

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CJS MECHANICAL CONTRACTING, INC.	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 02-9056
NATIONAL FIRE INSURANCE COMPANY	:	
OF HARTFORD,	:	
Defendant	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

RUFE, J.

March 31, 2005

Plaintiff CJS Mechanical Contracting, Inc. (“CJS”), initiated this action on December 13, 2002, for breach of a surety bond covering a contract for sheet metal work on a school renovation project. After a two-day bench trial at which it had the opportunity to observe the demeanor of the witnesses and to evaluate their testimony, the Court now issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In late 2000, JBM Plumbing, Inc. (“JBM”), was awarded the prime contract (the “Contract”) to perform plumbing and HVAC¹ construction and renovation work (the “Project”) at Bethlehem Area Vocational Technical School in Bethlehem, Pennsylvania (the “School”).
2. Defendant National Fire Insurance Company of Hartford (“National”) issued a Labor and Material Payment Bond (the “Bond”) on behalf of JBM for the Project. 8/24/04 N.T. at 42.

¹ HVAC stands for Heating, Ventilating and Air Conditioning. See 8/23/04 N.T. at 9.

3. On December 14, 2000, JBM awarded the sheet metal subcontract (the “Subcontract”) to CJS pursuant to a purchase order stating that CJS would, inter alia, “furnish and install a complete ductwork system per plans, specifications and addendums.” The purchase order listed the total price as \$880,000. Despite the statement in the purchase order that a contract was to follow, the purchase order is the only written documentation of the Subcontract between JBM and CJS. 8/23/04 N.T. at 20, 50; 8/24/04 N.T. at 5-6; Exh. P-3.

4. The Project was originally scheduled to be completed by September 2002. According to the original schedule, work on the Project was only to take place during the summer, when school was in recess. However, the School subsequently agreed to allow work to take place while school was in session. As a result, the Project completion date was advanced to March 2002. CJS participated in discussions related to this change and never voiced an objection. 8/23/04 N.T. at 29, 53-54; 8/24/04 N.T. at 17-18.

5. On May 9, 2001, JBM issued an additional purchase order to CJS related to the Project for an “extra duct in office area.” The total amount for this purchase order was \$3,406, increasing the total Subcontract price to \$883,406. This was the only approved change order to the Subcontract. 8/23/04 N.T. at 51; 8/24/04 N.T. at 8-12; Exh. D-9.

6. CJS did not provide a sufficient number of employees to fulfill its obligations under the Subcontract in a timely fashion. 8/24/04 N.T. at 15.

7. In the fall of 2001, it became apparent that CJS was not fulfilling its responsibilities under the Subcontract. JBM then asked CJS to draft a schedule of the time it would need to complete the sheet metal work on certain areas of the Project. CJS compiled these schedules detailing the completion date for specific areas with the latest completion date being

February 14, 2002. 8/24/04 N.T. at 18-19; Exhs. D-49, D-50.

8. In the fall of 2001, JBM hired Scranton Sheet Metal Company (“SSM”) to assist CJS with the sheet metal work because CJS was falling behind. JBM paid SSM \$12,940 for the work SSM did side-by-side with CJS. CJS approved of this assistance and agreed to absorb this cost. 8/23/04 N.T. at 143-45; 8/24/04 N.T. at 15, 27; Exhs. D-52, D-54.

9. Between December 2001 and June 2002, JBM sent CJS several letters noting CJS’ delay in completing its responsibilities under the Subcontract, its failure to complete punchlist work, and its failure to respond to JBM’s requests for estimates of the time CJS would need to complete its work. 8/23/04 N.T. at 55-58; Exhs. D-11, D-39, D-41, D-44.

10. CJS contends that it was unable to complete certain duct work because it needed holes cut out of stone and brick walls before it could install the duct work. However, CJS failed to mark the walls where cuts were needed until June 16, 2003, when a JBM employee and a CJS employee met at the School. On that date, the CJS employee marked the walls, and the JBM employee followed him cutting out the holes. 8/24/04 N.T. at 20-21.

