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November 8, 2013

VIA US MAIL AND EMAIL greg.butts@arkansas.gov

RECEIVED
NOV 13 2013

Arkansas Department of Parks and Tourism
Greg Butts, Director
1 Capitol Mall
LITTLE ROCK, AR 72201

PARKS ADMINISTRATION

Re:	Surety:	Travelers Casualty and Surety Company of America (the "Surety")
	File No.	111-SC-T1308347-NR
	Bond:	Performance and Payment Bond #105701169 (the "Bond")
	Principal:	Wade Abernathy, Inc. ("WAI")
	Project:	PROJ. #9001211, RENOVATIONS/REPAIRS & UPGRADES TO THE LODGE AT QUEEN WILHELMINA STATE PARK (the "Project")
	Obligee:	Arkansas Department of Parks and Tourism (the "State")

Dear Mr. Butts:

Summary

The State notified WAI on May 15, 2013 that sufficient justification existed to declare WAI in default and terminate the Contract. The State alleged that WAI failed to provide sufficient resources to the Project to complete it in a timely manner; permitted mold infestation in the building that required remediation; and failed to maintain quality control over construction. To cure the defaults, the State required WAI to complete the building enclosure, execute a mold remediation plan, and submit a "realistic schedule" for completion. WAI disputed the default allegations of the State. WAI contended that delays in construction occurred from circumstances beyond its control that should extend the completion date; that mold pre-existed construction; and that it adequately protected the building, equipment, and materials from the elements. Despite the ongoing efforts of WAI to complete the Project, the State ultimately decided that those efforts failed to cure the defaults. The State issued a notice of termination on August 21, 2013 and looked to the Surety to respond under the Bond.

As the State knows, pending the Surety's investigation of this matter, with a full reservation of rights, and in an effort to mitigate all parties' potential damages, the Surety has been proceeding on a dual track to attempt to arrange for the completion of this project utilizing WAI. As the Surety advised the State by email on October 28, 2013, WAI informed the

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Surety that it desired to proceed in a different direction which would involve WAI working directly with the State to complete the Project. The State informed the Surety by letter dated November 1, 2013 that "WAI proposing to work directly with ADPT in completing the project is not an acceptable option to ADPT." The Surety is disappointed with this turn of events because it had the impression that the parties were making positive progress toward an amicable and acceptable interim solution to this situation that would have allowed the Project to move forward while the parties otherwise attempted to resolve their differences.

As the State also knows, WAI contests the propriety of the default termination undertaken by the State. The Surety has proceeded diligently with its investigation during this time, and it believes that there is evidence to support many of the positions asserted by WAI in its defense to the State's actions. Nonetheless, the Surety remains interested in exploring, perhaps for one last time, whether the parties can work cooperatively towards an agreement to complete the Project under terms and conditions that fairly and responsibly address the concerns of all parties involved in this disputed matter, which would include a reservation of all parties' rights. If the parties cannot succeed in this effort, which the Surety earnestly believes is in all the parties' best interest, then it is important to understand that the Surety reserves the right to continue to evaluate the propriety of the termination of WAI and issue a determination as the facts and law may compel.

The Surety requests the opportunity to meet with the State during the week of November 11, 2013 for the purpose of negotiating a potential interim resolution of this matter which would contemplate the completion of the Project utilizing a contractor other than WAI (the Surety is confident that the State will be very satisfied with the contractor being considered by the Surety) and under terms and conditions that are fair to both sides. As part of the State's preparation for the meeting, the Surety is providing in this letter its initial observations concerning the termination of WAI.

The State's Termination of WAI

The responsibility of the Surety to the State under the Bond arises if WAI materially defaulted and its rights under the contract have been properly terminated. The Surety has been considering the following questions on whether that happened:

1. At the time of the termination, did WAI have sufficient resources to complete the Project in a timely manner based on approved and/or entitled time extensions?
2. Did the State delay the Project by taking control of mold remediation and imposing an overly broad and unnecessary mold remediation plan on WAI?
3. Did any quality of construction issues rise to the level of a material default and/or became non-issues when the State agreed to pay for them knowing of alleged problems?

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4. Did the August 21, 2013 notice of termination satisfy the notice requirements of Section 14.2.1 of the General Conditions of the Contract?

1. Completion Schedule

The Surety reviewed the project schedules, daily logs, and approved change orders and change order requests and found support for WAI's ability to complete the Project on time. Using January 7, 2014 as the date of substantial completion, WAI, according to its daily logs, did seem to have sufficient resources and a construction schedule in place to achieve substantial completion in a timely manner.

The State and WAI entered into a contract dated March 5, 2012 (the "Contract") for the renovations, repairs, and upgrades to the Project. The Contract required WAI to complete its scope of work within 450 calendar days from the issuance date of the notice to proceed. The State issued a notice to proceed on March 16, 2012. The issuance date of the notice to proceed set the original substantial completion date at June 7, 2013. WAI mobilized on the Project on March 21, 2012. When the State issued its notice of default on May 15, 2013, it relied upon the opinions of The Borne Firm (architect of record) in its report dated May 13, 2013. The Borne Firm alleged that WAI (a) failed to dedicate sufficient resources to the Project to advance the completion of its scope of work, and (b) failed to familiarize itself with the extreme conditions of the site located on Rich Mountain.

