UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

NORTH AMERICAN MECHANICAL, INC.,

Plaintiff,

vs. Case No. 12-cv-598

WALSH CONSTRUCTION COMPANY II, LLC,

Defendant.

DEFENDANT'S PRETRIAL REPORT

Defendant, Walsh Construction Company II, LLC ("Walsh" or "Defendant") respectfully submits the following Pretrial Report pursuant to this Court's Trial Scheduling Order, dated December 23, 2014, and Civil L.R. 16(c).

I. SHORT SUMMARY OF FACTS, CLAIMS AND DEFENSES

Walsh served as general contractor for the renovation and expansion at the Mercy Walworth Hospital and Medical Center in Lake Geneva, WI ("Mercy") which commenced in 2010 (the "Project"). This case arises from disputes arising under the Subcontract Agreement ("Subcontract") between Walsh and North American Mechanical, Inc. ("NAMI") for the performance of NAMI's HVAC and plumbing work at the Project.

The comprehensive Subcontract included specific claim notice requirements and a clause prohibiting the recovery of damages for delay. NAMI alleges that its work commenced on June 11, 2010, filed suit on June 12, 2012, and asserts damages for work allegedly continued through at least February 28, 2013. The Project, in fact, took longer than expected, and NAMI seeks to recover for alleged additional costs incurred through a breach of contract action.

NAMI's claims include:

1) costs for certain work it asserts should have resulted in change orders totaling approximately $805,572.00 ("Changed Work Claim");

2) costs for alleged delays and interference to its work totaling $1,747,326.00. ("Inefficiency Claim");

3) costs for additional general conditions in the amount of $201,397.73 ("General Conditions Claim").

Walsh contends it did not breach the Subcontract and does not owe the claims because of – *inter alia* – the following defenses:

(a) the Owner did not certify additional change work amounts and has rejected disputed changes;

(b) NAMI waived all of its claims except for a reserved balance of $278,625.00 which is not yet due under the Subcontract pay application process;

(c) the language of the Subcontract bars the Inefficiency Claim;

(d) NAMI did not provide timely notice of its claims as required by the Subcontract; and

(e) the Inefficiency Claim damages are founded upon unreliable and inadmissible expert opinions.

II. STATEMENT OF THE ISSUES

A. LIABILITY

1. NAMI's Changed Work Claim

a. The Court Must Determine if Walsh Breached the Subcontract Despite the Owner and Architect Rejecting NAMI's Change Order Requests.

The parties' Subcontract Section 11.3 governs change requests in any way relating to or arising from any act or omission of the Owner or Architect/Engineer or involving the Contract Documents, including the construction drawings. Article 11.3 of the Subcontract provides that, in the event of such a dispute, NAMI agreed to be bound to Walsh to the same extent that Walsh

is bound to Mercy. Walsh is not liable to NAMI in excess of any sum received by Walsh from Mercy on behalf of NAMI, and Walsh is required to pay NAMI only if Mercy pays Walsh. Moreover, NAMI was required to submit such a claim to Walsh, which was obligated to pass any such claim on to Mercy only if Walsh could certify the Claim in good faith.

It is undisputed that NAMI's remaining change requests were discussed with the Architect and Owner during the Project and rejected. Therefore, because the Court has determined in its summary judgment Decision that certain items of the Changed Work Claim may fall outside the scope of provision 11.3, the Court must determine which items those are and whether Walsh has somehow otherwise breached the agreement as it relates to those costs.

b. The Court Must Determine Whether the Changed Work Claim [and the Inefficiency and General Conditions Claims, for that matter]Has Been Waived Except for $278,625.00.

NAMI submitted a Partial Waiver and Release of Claims for Payment form ("Partial Waiver and Release") along with each of its Application and Certification for Payment packet. The Partial Waiver and Release form was attached as Exhibit I to the Subcontract, which required that, "as a prerequisite for payment, [NAMI] shall provide waivers and affidavits from [NAMI] in a form as shown in an Exhibit to this Agreement[.]"

The Partial Waiver and Release form stated that NAMI waived and released Walsh from all suits and claims for payment for work performed "on the above-described Project from the beginning of time through the date indicated below, including extras." Article 12.5 of the subcontract permitted changes to or alterations of the contract only through a writing signed by both parties.

NAMI submitted its first four requests for payment using the Partial Waiver and Release form attached to the subcontract. However, in a request for payment dated January 3, 2011, NAMI added to the end of the form, in the same typeface used on the rest of the form, the

phrase, "with the exception of all previously made claims in writing." This reservation clause was included in eight additional requests for payment. Later, NAMI began adding a longer reservation statement that said, "...with the exception of all previously made claims in writing and retainage, such claims for extra work and impacts and retainage being specifically reserved by the Undersigned."

