 Work on changed work - compensable to Appellant

5/26 Work concurrent with preparing for test welding (Resp. Ex. 13)

5/27 Test scheduled, no one showed up (Tr. 13); no man on job (Rule 4, Tab 156)

5/28 Test, leaks at can welds (Rule 4, Tab 154)

5/29 Weld cans & leaks, retest OK, (Resp. Ex. 13; Rule 4, Tab 156)

5/30 Sunday, no work (Resp. Ex. 13)

5/31 Memorial Day - contractor off (App. Ex. 16)

6/1 Weld cans, no entry re: change order work (Resp. Ex. 13)

6/2 Weld cans, test pipe, no entry re: change order work (Resp. Ex. 13)

6/3 Weld cans, clean out a wash-in (Resp. Ex. 13)

6/4 No entry re: change order work, backfill (Rule 4, Tab 154)

6/5 No work, rain (Resp. Ex. 13), men did not show up (Rule 4, Tab 154)

6/6 Sunday, no work

6/7 Work on changed work - compensable to Appellant

6/8 Concurrent excavation at loop 3 (Resp. Ex. 13)

7/21 Concurrent line tests; backfill and drying insulation (Rule 4, Tab 154).

7/22 & 7/23 Concurrent line tests, backfill and drying insulation (Rule 4, Tab 156)

8/5 & 8/6 Concurrent work on valve vault No. 3 (Rule 4, Tab 154)

8/9 & 8/10 Concurrent work on valve vault number 3 (Rule 4, Tab 154)

Discussion

Appellant claims it was delayed 26 calendar days by this work (May 21 - June 8, July 21-23, August 5-6, and August 9-10). However, the bulk of the time claimed as delay is either not substantiated by the record, or is concurrent with other critical work being performed. As noted, we find two days to be compensable.

B. Acceleration Delay

Findings of Fact

32. In May 1982, DGS directed Appellant to accelerate[14] its work on Bladen Street so that the street could be opened for "June Week" activities involving the United States Naval Academy. (Tr. 75, 215-216). On June 25, 1982, DGS issued Change Order No. 1 (Rule 4, Tab 5) to compensate Appellant in the amount of $4,067.81 for the "additional overtime work to complete the work on Bladen Street in order to re-open for June Week."

Discussion

Appellant contends that the effect of the acceleration was to delay its overall progress on the job by three days. We find, however, that the accelerated effort was used to install main line pipe, a critical job activity. In addition, Appellant was unable to present any evidence that would support its claim that the June Week work caused the overall progress of the work to be delayed by an additional three days. In this regard, Mr. Beever testified that the only delay the accelerated work caused was to the installation of the non-critical brick sidewalk. (Tr. 218). Thus, Appellant is not entitled to increased costs of performance based on this aspect of its claim.

C. Bladen Street Opening

Findings of Fact

33. After the "June Week" re-opening of Bladen Street pursuant to Change Order No. 1 for which Appellant was paid extra costs as an equitable adjustment, DGS directed Appellant to keep Bladen Street open to traffic during non-work hours for the duration of the project in 1982. Appellant claims $4,748.29 as extra compensation for direct costs for labor and equipment for the work required to open and to close the street each day during the summer of 1982 to permit traffic to flow unimpeded during non-work hours.

Discussion

Appellant maintains that it informed DGS that it expected to keep the street closed, and had done so for two months with DGS's permission prior to "June Week."

Contract General Requirements, Section 1B-03, "Co-ordination of Work," provides as follows:

> "b. Existing Vehicular Traffic in the vicinity shall be maintained and adequate warning and/or other traffic control devices utilized. The delivery of materials and/or equipment and

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[14]"Acceleration" involves a directive by a procurement official to complete the work earlier than the contract requires and may constitute a change to the contract. See: Utley-James, Inc., GSBCA No. 5370, 85-1 BCA ¶17,816 (1984).

entire work shall be scheduled and otherwise controlled so as to minimize interference with vehicles and/or pedestrians in the vicinity of the work."

