Navillus Tile, Inc. v. Dep't of Design & Construction

OATH Index No. 2358/13, mem. dec. (May 14, 2014)

Subcontractor petitioned CDRB alleging agency wrongfully denied 16 change orders for extra work. CDRB remands seven disputed change orders to DDC for processing, rules for petitioner on one claim and dismisses the rest of the claims as time-barred and/or on the merits.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of
NAVILLUS TILE, INC.
Petitioner
- against -
DEPARTMENT OF DESIGN & CONSTRUCTION
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge/Chair*

VICTOR O. OLDS, ESQ., *Mayor's Office of Contract Services*

MICHAEL J. HOLLAND, ESQ., *Prequalified Panel Member*

Navillus Tile, Inc., d/b/a, Navillus Contracting ("Navillus" or "Petitioner"), filed a petition with the Contract Dispute Resolution Board ("CDRB" or "the Board") alleging that the Department of Design and Construction ("DDC" or "Respondent") wrongfully denied change orders for extra work on a project to construct the headquarters for the Police Department's 9th Precinct at 321 East 5th Street in Manhattan ("the precinct"). DDC had entered into a contract with Kriesler Borg Florman General Construction Company, Inc. ("KBF") to serve as the construction manager for its special projects program unit. KBF hired Navillus to serve as a subcontractor on the precinct project.

In its petition, Navillus claimed that DDC wrongfully denied 19 change orders ("COs") and it sought additional compensation of $1,223,342.57 for the claimed extra work (Pet. Sch. A).

DDC initially moved to dismiss the petition, asserting that as a subcontractor, Navillus lacked contractual privity with DDC and could not invoke the contract's dispute resolution provision (Resp. Motion to Dismiss, July 17, 2013). However, KBF assigned its rights under the contract to Navillus, by agreement dated February 24, 2010 (Pet. Ex. C). DDC later accepted the assignment and waived its privity argument in a stipulation, dated August 26, 2013 (Resp. Ans. Ex. 1; Tr. 40-41). As part of the same stipulation, Navillus withdrew with prejudice its challenge to the denial of three change orders seeking delay damages (General Construction Contract ("GC") COs 77, 87, and 91) as outside the jurisdiction of the CDRB. Navillus proceeded with the remaining 16 change orders.

DDC filed its answer to the petition on October 4, 2013, asserting that six of the disputed change orders should be remanded to DDC for processing because KBF had not submitted them to DDC's project manager for review before it filed its Notice of Dispute ("NOD") with the Commissioner; four should be dismissed as time-barred; and the rest should be rejected on the merits. Navillus submitted reply papers on October 28, 2013.

Oral argument on the 16 change orders was held on March 28, 2014. During oral argument, Navillus argued that because the DDC Commissioner had dismissed the challenge to all of the change orders on procedural grounds only, without reaching the merits, all 16 of the disputed change orders should be remanded to DDC for processing (Tr. 18, 20-21). DDC argued that notwithstanding DDC's denial of the claims on procedural grounds, the Board should remand only the six disputed change orders, which the parties agree had not been submitted to DDC's project manager. DDC contended that the CDRB should deny the remaining ten change orders as time-barred or on the merits (Tr. 31-33; letter from Miller to CDRB of Apr. 10, 2014).

At the close of oral argument, the record remained open until April 28, 2014, for the parties to submit additional material requested by the CDRB.

For the reasons explained below, the CDRB remands seven of the disputed change orders for processing by DDC, rejects Navillus' challenge to eight of the change orders, and awards Navillus $25,216.30 in extra compensation for GC CO 81.

BACKGROUND

In February 2001, DDC entered into a requirements contract with KBF to provide

construction management services for various capital construction projects (Pet. App. Vol. 1, Ex. A: Contract No. 20010018158, PIN 8502000VP0007P, "Prime Contract"). The project at issue was to design and construct the precinct. KBF entered into four separate subcontracts with Navillus for general construction, masonry, façade, and concrete (Pet. ¶ 5; Pet. App. Vol. 1, Ex. B: general construction subcontract)("Subcontract").

