GOVERNMENT OF DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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DATE: February 5, 1998

TO: Thomas F. Kennedy, Esquire
7826 Eastern Avenue, N.W., Suite 12
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SUBJECT: CAB No. D-936, Appeal of W.J. McGee & Associates, P.C., and Leroy J.H. Brown & Associates, P.C.

Attached is a copy of the Board's opinion in the above-referenced matter.

Mia J. House
MIA J. HOUSE
Clerical Assistant

Attachment

cc: The Honorable Steny H. Hoyer
Congressman, 5th District, Maryland
United States House of Representatives
Washington, D.C. 20515-2005

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

W.J. MCGEE & ASSOCIATES, P.C., and LEROY J.H. BROWN & ASSOCIATES, P.C.	)	
	)	CAB No. D-936
Under Contract No. 4468-72	)	

For the Appellants W.J. McGee & Associates, P.C., and Leroy J.H. Brown & Associates, P.C.: Thomas F. Kennedy, Esq., and Bruce M. Cooper, Esq., Jasen & Kennedy. For the District of Columbia: Arthur W. Finch, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

Appellants, W.J. McGee & Associates, P.C., and Leroy J.H. Brown & Associates, P.C., joint venturers, seek an equitable adjustment to their architect-engineer contract amounting to $223,700 for work they claim was beyond the contract scope of work. We conclude that Appellants have not met their burden of proof on quantum for some claims, and have not shown other claimed effort was extra work. The remaining claims are foreclosed because Appellants previously received full compensation under Change Order No. 1 for what they are now claiming was extra work. Accordingly, we deny the appeal.

FACTS

This case involves claims by the Appellants for extra compensation regarding Contract No. 4468-72, a contract for architectural and design services for the comprehensive modernization of 28 buildings containing a total of 314 housing units at the Carrollsburg Dwellings located in the District. ((Consolidated Hearing File ("CHF") Ex. 1; Tr.498-499).

Appellants initially stated their claim as one for "extra work and cost overrun" amounting to $198,606 (essentially, a total cost claim), compensation for a wrongful deduction of $21,160, extra roof ventilation work of $1,100, attorneys fees, and prejudgment interest. (*See* Complaint; Appellants' Prehearing Statement). During the hearing, Appellants identified in support of their claim for $198,606 the following alleged changes to the scope of work which required extra architectural and engineering design work: (1) certain building units which had suffered fire damage (the "burned" units); (2) the canopies and foyers; (3) the handicapped units; (4) phasing of cost estimates; (5) playground equipment; and (6) storage facilities and toilets. In their

posthearing brief, Appellants seek $202,540 for these six items.[1]

The District argues that the contract scope of work defined by the March 31, 1986 contract and Change Order No. 1, issued August 26, 1987, act as a complete accord and satisfaction for all elements of Appellants' claims.

The first relevant pre-contract meeting between representatives of the parties took place at a meeting held on or about August 5, 1985. At that meeting, Mr. Benjamin F. Carter, Jr., Chief of the Maintenance Engineering Department of the District's Department of Housing and Community Development ("DHCD") advised Mr. W. Jerome McGee and Mr. Leroy Brown that their joint venture had been selected to perform the architectural and design work for the Carrollsburg modernization project. (Tr. 19-20). Mr. Carter handed them a two-page document entitled "Project Justification & Scope of Work." The document's "Project Overview" section provides in part:

> Carrollsburg Dwelling is a 314-unit complex located in Southeast Washington. It requires extensive renovation to address serious problems of deterioration, which include the following: bathrooms and kitchen fittings and equipment are unserviceable; vinyl floors have deteriorated; canopies are either missing or are in a poor state of repair; electrical systems are inadequate; gas-fired boilers are aged and nearly unserviceable; kitchen and bathroom mechanical piping and fixtures have deteriorated; gutters and downspouts are corroding and should be connected to the storm drainage system; several roofs have fire and water damage; smoke detectors are in a poor state of repair; existing apartment entrance doors are not insulated and hardware is not secure; existing hardwood floors have some surface damage and wear; joists and subfloors in 20 townhouse units have dry-rotted; screen doors are required, and existing wall and ceiling surfaces show considerable wear. An energy audit has shown a need for additional insulation on exterior walls. There are no accommodations for handicapped persons on site. Renovated spaces require insect and rodent extermination; property maintenance facilities are inadequate, the administration area is in need of upgrading; the property is experiencing erosion and alleys need resurfacing; underground gas and water lines do not have corrosion protection; storm drains are clogged and need cleaning; maintenance crews need exterior access to sanitary lines; exterior lighting within the property is inadequate; and relocation is required for phased construction.