WAI refuted the allegations of The Borne Firm in its letter dated May 29, 2013. WAI claimed that delays in the completion of the Project related to unforeseen conditions (rock and undercut issues), weather, and approximately 70 change order requests mostly initiated by the State. WAI also claimed that the delays had nothing to do with sufficiency of resources. As of May 29, 2013, WAI had calculated approximately 96 days of delays due to weather and 56 days due to unforeseen conditions. WAI submitted requests for the additional days along with a project schedule reflecting those delays. The communications between the State and WAI in June and July 2013 show an ongoing dispute over time extensions. In July 2013, WAI submitted an updated schedule reflecting completion of the Project in January 2014.

At the time the State issued its notice of termination in August 2013, WAI had requested no less than 263 additional days. If approved, the new substantial completion date would be well beyond WAI's July 2013 schedule and WAI would be on schedule for timely completion. The State contends that it only approved 96 additional days through Change Order No. 5.

The Surety reviewed all of the change orders and change order requests submitted by WAI that the State approved. Relying solely on approved and undisputed time extensions requested by WAI (including Change Orders 1 through 5 and Change Order Requests 24 and 69), the Surety calculated a current substantial completion date of January 7, 2014 (this does

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not take into consideration mold related delays). When factoring in additional weather days requested by WAI that seem appropriate for approval, the substantial completion date moves to January 15, 2014, within two weeks of the end date shown on the July 2013 progress schedule of WAI. With the estimated substantial completion date in the WAI schedule on par with the date for substantial completion reflected in change orders, in addition to further time extensions that the Contractor may have been entitled to arising from the disputed extension requests, the Surety questions whether a termination based on alleged delay is supported by the facts and terms of the Contract.

2. Mold Remediation

The Surety investigated the mold in the building, communications between WAI and the State on mold, and the mold reports and remediation plans obtained by WAI and the State. The information reviewed suggests that the State failed to accept any responsibility for mold remediation despite its knowledge of pre-existing mold; that delays in construction resulted from time taken by the State to identify a remediation plan (thus constituting concurrent delay); that the State refused to take responsibility for pre-existing mold; and that the mold remediation plan obtained by the State seems excessive given the scope and type of mold – both pre-existing and subsequently arising mold – present in the building.

The Surety developed the following sequence of events related to mold remediation:

1. The State retains Environmental Enterprise Group (EEG) to perform tests on mold observed on new and old framing in the building. EEG performs its tests on March 27, 2013 and issues a report with recommendations dated April 3, 2013.
2. WAI denies responsibility for mold on April 15, 2013 and notes that the State would need to issue a Change Order Request for mold removal.
3. Responsive to the May 13, 2013 recommendation of The Borne Firm that WAI execute a mold remediation plan prepared by the State's consultant, WAI discusses the EEG report with The Borne Firm on May 21, 2013 and informs the State that it considers the mold remediation recommendations of EEG as "the report" for it to execute.
4. Though it denies responsibility for mold, WAI proceeds to obtain two bids in June 2013 from Metro Builders and All Clean to perform mold remediation consistent with the EEG recommendations. The bids were approximately \$30,000.
5. The State notifies WAI on June 19, 2013 that it considered the recommendations provided by EEG as general and not a remediation plan. The State informs WAI that it commissioned a full remediation plan that it would present to WAI before the end of the month. The State notes that the mold remediation must be completed within 30 days of submittal.

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6. WAI informs the State on June 27, 2013 that it has no control over the mold remediation because it has not received a mold remediation plan approved by the State. WAI advises the State of being placed on hold while consultants of the State perform more tests and prepare another report. WAI also informs the State that there is evidence of existing mold pre-construction.
7. WAI receives the Guideline Specifications for Mold Remediation prepared by Morris & Associates (Morris), a mold consultant retained by the State, on June 28, 2013. The remediation plan requires, among other things, coating of all the lumber and substantial drying out of the building.
8. WAI informs the State on July 1, 2013 that the recommendation of The Borne Firm to have the Morris mold remediation plan completed within 30 days of submittal is "out of his control" because it has no control over the pre-price walk thru, bid due date, or notice to proceed date.
9. The State informs WAI on July 9, 2013 that it will agree to extend the 30 day deadline "to accommodate a reasonable time for you to receive bids, award a contract, and then a notice to proceed will be given stipulating that the work will be completed in 30 days from the notice to proceed." The State also informs WAI that Morris provided four prequalified contractors to undertake the work.
10. WAI retains Atoka, Inc., a mold consultant, to review the Morris remediation plan. Atoka provides its review of the Morris plan on July 19, 2013. The review shows that the remediation plan of Morris is excessive based on the nature of the mold present in the building. For example, Atoka does not consider it necessary to erect containment barriers to segregate different areas.
11. WAI reports to The Borne Firm on August 1, 2013 that Morris has failed to receive any responsive bids to perform the Morris remediation plan. WAI proceeds with hiring Atoka to prepare a mold remediation plan.
12. Atoka generates a mold remediation plan that delineates mold from non-mold areas and pre-existing mold from new mold.
13. WAI receives proposals on September 9, 2013 from Diversified Service Group (\$85,000) and Ward's Asbestos Removal (\$87,900) to perform the Atoka remediation plan.
14. The Surety provides the State with a copy of the revised Atoka plan on October 28, 2013.

