[Cite as *George Allen Constr. Co., Inc. v. Ohio Dept. of Adm. Serv.*, 2001-Ohio-3957.]

IN THE COURT OF CLAIMS OF OHIO

GEORGE ALLEN CONSTRUCTION CO., INC.	:	
	:	CASE NO. 2000-04766
Plaintiff	:	REFEREE REPORT
v.	:	William L. Clark, Referee
DEPARTMENT OF ADMINISTRATIVE SERVICES	:	
Defendant	:	

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I. STATEMENT OF THE CASE

This case involves disputes arising out of the performance of the interior general trades contract for a law library addition for Cleveland State University (CSU). Plaintiff George Allen Construction Co., Inc. (GAC) was the interior general trades prime contractor. Defendant Ohio Department of Administrative Services (defendant) acted as the contracting agent for CSU. The contract was let in 1995, with GAC's work scheduled to commence in mid-1996 following site preparation and building erection work by other prime contractors. The GAC contract stipulated a lump sum price of $2,024,913, called for completion within 670 calendar days, and permitted the assessment of liquidated damages of $2,000 per day for late completion. Defendant retained R.P. Carbone Construction Company in association with O'Brien, Kreitzberg and Associates (RPC/OK) to serve as construction manager.

The project was behind schedule when GAC commenced work in 1996 due largely to delays and defective performance by J.P. Sorma Construction Co., Inc. (Sorma), the building shell general trades prime contractor. As a result, the project construction schedule affecting GAC and other prime contractors underwent numerous modifications during the course of construction. However, the project was completed essentially on time, and liquidated damages for late completion were not assessed against GAC.

In November, 1998, GAC filed suit against defendant for additional compensation allegedly due for extra work it performed and expenses incurred by it on the project. That suit was subsequently dismissed, and GAC asserted its claims in the Article 8 dispute resolution process. Several of those claims were resolved for a total of $71,092 and are not before this court. Thereafter, GAC filed suit in this court on the rejected claims, seeking recovery for:

1) Alleged violation of GAC's right to work due to union interference at the site, which resulted in delay and additional costs of completion and wrongful assessment of back charges for cleanup;

2) Cost of providing "J" bead at window mullion/drywall partition intersections, which was allegedly beyond the scope of GAC's contract;

3) Additional bond costs on several items of extra work;

4) Extra cost of "out of sequence" work allegedly performed by GAC through its subcontractor, Giorgi Interior Systems, Inc. (Giorgi).

GAC's lawsuit also included a claim for consequential damages, alleging that the acts and omissions of defendant and

its agents on this project caused GAC to go out of business. That claim was withdrawn prior to trial.

GAC also seeks to recover interest on the amount of the Article 8 award for an alleged 5½-month delay in effecting payment, together with prejudgment interest and costs on the other amounts to which it is found to be entitled herein.

Defendant filed its answer denying liability and requesting dismissal of GAC's complaint. Thereafter, William L. Clark was appointed "referee" pursuant to R.C. 153.12 and R.C. 2743.03 to hear the case and submit his report and recommendations to Judge J. Warren Bettis, the assigned judge. A trial was conducted by Referee Clark on June 28 and 29, 2001, and post-trial briefs were submitted on behalf of the parties.

Upon consideration of the evidence, the applicable law and the arguments of counsel, the referee hereby submits the following report and recommendations.

II. DISCUSSION

A. Right to Work Claim

1. Claim for cost of employing union labor

GAC, a nonunion contractor, performed most of its work on the project through union subcontractors, reserving for itself miscellaneous labor and various items of material supply. It is conceded that GAC had the right to employ nonunion laborers and material suppliers for such work so long as the prevailing wage rates specified in the contract were paid. (GC 1.2.5; WR 1.1.1; Tr.570.)