(CHF Ex. 7, at 1). The "Scope of Work" section reads in full:

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[1] In their posthearing brief, Appellants identify quantum amounts for each of the six claimed changes, the sum of which is $202,540, after correcting for an arithmetic error. *See* note 6 *infra*.

Correct erosion; construct dumpster pads; repair or replace chain link fencing and clothes poles; install cathodic protection on gas and water piping; install clean-outs in sanitary sewer lines to units; install 46 pole-mounted lights, including underground wiring; provide new kitchen and bathroom fittings; install new vinyl floor tile and underlayment; construct exterior foyers for townhouses; upgrade electrical systems; install gas-fired warm-air system in townhouses; replace piping and convectors in apartment units; install gas-fired, hot-water heaters in 86 units; replace all mechanical piping and fixtures in kitchens and bathrooms; replace gutters and leaders and tie into storm system; replace roofing as required; repair or replace smoke detectors; install insulated doors and hardware; refinish hardwood floors; install screen doors; repair, spackle, and paint walls and ceilings; insulate exterior walls; provide insect and rodent extermination; purchase equipment for maintenance operation; and provide relocation services.

In an August 5, 1985 memorandum, Mr. Carter notified the property managers at Carrollsburg that the Appellants had been selected as the design team for the modernization project, that the Appellants expected to begin their work with a physical needs survey of the property on August 6, 1985, and that the building managers should cooperate in giving the Appellants access to the property. (CHF Ex. 6). The parties met again on August 14, 1985, discussing the scope of work and agreeing on a deadline for Appellants to submit a price proposal. (CHF Ex. 24). At some point in August, Appellants began a physical needs survey of the Carrollsburg project which involved surveying each of the 314 units. (Tr. 21, 274, 367).

By letter dated August 22, 1985, Appellants submitted a general outline of the scope of work and a price proposal to perform the Title I architectural and engineering design work (*i.e.*, the services to prepare the plans and specifications for the follow-on construction contract) and the Title II services (*i.e.*, services provided during the actual construction phase of the project) which comprised shop drawings review and site inspection services. (CHF Ex. 24). The scope of work included general repairs to the interior of the housing units, such as installation of new kitchen equipment, new baths and showers, new floor tiles, new insulation, upgraded electric service, and repair or replacement of the existing canopies on all units. General repairs to the exterior included replacing some portions of the sewer, regrading the site, and repair or replacement of concrete walks. The cover letter identified the total price as $594,016 but the pricing data shows a total price of $653,813, with Title I services amounting to $410,453, and Title II services amounting to $243,360. The pricing detail contains some arithmetic errors.

Appellants continued their survey work in September and perhaps into October 1985. (Tr. 25). In response to a September 30, 1985 meeting with Mr. Carter, the Appellants submitted by letter of October 2, 1985, another price proposal and in this proposal the pricing detail adds up to the $594,016 amount stated in the August 22 cover letter. (CHF Ex. 26). In the October 2 cover letter, Appellants note DHCD's urgency that work commence. Appellants state that they are ready to commence work on the project immediately "since it appears all contractual matters are imminent." Appellants request that Mr. Carter advise them if he desires that they begin work at once. (CHF Ex. 26). Apparently, Appellants received oral direction from DHCD because

Appellants began preliminary design work for the schematics in October 1985, using the two-page scope of work previously provided by Mr. Carter in August. (Tr. 25, 31-32). The record references, but does not contain, a third price proposal submitted by Appellants on November 19, 1985, in the amount of $466,613. (*See* CHF Ex. 8).

