

COMMONWEALTH OF PENNSYLVANIA

ERNEST BOCK & SONS, INC. : BEFORE THE BOARD OF CLAIMS
VS. :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 2061

FINDINGS OF FACT

1. Plaintiff, Ernest Bock & Sons, Inc., (hereinafter "Bock") is a Pennsylvania corporation with its principal place of business at 2800 Southampton Road, Philadelphia, PA 19154. (Complaint and Answer, para. 1)
2. The Defendant, Commonwealth of Pennsylvania, Department of General Services (hereinafter "DGS") is an executive agency having a place of business at 603 North Office Building, Harrisburg, PA 17125. (Complaint and Answer, para. 2)
3. On or about February 9, 1990, DGS entered into an Agreement with Bock referred to as Contract No. DGS 960-50.111 Phase III, Renovations and Conservation of Part of Pennhurst Center to a State Veterans' Center (New Horizon Building) Southeastern Pennsylvania Veterans' Center, Spring City, Chester County, Pennsylvania. (Def. Ex. 1)
4. Nutec Design Associates, Inc. of 3450 Concord Road, York, Pennsylvania 17402, served as the professional on behalf of DGS in administration of this Contract. (Def. Ex. 1, pg 9)
5. The Pennhurst building is a four-story building with a basement which, under the terms of the Contract, was being gutted and restored as a Veterans' Center. (N.T. 13-14)
6. Ernest Bock had the responsibility to install new partitions and 85% new ceilings, doors, frames, various finishes and floors. (N.T. 14)
7. Of all the new doors installed, 32 had to be replaced because of warpage. (N.T. 11-12)
8. On January 18, 1995, Ernest Bock filed a claim with DGS in the amount of \$13,310.26 as claim for door replacement. (N.T. 12; Pltf. Ex. 1-2)
9. Bock set up an area in the basement of the building in early 1991 in which it stored materials to be installed in the building and set up a heating system to control the environment in this area. (N.T. 14, 23)

10. On April 1, 1991, Bock suspended work on the Project and remained off the Project until May 6, 1991. (N.T. 16)
11. On April 1, 1991, Bock contended that it was owed approximately \$1,400,000 and that was its reason for suspending work on the Project. (N.T. 14-15; Pltf. Ex. 3)
12. Bock resumed work on May 6, 1991 and continued without interruption to completion of the work. (N.T. 15-16)
13. Precision Piping was the mechanical contractor on the Project and responsible for control of the environment. (N.T. 23-24)
14. In the Fall and early Winter of 1991, most of the doors had been installed on the Project. (N.T. 26, 28; Pltf. Ex. 12)
15. Bock wrote a letter to DGS on September 18, 1991, advising them that the building temperature was not regulated and that the variation in temperatures would cause problems. (N.T. 16; Pltf. Ex. 5)
16. On September 26, 1991, DGS sent a letter to Bock advising that “The Mechanical Contractor is to provide and maintain required temperature/humidity control.” (Pltf. Ex. 8)
17. On October 1, 1991, Bock sent a letter to DGS demanding that DGS require the mechanical contractor to turn on the system, the HVAC, in order to control the climate and temperature within the building. (N.T. 21)
18. Doors were installed by Bock from September through December of 1991. The heating system was operated sporadically during this period. (N.T. 70)
19. Ultimately, Bock replaced 32 doors that had been previously installed. The doors were replaced because of warpage, which did not correct itself upon consistent climate control occurring in the building. (Pltf. Ex. 1)
20. Bock requested payment for the 32 doors on May 9, 1994. (Pltf. Ex. 2)
21. Bock claimed \$13,310.26 for the replacement of these doors. (Pltf. Ex. 1)
22. DGS contracted with Precision Piping, Inc., the mechanical contractor, as a prime.

Roof Claim

23. Part of the work required by the Contract was installation of a new roof system. (N.T. 29-30)
24. Atop the exterior wall of the building was a masonry parapet. The new roof system was to be secured to this parapet. (Pltf. Ex. 15)

