IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of General Services, Petitioner	:	
v.	:	No. 2074 C.D. 2007
H. Platt Company, Respondent	:	Argued: April 8, 2008

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 8, 2008

The Department of General Services (Department) petitions for review of the order of the Board of Claims (Board) entering judgment in favor of H. Platt Company (H. Platt), and against the Department in the amount of $666,598.42, including prejudgment interest, plus post-judgment interest at a rate of six percent per annum pursuant to the provisions of the Commonwealth Procurement Code (Procurement Code).[1] We affirm.

H. Platt and the Department entered into a written contract on August 4, 1999 for the construction of a two-story multi-purpose facility on the Behrend

[1] 62 Pa.C.S. §§ 101 – 4509. As this Court has previously noted, the Board exercises both law and equity jurisdiction pursuant to Section 405 of the Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. § 405. Miller v. Department of Environmental Resources, 578 A.2d

(Continued....)

Campus of Penn State University for a contract bid of $7,700,000.00. H. Platt was to be the general contractor on the project. The facility was to contain a swimming pool, locker rooms, athletic offices, classrooms, a work-out area and a gymnasium. The final completion date for the project was scheduled to be September 21, 2000, time was of the essence, and H. Platt could be assessed for liquidated damages for any "unexcused delays" beyond the contract completion date.

As part of the design of the project, a retaining wall was to be constructed on the south side of the building. The original design of the wall called for large steel I-beams to be buried in the ground along the face of a large embankment that was to be excavated. Precast concrete wall sections would then be placed in between the webs of the I-beams to act as the retaining wall. This "top down" method of construction could be repeated for each section of the retaining wall, and could be completed by only excavating the material in front of the retaining wall with minimal disturbance to the material behind the wall.

However, shortly after initial excavation of the wall began, H. Platt learned that it could not obtain the necessary I-beams until many months after the anticipated delivery date. In order to comply with the construction schedule, and to avoid the imposition of liquidated damages, H. Platt changed the method of constructing the retaining wall to a "bottom up" method of construction with the concurrence of the Department and Celli-Flynn & Associates, the professional architect (Professional) for the project. The "bottom up" method required H. Platt to excavate both in front of and behind the retaining wall, and to backfill behind the completed sections of the wall. During the construction of the wall, the excavated material was deemed to be unsuitable for use as backfill by the

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550 (Pa. Cmwlth.), petition for allowance of appeal denied, 526 Pa. 643, 584 A.2d 324 (1990).

Professional and its geotechnical expert due to compaction and lateral pressure issues even though the material was of the type deemed to be suitable under the contract specifications. As a result, H. Platt was required to haul away the excavated material and to purchase and haul in new backfill material that was more granular for use behind the retaining wall.

Ultimately, H. Platt submitted a request for change order to the Department in the amount of $94,923.61 based on the changes to scope of work in the construction of the retaining wall, relating to the over-excavation behind the retaining wall, and another change order request in the amount of $174,974.20 for importing the new material and backfilling the new material behind the wall. The Department denied the request because it deemed the changes to be a "means and methods" change used to minimize impact in the delays associated with the delivery of the steel I-beams and not work beyond the scope of the contract.

In addition, based on the design of the project, and the representations of the Department and its Professional, H. Platt's bid was based on the premise that it would be a "balanced site", i.e., that the amount of fill material excavated during construction would be reused at other areas so that there would be no excess to be removed from the site. However, following construction, there was a substantial amount of excess material. As a result, H. Platt incurred costs of $152,899.11 for the removal and disposal of 18,470 cubic yards of excess material from the site. H. Platt submitted a request for change order to the Department for the amount expended removing the material. On August 5, 2000, the Department denied H. Platt's change order request because the excess material was caused, in part, by the change in "means and methods" used by H. Platt to minimize the impact of the delay in the delivery of the steel I-beams.

In addition, as part of the construction, H. Platt installed a maple wood gymnasium floor as indicated in the construction plans. In late 2000, the gymnasium began to be used by the University and, at times, movable bleachers were rolled over the wood floor to provide extra seating. The University cleaned and maintained the wood floor by using two heavy scrubbing machines that applied water and water-based cleaning solution to the floor. In addition, as part of value engineering, the design of the gymnasium did not include air conditioning which resulted in wide variations in temperature and humidity levels. Also, the sub-floor that was installed as per the approved design was non-wolmanized plywood.

However, the floor manufacturer's specifications indicated that, in order to maintain the flooring: (1) humidity levels should not exceed 35 to 50%; (2) HVAC systems should be used to avoid excessive tightening and shrinking of the flooring; (3) water should not be used to clean the flooring; and (4) wheel loads exceeding a specified amount could crack and split the floor boards. Eventually, following the expiration of the floor's warranty period, the wood gymnasium floor began to warp and crack. In May of 2003, the Department approved Change Order #24 for H. Platt to come back and repair and replace the particular boards that were splitting; however, following completion, the Department refused to pay the agreed-upon price of $32,345.70.

On July 31, 2003, the Department notified H. Platt that the composition of the backfill it used in the areaway between the retaining wall and the southern gymnasium wall was non-conforming under the contract specifications, and later asserted that this defect caused the excess humidity in the gymnasium. Following a meeting in September of 2003, the parties agreed that an independent Consultant for the University would assess the cause of the damage to

the wood floor. Following the meeting, the Department paid H. Platt half of the money due under Change Order #24, or $16,172.85.

