

# Government of the District of Columbia

## CONTRACT APPEALS BOARD

717 14TH STREET, N.W., SUITE 430  
WASHINGTON, D.C. 20005



1202, 727 6597

DATE: January 14, 1993

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SUBJECT: CAB No. D-863 and D-864, Appeals of The Sherman R. Smoot Corporation

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

*Rose M. Gillison / RMH*  
ROSE M. GILLISON  
Clerk to the Board

Attachment

RMG/ mjh

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

**APPEALS OF:**

<b>THE SHERMAN R. SMOOT CORPORATION</b>	)	
	)	<b>CAB Nos. D-863 and D-864</b>
	)	<b>(Consolidated)</b>
<b>Under Contract No. 88-0053-AA-2-0-CC</b>	)	<b>(Reconsideration)</b>

**For the Appellant: Jack Rephan, Esquire. For the Government: Warren J. Nash,  
Assistant Corporation Counsel.**

**Opinion by Administrative Judge Zoe Bush.<sup>1/</sup>**

**OPINION ON RECONSIDERATION**

Appellant, Sherman R. Smoot Corporation (Appellant, SRS) has timely requested reconsideration of the July 17, 1992, decision concerning the above-captioned consolidated appeals.<sup>2/</sup> Board Rule 117.1(d), 36 DCR 2696. The District timely responded in opposition to the petition (Board Rule 117.4, 36 DCR 2697) and SRS has replied thereto.

In its decision on the consolidated appeals, the Board held that a contractor's claim for additional compensation must be denied where it is not timely filed in compliance with the 30 day notice provisions of the Changes Clause of the Government of the District of Columbia Standard Contract Provisions. The provision at issue, Article 3. Changes, Section C, state:

**C. GENERAL REQUIREMENTS - Except as herein provided, no order, statement or conduct of the Contracting Officer shall be treated as a change under this Article or entitle the Contractor to an equitable adjustment hereunder.**

**If any change under this Article causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this Contract, whether or not changed by any order, an**

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<sup>1/</sup>As with the original consolidated appeals, this decision on reconsideration is pursuant to the Small Claims Procedures of the Board, D.C. Code § 1-1189.4(d-h) and Board Rule 215, 36 DCR 2702-2708. Because this decision on reconsideration is rendered by a single administrative judge, it has no precedential value.

<sup>2/</sup>The July 17, 1992, decision is unpublished because it has no precedential value.

equitable adjustment shall be made and the Contract modified in writing accordingly. Provided, however, that except for claims based on defective specifications, no claim for any change under (B) above shall be allowed for any cost incurred more than 20 days before the Contractor gives written notice as therein required unless this 20 days is extended by the Contracting Officer. And provided further, that in case of defective drawings and specifications, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective drawing and specifications.

If the contractor intends to assert a claim for an equitable adjustment under this Article, he must, within 30 days after receipt of a written Change Order under (A) above or the furnishing of a written notice under (B) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Contracting Officer. The statement of claim hereunder may be included in the notice under (B) above.

No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under the Contract.

The Board cited as support, Appeal of Mirando, Inc., GSBCA 3513, 72-2 BCA ¶9483; and Appeal of Mirando, Inc., GSBCA 3300, 77-1 BCA ¶8892.

Appellant correctly points out, however, that while the Board took into account the fact that the government must show prejudice for the 20 day notice provision set forth above to apply, the Board failed to apply the same standard to the 30 day notice provision. SRS cites as support, Powers Regulator Company, GSBCA Nos. 4668, 4778, 4838, 80-2 BCA ¶14,463; Hartford Accident and Indemnity Company, IBCA No. 1139-1-77, 77-2 BCA ¶12,604; Pittsburgh-Des Moines Corporation, EBCA No. 314-3-84, 89-2 BCA ¶21,739. The District responds that it was prejudiced by SRS' failure to notify the District within 30 days of the monetary extent of SRS' claims, because the District was unable to mitigate its costs.


