Triton Structural Concrete, Inc. v. Dep't of Design and Construction

OATH Index No. 1300/17, mem. dec. (Aug. 11, 2017)

CDRB dismisses extra work claim because contractor failed to document work as required by the contract. Further, contractor failed to request clarification prior to bid so it was bound by agency's interpretation.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

CONTRACT DISPUTE RESOLUTION BOARD

In the Matter of
TRITON STRUCTURAL CONCRETE, INC.
Petitioner
- against -
DEPARTMENT OF DESIGN AND CONSTRUCTION
Respondent

MEMORANDUM DECISION

INGRID M. ADDISON, *Administrative Law Judge/Chair*

MICHAEL SMILOWITZ, ESQ., *Mayor's Office of Contract Services*

CHARLES SMITH, *Prequalified Panel Member*

Pending before the Contract Dispute Resolution Board ("CDRB" or "Board") is a petition filed by Triton Structural Concrete, Inc. ("Triton" or "petitioner"), on behalf of its subcontractor, Metro Steel, Inc. ("Metro"), seeking additional compensation[1] arising out of a contract ("Contract") entered into with the Department of Design and Construction ("DDC") for the design and construction of the Ocean Breeze Indoor Horse Riding Arena in Staten Island (the "Project" or "Arena"). Petitioner seeks review of DDC's rejection of a claim for extra work which Metro performed and which it asserts was done because of changes that DDC made to the canopy and metal spans to be constructed during the Project. Respondent argues that its plans for an enclosed canopy were never changed, that petitioner waived its claim by failing to seek a pre-bid clarification of the canopy design, and further, that petitioner waived its claims by failing

[1] Petitioner seeks $93,170.70 in one section of the Petition (Pet. at ¶ 6), but requested $88,674 in its conclusion section and at oral argument (Pet. at Conclusion; Tr. 7-8).

to support its extra-work claim with the required documentation.

Oral argument was held on July 11, 2017. The Board granted petitioner, by its subcontractor, until July 19, 2017, to respond in writing to a question posed by a panel member. That response was delivered by United Parcel Service ("UPS") on July 21, 2017, in spite of the subcontractor's assurances that it had hand-delivered its response on the deadline date. The response was nevertheless accepted because there was indication that the UPS label had been created on July 18, 2017. Accordingly, the record closed on July 21, 2017.

For the reasons set forth below, the Board denies Triton's request for additional compensation.

BACKGROUND

On or about August 12, 2013, DDC solicited bids for the Project to construct an indoor horse-riding arena in Staten Island, New York, which was to serve as the headquarters for Helping Others Overcome Personal Handicaps, a therapeutic riding program (Resp. Br. at 2). Petitioner submitted its bid for the Project on September 19, 2013, in the sum of $5,109,911.55 (Pet at ¶¶ 4-5; Resp. Br. at 6; Resp. Ex 2), and was awarded the Contract by DDC on or about March 25, 2014 (Pet. at ¶ 4; Resp. Ex. 2). Petitioner entered into a subcontract with Metro to fabricate, furnish and deliver all material necessary for a complete and warranted pre-engineered metal building ("PEMB") system (Pet. at ¶5). Metro then retained subcontractor Star Building Systems ("Star") to fabricate the building (Resp. Br. at 7).

DDC asserts that its plans for the Arena included features to protect against storm damage after the previous plans to build an indoor horse-riding center in Staten Island were withdrawn due to the extensive damage caused to the borough by Hurricane Sandy (Resp. Br. at 2-3). It maintains that the plans provided for the Arena's roof to feature an enclosed canopy structure extending the length of the building (Resp. Br. at 3; Resp. Ex. 1 at A-401). DDC did not provide specific dimensions for the canopy, reasoning that different building manufacturers make different sized canopies, and it could not appear to be biased in favor of one manufacturer by specifying dimensions that might accord with that manufacture's standard canopy (Resp. Br. at 3).