In December of 2003, H. Platt excavated the fill in the areaway, and it was discovered that H. Platt had failed to grout the sub-grade gap in the wall or the joint between the wall and the gymnasium foundation as required by the contract. H. Platt completed the grouting work and replaced the fill in the areaway, incurring costs totaling $44,728.88, and submitted a request for change order. Following the Department's failure to pay the amounts claimed in the change order requests, H. Platt filed four complaints with the Board and hearings before the a three-judge panel of the Board ensued.[2]

On October 10, 2007, the Board issued an Opinion and Order disposing of the complaints. With respect to the complaint regarding the construction of the retaining wall, the Board made the following relevant findings of fact: (1) if the retaining wall had been constructed as originally designed and scheduled, there would have been no need to excavate and backfill behind the wall; (2) the excavation work necessary to construct the retaining wall by a "bottom-up" method was not work outside the scope of the contract, but was the means and methods chosen by H. Platt so that construction could proceed in a timely fashion; (3) the Department and the Professional denied H. Platt the right to use the excavated material as backfill behind the retaining wall and directed it to import new fill when, in fact, the existing excavated material's soil classifications met the requirements of satisfactory fill in the contract specifications; (4) the removal of the old soil and the replacement with new material was work beyond the scope of

[2] On May 22, 2002, the Board issued an order granting the Department's request to consolidate the complaints filed by H. Platt for disposition.

the contract directed by the Department because the old soil was suitable for backfill per the contract specifications, and Department and the Professional could have specified the allowable limits on compaction pressure and procedures with this suitable backfill; (5) H. Platt incurred costs totaling $61,021.25 for hauling the old soil off the site; (6) H. Platt incurred costs totaling $151,854.73 for purchasing and hauling new backfill material to the site, which was work beyond the scope of its original contract at the direction of the Department; and (7) as a result, H. Platt incurred costs totaling $212,875.98 for the work beyond the scope of its original contract at the direction of the Department. Board Opinion at 6, 7, 9, 10.

With respect to the complaint regarding the "balanced site" issue, the Board made the following relevant findings of fact: (1) the minutes of the controlled site meeting held on April 22, 1999 show that the Professional told H. Platt that the project site was designed to be balanced (i.e. materials removed during excavation could be re-used as fill at other areas of the site without the need to haul away or import any other soil); (2) H. Platt reviewed the contours of the plans and drawings and confirmed the representation by the Professional that the site would roughly balance; (3) after H. Platt finished 99% of the grading of the site, built the retention ponds, and installed the parking lots and sidewalks, H. Platt still had several very large piles of material left; (4) 18,470 cu. yds. of excess material resulted from finishing the contouring and grading of the site as specified; (5) H. Platt was required by the Department to load up the excess material and haul it off site, then grade it and seed it in accordance with the requirements of the Conservation District of the Department of Environmental Protection; (6) H. Platt was given inaccurate information upon which it reasonably relied to prepare its bid; (7) the disposal of the excess 18,470 cu. yds. of soil was extra work beyond

the scope of the contract; and (8) H. Platt incurred costs of $152,899.11 for this extra work. Board Opinion at 14, 15, 16.

Finally, with respect to the complaint regarding the wood gymnasium floor, the Board made the following relevant findings of fact: (1) the major or primary cause of damage to the gym floor were the lack of air conditioning in the gymnasium (which allowed fluctuations in humidity in excess of the floor manufacturer's recommendations) and the use of water and over-weight cleaning equipment on the flooring, also contrary to the manufacturer's explicit recommendations; (2) these factors had at least twice the impact on the flooring as any of the other contributing factors; (3) H. Platt's failure to grout the precast concrete wall/foundation joint along the south gymnasium wall only contributed 15% of the damage to the gym flooring; (4) another contributing factor was the failure of the contract to specify the use of pressure-treated exterior grade plywood for the gym subfloor; (5) H. Platt repaired the flooring at the direction of the Department, pursuant to the terms of approved Change Order #24, $16,172.85 of which the Department has refused to pay; (6) H. Platt also excavated and replaced the fill material and installed grout in the areaway at the direction of the Department, incurring costs totaling $44,728.88; and (7) H. Platt incurred costs totaling $51,766.47 for extra work relating to the wood floor for which the Department is liable. Board Opinion at 25, 26, 28.

Based on the foregoing, the Board concluded, inter alia, that: (1) the Department is not liable to H. Platt for costs incurred with regard to the over-excavation of the slope behind the retaining wall or for its operational costs to backfill the over-excavated area because it does not constitute extra work beyond the scope of the original contract; (2) the Department is liable to H. Platt in the amount of $212,875.98 because the removal of the existing material excavated

from behind the retaining wall and replacement with new imported backfill was extra work beyond the scope of H. Platt's contract; (3) the Department is liable to H. Platt in the amount of $152,899.11 for the removal of 18,740 cu. yds. of extra material because the removal of this material was extra work beyond the scope of H. Platt's contract; and (4) the Department is liable to H. Platt in the amount of $51,766.47 for the replacement of fill in the areaway and repair to the wood flooring because that portion was extra work beyond the scope of H. Platt's contract. Board Opinion at 30, 31, 32, 34. As a result, the Board issued the instant order entering judgment in favor of H. Platt Company, and against the Department in the amount of $666,598.42[3], including prejudgment interest, plus post-judgment interest at a rate of six percent per annum. The Department then filed this appeal of the Board's order.[4]

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[3] The amount awarded by the Board is part of a total which includes sums for other claims by H. Platt against the Department that are not at issue in the instant appeal.

