

16, 1991, bids were opened on May 25, 1991. General Contracting Company was the low bidder and listed Clontz-Garrison as its mechanical subcontractor.

A pre-construction meeting was held on July 13, 1989, and attended by the Citadel, its engineer T.D. Velissarios, General Contracting and Clontz-Garrison. The majority of the meeting was taken up with discussion of how to provide the Citadel with temporary steam while the new boilers were being installed. The original contract made no provision for temporary steam.

As a result of the meeting, on July 31, 1989, Clontz-Garrison leased a 700 HP boiler from Ivan Ware and Sons, Inc., of Kentucky and installed it on site, ready for start-up around August 14. As part of the installation, Clontz-Garrison lay underground pipe and connected the pipe to the system. Clontz-Garrison quoted a price of approximately \$37,000 for performing the work. Mr. Jay Montgomery, an employee of the Citadel, rejected this price as too high based on a quote from another contractor of approximately \$27,000.

At a meeting attended by Clontz-Garrison, General Contracting and a representative from the State Engineer's Office, the project engineer, T.D. Velissarios, asked Clontz-Garrison to accept a change order for the installation work in the amount of \$26,534 with the promise by Mr. Velissarios that any extra charges by Clontz-Garrison could be made up on other change orders. The Citadel did

not know of, or agree with, this offer to pay additional charges for the work in other change orders. Clontz-Garrison accepted Change Order #4 for \$26,534 in October 1989 (Defendant's Ex. 1).

Because the local company hired to perform the start-up on the temporary boiler was unable to accomplish the job, Clontz-Garrison requested Ivan Ware & Sons' assistance on August 16. On August 17, an Ivan Ware representative came on site to start up the boiler. He reported back to Ivan Ware that no chemicals were being added to the boiler water to prevent mineral buildup, known as scaling.

The start-up was completed on August 18 using fuel oil. Also on August 18, Ivan Ware wrote Clontz-Garrison about the apparent lack of, but necessity for, chemical water treatments. (Record, p. 31). On August 30, an Ivan Ware representative returned to the site to re-start the boiler using natural gas instead of oil. At that time, he took a water sample which revealed that the boiler was in a scaling condition. Ivan Ware advised Clontz-Garrison that, unless chemicals were added to water, the small boiler would have to be shut down.

According to Charlie Bowers, Deputy Director of the Physical Plant for the Citadel, the Citadel understood from the outset the need for chemical treatment, and, therefore, had from start-up added a dosage of chemicals to the small temporary boiler water equal to that previously used by the Citadel on the old permanent boilers. This dosage was

maintained until Robert Horky of Metropolitan Refining, the Citadel's chemical expert, advised the Citadel on the proper dosage.

Mr. Horky testified that he visited the site on August 28 and took samples. Shortly thereafter, he recommended that more frequent blowdowns of the boiler take place and that the Citadel increase its chemical dosage to three to five times the old amount. The reason for the increase was that the temporary boiler was using 100% makeup water rather than some¹ makeup water and some recycled water as with the old boilers.¹ The Citadel followed Mr. Horky's recommendations.

Mr. Horky tested for scaling on November 29. He opined that the amount of scaling seen in the small boiler could not have occurred in the short time which the Citadel had been operating it. Therefore, he concluded that a significant amount of scaling was present in the small boiler when delivered from Ivan Ware.

Mr. Steve Taylor, Sales Representative with Ivan Ware, admitted that the small boiler had been returned by a previous customer after an explosion caused by blockage. However, he stated that the small boiler was cleaned before delivery to the Citadel. Mr. Taylor admitted that, even after cleaning, one can expect 15-20% percent of scaling to

¹The recycled water would have already contained the chemicals.

remain. He stated that, in his experience, only a few days operation with no or inadequate chemicals is enough to scale a boiler.

On October 24, 1989, Change Order #2 was issued to General Contracting and approved by the Citadel to provide for the temporary boiler until January 1, 1990. (Record, p. 110). Change Order #2 requested that Clontz-Garrison "provide a temporary steam boiler system complete with feedwater equipment for a complete and operable system capable of delivering 24,000 lb/hr steam."

On October 25, Ivan Ware informed Clontz-Garrison that, due to scaling, the small temporary boiler would have to be opened up once a larger 1700 HP temporary boiler, rented on October 20, 1989, was in place. Ivan Ware advised that, if a significant amount of scaling was present, Clontz-Garrison would be liable for cleaning the small boiler. The small boiler was opened on November 1 and the amount of scaling was significant, according to Ivan Ware.

Clontz-Garrison arranged for a local firm to clean the small boiler by water blasting.² However, on November 7, Ivan Ware rejected the cleaning job. On December 12, an Ivan Ware representative again inspected the small boiler, which had been dismantled since November 1 and determined that it had not been satisfactorily cleaned.