From 2004 to 2007, Navillus submitted to KBF the 16 disputed change orders at issue. KBF approved some of the change orders but disapproved others. None of the 16 change orders were approved by DDC.

DDC contends that six of the disputed change orders were never submitted to its project manager (GC COs 9, 15, 53, 56, 100 and Masonry CO 2; Resp. Ans. ¶¶ 53, 63, 67, 71, 95, 99). Navillus asserts that the change orders were brought up at change order meetings and were verbally rejected by DDC's project manager (Pet. ¶ 31; Pet. App. Vol. 1, Ex. S). Navillus further contends that KBF requested that the rejections be made in writing, but DDC's project manager refused to do so (Pet. ¶ 36; Pet. App. Vol. 1, Ex. T).

KBF informed Navillus in writing that DDC's project manager had rejected the change orders at a meeting on January 8, 2010 (Pet. App. Vol. 1, Ex. D: letter from Ulbrich to Mathers of Jan. 12, 2010). KBF filed a NOD on Navillus' behalf with the DDC Commissioner on February 9, 2010 (Pet. App. Vol. 1, Ex. F). The NOD covered all of the change orders at issue here, along with four additional claims.

On May 14, 2010, DDC Associate Commissioner Mark A. Canu issued a decision on behalf of DDC Commissioner David J. Burney (Pet. App. Vol. 1, Ex. I), approving four claims totaling $31,037.92, and rejecting the rest. DDC rejected seven change orders as time-barred (GC COs 2, 12, 77, 87, 88, 91 and 99), and returned the remainder to KBF without prejudice because those change orders were never submitted to DDC's project manager. DDC did not reach the merits on any of the change orders that are before the CDRB.

KBF filed a Notice of Claim on behalf of Navillus with the Comptroller on June 10, 2010 (Pet. App. Vol. 1, Ex. J). On July 20, 2010, the Comptroller dismissed three claims as delay claims outside the dispute resolution provision in the Prime Contract (GC COs 77, 87 and 91; Pet. App. Vol. 1, Ex. K). The Comptroller dismissed 12 claims as premature because they had never been submitted to DDC (Facade CO 8, Masonry CO 2, and GC COs 6, 9, 11, 15, 53, 56,

61, 81, 84 and 100); and reserved decision on the remaining four claims (GC COs 10, 12, 88, and 99; Pet. App. Vol. 1, Ex. K).

Following the exchange of correspondence with KBF, on May 15, 2013, the Comptroller denied the remaining claims as untimely filed or delay claims not subject to the dispute resolution process (Pet. App. Vol. 1, Ex. R).[1]

On June 11, 2013, Navillus requested an extension of time to file its petition with the CDRB, which was granted. Navillus filed the petition on July 1, 2013.

ANALYSIS

Pending before the Board are 16 change orders for extra work, which Navillus claims were wrongly denied, worth $945,653.53.

The parties agree that six of the change orders (GC COs 9, 15, 53, 56, 100 and Masonry CO 2) should be remanded to DDC for processing because they had not been submitted to or reviewed by DDC's project manager and therefore they were not ripe when KBF filed the NOD. Navillus contends that the remaining ten change orders should also be remanded to DDC for processing, because the DDC Commissioner never passed on their merits, with DDC directed to permit Navillus to provide additional substantiation of its claims (Tr. 18, 20-21). By contrast, DDC contends that the CDRB should decide the remaining ten change orders, even though the DDC Commissioner had rejected those change orders on procedural grounds and did not rule on the merits (Tr. 31-33; letter of Miller to CDRB of Apr. 10, 2014).

In support of its argument that all 16 claims should be remanded, Navillus cites to *Kreisler Borg Florman General Construction Co. on behalf of A & F Fire Protection Co., Inc. v. Dep't of Design & Construction*, OATH Index Nos. 800/06, 801/06, 802/06, 803/06 and 1154/06, mem. dec. (Apr. 12, 2006).

