

COMMONWEALTH OF PENNSYLVANIA

FREY LUTZ, INC. : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
STATE SYSTEM OF HIGHER EDUCATION : DOCKET NO. 1923

FINDINGS OF FACT

1. Plaintiff, Frey Lutz, Inc., (hereinafter referred to as “Frey Lutz”) is a Pennsylvania corporation with its principal place of business at 431-A Harrisburg Pike, Lancaster, Pennsylvania, 17603. (Complaint & Answer Para.1)

2. Defendant is the Commonwealth of Pennsylvania, State System of Higher Education (hereinafter referred to as “SSHE”) 603 North Office Building, Harrisburg, Pennsylvania, 17125. (Complaint & Answer Para. 2)

3. Plaintiff and Defendant entered into Contract No. SSHE-UC-92-14 (hereinafter referred to as “the contract”) whereby Plaintiff agreed to provide HVAC services for Defendant who was constructing a new Administration Building and renovating several existing buildings at the Dixon University Center (hereinafter referred to as “the project”) in Harrisburg, Pennsylvania. (Complaint Para. 3)

4. Plaintiff, pursuant to contract §3.2.13.5, agreed to furnish temporary heat “[a]s soon as the building. . . is . . . enclosed in a weather tight manner by walls, glazing, roof, or other materials and methods approved by the Construction Manager. The responsibility for supplying temporary heat, as per Specifications Section 01500-3.3.4.1,. . . shall rest with the HVAC Trade Contractor.” (Plaintiff’s Exhibit A)

5. The Construction Manager, H. B. Alexander (later known as Reynolds Construction Management) approved the use of reinforced fiber mesh plastic (hereinafter referred to as “plastic”) to generally enclose the Administration Building during the construction period. (N.T. Page 82)

6. In October of 1993, Mr. Vascellaro, project manager employed by Plaintiff, submitted a list of problems to the general trades contractor to be remedied before beginning the temporary heat. (N.T. Page 85)

7. The list did not include any complaint regarding the plastic. (N.T. Page 86)

8. On or about January 5, 1994, Mr. Vascellaro, in a letter to H. B. Alexander, requested a change order to cover additional temporary heating costs to be incurred by Plaintiff because the building was not generally enclosed as required by the specifications. The letter does not mention the plastic covering. (N.T. Page 17)

9. On January 5, 1994, Mr. Vascellaro wrote a letter to Mr. Carll, Director of Facilities and Administrative Services at Dixon University, setting forth that the Administration Building was not generally enclosed until December 30, 1993. No mention is made of the plastic covering or that the plastic covering does not qualify as a general enclosure. (N.T. Page 18)

10. Plaintiff claims that as a result of the plastic used to enclose the project, it, Plaintiff, incurred additional costs in supplying temporary heat. (Complaint Para. 17)

11. Plaintiff requested additional compensation as a result of the higher cost of temporary heat. (Complaint Para. 17)

12. Defendant denied Plaintiff's request for additional compensation and this suit followed. (Answer Para. 17)

13. Plaintiff requested that the Defendant be ordered to pay additional compensation resulting from the higher cost of temporary heating, as well as overhead and profit on additional costs. Plaintiff's suit is in the amount of Eleven Thousand Nine Hundred Seventy-Seven Dollars and Sixty-Three Cents (\$11,977.63). (Complaint Para. 17)

CONCLUSIONS OF LAW

1. The contract between Frey Lutz and Commonwealth of Pennsylvania, State System of Higher Education, is a “public contract” pursuant to 73 P.S. §1621 and thus the Board has jurisdiction over the claim made herein.

2. Equitable estoppel arises when a party, by acts or representation, intentionally or through culpable negligence, induces another to believe that certain facts exist and the other justifiably relies and acts upon such belief, so that the latter will be prejudiced if the former is permitted to deny the existence of such facts.

3. Plaintiff, through their course of conduct, induced Defendant to believe that the plastic was an acceptable enclosure material.

4. Pursuant to that justifiable belief, Defendant left the plastic on the building.

5. Defendant will be prejudiced if Plaintiff is now allowed to deny their assertions that the plastic was an acceptable enclosure material and make a claim for additional compensation.

6. Accordingly, Plaintiff’s claim for additional compensation for higher heating costs based on the inadequacy of the plastic as an enclosure material as well as overhead and profits based on additional costs is denied.

7. The Board's Findings of Fact are supported by substantial, relevant evidence such as a reasonable mind might accept as adequate to support its Conclusions of Law.

OPINION

This matter was called to hearing before a panel, composed of Frederick D. Giles, Attorney Member and Chairman and Gene G. Smith, P.E., Engineer Member. The panel report has been submitted and reviewed. A hearing was held on June 20, 1996, and as a result, the Board now concludes the following: A review of the facts underlying this matter indicates that Plaintiff undertook a course of conduct which induced Defendant to believe that the plastic was an acceptable enclosure material and suitable for temporary heating. As a result, Defendant left the plastic on the building. Defendant would be prejudiced if Plaintiff is now allowed to assert that the plastic is an unacceptable enclosure material after repeated assertions to the contrary. Therefore, Plaintiff is equitably estopped from denying that the plastic is an acceptable enclosure material and its claim for additional compensation is accordingly denied in its entirety.