25. Upon removing the old roof, Bock discovered a wood nailing in the parapet. At different locations, the wood nailing was saturated with water and was soft. (N.T. 32-33)
26. The wood nailing is not shown on the original drawings nor on the revised drawings showing the roof. (N.T. 36; Pltf. Ex. 16-17)
27. Bock notified DGS of the problem with the wood nailing and suggested that the wood nailing be replaced. (N.T. 33)
28. As part of the correction, in 1991, the wood nailing was replaced in part by what is referred to as a termination bar, a metal bar that roofing material clips onto and locks in place. (N.T. 88, 95-96)
29. DGS instructed Bock to remove the metal termination bar and install the wood nailing in those areas where no wood nailing existed due to water damage. (N.T. 96)
30. Approximately 80% of the wood nailing was in tact and 20% had been intermittently replaced with the termination bar. This 20% was replaced with a wood nailing, installed at the direction of DGS. (N.T. 96)
31. Bock subcontracted the installation of the roof to Allied Roofing, who installed the termination bar. (N.T. 56)
32. Moisture was penetrating the concrete wall and cap at the top of the parapet, saturating the wood nailing and causing exterior bricks to pop off. (N.T. 39-40)
33. Nutec did not know the wood nailing was in or on the parapet. (N.T. 112)
34. After installation of the new roof, the wood nailing failed and the base flashing pulled away from the wall. (N.T. 97)
35. The roofer, Allied, came back on a number of occasions to repair the wood nailing, reattach the base flashing, but it failed again because of water penetration. (N.T. 97)
36. The new roof was installed by Bock in 1991, and the work involving the wood nailing was completed in October, 1994. (N.T. 84-85)
37. Bock ultimately replaced the wood nailing completely with a metal termination bar. (N.T. 38-39)
38. In 1994, the concrete parapet wall was sealed. (N.T. 45-46)
39. Bock was paid \$39,968.66 for sealing the parapet cap and related work. (Pltf. Ex. 25)

40. Bock has claimed \$46,605.63 for replacement of the wood nailing with the termination bar.
(Pltf. Ex. 18)

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the parties and the subject matter of this action.
72 P.S. §4651 1-10.
2. DGS presented no contradictory evidence or affirmative testimony to that presented by Bock regarding the temperature fluctuations, the cause of the doors warping and the costs to replace the doors.
3. Control of the climatic conditions of the stored material was the responsibility of DGS in April of 1991, when Bock suspended work for lack of payment by DGS.
4. Precision Piping, the mechanical contractor on the Project, was responsible for maintaining climatic control within the building in the Fall and Winter of 1991 and failed to do so on various occasions.
5. The variations in temperature and humidity occurring during the time the doors were stored and later, when doors were installed, caused the permanent warpage of 32 doors.
6. Bock is entitled to \$13,310.26, plus interest from June 10, 1994 until date of payment, this being the cost to replace the 32 permanently warped doors.
7. A contractor is entitled to suspend work under a Contract when payment, as agreed to, has not been made.
8. A contractor is entitled to work performed beyond the scope of the Contract, when such work is directed by the owner.
9. Neither the specifications nor the drawings, original or revised, gave any indication or even hint that a wood nailing was present in the parapet wall.
10. The wood nailing was the means used to secure the flashing to the parapet wall.
11. Work done to repair or replace the wood nailing was beyond the scope of Bock's Contract.
12. Moisture penetrating the parapet wall and cap caused the failure of the wood nailing.
13. After various attempted solutions, the wood nailing was finally replaced with a termination bar.
14. Nutec, the professional acting on behalf of DGS, conceded that this would be a recommended means of securing flashing.

15. DGS paid to seal the parapet cap and wall and to replace the flashing, which could not be secured to the wood nailing.
16. Responsibility for the cost of replacing the wood nailing rests with DGS.
17. Bock is entitled to \$46,605.63, plus interest from January 18, 1995 until date of payment.

OPINION

This case was heard on November 24, 1997, by a Central District Panel, consisting of Louis R. Martin, Esquire, Chairman, and John L. Sokol, P.E., Engineer Member. The Panel Report has been submitted and reviewed.

- A. **Ernest Bock & Sons, Inc. is entitled to an award of monetary damages for their costs of material and labor for replacing 32 warped doors.**

It is uncontradicted that 32 doors warped and were replaced. It is also uncontradicted, through the testimony of an experienced finish contractor, Mr. Bock, that the cause of the warpage was variations in the climatic condition within the Pennhurst Center Building. One of the first periods of uncontrolled climatic conditions in the building occurred in April of 1991 when Ernest Bock suspended work and left the job site. At this time, Bock contended that it was owed 1.4 million dollars, and again, this evidence was uncontradicted. When an owner fails to make payments as required by the contract, a contractor is entitled to suspend work. Totten v. Lampenfeld 319 Pa Super. 516, 466 A.2d 663 (1983). Throughout the course of the project, climatic conditions again were uncontrolled, especially during the period from September of 1991 through December of 1991. DGS advised Bock in correspondence that climatic conditions within the building were the responsibility of the plumbing and heating contractor. The mechanical contractor had a direct contract with DGS. Bock's responsibility for climatic conditions was only in the storage area for its materials.

Responsibility for climatic conditions throughout the building was beyond the scope of Bock's responsibility. Responsibility for repairing damage caused by factors beyond Bock's control is also beyond the scope of Bock's contract. It is well established that a contractor is entitled to compensation for work performed beyond the scope of its contract. Commonwealth, Department of Transportation v. Paoli Construction Company, 35 Pa. Cmwlth. 390, 386 A.2d 173 (1978). Commonwealth, Department of Transportation v. Gramar Construction Company, 71 Pa. Cmwlth. 481, 454 A.2d 1205 (1983). It, therefore, follows that Bock is entitled to compensation for the work performed beyond the scope, installation of the 32 doors to replace those that were warped.