On several occasions during construction, representatives of Union Local No. 310, incorrectly informed GAC's nonunion laborers and material suppliers that it was a union job and nonunion workers could not work there. The representatives impliedly

threatened reprisal for noncompliance. GAC's response was to avoid confrontation with the union and to seek the assistance of defendant's construction manager to "set the union straight." Letters written by George Allen to RPC/OK, one in November 1996 and at least three in April 1997, describing the union interference and requesting defendant's assistance in resolving the problem went unanswered. GAC also sought to involve its state representative, Hank Tersigni, and the state EEO officer, Jim Burton, in the matter but without meaningful result. On May 1, 1997, GAC wrote to state architect Randall A. Fisher seeking his assistance in addressing this and several other concerns. Fisher replied on June 9, 1997, promising to investigate the matter. However, no further response was forthcoming. (Plaintiff's Exhibit 4.)

Clearly, defendant elected during the first several months of the project not to assist GAC in the enforcement of its right to employ nonunion labor and material suppliers on this project. In the words of Joe Coreno, GAC's project manager and on-site superintendent, RPC/OK said in effect: "It's your job. You take care of it." (Tr. 116.) Mike Scaparotti of RPC/OK testified that the construction manager, as an agent of defendant, was not under contract to resolve labor disputes, but took his direction in such matters from defendant or the university. He said that GAC should have ignored the attempted interference and proceeded with the use of nonunion laborers and material suppliers as was its right. Scaparotti stated that if that were to result in physical violence or other illegal activity, the appropriate authorities would have been called in to deal with it. (Tr. 570-574.)

In early May 1997, GAC engaged legal counsel to attempt to move the matter ahead. At a May 14, 1997, meeting attended by representatives of GAC (George Allen, Joe Coreno and attorney Alan Ross) and RPC/OK (Mike Scaparotti and Jon Dregalla) the parties discussed establishing a "reserve gate" system to provide a separate entrance to the worksite for nonunion laborers and material suppliers and to restrict any picketing to that location. Later that day, or the next day, the idea was abandoned, either because RPC/OK feared it would inflame Local 310 and create problems on this and perhaps other jobs, as attorney Ross testified (Tr. 504), or because Joe Coreno opposed the idea and most of the remaining work was expected to be done by Giorgi without union opposition, as Mike Scaparotti testified (Tr. 553). Ross stated that Scaparotti offered, as an alternative, to process a claim for whatever GAC's previous union interference-related costs were, grant an extension of time for delays attributable thereto, and pay GAC's extra costs for using union labor in completing its work. (Tr. 506-507; 531.) Scaparotti vigorously denied Ross' testimony on this point. (Tr. 576.)

Nothing in writing was offered at trial to evidence RPC/OK's alleged offer or GAC's acceptance thereof. Therefore, even if Ross' version of the facts be true, the alleged agreement would not have been enforceable against defendant because it did not comply with the requirement of GC Section 7.1.2 that any change in the work be in writing. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority* (1997), 78 Ohio St.3d 353, 678 N.E.2d 519.

The referee questions whether the establishment of a "reserve gate" offered a real solution to the problem. Even if

all nonunion laborers and material suppliers could have gained access to the site through such a gate and any picketing would have been limited to that location, the union representatives would still have been able to intimidate them when they attempted to perform their work on site.

After being denied meaningful assistance from defendant and continuing to elect not to challenge the union directly, either by obtaining a court injunction or through self help, GAC employed union laborers and material suppliers to perform the work. Allen testified that GAC employed Jay's Boom Trucking (JBT), a union contractor, between March 21, 1997, and July 31, 1997, to provide labor for general cleanup on the project at a total cost of $18,161.50. The hourly rate charged by JBT for those services was $28.50 in April and $29.50 from May through July, for a total of 627 hours.[1] (Plaintiff's Exhibit 4, Voucher History Report, July 1, 1996 to December 31, 1997.) The prevailing wage rate for such work for the same period was $18.10 (Contract, Wage Determination, Hod Carriers and Common Laborers – Building Construction), or a total of $11,348.70 for 627 hours. Deducting the amount GAC would have paid at the prevailing wage rates ($11,348.70) from the amount actually paid at union rates ($18,161.50) leaves a balance of $6,812.80, being the extra cost incurred by GAC for cleanup by reason of using union labor.

Similarly, GAC hired Reliance Mechanical Corp. (Reliance) to provide union labor to unload and move doorframes, wood and other materials from delivery trucks to carpenters inside the building.