[4] This Court has restated our scope of review of a Board decision as follows:

> At the outset, we note, this Court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with the law, or that the statutory provisions controlling practice and procedure of Commonwealth agencies have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. 2 Pa.C.S. § 704.
>
> "It is not within the province of this Court to retry the case or to make independent factual findings and conclusions of law." To the contrary, the Board is entrusted with the duty of fact-finding, and we may neither assist nor interfere with this function. The Board's role as fact-finder includes determining the credibility of witnesses and resolving conflicting evidence. The Board's findings do not need to be supported by uncontradicted evidence, so long as they are supported by substantial evidence. If the Board's findings are supported by substantial evidence, they are

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In this appeal, the Department claims: (1) the Board erred in determining that the Department was liable to H. Platt for the removal of the existing material excavated from behind the retaining wall and the replacement with new imported backfill; (2) the Board erred in determining that the Department was liable to H. Platt for the removal of 18,740 cu. yds. of extra material from the site; and (3) the Board erred in determining that the Department was liable to H. Platt for the replacement of the wood floor and the fill in the areaway of the gymnasium.

The Department first claims that the Board erred in determining that it was liable to H. Platt for costs totaling $212,875.98 for the removal of the existing material excavated from behind the retaining wall and the replacement with new imported backfill as extra work beyond the scope of the contract. More specifically, the Department argues that the necessity of the removal of the excavated material, and the importation of backfill, were the result of H. Platt's change in the means and methods of construction, and that it was not the result of extra work beyond the scope of the contract.

However, contrary to the Department's assertions, the Board's findings of fact in this regard are amply supported by substantial evidence. The contract itself specifically delineates the type of materials that can be used as backfill in the project. See Supplemental Reproduced Record (SRR) at 67b-68b. In addition, H. Platt's expert specifically found that the material excavated during construction of the "bottom up" design was the classification of material deemed

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binding on this Court.

A.G. Cullen Construction, Inc. v. State System of Higher Education, 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006) (citations omitted).

suitable as backfill under the specific provisions of the contract. See Reproduced Record (RR) at 889a-890a.[5] H. Platt's president and engineer testified that the compaction limits and procedures prescribed for the new fill could have been utilized with the old fill. See RR at 375a-377a. Thus, when the Department's Professional and its expert determined that the type of material provided for in the contract is not the type that may, in fact, be used for backfill, see RR at 879a-882a, this was extra work performed at the direction of the Department and contrary to the express contract provisions. See RR at 375a-377a. As a result, the Board's award for the removal of the excavated material and the replacement with new imported backfill was appropriate in this case, and the Department's allegation of error in this regard is patently without merit. See, e.g., Department of Transportation v. Paoli Construction Company, 386 A.2d 173, 175 (Pa. Cmwlth. 1978) ("Since the law is clear that contractors performing work and incurring costs beyond the scope of the contract are entitled to compensation therefor, *Department of Highways v. S.J. Groves and Sons Co.*, [343 A.2d 72 (Pa. Cmwlth. 1975)];

[5] More specifically, H. Platt's expert found that the excavated material was of USCS Soil Classification GC-GM and SC-SM. RR at 889a-892a. In addition, Section 02200 2.2.A.1. of the written contract provides, in pertinent part:

> Satisfactory Fill: Satisfactory fill or backfill, whether from on-site or borrowed off-site, shall consist of soil classification group GW, GP, GM, GC, SW, SP, SM or SC…. The material shall be clean earth containing no organic matter, rubbish or debris, but may contain sound rocks pieces of concrete and masonry material not over 6" in size if well distributed in earth, but not in the top 12" or against foundations, wall, grade beams or similar construction. Select granular material … is also satisfactory fill.

SRR at 67b-68b.

Penn-Jersey Contractors, Inc. v. General State Authority, [315 A.2d 920 (Pa. Cmwlth. 1974)], we affirm the order of the Board.").[6]

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[6] In addition, as noted by the Board, its conclusion that H. Platt should be compensated by the Department for this extra work is supported by both a memo and the testimony of a Department soils engineer, John Bender. In the memo dated July 5, 2000, Mr. Bender recounts a meeting with, inter alia, the Professional's expert and H. Platt, and indicates that the removal of the excavated material and the importation of new backfill was extra work beyond the scope of the contract for which H. Platt should be compensated. See RR at 883a-884a. More specifically, Mr. Bender's memo states the following, in pertinent part:

> Construction of the retaining wall in the 'down-up' manner resulted in much additional excavation. The slope was laid back on approximately a 1:1, for safety and access. Now the dilemma. With the retaining wall now belatedly completed, all of the on-site borrow was deemed unsuitable, being too plastic and having an angle of low internal friction. Compaction of this material against the wall and moisture control was also considered problematic. Therefore, most of the on-site excavated material would have to be hauled off-site and wasted. In addition, granular soil meeting the guidelines would have to be trucked in. The reason for the granular material is that it exerts less lateral pressure against the retaining wall.
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> At the meeting with [the Professional's expert] and others, a review of his recommendations was made. [The expert] suggested the entire void behind the retaining wall be compacted with processed granular, such as 2B or similar. This material was to be used up to an elevation level with the height of the wall. I suggested that we use some of the on-site soils. [The expert] stated he was concerned that the use of the on-site soil would cause excess lateral pressure against the wall, as it was being placed and compacted.
>
> I then suggested that we use run-of-bank sandy gravel, which is abundant in the local area. I also recommended compaction and corresponding density tests be waived, in that the area to be backfilled is non-structural. These suggestions were accepted, providing that the borrow have less than 10% passing the #200 sieve. Matter resolved. On-site soil use will be permitted at any point 30 feet from the retaining wall and at any point above a level line from the top of the wall to the laid back slope.

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> It appears that approximately 3,000 cubic yards of sandy borrow will be required in order to meet this new criteria. In some ways, we have now made the contractor's task easier. However, he is still subject to much extra expense. He must buy, truck and place off-site borrow and dispose of the excess excavated unsuitable soil. Much of these unanticipated expenses were beyond his control. Also, this 'top-down' construction of a retaining wall is considered to be, in theory, practical, but in practice, less so (I-beams 30 feet long were to be socketed into rock with only a 2-inch tolerance). I feel the contractor proceeded in a manner that he was forced into, so as not to delay the progress of the job. It can only be deemed fair that he be awarded full, or at least partial compensation.

