

# ***Tully Construction Co., Inc. v. Dep't of Sanitation***

OATH Index No. 2321/09, mem. dec. (July 21, 2009)

While installing spray-on fireproofing pursuant to a general construction contract entered with respondent, petitioner's subcontractor oversprayed fireproofing material, soiling HVAC equipment. CDRB denies contractor's claim for additional compensation for its cost of removing overspray.

---

**NEW YORK CITY OFFICE OF  
ADMINISTRATIVE TRIALS AND HEARINGS  
CONTRACT DISPUTE RESOLUTION BOARD**

*In the Matter of*  
**TULLY CONSTRUCTION CO., INC.**  
*Petitioner*  
*- against -*  
**DEPARTMENT OF SANITATION**  
*Respondent*

---

## **MEMORANDUM DECISION**

**TYNIA D. RICHARD**, *Administrative Law Judge/Chair*

**KEVIN HANRATTY, ESQ.**, *Deputy General Counsel, Mayor's Office of Contracts*

**RUTH M. GURSKY, ESQ.**, *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board (the "Board") is the petition of Tully Construction Co., Inc. ("Tully"), which seeks additional compensation from the Department of Sanitation ("Department") for the cost of removing fireproofing overspray. This dispute arises out of a contract awarded to Tully in the amount of \$91,411,598, to perform general construction work for the construction of a four-story parking garage at a Department facility (Contract No. 20030019416). Tully's work included spraying fireproofing materials onto structural beams. Its subcontractor oversprayed the fireproofing which soiled equipment at the site.

By letter dated June 17, 2008, the Department directed Tully to conduct removal of overspray. Tully filed a Notice of Dispute with the Department on June 30, 2008. After the Department denied its claim, on or about August 15, 2008, Tully appealed to the Comptroller on September 10, 2008. On January 30, 2009, the Comptroller issued a decision denying Tully's

claim and finding that Tully was obligated under the contract to protect the soiled HVAC equipment, remove overspray, and clean surfaces. Thus, Tully had no claim against the City for damages, although it may have a right to recover against another contractor. Petitioner filed the instant appeal with the Board.

Oral argument was conducted before the Board on May 22, 2009, after which the Board requested that petitioner submit additional material from the contract. The record was closed on June 15, 2009, after affording respondent an opportunity to respond to the submission.

### **ANALYSIS**

Petitioner entered into a general construction contract with the Department to build a four-story parking garage – in this case, a “Wicks Law” project that included four independent prime contracts (general construction, plumbing, electrical, and heating, ventilation and air conditioning (“HVAC”)) (Tr. 5, 10). The HVAC contract (No. 3) was awarded to Dart Mechanical Corporation (“Dart”). Under its general construction contract (No. 1), Tully was to install spray-on fireproofing, which it hired a subcontractor to do. While in the process of fireproofing the structural steel frame on the fourth floor, Tully’s subcontractor oversprayed fireproofing material which became airborne, floated upward, and stuck to the rooftop HVAC equipment, which included roof-curbs, 55 exhaust fans, and nine heating-ventilation units, all of which had been installed by Dart. Bovis, the construction coordinator, instructed Tully to clean the soiled equipment, and Tully objected, arguing that Dart was responsible. Besides the expense, Tully expressed concern that it might actually damage the equipment during the cleaning process. Bovis insisted that Tully perform the cleanup and, eventually, Tully did.<sup>1</sup>

Tully argues that, as the HVAC contractor, Dart was obligated to furnish, install and protect the HVAC equipment. Having failed to protect the equipment from the fireproofing overspray, Dart should have performed the cleanup made necessary by its failure (Tr. 13). The logical extension of its argument is that Dart must therefore reimburse Tully for the cost it expended on the cleanup. The Department contends that it is not aware whether Dart had a concomitant responsibility to protect and clean the equipment. However, if it did, the

---

<sup>1</sup> The cost of the cleanup was not set forth in the petition and no evidence was submitted. At oral argument, Tully estimated it was \$28,000 (Tr. 14).

Department could choose one contractor over another to clean up the overspray if it thought that contractor was more culpable, and that contractor (Tully) could seek damages from the other contractor (Dart), but not from the Department. That is, the City may rely on any contract provision requiring a contractor to do something and, therefore, had a right to direct Tully to clean the overspray. Tully's remedy, it submits, is to seek reimbursement from Dart or its own subcontractor. Here, Tully seeks payment from the Department.<sup>2</sup>

Petitioner points out that, under the HVAC contract, Dart is responsible for protecting its equipment until such time as the equipment is "accepted" by the Department, which occurs when the entire project is turned over to the Department at completion and the City accepts risk for the work (Tr. 24). The relevant provision states as follows:

*All mechanical and electrical equipment and material shall be coated, wrapped, and otherwise protected from snow, rain drippings of any sort, dust, dirt, mud, flood, and condensed water vapor during shipment, storage, installation and at all other times prior to acceptance of the equipment by the Department in writing.*

....