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[1] These figures exclude the amount of $759 paid by GAC to JBT for twenty-three hours of labor at $33 per hour to move furniture, doors, etc., on May 21, 1997. (See pg. 7, *infra*.)

The total amount GAC paid to Reliance for these services was $2,730. As previously noted, GAC paid Jay's Boom Trucking $759 for similar services on May 21, 1997. These two figures total $3,489. Allen stated that those costs were incurred solely because the union representatives prevented the nonunion material suppliers from unloading and delivering the materials on site, a service which GAC had already paid for in the purchase price of the materials. (Tr. 769-770.)

Additional costs allegedly incurred by GAC as a result of union interference were storage charges for indoor storage of doors paid to Shippers Highway Express, Inc. from November 1996 through March 1997 for a total of $1,495.74. GAC failed to present evidence establishing a link between alleged union interference and the need for four months of indoor storage of doors. However, Shippers Highway Express, Inc. also provided union labor for unloading and delivering doors, a large reference desk and bathroom partitions at the job site in March and May 1997, for a total charge of $3,059.63. When added to the charges for similar services provided by Reliance ($2,730) and Jay's Boom Trucking ($759), GAC's cost of using union labor for delivery services totals $6,548.63.

In summary, the referee finds that GAC incurred the following extra costs by reason of union intimidation on the project:

Extra cost of labor for cleanup	$6,812.80
Labor to unload and move door frames, wood and other materials to points of use on site	6,548.63
Total	$13,361.43

GAC contends that defendant had a duty under the contract to "police the union" to prevent it from harassing or interfering

with GAC's rights to hire nonunion labor at the prevailing wage; that its failure to do so was a breach of contract; and that GAC is entitled to recover its extra costs attributable thereto. The authority cited by GAC for this proposition is the testimony of Alan Ross, GAC's labor attorney who attended the meeting of May 14, 1997. Ross testified that GAC agreed to forego the use of a reserve gate in return for reimbursement by RPC/OK of GAC's costs of using union labor and an extension of the contract time. Ross also identified several contract provisions[2] which, taken together, show that defendant had a duty to give GAC access to the job to perform its work and to regulate the intimidating conduct of the employees of other contractors who employed union labor. (Tr. 522-525.) GAC also cites *Visintine & Co. v. The New York, Chicago & St. Louis Railroad* (1959), 169 Ohio St. 505, 506 for the same proposition, quoting the following language:

> The state of Ohio owed certain duties to plaintiff under the contract entered into between them. Among those duties was that of providing plaintiff with a site on which it could perform its work without hindrance or delay and of doing those things which it promised to do at such time and in such manner as would not hinder or delay the plaintiff.

Counsel for GAC has not informed the court how an application of the rule of law in *Visintine, supra*, to the specific contractual provisions in this case, supports its

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[2] GC Sections 2.5.2; 4.1.1; 4.1.2; 4.2.1; 4.2.2; 4.2.2.3; 4.2.4; 4.3.5; 4.3.5.1; 4.4; 4.4.2; 4.6; 4.6.1.1; 6.1; 6.1.4; and 6.3.

position. Upon review thereof and consideration of the evidence presented, the referee finds that defendant did provide GAC with a site upon which to perform its work. GAC planned from the outset to do that work largely through union subcontractors and did so without any union interference. In the relatively few instances where the union interfered with GAC's right to use nonunion laborers and material suppliers, GAC elected to ask defendant to compel the union to alter its behavior rather than going forward with the work or seeking a court injunction to enforce its rights. The referee finds no duty under the contract or in law requiring defendant to intervene on plaintiff's behalf. In the event that violence or other illegal activity were to erupt out of any encounter between the union and GAC or its employees, defendant was ready to call in the campus police to deal with it, as Mike Scaparotti testified. Accordingly, the referee recommends that GAC's claim to recover the cost of union labor for cleanup and deliveries be denied.

2. Claim for reimbursement of cleanup back charges

GAC was back-charged the sum of $54,379 for its failure to daily remove all waste materials and rubbish resulting from its operations as required by GC Section 2.10 of the contract. GAC seeks to recover those back charges as being improperly assessed.