That same day, H. Platt's president sent a letter to the Professional memorializing the meeting, and reaffirming that the extra work beyond the scope of the contract was approved at the meeting. See RR at 885a-886a. More specifically, the letter states the following, in pertinent part:

> On Thursday, June 29, 2000, we met with Mr. Bender ([the Department]) and Dave Hooper ([the Professional's expert]) to discuss backfilling operations behind the retaining wall. The following was/is the resolve of this meeting:
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> Mr. Bender in no uncertain terms agreed that this backfilling operation, along with the excavation operation, is a legitimate change order claim and indicated we should proceed accordingly. As a result, we have begun this operation, and, attached please note a revised cost breakdown for this claim.
>
> The backfilling operation will be with offsite borrow from Kuhl's pit. The materials will be placed and spread via a small dozer, no compaction required other than the machine travel; the existing bank will be "stepped" via the dozer blade and materials from this operation will be "blended in" with the offsite borrow materials; the fill will be placed to the top of the steel piles, then on site materials utilized to meet grade.
>
> A 6" drain line will be installed at the bottom of the retaining wall (exterior side) covered with #57 stone, and run to the nearest catch basin on either side of the building.
>
> We are proceeding with this additional work in accord with the understanding of the above referenced meeting notes taken and with the confirmation that this work is classified as change order

(Continued....)

work.

Likewise, Mr. Bender's testimony supports the Department's determination that the removal of the material excavated from behind the retaining wall and the importation of new backfill as extra work beyond the scope of the contract. See RR at 272a-274a, 275a-276a, 287a-288a. More specifically, Mr. Bender testified in pertinent part, as follows:

> Q. [A]ll right. Mr. Bender, looking at your report, … can you describe basically what the nature of your report and recommendations were, and what the situation was as you understood it that gave rise to the report?
>
> A. When I was called there, [H. Platt] had – had completed the construction of a retaining wall.
>
> Q. Yes, sir.
>
> A. That was not done the way that – prescribed, due to unforeseen circumstances as described in my report. So there now was a problem of – the main problem was to backfill against this retaining wall.
>
> Due to unforeseen conditions, late arrival of some I-beams, he was put in a position where he had to use a different method. And he correct – he ended up installing a retaining wall as designed; however, he used a different procedure. And it looked to be structurally intact, stable and professional.
>
> I then suggested that instead of wasting all the material that he had excavated from the site, that we use some granular material immediately against the wall – and this is not described in the report, but it comes to me after the fact, after I had time to recollect – maybe to a distance out of no more than 10 or 12 feet, and then utilize on site material.
>
> But I had a meeting with [the Professional's expert], who was a consultant on the project. And he wanted all the material removed and select granular material, processed material, to be put against the wall in order not to cause undue pressure against the wall.
>
> So I suggested that we use less expensive run-of-bank material, which is fairly clean with less than 10 percent pass in a 200-sieve. And he relented on that point, but still he wanted all the fill to be wasted that was removed during the excavation and select material brought in, this run-of-bank sand gravel.

(Continued....)

And as it turned out, [H. Platt] placed the run-of-bank sand against the wall and wasted all the other material that was excavated from the site. And it was satisfactorily completed.

I feel that [H. Platt] proceeded in a manner that he was forced to, not to delay the job. And it seemed fair to me back then, and it does now, that there should have been mitigation of this claim and he should have been fully awarded or partially compensated for the effort that he performed. His work seemed to me to be very professionally done and it was more than structurally sound. And basically that's the gist of my report.

* * *

Q. [D]id you indicate to other representatives of the Department … or to anyone from … the professional, that you thought that this was a legitimate change order request by [H. Platt]?

A. We had a job conference at the site. And what I have mentioned in my report I brought up at that time.

Q. Thank you sir.

A. And as I said before, I was trying to utilize more of the on-site material without going to this elaborate scheme.

* * *

JUDGE SMITH: Mr. Bender, I do have a question for you. Speaking as a geologist, can you help me understand why the changes in the backfill would either – would reduce the lateral pressure on the retaining wall? What type of soil were we changing from and to, and how would that reduce the lateral pressure here?

[MR. BENDER]: The – the on-site soils are – were a glacial till composed of small boulders, sand, silt, and a little bit of clay. The – and the internal angle of friction is such that you have a more of a lateral force exerted with a glacial till than you would with a granular material that was free draining, and, thus, its weight would not be exerted in a horizontal direction as much.

JUDGE SMITH: Because of the smaller particles in the gravel?

[MR. BENDER]: Well, granular, free-draining material

(Continued....)

– when I said no more than 10 percent passing the 200, this material would drain, and most of its force would be directed downward instead of laterally. The more clay – clays act like a fluid, and then sands act less so. So you go from something that acts as a fluid, like a dam and water against it, and something that is – its own weight, has more of a direct vertical force more so than a lateral force.

JUDGE SMITH: Okay. Thank you. Does the retention of moisture in the soil also play a role here?

[MR. BENDER]: Yes. One of my first suggestions was to use – if you can – if you can see my hand, here's the wall and we come out with select real granular material on a – going out on a – maybe on a four up and one over horizontal all the way up and put granular material there that would take any of the moisture coming out of the tills and direct it downward, and, therefore, the tills soils, which were the existing on-site soils, could not exert their lateral pressure.

But we ended up filling the whole thing with select material, well run-of-bank sand and gravel.

JUDGE SMITH: So in your opinion was that necessary to fill the whole area with sand and gravel?

[MR. BENDER]: Overkill in my estimation.