Plaintiff and Defendant entered into Contract No. SSHE-UC-92-14 whereby Plaintiff agreed to provide HVAC services for Defendant who was constructing a new Administration Building and renovating several existing buildings at the Dixon University Center in Harrisburg, Pennsylvania. (Complaint Para. 3)

Plaintiff, pursuant to contract §3.2.13.5, agreed to furnish temporary heat “[a]s soon as the building . . . is . . . enclosed in a weather tight manner by walls, glazing, roof, or other materials and methods approved by the Construction Manager. The responsibility for supplying temporary heat, as per Specification Section 01500-3.3.4.1, . . . shall rest with the HVAC Trade Contractor.” (Plaintiff’s Exhibit A)

The construction manager of H.B. Alexander (later known as Reynolds Construction Management) approved the use of reinforced fiber mesh plastic (hereinafter referred to as “plastic”) to generally enclose the Administration Building during the construction period. (N.T. Page 82) Plaintiff now claims that the plastic was an unacceptable enclosure material which caused them to incur additional costs in heating the project. (Complaint Para. 17)

In October of 1993, Mr. Vascellaro, project manager employed by Plaintiff, submitted a list of problems to the general trades contractor to be remedied before the temporary heat could be supplied. (N.T. Page 85) The letter did not include any complaint regarding the plastic. (N.T. Page 86) On or about January 5, 1994, Mr. Vascellaro, in a letter to H. B. Alexander, requested a change order to cover additional temporary heating costs to be incurred by Plaintiff because the building was not generally enclosed as required by specifications. (N.T. Page 18) The letter does not mention the plastic covering. (N.T. Page 17) On January 5, 1994, Mr. Vascellaro wrote a letter to Mr. Carll, Director of Facilities and Administrative Services at Dixon University, setting forth that the Administration Building was not generally enclosed until December 30, 1993. (N.T. Page 18) No mention is made of the plastic or that the plastic does not qualify as an acceptable enclosure material. (N.T. Page 18)

Plaintiff claims that as a result of the plastic used to enclose the project, Plaintiff incurred additional costs in supplying temporary heat. (Complaint Para. 17) Plaintiff requested additional compensation as a result of the higher cost of temporary heat. (Complaint Para. 17) Defendant denied Plaintiff’s request for additional compensation and this suit followed. (Answer Para. 17) Plaintiff requests that the Defendant be ordered to pay additional compensation resulting

from the higher cost of temporary heating, as well as overhead and profit on additional costs. Plaintiff's suit is in the amount of Eleven Thousand Nine Hundred Seventy-Seven Dollars and Sixty-Three Cents (\$11,977.63). (Complaint Para. 17)

“Equitable estoppel arises when a party by acts or representation intentionally . . . induces another to believe that certain facts exist and the other justifiably relies and acts upon such belief, so that the latter will be prejudiced if the former is permitted to deny the existence of such facts.” Straup v. Times Herald, 423 A.2d 713, 720 (Pa. Super. 1980); Board of Educ. of School Dist. of Phila. v. Philadelphia Fed'n. of Teachers Local No. 3, AFT, AFL-CIO, 397 A.2d 1273 (1979). “Estoppel is essentially a flexible doctrine, to be applied or denied as the equities between the parties preponderate.” Straup, 423 A.2d at 720. “[T]he doctrine of equitable estoppel is used to protect the reasonable expectations of the party who relies on another's course of conduct to the former's detriment in order to insure fundamentally fair dealing.” Id.

Plaintiff, through project manager Mr. Vascellaro, submitted a list of problems to the general trades contractor to be remedied before beginning the temporary heat which contained no mention of the plastic. Further, Mr. Vascellaro, in a letter to H. B. Alexander, requested a change order to cover additional temporary heating costs to be incurred by Plaintiff because the building was not enclosed as required by specifications. The letter makes no mention of the plastic. Finally, Mr. Vascellaro wrote a letter to Mr. Carll setting forth that the Administration Building was not generally enclosed until December 30, 1993. No mention is made of the plastic covering or that the plastic covering does not qualify as an acceptable enclosure.

Plaintiff, through the above outlined course of conduct, represented to the Defendant that the plastic was an acceptable enclosure material. The Defendant justifiably relied on such representation and left the plastic enclosure material in place. The Defendant will be prejudiced if the Plaintiff is now allowed to claim that the plastic is an unacceptable enclosure material. Therefore, Plaintiff's claim is denied in its entirety.

ORDER

AND NOW, this day of , 1997, upon due consideration of the pleadings, the records, and other submissions of the parties, it is hereby **ORDERED** and **DECREED** that Plaintiff's, Frey Lutz, Inc., claim is **DENIED** in its entirety.

BOARD OF CLAIMS

Opinion Signed
June 4, 1997
David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

James W. Harris
Citizen Member