

[Cite as *Fed. Ins. Co. v. Dept. of Admin. Serv.*, 1992-Ohio-270.]

IN THE COURT OF CLAIMS OF OHIO

FEDERAL INSURANCE CO., et al. :

Plaintiffs : CASE NO. 90-09428

v. : DECISION

DEPARTMENT OF ADMINISTRATIVE : Judge Fred J. Shoemaker  
SERVICES, et al.

Defendants :

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This cause arose due to the default of an electrical contractor on a public works construction project.

Pursuant to a federal court's decree, the Department of Rehabilitation and Correction, defendant herein, decided to substantially expand the prison facilities at the Chillicothe Correctional Institute. Plans were drawn and bids solicited for the construction of some nineteen additional buildings. Becker Electric Company (Becker), obtained the electrical portion for Phase IV of the project and signed a contract to that effect on February 20, 1985, with defendant Department of Administrative Services (DAS). Pursuant to its contract, Becker had 750 days to complete the project, *i.e.*, until March 19, 1987. The contract also required Becker to provide a bond for its performance. The bond was furnished by Federal Insurance Company (Federal), in the penal sum of \$5,505,683.

On April 14, 1986, Becker defaulted upon its contractual obligations. Becker abandoned the project and went out of business. Demand was immediately made upon Federal to complete the electrical portion of the project and to supply an electrical contractor within fifteen days. Federal was unable to comply. DAS

then requested that the general contractor hire an electrical contractor to keep pace with the construction. The general contractor hired S.O.S. Electrical Company (S.O.S.), to work on the project performing limited electrical services. S.O.S. manned the project for approximately seven weeks and was paid \$200,000 on force account via the change order process.

On June 9, 1986, plaintiff, Henderson Electric Company (Henderson), entered the project pursuant to an agreement with Federal. The agreement required Henderson to assume all of Becker's contractual responsibilities. The contract also provided that Henderson would look to Federal for payment with all progress payments due the electrical contractor to be paid to Federal.

Henderson began work on the project with approximately twenty-five electricians. Within three months, Henderson increased that number to forty-six electricians. Henderson began to reduce its force on the project during November and early December. At a job meeting held on December 18, 1986, with the deputy director of public works in attendance, Henderson was told that its performance was behind schedule and that it must increase the number of electricians to complete performance on the contract completion date. Henderson's representative at that meeting agreed to provide the additional manpower. However, later, Henderson's vice president countermanded that agreement. Thereafter, the deputy director sent a letter to the bonding company's representative by which he stated the following:

\*\*\* Henderson will not finish this project at a time sufficient to guarantee completion of the entire project by mid-March, 1987. Therefore, I

have requested Henderson Electric, Inc. to accelerate its performance in order to comply with the revised schedule to be prepared by the associate architect, Voinovich-Sgro, Inc. \*\*\*. If Henderson Electric, Inc., satisfactorily performs its work in accordance with the revised schedule, and meets the time requirements set, this office shall entertain a request for additional compensation consistent with the additional expenditures made by Henderson Electric, Inc.

In response to these representations, Henderson increased the manpower levels to forty-four electricians and held that level until the project was substantially completed in mid-March. Henderson sought additional compensation from Federal. Federal settled with Henderson and assigned all of its rights and obligations to Henderson. After first submitting the claim to DAS, Henderson filed the instant lawsuit. Henderson claimed that it was forced to accelerate its performance on the project after the December 18, 1986, meeting based on the letter from the deputy director set forth above. Henderson contends that it was forced to accelerate from January 4 to March 4, 1987, and incurred substantial additional expenses.

The term "acceleration," as applied to construction law cases, describes a quickening of the normal progress of the construction. "It occurs when the contractor performs its work at a faster rate than required by the original contract." Cushman & Carpenter, *Proving and Pricing Construction Claims* (1990), citing *Contracting & Material Co. v. City of Chicago* (1974), 20 Ill. App. 3d 684, 692. The normal result to the contractor who is accelerated is that it must incur greater labor, overhead,

mobilization and inefficiency costs to perform at the greater than anticipated speed. However, mere acceleration alone will not support a contractor's claim for damages. Acceleration occurs when the contractor is forced to complete the contract at a date earlier than the date which he would be entitled to if he were granted proper time extensions. The case *sub judice* only required Henderson to timely complete the contract. If Henderson failed to timely complete the contract, it would have been subject to substantial damage claims.

