

STATE OF SOUTH CAROLINA)
)
 COUNTY OF JASPER)
)
 INTERNATIONAL PUBLIC WORKS,)
 LLC,)
)
 Plaintiff,)
)
 V.)
)
 JASPER COUNTY,)
)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 Docket No.: 2012-CP-27-442

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Amerced (CW)
 ORDER

Plaintiff ("IPW") contracted with Defendant ("Jasper County") on April 22, 2009 for certain renovations and additions to the Jasper County Courthouse at a cost of \$3,511,644.00. Watson Tate Savory Architects ("the Architect") administered the contract, pursuant to the terms of the contract entered into by the parties. The construction experienced delays, and, ultimately, the Architect assessed liquidated damages totaling \$40,500 against IPW (allocated as "Step One" liquidated damages of \$7,500.00 and "Step Two" liquidated damages of \$32,750.00). Thereafter, Jasper County withheld the amount of liquidated damages from its payments to IPW, but, otherwise, paid all amounts certified by the Architect to IPW.

Ultimately, IPW sued Jasper County and asserted a breach of contract claim for \$147,902.93, prejudgment interest, attorney's fees, and costs. This Court held a non-jury trial on May 12, 2015. After consideration of the evidence, testimony, and applicable law, the Court finds in favor of Jasper County, with the exception of requiring Jasper County to refund \$6,550.00 to IPW because of an erroneous calculation by the project Architect of the "Step Two" liquidated damages. This Order is pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedures and incorporates the 36 exhibits and the transcript of the May 12, 2015 trial.

FACTS

The parties agreed on most, if not all, of the relevant facts:

1. The parties contracted on April 22, 2009 for the renovations and additions of courthouse at a cost of \$3,511,644.00. Exhibit 1 (the "Contract").
2. The Contract included certain Supplementary Conditions. Exhibit 2.
3. Jasper County contracted with Watson Tate Savory, Inc. (Architects) to administer the Contract. Exhibit 3.
4. Watson Tate Savory served as the project manager for the project from inception to completion. Record, page 146, lines 1-20. J. Sanders Tate acted as project manager from inception through schematic design, and John McLean acted as the project manager from roughly the start of the design development stage through the end of construction. McLean visited the project initially once per month and twice a month as the project drew closer to completion. Record, page 152, lines 3-11. IPW's project superintendent Ann Johnson confirmed this schedule. Record, page 37, lines 7-11.
5. The Contract set forth the date for Substantial Completion as May 23, 2010 and the date for Final Completion as October 3, 2010. The Contract allowed IPW thirty days after Substantial Completion to complete any punch list items.
6. The Notice to Proceed was issued on April 28, 2009, and construction started in May 2009.
7. The project included six Change Orders. Exhibits 4, 5, 6, 7, 23, and 30.
8. Change Orders #1-2 are not relevant to the issues raised in the lawsuit. The parties agreed to Change Orders #1-2.
9. Change Order #3 added 42 days to the date for Substantial Completion, with new date established as July 4, 2010. The parties agreed to Change Order #3.
10. Change Order #4 added 31 days to the date for Substantial Completion.
11. Change Order #5 added 15 days to the date for Substantial Completion.
12. The date for Substantial Completion after including the additional days provided by Change Orders #3-5 became August 19, 2010.
13. Architect McLean determined the actual date for Substantial Completion to be September 3, 2010.

14. The final Certificate of Occupancy was issued on October 1, 2010.
15. The actual date for Final Completion as determined by architect McLean was February 11, 2011.
16. Architect McLean determined certain delays resulted from issues attributable to fault by IPW.....
17. Architect McLean assessed liquidated damages as follows:
 - Step One Liquidated Damages of \$7500.00:
 - 15 days from August 19, 2010 to September 3, 2010
 - \$500 per calendar day
 - Step Two Liquidated Damages of \$32,750.00:
 - 131 days from October 3, 2010 to February 11, 2011
 - \$250 per calendar day
18. Section § 3.3 of the Contract allowed "Step Two" Liquidated Damages of \$200.00 per calendar day, and Architect McLean and Jasper County concede IPW is entitled to a refund of \$6,550.00 for the incorrect calendar day assessment of \$250.00 per day versus \$200.00 per day.
19. Jasper County paid IPW all sums certified by the Architect.
20. The parties mediated the dispute, as required by the Contract.

CONCLUSIONS

1. The Architect, and not Jasper County, assessed the liquidated damages against IPW, as provided by the contract documents. The Contract included the following relevant provisions:

§ 3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than 360 days from the date of commencement, or as follows, subject to adjustments of this Contract Time as provided in the Contract Documents. *(Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)*

Step One: Liquidated damages of \$500 per calendar day for Substantial Completion.