> In this case, neither the agency nor the Comptroller investigated or considered the merits of the ten A & F claims. Although at the argument, the Board considered rectifying the inadequate record by soliciting further submissions from the parties, in retrospect this seems like an unsatisfactory solution. The contractor will still be deprived of an opportunity to argue the merits of its claims to the

[1] The Comptroller also dismissed three claims as delay claims outside the scope of the alternative dispute resolution process (GC COs 77, 87, and 91). Navillus later withdrew these claims from the CDRB petition by stipulation, dated August 26, 2013.

> agency head or to the Comptroller. The Board will also be deprived of the additional investigation and analysis which the PPB procedures contemplate.
>
> The Board therefore believes that the fairer resolution here is to remand the claims to the agency head for review and determination on the merits as contemplated by the PPB rules.

Kreisler Borg Florman, OATH 800/06 at 6.

The Board agrees that it is proper to remand to the agency head when there are factual issues warranting further investigation. Accordingly, the Board remands to DDC's project manager for processing the six change orders that were not determined by DDC's project manager because there was no "determination with which the vendor disagrees" ((9 RCNY §4-09(a)(2)) (Lexis 2013); GC COs 9, 15, 53, 56, 100, Masonry CO 2). Those change orders were not ripe for review by the DDC Commissioner when KBF/Navillus filed its NOD (9 RCNY §4-09(a)(2), (d)(1)).

The Board also finds there are disputed issues which require a remand of GC CO 11. Navillus seeks an additional $63,089 to cover the costs of dewatering the worksite prior to its commencement of work at the site. Navillus contends that KBF orally directed it to continuously pump water, 24 hours per day, but it had not carried extra labor for continuous pumping or for pumping for more than two hours on any day (Pet. App. Vol. 2: Not Qualified CO, CO 11: letter from DelGreco to Schnitzer of July 29, 2004).

Dewatering is governed by Addendum 3 to the Subcontract, which provides, in its entirety:

> the General Contractor is responsible for dewatering of the site, including all pits and areaways, as required to comply with site safety and execution of the work of all trades.

Addendum 3, which is only one sentence long, does not expressly state that the general contractor must provide continuous water-pumping. The Board finds there are questions of fact as to whether continuous water pumping was required "to comply with site safety and execution of the work of all trades," as per Addendum 3, or if 2 hours of pumping per day would be sufficient, as proposed by Navillus. Accordingly, the Board remands GC CO 11 to the project manager for further investigation on this question. *See Gateway Demolition Corp. v. Dep't of*

Housing Preservation & Development, OATH Index No. 1469/11, mem. dec. (Mar. 23, 2011) (CDRB remands to agency for further fact finding on whether application of sealant was necessary to permanently weatherproof the exposed wall next to a demolition site, as required by the contract and the building code). Therefore, the Board remands GC COs 9, 11, 15, 53, 56, and 100 and Masonry CO 2.

With regard to the nine remaining change orders, the Board finds that remand would not serve any purpose. There are no disputed issues of material fact and the claims can be resolved as a matter of law or contract interpretation. The parties are not restricted to arguments or decisions made at earlier stages of the dispute and DDC is free to argue the merits of the claims before the Board, notwithstanding that the agency head did not make a determination on the merits. *Tully Construction Co., Inc. v. Dep't of Sanitation*, OATH Index No. 3524/09, mem. dec. at 2, 4 (Dec. 10, 2009); *ADC Contracting & Construction, Inc. v. Dep't of Parks & Recreation*, OATH Index No. 1010/04, mem. dec. at 5 (June 24, 2004). Hence, the Board finds that it is appropriate to review the remaining nine change orders and denies Navillus' request to remand them to DDC for processing.

As set forth below, of these nine claims, the Board dismisses GC COs 10, 6, 61, and 99 as untimely filed and on the merits, Façade CO 8 as time-barred, and GC COs 12 and 84 as delay claims which are outside the jurisdiction of the CDRB. The Board denies GC CO 88 on the merits, and rules for Navillus on GC CO 81.

GC COs 10, 6, 61, 99 and Façade CO 8

At oral argument, DDC acknowledged that, for the most part, DDC's Project Manager did not issue written determinations on the change orders and declined to defend all of the DDC Commissioner's findings of untimeliness (Tr. 29). However, DDC continued to assert that these five change orders should be dismissed as time-barred (Resp. Ans. ¶¶ 24-26, 49, 75-76, 104; Tr. 31).