Metro submitted to Triton, to be forwarded to DDC, preliminary designs for the PEMB that Star had prepared for Metro in accordance with the criteria outlined in the Project

specifications (Pet. at ¶ 15; Resp. Ex. 4). After reviewing these drawings, DDC provided petitioner with a mark-up dated January 6, 2015 (Resp. Ex. 4). On the mark-up, DDC noted that Star had failed to show how the soffit under the canopy would extend as a continuous structure from the northern to southern wall (Resp. at 7).

Petitioner alleges that at the time that Star prepared the preliminary designs, DDC had made architectural drawings and pre-engineered specifications available, but had not made structural drawings or framed opening information available as it pertained to the PEMB (Pet. at ¶ 16). Petitioner further alleges that during the design phase of the Project, DDC requested a number of changes to be added to the PEMB, including vertically braced frames, extensive roof bracing and customized Chevron bracing, causing delays of over three months (Pet. at ¶¶ 17-18).

A conference call between representatives of petitioner, Metro, Star and DDC was held on January 7, 2015, during which the parties discussed the means by which they would attempt to make some of the corrections identified in the mark-up (Pet at ¶ 21; Resp. Br. at 7-8). DDC memorialized the conference call in minutes on January 8, 2015, which state in part: "To maintain planarity, soffit will be attached to a purlin subsystem (not shown in permit drawings, but to be shown with Erection Drawings)" and "Purlin system for eaves to be located above overhang rafters" (Pet. Ex. E).

Petitioner argues that the conference call minutes establish that DDC acknowledged that the purlin system was to be located above the overhang rafter and the soffit would be attached to the purlins and that such a design would "necessarily result in exposed rafters" (Pet. at ¶ 23). Petitioner further argues that nothing contained in the specifications or drawing suggested that exposed rafters would be unacceptable to DDC, and that prior to fabrication of the canopy, DDC never articulated as such (Pet. at ¶¶ 24-25).

Petitioner alleges that Star designed and fabricated the canopies based on what was discussed during the January 7, 2015 conference call (Pet. at ¶ 27); however, petitioner contends that only after materials arrived onsite did DDC notify Triton, Metro, and Star that it expected the canopy to cover the rafters supporting the purlins, therefore requiring a 28-inch-deep canopy, and thus resulting in a major redesign by Star to construct framework suspended from the overhead steel to accommodate the much deeper canopy (Pet. at ¶¶ 28-29). DDC directed petitioner to furnish an enclosed canopy as DDC allege was denoted in the plans (Resp. Br. at 10). Petitioner argues that DDC's eventual position that it did not intend for exposed rafters

required petitioner, through Metro and Star, to perform extra work on the Project and to incur additional costs to furnish and install a boxed canopy system in order to avoid exposed rafters (Pet. at ¶¶ 49-50).

On March 6, 2015, Metro submitted a proposed change order regarding its canopy work, requesting additional compensation for providing an enclosed canopy (Resp. Br. at 10; Pet. Ex. B). Metro notified Triton by letter that it was exploring the possibility of furnishing a boxed canopy arrangement for the PEMB in order to eliminate the exposed rafters, which Triton forwarded to DDC (Pet. at ¶ 30). DDC rejected the change order (Resp. Br. at 10). DDC resident Architect Frank Kugler stated via email that "[t]here has never been an expectation of exposed rafters, beams, or any structural member on the exterior of the building" and that "DDC never changed the design of the braced frame building structural system as defined in the bid documents" (Pet. at ¶ 31; Pet. Ex. B; Resp. Ex. 8).

On April 6, 2015, Metro provided Triton with an additional estimated cost of $88,674 to furnish and install a boxed canopy system (Pet. at ¶ 33). On April 14, 2015, Triton submitted a Notice of Dispute to DDC Commissioner, noting that it was "proceeding with this work as directed but [was] reserving [its] rights to pursue a claim for the additional time and costs involved" (Pet at ¶ 34; Pet. Ex. B). Metro installed the boxed canopy system throughout June and July 2015 (Pet at ¶ 35).

