

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT)
OFFICER FOR CONSTRUCTION)

IN THE MATTER OF: CONTROVERSY)
BUILDING 920 RENOVATION)
STATE PROJECT NO. H59-9679-BW)
D&S CONSTRUCTION CO., INC.)

DECISION

POSTING DATE: July 1, 1998

vs.)
TRIDENT TECHNICAL COLLEGE)

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from D&S Construction Co., Inc. (D&S), under the provisions of § 11-35-4230 of the South Carolina Consolidated Procurement Code (Code), for an administrative review of a contract controversy on the Building 920 Renovation Project (Project) for the Trident Technical College (TTC). Pursuant to § 11-35-4230(3), the CPOC attempted to resolve the controversy by mutual agreement. Following this attempt, the CPOC conducted hearings on May 27-28, 1998 and June 3-4, 1998.

NATURE OF THE CONTROVERSY

TTC contracted with D&S to perform the construction work required to renovate a portion of Building 920 on the TTC campus. The Design Professional of record is SBF DESIGN (SBF). During the course of the Project, certain items of work arose. D&S asserts that these items constituted new or changed work for which it should be compensated by additional monies and time. TTC disagrees. TTC found that D&S did not complete its scope of work within the time allotted by the Contract and accordingly, terminated D&S for material breach. TTC then engaged another contractor to complete the unfinished work and seeks to withhold the cost of that work from any funds otherwise due to D&S. D&S contends that the termination was improper and requests damages for wrongful termination.

FINDINGS OF FACT

1. TTC entered into a contract for construction with D&S for construction of the Project. The effective date of the Contract was October 18, 1996. The form of the contract was AIA document A101-87. The General Conditions of the Construction Contract (AIA A201-87 with the then current OSE Supplemental Conditions attached) were incorporated by reference.

2. The Contract established two completion milestones relevant to this controversy. Article 3.2 of AIA A101-87 states:

“3.2 The Contractor shall achieve Substantial Completion of the entire Work not later than one hundred eighty (180) calendar days from the date set forth in the Notice to Proceed.”

Article 8.2 of AIA A201-87 (as amended) states:

“8.2.3.2 Final Completion shall be achieved within 30 days of the established date of Substantial Completion, unless otherwise amended by Change Order.”

3. TTC issued the Notice to Proceed on November 7, 1996. The initial date of Substantial Completion was set as May 6, 1997. By subsequent Change Order, that date was changed to May 21, 1997.
4. On June 12, 1997, SBF issued a Certificate of Substantial Completion for the Project. This certificate was accepted by D&S on June 25, 1997, and TTC on June 30, 1997. The date fixed by the Certificate was May 21, 1997. The work identified by SBF as incomplete was referred to as the items on the “Substantial Completion Punch list dated May 19, 1997 with referenced other punch lists.”
5. On June 23, 1997, TTC issued a notice of intent to terminate the Contract on June 30, 1997, in the event that D&S did not complete unfinished punch list work.
6. On July 1, 1997, TTC declared an emergency to exist under § 11-35-1570 of the Code.
7. On July 2, 1997, TTC terminated the Contract, citing D&S’s failure to “...complete all the punch list items...”.
8. In an undated letter received at the Office of the State Engineer on July 8, 1997, D&S requested a hearing on two specific issues: (1) wrongful termination and (2) installation and removal of a floor coating.
9. On July 14, 1997, TTC entered into a contract with Emory J. Infinger & Associates Construction Company, Inc., (Infinger) to complete the work. The form of contract was AIA A117-87, a cost plus fee contract. The fee authorized was “10% General Burden” and “10% Profit.”

DISCUSSION

CLAIMANT'S POSITION

D&S contends that despite its position as claimant in this matter, the burden of proof for the issue of wrongful termination should belong to TTC. D&S further contends that it was not in default of the contract because TTC and SBF had issued a Certificate of Substantial Completion, and therefor the doctrine of substantial performance should prevail.

D&S argues that other elements of unfinished work delayed the completion of the Project. D&S contends that during the period between substantial completion and the termination there were unresolved contract modification requests which would, if settled in D&S's favor, add additional time (and cost) to the Contract. These requests were as follows:

1. Work to convert the original sidewalks into a landscaped entrance plaza—\$3,502 and 3 days time extension.
2. Schedule impact to remove existing HVAC units—7 days time extension.
3. Construction of a 6-inch wall at a toilet room—\$2,169 and 5 days time extension.
4. Installation of an alternative floor coating (Tennant)—\$9,848 and 30 days time extension.
5. Removal of Tennant floor—\$5,694 and 30 days time extension.