Under PPB rule 4-09(d)(1) and Article 29.4.1 of the Contract, a contractor must file a NOD "within thirty days of receiving written notice of the determination or action that is the subject of the dispute" (emphasis added). Navillus argues that because DDC's project manager refused to put his denials of the change orders in writing, the 30-day clock did not begin until

January 12, 2010, when KBF notified Navillus in writing that DDC's project manager denied the change orders. Thus, Navillus contends that its NOD, which was filed on February 9, 2010, was timely. DDC, however, contends that the February 2010 NOD was untimely for these four change orders because the 30-day clock began to run in 2005, for GC COs 10, 6, and 61, when KBF issued written denials (Tr. 31), and in 2008, for façade CO 8, when DDC's project manager approved the change order, at only one-third of the amount requested.

The Board finds that the Subcontract between Navillus and KBF is determinative for purposes of timeliness. Under the Subcontract, a NOD must be filed "within thirty days of receiving notice of the determination or action which is the subject of the dispute" (Subcontract Art. 29.4.1). A dispute arises under the Subcontract, "when the CM or Commissioner's Representative makes a determination with which the Contractor disagrees" (Subcontract Art. 29.1.2).

Hence, the Board finds that 30-day clock began to run when KBF issued its written determinations with respect to COs 10 (August 2005), 6 and 61 (May 2005), and when DDC's project manager issued his written determinations for Façade CO 8 (January 2008) and GC CO 99 (January 2006). Thus the February 9, 2010 NOD, filed for all five change orders, was untimely.

In so finding, the Board rejects Navillus' argument that KBF's written denials were not "determinations" which started the 30-day clock, but instead only invitations to negotiate. Navillus failed to advance any factual basis for this assertion. Indeed, counsel for Navillus acknowledged that he was unaware of any correspondence between Navillus and KBF which indicated the parties were engaged in negotiation (Tr. 25-26). Moreover, KBF's denials were unequivocal:

GC Change Order 10:	"KBF rejects this claim for Extra Work based on the following …"; "KBF concludes that waste and rubbish removal and disposal for all trades except masonry is included in Navillus' General Contracting scope of work" (Letter of Aug. 12, 2005 from Mahoney to Sheehan).

GC Change Order 6:	"KBF rejects this claim for Extra Work based on the following …." (Letter of May 11, 2005 from Mahoney to Sheehan).
GC Change Order 61:	"KBF denies your Request For Change Order for the reasons described below…. Therefore, KBF considers these steel soffits to be contract work" (Letter of May 9, 2005 from Mahoney to Sheehan).
Façade Change Order 8:	KBF signed off on the change order and submitted it to DDC's project manager. On January 13, 2008, the project manager agreed to pay, but at a reduced amount ($9,901 request; $3,002 approved).
GC Change Order 99:	"Navillus is responsible for any and all damage to the stainless steel ceiling due to faulty installation and any subsequent damage. The GC is responsible for protecting work in place" (E-mail of Jan. 4, 2006 from Arscott to Mathers).

Thus, for GC COs 10, 6, 61, and 99, the Board finds KBF's and DDC's Project Manager's written denials to constitute unambiguous determinations, which began the running of 30-day clock, such that Navillus had 30 days after their receipt to file a NOD with the Commissioner. *See A-1 First Class Viking Moving & Storage, Inc. v. Human Resources Admin.*, OATH Index No. 2655/11, mem. dec. at 6 (Oct. 28, 2011), *aff'd*, 2012 NY Slip Op 31463U (Sup. Ct. N.Y. Co. 2012) (Board dismisses NOD filed almost two months later as time-barred, finding that a letter from the agency was "an unambiguous determination …, not an invitation to haggle. That determination triggered the dispute resolution process.").

For façade CO 8, similarly, the Board finds that written notification from DDC's project manager on January 13, 2008, that DDC would pay only one-third of the compensation requested, was an adverse determination or action which began the 30-day clock, such that Navillus had 30 days after its receipt to file the NOD with the Commissioner. Yet, KBF/Navillus did not file the NOD until February 9, 2010, approximately two years late. *See D. Gangi Contracting Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1642/03, mem. dec. at 5 (Nov. 13, 2003) (contractor challenged agency's reduction in the amount due on a change order, the CDRB found that the dispute arose when engineer notified petitioner that the security payment was cut in half; NOD filed more than seven months later was dismissed as time-barred).