By December 1985, every unit had been surveyed and Appellants had submitted to DHCD some schematics showing a "kind of a composite layout of all of the rooms and buildings on the site." (Tr. 21, 25). Also in December, Mr. Harold Johnson was appointed the DHCD contract representative for the project. He retained that position until September 1987. (Tr. 289, 318, 358-359). Mr. Johnson was given the task of putting together a notice of award with a specified award amount. He reviewed Appellants' prior proposals and calculated an award amount of $469,793 based on the estimates contained in the Appellants' initial price proposal (totaling $653,813), as annotated by Mr. Johnson to correct certain arithmetic errors in Appellants' numbers and to deduct $187,200 for some of Appellants' proposed Title II services (to be performed during actual construction) which the District decided to do itself. (CHF Ex. 25, Tr. 107-112, 226, 307-309). Sometime in mid-December, Mr. Johnson reviewed the corrected and revised price proposal amount with Messrs. McGee and Brown. There is no indication in the record that Appellants' principals voiced any objection to Mr. Johnson regarding the proposed award amount but rather they worked together with him on it. (Tr. 108-112). A DHCD contracting officer issued a "Notice of Award/Notice to Proceed" to Appellants on December 20, 1985, with a price correction agreed to by the parties on December 23, authorizing Appellants to begin design work starting December 30, 1985. (CHF Ex. 8). The notice states that Appellants' earlier proposal is accepted with a revised price of $469,793. Appellants acknowledged receipt of the notice and made no objection to the revised award amount. The notice advises Appellants that a "formal contract is being prepared and will be forwarded to you in the near future." Although the notice does not expressly define the scope of work, we find from the record that the scope was defined in the "Scope of Work" section of the 2-page "Project Justification & Scope of Work" document given to Appellants on August 5, 1985, as supplemented by the general scope of work furnished by Appellants in their August 22, 1985 proposal. (*See, e.g.*, CHF Exs. 8, 9; Tr. 366-367).

From the beginning, both parties understood that Appellants would be revising, refining, and giving detail to the August 1985 scope of work, based on the information in the August 1985 project overview, Appellants' detailed field survey of every unit, and Appellants' architectural experience. Throughout the survey period, Appellants' personnel were in ongoing discussions with Mr. Carter and Mr. Johnson concerning what Appellants recommended be incorporated into the "formal" or definitized contract scope of work. (*E.g.*, Tr. 365-372, 385-395). For example, although the original August 1985 project overview mentioned the need for handicapped accommodations, the accompanying work scope did not mention design for handicapped accommodations. During the survey period, Appellants' representatives notified Mr. Johnson of the need for handicapped accommodations and in December 1985 Mr. Johnson instructed them to design 15 of the units to accommodate handicapped persons. (Tr. 365-370, 390, 419-422). This took place well before the definitized contract was executed by the parties.

In January 1986, the parties agreed to other revisions of the project scope of work to include underground utility work, a storm drainage system, and inspection services during construction. Because of the extent of work involved, the parties agreed to increase the award price by $75,094, resulting in a new total of $544,087. (CHF Ex. 9; Tr. 96-97, 227-229, 281-282). The revision is reflected in a January 13, 1986 internal DHCD memorandum from Mr. Johnson to Mr. Carter. (CHF Ex. 9). The version of the memorandum in the record contains additional entries showing a deduction of $21,160 from the contract price for design services relating to steam condensate return piping work which Mr. Johnson says was included in the original scope of work (CHF Exs. 1, 7; Tr. 286-289, 312) but needed to be removed because the design had previously been performed by an engineering firm, Diversified Engineering, Inc., under a separate contract with the District. (*See* CHF Exs. 9, 10). The Appellants subcontracted various engineering requirements of their project work to Diversified. (*See* CHF Ex. A). Although the parties dispute when Mr. Johnson inserted the $21,160 deduction on the memorandum — January 13, 1986 according to Mr. Johnson, February 14, 1986 according to Mr. McGee — the issue is irrelevant. Appellants agree that they received notice of the proposed deduction, which would lower the contract price to $523,727, at least by February 13, 1986, a full month before the parties executed the definitized contract on March 21, 1986. (CHF Ex. 10; Tr. 298; *cf.* Tr. 95-97). Mr. McGee testified that he orally protested the proposed deduction of $21,160 from the contract price. (Tr. 275-279). Although Mr. McGee testified that he communicated his protest in writing (Tr. 100), there is no such written communication in the record. When asked whether he had some understanding that the $21,160 was going to be re-inserted into the contract price, he stated "No, but we knew we were going to protest it." (*Id.*). He stated that he did not protest prior to the definitized contract because he did not want to lose the contract over a dispute concerning this amount. (Tr. 100-101). He testified that the Appellants' scope of work did not include the Diversified design work but rather the Appellants' scope of work only covered having Diversified's design drawings incorporated into Appellants' final construction drawings. Mr. Johnson seems to have used the $21,160 price in Diversified's separate contract with the District as the basis for his deduction from the Appellants' price.

On February 6, 1986, still before the definitized contract had been executed by the parties, Appellants submitted a complete schematic package with preliminary drawings showing the suggested layout for each room within the 314 units at Carrollsburg. The submission also included outline specifications and a complete report providing a written description of all conditions that Appellants had discovered on the site during the extensive survey that began in August 1985. (Tr. 25-27, 365-372; CHF Ex. 13, at 2). Appellants' February 1986 package set forth a proposed scope of work and Appellants were aware from their discussions with DHCD representatives that their proposed scope of work would form the basis for the scope of work under the definitized contract. (Tr. 367, 368-372). Unfortunately, neither party introduced the February 1986 package into the record.