The last Partial Waiver and Release form that NAMI submitted to Walsh was dated January 27, 2014 and showed a balance due to NAMI of $278,625. <u>None of the alterations were approved by Walsh, or brought to Walsh's attention</u>.

Consequently, the Court must determine whether the parties had agreed to alter the contractual requirement that claims be waived in their entirety as a prerequisite for payment. If they did not, the Changed Work Claims (as well as the Inefficiency and General Conditions Claims) have been waived.

2. <u>NAMI's Inefficiency Claim</u>

a. Unless NAMI Proves: i) a Cardinal Change, and/or ii) Fraudulent Conduct, Bad Faith, or Orders Resulting from Inexcusable Ignorance or Competence, there is No Contractual Right to Recover Damages for Delay.

The Subcontract bars delay damage claims. The subject provisions are – *inter alia* –2.1 , 4.4, and 5.1. These empowered Walsh to direct the sequence and pace of NAMI's work, including overtime, without monetary compensation to [NAMI]. NAMI expressly waived and released the right to recover costs beyond the Subcontract Price as a consequence of delay, hindrance, interference or other similar events even if caused by Walsh.

Under Wisconsin law, a "no damages for delay" clause is enforceable to the extent that the party seeking protection of it is not guilty of intentional wrongdoing or gross negligence. John E. Gregory & Son, Inc. v. A. Guenther & Sons Co., 147 Wis. 2d 298, 304, 432 N.W.2d

584, 586 (1988). Consequently, only three types of delay are not covered by a "no damages for delay" clause; delays resulting from:

> (1) fraudulent conduct;
>
> (2) reason of orders made in bad faith, and
>
> (3) reason of orders unnecessary in themselves and detrimental to the contractor and which were the result of inexcusable ignorance or incompetence.

Id. at 304, 432 N.W.2d at 586 (citing *First Sav. & Trust Co. v. Milwaukee Cnty*., 158 Wis. 207, 240, 148 N.W. 1093, 1093 (1914)).

Consequently, to even avail a claim for delay damages, NAMI carries the burden to demonstrate either: 1) Walsh required NAMI to perform work materially different from that which it contracted to perform (a "cardinal change")[1], and/or 2) fraudulent conduct, bad faith, or orders resulting from inexcusable ignorance or incompetence on the part of Walsh. If the burden is not met, all delay claims are barred.

b. Unless NAMI Proves that it Followed the Subcontract's Strict Notice Requirements, its Inefficiency Claim is Waived under the Subcontract.

NAMI did not seek accommodations due to alleged delay within the time limits required by Subcontract Section 4.3, which states that "all claims must be made by written notice to the Contractor within one week of the Subcontractor's first knowledge of the event." NAMI

[1] A cardinal change has been defined as one which cannot be redressed within the contract by an equitable adjustment to the contract price. *Allied Materials & EquiDment Co., Inc. v. United States, 569 F.2d 562, 215 Ct.Cl. 406 (1978)*. The purpose of the "cardinal change" doctrine is to provide a remedy for contractors who are directed by the government to perform work which is not within the general scope of the contract, and fundamentally alters the contractual undertaking of the contractor., *Edward R. Marden Corp. v. United States, 194 Ct.Cl. 799, 808, 442 F.2d 364, 369 (1971)*. The basic standard is whether the directed change comprises "essentially the same work as the parties bargained for when the contract was awarded." *Araaona Construction Co. v. United States, 165 Ct.Cl. 382, 391 (1964)*.

contends that its work was delayed from the beginning of the Project; however, NAMI has produced only ten documents which purportedly seek extensions of time, ranging from May 9, 2011 to January 14, 2013. This is nearly one calendar year after the first alleged "delay" incurred at "the beginning of the project." Furthermore, the first notice of an inefficiency and acceleration claim value is included in a letter from NAMI's attorney dated January 9, 2012. This is two years after the alleged delays commenced. There are no documents furnishing written notice of extension requests or delay claims within seven days as required by the Subcontract. Consequently, the Court must determine whether NAMI was non-compliant. A finding of non-compliance bars NAMI's claims.

3. NAMI's General Conditions Claim

NAMI contends changes, management, delays and extended performance by Walsh, NAMI was on the Project 479 calendar days longer than contemplated in its bid. Mr. Spittler concludes that NAMI is entitled to additional general conditions costs in the amount of $201,397.73. The Court must determine whether the foregoing contractual defenses bar these claims, and if not, whether NAMI incurred any "General Conditions" costs as a result of the alleged delay.