Accordingly, the Board dismisses these change orders as time-barred. The Board further finds that if it were to reach the merits, GC COs 10, 6, 61 and 99 would be denied on the merits. The Board need not reach the merits on Façade CO 8.

Change Order 10

Navillus requests additional compensation of $315,320 for collecting and disposing rubbish left by other trades at the job site (Pet. App. Vol. 2: Rejected CO, GC CO 10).

The relevant contract clauses are Subcontract sections 10.4 ("Cleaning and Rubbish Removal") and Article 84(B)("Removal of Rubbish and Surplus Materials"). Navillus relies upon modifiers in Subcontract section 10.4.1 ("The General Contractor shall, not less than two times each week, clean up after **his operation** by removing rubbish, including old and surplus materials" (emphasis added)), and Subcontract Article 84 (B) ("General Contractor shall sweep up and deposit, at a location designated on each floor by the General Construction Contractor and CM, all of **his rubbish"** (emphasis added)), to argue that the general contractor is responsible for cleaning up the rubbish of its own and its subcontractors' operations, but not the operations of other trades.

DDC contends that the contract clauses cited by Navillus do not "reduce or modify" the other parts of the same clauses which place the responsibility for cleanup on Navillus as the general contractor (Resp. Ans at 7-8). Specifically, DDC highlights this contractual language:

> The General Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish. At the completion of Work the General Contractor shall remove from or about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials. The General Contractor shall leave the Work neat and broom clean . . . The General Contractor shall use his best efforts to prevent dust. The General Contractor shall be responsible for the overall cleanliness and neatness of the Work/Project.

Subcontract section 10.4.1.

> The Contractor for General Construction Work shall be responsible for removal of all rubbish, etc. from the site of the project. He shall remove from the designated locations all piles of rubbish, debris, waste material and wood crating as they accumulate and when directed by the Construction Manager, and shall cart them away

> from the site of the project. He shall employ and keep engaged for this purpose an adequate force of laborers.

Subcontract Article 84[c].

The CDRB finds that the collection and disposal of rubbish left by other trades on the job is contract work. Subcontract Article 84[c] and Section 10.4.1 imposes a broad obligation on the general contractor to keep the area clean and remove "all rubbish" from the work site. Under those provisions, Navillus is responsible for the "overall cleanliness and neatness of the project." The fact that Navillus is required to remove its own rubbish does not obviate its broader responsibilities to keep the premises clean and remove all rubbish, debris and other materials.

Change Order 6

Navillus seeks an additional $13,503, to cover the cost of providing a security guard during the period from July 2004, when it received the Notice to Proceed ("NTP") until September 2005, when it began work in the field. Navillus contends that it was not required to provide guard service until it began work in the field. The Board finds that under the Contract Navillus was required to provide guard service as of July 2, 2004, the date it received the NTP.

Item 41 of Special Provisions states that "the general contractor shall provide security guard service in accordance with Article 87." Article 87, paragraph C1, states that "security service shall commence with the start of work." Work is defined in Article 1, paragraph 1.40 as "everything expressly or implicitly required to be furnished and done by the Contractor." Item 11 of the special provisions directs "work to start as indicated by the Notice to Proceed." The NTP was issued and accepted on July 2, 2004.

Navillus claims that the NTP provision did not specify security guard service and that typically the contractor is required to obtain insurance and permits before it is able to staff the project. Navillus further contends that the Contract does not require Navillus to provide security for other trades on the project.

The Board disagrees. Taken together, the relevant Contract provisions require that security service is to commence as of the issuance of the NTP. Further, the Contract does not limit Navillus' obligation to provide security guard services only for its own workers. Thus, there is no contractual support for Navillus' contention that it was not required to provide guard

service until it began work in the field. Accordingly, the Board finds that Navillus is not entitled to additional compensation.