Thus, it is clear that the Board did not err in determining that the Department is liable to H. Platt for this extra work beyond the scope of the contract. See, e.g., Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 557-558, 244 A.2d 10, 15 (1968) ("Unless a contract is for the sale of goods, it appears undisputed that the contract can be modified orally although it provides that it can be modified only in writing. Construction contracts typically provide that the builder will not be paid for extra work unless it is done pursuant to a written change order, yet courts frequently hold that owners must pay for extra work done at their oral direction. This liability can be based on several theories. For example, the extra work may be said to have been done under an oral agreement separate from the written contract and not containing the requirement of written authorization. The requirement of a written authorization may also be considered a condition which has been waived.") (citations omitted). See also Kreutzer v. Monterey County Herald Company, 560 Pa. 600, 606-607, 747 A.2d 358, 362 (2000) ("It is hornbook law that a contract, either oral or written, may be modified by a subsequent agreement which is supported by legally sufficient consideration or a substitute therefor and meets the indicia of contract formation. Additionally, under the estoppel concept, a contract may be modified if either words or actions of one party to the contract induce another

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The Department next claims that the Board erred in determining that the Department was liable to H. Platt for costs totaling $152,899.11 for the removal of 18,740 cu. yds. of extra material from the site. More specifically, the Department claims that the contract specifically required H. Platt to shoulder the costs of removing any excess material from the site, and that the Board's findings that H. Platt was assured that it would be a "balanced site" are not supported by substantial evidence.

It is true that specific provisions of the contract required H. Platt to remove some "unclassified" excess materials at its own expense. See SRR at 66b.[7] Nevertheless, substantial evidence in this case supports the Board's findings that: (1) H. Platt built the site in accordance with the Department's plans and specifications; (2) it was represented to H. Platt that the site was designed to balance; (3) H. Platt prepared its bid based upon these representations; (4) the site did not balance through no fault of H. Platt; and (5) H. Platt was required to remove 18,740 cu. yds. of excess material from the site following project completion. See RR at 155a-160a, 368a-369a[8]; 490a, 514a-515a[9]; 849a.[10]

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party to the contract to act in derogation of that contract, and the other justifiably relies upon the words or deeds of the first party.").

[7] Section 02200 1.4.A. of the contract specifically provided, in pertinent part:

> Excavation for this project shall be considered unclassified and shall include all types of earth and soil, any pebbles, boulders, and bedrock, municipal trash, rubbish and garbage and all types of debris of the construction industry…. All such materials encountered which are identified by this paragraph as unclassified shall be removed to the required widths and depths to create a finished product as shown and/or noted on the drawings and as written in the specifications. No additional compensation shall be made to the contractor for this unclassified excavation….

[8] H. Platt's president testified, in pertinent part, as follows:

(Continued....)

Q. Mr. Smith, I'd like to discuss now, and have you explain to the Board, the issue relating to the 18,400 cubic yards of material that required export form the site, and the claim which arose out of that.

A. Okay. The earthwork operations and the site work operations were an ongoing construction activity from the very beginning of the job through approximately three-quarters of the job….

* * *

[W]e know that because this building was going to be on the side of this mountain, that the earthwork operations were going to be a major portion of the project, one of the four or five largest numbers involved with the total project cost.

So we did our due diligence before the pre-bid conference, the site visit, and we determined at that time by the contours that are on the drawings that the site, in essence, would balance.

Now, when I say that the site would balance, that means that we had maybe 60,000 cubic yards of cutting to do and 55,000 cubic yards of filling to do, and that was derived by running grids throughout the entire site and determining what the grade changes were from what the existing grades and elevations were to what the proposed new elevations would be.

* * *

But at any rate, we determined from the contract drawings that the site would balance. In fact, ultimately we felt the numbers, the true numbers worked out to be, if I remember correctly, about 5,000 yards we had to import from off site in order for everything to be exactly according to the drawings.

* * *

[H]owever, when the grading, the majority, 99 percent of the grading was done, the retention ponds were built, the parking lots were in, the sidewalks were going in, we had two or three great big piles of dirt that were left over, literally left over. And we had those piles of dirt surveyed. We had a surveyor go out to the site and tell us how much dirt was there. And that turned out to be 18,470 cubic yards of dirt….

So when I notified the Department that these two piles were

(Continued....)

not going to disappear on the site, there was no place to waste it on the site, and that this – that we had to do something with it and they told us, well, what you got to do is you got to haul that off site. And we claimed that that was a material change to the contract documents.

Now, keep in mind that not only us but various – our subcontractor who ended up doing the site work did take-off work, determined that the site was going to balance. The site didn't balance for whatever reason, and there are a multitude of reasons why the site wouldn't balance.

Q. Why didn't this one balance?

A. The grades could have been off. They performed an aerial topographic survey, which isn't quite as accurate as a ground one would be.

JUDGE SMITH: Who's they?

* * *

A. The surveyors, the designers, the design professionals. So the original contour lines as shown on the existing condition drawings could have been off a little bit here or there. There could have been a little bit more topsoil than what the test borings indicated, which would result – which would mean that the grades were lower when you got to usable dirt.

The – probably the major, one of the major reasons why the site did not balance was because they relocated the building. They took the building and relocated it on the same site to a different portion of the site from what their preliminary plans were. And I suspect that that created a series of inaccuracies as far as the topographic information occurred.

* * *

So when we were discussing this with the Department personnel on the job site … we told them about this. And, again, they indicated that sure, yeah, we know that the project was designed – and they – you design a project to balance for cost considerations. I mean, that's why they take great pains in establishing finish floor elevations and so on and so forth so you don't have to take a lot of material off site or you don't have to bring a lot of material on site, because it's expensive work to do.

(Continued....)

And when we were discussing that with the Department personnel, they indicated to us there are procedures in place, and submit for a change order and you should get paid for that additional work that you're doing to haul all this material off site.