For the period August 1985 through early March 1986, Appellants state that there was no "formal contract" in place and there was no written arrangement by which they would receive

payment for services.[2] Mr. McGee testified that this situation was not unusual for architects who performed services for the District government. (Tr. 26, 34).

The Definitized Contract

The record sheds little light on the circumstances surrounding the actual execution of the definitized contract, Contract No. 4468-72, dated March 21, 1986. (CHF Ex. 1). The contract required the Appellants to proceed with the design and preparation of construction contract plans and specifications for Carrollsburg and to complete the work within 180 days from the December 1985 Notice of Award/Notice to Proceed. It provides for a total lump sum fee not to exceed $523,727, consisting of $459,647 for all Title I architectural and design services and construction document preparation work, and $64,080 for the Title II construction services option, such as site visits, inspection of construction, and review of shop drawings and samples. (CHF Ex. 1, at 5). Appendix A of the contract, entitled "Scope of Work", summarizes the Title I requirements as follows:

> In depth restoration of all units including, Mechanical, Electrical, all Structural Elements, Architectural Elements and Common Spaces.

(Appendix A, Part A). Under the subheading "Services to be Performed" appears the following:

> All necessary services for complete restoration of the Carrollsburg Apartments and Garden Units, including the items listed in the Scope of the A/E services (attached) and to conform with the following attachments: 1.) Standards for Modernization of Public Housing and 2.) Schedule for A/E Services.

(*Id.*, Part B). Under the subheading "Scope of Work" appears the following:

> Complete renovation of 314 units as follows[:] General repairs to Interior and Exterior of units; complete underground Utility Services, Landscaping throughout site, Upgrading all Electrical Systems and Upgrade hallways and public spaces; See attached A/E Scope of Work and Standards for Modernization of Public Housing.

(*Id.*, Part D). Under a heading "Design Requirements are:" appears the following pertinent information:

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[2] In its posthearing brief, Appellants state that they are not making any claim for compensation for the period from August 1985 through March 21, 1986 (the date of contract execution). The fact is the survey and schematic work was always a part of the scope of work and compensation for that work was included in their price proposals that formed the basis of the December 1985 Notice of Award amount of $469,793. (*See* CHF Ex. 8, 24, 25, 26).

Architectural Requirements:

Provide all services contained in the A/E proposal and DHCD Design requirements.

Electrical Requirements:

Complete upgrading of the Electrical Systems, Fire Alarm Systems; replace smoke detectors, provide extra circuit for A/C unit and provide (45) pole mounted lights including underground wiring. See Attached A/E Scope of Work.

Mechanical Requirements:

Provide new kitchen and bathroom fittings; replace piping and convertors in units; new disposal units, washer/dryer combination in each unit; complete condensate replacement design, specifications and estimates; and work stops 5' outside of building. Provide plans and shop drawings services. Including in A/E Work Scope.

Neither party made the "A/E Scope of Work" referenced above a part of the appeal record. Based on the "Design Requirements" text and the hearing testimony, we find that the "A/E Scope of Work" was prepared by Appellants, and more likely than not, was the work scope prepared by Appellants and submitted as part of its February 1986 package. The "A/E Scope of Work" is not attached to any version of the contract included in the Appeal File, Appeal File Supplements, or the Consolidated Hearing File. Nevertheless, based on the other documentation of record and the transcript of the hearing, we are satisfied that there is sufficient evidence to determine the contractual scope of work governing Appellants' performance so far as the issues of this appeal are concerned.

Changes to the Contract Scope of Work

When residents of Carrollsburg became aware of DHCD's comprehensive modernization project, they requested a meeting involving the architects and DHCD. The meeting occurred shortly after contract execution, on April 3, 1986. The residents expressed their displeasure with the manner in which the project had been handled and various residents' groups complained about the proposed modifications. The residents and property management requested certain changes be made to the planned design, including replacing the existing steam boilers and steam supply lines with a hot water system and converting the currently vacant basement space into finished space offering a resident manager's office, a community clothing facility, and a resident laundry facility. (CHF Ex. 13, Ex. E).