D&S also argues that the punch list was not received until one week after the date of Substantial Completion and therefore, D&S did not have the benefit of a full 30 days to complete the punch list work.

D&S contends that TTC is overcharging D&S for the cost to complete the unfinished work and that the contract with Infinger violates § 11-35-2010 of the Consolidated Procurement Code (Code), in that TTC never obtained the approval of the Office of General Services as required. D&S argues that the Infinger contract is therefore illegal and TTC is barred from recovery of damages in this event.

D&S offers two approaches to the determination of "reasonable costs to complete (see Tab 13 of Exhibit 1). The first approach is a direct D&S estimate of \$7,941, which is based on D&S' completion of unfinished items on the final punch list. The second approach evaluates the elements of Infinger's total charges of \$53,519.15 for its work to complete the punch list. D&S asserts that \$39,533.43 of these charges would have been avoided if D&S and its subcontractors had been allowed to complete the work, leaving an estimated D&S cost to complete of \$13,985.72.

In addition, D&S asserts that as a consequence of the alleged wrongful termination, D&S lost its ability to obtain construction bonds. The resultant inability to obtain new work resulted in the near-total loss of the firm's equity. D&S requests the CPOC to restore this lost equity by awarding wrongful termination damages in the amount of \$220,985.

RESPONDENT'S POSITION

TTC contends that the termination action was proper and that full and proper notice was given to D&S. TTC further contends D&S was given time to cure any deficiencies in the work and that the sums paid to the completion are reasonable and appropriate.

TTC contends that the Infinger contract was procured under a declaration of emergency which relieves TTC of compliance with Article 11-35-2010 of the Code. TTC further argues that the issue of the legality of a particular contract is properly the subject of an audit process, and not a contract controversy hearing.

TTC submitted a cost analysis of the Contract, including a list of amounts that should be deducted from the Contract balance (see page 162 of Exhibit 2). TTC asserts the following:

1. D&S is not entitled to any extensions of time for any disputed items.
2. The current Contract Sum is \$1,083,335.
3. TTC proposes to pay D&S the sum of \$3,502 for the concrete plaza work.
4. The remaining contract value should be reduced by \$107,111.15, as shown in the following amounts, which reflect the TTC costs to complete the work following D&S' termination:
 - 4.1. Storage—\$750
 - 4.2. Infinger contract—\$53,519.15
 - 4.3. W.D. Robinson Electric Company payment—\$19,307.00
 - 4.4. Piedmont Industrial Coatings, Inc. (Piedmont) payment—17,937.00
 - 4.5. TTC costs for lock replacement—\$1,782.59
 - 4.6. TTC costs for floor finish application—\$2,896.14
 - 4.7. SBF termination phase costs—\$3,842.70
 - 4.8. SBF protest hearing costs—\$1,190.57
5. In addition TTC claims that \$5,676 should be deducted from Change Order 2, as this reflected payment for work that was in the original scope.

With respect to D&S' issue of unresolved contract modifications, TTC contends that these were without merit, with the exception of the payment for the concrete plaza work.

CPOC FINDINGS

D&S submitted a claim for a total of 75 days time extension due to alleged impacts to the Project critical path. During testimony, D&S reduced this request substantially. The critical path approach to delay analysis applies only to the time leading to a declaration of Substantial Completion. D&S achieved Substantial Completion on May 21, 1997, as required by the contract and thus rendering moot any claim for time for work performed before May 21, 1997. Furthermore, the CPOC finds that D&S did not have a critical path schedule as required by the Contract Documents and presented no evidence or testimony that the additional work activities had any impact on the actual critical path for the project. D&S submitted no evidence or testimony that it ever asked for additional time as part of any unresolved change order item, with one exception. In a letter dated August 4, 1997, D&S requested money and 30 day extension for the removal of the failed Tennant floor coating. This letter was submitted one month after TTC's decision to terminate D&S. The CPOC finds that D&S failed to substantiate its claim for extensions of time by the greater weight or preponderance of the evidence and is entitled to no extensions of time.

TTC and D&S are in agreement as to the value of the additional work required to install the concrete entrance plaza in lieu of the original sidewalks. The CPOC finds this value to be reasonable and hereby adjusts the Contract Sum accordingly.

