PSBCA Nos. 3338 & 3372

November 01, 1994

Appeal of
L.A. CONSTRUCTION, INC.
Under Contract No. 284218-92-B-0214
PSBCA Nos. 3338 & 3372

APPEARANCE FOR APPELLANT:
Mohsen Loghmani

APPEARANCE FOR RESPONDENT:
Nancy E. Slovik, Esq.

OPINION OF THE BOARD

Appellant, L.A. Construction, Inc., has appealed from the default termination of its contract to perform miscellaneous repairs at the Rolla, Missouri Post Office. In addition, Appellant has appealed from the denial of several claims for costs incurred in connection with work performed by Appellant that was allegedly beyond the contract requirements. Both entitlement and quantum are at issue in these appeals.

FINDINGS OF FACT

1. Contract No. 284218-92-B-0214, for miscellaneous repairs at the Rolla, Missouri Post Office, was awarded to Appellant by Respondent, United States Postal Service, on February 19, 1992. The contract work consisted of roof repairs; miscellaneous interior repairs, including the replacement of four pairs of loading dock doors; and repairs to the parking areas, including the removal and replacement of concrete pavement in specified areas and sealing or resealing cracks in some areas of concrete that were not to be replaced. The initial contract price was $73,870 and contract completion was required by June 27, 1992. (Appeal File Tab (AF) A; Respondent's Exhibit (Resp. Exh.) 35).

2. Through two contract modifications, Appellant was required to remove unstable soil discovered beneath the original areas of concrete pavement and to replace that soil with new "compacted earth base material." In addition, two new areas of concrete pavement replacement were added to the contract. The two modifications increased the contract price to $99,990.22. The completion date and all other terms and conditions of the contract remained unchanged. (AF G, H).

Parking Lot -- Concrete Slabs

3. The contract specifications contained the following provisions relevant to this dispute:

"SECTION 02520 - PORTLAND CEMENT CONCRETE PAVING

* * *

Forms: Steel, wood or other suitable material of size and strength to resist movement during concrete placement and to retain horizontal and vertical alignment until removal. Use straight forms, free of distortion and defects.

***

Concrete Mix, Design and Testing: ... Design mix to produce normal weight concrete ... [having] the following properties:

Compressive Strength: 3,500 psi, minimum at 28 days....

***

Expansion Joints: Provide premolded joint filler for expansion joints abutting concrete curbs, catch basins, manholes, inlets, structures, walks, and other fixed objects, unless otherwise indicated....

Extend joint fillers full width and depth of joint and not less than 1/2 inch or more than 1 inch below finished surface where joint sealer is indicated....

Concrete Finishing:

***

Protect and cure finished concrete paving, complying with applicable requirements of Division 3 sections....

SECTION 03300 - CAST-IN-PLACE CONCRETE

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Form Materials: As follows:

Provide form materials with sufficient stability to withstand pressure of placed concrete without bow or deflection.

***

Concrete Placement:

***

Protect concrete from physical damage or reduced strength due to weather extremes during mixing, placing, and curing.

***

Curing: ...Provide protection as required to prevent damage to exposed concrete surfaces." (AF A-3).

4. The specifications also required that the resulting concrete have a uniform, smooth surface (AF A-3 (pp. 94, 98)).

5. The contract drawings and specifications required that expansion joints between concrete sections be constructed "true to line" with a width of one-half inch and that backer rod material be inserted in the joint leaving a space one-quarter inch deep above it. Sealer material was to be applied in the space remaining above the backer rod. (AF A-3, A-5). The sealer material was intended to adhere to the concrete sides of the joint to prevent water from entering the joint and flowing under the concrete (Transcript page (Tr.) 169-70).

6. At a preconstruction conference held on February 27, 1992, the parties agreed that the concrete replacement would be accomplished in three phases, so as to minimize the impact on vehicle movements at the post office. Phase one, the work at issue here, consisted of approximately one-half of the total. (AF B; Tr. 21).