The record is replete with notifications and directions from the construction manager to all prime contractors to comply with this requirement. (Defendant's Exhibits AA – FF.) Those exhortations went largely unheeded. As a consequence, the construction manager proceeded in accordance with GC Section 5.3 of the contract to give the required three-day notices to the defaulting contractors to perform the cleanup by other means, and back-charge each contractor a proportionate share of the cleanup

cost. (Tr. 628-630.) Jon Dregalla, RPC/OK's on-site project manager, testified that the allocation of responsibility among the various contractors for the cleanup cost was made carefully and thoroughly by the construction manager's field personnel based upon daily observations of the accumulated trash. Their findings were reported weekly on detailed spread sheets. (Tr. 594; 631-637; 711; Defendant's Exhibits AA - FF.) The affected contractors did not participate in the cost allocations but could review the field notes and other records backing up the proposed change orders if they had questions. (Tr. 635-636.) Six deductive change orders averaging approximately $9,000 per month were issued to GAC covering the period from February 21, 1997, through August 21, 1997. Most of the cleanup work was performed by Gorman-Lavelle Corporation at union labor rates.

The assessment of $54,379 against GAC represented seventy-six percent of the total cleanup back charges of $71,374 levied against five prime contractors which were on site during the period in question. The next largest back charge was against Sorma Construction Co., the building shell contractor, in the aggregate amount of $13,817, with lesser amounts being assessed against Doan Electric Co. ($1,014), Reliance Mechanical ($1,766), and S.A. Comunale Co. ($398).

Upon receipt of notices of insufficient progress regarding cleanup, GAC would immediately call upon Giorgi, GAC's interiors subcontractor whose operations were allegedly creating the trash, to take the necessary corrective action. (See, *e.g.*, Defendant's Exhibits P, Q, R, S, V; Tr. 245.) Giorgi's response in December 1996 and March 1997 was to deny that it had generated the trash. (Defendant's Exhibits R, T; Tr. 226; 247; 297; 299.) However, David Giorgi acknowledged at trial that the trash conditions

shown in six of twelve photographs taken in April and May, 1997 (Defendant's Exhibits MM1 to MM12) portrayed Giorgi's "mess." (Tr. 369-372.) Jon Dregalla testified that most of the debris shown in those photographs appears to be trash resulting from Giorgi's work. (Tr. 628.)

GAC concedes that the construction manager gave the three-day notice required by GC Section 5.3 of the contract and then arranged for the cleanup work upon the default of the prime contractors. (Tr. 801.) Although both GAC and Giorgi contended during construction and at trial that more of the cleanup cost should have been allocated to Sorma, no independent analysis of cleanup costs was made by them to refute RPC/OK's allocation. (Tr. 801.) GC Section 5.3.2.3 of the contract states: "The decision of the Director to back-charge the Contractor shall be final." The six change orders covering the back charges to GAC for cleanup work all bear the approval of Deputy Director Kaitsa.

On the basis of the evidence presented, the referee finds that the back charges for cleanup work assessed against GAC were appropriate and made in accordance with the contract requirements. The referee fails to see any evidentiary link between GAC's claim for reimbursement of the cleanup costs and its allegation of union interference. Accordingly, the referee recommends that GAC's claim for reimbursement of the cleanup costs assessed against it be denied.

B. "J" bead Claim

GAC seeks to recover the sum of $4,377 for providing and installing "J" bead at window mullion/drywall partition intersections on the basis that such work was beyond the scope of GAC's contract.

The detailed drawing for this installation, identified as 20M-20 and dated June 21, 1995, was prepared by Collins Rimer Gordon Architects, Inc. (CRG), the associate architect on the project. (Plaintiff's Exhibit 5.) At the intersection between the window mullion and the drywall the drawing shows "08520 prefinished alum. closure both sides" and at the same points "F mold." Carder MacKnight, Giorgi's estimator who assisted in the preparation of Giorgi's bid, interpreted this drawing as indicating that an aluminum closure would be provided by the manufacturer of the curtain wall system to receive the drywall partitions and that the use of "J" bead would not be required in the installation. In a letter dated February 18, 1997, he explained that the F mold and aluminum closure are shown as the same piece, and he interpreted the reference to F mold as indicating the form of the aluminum closure. If the F mold had been intended as a drywall bead, he reasoned, it would have been given the master legend of 09255 and would have been called a "J" bead. There is no drywall bead, he said, that resembles an "F." (Plaintiff's Exhibit 5.) Therefore, he excluded the cost of providing and installing "J" bead from Giorgi's bid. (Tr. 207-208.)