The original contract documents called for a nominal 4-inch metal stud-and-sheetrock wall in a toilet room. This wall contained wooden blocking to support the toilet room sink units, insulated piping and electrical conduit and was faced with sheetrock on both sides. It is undisputed by the parties that D&S constructed the wall as shown on the drawings and found that there was insufficient wall thickness to install the interior elements and also both sides of the sheetrock facing. D&S asserts that SBF was called to the site to view the situation and did not object to replacing the 4-inch wall with a 6-inch wall, which D&S then proceeded to do. TTC contends that D&S should be held responsible for the identification of the problem and the costs of correction. TTC takes an unacceptably broad view of the contractor's duty to coordinate the work of the various trades required to complete the work. It is not a contractor's responsibility to perform coordination of design, that duty belongs solely to the design professional of record. The CPOC finds that the root cause of the problem is SBF's failure to properly coordinate the elements of its design and that as Owner, TTC is responsible for the consequences of this error. The CPOC further finds that the D&S' proposed contract adjustment is fair and reasonable and hereby adjusts the Contract Sum accordingly.

D&S claims a total of \$15,542 for its costs associated with the installation and removal of the Tennant floor coating. TTC rejects this claim, countering with a claim of \$20,833.14, which represents TTC's cost to complete the removal of the failed coating and application of the existing floor treatment. TTC also requests the return of \$5,676 from Change Order 2, as this reflected payment for work (chemical treatment of the floor) that was in the originally contracted scope of work for D&S. During the extensive testimony on this issue certain undisputed facts emerged which guide the CPOC's evaluation of D&S' claim and TTC's counterclaim. These are:

1. The bid documents called for the installation of a specific coating on the concrete floors.
2. After contract award TTC directed SBF to use a Tennant (Tennant is a manufacturer of various types of paints and coatings) concrete floor coating system in lieu of the originally specified coating.
3. In making this decision, TTC relied on the assertions of a local sales representative that the desired coating system was suitable for the existing conditions. TTC did not avail itself of the standard product literature, more specifically the installation requirements.
4. TTC did not request SBF to confirm the suitability of the Tennant coating for this project. SBF was not familiar with this type of coating system nor the particulars of the Tennant product. SBF's supplemental instructions (i.e., the request to D&S for pricing the change) included only a marketing brochure for information.
5. In submitting its quotation for performing the work, D&S did not obtain Tennant's written installation instructions, choosing to rely on telephone conversations.
6. In response to a D&S inquiry, TTC directed D&S to precondition the concrete surface with muriatic acid. The Tennant guide specifications specifically prohibit the use of muriatic acid to condition the concrete.
7. D&S proceeded with the work of installing the Tennant coating system without an approved Change Order. The value of the work was within TTC's certification authority and this was accepted practice on this project. There is no evidence that D&S followed the surface preparation and application instructions contained in the Tennant guide specifications.
8. D&S purchased individual Tennant products rather than an available kit which included the installation instructions.
9. After the coating system failed, a representative of Piedmont (a certified Tennant applicator) examined the floor and declared that the coating system selected by TTC was not recommended for the specific conditions and would not be warranted if it were reapplied. The basis for this finding was the moisture level in the slab, even though the

measured readings were within the limits specified by Tennant in the product guide specifications.

In evaluating the record on this issue, the CPOC has failed to find a single instance where any of the participants acted prudently and in accordance with the ordinary standards of care and custom in construction contract administration. Without enumerating the manifold errors, the CPOC finds that TTC and D&S were collectively at fault for the ultimately futile attempt to install the Tennant floor coating and that neither party is justified in receiving damages for this issue.

TTC requested that the CPOC order the forfeiture of \$5,676 from the adjustment granted to D&S in Change Order 2. By submitting this astounding request, TTC evidences a substantial deficiency in its understanding of the basic principles of contract law. A Change Order, once signed by the parties, represents an accord and satisfaction, and fully extinguishes the claims of the parties related to the subject of the change order. Both agencies and contractors are expected to conduct the administration of the contract accordingly. To unilaterally reopen a properly executed change order, because one party now thinks it made a bad bargain, would reduce the construction process to chaotic unmanageability. The CPOC finds this request completely without merit and denies and dismisses it.

D&S claims that the termination was invalid because TTC did not provide the punch list until May 27, 1997, thereby depriving D&S of adequate time to complete the unfinished work. D&S further claims that termination was improper because D&S “substantially performed” the work required as evidenced by the Certificate of Substantial Completion. The first claim is invalidated by D&S’s participation in the various inspections that resulted in the formal punch lists, and by the acceptance of the Certificate of Substantial Completion, which included a reference to the items on the “Substantial Completion Punch list dated May 19, 1997 with referenced other punch lists.” The CPOC finds that by the greater weight or preponderance of the evidence that D&S received constructive and effective notice of the nature and extent of the work deemed unfinished by TTC, and further that proper notice was timely given to D&S in accordance with the custom and practice of the construction industry.