Change Order 61

Navillus seeks an additional $3,864 for costs associated with the installation of a steel security ceiling soffit[2] in cells 1 and 2. Navillus contends that this is extra work because the work was not detailed in drawing A-804 (Pet. App. Vol. 2: Not Qualified CO, CO 61).

In denying the claim, KBF found that drawing A-804 describes the existence of soffits in cells 1 and 2 but does not specify the material. The material is shown on A-402, which shows both cells with Security Steel Ceiling in the soffit area. Therefore, KBF concluded, installation of the steel soffits is contract work. The Board agrees that the material shown in A-402 indicates a security steel plate ceiling (*See* A-804, no. 7, line of steel-clad soffit above noted on cells 1 and 2 on plan detail). Thus, the installation of a steel security ceiling was not extra work compensable under the change order.

Change Order 99

Navillus seeks an additional $67,160 for costs associated with repair of a ceiling it installed, contending that damage to the ceiling was caused by other trades (Pet. App. Vol. 2: Rejected CO, CO 99). This claim is barred by Articles 15.1 and 31.3 of the Subcontract:

> During the performance of the Work and up to the date of Final Acceptance, the Contractor shall be under an absolute obligation to protect the finished and unfinished Work against any damage, loss or injury; and in the event of such damages, loss or injury, he shall promptly replace or repair such Work, whichever the Commissioner's Representative shall determine to be preferable.

Pet. App. Vol. 1, Ex. B at 23: Subcontract Art. 15.1.

> Should this Contractor sustain any loss, damage or delay through any act or omission of any other subcontractor having a contract with the Construction manager for the performance of work or delivery of materials upon the site, then this Contractor shall have no claim against the Construction Manager for such loss, damage, or delay, but shall have recourse solely through the other subcontractor.

[2] A soffit is defined as "the underside of an architectural feature, as a beam, arch, ceiling, vault or cornice." Random House College Dictionary at 1249 (rev. ed. 1975).

Pet. App. Vol. 1, Ex. B at 39: Subcontract Art. 31.3.

Façade Change Order 8

Navillus seeks an additional $9,430, as compensation for the cost of a surveyor. The cost reflected the surveyor's bill for 46 hours at $205 per hour.

DDC's project manager authorized the change order but reduced the amount to $3,002. The reduction was based on the New York City prevailing wage rate for surveyors of $23 per hour.

The Board finds it is unable to determine the merits of this claim on the record provided. The Subcontract indicates that the contractor must pay prevailing wages and benefits under section 220 of the Labor Law, and indicates that the prevailing wage schedule is attached (Subcontract Section 38.1.3). Yet the schedule was not provided to the Board. It is unnecessary, however, to remand the matter to DDC for processing, because for the reasons stated earlier (at 8-9), the Board finds that Navillus' challenge to the denial of this change order is time-barred.

GC COs 12 and 84

DDC argues that GC CO 12, which seeks compensation for extra costs associated with a directive to expedite work, and GC CO 84, which seeks compensation for additional costs for overtime work necessitated by other trades falling behind schedule, should be denied as delay damages, beyond the jurisdiction of the Board (Resp. Ans. ¶¶ 32, 86-88; Tr. 37). The Board agrees.

Delay claims are outside the scope of the CDRB's jurisdiction, as defined both by the Contract, Section 29.1.2, and by section 4-09(a)(2) of the PPB rules, which provides that the dispute resolution process shall apply

> . . . only to disputes about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work. . .

9 RCNY § 4-09 (a)(2) (Lexis 2013).

The Board has relied upon section 4-09(a)(2) in dismissing delay claims as outside the scope of its jurisdiction. *Schlesinger-Siemens Electrical, LLC v. Dep't of Environmental Protection,* OATH Index No. 1817/10, mem. dec. at 4 (Apr. 28, 2010); *Samson Construction Co. Inc. v. Dep't of Parks & Recreation*, OATH Index No. 1327/06, mem. dec. at 3 (May 15, 2006).