On January 28, 1997, the construction manager submitted a request for information (RFI) to the associate architect seeking verification of Giorgi's interpretation of drawing 20M-20. The next day, Jim Quandt of CRG advised that the F mold and aluminum closure were two distinct components of the assembly and that the F mold was a gypsum board corner bead, to be supplied by the drywall installer (Giorgi). He acknowledged two errors in the drawing: 1) that the specification reference was incorrect ("08520" should have been "08920"); and 2) that "F mold" should have been "J" bead. (Plaintiff's Exhibit 5.)

Giorgi did not agree with CRG's explanation and, on February 6, 1997, submitted a change order proposal to GAC to provide drywall "J" bead and drywall finish for the sum of $3,882. (Plaintiff's Exhibit 5.) MacKnight explained at trial that the installation of "J" bead involves labor and material cost for applying the bead, taping, sanding and finishing rather than simply sliding the drywall behind a piece of aluminum closure as he had anticipated from the drawing. (Tr. 213-214.) In order to avoid delaying Sorma's window trim work, GAC instructed Giorgi to proceed with the installation under protest. GAC also requested another letter from Giorgi providing greater detail in support of its position that the "J" bead work was beyond the scope of the contract. That letter was provided on February 18, 1997, as described above.

GAC forwarded the claim to the construction manager after adding its markup of ten percent and bond cost of two and one-half percent bringing the total claim to $4,377. On February 21, 1997, in further correspondence with RPC/OK regarding this matter, Quandt suggested that GAC be directed to install two corner beads soldered together to create the "F" mold profile shown in drawing 20M-20 which, he said, would be "extremely labor intensive." Quandt stated further that "CRG considers this issue closed and with no additional cost to the project." (Plaintiff's Exhibit 5.) Giorgi proceeded with the installation of "J" bead under protest. GAC's Article 8 claim for this item was submitted under date of September 7, 1997. (Plaintiff's Exhibit 5.) It was rejected. (Defendant's Exhibit Z.)

The evidence demonstrates that the errors contained in the associate architect's drawing 20M-20 caused the drywall subcontractor reasonably to anticipate that "J" bead would not be required at the window mullion/drywall partition intersections

and to exclude that cost from its bid. At trial, defendant did not question the quality of the installation or the reasonableness of the amount claimed. Clearly, CSU received the full benefit of this work.

It is well-established that the owner is required to furnish sufficient plans and specifications to enable the contractor to perform. *Bates & Rogers Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.* (N.D. Ohio 1920), 274 Fed. 659; *Valentine Concrete, Inc. v. Ohio Dept. of Administrative Services* (1991), 62 Ohio Misc.2d 591. The architect is the agent of the owner, and the owner is liable for any errors by the architect that create extra costs. *Mason Tire & Rubber Co. v. Cummins-Blair Co.* (1927), 116 Ohio St. 554. Accordingly, the referee recommends that GAC's "J" bead claim be allowed in the amount of $4,377.

C. Increased Bond Cost Claim

GAC seeks to recover $7,138.15 for additional bonding costs for change order work and for allowance increases during the course of the project. A total of 23 change orders authorizing various increases in the contract price from August 13, 1996, to April 18, 1997, and aggregating $259,569.03, are involved. The claim includes $6,489.23 in bond premiums calculated at 2.5 percent, plus one year of interest at the rate of ten percent per annum, or $648.92. (Plaintiff's Exhibit 6.)

The claim is based upon GC Section 7.1.1.1, which mandates: "*** The Contractor shall increase the amount of the Bond whenever the contract price is increased."