* * *

Q. [B]ut you agree that the intention was for the site to be balanced?

A. The intention of the design professional, yes.

Q. And you confirmed that with your own independent evaluation?

A. Yes, we did.

Q. So basically you and the design professional were both in agreement up from on your evaluation of this site, correct?

A. Well, I was in agreement that the design documents prove that the site balanced. I don't – I can't tell you whether he ran any calculations to assure himself that the site was balanced. I would submit that he did and did often. And those calculations are based on the contour elevations of the site plan.

[9] The Professional's project manager testified, in pertinent part, as follows:

Q. [T]he actual siting of the building on the site, was that ever changed at any point in the process?

A. Yes.

Q. Do you recall when that occurred?

A. There were numerous times it was changed throughout the design process.

Q. Throughout the design process?

A. Yes.

Q. That would have been prior to any bids?

A. Yes.

Q. Do you recall why it was changed?

A. To balance the site. Very specifically, it was changed for a reason.

* * *

(Continued....)

JUDGE SMITH: Okay. Do you know – you indicated that the location of the building on the site was changed in order to balance the site, I believe I heard you say.

[MR. WALKER]: Correct.

JUDGE SMITH: Okay. Do you know whether the location of the building on the site that, when it was changed, was it changed before or after [the Professional] did its take-off excavation quantities for the site?

[MR. WALKER]: It would have been afterwards, because the take-off quantities probably would have told us that the site was not balanced, so I'm sure we moved the building accordingly to try to get it to balance. That's why.

JUDGE SODER: Would that have been, then, recalculated?

[MR. WALKER]: I'm sure they would have been, yes. Our landscape engineer would have done that.

JUDGE SMITH: Okay. So when it was represented to be designed as a balanced site, by the time the bid documents were put out –

[MR. WALKER]: Yes, that was – could I explain that?

JUDGE SMITH: Sure. What I'm trying to figure out is, again, I'm trying to figure out why we've got 18,000-some-odd cubic yards of extra material.

[MR. WALKER]: The building, we originally placed it on the site generically. And as the job progressed, we moved the building as the landscape architect did his calculations. We moved the building to try to bring it – the site to balance. And that was the ongoing process throughout.

We probably moved the building ten or 15 times. And the final result was when we had the building in the final location for bidding that the site was balanced. That was what we worked towards. So we finally moved the building to a location that to the best of our knowledge the site was balanced. And that was the bid documents that H. Platt bid on.

[10] In addition, before the contract was awarded, the Professional's project manager issued a memo memorializing a controlled site visit which stated the following, in pertinent part:

(Continued....)

As a result, the Board quite properly determined that the removal of this large amount of excess material constituted extra work beyond the scope of the contract provisions, and that H. Platt was entitled to recover the amount expended for this extra work. See, e.g., A.G. Cullen, 898 A.2d at 1170 ("A contractor seeking recovery for work performed as a result of site conditions that differ from specified conditions must show, among other things, the contracting agency made a positive representation of work specifications. A government contracting agency is liable for damages suffered by a contractor where it reasonably relies on a material misrepresentation by a government agency. The government agency need not possess actual knowledge of the misrepresentation in order for the contractor to recover. Rather, it is sufficient to show the information conveyed by the government agency was false or misleading, whether it is mistakenly so or due to arbitrary action or intentional subterfuge.") (citations omitted).[11,12] In short, the Department's allegations of error in this regard are likewise without merit.

> C. Will additional fill be required to be brought to the site or will fill be required to be removed from the site?
>
> The project was designed so that fill materials will be balanced. Fill materials removed during excavation will be re-used at other areas of the site. Excess topsoil removed will be transported to a site as directed by the Behrend College, refer to specification section 02200 3.18 – B. Should it become necessary to remove excess fill from the site or import fill to the site, procedures for doing so are outlined in specification section 02200.

[11] See also Department of Transportation v. W.P. Dickerson & Son, Inc., 400 A.2d 930, 932 (Pa. Cmwlth. 1979) ("It is well established that a contractor who performs according to detailed plans and specifications is not responsible for defects in the result. PennDOT says that it did not provide detailed design specifications or, alternatively, that [the contractor] did not strictly comply with the specifications which were provided. The Board disagreed with both contentions and its conclusions are supported by substantial evidence…. [The contractor] followed PennDOT's specifications and any delay in construction caused by apparent defects

(Continued....)

Finally, the Department claims that the Board erred in determining that the Department was liable to H. Platt for costs totaling $35,593.62 for the replacement of the wood flooring and the fill in the areaway of the gymnasium.[13] More specifically, the Department contends that, because H. Platt had failed to properly grout the precast concrete foundation joint along the south gymnasium wall, H. Platt was required to bear all of the costs pursuant to Section 63.142 of the contract relating to the repair of work rejected as defective by the Department.[14]

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was attributable solely to PennDOT even if the rejection was made in good faith. Since [the contractor] fully satisfied its obligation by constructing the beams according to specifications, it was entitled to additional compensation for the extra work and expenses involved in shifting or removing the beams from the bridge and testing them.") (citations omitted).

[12] The Department's assertion that the provisions of Section 02200 1.4.A. of the contract, requiring H. Platt to remove some "unclassified" excess materials at its own expense, compel a different result is likewise without merit. The Department affirmatively represented to H. Platt that the site would be balanced; the provisions of Section 02200 1.4.A. merely relate to the addition or removal of reasonable amounts of materials incidental to the construction of the facility. Thus, the provisions of Section 02200 1.4.A. cannot serve as a basis upon which the Board's determination in this regard will be reversed. See, e.g., Ideker, Incorporated v. Missouri State Highway Commission, 654 S.W.2d 617, 622 (Mo.Ct.App. 1983) ("Moreover, the 'boiler plate' specification which the Commission relies on, reasonably construed in light of all the facts, relates, at best, to the disposal of minimum waste within reasonable tolerances that might be encountered rather than rebutting or nullifying a positive representation that the project was a 'balanced job'. By way of reiteration, [the contractor] encountered a massive amount of waste on the project as opposed to a minimal amount which could be categorized as being within reasonable tolerances for the type of project reflected in the plans.").

