October 31, 1997

SPECIAL MASTER'S FINAL REPORT	DATE	COMM.	ACTION
The Honorable Toni Jennings President, The Florida Senate Suite 409, The Capitol Tallahassee FL 32399-1100	11/03/97	GO WM	Fav/1 amendment

Re: SB 20 - Senator Clary
HB 939 - Representative Melvin
Relief of Dale R. Cowie

THIS IS AN EQUITABLE CLAIM FOR $15,401.77 AGAINST THE DEPARTMENT OF MANAGEMENT SERVICES TO COMPENSATE CLAIMANT FOR EXPENSES INCURRED IN PERFORMING WORK AS A SUBCONTRACTOR ON THE JACKSON CORRECTIONAL INSTITUTION PROJECT.

FINDINGS OF FACT:

Claimant, Dale R. Cowie, was the owner of Fire Control, Inc., and was the subcontractor installing the fire sprinkler system on the Jackson Correctional Institution construction project. The general contractor on the project was J. Kinson Cook, Inc. The project was overseen by Schweizer Incorporated, an architectural firm, as agent for the Department of General Services.

During construction of the Jackson Correctional Institute, claimant allegedly encountered several problems. The only evidence adduced at the Special Master's hearing was the statements of the claimant and of a Department of Management Services witness and documentary evidence.

According to claimant, he encountered the following three problems in installing the fire sprinkler system at Jackson Correctional and incurred the costs set forth as a result. First, in installing the sprinkler pipes inside the mechanical chases, there was a conflict with the plumbing pipes. The sprinkler pipes had to be re-routed to avoid the plumbing pipes at a total cost of $13,659.29. The second problem was the

installation of access panels, which claimant did not think the contract plans required, and which cost $477.48. The third problem was the extension of sprinkler pipes when sprinkler head spray patterns conflicted with lighting fixtures, which cost $1,265.00. The total additional costs were $15,401.77. These costs are the basis of this claim bill.

Claimant had 3 possible remedies by which to recover these costs. If the problems were due to inadequate coordination of the work of the subcontractors by the general contractor, he could have brought an action against the general contractor. If the problems were due to errors in the plans, he could have sought a change order or pursued a claim for additional construction costs incurred. If the problems were covered by the construction contract and payment was not made, he could have presented a claim against the surety payment bond.

Inadequate Coordination by General Contractor

Under the terms of the construction contract between the Department of General Services and the general contractor, J. Kinson Cook, Inc., the general contractor is responsible for supervision of the subcontractors. The duty of the general contractor to coordinate the work of the subcontractors appears to be undisputed. In his correspondence, J. Kinson Cook never denies that his company has this duty; he only denies that the problems were due to a failure to properly perform the duty.

In a letter written to the general contractor on October 5, 1990, claimant indicates that he believes that the problem with the plumbing pipes may have been due to improper placement of those plumbing pipes. In this letter, claimant stated that, from the beginning of his work on the project, he had pointed out coordination problems to the general contractor's foreman. In this letter, claimant states that the plumbing contractor installed the sleeves for the plumbing pipes in the mechanical chases in such a way as to create a conflict with the sprinkler pipe. Claimant refers the general contractor to a specific contract and shop drawings, both of which show the same arrangement for the pipes in the chases. Claimant states that the actual installation was quite different from these

drawings and that the placement of the plumbing pipes necessitated that the sprinkler pipes from the first to the second floor be offset. However, despite all these statements, claimant also stated that:

> [The plumbing contractor's] statement that there is only one way to install the system seems a little bold to me. Certainly that is not the case. However, if you and they insist that that is the case, then the contract drawings are not correct and change orders for revisions should be a matter of fact and a matter of record for all trades.
> . . .
> If you think that the changes are due to the contract drawings, then I would suggest submitting this to the architect. If you think that it is due to a lack of coordination, then I suggest that you work it out with the plumbing and electrical contractor.

In all other correspondence in the record, claimant adamantly denies any problem of coordination of subcontractors and blames the conflict on the plans. The inconsistency between the correspondence is not addressed or explained in any other documents. The apparent explanation is that claimant became convinced subsequent to the October 5, 1990, letter that the plans were in error, not the installation of the plumbing pipes.

Claimant did not pursue the initial allegations of inadequate coordination nor did he bring any action against the general contractor.

Errors in Plans

Under the contract between the Department of General Services and the general contractor, the general contractor’s remedy for construction delays or for changes in construction was to file a claim with the Department. A subcontractor had no direct rights under the construction contract as the subcontractor is not a party to the contract. As a corollary, the Department owed no contractual responsibility or duty directly to a subcontractor. If a subcontractor encountered a problem necessitating a delay or a change in construction plans, it was required to proceed through the general contractor, the only entity involved in constructing the

building which had contractual rights and remedies against the Department.

