

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
Case No. 1992-21

IN RE:)
)
APPEAL OF MCCARTER ELECTRIC COMPANY) O R D E R
)
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on December 10, 1992, on the appeal of McCarter Electric Company ("McCarter") from a decision by the Chief Procurement Officer ("CPO") in a contract dispute between McCarter and Clemson University ("Clemson").

Present and participating at the hearing before the Panel were McCarter, represented by John McRae; Clemson, represented by Fredrick J. Mappus, Jr.; and the Division of General Services, represented by James W. Rion, Esquire.

FINDINGS OF FACT

On July 9, 1990, Clemson and McCarter entered into a contract for the extension of utilities from existing services to a new student housing project. (Record, p. 91). Under the contract documents, work was to be completed by March 13, 1991. (Record, pp. 90, 92). A delay by McCarter in completing the work on time could result in a liquidated damages assessment of \$500 per day for each calendar day that the actual completion date overran the contract completion date. (Record, p. 92).

As architect/engineer on the project, Clemson chose Heery Engineering, Inc., of Atlanta, Georgia. Heery's consultant was Burdette-Devita Engineering, Inc..

On February 22, 1991, McCarter notified Burdette-Devita that, while pulling the specified 15KV feeder cable, McCarter had discovered that the cable was too large to fit into the conduit. (Record, pp. 99-100). On February 26, McCarter requested a change order to cover the cost of the replacement cable. (Record, p. 102). On February 28, 1991, McCarter requested an extension of the completion date to March 25, 1991, because of the delay caused by cable replacement. (Record, p. 104).

On March 12, 1991, Heery issued Change Directive No. 1 and Change Order No. 2 to McCarter extending the completion date to April 10, 1991. (Record, pp. 115-116). On March 15, McCarter ordered the cable pursuant to the Change Directive. McCarter received the new cable on March 27 and immediately continued work upon the project.

On May 7, McCarter requested a fourteen-day extension of the Completion Date on account of 15 rain days in April and 5 rain days in May. (Record, p. 54). The contract provided as follows with regard to rain delay:

8.3.1 Completion time stipulated under other sections of the Contract Documents may be extended by Change Order to provide one additional work day for each full work day that the Contractor is prevented from working by reason of one or more of the following causes:

* * *

(2) An unusual amount of severe weather to such an extent as to be definitely abnormal and beyond conditions that may be reasonable [sic] anticipated. For the purpose of this contract, a total of three (3) working days per calendar month shall be anticipated as

"normally bad or severe weather", and such time will not be considered justification for an extension of time;

(Record, p. 45). McCarter performed some work tasks on the rain days, including weekend days, but was unable to perform the main task of pulling cable.

Neither Heery nor Clemson ever responded to McCarter's request for an extension.¹

In a phone conference among the parties on May 20, Burdette-Devita noted that the 15 KV loop had been energized and was available to the construction contractor, Weaver Construction Company. During this phone conference, Clemson refused to accept substantial completion from McCarter because of several punch list items yet to be completed. (Record, p. 118). Nevertheless, in a June 28, 1991 letter to Heery, McCarter indicated that the project was substantially complete as of May 6, 1991. (Record, p. 120).

Despite several problems with McCarter's work that were not resolved until December 1991, Heery and Clemson turned the project site over to Weaver Construction Company on schedule by July 15.²

¹Clemson and Heery had denied an earlier request by McCarter for an extension on account of rain days in January 1991 on the grounds that McCarter was already behind schedule because of its own conduct and problems.

²Weaver completed construction on the new housing ahead of the time for occupancy by students in August. Clemson paid Weaver a bonus for this early completion.

On July 19, in a letter to Clemson, Heery recommended that Change Directive No. 1 be altered to show \$7,191 as the actual cost of the new cable purchase. Heery further noted that the amount of weather days and its effect on construction had not been settled with McCarter. (Record, p. 121).

In response, Clemson issued revised Change Order No. 2, giving McCarter \$7,587.77 in additional compensation for the cable change and an additional 28 days to complete the contract. The new contract Completion Date was stated as April 10, 1991. An authorized representative of McCarter signed Change Order No. 2 (Record, p. 122) and the Certificate of Substantial Completion (Record, p. 123) on October 24, 1991. The date of actual completion stated in the Certificate is October 6, 1991.

Clemson assessed McCarter \$13,000, a total of twenty-six days of liquidated damages at \$500 per day because of McCarter's failure to complete the project on April 10, the stated Completion Date. In calculating the liquidated damages, Clemson and Heery accepted McCarter's date of May 6 as the actual substantial completion date.

Excluding the \$13,000 withheld as liquidated damages, McCarter was not fully paid for its services until sometime after July 1992 because Clemson disputed McCarter's work.