Contract General Requirements, Section 15A-04, "Work Schedule and General Procedure," provides:

"c. The Contractor shall coordinate in advance his work in Bladen Street with the City of Annapolis, Department of Public Works."

Contract General Requirements, Section 15A-11, provides, in pertinent part, as follows:

"e. All excavations shall be adequately protected by barricades, lights, signs, etc. to prevent injury to personnel and to the public or damage to requipment [sic]. The excavations shall be so arranged and protected to allow uninterrupted vehicular traffic and pedestrian passageway [sic] as possible at Bladen Street and on the parking lot." (Underscoring added).

Since the contract provisions clearly required Appellant to minimize disruption to traffic during construction, it was unwarranted in planning to keep Bladen Street completely closed throughout the duration of this construction project. In addition, the record reflects that DGS lacked authority to give permission to Appellant to close Bladen Street. Such permission would have to be obtained from the City of Annapolis, and the City desired that Bladen Street remain open. Under these circumstances, we find that Appellant is not entitled to extra costs for a change where the contract required that Appellant keep Bladen Street open to minimize traffic disruption and the City of Annapolis was the sole authority for control of traffic in Annapolis streets. See: Clevecon-Au-Vianini, MDOT 1007, 1013 (January 7, 1983); CAM Construction Co., MSBCA 1088 (October 25, 1983).

D. Mechanical Pit

Findings of Fact

34. As part of CO No. 2 (Rule 4, Tab 6), DGS directed Appellant to construct a mechanical pit in the Central Services Building. (Tr. 72). DGS had originally included the mechanical pit as an Add Alternate to the base contract, but the contract as awarded did not incorporate it. Appellant contends that the construction of the mechanical pit delayed job progress by seventeen calendar days (App. Ex. 1) because DGS failed to provide the necessary directions for construction of the pit in a timely manner. (Tr. 124, 212). Appellant contends it needed these directions by June 14, 1982 in order to avoid delays, and while DGS had been aware of the need for, and location of, the pit for a year, DGS did not provide the directions until June 25, 1982. (Tr. 213-214). Appellant also charges that the actual installation of the mechanical pit delayed overall job progress from June 25, 1982 to July 1, 1982. (App. Ex. 1).

Discussion

Regardless of the merits of Appellant's assertions, this delay is not compensable because it was concurrent with the entire period that pipe installation was physically suspended because of a rain storm that flooded both the excavation and exposed pipe that had been installed. Although Appellant was required by the specifications to protect the pipe, on June 14, an uncapped pipe was flooded with mud and water following a rain storm. (Tr. 509-10, 574-77, 747-49). Before backfilling operations could begin, Appellant's clean-up of the flooded area and drying of the wet pipe and wet pipe insulation required approval of TPCO[15] which did not occur until July 14.

Further, the mechanical pit delays were actually attributable to Appellant. The DGS Engineer asked Appellant to locate the footer at the Central Services Building on April 2, 1982 so a decision could be made regarding the need for a pit. Appellant did not do this until June 23, 1982. Finally, the work on the mechanical pit would have taken only two days, and not five, if Appellant had used the correct equipment. (Tr. 894-95).

E. Manhole No. 1 & House of Delegates Building Tie-in

Findings of Fact

35. Drawing M-1 (Rule 4, Tab 3) indicated that Appellant would tie into a ten-inch existing pipe at Manhole Number 1. (Tr. 76-78, 222). However, the existing pipe was only eight inches in diameter. This difference required Appellant to put a reducer on the line, construct a protective tunnel around it, and field fabricate fittings to make the tie-in. (Tr. 76-78, 222). Change Order No. 2 (Rule 4, Tab 6) compensated Appellant for the direct costs of performing this work, but Appellant is also claiming three days of delay. At most, however, one delay day is attributable to DGS because it took Appellant three attempts to properly complete this work. (Rule 4, Tab 34; Tr. 751, 752).