Step Two: Liquidated damages of \$200 per calendar day for Final Completion.

ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be Three Million Five Hundred Eleven Thousand Six Hundred Forty-Four Dollars and Zero Cents, subject to additions and deductions as provided in the Contract Documents.

Section 4.1 of the Contract made Jasper County's obligation to pay IPW subject "to additions and deductions as provided in the Contract Documents." Accordingly, the Contract stipulated the "Contract Sum" would decrease based on any assessed liquidated damages and could increase based on any bonus payments.

Section 5.1.1 of the Contract required Jasper County to make "progress payments on account of the Contract Sum to Contractor" based "upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect." Pursuant to Section 4.2.5 of the "General Conditions," the Architect evaluated IPW's "Application for Payment" and "[would] review and certify the amounts due the Contractor and [would] issue Certificates for Payment in such amounts." The contract documents then required the Architect to either issue to the owner a Certificate for Payment "for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part..." Section 9.4.1. Pursuant to Section 9.5.1, the Architect could withhold a Certificate for Payment in whole or in part,

"...to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible ... because of:

.1 defective Work not remedied;

...

- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 persistent failure to carry out the Work in accordance with the Contract Documents.

The issuance of a Certificate for Payment by the Architect constituted a representation by the architect that the contractor was entitled to payment in the amount certified. Section 9.4.2. At that point, the contract required Jasper County to "make payment in the manner and within the time provided in the Contract Documents...." Section 9.6.1. IPW admitted Jasper County paid every penny for this project certified by the Architect. Record, page 108, lines 5-8. Further, IPW admitted the Architect did not approve the claims that formed the basis of IPW's lawsuit. Id., page 113, lines 2-16.

2. The test regarding whether a provision in a contract is for liquidated damages or is an unenforceable penalty was set forth by the South Carolina Supreme Court in Tate v. LeMaster:

Implicit in the meaning of 'liquidated damages' is the idea of compensation; in that of 'penalty,' the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957); see also Kirkland Distrib. Co. of Columbia, S.C. v. U.S., 276 F.2d 138, 145 (4th Cir. 1960). Moreover, "[w]hether such a stipulation is one for liquidated damages or for a penalty is . . . primarily a

matter of the intention of the parties." Tate, 231 S.C. at 441, 99 S.E.2d at 45; see also Benya v. Gamble, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App.1984), cert. granted, 284 S.C. 366, 326 S.E.2d 654, and cert. dismissed, 285 S.C. 345, 329 S.E.2d 768 (1985).

3. The Architect (John McLean) administered the contract and recommended Jasper County assesses liquidated damages against IPW. Record, page 146, lines 1-17; page 151, lines 12-19; page 203, lines 9-10. The Court concludes that McLean diligently and competently carried out his duties at this project and was a fair arbitrator of the disputes between IPW and Jasper County. McLean understood that the contract required him to resolve any disputes that may have arisen between the parties and that his decision would be binding. Id., page 151, line 20-page 15, line 2.

IPW conceded it had a good relationship with McLean, that McLean was "fair," that he was not rude or disrespectful, and that he did not show any bias against IPW. Record, page 37, line 12-page 38, line 10. McLean also testified about his role:

I don't have a dog in the fight. I'm not the person paying the bills. That's the owner. And I'm not the person doing the work. That's the contractor. I mean I - my reading of the general conditions is that the architect is to be a fair, impartial person, and I felt like I was fair, and I felt like I was impartial.

Id., page 175, line 21-page 176, line 2.

4. IPW's work suffered from delays. McLean testified about his frustration with delays and errors by IPW. He stated,

I mean, I was the person that did the drawings for the building. I'm the person who wrote the specs for the building. I worked with the County for more than a year to design it. And so, you know, I'm at advantage to walk onto the job site, and I kind of have the whole job in my head as to what things should look like. But on this project, it was sort of beyond the pale. I mean, we'd come down here, and there was just a lot of work that had to be torn out and reworked, and over time,

you know, I – it just got to be – it got to be burdensome to just come down and see – to see all the quality control issues that we had here.

Id., page 155, lines 4-15.

For example, McLean testified about concerns early in the project about the schedule and quality set forth by IPW. Id., page 147, line 14-page 148, line 8; page 148, line 12-page 22. McLean also testified about his surprise that IPW did not have a mechanical subcontractor committed at the time of the preconstruction conference. Id., page 148, line 23-page 149, line 15. McLean also cited concerns about IPW's failure to establish a proper "critical path schedule" for the project. Id., page 149, line 16-150, line 3.