Under these provisions, this equipment is required to be protected during shipment, storage, installation *and at other times prior to use in service*. Such protective measures are required to be suitable for the duration of time between fabrication and up to the time the equipment is placed into operation. Any cost for equipment protection, warehousing or other work to meet this condition shall be deemed to be included in the Contract Price, and no additional payment shall be allowed for such costs.

Contract No. 3, ¶ 00003.15 ("¶ 3.15") (emphasis added).

According to this provision, as the Department concedes, Dart is responsible for protecting its equipment until "acceptance" of the work, and the work had not been accepted at the time of the fireproofing. Thus, Dart appears to have failed to meet its obligation. Nevertheless, Tully also was contractually obligated to protect the equipment.

The Department points to several provisions in Tully's contract that give Tully explicit

---

<sup>2</sup> Tully conceded that it could sue Dart for the cost of the cleanup and that it might do so if its appeal to the Board was unsuccessful. However, Tully would like the Department to perform an "intra-credit charge" which would credit Tully and debit Dart for the expense, as is "common practice" in city contracting (Tr. 8, 22). Respondent said these charges are also commonly done by a general contractor who believes its subcontractor failed to perform properly (Tr. 22).

responsibility for the cleanup work it performed. These provisions required Tully to ensure proper conditions for the fireproofing prior to performing the work, to cover “other work” that could be damaged by the fireproofing, and to clean the area and/or remove any overspray.

A provision instructs Tully not to proceed with fireproofing until conditions for performing the work are “satisfactory”:

Installer must examine substrates and conditions under which fireproofing work is to be performed. Do not proceed with fireproofing work until unsatisfactory conditions have been corrected in a manner acceptable to Installer and to Construct Manager.

Contract No. 1, ¶ 3.01(A). Petitioner disputes that this provision means what it says (Tr. 18).

Another obligates Tully to protect the work area from overspray. It states that Tully must:

Cover *other work* which might be damaged by fall-out or overspray of fireproofing materials during spraying operations. Provide temporary enclosure as may be required to confine operations, protect the environment, and ensure adequate ambient conditions . . . .

Contract No. 1, ¶ 3.01(F) (emphasis added). Last, the contract requires Tully to remove overspray and clean areas soiled by overspray:

Immediately upon completion of spraying operation in each containable area of project, remove over-spray and fall-out of materials from surfaces of the work, and clean surfaces to remove evidence of soiling. Repair or replace damaged work to restore surfaces to acceptable condition.

Contract No. 1, ¶ 3.04. The Board finds ample support for respondent’s contention that Tully was liable for overspray cleanup under the terms of its contract.

Tully disputes the plain meaning of these provisions. Petitioner argues that the contracts require each of the four prime contractors, narrowly, to protect its *own work*, that is, the work each was contracted to perform under its contract, but not the work performed by other contractors (Tr. 6-7). Thus, Tully argues, it never had an obligation under Contract No. 1 to cover or protect the HVAC equipment installed by Dart under Contract No. 3. Tully stated that it protected its work by protecting certain exposed areas and that it does not know how to protect HVAC equipment. According to Tully, if Dart did not protect its own work, Tully’s workers

were entitled to assume it did not need protection or that Dart would clean it later (Tr. 27). These arguments, however, are a clear contradiction of the contract language requiring Tully to cover “other work” to protect it from overspray. *See* ¶ 3.01(F).

Although “other work” might logically refer to work performed by another contractor (Tr. 23), the term is not defined as such in the contract. “Other work” is not a defined term.<sup>3</sup> The contract defines “work” as “all services required to complete the Project,” which should include Dart’s work and Tully’s work. Thus, it is not clear that the contract allows a distinction between any of the work performed pursuant to each of the prime contracts so as to consider it “other” work. In either event, the Board finds no merit to the distinctions Tully has attempted to draw.

In sum, the Board finds that the contract clearly and explicitly required Tully to protect the HVAC equipment from overspray and to clean any soiling. The requirements made of other contractors in connection with the construction project do not vitiate Tully’s clear and unambiguous obligations.

In consideration of the foregoing, petitioner’s claim is denied. This constitutes the final decision of the Board. All panel members concur in this decision.

Tynia D. Richard  
Administrative Law Judge/Chair

July 21, 2009

APPEARANCES:

**PECKAR & ABRAMSON, P.C.**

*Attorneys for Petitioner*

**BY: PAUL MONTE, ESQ.**

**MICHAEL A. CARDOZO, ESQ.**

**CORPORATION COUNSEL**

*Attorney for Respondent*

**BY: BARBARA PEABODY, ESQ.**

---

<sup>3</sup> The contract defines “work” as “all services required to complete the Project in accordance with the Contract Documents, including without limitation, labor, material, superintendence, management, administration, equipment, and incidentals, and shall include both Contract Work and Extra Work.” City of New York Standard Construction Contract, October 2000, ¶2.1.33 (“Definitions”). “Contract documents” refers to “each of the various parts of the contract,” likely meaning each of the prime contracts. ¶2.1.8.