36. While work on Manhole No. 1 was being performed, Appellant had to change its plans in order to make the tie-in to the existing lines at the House of Delegates Building (Drawing M-1; Rule 4, Tab 3; Tr. 78, 225) because the tunnel was closer to the building than indicated on the drawings. (Tr. 78-79, 225).

Discussion

Appellant requested a two day extension for the House of Delegates Building work but is entitled to only one day of delay because part of this work was concurrent with the delay associated with Manhole Number 1.

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[15]The contract specifications required TPCO, the supplier of the pipe, to assure that Appellant properly installed it.

F. Subcontractor Actions

Findings of Fact

37. At one point during the course of the project, Mr. Herbig, (at the direction of Mr. Hartlove), approached Mr. Luers, President of Luers Associates, the subcontractor, to discuss a price for his taking over the job. (Tr. 401, 702, 814-815). Mr. Luers told Appellant's employees that he would soon be in charge. (Tr. 82, 227-228, 960-961; Stipulation dated September 28, 1984).

38. On July 26, 1982, Appellant terminated Luers Associates after Mr. Luers physically assaulted Mr. Beever at the jobsite. (Stipulation; Tr. 295-296). However, this action did not delay work progress because Appellant undertook and completed the pipe installation work with its own forces.[16]

39. According to Mr. Beever, DGS's inquiry to Mr. Luers affected the job progress only slightly. (Tr. 332).

Discussion

Appellant does not allege that compensable delay resulted because of DGS's contact with Appellant's subcontractor. Appellant maintains that the contract work was not delayed due to its turbulent relationship with its subcontractor, although Appellant experienced many problems with the performance of Luers Associates which no doubt had some effect on the progress of the work. Accordingly, we disregard any actions of Appellant's subcontractor and their effect on work progress, since the effect of such actions is not quantified in the record nor is whether any subcontractor delay was the responsibility of Appellant or DGS.

G. Summary

Appellant is entitled to only four days of delay: two for the chilled water lines, one for Manhole No. 1, and one for the tie-in to the House of Delegates Building.

Following resumption of the work in the spring of 1982, Mr. Beever, by letter to Mr. Hartlove of June 7, 1982 proposed a completion date of July 15, 1982 (Rule 4, Tab 24) which was accepted by DGS. However, the work was not substantially complete until August 13, 1982, twenty-nine days after July 15. We find that four of those days are attributable to delays caused by DGS. The other twenty-five days either are attributable to delays for which Appellant is responsible, or it has not provided adequate evidentiary support to sustain its burden of proof that this delay was DGS's responsibility under

[16]During the hearing, diaries kept by Mr. Luers were introduced as evidence by DGS. When the originals are carefully examined, it is apparent that they are not contemporaneous accounts of the events that transpired. In addition to the physical problems such as the condition of the diaries, the cleanliness of the calendars, and the uniformity of the handwriting on the diaries and calendars, which suggest they were not prepared under field conditions, there are many factual discrepancies that were brought out during the hearing for which Mr. Luers had no explanation. (Tr. 463, 781-821, 831-848).

the terms of the contract. Appellant is entitled to receive its direct and indirect costs that can be adequately identified for the four days of delay after July 15 that are attributable to DGS.

IV. Quantum

The following is our analysis of direct and impact and delay costs allowed on the basis of our entitlement findings as set forth above. The total amount claimed by Appellant is $63,025.45 broken down as follows:

A. DIRECT COSTS

1.	Briarwood Landscaping - replanting trees	$ 300.00
2.	Covington Machine Rental - 2 days crane rental to relocate pipe	669.90
3.	Labor and labor burden to relocate pipe	279.12
4.	R&H Paving permanent patch on test hole	1,153.50
5.	Material Escalation - latacrete[17]	120.25
6.	Demobilization and remobilization of equipment	375.83
7.	Costs for opening Bladen Street	4,748.29
8.	Additional survey costs	3,436.80
	SUBTOTAL - DIRECT COSTS	$11,083.69
	20% Overhead & Profit ON DIRECT COSTS	2,216.73
	TOTAL - DIRECT COSTS	$13,300.42

B. ADDITIONAL COSTS DUE TO IMPACT AND DELAY

1.	Idle Equipment #4500 backhoe	$ 6,264.50
2.	Superintendent's Salary	5,547.00
3.	Additional General and Administrative Overhead	33,393.08

[17]Appellant deleted its request that it be reimbursed for increased costs of concrete. (Tr. 252).