7. The phase one concrete was poured in mid-March 1992 (Tr. 21/22; AF I; "Postmaster's Repairs & Improvement Progress Reports" dated 13 March and 16-20 March 1992 (attachments to the Complaint)).[1] The day the concrete was poured, Appellant's workers covered it with plastic sheeting held down with small pieces of brick. Appellant's workers also placed some clay soil near a downspout from the roof in an attempt to divert any water from the roof away from the new concrete. There was rain during much of the following night. In the morning, Respondent's building maintenance employee at the post office discovered that the plastic sheeting was no longer covering the concrete, having apparently been blown off to the side during the night, and that rain was falling on the new concrete. Further, the soil intended to divert water from the downspout had washed away, allowing water from the downspout to flow across the new concrete. The employee attempted to replace the cover with the aid of a colleague, but the record does not indicate whether he was successful. Appellant's employees were not present at the time. (Tr. 215-218, 231-237).

8. By May 1992, two months after the phase one concrete was poured, the surface of the concrete was severely eroded and soft in places -- i.e., there was an apparent lack of adhesion between the materials making up the concrete, as evidenced by the ability to sweep up easily both powdered cement and aggregate materials from the surface (Tr. 20, 23, 158, 221; Resp. Exh. 5, 14, 24; Report of Anderson & Associates dated June 30, 1992 (attachment to the Complaint)). This condition can be caused by allowing water to get onto the surface of the concrete during the first part of the curing process (Tr. 22). Within four or five months after the phase one concrete had been placed, the top or "wearing" surface had eroded and the interior of the concrete was exposed to accelerated deterioration. Based on the testimony of Respondent's architect, we conclude that the useful life of the concrete had been reduced by five to ten years because of this condition. (Tr. 67-69). No similar problems occurred with the concrete poured during phases two and three (Tr. 191).

9. Appellant used expansion joint material, rather than more rigid metal or wood, to construct the forms used in pouring the phase one concrete. The weight of the concrete pushed the material out of alignment and caused some of the expansion joints to be crooked rather than true to line as required by the contract drawings and specifications. (Tr. 43, 170, 224-226; Resp. Exh. 10, 22; AF K, p.162; Finding 5, above).

10. Appellant did not use the backer rod required by the contract drawings (see Finding 5, above) before sealing the concrete expansion joints because Appellant's president did not believe that the use of backer rod in this situation was appropriate. Instead, Appellant placed sand in the space between the concrete slabs before installing the sealer material. (Tr. 42, 296, 306, 307; Resp. Exh. 9). Appellant did not request the Contracting Officer's approval to deviate from the contract requirements (Tr. 163, 307). In a number of joints the sealer material did not adhere to the concrete (Tr. 24, 27; Resp. Exh. 9). In a number of places the sealer material gave the appearance of having overflowed the joints and having spread over the surface adjacent to the joints. Further, in a number of places the expansion joints were considerably wider than the one-half inch shown on the drawings. (Tr. 24; Resp. Exh. 14).

11. On June 16, 1992, Appellant's president met with, among others, the Contracting Officer's Representative (COR) and representatives from Respondent's contract architect/engineer firm. At the meeting, Appellant's president was informed that, because of deficiencies in the concrete, Appellant would be required to remove and replace all of the concrete it had installed on the project. The direction to remove and replace the concrete was not limited to the phase one concrete in which erosion had been found, but was addressed to all three phases. The direction to replace the concrete was repeated in a letter, dated June 19, 1992, from the COR to Appellant. The letter informed Appellant that if it disagreed with the direction, it could request a final decision from the Contracting Officer. (AF I; Resp. Exh. 16).

12. By letter dated June 19, 1992, and titled "NOTICE OF IMPENDING TERMINATION," the Contracting Officer advised Appellant that termination was being considered because of Appellant's failure to perform and because of a June 17, 1992 letter in which Appellant apparently stated that it had stopped work.[2] The Contracting Officer listed eight deficiencies in the concrete work at the facility. Included in the list were deficiencies related to the erosion and general workmanship of the phase one concrete, problems with joint sealing, and uneven joints (where the new concrete joined existing concrete) that created tripping hazards. Appellant was given ten days in which to respond and demonstrate that its failure to perform was without its fault or negligence. (AF J).

13. By letter dated June 22, 1992, Appellant's president responded to the Contracting Officer, stating his position with respect to the eight points raised in the June 19, 1992 letter. In essence, Appellant maintained that it had installed concrete in phase one that met the workmanship requirements and met all the functional requirements of texture, strength, and durability. Appellant agreed to repair any areas in which the joints were not flush or where there were problems with joint sealing, but insisted that the overall quality of the phase one concrete was acceptable. Appellant also proposed that an independent expert test the concrete using non-destructive testing or core sampling to determine the strength of the concrete and whether the concrete met all functional requirements. (AF K).