²Charlie Bowers of the Citadel testified that he asked Clontz-Garrison to keep the small boiler available after cleaning for use as a back-up.

On December 22, 1989, unusually cold weather in Charleston resulted in the freezing of both the small and large temporary boilers. Mr. Bowers testified that, when he first learned of freezing conditions, he marshalled all available personnel to begin securing the whole campus. Because the freeze occurred during Christmas break, Mr. Bowers had only four maintenance personnel available.

Mr. Bowers and his crew first drained the sprinkler systems in the buildings. The large boiler was not drained at that time because it was needed to supply heat to some of the buildings thus providing further protection. The small boiler tank was already drained for cleaning, however, its auxiliary equipment had not been drained.

According to Mr. Bowers, a control on the large boiler froze and shut down the boiler. At that point, Mr. Bowers personally drained the boiler tank. He testified that by the time he thought of draining the auxiliary equipment - the feedwater pumps and controls - they were already frozen. The small boiler auxiliary equipment also froze.

Mr. Bowers was unable to reach Clontz-Garrison during the night of the freeze. However, on December 26, Clontz-Garrison personnel went to the site to assist the Citadel in thawing the equipment and in assessing and repairing the damage.

It is undisputed that, while Clontz-Garrison was the sole lessee of both boilers under Lease Agreements between

itself and Ivan Ware (Defendant's Ex. 2 and Record, p. 50),³ the Citadel was in sole charge of operating the boilers during the times relevant to this case.

On January 20, Clontz-Garrison notified Ivan Ware that the Citadel wanted the small boiler returned to Ivan Ware after cleaning was complete.⁴ On January 30, Clontz-Garrison and Ivan Ware agreed that the boiler would be returned to Ivan Ware for proper cleaning. On February 1, Ivan Ware notified Clontz-Garrison that rent on the small boiler would continue to be due until it was returned to Ivan Ware and that Clontz-Garrison would have to pay for the cleaning. (Record, p. 34).

At a project status meeting on February 2, which was attended by the Citadel, Clontz-Garrison announced that the rental charges on the boiler were still in effect but that the boiler could not be moved until an oil tank, sand containment and canopy were removed. (Record, p. 115). The obstructions were removed on February 27 and the small boiler was returned to Ivan Ware on February 28.

On August 24, 1990, Clontz-Garrison requested a list of change orders to cover the various costs incurred in the

³Mr. Hank Garrison, President of Clontz-Garrison, testified that Clontz-Garrison signed the lease agreements because the Citadel stated that this was the only way to avoid the time-consuming procurement procedures required if the Citadel signed.

⁴Mr. Bill Heaner, the Citadel's resident engineer, testified that he informed Clontz-Garrison in late December that the small boiler should be sent back to Ivan Ware.

above activities. The Citadel's Engineer issued his decision on each of the claims on October 3 and the Citadel made a final settlement offer on October 28, 1990.

On October 8, Clontz-Garrison requested the State Engineer to settle the dispute under S. C. Code Ann. §11-35-4230 (1976). The State Engineer heard the case on January 3, 1991, and issued his decision on January 28, finding in favor of Clontz-Garrison on some issues and for the Citadel on others. Clontz-Garrison appealed the CPO's decision to the Panel on February 7, 1991.⁵

CONCLUSIONS OF LAW

A summary of Clontz-Garrison's claims is found at page 4 of the Record. Claims # 7, 8, 9, 10, 11, 12, 15 and 16 were settled prior to or at the hearing before the Panel. The remaining claims are disposed of in order below.

No. 1 Freeze Damage to Boilers

Clontz-Garrison claims \$37,076.00 as the costs incurred in repairing the freeze damage to both the large and small temporary boilers. At the time of the damage, the boilers were on site at the Citadel and were under the control of Citadel personnel. The Panel does not condemn the Citadel's

⁵Under §11-35-4230, only the contractor may appeal a decision of the Chief Procurement Officer. The Panel proceedings are de novo, however. (§ 11-35-4410(5)). Therefore, even though the Citadel may not initiate an appeal, the Panel believes that, once an appeal is taken by the contractor, the Panel may examine all issues and claims inherent in the case under its jurisdiction in §§11-35-4410(1) and (5).

decision to attend to other structures on the night of the freeze rather than to the boilers, however, the decision to do so was solely the Citadel's. Therefore, as between Clontz-Garrison and the Citadel, the Panel finds that the Citadel should be responsible for the damage incurred during the freeze.

Nos. 2 and 6 Temporary Boiler Rental

Clontz-Garrison claims an additional \$28,376 in rental charges for the small boiler from January 1 through February 28, 1990. Change Order #2 provided for rental of the small temporary boiler until January 1, 1990. As discussed above, however, the boiler was not removed until February 28.