SUBTOTAL - IMPACT AND DELAY COSTS	45,204.58
10% Profit	4,520.45
TOTAL - IMPACT AND DELAY COSTS	$49,725.03
TOTAL CLAIM (A. + B.)	$63,025.45

Appellant is allowed the following costs:

A. DIRECT COSTS:

1. Briarwood Landscaping $ 300.00

Appellant's request for $300 as compensation for replanting trees is granted. The trees were planted in a different location than was originally planned at increased cost to Appellant. (Tr. 240-41, 252; App. Ex. A9d.)

2. Covington Machine Rental $0.00

Appellant's request for $669.90 as compensation for the cost of two days crane rental is denied. It is not disputed that Appellant incurred this cost. However, this Board finds that there was insufficient evidence to prove that this is an allowable cost. Mr. Beever testified that if the pipe had been stored on-site, he would have been able to unload it with the equipment used for installing it, but because DGS directed that it be unloaded off-site it became necessary to rent a crane. (Tr. 241, 356). What Mr. Beever does not discuss is why the equipment that was on-site could not be moved to the storage site and used for handling the pipe. It is obvious that it was capable of being moved because it was demobilized during the winter suspension. If Appellant had stated for the record that it was impossible or impractical to move the equipment, then this part of the claim might have been granted; however, the testimony regarding this cost never mentioned this important aspect. In addition, the record indicates that this cost was incurred in November 1981. (App. Ex. A9e). The record does not indicate that this cost was incurred for the additional step to move the pipe from the designated winter storage location back to the location of the work following the winter shutdown period which could have been considered an extra cost resulting from DGS's suspension of the work. Appellant has failed in its burden of proof as to this claimed cost.

3. Labor and Labor Burden to Relocate Pipe $0.00

Appellant requested $279.12 for the labor cost of relocating the pipe off the site in the fall of 1981. (Tr. 250; App. Ex. A9(f)). This claim is denied because Appellant would have had to unload the pipe whether or not the storage location was on the site. There was no testimony that this aspect of the claim was to compensate for the added cost of bringing the pipe back to the site when work recommenced in the spring. (Tr. 243). Nor was there any testimony as to why a simple change in storage location resulted in additional labor charges for three men for two days. Thus, the Board must assume that Appellant's claim is for a cost that was part of the original contract price and thus is not reimbursable.

4. R&H Paving $1,153.50

Appellant is entitled to the $1,153.50 claimed to place permanent patches over certain test holes. Appellant would not have incurred this cost if it had proceeded with its work and completed it in the fall of 1981 and the winter of 1982. These test holes were in the direct line of Appellant's excavation. (Tr. 251-52).

5. Material Escalation (Latacrete) $120.25

Appellant requested payment of $120.25 for an increase in material costs for latacrete over the period work was stopped. (Tr. 254). One of the materials used by Appellant in its brick work was latacrete. Appellant did some brick work in 1981 and completed it in 1982. During the time of the shutdown, the price of latacrete increased. (App. Ex. 9h; Tr. 252). Appellant is entitled to reimbursement for this additional expense for material cost escalation as part of the equitable adjustment. While it is possible that DGS would have reimbursed Appellant for materials stored during the winter, Appellant was not reasonably required to purchase and store materials during the suspension period.