14. At the end of June both parties hired outside consultants to evaluate the quality of the concrete on the project (AF M; Resp. Exh. 20). The cost to Respondent for the work performed by its consultants was $3,068.94. Of this amount $809.75 was paid to a testing laboratory for compressive strength tests of concrete cores; $1,510.61 was paid to an engineering firm that supervised the tests, inspected the site and evaluated the results; and $748.58 was paid to an engineer who supervised taking the concrete cores for testing. (Resp. Exh. 36).

15. The average compressive strength of the core samples was 4,243 psi, with a minimum recorded strength of 3,872 psi. Therefore, notwithstanding any other deficiencies, the concrete installed by Appellant met the contract strength requirement of 3,500 psi. (AF P).

16. Both consultants concluded that removal and replacement of the concrete was not necessary, but both recommended that certain remedial actions be taken (Report of Anderson & Associates dated June 30, 1992 (attachment to the Complaint); AF O).

17. In a July 28, 1992 letter to Appellant, the Contracting Officer agreed that the concrete strength requirements had been met. However, based on the report of Respondent's consultant, the Contracting Officer noted that there were still deficiencies in the work, such as poor surface finish, patch work used to level the surface and fill voids, misaligned joints, improper sealants and sealant failure, and surface sanding. The Contracting Officer agreed that the work would be accepted by the Postal Service if corrective actions were taken and a significant price reduction was made because of poor workmanship and additional testing costs incurred. The Contracting Officer directed Appellant to contact him to arrange an on-site meeting to review the project and negotiate a final resolution. (AF P).

18. At some time between July 16 and August 12, 1992, Appellant applied a product called "Thinpave" to portions of the phase one concrete (Tr. 51/52; AF Q). Thinpave is a compound intended for patching or resurfacing concrete and requires a sound, clean surface free of loose dust, dirt and debris for its application (Thinpave data sheet (attachment to the Complaint)). Appellant did not inform the Contracting Officer or get authorization before applying the material (Tr. 163, 303). By August 12, 1992, the Thinpave material that had been applied was crumbling in some areas (Resp. Exh. 7; Tr. 38, 164).

19. On August 4, 1992, Appellant submitted a payment invoice for the balance remaining under the contract (less a 5 percent retainage). By letter dated August 6, 1992, the COR returned the invoice, stating that no further payment recommendations would be made until all outstanding problems had been resolved to Respondent's satisfaction. (Appellant's Exhibit 2).

20. On August 12, 1992, the parties met at the site to discuss the items in the Contracting Officer's June 19, 1992, letter (Finding 12) and several items claimed as additions to the work by Appellant in a letter dated July 16, 1992. Following the meeting, Appellant's president and Respondent's architect and COR conducted a walk-through inspection, noting on a copy of the plans the locations where remedial work was required.[3] (AF Q; Attachment 1 to the Complaint).

21. By letter dated August 20, 1992, the COR directed Appellant to take remedial action consisting of:

(a) removing unsuitable surface material in the "sanding" areas (including the Thinpave previously applied) down to sound concrete, shot blasting or grinding all the new concrete areas for uniformity of appearance, and applying a concrete sealer to all new concrete surfaces;

(b) repairing joints that were not flush by adding patching material to the low side of the joint; and

(c) replacing the sealer in the expansion joints and cracks noted during the inspection on August 12, 1992.

The COR directed Appellant to complete this work no later than September 15, 1992. The completion date was based on an estimate by Respondent's personnel as to a reasonable length of time to do the work. The completion date was not discussed with Appellant before it was established. (AF R; Tr. 210).

22. Through an invoice dated August 17, 1992, Appellant sought payment of $5,125.64 for contract work. The Contracting Officer approved the invoice for payment on August 21, 1992. (AF S).

23. By letter dated August 24, 1992, the Contracting Officer forwarded a proposed contract modification to Appellant. The modification provided an increase in the contract price of $2,601.81 for additional parking lot striping, additional joint and crack filling, and additional minor repairs. The modification also proposed a $5,000 credit to Respondent for poor workmanship on the project and a $4,331.34 credit to Respondent for architect/engineer and laboratory services for the additional testing. (AF T).