Likewise, the Appellate Division has specified that the alternative dispute resolution procedure set forth in Article 29 is a "procedural device [that] is limited by the parties' agreement to claims arising out of disputed work, a category that does not include delay damages." *CAB Assoc. v. City of New York*, 32 A.D.3d 229, 232 (1st Dep't 2006); *Trocom Construction Corp. v. City of New York*, 51 A.D.3d 533, 534 (1st Dep't 2008); *Gemma Construction Co. v. City of New York*, 246 A.D.2d 451, 454 (1st Dep't 1998).

The CDRB has looked at the cause of the damages underlying a claim to determine whether or not it should be categorized as delay damages. *See, e.g., Schlesinger-Siemens Electrical, LLC*, OATH 1817/10, at 4; *Corino Civetta Construction Corp. v. City of New York*, 67 N.Y.2d 297, 313-14 (1986) ("all delay damage claims seek compensation for increased costs, … , whether the costs result because … overtime or additional costs are expended in an effort to complete the work on time …"). The CDRB finds that claims for additional compensation for costs associated with a direction to expedite work, and with overtime occasioned by other trades falling behind schedule, are delay claims.

In GC CO 12, Navillus seeks an additional $2,420 because it was directed to expedite the fabrication of three metal doors. Navillus contends that there was an increased cost to order the doors with a three-week lead time, rather than the customary six-week lead time. KBF offered, and Navillus accepted, $2,100 for the work. KBF and Navillus signed the change order by May 2, 2006. DDC never signed off on the change order request.

DDC argues that the claim should be dismissed because the extra cost of accelerating contract work in order to complete the Contract on time is a form of delay damages, which are beyond the scope of the CDRB process, and cites to *Corino Civetta Construction Corp.,* 67 N.Y.2d at 313-14.

In its reply, Navillus argues that DDC "confuses directed expediting of materials with acceleration costs expended by a contractor on its own to complete the work on time. Without being provided with a change order, a contractor could refuse the direction to expedite the

materials and simply request a time extension for the resulting delay, which was not of his making. DDC's interpretation vitiates the time provision of the Contract" (Pet. Reply ¶ 8) (emphasis supplied).

The Board agrees with DDC that Navillus' claim for extra compensation based upon a directive to expedite the fabrication of the metal doors is a delay claim, which is barred by Article 19.2 of the Contract and Article 19.2 of the Subcontract, and is outside the jurisdiction of the CDRB. *See Samson Construction Co. Inc. v. Dep't of Parks & Recreation,* OATH Index No. 1327/06, mem. dec. at 2-3 (Aug. 7, 2006) (determining that a claim for damages based upon an expedited phased opening schedule for a project to renovate a pier was a delay claim and was outside the jurisdiction of the CDRB).

In CO 84, Navillus seeks an additional $26,307, as compensation for additional costs for overtime flooring and lobby work. Navillus contends that it was required to work overtime due to other contractors falling behind schedule (Pet. Vol. 2, Ex. J: Not Qualified CO, CO 84). DDC contends that the claim should be denied as delay damages.

The Board finds that Navillus' request for extra money for overtime incurred because other contractors fell behind schedule is a request for damages due to delay. This is outside the scope of the Contract's dispute resolution process.

Further, this claim is barred by Article 31.3 of the Subcontract, which bars damage claims based upon acts or omissions of other contractors:

> Should this Contractor sustain any loss, damage or delay through any act or omission of any other subcontractor having a contract with the Construction manager for the performance of work or delivery of materials upon the site, then this Contractor shall have no claim against the Construction Manager for such loss, damage, or delay, but shall have recourse solely through the other subcontractor.

Pet. App. Vol. 1, Ex. B at 39: Subcontract Art. 31.3.

GC CO 88

Here, Navillus seeks an additional $15,423 in compensation for water damage. The CDRB denies this claim because Navillus was under an absolute obligation to protect its work until completion under Article 15 of the Contract.

Navillus contends that it was on schedule to complete its cornice installation and

associated roofing work by early September 2005, but its work was put on hold in mid-August due to several redesigns by the project architect. During the redesign period, Navillus installed temporary protection against the rain but that "the unprecedented rain event in October [2005] overwhelmed this protection and some water entered the building" (Pet. App. Vol. 2: Rejected CO, CO 88: Part B: Subcontract change order/overrun justification). Navillus contends that but for the extended redesign period, the cornice and roof would have been complete and no water damage would have occurred. Navillus seeks compensation for extra work related to the installation of temporary protection and the removal of damaged sheetrock. Neither KBF nor DDC signed off on the requested change order.