[13] The Board awarded H. Platt costs totaling $51,766.47 for its work in the areaway and for the repair to the wood flooring. However, the Department concedes that it is required to pay H. Platt the remaining $16,172.85 that is owed pursuant to approved Change Order #24 for the repair to the wood flooring, see RR at 899a-900a, and that it has previously refused to pay.

[14] As noted by the Department, Section 63.142 of the contract provides the following, in pertinent part:

> (A) The Contractor shall promptly correct all work rejected by the Department or the Professional as defective or as failing to conform to the Contract Documents, whether observed before or

(Continued....)

However, the Department's allegation of error in this regard overlooks a number of relevant findings by the Board.[15] More specifically, the Department

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> after substantial completion and whether or not fabricated, installed or completed. The Contractor shall bear all costs of correcting such rejected work, including the cost of the Professional's additional services and any additional cost incurred by the Department and/or the requesting agency.
>
> * * *
>
> (C) All defective or non-conforming work under paragraphs (A) and (B) of this section shall be promptly removed from the site, and the work shall be corrected to comply with the Contract Documents without cost to the Department.
>
> * * *
>
> (G) The obligations of the Contractor under this section are in addition to and not in limitation of any obligations imposed upon the Contractor by special guarantees required by the Contract Documents or otherwise prescribed by law.

Brief of Appellant at 21 n. 3.

[15] The Board made the following specific findings of fact in this regard:

> 171. On July 31, 2003, [the Department] told H. Platt that its original work related to the backfill in the areaway between the retaining wall and the southern gymnasium wall as non-conforming work because it did not comply with Contract Specification, Section 02711, Paragraph 2.4B defining the composition of drainage fill (i.e. No. 57 gravel) and Contract Drawing A20 detail for said areaway.
>
> * * *
>
> 175. Since [the Department] was refusing to pay H. Platt fully for the floor repairs it had already completed pursuant to Change Order #24, H. Platt felt it had no practical choice but to agree to having [the independent Consultant for the University] proceed with humidity and temperature testing procedures. For the same reason, H. Platt removed the fill in the areaway it had previously installed and replaced it with alternate fill, No. 57 gravel, from top to bottom, pursuant to [Department] direction.

(Continued....)

176. [H. Platt's president] testified that when H. Platt originally constructed the areaway between the retaining wall and the gymnasium, it installed a drainpipe and connected surface drains to same, placed a vapor barrier on the outside face of the gym wall, and backfilled the areaway with the three different materials required by the plans and specifications, including filtering material, the No. 57 gravel drainage material and a top layer of impervious material. H. Platt contends that this construction met the contract specification.

177. Contract Specification Section 02711 – FOUNDATION DRAINAGE SYSTEMS – states, in relevant part, as follows:

> 2.4 SOIL MATERIALS
>
> A. Impervious Fill: Clay, gravel and sand mixture capable of compacting to dense state.
>
> B. Drainage Fill: Washed, evenly graded mixture of crushed stone, or crushed or uncrushed gravel, ASTM D 448, coarse aggregate, Size No. 57….
>
> * * *
>
> 3.5 SOIL MATERIAL INSTALLATION
>
> A. Impervious Fill at Footings: Place impervious fill material on subgrade adjacent to bottom of footing after concrete footings have been cured and forms removed. Place and compact impervious fill to dimensions indicated….
>
> * * *
>
> C. Drainage Fill: Place fill over drain piping after satisfactory testing and covering with filtering material. Cover piping to width of at least 6 inches (150 mm) on each side and above top of pipe to within 12 inches (300 mm) of finish grade. Place fill material in layers not exceeding 3 inches (75 mm) in loose depth, and compact each layer placed.
>
> 1. Place synthetic drainage fabric as detailed.
>
> D. Fill to Grade: Place impervious fill material over compacted drainage fill. Place material in loose-depth layers not exceeding 6 inches (150 mm). Thoroughly

(Continued....)

compact each layer. Fill to finish elevations and slope away from building.

[Emphasis Added]

178. The project plan drawings, particularly the 2/A20 detail for the wall section at the south side of the gymnasium on Contract Drawing A20 and the 14L-11 inline drain detail on Contract Drawing L-11, indicate that the areaway is to be filled from top to bottom with a gravel material (without an impervious top layer). These contract drawings were in conflict with the contract specifications.

179. The contract, at General Conditions, Section 63.2, Paragraph C states, in relevant part, that, "If there is a conflict between the drawings and the specifications, the specifications shall prevail."

* * *

181. The Board finds Mr. Smith's testimony credible with regard to the original backfill of the areaway and that H. Platt properly followed the contract specifications rather than the contract drawings when it originally installed the No. 57 gravel around and above the drain pipe but then topped it off with impervious fill in the areaway.

182. When H. Platt excavated the backfill from the areaway, as ordered by [the Department], [the Department] determined that no grout had been installed in the sub-grade gap or joint between the bottom of the precast wall and the top of the buildings foundation…. H. Platt had not applied grout to this joint originally and disagreed that it was required to do so, but did the grouting work when it replaced the areaway fill at [the Department's] direction.

* * *

196. [T]he Board finds that the major or primary causes of damage to the gym floor were the lack of air conditioning in the gymnasium (which allowed fluctuations in humidity in excess of the floor manufacturer's recommendations) and the use of water and over-weight cleaning equipment on the flooring, also contrary to the manufacturer's explicit recommendations. These factors had at least twice the impact on the flooring as any of the contributing factors identified below.