On June 26, 1986, Appellants submitted a 3-page document entitled "General Repair and Modernization of Carrollsburg" setting forth a modified scope of design work for the Carrollsburg project. (CHF Ex. D; Tr. 591-592, 597, 603, 698-700). Most of the items listed in the modified scope remained unchanged from the definitized contract scope of work. For example, the individual design items listed under the categories "Kitchens", "Bathrooms", "Living and Dining

Rooms", "Bedrooms", "Insulation", and "Electrical" were unchanged from the contract scope of work. The design items listed under the category called "General" were also unchanged, including that of providing dwelling units for the handicapped. Most of the design items listed under the category "Exterior & Site" were also unchanged, such as replacing defective concrete walks, installing new fixtures on light poles, providing new canopies for the front entrance of each of the 228 apartment units, and providing new foyers for each of the 86 townhouse units.[3] (*See* CHF Ex. 7; Ex. 24, at 3; Tr. 389-394). Mr. Johnson stated that the changes reflected in Appellants' June 26 modified design scope resulted from comments received at the April 3, 1986 meeting and from intense political interest from local and federal officials. (Tr. 592-594, 596-600). The principal changes are found under the category entitled "Heating", where Appellants' design scope is to include replacing the steam heating system with a hot water system and replacing all radiators with fan-coil units having individual controls. Under "Exterior & Site", the modified design scope adds: "Provide in basement space acceptable to DHCD and tenants, Laundry room." The parties continued to discuss design scope changes after Appellants' June 26, 1986 proposed revision to the scope of work.

By letter dated December 12, 1986, Appellants advised Mr. Johnson that they were acutely concerned about changes to the contract scope of work without corresponding increases to the contract price. (CHF Ex. 20). In the letter, Appellants identify "the various scope changes throughout the project," propose a price adjustment for each, and request a contract action reflecting the increase. Four scope changes are presented: (1) boiler redesign and the replacement of the radiators with fan coil units, priced at $60,354; (2) provision of temporary heat throughout the project, priced at $43,111; (3) changing the entire boiler system from the existing six boilers to "pulse" boilers, with prices of $59,544 or $115,554 for two alternative implementations; and (4) provision of a new administrative office, including maintenance shop, relocation of the community clothing facility, and provision of a laundry room, priced at $4,000.

The contract provided for DHCD review of schematics, design, and construction documents being prepared by Appellants, at various stages of development. (Contract, Appendix B). At some point in early 1987, Appellants submitted to DHCD their 90-95 percent design documents. We know that the submission was prior to March 26, 1987, the date that Proceed Order No. 1 issued, because in later correspondence, Appellants state that at the time of their 90-95 percent submission, Appellants had not yet received the scope of work for the basement facilities defined in Proceed Order No. 1 (which was issued on March 26, 1987). (*See* CHF Ex. 23). A March 10, 1987 letter from Appellants to Mr. Johnson indicates that the 90-95 percent submission occurred before March 10. (CHF Ex. 11).

On March 10, 1987, Messrs. McGee and Brown met with Mr. Johnson to negotiate an upward price adjustment to the contract for extra work required by various changes in the scope of work. (*See* CHF Ex. 11). Appellants had prepared in advance of the meeting a "handwritten delineation . . . of the various tasks performed over and above the original A/E agreement" which

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[3] The number of apartments and townhouses at Carrollsburg is set forth in the construction contract's specifications. (Appeal File, Vol. 2, Tab 7, Specifications, Special Conditions, 1.6-1).

formed the basis for the requested price adjustment. (*Id.*). The handwritten document was not made a part of the appeal record. The Appellants confirmed their meeting with a letter dated March 10. The letter states that the parties reached an agreement "whereby, due to various changes in [Appellants'] A/E scope of work, [Appellants'] A/E fee was increased (by $116,439.00) from $523,727.00, per our original agreement dated February 14, 1986, to $640,166.00 as of March 10, 1987." In the letter, Appellants state that the handwritten delineation "reflecting both the format and changes [Mr. Johnson] requested to be made, will be the subject of a separate correspondence." The letter ends by requesting DHCD's "final review comments on all disciplines." (*Id.*).

On March 26, 1987, the contracting officer issued Proceed Order No. 1, authorizing the Appellants to proceed with the changes in the design scope described in an attached "Description of Change" dated March 25, 1987. (CHF Ex. 4). The "Description of Change" instructed Appellants to provide a boiler study report and certain emergency design services related to the boilers, condensate lines, condensate pumps, and sump pumps. It also directed Appellants to "prepare and perform design documents, construction plans, specification, estimates, coordinate surveys and field inspections associated with the additional scope of work." This included performing additional architectural and design services relating to support replacing radiators with fan coil units and constructing a management office, maintenance shop, new laundry room, and clothing center. (CHF Ex. 4; Tr. 349).

Appellants received DHCD's comments on their 90-95 percent construction documents on April 28, 1987. (*See* CHF Ex. 23, at 2).