6. Demobilization and Remobilization of Equipment $375.83

Appellant has requested $375.83 as compensation for mobilization costs as follows:

backhoe move-out 1/15/82	$120.00	
backhoe move-in 5/15/82	150.00	
	$270.00	270.00
labor to shutdown site 12/21/81	$ 84.75	
labor burden (25%)	21.18	
	$105.83	105.83
		$375.83

Appellant is entitled to recover the cost of the backhoe move-in and move-out, and site clean-up because these are extra costs necessitated by the winter shutdown. If work had continued, there would have been no need to bring back the backhoe because it never would have left the site, nor would it have been necessary to clean the site at that time in addition to the final clean-up. We further find the requested amounts to be reasonable and supported by the evidence of record.

7. Additional Survey Costs $0.00

Appellant is not entitled to the costs for survey work. See page 12 of this decision.

Direct Cost Summary

The total amount of direct costs for which Appellant should be reimbursed is as follows:

Direct Costs	$1,949.58
Profit 10% (App. Ex. A8)[18]	194.95
TOTAL - DIRECT COSTS	$2,144.53

B. ADDITIONAL COSTS DUE TO IMPACT AND DELAY

1. Idle Equipment $0.00

Appellant owns a 1971 Ford Model #4500 backhoe which it had planned to use in the performance of its work. Appellant was unable to use this equipment during the winter shutdown and claims $7,403.50 for the loss of use of this equipment calculated as follows:

$2,278.00/2 = $1,139.00 x 6.5 mo. = $7,403.50

The $2,278.00 figure was obtained from a rental rate book as the monthly rate for the rental of a Case 580 backhoe. (App. Ex. 8; Tr. 283). Mr. Beever testified that his Ford backhoe is an equivalent piece of equipment to the Case 580. (Tr. 283). This rental figure was halved to compensate for the fact that the equipment was idle during the suspension period. Mr. Beever also stated that it "would be very unusual to do any kind of earth work in the winter" (Tr. 362) and that he "did not bid any large work" during the shutdown period. (Tr. 363). We find that Appellant has not established its claim for idle equipment. While a Ford backhoe may be equivalent to a Case backhoe, as Mr. Beever testified, there is no proof that Appellant would have rented out the equipment because a major part of the shutdown period was during the winter when it might not have been possible to use a backhoe. Further, Mr. Beever never bid on any other jobs as Appellant had reached the limit of its bid bonding capacity (Tr. 363), so it is impossible to gauge what its lost opportunities actually were. Under these circumstances, Appellant is not entitled to an equitable adjustment for the costs of the idle backhoe during the period of suspension for DGS's convenience. See: J.D. Shotwell Co., ASBCA 8961, 65-2 BCA ¶5243 (1965).

2. Superintendent's Salary $0.00

Appellant claims $5,547.00 as compensation for the salary of its superintendent (Mr. Bitzer) for the project for the entire winter shutdown. Mr. Bitzer's salary was $22,188 per year. (App. Ex. A8, p. 3; Tr. 286-88). Appellant is claiming $5,547 for Mr. Bitzer's idle time during the suspension of work calculated as follows:

$\frac{\$22,188}{\text{year}}$ x 1/2 (6 month suspension) = $11,094

[18](Resp. Ex. 19A, pp. 2, 4; Tr. 953).

$\frac{\$11,094}{6 \text{ month}}$ x 1/2 (Idle 50%) = $ 5,547

Appellant's calculation is based on a six (6) month suspension period from October 28, 1981 to April 26, 1982.

However, based on the suspension of work from January 17, 1982 to April 26, 1982 for which DGS was responsible,[19] the amount of Mr. Bitzer's salary for his claimed idle time is calculated as follows:

$\frac{\$22,188}{\text{year}}$ x $\frac{\text{year}}{12 \text{ mos.}}$ x 3.3 mos. = $6,101.70

$6,101.70 x 1/2 (Idle 50%) = $3,050.85

The most Appellant would be entitled to recover of Mr. Bitzer's salary for the suspension period would be $3,050.85.