DDC argues that the claim is not compensable under Article 15 of the Subcontract, "Protection of Work and of Persons and Property," because Article 15 imposes an "absolute obligation" upon the contractor to protect its work:

> ARTICLE 15- PROTECTION OF WORK AND OF PERSONS AND PROPERTY
>
> 15.1 During the performance of the Work and up to the date of Final Acceptance, the Contractor shall be under an absolute obligation to protect the finished and unfinished Work against any damage, loss or injury; and in the event of such damages, loss or injury, he shall promptly replace or repair such Work, whichever the Commissioners Representative shall determine to be preferable. The obligation to deliver finished Work in strict accordance with the Contract prior to Final Acceptance shall be absolute and shall not be affected by the Construction Manager's or Commissioner's Representative's approval or failure to prohibit means and methods of construction used by the Contractor.

Pet. Vol. 1, Ex. B at 23: Subcontract Art. 15.1.

Navillus argues in its reply that Article 15 of the Contract "cannot place the risk on the contractor to protect work that is left open to the extreme elements as a result of design delays for which DDC is responsible" (Pet. Reply ¶ 10).

The Board finds that Navillus is not entitled to additional compensation as it had an absolute obligation to protect its work under Article 15 of the Contract. *William A. Gross Construction Associates, Inc. v. Dep't of Parks & Recreation*, OATH Index No. 1894/13, mem.

dec. at 4-8 (Aug. 7, 2013) (contractor has an absolute obligation under the contract to repair and replace work that was destroyed by Hurricane Sandy prior to final acceptance of the work by the City); *L & L Painting Co. v. City of New York*, 69 A.D.3d 517, 518 (1st Dep't 2010) (contractor not entitled to extra compensation for work to repair damage caused by fire because it had an absolute duty under the contract to protect its work against damage).

GC CO 81

The CDRB rules for Navillus on this claim.

On September 30, 2005, Navillus requested a change order from KBF seeking an additional $25,216, representing the price difference between standard brand coat hook and hat shelves and the Peter Pepper brand coat hook and hat shelves requested by the architect (Pet. App. Vol. 2, Ex. J: Not Qualified CO, CO 81).

Navillus argues that coat hooks and hat shelves are not provided in the Contract, other than in notes 4.12 and 4.13 in the drawings. The drawing shows coat hooks and hat shelves but does not specify the name brand (Pet. Reply Ex. O). Therefore, it was willing to provide standard brand hooks and shelves at no cost, but it objected to the architect's insistence that it use expensive Peter Pepper hooks and shelves.

DDC argues that drawings are part of the Contract (Pet. App. Vol. 1 Ex B: Art. 1, Section 1.11) and that Article 6.1.5 provides that "if there is any inconsistency between or among various contract documents, the contractor shall provide the better quality or quantity of work or materials, and shall apply the more stringent provision, unless ordered in writing by the Construction Manager." DDC contends that means the Contract required "the better quality" coat hooks and hat shelves, *i.e.*, the Peter Pepper brand.

The Board finds, as argued by Navillus, that Article 6.1.5, is inapplicable because there is not any "inconsistency between or among contract documents" as none of the contract documents specify the use of Peter Pepper products (Tr. 50-51). Thus, the Board awards Navillus $25,216.30, representing the difference in cost between Peter Pepper coat hooks and hat shelves and the substitute brand used by Navillus.

CONCLUSION

The CDRB remands to DDC for processing General Construction Contract Change Orders 9, 11, 15, 53, 56, 100, and Masonry Change Order 2. The Board denies General Construction Contract Change Orders 6, 10, 12, 61, 84, 88, 99, and Facade Change Order 8. The CDRB grants General Construction Contract Change Order 81 and it awards Navillus extra compensation of $25,216.

All concur.

Faye Lewis
Administrative Law Judge/Chair

May 14, 2014

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