B. Bock should receive an award of interest on the damages it recovers for replacement of the warped doors.

Awards made by the Board of Claims apply the Pennsylvania law, that a party having a right to payment under a contract, and payment is withheld and the damages are liquidated and certain interest is allowed at the legal rate. Walter Fiehl v. Commonwealth of Pennsylvania, Department of Environmental Resources, 1984 W.L. 262087, Pa. Board of Claims (1984). See also Commonwealth, Department of Property & Supplies v. Berger, 11 Pa. Cmwlth. 332, 312 A.2d 100 (1973). Interest should run from the date the obligation arises. In Pennsylvania, the legal rate of interest is six percent (6%) per annum. *41 Pa. Statutes Annotated Section 202*.

DGS has owed Bock the reasonable costs of replacing the doors, Thirteen Thousand Three Hundred Ten Dollars and Twenty-Six Cents (\$13,310.26), since June 9, 1994. This date is thirty (30) days after the correspondence requesting payment dated May 9, 1994. Interest should be awarded at the rate of six percent (6%) per annum from June 9, 1994 until date of payment.

C. **Ernest Bock & Sons, Inc. is entitled to an award of monetary damages for replacement of the wood nailing with the termination bar.**

From installation of the new roof in 1991, until final satisfactory repairs were made in 1994, the flashing attached to the parapet wall around the periphery of the roof continually separated from the parapet wall. Flashing was connected to the parapet wall by being nailed to a strip of wood attached to the parapet wall, referred to as a wood nailing. Neither the professional's, nor DGS's, drawings or specifications acknowledged the existence of this wood nailing. It was conceded that some means must exist to connect the flashing to the parapet wall. During installation of the new roof, the wood nailing was discovered. It was also discovered to have been saturated with water. Initially, the source of the water was not known. In locations where the wood nailing was useless because of its saturated condition, the roofing subcontractor attempted to replace the wood nailing with a metal termination bar. This solution was rejected and the saturated wood nailing was replaced with a new wood nailing. After a period, the flashing separated from the wood nailing, and again it was found to be saturated.

After consultations between the professional, the owner, the contractor and subcontractor, it was determined that the source of the water which was saturating the wood nailing and rendering it useless was water penetrating the parapet wall and cap. DGS agreed to seal the parapet wall and cap. The wood nailing was replaced entirely with a metal termination bar to secure the flashing. DGS paid Bock for the additional work in sealing the parapet wall and cap. DGS, however, did not pay Bock for replacement of the wood nailing with a metal termination bar.

This entire claim deals with the means used to secure the flashing to the parapet wall. Neither the drawings nor the specifications shed any light on how the flashing was secured to the parapet wall. Upon discovery of the means (the wood nailing) DGS attempted to utilize existing conditions but was unsuccessful in doing so. The metal termination bar was then installed. Neither

the drawings nor the specifications depicted the wood nailer, although it was obvious to all concerned that some means must exist to secure the flashing. When a new and different means (the metal termination bar) was installed, this was beyond the scope of the contract, and responsibility for the costs thereof rested with DGS. Bock is entitled to those costs in the amount of Forty-Six Thousand Six Hundred Five Dollars and Sixty-Three Cents (\$46,605.63).

D. Ernest Bock and Sons is entitled to an award of interest on the monetary damages for the installation of the metal termination bar.

Under Pennsylvania law, when a party has a right to payment under a contract and payment is withheld, and the damages are liquidated and certain interest is allowed at the legal rate. Wheeling Pittsburgh Steel Corporation, 122 P.R. 29, 32 (W.D. Pa 1990) Interest should run from the date the obligation arises, and in Pennsylvania, the legal rate of interest is six percent (6%) per annum. *41 Pa Statutes Annotated Section 202.* In this instance, DGS has owed Ernest Bock & Sons, Inc. the cost of the installation of the metal termination bar since January 18, 1995. Interest should be awarded at the legal rate of six percent (6%) per annum from January 18, 1995 until date of payment.

ORDER

AND NOW, this 16th day of September, 1998, the Board finds in favor of the Plaintiff, Ernest Bock & Sons, Inc., and against the Defendant, Commonwealth of Pennsylvania, Department of General Services, in the amount of Fifty-Nine Thousand Nine Hundred Fifteen Dollars and Eighty-Seven Cents (\$59,915.87), with interest at the legal rate of six percent (6%) per annum from June 10, 1994 until date of payment on Thirteen Thousand Three Hundred Ten Dollars and Twenty-Six Cents (\$13,310.26), the door claim, and from January 18, 1995 until date of payment on Forty-Six Thousand Six Hundred Five Dollars and Sixty-Three Cents (\$46,605.63), the roof claim.

Each party to bear its own costs and attorney fees. Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims a Praeclipe requesting that the matter be marked "closed, discontinued and ended with prejudice."

BOARD OF CLAIMS

Opinion Signed

David C. Clipper
Chief Administrative Judge

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

9/16/1998

James W. Harris
Citizen Member