Mr. Bitzer was utilized on a half time basis during the shutdown period on other contract work done by Appellant. Mr. Beever testified that he did not lay off Mr. Bitzer, did not put him on hourly wages, nor did he pay him to perform plumbing work, which he was licensed to do, because to do anything other than keep him on salary would be akin to a demotion, and Mr. Beever did not want to offend Mr. Bitzer. (Tr. 364).

However, application of the principle which states that a party cannot recover damages for loss that it could have avoided by reasonable efforts leads to our denial of this claim in its entirety.[20] See: Calvert General Contractors Corp., MDOT 1004 (March 4, 1981), at 44. The aggrieved party is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss. The amount of loss that reasonably could have been avoided by making substitute arrangements is subtracted from the amount that otherwise is recoverable as damages.[21] This principle would result in the exclusion of that part of Mr. Bitzer's salary claimed for his idle time which he would not have received, if he had been put on hourly wages and assigned plumbing work which he was qualified to do. However, it is impossible to guage what this figure would be from the record. The record does not indicate any attempt by Appellant reasonably to mitigate the salary costs attributable to the time Mr. Bitzer was idle (50% of his time during the suspension) by employing him in work he was qualified to do as a plumber or by laying him off. Accordingly, this Board finds that Appellant has not shown that it is reasonably entitled to an equitable adjustment for the claimed amount for Mr. Bitzer's salary and related expenses.

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[19] We have determined that DGS is only responsible for an equitable adjustment for the period January 17, 1982 to April 26, 1982 and thus DGS could only be liable for Mr. Bitzer's salary based on this period of suspension.
[20] Restatement of Contracts 2d, Vol. 3, §350(1), p. 126 (1981).
[21] Restatement of Contracts 2d, Vol. 3, §350(1)(b), p. 127 (1981).

3. Additional General and Administrative Overhead - Extended Overhead $11,094.95

Appellant has calculated its additional General and Administrative overhead (G&A) costs by the use of the "Eichleay Formula" which calculates a daily (or monthly) General and Administrative overhead (G&A) rate and then extends it by the period of the alleged delay. Appellant claims $33,374.16[22] for these costs. This Board finds that the amount calculated by Appellant as G&A during the period is incorrect as is its assertion of the delay period involved.

Use of the "Eichleay Formula" is acceptable. The use of the "Eichleay Formula" as a method of computing overhead for compensable delay was first accepted in Eichleay Corp., ASBCA 5183, 60-2 BCA ¶2688, 61-1 BCA ¶2894. Since that decision, the use of the "Eichleay Formula" has gained widespread acceptance in the Federal courts,[23] and is gaining recognition in State courts.[24] We have found no Maryland cases that bar its use. Although use of this method has been criticized, it has been used extensively as a reasonable method of calculating unabsorbed overhead in an extended contract performance situation. See: Don Cherry, Inc., ASBCA No. 27795, 85-2 BCA ¶18,150 (1985); Shirley Contracting Corp., ASBCA No. 29848, 85-1 BCA ¶17,858, aff'd on recon., 85-2 BCA ¶18,019. Accordingly, we accept this method in this appeal for approximating Appellant's unabsorbed overhead for the extended performance period for which DGS is responsible.

Using the "Eichleay Formula" leads to the calculation of allowable, extended overhead as follows. This Board accepts the figure of $72,387.00 for Appellant's general and administrative overhead expense as calculated by the accounting firm of Rubino & McGeehin in its report introduced as DGS (Resp.) Exhibit 19A. On Schedule 5 of this exhibit, Total G&A (per Financial Statements) is calculated as being $72,387.00. In addition, the delay period is

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[22]This figure was calculated as follows:

1.	Original Contract Price	$353,000.00
2.	Total Contract Income	980,000.00
3.	G&A, June 1, 1981 to August 13, 1982	141,498.67
4.	"Eichleay" Calculation $\frac{353,000}{980,000} \times 141,498.67 =$	50,939.52
5.	G&A Expense allowable to project per month: $\frac{50,939.52}{14.5 \text{ mo. (total performance period)}} = \$3,513.07$ per month	
6.	G&A Expense due to suspension and delay: $3,513.07 x 9.5 mo. =	$33,374.16

This figure is less than either of the two figures listed on page 4 of Appellant's Amended Proof of Cost as both of them are the result of computation errors.