Based on the foregoing, the Board finds that the decision in this case was based on legal error and that the 30 day notice provision should not be generally enforced where there has been no prejudice to the government. Powers Regulator Company, *supra*, Hartford Accident and Indemnity Company, *supra*, Pittsburgh-Des Moines Corporation, *supra*. In that the District did not raise the 30 day notice provision as an affirmative defense, it may not now on reconsideration claim that it was unable to mitigate its costs. General Exhibits, Inc., AGBCA No. 81-260-1, 84-1 BCA ¶17,071.<sup>3/</sup>

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<sup>3/</sup>In its July 17, 1992 decision, the Board did not reach the issue raised by the District on brief concerning the lack of authority of the Supervisory Construction Engineer. While this challenge to SRS' claim for  
(continued...)

Therefore, the Board's decision of July 17, 1992, is hereby vacated, the appeal is SUSTAINED, and Appellant is entitled to an equitable adjustment in the amount of \$3,406.12 for CAB No. D-863, and \$6,092.21 for CAB No. D-864, plus interest.

DATE: January 14, 1993

  
\_\_\_\_\_  
ZOE BUSH  
Administrative Judge

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<sup>3/</sup>(...continued)

recovery is set forth in the appeal file in CAB No. D-863 at AF 4.3, and in the appeal file in CAB No. D-864 at AF 4.3, it is not set forth in the District's answer in either docket as an affirmative defense, therefore it will not be considered at this time. General Exhibits, Inc., supra.

12/18/92

**DELIVER TO:** Clerk  
D.C. Court of Appeals  
500 Indiana Avenue, N.W.  
Washington, D.C. 20001

**SHERMAN R. SMOOT CORPORATION v. D.C. CONTRACT APPEALS BOARD**

No. 92-AA-1380

**BOX 1 OF 1**

APPEAL OF:

SHERMAN R. SMOOT CORPORATION )

Under Contract No. 88-0053-AA-2-0-CC )

CAB Nos. D-864, D-863

INDEX

		<u>Page</u>
<u>CAB No. D-864</u>		
10-01-90	Notice of Appeal.....	1
11-01-90	Notice of appeal to agency.....	31
11-01-90	Acknowledgment of notice of appeal.....	32
11-30-90	Complaint.....	33
12-20-90	Index of Appeal File Documents.....	37
12-27-90	Notice of Appearance .....	40
10-27-90	Answer.....	41
05-31-92	Order consolidating appeals.....	44
 <u>CAB No. D-863</u>		
10-01-90	Notice of Appeal.....	45
11-01-90	Notice of appeal to agency.....	76
11-01-90	Acknowledgment of receipt of notice of appeal.....	77
11-30-90	Complaint.....	78
12-20-90	Index of Appeal File Documents.....	82
12-27-90	Notice of Appearance.....	85
12-27-90	Answer.....	86
05-31-91	Order consolidating appeals.....	89
01-30-92	Notice of Appearance.....	90

CAB No. D-863 Cont'd.

		<u>Page</u>
02-04-92	Order requesting dates for telephone conference.....	91
02-10-92	Letter from appellant, dated 2/7/92, regarding Board Order for telephone conference.....	92
02-12-92	Letter from appellant, dated 2/11/92 advising of dates for telephone conference.....	94
02-18-92	Order scheduling telephone conference.....	95
02-25-92	Report and Order on Telephone Conference.....	96
04-21-92	Order rescheduling hearing.....	97
06-01-92	Appellee's Post-Hearing Brief (D-863).....	98
06-01-92	Appellee's Post-Hearing Brief (D-864).....	103
06-01-92	Appellant's Post-Hearing Brief (D-864).....	108
06-01-92	Appellant's Post-Hearing Brief (D-863).....	121
06-10-92	Appellant's Reply Brief (D-863).....	130
06-10-92	Appellant's Reply Brief (D-864).....	133
07-17-92	Opinion.....	137
08-06-92	Appellant's Motion for Reconsideration.....	143
09-01-92	Appellant's Suggestion that Motion for Reconsideration be Treated as Conceded.....	157
08-06-92	Appellant's motion for reconsideration.....	159
09-04-92	Appellee's Memorandum of Points and Authorities in Opposition to Appellant's Motion for Reconsideration.....	160
09-14-92	Appellant's Reply to Respondent's Memorandum of Points and Authorities in Opposition to Appellant's Motion for Reconsideration.....	165
11-18-92	Petition for Review of Opinion of Government of the District of Columbia Contract Appeals Board.....	170