In the March to early May 1987 time frame, Mr. Johnson directed several additional changes to the scope of work. After most of the architectural work had been completed for the 15 handicapped units and incorporated in the 90-95 percent submission, Mr. Johnson directed Appellants to redesign 6 of the 15 handicapped units and make them into standard units. (Tr. 396, 398, 572, 616). Appellants also received direction from Mr. Johnson to replace the townhouse foyers design with canopies. (Tr. 459, 470; *see* CHF Ex. E, at 2; Tr. 393-394). In April or May 1987, Appellants became aware the certain housing units had been damaged by fire. (Tr. 432). In a letter dated May 13, 1987 to the Appellants, Mr. Johnson advised them of 5 units that had to be included in the construction estimate and directed them to make "a walk through inspection in order to ascertain the scope of work." (CHF Ex. C). In the May or June 1987 time frame, Appellants' two project managers spent one day surveying the burned units. (*Cf.* Tr. 576-577 *with* Tr. 402-403). Design work was done shortly thereafter. (Tr. 577-579).

The contract required Appellants to submit a detailed cost estimate for all construction work and that estimate would become the government estimate used for the evaluation of bids received for the construction contract. (Contract, Appendix A, at 4). Appellants were responsible for preparing an economical design within a specified mandatory construction cost limitation. (*Id.* at 8). During the design development phase, Appellants were required to submit a preliminary estimate showing "*separately* (a) the cost of each new building or addition, (b) the work in existing buildings, and (c) costs of all work outside the buildings; the estimate shall be broken down to

show the cost analyses or allowances (noted as such) based on these units." (Appendix B, at 24). The contract required that the estimate for the construction documents phase be based "on an accurate detailed quantity survey of both labor and material. Any standard estimating procedure will be acceptable provided that the conclusions are presented in the order and detail shown on the Recapitulation Sheet attached. Lump sums or allowances for major items of the estimate shall not be used." (*Id.* at 34). Although the Recapitulation Sheet is not in the record, the estimating requirements suggest that the cost estimates are derived from unit building estimates, consistent with the requirements for the design development phase's preliminary cost estimates. By May 1987, Mr. Johnson had received from Appellants an initial 100 percent construction documents phase cost estimate. (*See* Tr. 664-666, 701-703, 865-866; CHF Ex. C; CHF Ex. 22, at 2).

On May 11, 1987, Appellants submitted an initial price proposal amounting to $136,233. (*See* CHF Ex. B, at 4). Although the proposal was not made a part of the record, Mr. Johnson testified that the proposal amount covered the changes directed by Proceed Order No. 1 and project delays attributable to DHCD. (Tr. 232-233). The parties met several times to negotiate an equitable adjustment to the contract price and completion date. One such negotiation session took place on May 22, 1987. (*See* CHF Ex. E).

Appellants submitted a revised pricing proposal by letter dated May 28, 1987, in the amount of $116,964. (*Id.*; Tr. 620-625). The proposal makes clear that it covers both architectural and engineering work for: (1) converting from steam to hot water heating system; (2) replacing radiators with fan coil units; (3) converting vacant basement space into a resident manager's office, with ancillary facilities such as administrative space and an engineer-custodial facility, a community clothing facility, and a resident laundry facility; (4) emergency boiler work; and (5) miscellaneous architectural changes. The text for item (5) specifically mentions the effort of removing (from the 90% drawings) the townhouse entrance foyers "which entailed considerable architectural redesign and drafting," *i.e.*, replacing them with canopies. (CHF Ex. E; Tr. 393-394, 458-460, 466-470).

For their final negotiation session held on June 1, 1987, Mr. Johnson advised Appellants to bring to the table any other kind of delays or administrative costs due the architect team. (Tr. 258). The parties agreed on a change order amount of $120,194, which included additional amounts for reproductions of drawings and other miscellaneous fees. (CHF Exs. 3 and E; Tr. 343, 620-625). Appellants submitted another proposal dated June 2, 1987, confirming the agreement reached by the parties. (CHF Ex. B, at 3; Tr. 248). That proposal was not made a part of the record.

During the period May through approximately July, 1987, Appellants were revising their 90-95 percent documents for all disciplines and incorporating the comments received from DHCD on April 28. For the new scope added by Proceed Order No. 1 and the miscellaneous changes directed by Mr. Johnson — redesigning 6 handicapped units back into standard units, replacing the townhouse foyers with canopies, and supplementing the drawings for the 5-7 burned units — Appellants were incorporating these design elements into the overall construction document package for Appellants' 100 percent submission. We find that Appellants submitted the 100

percent construction document package by early August based on an August 19, 1987 letter in which Mr. Johnson mentions that the 100 percent documents are being reviewed by DHCD staff for comments. (CHF Ex. F; Tr. 271-272).

