COMMONWEALTH OF PENNSYLVANIA

GOLDEN TRIANGLE CONSTRUCTION CO., INC., to the use of BURRELL INDUSTRIES, INC.	:	BEFORE THE BOARD OF CLAIMS
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION	:	DOCKET NO. 1492

FINDINGS OF FACT

1. The Plaintiff, Golden Triangle Construction Company Inc. (hereinafter "GTC") is a Pennsylvania corporation acting on behalf of its subcontractor, Burrell Industries Inc. (hereinafter "Burrell"), also a Pennsylvania corporation, with its principal place of business in Wheeling, West Virginia. (Complaint, Para. 1)

2. The Defendant, Commonwealth of Pennsylvania, Department of Transportation (hereinafter "Department"), is an executive agency having its principal place of business in Harrisburg, Pennsylvania. (Complaint and Answer, Para. 2)

3. In May 1989, GTC contracted with the Department to work on State Route 51, Section 05M, in Crescent and Moon Townships and South Heights Borough, in the counties of Allegheny and Beaver. (Complaint, Para. 3)

4. Burrell entered into a subcontract with GTC to perform certain items of this work, including asphalt paving and driveway grading along the main line. (N.T. 33)

5. Glenn Straub is the President and CEO of both Tri-State Asphalt Corporation and Burrell. These two corporations are the same for purposes of this litigation and shall be referred to as Burrell. (N.T. 34, 280)

6. Burrell ran the asphalt plant in Coraopolis, Pennsylvania that produced the asphalt for this project. (N.T. 39)

7. GTC, as general contractor, prepared the site, after which Burrell put the overlay in, or binder material, where necessary. Burrell put in wearing course, driveways, seal on the sides, provided minor traffic control, and furnished project trailers. This work was done in or prior to August of 1989. (N.T. 40-42)

8. The job mix formula requires an average asphalt (bitumen) content to be 6.3 with a tolerance range of plus or minus 0.4%. An acceptable average bitumen content will fall between 5.9 and 6.7. (N.T. 197-98, 204, Def's Exhibit 35)

9. In a letter dated September 21, 1989, Charles J. Remmy informed GTC that the Department was rejecting two lots (Lots 1 and 3) of the main line bituminous wearing course due to deficient asphalt content. The letter directed GTC to remove and replace the lots prior to October 31, 1989 to avoid the assessment of liquidated damages. (Pltf's Exhibit 3, Def's Exhibit 2, N.T. 46-47, 266-67)

10. Ultimately, Lot 3 was the only lot rejected by the Department. (N.T. 45-48).

11. No binder material work or driveway work was rejected. (N.T. 44)

12. The same material is used for the main line and driveways, but the material is applied differently. Driveway material would tend to be more segregated because it is placed by hand, and thus, tests for asphalt content might result in a more varied range than main line material that has been augured. (N.T. 7-8, 63-64, 66-67, 241)

13. Burrell takes the loose box samples in the presence of the Department. Mr. Straub has no specific recollection regarding the taking of loose box samples for Lot 3. (N.T. 175, 177)

14. Sample identification forms (T447) are attached to the samples, which then go to the District Office and on to the Harrisburg Lab for the actual testing. The loose box samples for Lot 3 were dated August 25, 1989. (N.T. 33-37, 369, Def's Exhibit 37)

15. The lab received the loose box samples from Lot 3 on September 6, 1989, and the core samples the next day. (N.T. 95-97)

16. The lab tested the loose box samples on September 11, 1989, and the average for the asphalt content was 5.5%. (N.T. 273, 377-78)

17. On January 24, 1990, the loose box samples were retested and the asphalt content was 5.6%. (N.T. 273-74, 327, 378, Def's Exhibit 3)

18. On October 11, 1989, Burrell requested a re-sampling of Lot 3 for retesting of the asphalt content. As a result, the Department took core samples, but declined to retest because re-sampling was in violation of the Department's policy. (N.T. 106-10, 275, Def's Exhibit 7)