Claimant stated that when each problem was discovered, he submitted a request for a change order to the general contractor to be forwarded to the architect. The record is not entirely clear as to provision of notice of these claims, but claimant provided the following sequence of events. There is no indication in the documentary evidence of when the problem giving rise to the first claim for additional construction costs occurred. According to claimant, the first notice given of the problem was in a letter he sent to the general contractor on October 5, 1990, requesting that the general contractor obtain a change order. Claimant states that the general contractor's response to this letter was to telephone claimant on October 30, 1990, and tell him to simply get the job completed and settle matters at the end of the project. Claimant wrote the general contractor again on November 5, 1990, again requesting a change order. The general contractor wrote on November 9, 1990, instructing claimant to file a proper claim which it would submit to the architect.

Claimant was uncomfortable with this directive, as it was his understanding that a claim is to be filed only after additional expense has been incurred, that is after a request for a change order is submitted, rejected, and the alternative work is done. On November 11, 1990, claimant did as directed and sent the general contractor a claim. On January 1, 1991, the general contractor forwarded the claim to the architect. On February 8, 1991, the architect's project principal rejected the claim, "citing a 'conflict between' [Fire Control, Inc. and J. Kinson Cook, Inc.]." More correspondence followed, with no definitive action taken.

As to the second claim for additional construction costs, claimant's chronological statement of events states the following. On "11/10/90" claimant received notice from the general contractor to install the access panels. On November 5, 1990, claimant sent the general contractor a letter requesting a change order. On November 9, 1990, the general contractor forwarded the request to the architect. On "14/04/90" the architect's principal sent a letter directing

installation of the access panels, with no mention of the request for a change order. On December 20, 1990, the general contractor forwarded the letter to claimant. On January 14, 1991, claimant sent a letter to the general contractor containing a claim for additional construction costs for both problems. More correspondence followed, with no definitive action taken.

As to the third claim for additional construction costs, claimant states that on March 7, 1991, he sent a letter to the general contractor identifying the problem. On March 8, 1991, the general contractor sent a letter to claimant acknowledging the problem. On June 3, 1991, claimant sent a claim for additional construction costs to the general contractor, again including the claims for the previous two problems.

Claimant stated that after a time of obtaining no definitive response to his claims, he consolidated and reiterated the claims on October 29, 1991, and sent this new statement of claim to the general contractor. The general contractor forwarded the consolidated statement of claims to the Department of General Services on November 6, 1991.

In the time leading up to submission of this consolidated claim for additional construction costs, there were many communications between all those involved. The general contractor forwarded the claims to the architect's project principal, who denied them, stating that the problems were not due to the plans but were due to the general contractor's failure to coordinate the work of the subcontractors. During the same time period in which the project principal was denying the claims, there was some confusion as to whether the statement of the claims was actually sufficient to constitute a claim under the contract. Claimant and the general contractor continued to allege that the problems were due to the plans. The Department of General Services was made aware of the claims and the developments by all those involved.

During this time, claimant also made the Department aware of problems he experienced with the project principal, Michael Kelly. In a letter to the Executive Director of the Department,

Ronald Thomas, on August 27, 1990, claimant informed Mr. Thomas of a telephone conversation which he had with Mr. Kelly. Claimant wrote that during this conversation, Mr. Kelly accused him of price gouging and stated that if he, Mr. Kelly, could keep claimant off any future construction projects, he would do so. Claimant wrote that he feared that Mr. Kelly might discriminate against Fire Control on the remainder of the project.

After further correspondence between claimant and Mr. Thomas, Mr. Thomas wrote to claimant that he had looked into claimant's allegations further, had talked to other sub-contractors, and had found a consistent pattern of behavior in Mr. Kelly's dealings with sub-contractors. Mr. Thomas wrote that he had discussed this with Mr. Kelly, who agreed to send a letter of apology to claimant. Mr. Thomas also wrote that he entered into an understanding with Mr. Kelly that all of Mr. Kelly's future communications concerning the project would be with the general contractor, not with sub-contractors. Mr. Thomas stated in the letter to claimant that this should improve the communication on this project. Mr. Kelly promptly sent claimant a letter of apology.

During this time, communications between Mr. Kelly and the general contractor appear to deteriorate. Beginning when the sprinkler system installation problems were first presented to Mr. Kelly in early 1991, much of the correspondence between the two appears to concern not the resolution of the problems, but which of the two, the architectural firm or the general contractor, is responsible for the problems. Communications developed to the point where the general contractor, in a letter written to the Department of General Services on November 6, 1991, referred to the latest letter from Mr. Kelly as "the most disingenuous letter that the architect has written to date."