In an August 11, 1987 meeting, the parties agreed that the construction documents phase cost estimate should be divided into six construction phases. (CHF Ex. F). Phasing involved dividing the 28 buildings into six groups (phases) and preparing a separate cost estimate for each group.

On August 26, 1987, DHCD's contracting officer executed Change Order No. 1 on behalf of the District, granting Appellants an increase in the contract price of $120,194 and a time extension of 432 calendar days based on the changes authorized by Proceed Order No. 1 and all scope changes incorporated by Appellants' price proposals of May 11, 1987, May 28, 1987, and June 2, 1987. Change Order No. 1 states: "The net increase is the agreed to fixed price to accomplish the above work and is full and final compensation for the changes included herein." (CHF Exs. B, E, and 4; Tr. 620-625). In the "Justification for Time Extension" for Change Order No. 1, prepared by Mr. Johnson and dated June 1, 1987, the calculation of the 432-day extension is explained. First, it identifies 273 calendar days for District-caused delays for the period of June 27, 1986 to March 26, 1987, involving administrative delays, delays associated with revisions to the building code, and design and construction document submittal review delays. (CHF Ex. B, at 3; Tr. 254-262). Second, it identifies a total of 159 days for survey, study, preliminary design development and DHCD review, and for construction document preparation and DHCD review for the additional services required under Proceed Order No. 1, covering the period of March 26, 1987 to August 31, 1987. (CHF Ex. B, at 3; Tr. 262-263). The time extension revised the contract completion date from June 27, 1986, to August 31, 1987. (Tr. 271).

Appellants state that they received Change Order No. 1 on September 14, 1987. (*See* CHF Ex. 3; Posthearing Mem. at 27). Appellants executed Change Order No. 1, without reservation, making it a bilateral contract modification. (CHF Exs. 3 and B). By letter of September 29, 1987, Appellants acknowledged "receipt of the official change order with respect to the overall changes which have taken place during the course of our Notice to Proceed with the Carrollsburg Comprehensive Modernization project." (CHF Ex. 22).[4] Recognizing the grant of a 432-day time extension, Appellants' only stated concern raised in the letter is that DHCD "issue a written statement documenting the cause of delay in conjunction with the change documents [Change Order No. 1]."

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[4] Early in his testimony, Mr. McGee stated that Change Order No. 1 was "kind of a culmination of all of the different problems we had had with the mechanical up to that particular point," "either heating, electrical, and this kind of thing," but did not include any architectural work. (*See* Tr. 40-47). Based on our review of the documentation included by the parties in the record, including the correspondence, Proceed Order No. 1, the May 28, 1987 proposal, and the Change Order No. 1 documentation, we do not agree with Mr. McGee's assessment.

Under cover letter dated September 17, 1987, Appellants submitted their revised cost estimate for the project, taking into account the scope of work, as changed, and according to the grouping of the 28 buildings into six phases. (CHF Ex. 21; Tr. 180-181).[5] The division of the buildings into six groups is depicted in the contract drawings. (*See* Drawing No. SR-1).

In an October 23, 1987 letter, Appellants note that DHCD wants all documents finalized and ready to be incorporated into the construction contract bid package by November 6, 1987. To meet that date, Appellants request that DHCD advise them of the type of play equipment and their site location. Appellants indicate that there is a meeting with DHCD planned for Monday, October 26, and that they intend to submit their corrected (revised) cost estimate at the meeting. In the letter, Appellants request that DHCD provide to them at the meeting all final review comments regarding Appellants' 100 percent drawings and specifications and the construction phasing plan. Appellants assure DHCD that if they receive the information and review comments on October 26, it will take only a few days to finalize the construction documents. (CHF Ex. 23). Based on a review of record as presented by the parties, we find that Appellants' work was substantially complete by the end of October 1987. Although Appellants' witnesses testified to significant architectural effort being performed in November and December 1987, we do not find that testimony credible in the absence of corroborating documentation. Indeed, in one of Appellants' claim letters, it identifies the performance period as March 21, 1986 through October 23, 1987, and it gives October 23, 1987 as the date of their 100 percent submission. (CHF Ex. 16, at 3). To the extent that Appellants' October 23 letter suggests some minor architectural work or corrections would be performed after October 23, 1987, we find the work to be de minimis.