The change orders in question, copies of which are collected in Plaintiff's Exhibit 6, were based upon cost estimates prepared by Joe Coreno, GAC's project manager, showing the cost of

materials and labor plus ten percent for overhead and profit. These estimates did not include the amount of premium necessary to increase the amount of the contractor's bond as required by GC Section 7.1.1.1. George Allen explained at trial that Mr. Coreno simply forgot to add that cost to the estimate. (Tr. 433.)

On April 29, 1997, GAC wrote RPC/OK asking whether defendant required additional bonding for: 1) the delayed alternates which had been accepted the previous August in the amount of $199,106[3]; and 2) other change orders and field work orders involved in this claim which together totaled an additional $60,463.03. RPC/OK answered that the General Conditions require bonding on all change orders; that bonding costs should have been included in all of GAC's quotations; and that no final bill for additional bond premium would be entertained at the end of the project. On July 1, 1997, RPC/OK stated further that the contract documents

[3] During the bidding process, GAC submitted the low bid for the interior work and prices for several alternates. RPC/OK was afraid that GAC had failed to include all costs for a large alternate pertaining to a connector bridge between the law library building and another portion of the campus. When called to its attention, GAC agreed, and the contract was awarded without including that alternate. The price for that work was negotiated and was incorporated by change order in August 1996, at the price which had been calculated by RPC/OK's estimator during the design phase. Several other alternates were also accepted at that time. (Tr. 545-546; 608-609; Change Order No. 072-203.)

do not permit reopening of firm alternate prices submitted and accepted. (Plaintiff's Exhibit 6.)

Some of the change orders which had been issued previously to GAC by defendant had included bond costs. (Tr. 433.) Notwithstanding the exclusion of such costs from the change orders in question, GAC was required to incur a bond cost for each of them. (Tr. 435.)

This claim was rejected in the Article 8 proceeding on the grounds that: 1) the bond premium should have been included in the bid for the delayed alternates; 2) the other change orders would have resulted in only a few hundred dollars in bond premiums; and 3) the change orders signed by GAC state that the compensation provided for therein "constitutes full and complete satisfaction for all direct and indirect costs and interest related thereto." (Defendant's Exhibit Z.)

Section 6.4.2 of the Instructions to Bidders makes it clear that the contract bond is for the benefit of the State of Ohio. It provides:

> The Bond shall be in the full amount of the contract to indemnify the State against all direct and consequential damages suffered by failure of the Contractor to perform according to the provisions of the contract and in accordance with the plans, details, specifications and bills of material therefor and to pay all lawful claims of Subcontractors, Material Suppliers, and laborers for labor performed or materials furnished in carrying forward, performing or completing the contract.

uoted above, GC Section 7.1.1.1 requires the bond to be increased whenever the contract price is increased. The referee is not

aware of any contractual provision giving an agent of defendant the power to waive that mandatory provision.

It seems clear, therefore, that inclusion of the bond premium in each of the subject change orders was a non-waivable requirement of the contract. GAC was at fault in not proposing inclusion of that cost; and RPC/OK was at fault in not observing the omission of the bond premium and requiring its inclusion in the change order.

The referee recommends that this court order to constructively amend each of the subject change orders to add the cost of the bond premium in the amount of 2.5 percent of the increase in the contract price, and that defendant be ordered to pay GAC the unpaid portion of the change orders so amended in the aggregate amount of $6,489.23.

Out-of-Sequence Work Claim

This claim is asserted by GAC on behalf of Giorgi for alleged losses of $86,500. The loses are allegedly attributable to RPC/OK's failure to properly schedule, coordinate and manage the work after it had fallen behind schedule due to the delays and deficiencies in Sorma's performance. Sorma's delays and deficiencies, it is claimed, caused Giorgi not only to accelerate its work at the direction of RPC/OK, for which it was compensated, but also to lose planned efficiencies in its performance, for which it was not compensated. Defendant denies liability on the grounds that the actions of the construction manager were appropriate; that GAC was compensated by change order for the work in question; and that the contract prohibits any recovery against defendant for damage or expense to a contractor resulting from interference, hindrance, disruption or delay caused by another contractor.