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15. As of the date of this letter, the Surety is not aware of a fully resolved mold remediation plan approved by the State.

From the time the State raised the issue of mold to WAI, the sequence of events appear to show that WAI made diligent efforts to work with the State in developing and executing an appropriate mold remediation plan, even with the fact it disputed responsibility for mold.

3. Quality of Construction

The State acknowledged that "the overall quality of most of the construction is acceptable", but it considered a few construction items unacceptable. The Surety investigated the items that the State considered unacceptable and questions whether they rise to the level of material defaults under the Contract or, alternatively, whether they had been ultimately accepted by the State when it paid for them "as is".

In its May 13, 2013 report, The Borne Firm remarked that WAI had failed to protect the existing construction and stored materials from the elements such as fire protection piping, electrical panels, plumbing piping, structural elements and footings. WAI responded to the remarks of The Borne Firm on May 29, 2013 by informing the State that it had asked Robin Borne for suggestions on protecting the existing interior from the elements. WAI received no response from Mr. Borne. It also reported to the State that water had been pumped out of the footings. The State informed WAI in a letter dated June 19, 2013 of standing water in the walls and footings of concrete blocks as well as unprotected drop-offs and rebar. WAI responded on June 27, 2013 that "nothing has had to be removed or replaced because of lack of Quality by WAI or its subcontractors". WAI also stood behind its position that the cells in the CMU blocks had been filled.

In the last letter issued by the State on quality of construction issues (July 16, 2013) prior to its termination of the Contract, the State provided a list of construction quality items: rusted metal frames, rusted sprinkler piping, rusted electrical and plumbing elements, rusted wire mesh, and use of recycled lumber. The letter made no reference to footings, CMU walls, structural elements, or any other construction quality items. The Surety, with the assistance of its independent consultant, investigated each of the alleged quality of construction items and offers the following observations:

1. Rust on the metal frames, sprinkler piping, electrical and plumbing elements, and wire mesh is common surface rust that may be easily removed. The rust has no bearing on structural integrity and does not require removal and replacement of the rusted item.
2. Based on the schedule of values paid by the State through Pay Application No. 17, the State, with knowledge of the rusted materials and use of recycled materials, proceeded to accept all of those materials "as is" by paying for them.

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3. The State had the right to reject any of the construction quality items it identified under Section 12.3.1 of the General Conditions to the Contract, but it opted to pay for them instead of reject them.
4. Even if the State had not yet paid for the allegedly non-conforming materials, the construction quality issues identified by the State do not appear to rise to the level of a material default that would support termination of the Contract.

4. Notice of Termination

The State issued a letter dated August 21, 2013 that it deems a notice of termination under Section 14.2.1 of the General Conditions of the Contract. The notice provided that the State was “terminating the subject contract effective August 30, 2013.” Section 14.2.1 requires the State to give “ten days written notice of the termination to the Contractor and the Contractor’s surety.” By terminating the Contract on August 30, 2013, the State failed to provide the Surety and WAI with the requisite ten days notice.

Conclusion

The Bond requires the Surety “to indemnify and save harmless the Owner from all cost and damage which the Owner may suffer by reason of Principal’s failure to perform the Contract.” The Surety investigated the three items that the State identified as non-performing on the part of WAI – timely construction, mold remediation, and quality of construction. Based on its investigation, the Surety believes that questions exist about whether WAI was in material default under the Contract as alleged by the State sufficient to justify a termination of the Contract.

The Surety seeks to meet with the State to address those questions. As part of that process, the Surety would like to discuss: (1) why and how the State challenges the completion date calculated by WAI, (2) what issues the State has with the scope and implementation of the revised Atoka mold remediation plan, and (3) what quality of construction issues the State considers material. As discussed above, equally importantly, the Surety also wants to meet with the State to discuss whether the parties can *promptly* come to an agreement to complete the Project under terms and conditions that fairly and responsibly address the concerns and issues raised by all parties in this matter.

I look forward to receiving dates that the State is available to meet during the week of

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November 11, 2013. The Surety continues to reserve all rights and defenses available to Surety and WAI as a matter of law or equity.

Sincerely,



Tom Groseclose

c.c. Mr. Bruce Corriveau
Mr. Greg Weinstein, Esq.
Mr. Wade Abernathy
Mr. Ron Hope

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