B. DAMAGES

If the Court finds that Walsh has breached the terms of the Subcontract, it must determine whether NAMI is owed compensatory damages. NAMI contends it is owed for certain change orders, $2,000,000.00 per the "total cost method" of calculating damages, and for sums incurred as a result of excess general conditions. Consequently, the Court must determine whether NAMI satisfied each element of the "total cost method."[2]

1. Total Cost Method

Under the total cost method of calculating damages, the measure of damages is the difference between the actual cost of the work and the amount bid. *Raytheon Co. v. White,* 305 F.3d 1354, 1365 (Fed. Cir. 2002). But the method has been viewed with disfavor, in part because it could reward both bidding inaccuracies, which can reduce the contractor's estimated costs, and performance inefficiencies, which can inflate actual expenditures. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861-62 (Fed. Cir. 1991).

In rejecting the method of calculating damages, the Court determined that total costs cannot be generally accepted as the end for determining an equitable adjustment in a fixed priced contract because it would undermine prospective costing approach and negate the contract's basic incentive character; pure total cost method, even when applied to selective items, would allow for correction of bidding errors and reward possible inefficiency. *Id* at 6. *Fattore Co., Inc. v. Metropolitan Sewerage Commission of the County of Milwaukee*, 505 F.2d 1, 5 (7th Cir. 1974). The court will use any other method to calculate damages before it will accept a total cost approach. See *Skip Kirchdorfer, Inc. v. United States*, 14 Cl. Ct. 594, 606 (1988)(where the court declined to use the total cost method where the plaintiff could show a direct correlation between its bid price and services it provided; the Court noting the total cost method is "tolerated only when no other mode of recovery (is) available." *Skip Kirchdorfer, Inc.*, 14 Cl. Ct. at 605. Total cost claims will be rejected if it is possible to estimate separately or segregate actual costs due to the breach. See, *M.A. Mortenson Co.*, ASBCA 49917, 97-1 BCA 28886.

Thus, "[b]efore a contractor can obtain the benefit of the total cost method, it must prove:

(1) the impracticability of proving its actual losses directly;

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[2] The "modified total cost approach" has not been pled or introduced by NAMI in presenting its claim. The record is, and must remain, barren of such an itemization.

(2) the reasonableness of its bid;

(3) the reasonableness of its actual costs; and

(4) the lack of responsibility for the added costs.

Propellex Corp. v. Brownlee, 342 F.3d 1335, 1339 (Fed. Cir. 2003).

The contractor bears an extremely stringent burden of proof in satisfying the four requirements. *See Neal & Co. v. United States*, 36 Fed. Cl. 600 (1996).

NAMI has presented its total cost methodology and itemization through its retained expert, Mr. Spittler. As the Court is aware, Walsh contends that Mr. Spittler's opinions are inadmissible and fail to satisfy NAMI's "stringent burden.

III. WITNESSES

1. Mr. Jeff Spiller

Mr. Spiller was Walsh's Project Manager at Mercy.

2. Mr. Aaron Bossow

Mr. Bossow was Walsh's Superintendent at Mercy.

3. Mr. Steve Cook

Mr. Cook was Walsh's BIM Coordinator at Mercy.

4. Ryan Mack

Mr. Mack was Walsh's Assistant Project Manager at Mercy.

5. Ms. Myleen Passini (Adversely)

Ms. Passini was/is NAMI's Corporate Secretary and Controller.

Defendant expressly reserves the right to call as witnesses at the trial of this action any persons listed by plaintiff on its witness list. Defendant further reserves the right to amend or supplement this list or call rebuttal witnesses as may be necessary.

IV. EXPERT WITNESSES

1. Mr. Richard Ott, PE

A copy of Mr. Ott's CV is attached hereto.

V. **<u>EXHIBITS</u>**

Defendants Exhibit List is provided separately herewith in accordance with the scheduling order. Defendant reserves the right to offer any of the exhibits listed by plaintiff in its pretrial report. Defendant also reserves the right to amend this list based on the evidence presented by plaintiff at trial.

VI. DEPOSITIONS

Walsh does not intend to offer portions of any deposition transcripts as substantive evidence at trial, reserving the right to use deposition transcripts to impeach witnesses called by plaintiff.

VII. LENGTH OF TRIAL

The Court has allotted five days.

VIII. ***VOIR DIRE*, JURY INSTRUCTIONS, AND PROPOSED VERDICT FORM**

This being a trial to the Court, *voir dire* questions, jury instructions, and verdict forms are inapplicable. Rather it is expected that the Court will provide a decision and order containing findings of fact and rulings of law.

Dated this 20th day of April, 2015.

s/JOSHUA B. LEVY
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