19. On November 28, 1989, Burrell requested in writing to have the re-samples tested for asphalt content. (Def's Exhibit 13)

20. Section 402.4(b)3 of the Performance Specifications states "when the percent within limits of …bitumen percent passing the No. 200 sieve, … remove and replace the lot. For practical purposes, the District Engineer may give permission in writing to leave the deficient lot in place, in which case the lot will be paid for at 50% of the contract unit price." (N.T. 203-04, Def's Exhibit 35)

21. Two informational core samples taken in April of 1990 from Lot 3 were tested by the Department and the average asphalt content was 5.6%. (N.T. 378-79, Def's Exhibit 3)

22. Burrell removed and replaced Lot 3 during the period of May 9-14, 1990. (N.T. 149)

23. The Department assessed liquidated damages against Burrell in accordance with the specifications, Form 408-87, during the period of the failed bituminous pavement replacement (six calendar days) at the prescribed rate of $1,000 per day for a total of $6,000. (Def's Exhibits 20, 33-35, N.T. 149-55, 331, 349)

24. The Department rejected Burrell's request for a reduction in liquidated damages. (Def's Exhibit 25, N.T. 345)

25. There was a reduction in quantity of work for driveway paving. (N.T. 10-11, 157-164, Pltf's Exhibit 18)

26. GTC accepted a work order from the Department that renegotiated the price for side streets, but not for driveways off the main line. (N.T. 346-48,372-73, Def's Exhibit 28)

27. On May 14, 1990, Burrell performed force account work for the Department. (N.T. 152-53)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter of the claim and over the parties. 72 P.S. Section 4651-1 et seq.

2. The Plaintiff complied with all the conditions precedent to presenting a claim.

3. The Plaintiff failed to prove that the tests and retests done by the Department were inaccurate.

4. The Defendant had the option of either requiring removal and replacement of deficient paving materials or paying at 50%. This was a discretionary decision to be made solely by the Department.

5. Plaintiff failed to meet its burden of proof that the Defendant breached the contract by requiring Plaintiff to remove and replace Lot 3.

6. The Department's assessment of liquidated damages was improper and in contravention of the contract.

7. Plaintiff is entitled to payment from the Department of $6,000 as reimbursement of the liquidated damages improperly withheld.

8. The Department changed the scope and character of the work, and the cost to perform it, requiring payment of extra costs in accordance with Section 110.03 of the specifications.

9. The Plaintiff proved its damages for changes in quantities of driveway paving with reasonable certainty.

10. Plaintiff is entitled to payment from the Department of $7,893.32 resulting from the reduction in quantities for driveway grading work along the main line.

11. Plaintiff is entitled to interest from January 24, 1991, the date of the filing of the claim with the Board of Claims.

OPINION

This matter was called to hearing on May 5, 1997, before the Central District Panel, composed of Frederick D. Giles, Attorney Member, and James Wilson, P.E., Engineer Member. The Panel Report has been submitted and reviewed.

Based on the evidence presented, the origin of the loose box samples has not been shown to be from driveway rather than main line paving materials, and there is no adequate basis upon which to conclude that the tests and retests of those samples were inaccurate. The loose box sample test results show that the asphalt content of Lot 3 was deficient (Def's Exhibit 3), and subsequent tests on the informational cores from that lot corroborate those findings (Def's Exhibit 16). The Department, the Defendant, at its discretion, may require the removal and replacement of sections with deficient paving material (Def's Exhibit 31). The Department may not, however, assess liquidated damages against Burrell, the Plaintiff, for the period of that removal and replacement when that work could have been performed within the contract period but for the actions of the Department. The Department is also liable for additional reasonable costs incurred by Burrell due to the change in quantities of driveway paving made subsequent to the original contract (Def's Exhibit 34).