On February 22, 2016, DDC Associate Commissioner Mark Canu denied Petitioner's claim for additional compensation for its enclosed canopy work (Pet. Ex. A). Associate Commissioner Canu found that a continuous soffit was "required by the contract drawings," and that the voluntary use of inconsistent structural elements for the canopy meant that the canopy would have to be thickened in order to provide for a continuous soffit (Resp. at 11). Mr. Canu determined that Triton was "not entitled to any additional compensation since the additional work they claim to have performed resulted from their own design issues of the metal building" (Pet. Ex. A).

Petitioner appealed DDC decision to the Comptroller on March 22, 2016 (Pet. Ex. B). The Comptroller affirmed DDC's denial of petitioner's extra-work claim via letter dated November 9, 2016, finding that "[t]he exposed rafter system . . . is contrary to the Contract Documents, which requires a canopy with enclosed structural members. Both the Contract Drawings and Shop Drawing markups all illustrate an enclosed canopy design. Thus, the work

performed by Triton/Metro to convert the exposed rafter design to an enclosed canopy design is not extra work." The Comptroller found that, in addition to the claim lacking merit, Triton waived the claim by failing to maintain Time and Material ("T&M") records in accordance with Article 28 of the Contract (Pet. Ex. D).

This appeal to the CDRB followed.

ANALYSIS

The Board's authority to resolve contract disputes between the City and a contractor is set forth in the Procurement Policy Board Rules ("PPB Rules") and Article 27 of the Contract. The PPB rules and Article 27.1.2 authorize the Board to hear claims "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 2017). The Board's "decision must be consistent with the terms of the contract." 9 RCNY § 4-09(g)(4). Moreover, the Board cannot provide equitable remedies. *See J.H. Electric of New York, Inc. v. Dep't of Sanitation*, OATH Index No. 2637/09, mem. dec. at 9 (Aug. 27, 2009) ("[t]he Board is constrained to render its decision solely based on the terms of the contract and the PPB rules, and has no authority to provide equitable remedies."); *Weeks Marine, Inc. v. Dep't of Sanitation*, OATH Index No. 1296/00, mem. dec. at 9-10 (June 23, 2000), *aff'd*, 291 A.D.2d 277 (1st Dep't 2002) ("[t]he Board has no authority to provide equitable remedies.").

Petitioner waived its claim by failing to support its extra-work claim.

Petitioner's claim must be denied because it has failed to provide the documentation required under Article 28 of the Contract. Contract Article 28.1 states:

> While the Contractor or any of its Subcontractors is performing Extra Work on a Time and Material Basis ordered by the Commissioner under Article 25, or is performing disputed Work, or complying with a determination or order under protest in accordance with Articles 27 and 30, in each such case the Contractor shall furnish the Resident Engineer daily with three (3) copies of written statements signed by the Contractor's representative at the Site showing:

> 28.1.1 The name and number of each Worker employed on such Work or engaged in complying with such determination or order, the number of hours employed, and the character of the Work each is doing; and
>
> 28.1.2 The nature and quantity of any materials, plant and equipment furnished or used in connection with the performance of such Work or compliance with such determination or order, and from whom purchased or rented.

Article 28.2 of the Contract requires that "[a] copy of such statement will be countersigned by the Resident Engineer, noting thereon any items not agreed to or questioned, and will be returned to the Contractor within two (2) Days after submission."

Article 28.5 of the Contract states that "[f]ailure to comply strictly with these requirements shall constitute a waiver of any claim for extra compensation or damages on account of the performance of such Work or compliance with such determination or order."

Petitioner failed to provide daily reports of its alleged extra work to DDC's Resident Engineer for counter-signature, as required under the Contract, and no counter-signed documents have been submitted to the Board in support of its petition (Pet. Ex. C). Additionally, Metro stated that the canopy work commenced June 17, 2015 and was completed before July 4, 2015 (Pet. Ex. C). To support its claim, petitioner submitted payroll reports from June 10, 2015 through July 14, 2015. In the work performed section, four of the reports (June 10, 11, 12, 15), describe "set[ting] canopy steel" and also reference work that is unrelated to canopy construction such as setting "wall panels," installing "corner trim," installing "jamb/header trim," and installing "overhead door trim." The payroll reports for these four dates are the only documents submitted by petitioner containing any description of the work performed and the equipment used. The 20 other reports that petitioner submitted lack descriptions of the character of work performed and details of the equipment used. In sum, petitioner has failed to support its extra-work claim as required by Article 28 of the Contract.

A party's failure to comply with the record keeping requirements of Article 28 requires dismissal of its claim. *See Centennial Elevator Industries, Inc. v. Dep't of Citywide Admin. Services*, OATH Index No. 622/16, mem. dec. at 9 (Dec. 4, 2015) ("Compliance with the contract's recordkeeping requirement is a condition precedent to recovery"); *see also F. Garofalo Elec. Co. v. New York Univ.*, 270 A.D.2d 76, 80 (1st Dep't 2000) ("The contract's

notice and documentation requirements for extra work and delay damages are conditions precedent to plaintiff's recovery and the failure to strictly comply is deemed a waiver of such claims."); *De Foe Corp. v. New York*, 95 A.D.2d 793, 794 (2d Dep't 1983) ("Plaintiff's undisputed failure to supply these records constitutes a waiver of his right to seek compensation."); *Naclerio Contr. Co. v. Environmental Protection Admin.*, 113 A.D.2d 707, 710 (1st Dep't 1985) (claims for extra or disputed work require "strict compliance with the requirements of article[] . . . 28 or any claims relating thereto are explicitly waived . . .").

Petitioner argues that DDC waived its right to enforce Article 28 because it had "knowledge of the claims during and throughout the construction process, as evidenced by meetings, emails and other communications" (Pet. at ¶ 54). Petitioner further argues that DDC waived its right to enforce Article 28 "based on prior course of dealings where it has agreed to pay claims for extra work without T&M tickets from Triton subcontractors that have been executed by Triton and the Resident Engineer" (Pet at ¶ 55). In support, petitioner cites *Amadeus, Inc. v. State of New York*, 36 A.D.2d 873 (3d Dep't 1971) and *G. De Vincentis & Son Construction, Inc. v. City of Oneonta*, 304 A.D.2d 1006 (3d Dep't 2003). Petitioner's reliance on these cases is without merit as they are easily distinguishable.

Amadeus involved a contractor's failure to strictly comply with the notice provisions of its contract, not a failure to comply with the documentation requirements, as is the case here. As the court noted:

> Clearly, the contract in its entirety requires claimant to protest in writing any work which it believes is beyond the requirements of the written contract. However, in cases where the State is apprised of the contractor's claim that extra work beyond the contract was being performed, the State has been precluded from insisting upon strict compliance with the notice provisions.

36 A.D.2d at 874.

Here, petitioner appears to have conflated the notice requirement, found in Article 30 of the Contract, with the documentation requirement of Article 28. DDC does not argue that it was not on notice that petitioner considered the canopy work to be extra work. Rather, DDC argues that petitioner failed to document its extra work claim as required by Article 28.

In *G. De. Vincentis & Son Constr., Inc.*, the underlying contract at issue "did not explicitly require plaintiff to strictly comply with its terms, nor did it include a provision

prohibiting estoppel or waiver on the part of the City." 304 A.D.2d at 1008. By contrast, Article 28.5 of the Contract at issue here explicitly imposes strict compliance with the record keeping requirements of Article 28.

Further, petitioner's Article 28 waiver argument based on prior course of dealings where DDC compensated extra work claims without the production of T&M tickets from Triton subcontractors is also without merit. This argument sounds in estoppel and thus ignores the No Estoppel Clause of the Contract and the principle that estoppel is unavailable against government entities.

Specifically, Article 34.1.1 of the Contract (the No Estoppel Clause), provides that:

> Neither the City nor any Agency, officer, agent or employee thereof, shall be bound, precluded or estopped by any determination, decision, approval . . . made or given under or in connection with this Contract by the City, the Commissioner, the Resident Engineer, or any other officer, agent or employee of the City . . . from showing the true and correct classification, amount, quality or character of the Work actually done.

Therefore, petitioner's reliance on *Amadeus* and *G. De. Vincentis & Son Constr., Inc.* is misplaced. *See also Granada Buildings, Inc. v. Kingston*, 58 N.Y.2d 705, 708 (1982) ("we have frequently reiterated that estoppel is unavailable against a public agency."); *Eden v. Bd. Of Trustees*, 49 A.D.2d 277, 284 (2d Dep't 1975) ("Estoppel against the state is to be applied only in truly exceptional cases . . ."); *Samson Construction Co. v. Dep't of Parks and Recreation*, OATH Index No. 1327/06, mem. dec. at 5 (Aug. 7, 2006) (citing "general rule barring the assertion of waiver and estoppel against a government agency"). Even if this Board were to conclude that the petitioner's argument had merit, it is not clear that these arguments could support a decision by the Board, as estoppel is an equitable principle which is outside the ambit of the Board's jurisdiction.

Thus, regardless of DDC's prior acquiescence to compensate for extra work without T&M tickets from Triton subcontractors, petitioner cannot rely on such prior acts. Rather, petitioner was required to strictly comply with the record keeping requirement described in Article 28 of the Contract.

Finally, at oral argument, petitioner argued that it did not comply with the Article 28 record keeping requirements because it believed the work would be processed on a lump sum basis (Tr. 9, 18-19, 42-44). Petitioner's belief was based on "the parties' actions, discussions and

e-mails [that] reflect that this was going to be a lump sum proposal" (Tr. 19). Directly discussing a similar situation and related interparty communications, the Court of Appeals found that "the relevant inquiry is not simply one of [a party's] bad faith or negligence in the performance of the contract but additionally whether the alleged misconduct prevented or hindered [the other party's] compliance with the notice and reporting requirements." *A.H.A. Gen. Constr. v. N.Y.C. Housing Auth.*, 92 N.Y.2d 20, 31 (1998).

Petitioner does not come close to establishing facts that meet this threshold. Petitioner admits that there is nothing in the written record to substantiate petitioner's position that the canopy work was to be handled on a lump sum basis except for Metro's April 6, 2015 letter indicating a lump sum cost for the canopy work (Tr. 43-44; Pet. Ex. B). Moreover, petitioner's argument directly contradicts its April 14, 2015 letter, which stated that it was "reserving [its] rights to pursue a claim for the additional time and costs involved" (Pet. Ex. B). DDC did not consider enclosing the canopy to be extra work and even if it had, the record is devoid of support for petitioner's argument that DDC agreed to pay for this work on a lump sum basis as would have been required under Article 25.[2] Rather, DDC disputed petitioner's position that this was extra work, which required petitioner to keep time and material records and to comply with the Article 28 record keeping requirements. By failing to do so, petitioner has waived its claim for additional compensation.

Petitioner waived its claim by failing to request a pre-bid interpretation or correction of the Arena's canopy design

Petitioner's claim also must fail because it never requested a pre-bid interpretation or correction of the canopy's design. The documents provided by DDC to bidders on the Project included "Information for Bidders." This document informed bidders that they were required to review the Contract documents and that they would be bound by DDC Commissioner's interpretation of any patent ambiguity in those documents unless they obtained a written interpretation or correction. *See* Information for Bidders, §9(A) ("Prospective bidders must examine the Contract Documents carefully and before bidding must request the Commissioner in

[2] Article 25.3 states in part:
"The Contractor shall be entitled to a price adjustment for Extra Work performed pursuant to a written change order. Adjustments to price shall be computed in one or more of the following ways:
25.3.2 By agreement of a fixed price."

writing for an interpretation or correction of every patent ambiguity, inconsistency or error therein which should have been discovered by a reasonably prudent bidder."); *see also* Information for Bidders, §9(B) ("Only the written interpretation or correction so given by the Commissioner shall be binding, and prospective bidders are warned that no other officer, agent or employee of the City is authorized to give information concerning, or to explain or interpret, the Contract."). Additionally, Article 1.2 of the Contract states:

> Should any conflict occur in or between the Drawings and Specifications, the Contractor shall be deemed to have estimated the most expensive way of doing the Work, unless the Contractor shall have asked for and obtained a decision in writing from the Commissioner, of the Agency that is entering into this Contract, before the submission of its bid as to what shall govern.

When a contract explicitly requires the contractor to raise any ambiguities or questions about the requirements of the contract in advance of submitting its bid, and the contractor fails to do so, the contractor will be bound by the agency's interpretation of the Contract. *See L&L Painting Co., Inc. v. Contract Dispute Resolution Bd.*, 14 N.Y.3d 827, 828 (2010) (where petitioner "failed to clarify [an ambiguity in the contract terms] prior to bidding as the contract required . . . the Board rationally disapproved the claim for additional compensation"); *Delidakis Constr. Co., Inc. v. City of New York*, 29 A.D.3d 403, 404 (1st Dep't 2006) ("since plaintiff bidder was obligated to discover and inquire as to any claimed ambiguity prior to submission of a bid, any such claim must be construed against plaintiff"); *J.H. Electric of N.Y., Inc. v. N.Y. City Housing Auth.*, 5 A.D.3d 191, 192 (1st Dep't 2004) ("Plaintiff's failure to seek clarification of this provision before submitting its bid meant that it would be held to defendant's reasonable interpretation of the term.").

Here, petitioner was required to read the Contract documents and submit a request for interpretation or correction of an ambiguity prior to bid. It is undisputed that petitioner failed to do so. Petitioner argues that "the bid document drawings furnished by DDC did not include a dimension for the depth of the canopy" (Pet. at ¶ 20). Petitioner further argues that "[n]othing contained in any aspect of the specifications or drawings provided that exposed rafters were unacceptable to DDC" (Pet. at ¶ 24). These arguments are irrelevant. If petitioner had any question about how the Arena's canopy was to be built, it was required to seek a written interpretation of the matter from the Commissioner. By failing to do so, petitioner implicitly

deferred to DDC's interpretation of the Contract. DDC interpreted the documents as requiring an enclosed canopy. Therefore, petitioner's extra-work claim concerning the enclosed canopy must be rejected.

Additionally, if petitioner believed there was a conflict between DDC's drawings and the canopy specifications, petitioner's failure to seek an interpretation from the Commissioner before submitting its bid meant that it was deemed to have estimated performing the canopy work in the most expensive way possible. *See* Contract Art. 1.2. Since petitioner is deemed to have estimated performing the canopy work in the most expensive way possible, petitioner cannot seek compensation for the expense of constructing an enclosed canopy.

Therefore, petitioner has waived its claim. Since the claim has been waived, we do not reach the merits.

CONCLUSION

The petition is dismissed. All panelists concur.

Ingrid M. Addison
Administrative Law Judge/Chair

August 11, 2017

APPEARANCES:

DIEFENBACH LAW GROUP
Attorneys for Petitioner
BY: JAMES DIEFENBACH, ESQ.

COHEN SEGLIAS PALLAS GREENHALL & FURMAN, P.C.
Attorneys for Subcontractor Metro Steel, Inc.
BY: CAROL SIGMOND, ESQ.

ZACHARY W. CARTER, ESQ.
CORPORATION COUNSEL
Attorney for Respondent
BY: GREGORY C. JOHNSON, ESQ.

STATEMENT BY CHARLES SMITH (prequalified panel member)
Although I concur with the other panelists in dismissing the claim for extra work, I respectively submit the following statement to be entered in its entirety as part of the Memorandum Decision.

The NYC Department of Design and Construction (DDC) is on record as having allowed the substitution of roof purlins proposed by the petitioner as a standard of the industry in lieu of a deep metal roof deck originally specified in the design of the Arena by DDC. The change was requested and granted subsequent to the awarding of the contract to the petitioner, which resulted in a substantial modification to the overhanging canopy that required an extraordinary structural solution to the method by which the soffit enclosing the eaves would be supported.

At the heart of the dispute is the petitioner's claim that an enclosed canopy was not expressly specified and that design drawings lacked necessary dimensions that were required to clearly establish a soffit at the eaves enclosing the surrounding canopy. DDC denied the necessity for such dimensions as not in keeping of design practices for pre-engineered buildings to which the Arena was subject and held the position that an enclosed canopy was required. The petitioner ultimately proceeded with erection drawings indicating the structural method by which a soffit enclosing the canopy would be supported, and an enclosed canopy was thus installed.

However, the petitioner mistakenly assumed that the additional time and materials this change required would be subject to a lump sum settlement, which is in dispute, and that the petitioner should have followed the contract requirements to support a claim for extra work. The failure on part of the petitioner to not follow the protocol and submit the required T&M for the extra work that the new canopy configuration involved was a grave error.

Nevertheless, serious contention exists as to whether DDC properly or adequately handled the problem of modifying the roof structure that significantly affected the simplicity of the canopy design indicated in the original DDC design drawings, a factor the architect considered an important aesthetic element.

The telephone conference of January 7, 2015, memorialized by memorandum of January 8, 2015, is purported by DDC to have made clear the requirement in the contract for an enclosed canopy noting under the heading "Soffit Panels" that ". . . soffit would be attached to a purlin subsystem . . . soffit plan to also be issued and with erection drawings . . . Purlin system for eaves to be located above overhanging rafters . . . canopy rafters located above clerestory

header." These statements lead the petitioner to construe that ". . . Such a design would necessarily result in exposed rafters." Whether one agrees or not with this conclusion, any system to support a soffit at the eaves would substantially alter the simplicity of the original canopy design.

The memorandum of January 8th raises the issue in the mind of this panelist as to whether DDC adequately, if not responsibly, dealt with the canopy design by leaving it to the petitioner merely because as stated in the City's brief ". . . DDC did not provide specific dimensions for the canopy because different building manufacturers make different-sized canopies . . ." This may be relevant prior to bidding, but the contract had been awarded and the building was under construction. Moreover, it was clear to DDC that the change to the roof structure would require an extraordinary suspension system to maintain planarity of the soffit and that the esthetics of the canopy would be at stake.

The Arena, engineered, fabricated and erected as a pre-engineered metal building (PEMB) under DDC design drawings and specifications, is an interesting, functionally-dedicated utilitarian building. Moreover, the architect acknowledged that the canopy was an important design element as evidenced by the necessity to return to the Art Commission for approval of the changes.

However, DDC apparently relied solely on the telephone conference memorialized in the January 8, 2015 memorandum to make known its expectation regarding the enclosure of the canopy and the need for a supporting structure. The content of the memorandum, as regarded by the petitioner, did not resolve the issue of full enclosure of the soffit.

On the other hand, DDC's architectural drawings in the bid documents did indeed show a soffit panel enclosing the eaves under the canopy that assumed planarity of the eaves based upon attaching a metal soffit corresponding to the underside of the rafters. However, the simplicity of this method was no longer possible given the modification of the roof structure.

Obviously, DDC did not want to dictate how the petitioner was to solve the problem of maintaining planarity of the soffit; only that it must be maintained. Nevertheless, it may have been prudent for DDC to provide details beyond the description in the subject memo to guide the fabrication of the canopy given the changed conditions, particularly in view of the fact that the insistence upon maintaining planarity became substantially more complex because of the modification of the roof structure.

I realize that the dispute centers on the petitioner's responsibility for changes attributed to its decisions, albeit with DDC's agreement. In this case, it may not have been unreasonable for the parties to negotiate a lump sum adjustment for the additional cost to the petitioner to structurally support the metal soffit enclosure at the eaves.

Unfortunately, the petitioner failed to protect its interests by obtaining such an agreement or by otherwise following contractual procedures for substantiating what may have been a valid claim for extra work.

Therefore, I join with the other panelists in denying their claim.

Charles Smith,
Panel Member