24. By letter dated September 18, 1992, Appellant rejected the modification proposed by Respondent (Finding 23). Appellant stated that payment for additional work performed in drilling holes in the steel door jambs would have to be added to the modification.[4] Appellant also stated that it would not agree to credits for poor workmanship or additional testing. Appellant demanded that Respondent pay the full amount of its earlier payment request and issue a modification with a price increase of $3,923.11 (which would include the additional drilling) rather than the proposed increase of $2,601.81. Appellant stated that it would then apply a sealer to the phase one concrete area and repair unevenness in the joints. Appellant would not agree to perform any more resealing of the expansion joints. Appellant argued that the sealing problem was caused by a defective design -- i.e., that the concrete had been poured on soil instead of gravel and, as a result, remained damp at all times, thereby preventing a good bond between the sealer material and the concrete. (AF V).

25. Appellant performed no further work on the project after the August 12, 1992 on-site meeting (AF U; Tr. 204-05, 301).

26. In a final decision dated September 22, 1992, the Contracting Officer terminated the contract for default for Appellant's failure to complete the work by the September 15, 1992 completion date established by the COR's letter of August 20, 1992. Appellant filed a timely appeal with this Board. (AF W, X). As of the date of termination, Respondent had paid Appellant $80,331.84,[5] leaving a contract balance of $19,658.38 (AF C-F, S).

27. In November 1992, Respondent received estimates from its contract architect that replacing the phase one concrete would cost approximately $17,300 and that refinishing and repairing the concrete would cost approximately $30,000 (Resp. Exh. 1).

Steel Door Jambs -- Additional Drilling

28. As part of the contract work, Appellant was required to install a number of doors. Shop drawings from the manufacturer required Appellant to mount brackets on existing steel door jambs by drilling and tapping sufficiently deep holes to allow the screw threads to hold, but did not require that the screw holes go all the way through the jambs. The contract drawings showed a jamb thickness of .875 inches. The actual thickness of the jambs was, instead, 1.375 inches. Appellant's personnel drilled all the way through the jambs when installing the doors. (AF A5; Tr. 178-81).

29. By letter dated July 16, 1992, Appellant filed a claim in the amount of $3,923.11 for extra work that included parking lot striping, additional crack and joint sealing, miscellaneous concrete repairs, and $1,207.03 for the cost of the labor necessary to perform the additional drilling (AF Y). By letter dated August 24, 1992, the Contracting Officer forwarded a proposed modification that approved payment for the items in Appellant's claim other than the charge for drilling (Finding 23). As noted above, this modification was rejected by Appellant (Finding 24). Following default termination, Appellant filed a claim letter dated September 28, 1992, that included as one of its items the entire $3,923.11 claim initially filed in July (AF Y).

30. In a final decision dated October 27, 1992, the Contracting Officer stated as follows with respect to this claim:

"Your claim ... was addressed in USPS Modification No. 03 sent to you for signature on August 24, 1992 .... This modification also included a USPS credit. We have not to date received a response regarding our modification proposal. Please advise if you did not receive it." (AF AA).

Appellant filed a timely appeal.

Additional Expansion Joints

31. Specification section 02520, "Portland Cement Concrete Paving," provides, in part:

"Expansion Joints: Provide premolded joint filler for expansion joints abutting concrete curbs, catch basins, manholes, inlets, structures, walks, and other fixed objects, unless otherwise indicated ...." (AF A-3).

32. On the contract drawings, the locations of expansion joints were indicated by the notation "E.J." and the locations of control joints were indicated by the notation "C.J." In the concrete replacement areas, expansion joints were shown at locations between new concrete areas and adjacent areas where concrete was to remain. No notations for expansion joints were shown on the drawings where new concrete abutted the building or curbs. (AF A-5). The existing concrete slabs that were to be replaced did not have expansion joints where they abutted the building (Tr. 67, 295).