The facts regarding this claim are not seriously in dispute. When Giorgi arrived on the site to begin work in July or August, 1996, the building shell contractor and some of its subcontractors were still there, the building was not yet watertight and temperature control was lacking; all of which inhibited the performance of drywall work. (Tr. 274-278.) Because of these conditions, some of the drywall work had to be taken down and redone. (Tr. 278.)

In January, 1997, Giorgi notified GAC of the delays and inefficiencies to its work caused by other contractors. (Plaintiff's Exhibit 15.) In a letter dated February 6, 1997, to RPC/OK, GAC complained of similar problems such as Sorma's failure to complete and clean up after its work, which caused the electrician and fireproofing contractor to be behind schedule and in Giorgi's way. (Plaintiff's Exhibit 16.)

In light of these problems, the project progress schedule was revised and updated on numerous occasions by the construction manager in conjunction with the various contractors. The revisions and updates were made pursuant to GC Section 4.3 of the contract. Some, but not all, of these schedules are collected in Plaintiff's Exhibit 7. Mike Scaparotti of RPC/OK described the rescheduling effort in the following terms. (Tr. 575.)

> We produced recovery schedules. We had meetings with the contractors to talk about how to meet those recovery schedules. In the development of the initial schedule, and in a lot of participation in the subsequent schedules, George Allen was not present, would not make himself available.

(See, also, Tr. 611.)

One of the options available to the construction manager to deal with the Sorma-caused delays was to grant the affected

contractors an extension of time to complete their work. (GC Sections 4.1.2; 6.3.) However, that option was not feasible here because of CSU's need to occupy the building before the start of the fall quarter. (Tr. 620.) In lieu of extending the completion date, defendant agreed to pay the contractors to accelerate portions of their work, to relax some interim scheduling milestones, and to develop "work around" schedules in order to bring the work in on time, notwithstanding the previous delays. (Tr. 622-623; 626.) The five change orders issued to GAC for Giorgi's overtime premium costs in April, May and June, 1997, are collected in Defendant's Exhibits GG - KK. The total amount paid to GAC for this work, including GAC's ten percent markup and 2.5 percent bond premium cost was $47,370. Offsetting deductive change orders were issued to Sorma for that work so that there was no additional cost to defendant.

Mike Scaparotti of RPC/OK testified that David Giorgi, Giorgi's project superintendent, was directly involved in the discussions leading to the generation of those change orders and had a full opportunity to advise RPC/OK of all additional work Giorgi was required to do. Scaparotti said that this was the compensation being offered for acceleration on this project due to delays encountered on the schedule. There was no discussion, he said, relating to a claim for additional compensation down the road. (Tr. 562.)

David Giorgi testified to the contrary, contending that those change orders were not intended to compensate Giorgi for the out-of-sequence work which resulted from the Sorma delays and resultant rescheduling. He described the normal sequence of Giorgi's work as doing the metal framing; allowing other trades to do their work; coming back in to drywall and tape; letting the

painter prime; putting in acoustical ceiling grid; allowing the mechanicals to install lighting and HVAC and then dropping the ceiling tile. All of this required that the different contractors work sequentially in various areas in a continuous flow. (Tr. 267-268; 402-403.) According to Giorgi, the numerous delays and rescheduling resulted in his company going back and doing small portions of work in various locations without completing anything, all of which raised quality concerns, slowed production, decreased efficiency and increased costs. (Tr. 269-271; 403.)

The only cost-related evidence offered in support of this claim is David Giorgi's testimony that Giorgi lost $86,500 due to the out-of-sequence work it had to perform on the project. No company financial records, reports or analyses were offered into evidence to support this claim, and no record custodian or financial expert was called to testify. (Tr. 407.) Using the total cost method, David Giorgi testified that the company's total cost on this project, including an allowance for overhead and profit, was $1,140,871 against contract revenues of $1,025,000, leaving $115,871 as Giorgi's gross deficit on the project. He then discounted that figure by approximately 25 percent to account for other, unidentified causes of extra cost, leaving a net claim of $86,500 for the out-of-sequence work. (Tr. 313-315; 405-406.)