DISCUSSION

The Board exercises jurisdiction over the appeal pursuant to D.C. Code § 1-1189.3.

Handicapped Units

Appellants claim they performed extra work in designing the 15 handicapped units, and later redesigning 6 of the 15 units into standard units. Appellants seek compensation of $22,275. From the facts described above, it is clear that the initial design of the 15 handicapped units was covered in the contract scope of work. One of Appellants' witnesses conceded the point. (Tr. 572-573). It is also clear that the parties understood that the redesign of the 6 units was covered Change Order No. 1.

Canopies and Foyers

Initially, both the apartments and townhouses at Carrollsburg had canopies at their entrances. The contract scope of work called for the repair or replacement of canopies for the apartments and a new design of exterior foyers, rather than canopies, for the townhouses. After

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[5] Although the September 17 letter states that McGee's firm did the cost estimate work, Mr. McGee testified that Mr. Brown's firm did the cost estimating work. (Tr. 184).

Appellants prepared 90-95 percent design drawings for the townhouse foyers, Mr. Johnson advised Appellants that DHCD was changing the design by deleting the foyers and replacing them with canopies. Appellants claim they performed extra work in redesigning the 82 townhouses to replace the foyers with canopies. Appellants seek compensation of $60,500. As previously discussed, the sequence of events leading up to execution of Change Order No. 1 demonstrates that the redesign and drafting effort was fully covered under Change Order No. 1.

Burned Units

Appellants claim they performed extra work in supplemental survey and design work for 7 units that were damaged by fire. Appellants seek compensation of $8,490.[6] This scope change, like that for the handicapped units and the townhouse foyers, was covered by Change Order No. 1.

Phasing the Construction Cost Estimate

Appellants seek an adjustment of $98,825 for preparing the construction cost estimate in six phases. They say they spent 1,050 hours in the period August to October 1987 and another 2,016 hours in the period October to December 1987. Beyond the fact that the record is devoid of any contemporaneous written notice of such a significant effort, and the claim letters make no mention of this alleged change, we are not persuaded that the effort in grouping the cost estimates for the separate buildings into six groups constitutes a material change to the contract scope of work. The contract required Appellants to prepare a detailed cost estimate by building. "Phasing" required Appellants to provide a proposed grouping of the 28 buildings into six groups with a cost estimate for each of the six groups. Appellants have not shown how this effort materially expanded their cost estimating effort and required over 3,000 additional hours of architect time.

Playground Equipment

Appellants seek $11,410 for 374 hours of extra architectural work associated with deleting work on site drawings and inserting playground equipment. The written record does show that Appellants did not have DHCD's desired playground equipment as of October 23, 1987. However, playground equipment was part of the scope of work. Thus, Appellants are only entitled to compensation to the extent that the delay in providing the specifications for the playground equipment caused extra work. We conclude that Appellants have not met their burden of proving quantum. Appellants rely exclusively on hearing testimony from its witnesses but that testimony does not distinguish between effort required by the contract and truly *extra* work.

Storage Facilities, Toilets, Roof Ventilation

Appellants seek $1,040 for extra work in the basement build-out for the design of storage

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[6] In their posthearing brief, Appellants miscalculate the amount as $4,490. Calculated correctly, Appellants seek $8,490.

space and to refurbish all toilets and $1,100 for alleged extra roof ventilation work. Appellants did not support these claim elements with any contemporaneous documentation. For the same reasons given with regard to the extra work claims relating to the handicapped units, burned units, and the townhouse foyers, we conclude that to the extent any of this effort was extra work, it was covered by Change Order No. 1.

The Deduction for Condensate Line Work

Appellants challenge the deduction made by Mr. Johnson in deducting $21,160 for condensate line work. We conclude that Appellants have legal ground to challenge that deduction. Mr. Johnson notified Appellants by no later than February 14, 1986, of DHCD's intent to deduct the amount from the contract price to be incorporated in the definitized contract. Appellants concede that they executed the March 21, 1986 definitized contract fully aware of the deduction reflected in the contract price. Having failed to expressly reserve their right in the contract to later challenge the deduction, they are barred from challenging it now. *A.S. McGaughn Co.*, CAB Nos. D-898 & D-899, July 21, 1994, 42 D.C. Reg. 4648, 4663.

CONCLUSION

Having carefully considered each of Appellants' arguments in support of their claims for equitable adjustment, we conclude that Appellants claims fail because either they have not met their burden of proving quantum or they have received full compensation under Contract Change Order No. 1. Accordingly, Appellants' appeal is denied.

DATED: February 4, 1998

JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

PHYLLIS W. JACKSON
Administrative Judge