33. At the preconstruction conference held on February 27, 1992, Appellant noted the absence of expansion joints where the concrete slabs abutted existing walls, curbs, and sidewalks and suggested including them at those locations. Appellant was directed to write a letter to the Contracting Officer asking for a decision as to whether the joints were required at those locations, although not shown explicitly on the drawings. In a letter dated March 16, 1992, Appellant requested a modification to the contract for installing the expansion joints. That request was turned down in a letter from the Contracting Officer dated March 18, 1992, citing the language in specification section 02520 relating to expansion joints (Finding 31, above). After the termination, Appellant renewed its request for an equitable adjustment, in the amount of $1,768.87, for having installed the expansion joints. That request was denied in the Contracting Officer's final decision dated October 27, 1992. (Tr. 64; AF B, Y, AA). Appellant filed a timely appeal.

Sewer Line Repair

34. In the course of performing the concrete removal and replacement work, Appellant damaged a sewer line that ran under the

concrete but was not shown on the drawings and repaired the line at the direction of Respondent's personnel (Tr. 226-28). In a letter dated September 28, 1992, Appellant sought $1,065.85 as the cost of the repairs. An attachment to that letter, included in the record, is an accurate summary of the costs, totaling $1,065.85, incurred by Appellant in performing the repair work (Tr. 292-93). In a final decision dated October 27, 1992, the Contracting Officer stated:

"[Y]ou are hereby requested to provide receipts for equipment rental and materials. When the receipts are received by this office to support your claim for $1,065.85, an equitable adjustment may be established. If additional costs are due, the remaining balance amount will increase accordingly."

Appellant filed a timely appeal from this decision. (AF Y, AA).

Appellant's Claim for the Unpaid Balance of the Contract

35. In its September 28, 1992, claim, Appellant sought payment of $19,658.38, the balance of the contract amount that remained unpaid at the time of contract termination. The Contracting Officer did not address this portion of the claim in his October 27, 1992, final decision. (AF Y).

Respondent's Counterclaim for Testing Expenses

36. As noted in Finding 14, above, Respondent paid $3,068.94 for compressive strength testing of cores taken from the phase one concrete area. In its Answer to the Complaint in PSBCA No. 3372, Respondent included a counterclaim alleging that Appellant was liable to it for the testing cost. Accompanying the Answer was a copy of a Contracting Officer's final decision dated February 9, 1993, which determined that Appellant was liable to Respondent in the amount of $3,068.94. Although the record does not indicate when or if Appellant received the final decision from Respondent, Appellant did receive a copy of the Answer and the accompanying final decision from the Board on February 16, 1993. The record contains no evidence that Appellant filed an appeal from this final decision.

DECISION

In these appeals, Appellant challenges the decision by the Contracting Officer terminating its contract for default. Further, Appellant challenges the refusal of the Contracting Officer to authorize payment for additional work allegedly performed by Appellant. Finally, Appellant challenges the Contracting Officer's assessment against it of the costs of performing tests to determine the strength of the installed concrete.

Termination for Default and Appellant's Claim for the Unpaid Balance of the Contract

Respondent argues that the Contracting Officer properly terminated Appellant's contract for default because of numerous deficiencies in Appellant's performance, which resulted in defects in the concrete parking lot slabs constructed under the contract. Respondent relies on evidence of serious erosion of the concrete surface, crooked joints in the concrete, failure to seal expansion joints as required by the contract, and failure to ensure that adjacent slabs were flush with each other. Respondent contends that termination for default was proper when Appellant failed to comply with Respondent's direction to perform certain remedial work on the concrete by September 15, 1992.

Respondent also argues that it was justified in retaining the balance of the contract amount ($19,658.38) because at least that amount will be required to bring the concrete work up to the level required by the specifications -- either by removing and replacing the concrete or by repairing the concrete surface.

Appellant argues that it was incorrectly directed in June 1992 to remove all the concrete and that this was a "default [by] the owner." As to failure of the expansion joint seals, which was a condition that Appellant refused to correct just before the default termination (Finding 24), Appellant argues that the design was defective. Appellant contends that the foam backer rod specified in the drawings was inappropriate for use with the sealing material used on the project because the sealing material would have melted the backer rod when it was poured. Further, Appellant argues that the decision by Respondent to install the concrete slabs on soil rather than gravel caused the concrete and filler material to remain damp and prevented adhesion of the sealer material to the concrete.