Plaintiff, GTC on behalf of Burrell, brought the instant claim for work performed pursuant to a contract award by the

Department. In May of 1989, GTC contracted with the Department for road work on State Route 51, Section 05M, in Crescent and Moon Townships and South Heights Borough, in the counties of Allegheny and Beaver. Burrell subcontracted to perform certain work for GTC, including paving. This involved putting in the overlay, binder material where necessary, bituminous paving wearing course, driveways, and seal on the sides. Burrell was also responsible for minor traffic control and furnishing work trailers. This work took place in August of 1989 or earlier (N.T. 40-42).

The contract provided a job mix formula requiring an average of the asphalt content (bitumen content) to be within 0.4% of 6.3% (N.T. 197-98, 204, Def's Exhibit 35). To test the paving materials, loose box samples and core samples are taken. The loose box samples are used to test asphalt content, at issue in this case, while initial core samples are used to test other factors such as density and air voids. The Department claims that loose box samples for Lot 3, the lot at issue, were taken on August 24, 1989, the day of placement. Burrell presented no evidence to contradict this, although the samples were dated August 25, 1989 (N.T. 33-37, Def's Exhibit 37). The Department explains this discrepancy by noting that core samples were taken on August 25 and that all samples were simply dated the same date. The Department lab received the loose box samples on September 6, 1989 and tested those samples four days later. The lab results reported the

average asphalt content of the Lot 3 samples to be 5.5%, below the contract tolerance minimum level of 5.9% (N.T. 273, 377-78).

On September 21, 1989, C. J. Remmy, Assistant Construction Engineer for the Department, wrote to GTC rejecting Lots 1 and 3 of the main line bituminous wearing course due to deficient asphalt content. (Def's Exhibit 2) The letter directed GTC to remove and replace the lots prior to October 31, 1989 to avoid the assessment of liquidated damages. Burrell requested in writing on October 11, 1989 a re-sampling of Lot 3 be performed with new core samples (Def's Exhibit 7). Initially, the Department agreed to take new samples, but subsequently decided that this was against Department policy. In a letter dated November 28, 1989, Burrell repeated its request for re-sampling of Lot 3 (Def's Exhibit 13). There is no record of any response from the Department. Only Lot 3 is at issue because the Department found that Lot 1, although originally thought to be deficient, was eventually found to be within the contractual tolerance range for asphalt content (Def's Exhibit 3).

Burrell claims that Burrell went ahead and tested two core samples on its own from Lot 3 and that these cores passed. Aside from Mr. Straub, the President and CEO of Tri-State Asphalt Corporation and Burrell, no one could testify to these test results. Burrell claims that the original sample locations for Lot 3 were faulty and thus resulted in inaccurate test results.

Eventually, in April of 1990, the Department took two additional core samples from Lot 3 and tested them for asphalt content. Once again, the average asphalt content fell below the tolerance level specified in the contract (Def's Exhibit 3). Although the contract required loose box sampling, as opposed to core sampling, the core testing acts as corroboration of the prior loose box testing which was in accordance with the contract. Although Burrell also claims that traffic would have affected the sample after eight months, no proof of this was offered.

Burrell makes a number of claims concerning the testing of the samples from Lot 3. Burrell claims that the samples were not taken from the main line paving, but from driveways which are laid by hand and would consequently have different test results. Burrell claims that even if the tests were taken from the main line paving, that the tests are inaccurate because the time between sampling and testing can affect the asphalt content. There is also a chance of contamination during that passage of time. Burrell also claims that Lot 3 tests were not comparable to the tests for Lots 1 and 2 and that there was no apparent deterioration of Lot 3. Burrell claims that Lot 3 could not have passed the density test if the lot were truly this far off in asphalt content.