11. On July 1, 2002, Pete Varenchick and Gene Sole from CJS² attended a meeting with Dwight Eisenhower, president and owner of JBM; Hank Millets from Snyder, Hoffman Associates, the design engineers for the Project; and Mike Franceski from D’Huy Engineering, Inc. (“D’Huy”), the School’s representative and project manager. At this meeting, CJS agreed that the sheet metal duct work would be completed by August 8, 2002. 8/23/04 N.T. at 92;

² Varenchick was a project manager for CJS. 8/23/04 N.T. at 37-38. Sole did not testify to his title at CJS, but based on his testimony, it appears that Sole was a senior officer, if not its president and owner. In any event, Sole was heavily involved both in the negotiations relating to the Subcontract and the actual work on the Project, and his precise title is irrelevant here.

8/24/04 N.T. at 21-22. On July 3, 2002, Franceski sent a fax to Eisenhower regarding what was discussed at the meeting, noting that “CJS will complete all additional duck [sic] work by August 8, 2002 provided JBM makes good on all outstanding payments to CJS.” 8/23/04 N.T. at 46, 59-60, 81, 104; Exhs. P-23, D-47. Franceski did not intend, however, for this statement to mean the release of all retainage.³ 8/23/04 N.T. at 93.

12. After the July 1, 2002 meeting, CJS received a check from JBM for \$28,023.30. 8/23/04 N.T. at 45, 59-60; 8/24/04 N.T. at 26-27; Exh. D-54.

13. On July 2, 2002, CJS abandoned the Project before completing all punchlist⁴ work and without notification to JBM. 8/23/04 N.T. at 42-43, 61-62; 8/24/04 N.T. at 22. CJS did not clean up the site and left materials and equipment laying around. 8/24/04 N.T. at 24. JBM spent \$5,578.64 to clean up the work site and dispose of the materials left by CJS. 8/24/04 N.T. at 33-34; Exhs. D-52J, D-54.

14. The punchlist items that CJS failed to complete were all within the scope of its Subcontract with JBM. 8/23/04 N.T. at 157. In addition, JBM discovered that a significant amount of the work CJS claimed to have completed, and for which CJS had been paid, was incomplete, including missing duct work and missing dampers with fire safing. 8/24/04 N.T. at 13.

15. CJS also left a roof curb uncovered, allowing water to seep through the ceiling and damage a Formica countertop. JBM paid \$850.00 to repair this countertop. 8/24/04 N.T. at 30-

³ Retainage refers to an amount that is set aside by contractual agreement to make certain that all contract work is completed by a contractor. Once the work is completed to the satisfaction of the contract documents, the retainage is released to the contractor. 8/23/04 N.T. at 90.

⁴ According to Franceski, “a punchlist would be put together to document areas of construction that are - - remain incomplete in accordance with the contract documents.” 8/23/04 N.T. at 89.

31, 82-84; Exhs. D-52B, D-54.

16. As of July 2, 2002, when CJS walked off the Project, JBM had paid CJS \$762,906.10 of the \$883,406 Subcontract price. 8/24/04 N.T. at 26-27; Exh. D-54. The remaining \$120,499.90 constituted the ten-percent retainage on the Subcontract plus approximately three percent of the remaining work under the Subcontract. 8/24/04 N.T. at 41-42.

17. After CJS walked off the Project, JBM hired SSM and Myco Chemical, Inc. (“Myco”) to perform the punchlist sheet metal work that CJS had left uncompleted. 8/23/04 N.T. at 107-122, 140-42; 8/24/04 N.T. at 27-32. All of the work completed by SSM and Myco was in accordance with the plans and specifications for the sheet metal duct work and was necessary to furnish a complete sheet metal duct work system. 8/23/04 N.T. at 121, 160, 182-83; 8/24/04 N.T. at 27-32.