Having considered the arguments of the parties, we conclude that Respondent properly terminated the contract for default. Respondent has shown that at least the phase one concrete poured by Appellant was not in compliance with several specification requirements. The concrete did not have a uniform, smooth surface but had, instead, suffered severe erosion shortly after it was poured. This was most likely caused by Appellant's failure to properly protect the newly poured concrete from rain. Further, a number of the joints in the concrete were not straight and true, as required by the specification. This was a direct result of Appellant's failure to use the required rigid forms. Finally, although Appellant met the compressive strength requirement for the concrete, the phase one concrete had a significantly reduced useful life expectancy.

We need not decide whether Respondent's initial direction to replace all the concrete would have been proper if carried through, because that direction was ultimately abandoned in favor of a more limited remedy for the deficiencies in the concrete before Appellant took any action in reliance on the removal order. Appellant has not argued that the direction contained in Respondent's August 20, 1992 letter to remedy deficiencies in the concrete was impossible to perform or that it could not have complied with the completion date of September 15, 1992, established by the letter.

We also do not accept Appellant's argument that the expansion joint design was defective. Appellant failed to use the joint sealing scheme required by the drawings and did not secure authorization from Respondent's personnel before altering the design. Further, the evidence in the record does not support Appellant's contention that applying the sealing material to the joint would have melted the backer rod. In addition, Appellant has not shown that the moisture problems it encountered would have been present if it had used the required design.

We conclude that because of Appellant's unexcused failure to complete the contract work by September 15, 1992, the Contracting Officer was justified in terminating the contract for default.

We next consider Appellant's claim for the unpaid contract balance. The Contracting Officer did not address the claim in a final decision. However, as more than 60 days have passed since the claim was filed, under the Contract Disputes Act the claim is deemed to have been denied and this Board may consider the appeal from that deemed denial. 41 U.S.C. §605.

Under the language of the Termination for Default clause, Respondent may, after a default termination, "... complete the work, and the contractor will be liable to the Postal Service for any excess costs." Under this language, Respondent is entitled to assess against Appellant only "excess" costs -- i.e., those costs in excess of what it would have paid Appellant under the contract if Appellant had satisfactorily completed the contract work.

Based on the architect's estimates for repair or replacement of the phase one concrete (Finding 27), it was reasonable for Respondent to withhold the $19,658.38 contract balance, pending action on its part to remedy the defects and charge Appellant. Bowman's Transport Co., PSBCA No. 1088, 1089, 1092, 84-1 BCA ¶ 17, 217; Norair Engineering Corp., GSBCA No. 3539, 75-1 BCA ¶ 11,062. Such funds may be withheld for a reasonable time while the actual costs of remedying the defects are ascertained. Bowman's Transport Co., supra; Servicemaster of West Central Georgia, DOT CAB No. 1096, 80-2 BCA ¶ 14,676. The period of withholding was not unreasonable in this case.

However, in order to finally assess Appellant for excess costs, those costs must have been actually incurred and paid. See, e.g., Whitlock Corp. v. United States, 141 Ct. Cl. 758, 159 F. Supp. 602 (1958), cert. den. 358 U.S. 815 (1958); Bowman's Transport Co., supra; United Aero, Inc., ASBCA No. 26967, 83-1 BCA ¶ 16,268.

Respondent may reasonably withhold the contract balance for an additional 120 days from the date of receipt of this Opinion in order to

have the repair work performed, to make payment for that work, and to assess Appellant for the cost to complete.[6] Respondent is to submit evidence that the necessary work has been performed and that the cost of such work has been paid. If the repair work is not completed and paid for within 120 days, the withheld balance is to be paid to Appellant, with Contract Disputes Act interest. Further, if the cost to complete the work is less than the withheld amount, the balance is to be paid to Appellant, with Contract Disputes Act interest. American Federal Contractors, Inc., PSBCA No. 1359, 87-2 BCA ¶ 19,848. If circumstances beyond Respondent's control prevent performance of the work, Respondent may apply to the Board for an extension of time.

Steel Door Jambs -- Additional Drilling

In the contested portion of this claim,[7] Appellant seeks payment for additional work performed in drilling through steel door jambs that were one-half inch thicker than shown on the drawings. There is unrebutted testimony in the record that it was not necessary for Appellant to drill all the way through the jambs (of either thickness) in order to fasten the door brackets in accordance with the shop drawings. Respondent argues that Appellant should not be paid for the work since it was unnecessary. Appellant's argument is not entirely clear, but it seems to be that the length of the screws it had to use was such that it did have to drill farther into the steel in order to install them. However, Appellant's argument is based on information concerning the length of the screws that was not part of the evidentiary record on which this decision is to be based, and is found only in Appellant's brief. Appellant has failed to meet its burden of proof, and this portion of the claim is denied.

