

Legal Opinion: GCH-0090

Index: 2.205, 2.230
Subject: CIAP: Audit Documents and Disagreement

November 9, 1993

MEMORANDUM FOR: Michael B. Janis, General Deputy Assistant
Secretary for Public and Indian Housing, PD

FROM: Michael H. Reardon, Assistant General Counsel, Assisted
Housing Division, GCH

SUBJECT: Referral Of Audit Recommendation Because of
Disagreement - Housing Authority of the City of
Pittsburgh Comprehensive Improvement Assistance
Program (CIAP)

This is in response to your memorandum of May 27, 1993 to Carole W. Wilson, Associate General Counsel, Office of Equal Opportunity and Administrative Law, which was referred to me by Kenneth A. Markison, Assistant General Counsel, Administrative Law Division. Please excuse the delay in responding which resulted from the transfer of the matter to my office and need for audit documents (including the contract and other relevant materials). Based on the audit documents provided (attached), we agree with Janice Rattley's memorandum of May 6, 1993, for Barbara L. Burkhalter, that asbestos abatement was covered under the original contract, but that the extent to which the change order was proper cannot be determined from the audit documents provided. We have provided our analysis and suggestions on contract interpretation; however a formal technical review of costs incurred for work performed should determine whether the change order duplicated work required in the original contract and lacked justification for the CIAP costs incurred.

I. Facts

We have relied on the facts as stated in the attached audit documents and have not been afforded an opportunity to review the actual contract documents. Briefly, we understand that the housing authority entered into a contract with C.J. Betters Corporation as general contractor for comprehensive modernization work, including plumbing, heating, and electrical improvements on 339 townhouse units at St. Clair Village in Pittsburgh, Pennsylvania. The contract provided that "Abatement of hazardous materials shall be performed as part of general contract work. Subcontractors shall cooperate and coordinate their work with the general contractor. Asbestos abatement and removal of lead based paint shall be completed and approved prior to initiation of work by subcontractors in areas where hazardous materials exist." See Section 01010, page 19, entitled Hazardous Materials. Under Plumbing Work in Section 15000, it stated that asbestos removal will be accomplished under a separate Contract. The plumbing contractor was to ascertain that all asbestos insulation has been removed from piping systems on which he will work before starting work. The drawings at T/P-19 indicated that asbestos insulation will

be removed under separate contract and lines shall be insulated by this contractor after asbestos has been removed. The special conditions in Section 01010 required performance of all work as shown on the contract drawings and as described in the specifications. Specifications and drawings were indicated as complimentary. Work shown, but not specified, and work specified but not shown was to be fully included as if both shown and specified. Specifications were to take precedence over the drawings in the case of discrepancies, except for large scale details. The architect was to make final interpretation of the contract documents. In addition, the supplementary instructions to bidders in No. 16.A required the bidder to bring any discrepancies, omissions, ambiguities or conflict among contract documents to the architect's attention not later than 10 days before proposal due date. We understand that the C.J. Betters did not bring any conflicts to the architect at the required time.

The housing authority approved a change order for asbestos removal from water pipes in 339 units and the removal and replacement of asbestos heat ducts in 312 of the units. The contractor's cost for the additional work was \$1,017,123, less a credit of \$37,123 for encapsulation work not performed. Counsel for the housing authority advised the authority to disregard enforcement of the contract and issue the change order because of the potential for an adverse judgement. The architect advised that asbestos removal would be part of the contract work. See November 4, 1988 letter to Daniel A. Pietragallo, Executive Director, Housing Authority, City of Pittsburgh, from Paul C. Apostolou. However, he also approved the change order.

II. Issue

The issue is whether this change order duplicated work required in the original contract and lacked justification for CIAP costs incurred.

III. Discussion and Analysis

Specifications for the contract were written for a general/subcontractor project. The general contractor performed the plumbing work and asserted the removal of water pipe asbestos was not a contract requirement citing section 15000 of the plumbing specifications. HUD's General Conditions of the Contract for Construction, HUD-5370, at paragraph 2a states that "Except as otherwise specifically stated in the Contract, the Contractor shall provide and pay for all materials, labor, tools, equipment ... and all other services and facilities of every nature whatsoever necessary to perform the work to be done under the Contract and deliver it complete in every respect within the specified time." Paragraph 3 of the HUD-5370 further provides that the contractor must have all subcontractors approved by the housing authority. It can not be determined from the audit documents provided if this process was followed; however, it would have served as another way to eliminate any ambiguity in the contract.