[23]See Capital Electric v. United States, 729 F.2d 743 (1984); Gerwick v. United States, 152 Ct.Cl. 69, 285 F.2d 432 (1961).

[24]Compare General Federal Const., Inc. v. D.R. Thomas, Inc., 52 Md. App. 700, 706, 451 A.2d 945 (1982); Golf Landscaping, Inc. v. Century Const. Co., 696 P.2d 590 (Wash. App. 1985).

not 9.5 months, but 6.17 months. This lower figure excludes the twenty-five days from July 20 to August 13, 1982 - the amount of time by which Appellant's completion date exceeded the proposed completion date of July 15 plus the four days of DGS caused delay. It also excludes 81 days from October 28, 1981 to January 17, 1982. Since we have found that the period of shutdown following the initial eighty-one day delay period was for DGS's convenience (January 17, 1982 through April 25, 1982), Appellant is entitled to its extended overhead costs for this period plus the additional period required to complete the work, pursuant to Contract General Conditions, Articles 11, 12, and 14.

The revised calculation of Appellant's unabsorbed overhead cost pursuant to the Eichleay formula is as follows:

1.	Original Contract Price	$353,000.00
2.	Total Contract Income	980,000.00
3.	G&A, June 1, 1981 - August 13, 1982	72,387.00
4.	"Eichleay" Calculation	
	$\frac{353,000}{980,000}$ x $72,387	$26,074.09
5.	G&A Expense allocable to project per month:	
	$\frac{\$26,074.09}{14.5 \text{ mo.}}$ = $1,798.21 per month	
6.	G&A Expense due to suspension delay:	
	1,798.21 x 6.17 mo. =	$11,094.95
	SUBTOTAL	$11,094.95
	10% Profit (App. Ex. A8)	1,109.50
	Total Costs and Profit	12,204.45

C. SUMMARY OF COSTS ALLOWED

DIRECT COSTS (Incl. Profit)	$ 2,144.53
IMPACT & DELAY COSTS (Incl. Profit)	12,204.45
QUANTUM ALLOWED	$14,349.00

D. Interest

Appellant requested interest for that portion of any equitable adjustment allowed by this Board. No evidence of actual borrowings or applicable interest rates was adduced. Nevertheless, predecision interest is allowable where the Board determines that it is necessary to permit the contractor to recover the entire cost of performing changed work. Maryland Port Administration v. Langenfelder, 50 Md. App. 525, 542, 438 A.2d 1374 (1982); Granite Construction Company, MDOT 1014 (December 20, 1983) at 59-61.

In determining when predecision interest should begin to run, we have consistently attempted to ascertain when the State was in a position to know the details of the claim, and the extent of the equitable adjustment requested. From this point, we add a reasonable period for review and processing of the claim, thus arriving at a date when the claim theoretically became liquidated and the obligation to pay actually arose. See: C. J. Langenfelder & Son, Inc., MDOT 1000, 1003, 1006 (August 15, 1980) at 32-34.

By letter dated August 16, 1983, Appellant submitted a request to DGS for a procurement officer's decision on claims raised in its complaint, received by this Board on June 7, 1983, but not decided by a DGS procurement officer by a final procurement officer's decision. These additional claims were denied by a final procurement officer's decision dated September 15, 1983. Appellant's quantum claim in response to the Board's Order on Proof of Costs was filed on December 15, 1983. Appellant filed amendments to its Proof of Costs on February 6, 1984 and April 10, 1984. DGS's response to Appellant's Proof of Costs was filed on May 25, 1984. Accordingly, we conclude that DGS was fully apprised of Appellant's quantum claim only as of May 25, 1984. Allowing 30 days to analyze these amounts and process payment, we conclude that DGS should be liable for interest on the allowed equitable adjustment from June 25, 1984. Without benefit of any evidence as to the approximate interest rate to be applied, we conclude that the 6% "legal rate" is fair and reasonable and sufficient to compensate Appellant. Compare Md. Port Administration v. Langenfelder, supra; Granite Construction Company, supra, at 59-61.