The record does not indicate whether the uncontested portion of the claim has actually been paid or credited to Appellant. If not, Appellant is entitled to payment of that amount plus Contract Disputes Act interest.

Additional Expansion Joints

Respondent argues that Appellant was required to install expansion joints where the new concrete abutted buildings and other fixed objects and relies on the specification language quoted in Finding 31 in support of that argument. Appellant offered no arguments in support of this claim in its brief. However, in its claim letter, Appellant argued that it is entitled to recover for these expansion joints because the drawings showed the location of numerous control joints and expansion joints in detail but did not indicate that expansion joints were to be installed at the locations in issue.

We agree with Appellant. The language relied on by Respondent does not state that expansion joints are to be provided in the listed locations. Rather, the language states that premolded joint filler is to be provided where there are expansion joints at those locations. The drawings, in turn, show the locations of the expansion joints, but do not show expansion joints adjacent to the building or curbs. Therefore, the direction to Appellant to place expansion joints at those locations constituted work not required by the contract for which Appellant may recover. As Respondent has not challenged the amount of the claim, Appellant may recover $1,768.87 plus Contract Disputes Act interest.

Sewer Line Repair

Respondent concedes that Appellant is entitled to recover the cost of performing this repair work[8] but argues that Respondent was never presented with receipts to support the costs of material and equipment rental. At the hearing Appellant's president offered unrebutted testimony as to the basis for his costs for labor and equipment. Although he did not testify as to the basis for the material costs (for gravel and pipe), those costs are detailed in his claim letter and Respondent did not offer evidence challenging either the assertion that these materials were used or the reasonableness of the prices claimed for them by Appellant. We conclude that Appellant has met its burden of proving these costs. This portion of the appeal is sustained. Appellant may recover $1,065.85 plus Contract Disputes Act interest.

Respondent's Counterclaim for Testing Expenses

This claim by Respondent was asserted in its Answer and was accompanied by a Contracting Officer's decision concluding that Appellant was responsible for the payment of $3,068.94. The Contracting Officer's decision informed Appellant of its appeal rights, including the right to appeal to this

Board within 90 days of receipt of the decision. The record of these appeals contains no documents that might be interpreted as an exercise of those appeal rights within the 90 days allowed by the Contract Disputes Act. The 90-day appeal period may not be waived by the Board. Cosmic Constr. Co., 697 F.2d 1389 (Fed. Cir. 1982). Accordingly, although testimony was offered by both sides at the hearing on the merits of the counterclaim, the Board has no jurisdiction to consider the merits of this issue and this portion of the appeal must be dismissed.

As explained above, these appeals are sustained in part, denied in part, and dismissed in part.

David I. Brochstein
Administrative Judge
Board Member

I concur:
James A. Cohen
Administrative Judge
Chairman

I concur:
James D. Finn, Jr.
Administrative Judge
Vice Chairman

[1] Although not given formal exhibit designations, all of the documents attached to the Complaint were admitted into evidence at the beginning of the hearing (Tr. 6).

[2] The June 17 letter, which apparently was precipitated by the direction at the June 16 meeting to replace all of the concrete on the project, is not in the record.

[3] Among the items noted were Respondent's conclusions as to the locations of joints that were not flush, the locations of the cracks and joints in need of sealant removal and replacement, and the extent of the concrete slabs requiring surface treatment. The record does not indicate whether Appellant agreed with Respondent's assessment.

[4] See the discussion beginning at Finding 28, below.

[5] This amount includes $5,339.41 paid to the Internal Revenue Service in April 1992 to satisfy a levy against Appellant.

[6] Appellant is, of course, free to appeal Respondent's assessment, which will be considered as a new appeal.

[7] The portions of the original $3,923.11 claim related to parking lot striping, crack and joint sealing, and miscellaneous concrete repairs are not contested. The contracting officer's decision on this claim referred back to proposed USPS modification 3 (Findings 23 and 30), which, although not accepted by Appellant, approved payment for these three items.

[8] See Tr. 14, 230. Respondent concedes that the presence of the pipe was an unknown site condition and that Appellant was not responsible

for the damage.