IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

RAUSCH CONSTRUCTION COMPANY, INC.,	)	
Plaintiff,	)	
v.	)	**Case No. 07 CH 4269** **(transferred to Law Division)**
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO	)	**Honorable Charles R. Winkler**
Defendant.	)	

MEMORANDUM – DECISION & ORDER

This is an action by Rausch Construction ("Plaintiff") against the Metropolitan Water Reclamation District ("Defendant") for breach of contract.

On November 20, 2003 the District awarded Contract 97-362-1S "O'Hare TARP Drop Shaft 5 Rehabilitation (the "Contract") to Rausch Construction Company (hereinafter "Rausch"). The Contract required Rausch to: 1) rehabilitate the District's Drop Shaft 5 by reconstructing and repairing Drop Shaft 5's vent chamber, re-lining the vent and drop shafts, and installing a louver system in the vent chamber; and 2) construct an odor control structure adjacent to Drop Shaft 5. The Contract contained a Time is of the Essence Clause.

Under the Contract, Rausch was to begin work on December 11, 2003 and was to complete work, including punchlist items and final cleanup, by December 5, 2004. There were numerous delays on the project, ultimately resulting in the Defendant assessing liquidated damages against the Plaintiff and declaring the contract forfeit on November 30, 2006. The case proceeded to a bench trial on October 26, 2009.

Summary of the Evidence

The Plaintiff's central contention is that the delays on the project were overwhelmingly caused by the Defendant and that therefore the declaration of forfeiture and assessment of liquidated damages was wrongful and a breach of contract. The Parties presented competing fact and expert witnesses.

The purpose of the project, as already indicated, was to rehab a drop shaft and install a device to reduce or eliminate a serious odor control issue. The Defendant was responsible for the selection and design of the odor control device. The device was ready to use on January 23, 2006. An operational test began on April 1, 2006 and was halted on May 23, 2006. It was found that the device functioned but was, in fact, too small to adequately control the emissions of sewer gas. This issue was unrelated to the Plaintiff's work. The Defendant's design was inadequate. The inadequacy of the unit led the Defendant to ultimately cap the dropshaft, rendering the entire project fruitless.

Despite the availability of both telephone and email, almost all communications between

the parties in this time sensitive contract occurred through letters. There is very little evidence of verbal communications during the two plus year duration of the project.

The contract was declared substantially complete on March 31, 2006. On November 30, 2006 the Defendant declared the contract forfeit.

The evidence shows that the project, originally slated as a one-year project, took two and a half years to complete. The testimony establishes that there were 469 days of unallocated delay on the project. The Defendant was responsible for 293 of those days.

A preliminary punchlist was provided on February 17, 2006. A final punchlist was provided June 23, 2006.

The evidence also shows that the Plaintiff did not timely submit numerous required submittals.

Legal Findings

Breach of Contract

To establish a cause of action based upon a breach of contract, Plaintiff must allege and prove: (1) the existence of a valid and enforceable agreement; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) damages caused by the breach. W.*W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752 (1st Dist. 2003). The plaintiff has the burden to prove each element by a preponderance of the evidence. *See Mannion v. Stallings & Co.*, 204 Ill. App. 3d 179, 186 (1st Dist. 1990).

Under the doctrine of substantial performance, the general rule regarding building contracts is that a builder is not required to perform perfectly, but rather is only held to a substantial performance in a workmanlike manner. *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.*, 132 Ill. App. 3d 260264 (1st Dist., 1985). However, a purchaser who receives substantial performance is entitled to an offset for defects in what he receives as compared to what strict performance would have given him. *See id.*

The Court has considered the testimony of Mark Evans and Robert Brown, the experts employed by the Plaintiff and Defendant, respectively. Both witnesses supported the positions of their respective employers. In arriving at its legal findings, the Court gave more weight to the Plaintiff's expert than the Defendant's. Mr. Brown worked for the Defendant from 1974 through 1996. Mr. Brown testified that he often provides expert testimony to the Defendant and that it would not be, in his words, "in the best interest to go against the district"

Having reviewed the relevant evidence, the Court concludes that both parties were at fault for the delays involved in this project at various times, but that the Defendant was more responsible for the delays than the Plaintiff.

Brown concluded that the Defendant would not have declared a forfeiture if the Plaintiff had not expressed its intent to finish the punchlist. In effect, this means that it would have been better for the Plaintiff to have walked away from the Project on the date of substantial completion rather than expressing its intent to perform the cleanup and suffering the forfeiture.

The Court concludes, after weighing the relevant evidence, that the Defendant breached the contract. The declaration of forfeiture and certain assessments of liquidated damages were not proper. Article 28 of the contract allows the Defendant to declare a forfeiture when the Chief Engineers deems that a contractor has failed financially, or abandons the project. The Plaintiff neither failed financially nor did it abandon the project prior to substantial completion or

otherwise.

The Plaintiff's expert set the amount of damages at $668,691.35 after giving the Defendant credit for payments, back charges and non-contested liquidated damages. In addition to the liquidated damages that the Plaintiff acquiesced to, the Court has determined that it incurred other liquidated damages as well.

First, the Plaintiff was late on numerous schedule and work plan submissions. These resulted in liquidated damages of $18,550. Second, the Plaintiff failed to complete the punchlist given to them in February and again in June. This is acknowledged in the Plaintiff's Expert Report when they give the district credit for unfinished items. Per Article 24, the Court assesses liquidated damages in the amount of $24,400 for the 244 days that that the punchlist went uncompleted from the date of substantial completion (March 31, 2006) through the date of forfeiture (November 30, 2006). These assessments are in addition to the liquidated damages acknowledged in the Plaitniff's calculations and will be set off against that amount. Thus, the Plaitniff's total damages are $625,741.35.

This determination does not end the Court's analysis as the Plaintiff has requested an award of prejudgment interest according to the Prompt Payment Act.

Plaintiff's Request for Interest Pursuant to the Prompt Payment Act

The Local Government Prompt Payment Act, 50 ILL. COMP. STAT. 505/1 *et seq.* (LGPPA), provides that a local governmental agency receiving services must approve or disapprove a bill from a contactor for services furnished to the agency within thirty (30) days after the receipt of such bill is received, or thirty (30) days after the services were received, whichever is later. *See* 50 ILCS 505/3 (West 2006). If one or more items on a construction related bill are disapproved, but not the entire bill or invoice, then the portion that is not disapproved shall be paid. *See id.* If the governmental entity does not make payment within the prescribed thirty (30) day period, an interest penalty of one percent (1%) of any amount approved and unpaid shall be added for each month or fraction thereof after the expiration of the 30 day period, until final payment is made. *See* 50 ILCS 505/4 (West 2006). There is little to no case law that interprets or applies this Act. The Plaintiff wants to the Court to insert into the statutory scheme a wrongful disapproval provision. The Court will not do so and as such denies the Plaintiff's request for pre-judgment interest.

ORDER

The Court hereby finds in favor of the Plaintiff and against the Defendant in the amount of $625,741.35.

The Court hereby finds that the Plaintiff is not entitled to prejudgment interest.

ENTERED
JUDGE CHARLES R WINKLER-1804
DEC 17 2009
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Entered,

Judge Charles R. Winkler