V. Equitable Adjustment

On the basis of the foregoing, we find that Appellant's equitable adjustment for its total direct and indirect costs is $14,349.00. Predecision interest is calculated based on 6% per annum simple interest, or $1,506.35. The total equitable adjustment due, therefore, is $15,855.35. Postdecision interest is payable from the date of this decision at the legal rate of 6% per annum simple interest. Md. Port Administration v. Langenfelder, supra; Granite Construction Co., MDOT 1014 (December 20, 1983).

VI. SHA Counterclaim

Shortly before the beginning of the hearing which commenced on June 19, 1984, DGS on May 14, 1984 filed an amended answer to Appellant's complaint. Labeled an affirmative defense and counterclaim, DGS's amended answer sought to recover damages as a recoupment against Appellant's claimed equitable adjustment. DGS's counterclaim was in the amount of $35,332 for damages caused by the incidental energy lost from the existing steamlines for the period beginning on the specified contract completion date

of October 28, 1981 to the date of substantial completion stipulated as August 13, 1982. Appellant was first contacted directly and asked for payment concerning DGS's counterclaim by letter dated May 10, 1984, although DGS had sent a letter dated April 16, 1984 to Appellant outlining the nature of its counterclaim in general terms. DGS filed amended responses to Appellant's discovery requests on May 24, 1984 in which it first informed Appellant that it would call an expert witness to testify regarding its counterclaim. This was seventeen (17) working days (3 calendar weeks) before the hearing, although discovery began in this proceeding on September 15, 1983. On May 25, 1984 DGS filed an amended "Audit and Cross-Statement to Appellant's Response to the Order on Proof of Costs." DGS's cross-statement further delineated DGS's claim for damages based on its then newly raised counterclaim for the loss of energy from the existing steamline during the delay period.

The Board ruled initially on May 22, 1984 that it did not have jurisdiction over DGS's claim since there had not been a timely appeal of a procurement officer's decision on the issue. (Memorandum of Prehearing Conference May 24, 1984). However, the Board reserved ruling on whether DGS could present evidence at the hearing on its counterclaim labeled as an affirmative defense in the nature of a recoupment.

On June 21, 1984 the Board ruled that DGS would not be permitted to present evidence on its counterclaim in the nature of an affirmative defense regarding its claim for $35,332.00. (Tr. 536). DGS's amended answer asserting the counterclaim was unreasonably late since it was raised just before the hearing was to begin. By that time discovery had closed and the parties were making final preparations for the hearing. We find specifically that Appellant would have been prejudiced since it would have had an inadequate amount of time to prepare an evidentiary response in time for the hearing. See: Granite Construction Co., supra, at 19. In addition, DGS's counterclaim was not otherwise properly before the Board by an appeal of a procurement officer's decision that addressed that issue. See: Granite Construction Co., MDOT 1014 (December 20, 1983); Traylor Brothers and Associates, MDOT 1028 (November 1, 1984).

For the reasons set forth herein, Appellant's appeal is sustained in part and remanded to DGS for payment in accordance with this decision.

of October 16, 1984 — the date of [illegible] August 1, 1985. Applicant was not [illegible] payment computing [illegible] although [illegible] had sent a letter [illegible] 1984, [illegible] the nature of the counterclaim [illegible] in opposition [illegible] that Applicant [illegible] would [illegible] the counterclaim [illegible] before the hearing, although discovery began in this proceeding [illegible] 1985 [illegible] counterclaim [illegible] by [illegible] for the lack of [illegible] the [illegible] record.

[illegible]

[illegible] the [illegible] pursuant to [illegible] the hearing [illegible] the [illegible] before the hearing was [illegible] that Applicant would have [illegible] hearing [illegible] the [illegible]

[illegible]