On September 3, 1992, McCarter requested that the CPO resolve the dispute over the liquidated damages. In his decision dated November 6, 1992, the CPO allowed liquidated

damages but adjusted them to reflect six days' additional time granted McCarter because of the April rain delay. The CPO did not allow rain delays for weekend days.

McCarter appeals the decision of the CPO to the Panel.

CONCLUSIONS OF LAW

The contract provides that "the contractor agrees that from the compensation to be paid, the Owner may retain as liquidated damages the sum of Five Hundred Dollars (\$500.00) for each calendar day this actual contract time exceeds the specified or adjusted contract time as provided in the Contract Document." (Record, p. 92).

The contract completion date agreed to by all parties in Change Order No. 2 was April 10, 1992. Clemson and McCarter have both accepted May 6, 1991, as the date of actual substantial completion for purposes of calculating liquidated damages.³

The question before the Panel is whether McCarter is entitled to an extension of the April 10 date based on the unusually large number of rain days in April and May. As noted earlier, the contract allowed one additional "work day" for each full "work day" that McCarter was prevented from working because of severe weather. Anything over three

³Clemson argued before the Panel that October 6, 1991, the date stated in the Certificate of Substantial Completion signed by McCarter, is the actual date of substantial completion. Clemson, however, seeks liquidated damages based on the May 6 date.

days per month of adverse weather was considered severe under the contract.

On May 7, McCarter requested a fourteen-day extension because of 15 days of rain in April and 5 days in May. In making its request, McCarter subtracted the three day minimum rain days per month provided in the contract. The CPO allowed McCarter only six rain days rather than the fourteen requested because he did not consider Saturdays and Sundays to fall within the term "work day."

At the hearing before the Panel, McCarter presented evidence that, after it received the replacement cable in late March, it was on the job site on Saturdays and Sundays trying to make the July 15 date the site was to be turned over to Weaver Construction. The evidence shows that McCarter was prepared to perform its primary work of pulling cable on Saturdays and Sundays during April and May but was unable to because of the rain. McCarter did in fact perform some secondary job tasks on some of the rainy Saturdays and Sundays.

The term "work day" is not defined in the contract. Given the evidence in this case, the Panel concludes that, in April and May 1991, "work days" for McCarter included Saturdays and Sundays.

Using the weather data supplied by Clemson (Record, pp. 55 and 66), it appears that there were a total of 15 rainy work days in April and 5 rainy work days through May 7. Subtracting three rainy work days from each month leaves a

total of 12 rainy work days in April and 2 in May, for a total of 14 rainy work days.

The Panel holds that McCarter is entitled to an extension of 14 work days to the April 10, 1991 contract completion date. The new contract completion date becomes April 24, 1991.

McCarter's actual completion date, May 6, was twelve days later than the April 24 deadline. Thus under the contract, Clemson may assess a liquidated damages penalty of \$500 a day for those twelve days for a total of \$6,000.00.

McCarter also asks the Panel to award McCarter interest on payments which it claims were unlawfully delayed by Clemson. (Record, pp. 16-17). The Panel denies McCarter's request because McCarter has not met the requirements of S. C. Code Ann. §§29-6-10 et seq., which provides that, when a contractor has performed in accordance with its contract, the owner shall pay the contractor by mailing the undisputed amount of any pay request within twenty-one days of receipt of the pay request or pay interest beginning on the due date at a rate of one percent per month, provided the contractor has notified the owner of the provisions of this section at the time request for payment is made. An owner may withhold application and certification for payment on account of unsatisfactory performance or disputed work.

The evidence is that Clemson withheld the payments in question because it found McCarter's work unsatisfactory. Further, McCarter's payment requests do not notify Clemson

that McCarter would be seeking interest under section 29-6-50 as required by that section. Some of the invoices indicate an interest rate greater than the statutory rate. (See, eg., Record, p. 124).

The Panel holds that McCarter is not entitled to interest on the withheld amounts.

Finally, Clemson asks for reimbursement of costs it claims were incurred as a result of McCarter's conduct, specifically \$11,162.50 in engineering fees because of "difficulties encountered with McCarter Electrical and coordination required with prime contractors" (Def. Ex. 1) and \$1,705.00 in site cleanup fees possibly attributable to McCarter. (Def. Ex. 2).

The Panel finds insufficient evidence to hold McCarter responsible in either case. The evidence shows that both Clemson and McCarter had some responsibility for the delays and poor coordination among the contractors and Clemson admits that it cannot show with certainty which of the three prime contractors on the job caused the site cleanup expenses. Therefore, Clemson's request for these costs is denied.

For the reasons stated above, the Panel orders that Clemson University remit to McCarter Electric the sum of \$7000.00, within thirty days from the date of this order. Clemson may retain \$6000 as liquidated damages.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Gus J. Roberts
Chairman

Columbia, S.C.

JANUARY 4, 1993