The evidence shows that the Citadel requested that Clontz-Garrison obligate itself to rental of the small boiler in the first instance and that, at least until late December, asked that the small boiler be kept for backup after cleaning. Further, the Panel finds that the Citadel was aware or should have been aware of the lack of progress being made in cleaning the boiler.⁶ At least by February 2, 1990, the Citadel knew that the boiler was still on site and that rental charges were accruing. Finally, the evidence shows that the boiler could not be removed until the Citadel first moved an oil tank and containments. The Citadel did

⁶Mr. Heaner testified that the small boiler was dismantled for cleaning at a spot some two to three hundred yards from his office.

not do this until February 27. Clontz-Garrison returned the small boiler the next day.

The Panel finds that the Citadel should be responsible for the additional rent of the small temporary boiler incurred from January 1 through February 28, 1991.

No. 3 Additional Charges on Change Order #4

Clontz-Garrison claims that it is owed some \$11,265 for extra labor and materials to perform Change Order #4. These charges were not included in Change Order #4 because of an alleged agreement between Clontz-Garrison and the project engineer, Mr. Velissarios, that the charges would be added to later change orders. The evidence is clear that the Citadel rejected the additional charges prior to Change Order #4's being issued and that it did not agree to make the charges up later. The question is whether the Citadel is bound by an oral agreement made by its engineer contrary to its wishes. The Panel finds that it is not.

The contract between the parties provides the only method for claiming monies for additional labor and materials. This procedure states:

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive, or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; A Construction Change Directive requires agreement by the Owner and Architect and may or may not

be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

(Emphasis added) (Record, p. 87). Section 5.3 makes the conditions of the Contract Documents binding on subcontractors such as Clontz-Garrison. (Record, p. 86).

Both Clontz-Garrison and General Contracting knew, or are charged with knowing, that the Citadel's agreement was essential to obtaining extra monies under the contract. They both knew, or should have known, that Mr. Velissarios, the Project Engineer, had no authority to circumvent the Citadel's rejection of Clontz-Garrison's \$37,000 price.⁷ The Citadel was entitled to rely on Change Order #4 as the sole cost of installing and connecting the underground pipe. Clontz-Garrison's claim #3 is, therefore, rejected.

No. 4 Scaling Damage

Clontz-Garrison claims an additional \$12,304 for cleaning costs occasioned by the scaling in the small boiler. The Panel finds that the scaling was caused by a combination of the Citadel's failure to add the appropriate amount of chemicals for a short period of time and by scale which existed in the boiler at the time of delivery. Although it was responsible for the boiler under its agreement with Ivan Ware, Clontz-Garrison in fact had no

⁷The contract in Section 7.3 provided a method for General Contracting and Clontz-Garrison to carry forward with the work described in Change Order #4 and still preserve their claim to the additional compensation. Neither chose to exercise its rights under this section.

control over the operation of the boiler, during which at least some of the scaling occurred.

The Panel believes that Mr. Horky's tests, the pictures of the scaling (Defendant's Exhibits 3 and 4) and Mr. Taylor admissions of previous problems with the boiler and that 15-20% scaling was present at delivery indicates that the degree of the Citadel's fault is small. Therefore, the Panel finds that the Citadel should be responsible for only twenty percent of the \$12,304 claimed by Clontz-Garrison, or \$2460.80.

No. 5 Inspections by Ivan Ware

Clontz-Garrison's claim #5 is for \$1435 in charges incurred by Ivan Ware in inspecting the small boiler to determine how cleaning was progressing. The Citadel did not approve or request these inspections and as stated earlier was not primarily responsible for the scaling that caused them. Therefore, the Panel finds that the Citadel bears no responsibility for the charges sought in claim #5.

No. 13 Start-up Costs for Small Boiler

Clontz-Garrison claims \$8852.00 costs for the two start-ups of the small boiler (first with oil, then with gas). The evidence shows that the second start-up was occasioned by the Citadel's decision to switch from oil to the more economical gas.

The lease agreement between Clontz-Garrison and Ivan Ware covered rental costs only. Start-up costs are specifically excluded by Paragraph 9 (Record, p. 51).

Likewise, transportation costs are the responsibility of Clontz-Garrison (Record, p. 51).

The Panel believes, as Clontz-Garrison maintains, that Change Order #2 was intended to cover rental and transportation charges, and did not include start-up charges.⁸ Therefore, the Panel finds that the Citadel is responsible for these charges.

No. 14 Start-up for Large Boiler

Clontz-Garrison presented no evidence substantiating this claim for start-up of the large boiler. Therefore, the Panel denies it.

For the reasons stated above, the Procurement Review Panel hereby orders the Citadel to pay to General Contracting the sums stated above plus any applicable markups or tax within 60 days of receipt of this Order.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
4-22-91, 1991

⁸The Panel agrees with the CPO that Change Order #2 and related change orders covered provision and installation of an "operable" as opposed to "operating" system and that start-up procedures were outside the scope of these orders.