(Continued....)

197. The Board agrees with … the assessment that the failure to specify pressure-treated exterior grade plywood for the gym sub-floor made the floor more susceptible to humidity or moisture fluctuation. However, we find this to be a contributing factor (as opposed to a primary cause) of the cracking and buckling of the gymnasium floor.

198. H. Platt was not at fault for Penn State's decision not to install air conditioning, Penn State's use of water and improper cleaning equipment on the floor, or the failure of the plans and specifications to require pressure-treated plywood in constructing the gymnasium sub-floor.

* * *

200. The Board finds, however, that the evidence presented establishes that H. Platt backfilled the areaway between the southern gymnasium wall and the retaining wall as required by contract and specification. Moreover, we find that the original backfill of the areaway did not contribute in any material way to the sub-floor moisture or flooring problem. We also find that replacement or the original backfill with the gravel in the areaway made no material difference in the environmental conditions of the gymnasium….

201. The Board also finds, however, that H. Platt's failure to apply grout to the precast concrete wall/foundation joint along the south gymnasium wall, while <u>not a primary cause</u> of the excess humidity or humidity variations in the gymnasium nor a primary cause of the cracking and buckling problems with the gymnasium floor, <u>was a contributing cause</u> of the humidity or humidity variations in the plenum area beneath the gymnasium floor and a contributing cause of the cracking and buckling problems with the gymnasium floor….

* * *

212. Of the $60,901.73 total amount of work preformed by H. Platt with regard to the gym floor which remains unpaid by [the Department], the Board finds that 15% of this cost is attributable to H. Platt's failure to grout the precast concrete gym wall sections to the gym foundation (contrary to project specifications), but that the remaining cost ($51,766.47) is attributable to actions or decisions of [the Department], Penn State, the project Professional or other

(Continued....)

overlooks the Board's finding that there was a conflict between the contract specifications and the drawings regarding the backfilling in the areaway, and that, pursuant to the contract, the contract specifications control. See Board Opinion at 21-22, 63-64. In addition, the Board found that H. Platt completed the backfilling work in compliance with the contract specifications which required topping the compacted drainage fill with impervious fill in the areaway. See Id. at 23, 26, 64. Thus, the Board determined that the Department's demand that H. Platt remove the backfill from the areaway, and completely replace it with drainage fill composed of No. 57 gravel, was not required by the contract specifications and, therefore, clearly constituted extra work outside of the contract for which H. Platt should be compensated. See Id. We discern no error in the Board's determination in this regard. See, e.g., Department of Transportation v. Gramar Construction Company, 454 A.2d 1205, 1208 (Pa. Cmwlth. 1983) ("[I]n view of the detailed nature of the sketches provided in the contract, … we cannot view them as being general in nature. Moreover, the written terms of the contract in no way indicate that the prior construction lines are to control when they conflict with the sketches. The contract language, instead, places equal emphasis on the previous construction lines and the sketches, with no indication as to which should control where a conflict arises. We believe that the contract is ambiguous in this regard and that the ambiguity must be resolved against DOT. We, accordingly, conclude that the disputed work performed by [the contractor] was in addition to its contractual obligations and that compensation, as ordered by the Board, is due. The law is

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> causes beyond H. Platt's control and constitutes costs for extra work beyond the scope of H. Platt's contract.

Board Opinion at 20, 21-22, 23, 25, 26, 28 (emphasis in original and citations to record omitted).

clear that a contractor who performs work beyond the scope of its contract is entitled to additional compensation. *Paoli Construction Co.*").

In addition, the Board found that H. Platt's backfilling work did not contribute to the damage to the wood flooring in the gymnasium. In fact, the Board stated that "[o]ur review of the project plans regarding construction of the areaway, the gymnasium walls and the flooring, as well as the alternate backfill method utilizing permeable fill prescribed by [the Department] leads us to conclude that the original construction of the areaway … was just as effective, if not more so, in preventing moisture from that areaway from seeping into the gymnasium wall area…." Board Opinion at 64. In fact, the Board stated that it "[r]ejects [the Department's] argument that the lack of grout is grounds for a complete denial of payment to H. Platt for the extra work H. Platt had to perform in repairing the floor or removing and replacing the areaway fill. We will, however, deduct 15% of such cost which we find attributable to the grouting issue." Id. Again, we discern no error in the Board's determination in this regard. See generally Tower Associates v. Pennsylvania Department of General Services, 687 A.2d 1225 (Pa. Cmwlth. 1997) (The Board's jurisdiction under the Procurement Code is not limited to counterclaims in set-off or recoupment, but also includes awards of affirmative recovery to the Department based upon a counterclaim.).

Moreover, the Department utterly fails to allege or demonstrate by competent record evidence what portion of the costs for this extra work were attributable to correcting the absence of grout at the foundation joint[16], or to cite to

[16] See, e.g., Laurelton Center v. L & L Boiler Maintenance, Inc., 407 A.2d 98, 100 (Pa. Cmwlth. 1979) ("A defendant bears the burden of proving his counterclaim. Therefore, *(Continued....)*

any authority supporting its assertion that the Board was not empowered to award costs in the manner that occurred in this case. In short, the Department's allegations of error in this regard are likewise without merit.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

Laurelton had to show that the contractor was responsible for the flooding of the cottage….).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of General Services, Petitioner	:	
v.	:	No. 2074 C.D. 2007
H. Platt Company, Respondent	:	

O R D E R

AND NOW, this 8th day of September, 2008, the order of the Board of Claims, dated October 10, 2007 at Nos. 3258, 3260, 3358 and 3465, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge