REPORT AND RECOMMENDATION
APPEAL OF W.J. MOUNTFORD CO.
REGARDING THE CHIEF ENGINEER’S DECISION
TO DENY CLAIM #2-74817-002

This report and recommendation is provided in accordance with the provisions of M.G.L. c.6C §40 and Division I §7.16 of the applicable contract.

BACKGROUND

W.J. Mountford Co. (“WJM”) is the general contractor on contract #74817 providing for additions and renovations to the District 2 Administration Building in Northampton. By letter dated February 8, 2016, the Chief Engineer made a written determination to deny a claim by WJM requesting $167,413.19 for “general conditions” costs incurred as a result of delays to the project (a.k.a. Claim #2-74817-002). On May 5, 2016, WJM properly appealed the determination by timely submitting a Statement of Claim to the Office of the Administrative Law Judge.

On July 1, 2016, the Department, citing Mass. R. Civ. P. 12(b)(6), moved to dismiss the appeal on the basis that it failed to state a claim upon which relief can be granted. WJM filed its Opposition to the Department’s motion on August 5, 2016.

On August 30, 2016, I held a hearing to allow oral argument on the Department’s motion and WJM’s Opposition. Mr. Jonathan Elder, Esq. represented WJM and Mr. Owen Kane, Senior Counsel, represented the Department. Lisa Harol, Administrator, was present to address administrative matters. At the hearing, each party’s counsel presented oral argument to advance their legal positions and clarify issues in response to questions that I put forth. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

For purposes of this Report and Recommendation\(^1\), I accept the following factual allegations contained in the Statement of Claim as true, drawing all reasonable inferences from such facts in favor of WJM:

1. WJM began work on Contract No. 74817 in December 2012. The project scope included additions and renovations to the District 2 Administration Building in Northampton. WJM’s bid for the original Contract scope was $5,247,000.00. The Contract required completion of the work within 450 calendar days.

\(^1\) Procedurally, this is a ruling on the Department’s motion to dismiss and WJM’s Opposition. In that regard, I make no independent findings of fact. The standard of review applicable to motions to dismiss requires that the factual allegations contained in WJM’s Statement of Claim be accepted as true, as well as such inferences as may be drawn therefrom in WJM’s favor, *Flagg v. AliMed, Inc.*, 466 Mass.23, 26 (2013), and a determination as to whether such “factual allegations plausibly suggest an entitlement to relief.” *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008).
2. During the project, the Department issued over 100 Extra Work Orders to incorporate design changes and scope revisions. These changes and revisions increased the Contract by over $800,000 and caused a 345-day delay to the project schedule. The Department compensated WJM for the scope changes through the Extra Work Orders and also granted time extensions covering the entire delay period.

3. During the delay period, from March 1, 2014 through December 1, 2014, WJM performed base Contract work that was delayed as a result of the design changes and scope revisions contained in the Extra Work Orders. During this part of the delay period, WJM assigned an additional on-site foreman to oversee the extra work, while also maintaining its existing supervisory staff onsite to oversee both change order work and base Contract work that was performed concurrently.

4. WJM submitted to the Department its initial Notice of Claim on April 21, 2014 and a final accounting on January 9, 2015 seeking compensation for its additional “General Conditions” costs incurred as a result of the delay to base Contract work. The claim is in the amount of $167,413.19 for additional costs incurred by WJM from March 1, 2014 through December 1, 2014 directly attributable to the delay caused by the Department without the fault of WJM.

5. A breakdown of WJM’s claim is provided at Exhibit 4 to the Statement of Claim. It is entitled “Additional costs for Supervision and Project Management due to contract delays by no fault of WJ Mountford” and lists the following cost categories and amounts:

<table>
<thead>
<tr>
<th>Description</th>
<th>Units</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory Onsite Supervision</td>
<td>1 lot</td>
<td>87,909.09</td>
</tr>
<tr>
<td>Company Truck – Repair, maintenance, Insurance taxes</td>
<td>1 lot</td>
<td>5,000.00</td>
</tr>
<tr>
<td>Company Truck – Fuel Expenses</td>
<td>1 lot</td>
<td>2,868.01</td>
</tr>
<tr>
<td>Oil Changes (1,720 miles per month x 10 = 17,200/3000= 6 ea)</td>
<td>6</td>
<td>45.00</td>
</tr>
<tr>
<td>Telephone/Internet</td>
<td>1 lot</td>
<td>1,139.69</td>
</tr>
<tr>
<td>Project Management (16hrs per week) $92.97/hr</td>
<td>10</td>
<td>5,950.08</td>
</tr>
<tr>
<td>Administrative (see below)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Month requisitions/Sub billing (8hrs per month) $44.69 per hour</td>
<td>10</td>
<td>357.52</td>
</tr>
<tr>
<td>Weekly payroll reporting 12 hrs per month $44.69 per hour</td>
<td>10</td>
<td>536.28</td>
</tr>
<tr>
<td>Posting/acknowledging payments on EBO website (4hrs month) $44.69hrs</td>
<td>10</td>
<td>178.76</td>
</tr>
<tr>
<td><strong>Total for 10 Months (March-December)</strong></td>
<td></td>
<td><strong>167,413.19</strong></td>
</tr>
</tbody>
</table>

6. Division I, Subsection 8.05 of the Contract provides in pertinent part:

The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided.

Provided, however, that if the [Department] in [its] judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time), and without the fault or negligence of the Contractor, an
adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay, or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted by the Department.

… The contractor shall submit in writing not later than 30 days after the termination of such suspension, delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.

… The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10.

7. Division I, Subsection 9.03B of the Contract provides in pertinent part:

Unless an agreed lump sum and/or unit price is obtained from above and is so stated in the Extra Work Order the Contractor shall accept as full payment for work or materials for which no price agreement is contained in the Contract an amount equal to the following: (1) the actual cost for direct labor, material (less value of salvage, if any) and use of equipment, plus 10 percent of this total for overhead; (2) plus actual cost of Workmen’s Compensation and Liability Insurance, Health, Welfare and Pension benefits, Social Security deductions, and Employment Security Benefits; (3) plus 10 percent of the total of (1) and (2); plus the estimated proportionate cost of surety bonds. For work performed by a Subcontractor, the Contractor shall accept as full payment therefor an amount equal to the cost to the Contractor of such work as determined by the Engineer, plus 10 percent of such cost.

No allowance shall be made for general superintendence and the use of small tools and manual equipment.

DISCUSSION

The issue presented in this appeal concerns the enforceability and scope of Subsection 8.05 of the Contract. This provision is the Department’s version of the “no damage for delay” clause, which has been the subject of prior review by this Office and the Court. See Report and Recommendation re: Appeal of B&E Construction Corp., MassDOT Office of the Administrative Law Judge, May 5, 2011; also see Sutton v. Commonwealth, 412 Mass. 1001, 1005 (1992); Reynolds Bros., Inc. v. Commonwealth, 421 Mass. 1, 4 (1992); Bonacorso Construction Corp. v. Commonwealth, 41 Mass. App. Ct. 8, 10-11 (1996).

The above decisions follow a long line of cases in the Commonwealth enforcing “no damage for delay” clauses that limit monetary compensation to contractors in the event of a delay caused by an awarding authority. See Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 499-501 (1939); Wes-Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 594-597 (1967); Joseph E. Bennett Co. v. Commonwealth, 21 Mass. App. Ct: 321, 329-330 (1985). In that regard, Subsection 8.05 is a standard “no damages for delay” provision. Sutton, 412 Mass. at 1005. It specifically precludes damages for delays in the commencement or performance of work, unless the Department in its discretion determines that an adjustment should be made for an unreasonable delay caused either by an action of the Department in administering the contract or by the Department's failure to act as required in the contract. Id. at 1006. If the Department makes such a determination, Subsection 8.05 provides that “... an adjustment shall be made by the Department for any increase in the actual cost of performance of
the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption.”

In Appeal of B&E Construction Corp., this Office reviewed the application and scope of Subsection 8.05 and reached the following conclusions:

Subsection 8.05, “Claim for Delay or Suspension of the Work,” is the exclusive contractual remedy for monetary compensation due to delay. If MassDOT makes a finding that a delay is “without the fault or negligence” of the contractor and the work was interrupted for “an unreasonable period of time” by MassDOT’s act or failure to act “… an adjustment shall be made by [MassDOT] for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption.”

Subsection 8.05 also requires that the contractor “submit in writing ... the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except that no allowance for overhead and profit shall be allowed.” Subsection 8.05 and Subsection 9.03B must be read together. Subsection 9.03B sets forth a detailed formula for calculating allowable costs. The formula expressly provides “No allowance shall be made for general superintendence and the use of small tools and manual equipment.” Hence, the plain language of Subsections 8.05 and 9.03, read together, requires MassDOT to make an “adjustment” in the contract price for the increased “actual costs” of performance for delays caused solely by MassDOT while limiting expressly what costs are compensable.

… Subsection 9.03B expressly does not “allow” compensation for “general superintendence.” Superintendence” is the “act or process of superintending,” which means, in plain English, “to oversee and direct work.” Random House College Dictionary (1984). The act of superintending this Contract was performed by the “project superintendent,” who oversaw and directed the work. That the salary of the “project superintendent” is included within the cost of “general superintendence” cannot be doubted. [The costs of the] “project superintendent” are not compensable because they are expressly precluded.

The language in the Contract that excludes such compensation is “strong, broad and unambiguous”; it may not be read out of the Contract. Bennett v. Commonwealth, 21 Mass. App. Ct. 321, 330 (1985). Even though B&E may have incurred costs of overhead and superintendence during prolonged delays, the Contract precludes compensation. Moreover, read properly, Subsections 8.05 and 9.03B do not permit B&E to seek reimbursement for overhead and superintendence because such costs may not be included in its “breakdown” of compensable costs. Since the Contract expressly excludes such costs from the “actual costs” B&E may recover and does not allow them to be stated in the “breakdown” of allowable costs B&E is required to submit, B&E’s Claim fails as a matter of law.

Id. At 5-7.

WJM suggests that the reasoning applied Appeal of B&E Construction Corp. is “flawed” and should not be followed because it would lead to “inequitable and undesirable results.” I disagree. General criticism of “no damages for delay” provisions and their potential for inequitable results have been widely noted.\(^2\) Despite that potential, Subsection 8.05 and other

\(^2\) See, e.g., Melinda Sarjapur, Bargaining in the Dark: Why the California Legislature Should Render “No Damage for Delay” Clauses Void As Against Public Policy in All Construction Contracts, 42 Golden Gate U.L. Rev. 283; Carl S. Beattie, Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damages for Delay" Clause, 46 Wm. & Mary L. Rev. 1857, 1859 (2005); Alain Lecusay, The Collapsing "No Damages for Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change, 15 St. Thomas L. Rev. 425 (2002);
contract provisions that shift the financial risk of delay entirely to the contractor have been upheld as valid and enforceable in the Commonwealth. In that regard, I have no cause to stray from the reasoning applied Appeal of B&E Construction Corp.

For purposes of the present Motion to Dismiss and Opposition, WJM maintains that its claim has merit and that the factual assertions in its Statement of Claim establish entitlement to the compensation sought. WJM describes its claim as one for “actual, direct costs WJM incurred for personnel, equipment and services WJM provided on-site during the [delay].” The gist of WJM’s position is that because it is not pursuing an extended home office overhead claim, the claim does not constitute “overhead” within the meaning of Subsection 8.05. This Office ruled in Appeal of B&E Construction Corp. that home office overhead is part of excluded overhead under Subsection 8.05. Id. at 6. The flaw in WJM’s argument is that the claim that it describes, albeit not for home office overhead, is clearly one for general superintendence, which is also part of excluded overhead under Subsection 8.05 and expressly excluded under 9.03B. Id. at 6. Subsections 8.05 and 9.03B do not permit WJM to seek reimbursement for overhead and general superintendence because such costs may not be included in its “breakdown” of compensable costs. Id. at 7. The Contract expressly excludes such costs from the “actual costs” WJM may recover and does not allow them to be stated in the “breakdown” of allowable costs WJM is required to submit.

WJM’s claim is indistinguishable from the claim examined in Appeal of B&E Construction Corp. The breakdown describes the claim as being for “Additional costs for Supervision and Project Management due to contract delays by no fault of WJ Mountford.” The cost categories are comprised of salaries, related administrative support costs, and vehicle and equipment costs for the project supervisor and management staff. In that regard, the claim is entirely for “general superintendence” costs. As held by this Office in Appeal of B&E Construction Corp., such a claim fails as a matter of law.

3 “Home office overhead” refers to the indirect cost of performing a construction contract, such as executive salaries, accounting and accounts payable services, insurance, and other general and administrative expenses of operating a construction company. See J. McNamara, MCLE - Massachusetts Construction Law and Litigation §7:5(d) (1st Ed. 2006, with 2013 & 2016 Supplements); also see J. Lewin & C.E. Schaub, Jr., Massachusetts Practice - Construction Law §6:45 at 448 (2014).

4 “General superintendence”, also referred to as “general conditions”, “field overhead”, and jobsite overhead,” are the direct costs necessary to staff a construction project, such as salaries of project managers, superintendents, clerical workers, and other supervisory and management personnel; the costs of office trailers and storage trailers; utilities associated with the field office; and vehicle and equipment expenses necessary to generally oversee the work and maintain the contractor’s presence on the site. See J. McNamara, supra; also see J. Lewin & C.E. Schaub, Jr., supra.

5 As opposed to delay costs not expressly excluded by Subsection 8.05 and 9.03B, such as labor escalation, material escalation, extended equipment rental, storage and restocking of materials, winter conditions, demobilization and remobilization, for example.
RECOMMENDATION

For the reasons stated above, I recommend that the Department’s Motion to Dismiss be ALLOWED and that the contractor’s appeal be DENIED.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: September 19, 2016