D&S urges that TTC’s decision be ruled improper on the grounds that D&S’ undisputed achievement of Substantial Completion should bar TTC from terminating the contract, notwithstanding the contractual requirement for timely Final Completion, as required by the “time is of the essence” clause. The CPOC finds nothing in the terms of the Contract, or the law which would support such an argument. The term “substantial completion” means performance that is in good faith and in compliance with the contract, but falls short of complete performance due to

minor and relatively unimportant deviations. The doctrine of substantial completion prevents the Agency from assessing liquidated damages or terminating the contract without giving the contractor reasonable time to correct deficiencies. However, it does not prevent the Agency from demanding strict compliance and full completion of the work, or from obtaining an equitable adjustment in the contract price if strict compliance is not attained.¹ In *Southland*², the principle was stated as follows:

Even though a construction contractor has substantially completed the project, the Government may nevertheless terminate the uncompleted portion of the contract for default in the event that the contractor refuses to complete [the project] or fails to complete [the project] within a reasonable period of time.

Article 8.2 of the Contract, as amended by the State's standard supplementary conditions, establishes that time is of the essence in the contractor's performance. This article further defined two periods of performance for the contractor. The first is the time from Notice to Proceed to Substantial Completion. The second is the time from Substantial Completion to Final Completion. By executing the Contract as offered, D&S warranted that the times provided were reasonable and would be adhered to strictly. Failure to perform within the time periods established, absent excusable delay, may entitle the Agency to terminate the contract for total breach.³

It is undisputed by the parties that D&S achieved Substantial Completion within the time allowed by the Contract. It is undisputed by the parties that D&S failed to achieve Final Completion within the time allowed by the Contract. The CPOC finds that TTC had the contractual right to terminate D&S and further finds that TTC issued an appropriate cure notice as required by paragraph 14.2 of the Contract. The CPOC finds that D&S failed to remedy the remaining deficiencies within the allowed cure period. The CPOC finds that TTC acted within its contractual rights in reaching the determination that D&S had materially breached the Contract for failure to complete the Contract Work within the time allowed. D&S' claim of improper termination is denied and dismissed. By consequence of its failure carry its burden of proof, the D&S claim for wrongful termination damages is dismissed.

Under the provisions of subparagraph 14.2.2 of the Contract, TTC was entitled, following the termination to:

*“...1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor.
.2 accept assignment of subcontracts pursuant to Paragraph 5.4, and*

¹ See *G.A. Karnavas Painting Co.*, VACAB 992, 72-1 BCA ¶ 9369.

² See *Southland Constr. Co.*, VABCA 2217,89-1 BCA ¶ 21,548 at 108,445.

³ See *Monmouth Pub. Sch. D. 38 v. D.H. Rouse Co.*, 506 N.E.2d 315 (Ill.App.3 Dist. 1987).

.3 finish the work by whatever reasonable method the Owner may deem expedient.”

D&S argues that TTC behaved “unreasonably” in completing the project by first entering into a cost-plus-percentage of-cost contract (with Infinger) which violated § 11-35-2010 of the Code, and second by paying Infinger an amount which exceeds the reasonable cost to complete the unfinished work. D&S contends that TTC should be barred from recovery from this allegedly illegal contract, or in the alternative, the amounts should be reduced to a reasonable amount.

TTC contends that by declaring an emergency procurement situation to exist, it was relieved of any requirement to comply with other provisions of the Code, and further, that a contract controversy hearing is not the proper venue for consideration of this issue.

With regard to TTC’s second contention, the CPOC is of a different opinion. Under the Code, and subject to appeal, the CPOC is the sole determiner of the appropriateness of a contract for construction and construction-related services. With regard to the first contention, TTC’s view of § 11-35-1570 of the Code is overbroad. The singular purpose of this article is to afford the agency only the minimum relief necessary to respond to the emergency condition. This relief is first, from the statutory requirements of the bidding and award process for public construction contracts. Article 11-35-1570 substitutes the requirement that the Agency obtain the maximum practicable competition. This article is intended solely to expedite a necessary procurement action. In the instant case, TTC stopped its telephone inquiries after one positive expression of interest, even though two other contractors remained on TTC’s list of potential contractors. The CPOC does not believe TTC’s actions represent a reasonable effort to obtain “...as much competition as is practicable under the circumstances.”

Article 11-35-2010 does not automatically exempt the agency from its obligation to comply with other provisions of the Code, the Budget & Control Board’s Procurement Regulations (Regulations) and the OSE Manual, unless a specific exemption is required to respond to the emergency. Despite the passage of twelve days between the termination of D&S and the award of the completion contract to Infinger, TTC apparently made no effort to notify the OSE or the Office of General Services of its intent to proceed with a cost-plus contract, nor did TTC request approval to proceed with such a contract, as required by § 11-35-2010 of the Code. Accordingly, and by reason of TTC’s failures to obtain reasonable competition and the use of a cost-plus contract without prior approval, the CPOC finds TTC’s award of the contract to Infinger to constitute an illegal procurement action.