McLean also recounted how IPW's initial electrical subcontractor quit the project "about halfway through the job" and improperly run electrical conduit. Id., page 150, line 4-page 151, line 11; page 154, lines 10-22. He also discussed concerns about quality with the brick masonry (Id., page 153, lines 1-19); rebar at the brick piers that support the enclosures behind the building (Id., page 153, lines 20-23); painting and finishing (Id., page 153, line 20-page 154, line 9); and the transformer (Id., page 154, lines 23-25). McLean also testified about how the courtroom "sat empty just for many months," how delays existed with the window orders, and that mold developed on the north wall which required some tear out of materials. Id., page 155, line 16-page 156, line 18.

McLean testified about three specific examples of how Jasper County attempted to address unacceptable work as, according to McLean, "things really drug on:"

(1) Jasper County accepted some glass throughout the building with scratches caused by the glazing subcontractor;

(2) Jasper County accepted a credit in lieu of requiring replacement of substandard trim around certain windows; and

(3) At some point about one month past substantial completion, IPW had to substitute the flooring material for the stairways because it had not ordered the specified flooring. Jasper County accepted a credit to avoid, as McLean testified,

"yet one more thing." Id., page 157, line 6-page 158, line 16. This last example illustrated to McLean "just reflective of the general level of challenge that we had with the management procurement and workmanship of the project." Id., page 159, line 25-page 160, line 2.

In addition, McLean testified that Jasper County self-performed certain work with the subfloor in the main courtroom and prep work for hardwood floors because IPW was "stretched too thin" or submitted an "exorbitantly high" Id., page 160, lines 3-18.

5. The record demonstrates the Architect's determination about Substantial Completion/"Step One" liquidated damages. The contract defined "Substantial Completion" as "the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." General Conditions § 9.8.1. Once IPW notified the Architect that the contractor considered the work to be substantially complete, the Architect would "determine the date or dates of Substantial Completion ..." Id. §§ 4.2.9, 9.8.2, and 9.8.3. Thereafter, "the Architect [would] prepare a Certificate of Substantial Completion, which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor ..., and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate." Id. § 9.8.4.

McLean testified that he attempted to "give the general contractor ... every benefit of the doubt" as he calculated the issues associated with "Step One" liquidated damages. Record, page 164, lines 4-6. The parties agreed that August 19, 2010 was the contract date for "Substantial Completion." However, McLean testified how IPW did not meet that date. He referenced "Field Report 31" (exhibit 12), which listed the explanations. As McLean stated, "I came down, and I remember the whole meeting was consumed with me looking and saying, 'You're not done. I can't - I can't call this substantially complete. This building cannot be used for its intended purpose.'" Id., page 168, lines 3-7. At that point, "the courtroom

was still all tore apart” and “not in any way or shape finished.” Id., page 169, lines 17-19. McLean labeled it “[a] construction zone. It looked like the general contractor was there with all his forces scrambling to try and get it done.” Id., page 169, line 25-page 170, line 3. In addition, “the building was ... very much in a state of being under construction” with missing finishes and an incorrectly installed transformer that would require the building not to have power for several days. Id., page 168, lines 8-23.

McLean also rejected IPW's claim that the building was substantially complete on August 19, 2010. Record, page 170, line 23-page 171, line 8. Ultimately, McLean determined the building to be substantially complete on September 3, 2010. Id., page 172, lines 15-18. The Architect then assessed “Step One” liquidated damages for the fifteen calendar days between August 19, 2010 and September 3, 2010, for a total of \$7500.00. Id., page 194, line 24-page 195, line 13. IPW argues that additional work should have pushed the substantial completion date to October 4, 2010; however, the Court finds sufficient evidence to support the Architect's decision on this issue.

6. The record demonstrates the Architect's determination about Final Completion/”Step Two” liquidated damages, with one change in the calculation of the amount assessed. The contract stated: “Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment” General Conditions § 9.10. The contract required “final payment” to IPW after “a final Certificate for Payment [was] issued by the Architect.” Contract § 5.2.1.2.

McLean testified that the building “still had a lot of work to be done” as of September 3, 2010 when he granted Substantial Completion. Record, page 177, lines 5-10. He said he “spent that first early day doing substantial completion

punch list on the first floor, and ... two or three days doing substantial completion for the balance of the building." Id., page 177, lines 10-14; exhibit 15. He called that "very unusual." Id., page 177, lines 15-16.