On March 18, 1992, the Department issued a letter rejecting claimant's October 29, 1991, consolidated statement of his claims of additional construction costs. The Department did so because it was not responsible for claims of subcontractors as it had no contractual responsibility or authority to accept such claims. The Department stated that only the general contractor could file a claim and that, in this case, if the

general contractor were to do so on claimant's behalf, this claim would be rejected as well because the general contractor did not file a claim in a timely manner. The Department stated that under the general conditions of the construction contract, notice for extensions of time or for additional costs must be given within 20 days of the event giving rise to the claim. The Department also stated that it had reviewed claimant's allegations and found them without merit, as stated in an attached letter from the project architect.

The attached letter was a report of a review of Fire Control's claims. The review was conducted by Schweizer Incorporated, the company which developed the plans. The report denied that there were any errors in the plans.

The general contractor did not appeal the denial. The reason for this is unknown, but it may have been due to the Department's determination that the claim which was denied was not in fact the general contractor's claim.

Construction was completed and, on September 30, 1993, the general contractor executed a release of all claims resulting from the construction contract and subcontracts.

Surety Payment Bond

There was a surety payment bond on the project. Subcontractors who were not paid could file a notice of nonpayment within 90 days after performing the labor or supplying materials. If a subcontractor did so, it would have one year from the date performance is completed to bring suit against the contractor or the surety. Claimant did not file claim on the surety bond nor file an action against the general contractor.

Current Status of Fire Control, Inc.

Fire Control, Inc., was administratively dissolved on August 29, 1997, for a failure to file an annual report. Claimant and Louise Gregory, his wife, were the officers and directors of the company. According to claimant, they were the sole shareholders of the company, and they preserved Fire Control's legal existence for one year after they actually

ceased it's operations. Also according to claimant, the company currently has approximately $30,000 in outstanding debt, which claimant and his wife are personally paying, and they are the company's largest creditors. Fire Control owes them approximately $24,000 for cash loans they made to the company. The other approximately $6,000 is owed for insurance, materials, and miscellaneous. The debt to the material supplier is not related to the Jackson Correctional project and is for approximately $2,500.

CONCLUSIONS OF LAW: As was discussed above, claimant had 3 possible remedies by which to recover the claimed additional construction costs: an action against the general contractor if the problems were due to inadequate coordination of the work of the subcontractors; a change order or a claim for additional construction costs incurred if the problems were due to errors in the construction plans; or a claim against the surety payment bond if the problems were covered by the construction contract and payment was not made.

Although claimant did at one point indicate that the problems causing him to incur additional construction costs might be due to coordination problems, he appeared to change his mind about this as he subsequently denied any such problems and continually alleged errors in the construction plans caused the problems.

Claimant filed formal claims for additional construction costs with the general contractor based upon these alleged errors in the construction plans. However, the general contractor, the construction entity in privity with the owner, never filed a formal notice of claim with the Department. Instead, the general contractor simply forwarded the claimant's statements of claims for additional construction costs, in some instances to the architect and in others to the Department. Because of this failure to follow the formal contractual procedures, claimant was foreclosed from pursuing his claims for additional costs. This result occurs despite the fact that the Department was aware of the claims for additional costs for quite some time before it formally denied them and despite the fact that the Department was aware of and intervened in the communications problems with the architect's project principal.

There was a payment bond, but it is uncertain whether claimant could have recovered under that bond. Such a bond is for claims that payment was not properly made as provided in the contract.

Based on what can be gleaned from the available correspondence and from testimony at the Special Master's hearing, it appears that claimant attempted to install the sprinkler system and to report problems as was required under contract, but that his efforts may have been frustrated by a lack of meaningful communication between the general contractor and the architect's project principal. It also appears that, under the contract, claimant had little recourse when this happened, as the general contractor was the only one who could present a request for a change order or a claim, the only one who could appeal a denial of a claim, and the architect was to communicate solely with the general contractor.

While it does not appear that the Department directly did anything to create either the installation problems or the communication problems, it was aware of them and may not have made adequate attempts to resolve them. In particular, the Department's Executive Director was aware of communication problems with the architect's project principal early in the project. His sole resolution of this problem was to arrange it so that the principal would have future contact only with the general contractor, not the subcontractors. Given the apparent animosity between the principal and the general contractor, problems such as claimant experienced may well have been avoided by arranging for a different principal.

ATTORNEYS FEES: None.

RECOMMENDATIONS: For the reasons set forth above, it would be equitable that the state, which has enjoyed the benefit of claimant's expenditures, should reimburse claimant for these expenditures. However, as it does not appear that the Department of Management Services had any direct role in creating the problems giving rise to this claim bill, it is recommended that the bill be amended to direct the payment

of this money be from General Revenue, and not from funds of the Department.

Accordingly, I recommend that SB 20 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Glenn Lang
Senate Special Master

cc: Senator Clary
Representative Melvin
Faye Blanton, Secretary of the Senate
Richard Hixson, House Special Master