While it is probable that Giorgi did perform out-of-sequence work and did incur unanticipated costs as a result of Sorma's delays and deficient performance, the referee recommends that this claim be disallowed in its entirety for the following reasons:

1) GAC failed to prove that RPC/OK's actions in rescheduling and otherwise managing the project fell below the requirements of the contract or the standards of the construction industry;

2) Under the applicable provisions of the contract, an extension of time as determined by the Director is the sole remedy available to GAC from defendant for the delay and additional expense caused by Sorma's neglect, delay or fault. (GC Sections 6.2 and 6.3.) In lieu of an extension of time, which was not a viable option on this project, the Director elected to require GAC to accelerate Giorgi's work and to reimburse the cost thereof at Sorma's expense.

GC Section 6.3 provides:

> Any extension of time granted pursuant to paragraph GC 6.2 shall be the sole remedy which may be provided by the Director. In no event shall the Contractor be entitled to additional compensation or mitigation of liquidated damages for any delay listed in paragraph GC 6.2, including without limitation, costs of acceleration, consequential damages, *loss of efficiency, loss of productivity*, lost opportunity costs, impact damages, *lost profits or other similar remuneration.*" (Emphasis added.)

Thus, defendant is not obligated to reimburse GAC for the expenses claimed. However, GAC would appear to have the right to assert that claim against Sorma under GC Sections 4.1.2.1 and 4.1.2.2 of the contract;

3) Quite apart from the merits of the claim, GAC failed to provide credible evidence of the amount of its alleged damages. The denial of recovery is justified on that basis alone.

E. Interest

1. For alleged delay in payment of Article 8 award

GAC seeks to recover interest in the amount of $3,291.66 on the $71,092 Article 8 award for an alleged 169-day delay by defendant in effecting payment.

The evidence discloses that the Article 8 award was announced on June 14, 1999, by Deputy Director Kaitsa. GAC was requested to indicate its acceptance in writing and was advised that the preparation and processing of a change order and other necessary paperwork would require approximately 90 to 120 days from the date of GAC's acceptance. (Tr. 787.) GAC's acceptance was communicated in a letter from GAC's counsel dated June 30, 1999, conditioned upon payment being made no later than July 15, 1999. Compliance with that condition was not possible.

Processing of the change order, initially prepared on August 8, 1999, was delayed by counsel for GAC's request that language be added to clarify that GAC was not waiving the claims which had been rejected in the Article 8 process. (Tr. 789.) After review of that request by defendant's legal counsel, additional language was added preserving such claims to GAC. GAC finally accepted the Article 8 award without condition on November 2, 1999. Thereafter, CSU had to obtain release of additional funding from the State Controlling Board before payment could be made. Payment of $71,092, the total amount of the award, was made on December 30, 1999, approximately 60 days after GAC's acceptance. (Defendant's Exhibit Z; Tr. 781.)

George Allen testified that he was told by defendant's representatives on June 8, 1999, that payment would be made within 30 days. (Tr. 779.) That testimony is inconsistent with

the statement in Deputy Director Kaitsa's announcement letter of June 11, 1999, discussed above. (Defendant's Exhibit Z.)

Article 8 of the contract does not specify a time limit for payment of amounts awarded through that process. A standard of reasonableness would therefore apply.

The referee finds that payment of the Article 8 award was made within a reasonable time after GAC's acceptance thereof and recommends that GAC's claim for interest thereon be denied.

2. On amounts awarded in this proceeding

The referee has recommended that GAC recover on the following claims:

a. "J" bead claim - $4,377. Payment for this extra should have been authorized by change order in February, 1997, and paid upon completion of the installation by approximately April 30, 1997. (Plaintiff's Exhibit 7, Revised Schedule No. 8.)

The referee recommends that GAC recover interest on the award of $4,377 in the amount prescribed by law;

b. Increased bond cost claim - $6,489.23. On April 29, 1997, GAC made its request for additional bond premium relating to all change orders issued prior thereto for which no bond premium had been included. The total amount of premium involved was $6,489.23. Inclusion of the additional bond premium should have been approved at that time.

Accordingly, the referee recommends that GAC recover interest on the award of $6,489.23 in the amount prescribed by law.

WILLIAM L. CLARK
Referee

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