Without performing a technical review of the specifications and any work related reports, we cannot determine whether any change order was required in this case. The contract did require asbestos abatement, but adjustments as described in paragraph 8 of the HUD 5370, may have been in order depending on the amount of the work involved and the intention of the parties. The audit documents, especially the statements of the architect and general contractor, often use the terms asbestos removal and asbestos abatement interchangeably. The specifications initially referred to asbestos removal and then were

amended to require asbestos encapsulation. However, the general provisions of the contract continued to require asbestos abatement (which could be either asbestos removal or encapsulation). The audit documents indicate that the encapsulation method of asbestos abatement was tried and failed. It was then determined that removal of asbestos would be necessary to accomplish abatement. Arguably, this may have resulted in an adjustment of price if conditions of the work changed (i.e., discovery that asbestos abatement could not be accomplished by encapsulation or discovery of more extensive asbestos problem). We cannot determine whether paragraph 8 procedures were followed. In addition, paragraph 9 of the HUD 5370 provides that "Should the Contractor encounter subsurface or latent conditions at the site materially differing from those provided for in this Contract, or unknown physical conditions differing materially from those inherent in work of the character provided for in this contract, he shall promptly, and before such conditions are disturbed, notify the housing authority in writing. They shall cause the Architect to investigate such conditions and if they do materially differ, make such changes in the Drawings and Specifications as the Architect may find necessary." The audit documents do not indicate whether section 9 procedures were followed. Additionally, it cannot be determined whether dispute procedures were used. See paragraph 10 of the HUD-5370.

It is a general rule of contract interpretation that if the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former. See 3 Corbin on Contracts, Section 547 and Restatement, Contracts, Section 236(c). In this case, the specifications (asbestos encapsulation) could be read to modify the general requirements (asbestos abatement). There is arguably no conflict because the specifications further clarify the method of abatement. This is also apparent in the original contract which generally called for asbestos abatement and specifically for asbestos removal.

Another rule of contract interpretation is that the terms of a contract are to be interpreted and their legal effects determined as a whole. See 3 Corbin on Contracts, Section 549. Applying this rule, it could be concluded that the contract as a whole required asbestos abatement and additional terms prescribed the methodology. Although the general contractor later argued that asbestos removal was not required, he did not challenge that the contract required asbestos abatement. There has been some argument over the effect of the contract's requirement for asbestos abatement under a separate contract and how this affects the interpretation of the contract as a whole. See e.g. Pittsburgh Field Office Recommendations. This does not appear to be decisive because in the context of a general/subcontractor project, most contract work will be performed through subcontracts.

IV. Conclusion and Options

Based on the audit documents, it can be reasonably argued that asbestos abatement was required, but the extent to which the change order was proper cannot be determined from the audit documents provided. A formal technical review of costs incurred for work performed should determine whether CIAP funds were spend for ineligible work activities (i.e., unreasonable costs, duplicate costs). We must defer to other HUD technical experts on matter of contract cost adjustments.

The audit documents do not reveal whether HUD's 5370 procedures were

followed. The Inspector General and PIH may consider this in their review of the housing authority's activities. The failure to follow these HUD procedures may have an effect on contract cost adjustments and provide the basis for remedial action.

The Inspector General's audit recommendation referral summary recommends repayment of the ineligible amounts from non-Federal funds. It should be noted that the statute of limitations for filing a suit against the contractor may have lapsed during the audit period. During the audit period, the housing authority may have relied upon the opinion of the HUD Field and Regional Offices which indicated that the change order was appropriate. However, the housing authority was under decontrol (and not required to submit contracts and change orders for HUD review) when the change order for asbestos removal was issued, and HUD did not advise or approve the change order. The housing authority is ultimately responsible for the repayment of ineligible amounts. It should also be noted that the housing authority may not have substantial non-Federal funds for repayment of ineligible amounts.

Although the architect concluded in his November 9, 1988 opinion that asbestos removal was part of the contract, he approved the change order for asbestos removal on February 6, 1989. Paragraph 8 of the HUD-5370 requires change orders to be countersigned by the architect. Justification for that action is not provided in the audit documents. The housing authority should consider further examination of the somewhat inconsistent actions of the architect as another possible option for a remedy.

Attachments