18. JBM paid SSM \$47,761 for the sheet metal work it completed on the Project after CJS had stopped working. 8/23/04 N.T. at 143-45; 8/24/04 N.T. at 28; Exhs. D-52, D-54. However, a portion of this work was extra work that D’Huy had approved for JBM to do outside of the scope of the Subcontract. 8/23/04 N.T. at 81-84; 8/24/04 N.T. at 55-56; Exh. P-9.

19. JBM paid Myco \$44,469.34 for the punchlist sheet metal work it completed on the Project after CJS had stopped working. 8/23/04 N.T. at 192-93; 8/24/04 N.T. at 31-32; Exhs. D-52G; D-54.

20. JBM also had to pay David Cody \$3,450 to repair ceiling tiles that had been damaged by CJS while it was still working on the Project. CJS had agreed to repair this damage but never performed the repairs. In addition, JBM spent \$191.99 to purchase ceiling tiles for this repair work. 8/24/04 N.T. at 32-33, 103-106; Exhs. D-52C, D-52E, D-52F, D-54.

21. CJS abandoned the Project without providing twelve sets of shop drawings for approval as specifically required by the original purchase order from JBM to CJS. 8/24/04 N.T. at 34-35; Exhs. D-1, P-3. JBM obtained an estimate from Myco that the cost of such drawings for the Project would be \$23,500. 8/24/04 N.T. at 34-35; Exhs. D-52G, D-54. However, these drawings were never completed. 8/24/04 N.T. at 35.

22. CJS also did not complete an alternate⁵ to the Subcontract that was valued at \$15,000. CJS supplied and installed a fan but did not install duct work and a fume hood. The cost of labor and material for the fan was \$1,060, so CJS did not perform \$13,940 worth of work required by the Subcontract. 8/24/04 N.T. at 36; Exhs. D-52I, D-54.

23. On August 1, 2002, still not having heard from CJS regarding its abandonment of the Project, counsel for JBM sent CJS a letter terminating the Subcontract due to CJS' material breach. CJS did not respond to this letter. 8/24/04 N.T. at 25; Exh D-48.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this case because there is diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332.

2. CJS and JBM entered into a valid written contract pursuant to which JBM would pay CJS \$880,000 to furnish and install a complete duct work system in the School. This contract was subsequently amended to add additional duct work, bringing the total contract price to \$883,406.

3. CJS materially breached this contract by failing to fulfill its obligations in a timely

⁵ The purchase order that constituted the Subcontract contained a line stating, "alternates – \$36,000." Exhs. P-3, D-1. The testimony did not explain exactly what the parties meant by this term. In any case, the Court credits Dwight Eisenhower's testimony that CJS never completed this alternate valued at \$15,000.

fashion.

4. CJS materially breached this contract by abandoning the work site without notice to JBM prior to fulfilling its obligations under the contract.

5. JBM had fulfilled its obligations under the contract as of the time CJS ceased work and as such, did not materially breach its contract with CJS.

6. JBM properly terminated the contract with CJS on August 1, 2002.

7. As a result of CJS' breach, JBM spent in excess of \$883,406 to complete the work for which CJS was responsible under the contract.

8. Accordingly, as a result of CJS' material breach and of the amount expended by JBM to complete work that should have been completed by CJS, neither JBM nor its surety, National, owes any money to CJS, and judgment will be entered in favor of National.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CJS MECHANICAL CONTRACTING, INC.	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 02-9056
NATIONAL FIRE INSURANCE COMPANY	:	
OF HARTFORD,	:	
Defendant	:	

ORDER

AND NOW, this 31st day of March, 2005, after a bench trial, and pursuant to the attached Findings of Fact and Conclusions of Law, it is hereby **ORDERED AND DECREED** that **JUDGMENT** is entered for Defendant National Fire Insurance Company of Hartford and against Plaintiff CJS Mechanical Contracting, Inc. on the Complaint.

It is further **ORDERED** that the Clerk of Court shall mark this case **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.