Both sides presented extensive documentation supporting their respective positions on the issue of termination damages. While it is not required that TTC select the least costly method for completing the unfinished work of the Contract, TTC is expected to perform its fiduciary responsibilities with prudence and cost consciousness. Neither the terms of the contract with Infinger nor TTC's administration of that contract, represent, to the CPOC, the expected level of prudence or cost consciousness. Of particular concern are the high levels of overhead and profit allowed and the large amount of project management time and expenses, and the use of the same contract (including workers and subcontractors) to simultaneously perform both cost-plus work and lump sum work, with all overhead charged to the cost-plus account. TTC's recovery of the costs to complete the remaining punch list items will be limited to that which the CPOC finds appropriate and reasonable.

According to TTC's testimony, TTC was able to hold its grand opening on schedule and used the building for classes by the end of August, 1997, as scheduled. Considering the evidence and testimony presented by the parties as a whole, and by the greater weight or preponderance of the evidence, the CPOC finds that the D&S position on reasonable completion costs is the more persuasive. The CPOC finds that this work was effectively complete by the end of August, 1997. Accordingly the CPOC awards project completion costs in the amount of \$21,393.77 to TTC.

This amount is comprised of the following elements:

1. \$13,985.72—the D&S estimated cost to complete.
2. \$750.00—Equipment storage costs.
3. \$2,658.05—SBF termination phase costs through August 31, 1997, excluding the services billed before the termination of D&S.
4. \$4,000.00—On-site supervision through August 29, 1997.

A recapitulation of the adjusted Contract Sum is presented below.

Item	Amount
Contract Sum, through Change Order 3	\$1,083,335.00
Adjustment for Concrete Plaza	\$3,502.00
Adjustment for Rework of Toilet Wall	\$2,569.00
Adjusted Contract Sum	<u>\$1,089,406.00</u>
Less Amount Paid to Date to D&S	(\$951,589.00)
Less Amount Paid to W.D. Reynolds	(\$19,307.00)
Less Awarded Completion Costs	<u>(\$21,393.77)</u>

Amount Due D&S Construction

\$97,116.23

DECISION

It is the decision of the Chief Procurement Officer for Construction that D&S Construction Co., Inc. is entitled to no extensions of time to perform the work of the project.

It is the decision of the Chief Procurement Officer for Construction that D&S Construction Co., is entitled to an increase in the Contract Sum of Three Thousand, Five Hundred and Two Dollars (\$3,502.00) as a result of installing a concrete plaza entrance to Building 920.

It is the decision of the Chief Procurement Officer for Construction that D&S Construction Co., Inc. is entitled to an increase in the Contract Sum of Two Thousand, One Hundred and Sixty-Nine Dollars (\$2,169.00) as a result of rework to a toilet wall.

It is the decision of the Chief Procurement Officer for Construction that Trident Technical College and D&S Construction Co., Inc. are mutually and equally at fault for the failed installation of the Tennant floor coating and no damages are awarded to either party.

It is the decision of the Chief Procurement Officer for Construction that the request by Trident Technical College for the forfeiture of Five Thousand, Six Hundred and Seventy-Six Dollars (\$5,676) from the adjustment granted to D&S in Change Order 2 is without merit and is hereby rejected.

It is the decision of the Chief Procurement Officer for Construction that Trident Technical College properly exercised its discretion, as allowed in the terms of the Contract, to determine that D&S Construction Co., Inc. had materially breached the Contract for failure to complete the work of the Contract within the time allowed and to terminate the Contract for cause. The D&S claim for wrongful termination damages is dismissed.

It is the decision of the Chief Procurement Officer for Construction that Trident Technical College gave D&S Construction Co., Inc. proper and timely notice of termination and the termination is hereby affirmed.

It is the decision of the Chief Procurement Officer for Construction that the award of a cost-plus-percentage-of-cost contract to Emory J. Infinger Associates by Trident Technical College constitutes an illegal procurement action.

It is the decision of the Chief Procurement Officer for Construction that Trident Technical College is required to promptly pay D&S Construction Co., Inc. the sum of Ninety-Seven Thousand One

Hundred and Sixteen Dollars and Twenty-Three Cents (\$97,116.23) from the balance of the contract funds.

/s/ _____
Michael M. Thomas
Chief Procurement Officer
for Construction

June 30, 1998
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.