Henderson was obligated by its agreement with the bonding company to perform all labor necessary to complete the contract, regardless of whether the labor was caused by the necessities of construction, the inadequacies of previous electrical contractors, or delinquent performance by the bonding company. Further, as the assignee of the bonding company's claims against defendants, Henderson was subject to all defenses that defendants might have against the bonding company. This includes tardy, incomplete, or defective performance by the original electrical contractor, its bonding company, the interim electrical contractor hired by defendants to maintain progress, or the successor electrical contractor, plaintiff, Henderson. Henderson was solely responsible to complete all of the electrical services within the time provided by the original contract.

After more than one month had elapsed from the time Henderson started the project, Henderson was still six to eight weeks behind the other contractors. Henderson then began to build its labor force up to approximately forty-five electricians. This pace was maintained for a number of months until approximately

the end of October.

By letter of October 17, 1986, Henderson was informed by the associate architect that completion was nearing for a number of buildings. He continued by notifying Henderson:

It is our observation that you have not been keeping up with the other contractors in both manpower and material delivery. It seems that this is the result of the long delay experienced when Becker Electric went out of business and the Bonding Company assumed the contractual responsibility.

We recommend that you take the necessary steps to meet the project schedule since the other Prime Contractors are proceeding to complete their work including the final clean-up by the general contractor. If it is necessary for you to work beyond the general contractor's final clean-up, then you will be responsible for your own clean-up. Would you please advise us as to the corrective steps that will be taken to meet the project schedule.

Henderson responded by letter of November 17, 1986, stating that it was experiencing delivery problems with certain fixtures. Henderson also set forth its anticipated completion dates for all of the buildings. The stated dates were well in advance of the March 19, 1987, contract completion date. In fact, Henderson scheduled many buildings for completion in November and December. Only five buildings were scheduled for later completion: two in January, two in February and one in March.

In late December, Henderson was again informed that it was behind schedule. At the previously mentioned job meeting of December 18, 1986, the electrical representative of the state

architect's office informed Henderson that it could not meet the contract completion date unless it increased its manpower levels. These sentiments were repeated by the deputy director. He persuaded Henderson to increase its manpower. Henderson's viewpoint was that defendants were seeking early completion of certain buildings. Although Henderson believed its performance was timely, it ultimately agreed to again increase its work force on the project.

The preponderance of the competent and credible evidence presented indicates that by January 20, 1987, Henderson was well behind in a number of buildings. Other contractors were close to completion in buildings C, F-1, F-2, G-1, H-4, and H-5. However, Henderson had substantial installations remaining to be performed, including basic wiring installations, and was behind in many areas of fixture installation.

Crucially, such tardy performance was manifested during the very time period that Henderson asserted it was forced to accelerate performance. Furthermore, Henderson barely completed the substantial portion of the installations by the contractual completion date.

The court finds that Henderson failed to prove its case by a preponderance of the evidence. Henderson voluntarily settled its claim with Federal and assumed all rights and obligations under this contract. Whether or not this was a wise and intelligent business judgment is not a concern of this court. However, the contract completion date was not accelerated in fact was only timely completed.

Judgment will be rendered for the defendants.

Case No. 90-09428

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DECISION

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**FRED J. SHOEMAKER**  
**Judge**

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DEPARTMENT OF ADMINISTRATIVE : Judge Fred J. Shoemaker  
SERVICES, et al.

Defendants :

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This action was tried before the court beginning November 4, 1991. The court has considered the evidence and rendered a decision filed herein. Judgment is rendered in favor of defendants and against plaintiffs. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry-upon the journal.

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FRED J. SHOEMAKER  
Judge

Entry cc:

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To S.C. reporter 10-1-2001