None of the claims made by Burrell have been proven to be true. There is no evidence showing that asphalt content is actually affected by the passage of time, or that any contamination

occurred. Although Mr. Straub admitted that from his experience, density cannot be achieved without adequate asphalt content, there is not sufficient evidence to conclude that the tests of the samples by the Department were inaccurate. The subsequent tests on the core samples confirm the low asphalt content of Lot 3. The contractor does not have the prerogative to select its penalty for failure to comply with the contract, thus the Department was acting within its authority when requesting the removal and replacement of Lot 3. See, Stabler Construction, Inc. v. Commonwealth of Pennsylvania, Department of Transportation, Board of Claims No. 1646. Therefore, Burrell's claims for damages for removing and replacing Lot 3 are rejected.

In accordance with the contract specifications, the Department assessed liquidated damages against Burrell during the six day period of the failed paving replacement at the prescribed rate of $1,000 per day (Def's Exhibit 20). The removal and replacement of Lot 3 was performed during the period of May 9-14, 1990, two days of which were weekend days and a third day included force account work for the Department for which Burrell was paid. Therefore, Burrell claims that no liquidated damages are due for those three days (May 12-14, 1990). In addition, Burrell claims that traffic was maintained throughout the work area on the other days at issue, and thus Burrell should only be charged 25% of the liquidated damages for those days.

The Department had originally agreed to perform retests on Lot 3, before deciding that this was against departmental policy. Almost eight months later, the Department reversed itself and took core samples for testing. The Department, through its own inconsistent and sloppy behavior, prevented an early resolution to the issue of asphalt content in Lot 3. Burrell made more than one attempt to obtain relief in a timely manner.

On the basis of these facts, the Board finds that Burrell is entitled to damages on the issue of liquidated damages in the amount of Six Thousand Dollars ($6,000.00), with interest from January 24, 1991, as reimbursement of improperly withheld liquidated damages.

Finally, Burrell claims that the Department estimated a given amount of square yards and tonnage of paving and then reduced these amounts, creating a change in quantities of driveway paving and an increase cost per unit of work. The Department admits to a change in quantities, but claims that the reduction was included in a work order which renegotiated the price for side streets and driveways.

The work order, accepted by GTC, deals with side streets and not driveways off the main line (Def's Exhibit 28). The Department presented no evidence in contradiction of this interpretation. The contract requires payment for additional costs (Def's Exhibit 34), and contractors have the right to demand strict

compliance by the Department, James D. Morrissey, Inc. v. Commonwealth, Department of Transportation, Docket No. 673 (dec. May 14, 1984), p.7-8, nor did the Department present evidence to dispute Burrell's calculations of damages totaling Seven Thousand Eight Hundred Ninety-Three Dollars and Thirty-Two Cents ($7,893.32). Uncontroverted evidence of the Plaintiff affords a reasonable basis for calculating the damages. Acchione and Canuso v. Commonwealth of Pennsylvania, 501 Pa. 337, 461 A.2d 765, 769 (1983).

The Board also finds that Plaintiff is entitled to damages for the change in quantities of driveway paving in the amount of Seven Thousand Eight Hundred Ninety-Three Dollars and Thirty-Two Cents ($7,893.32), with interest from January 24, 1991. Therefore, the Board will issue the following Order:

ORDER

AND NOW, this day of , 1997, it is hereby **ORDERED** and **DECREED**, that the Defendant, Commonwealth of Pennsylvania, Department of Transportation, is indebted unto the Plaintiff, Golden Triangle Construction Co., Inc., to the use of Burrell Industries, Inc., in the full and true sum of Thirteen Thousand Eight Hundred Ninety-Three Dollars and Thirty-Two Cents ($13,893.32) with interest at the legal rate of six percent (6%) per annum from January 24, 1991.

Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims, a Praecipe requesting the case be marked “closed, discontinued and ended with prejudice”.

Each party to bear its own costs and attorney fees.

BOARD OF CLAIMS

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David C. Clipper
Chief Administrative Judge

_____
Louis G. O’Brien, P.E.
Engineer Member

_____
James W. Harris
Citizen Member

August 15, 1997