McLean testified the "contents of Change Order 5 probably best illustrate[d] what was in discussion and the items that were still open and had to be resolved." Id., page 179, lines 11-14; exhibit 28. Change Order 5 dealt with selected items from June 29, 2010 through February 17, 2011. Id., page 181, lines 2-6. That change order also resulted from the Architect's review of IPW's Application for Payment No. 18, and stated "[b]ased on numerous discussions with both the county and IPW on several different occasions we have withheld our certification of payment until the final completion punch list was sufficiently complete for the county to feel comfortable stopping tier 2 liquidated damages and consent of surety was received." See Exhibit 28. The Architect then issued Change Order No. 5 on or about March 29, 2011 detailing the liquidated damages assessment. Exhibit 28.

The parties agree that the contract date for "Final Completion" was October 3, 2010. Architect McLean determined the actual date for "Final Completion" was 131 days later (on February 11, 2011), and the Architect assessed "Step Two" liquidated damages that totaled \$32,750.00 for that delay. Record, page 195, lines 14-24. McLean testified he had "ongoing discussions for more than a year" with IPW about liquidated damages at the time Change Order 5 was issued. Id., page 196, lines 13-22. IPW challenged the determination and McLean rejected those claims. Id., page 197, line 9-198, line 25.

As mentioned, IPW is entitled to \$6,550.00 refunded because of a calculation error. The Court also does not accept IPW's argument that Jasper County's conduct resulted in any significant prejudice to IPW with regards to the assessment of liquidated damages or to the overall completion of the project. As mentioned, architect McLean performed significant design and oversight roles and was in the best position to fairly evaluate the claims and issues, and the Court accepts his determinations.

Moreover, any issue with any delay about the "smoke purge system" for the prisoner holding cell did not alter the final determination by the Architect. IPW argued a "long delay" existed in fall 2010 without direction about the smoke purge. Id., page 18, line 23-page 19, line 20. However, the smoke purge system resulted in no more than 3-4 days of work and, as admitted by IPW, did not affect the overall project. Id., page 183, line 23-page 185, line 2; page 113, lines 17-25. Further, section 8.3 of the Contract grants the Architect the responsibility to extend any "Contract Time," and the testimony showed that the Architect did just that. The case law provided by Plaintiff argued that contractors are not responsible for liquidated damages when the governmental entity causes the delay; however, the testimony showed that any so-called delay by Jasper County paled in comparison to the numerous delays and issues caused solely by IPW. Further, the Court accepts the testimony by Architect McLean that he considered all factors, tried to get the benefit of the doubt to IPW, and worked through significant delay issues caused only by IPW and/or its subcontractors. The testimony supported McLean's position that he did not assess liquidated damages for any delays that resulted from non-IPW parties.

7. Alternatively, the Court concludes the Architect's determination about liquidated damages is binding, pursuant to the contract. The Contract between IPW and Jasper County included a provision that liquidated damages would be part of the final calculation of the "Contract Sum." Contract §§ 3.3 and 4.1. In addition, specific provisions of the Contract documents placed decisions about additions or subtractions to the "Contract Sum" with the Architect. Pursuant to Section 4.4.5 of the General Conditions, "[t]he Architect [would] approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both." The Architect assessed the liquidated damages and later reviewed IPW's dispute regarding the assessment of liquidated damages, and denied the claim.

Section 4.4.5 also stated: "The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation or arbitration." In addition, section 4.3.6 of the General Conditions stated that "[i]f the Contractor believes additional cost is involved for reasons including but not limited to ... (4) failure of payment by the Owner, ... Claim shall be filed in accordance with this Section 4.3." As shown, at no point before IPW filed this lawsuit (on July 16, 2012) did IPW file a written claim against Jasper County or the Architect alleging that the Architect did not timely assess liquidated damages. In addition, IPW admitted the Architect rejected and/or did not accept its challenges to the recommendations about the liquidated damages.

8. IPW did not prove its claim that Jasper County improperly withheld access to the building. IPW argued that the Architect improperly recommended "Step Two" liquidated damages because Jasper County denied it access to the building for a significant period of time before February 11, 2011. The Architect, testified, however, that Jasper County allowed access as well as it could under the circumstances that the building was a working courthouse with certain security issues. Record, page 203, line 21-page 204, line 8; page 193, line 3-page 194, line 21. IPW confirmed that Jasper County would not allow unsupervised access to the building because of security issues with court files and private offices. Id., page 94, line 25-page 95, line 16. In addition, IPW's Johnson contradicted IPW's claim that it did not have access to the courthouse on certain dates in December 2010 and January-February 2011. Id., page 43, line 21-page 46, line 6. The Court finds that IPW did not meet its burden of proof on this issue.

CONCLUSION

This Court finds in favor of Jasper County, with the caveat that Jasper County refund \$6,550.00 of the assessed "Step Two" liquidated damages.

 South Carolina



8/23, 2016

Judge Carmen T. Mullen