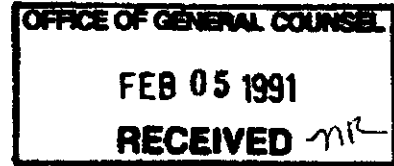


FROM PETER HANKE
IV UT Austin Central 2/5/91
Billing Station No. 5 / a

cc: Ann Dely ✓
RSK
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W.O.
Lins.



February 1, 1991

Mr. Leonard J. Gittinger, Jr.
Gittinger and Gittinger
201 Romana Plaza
San Antonio, Texas 78205

Mr. Peter S. Hanke
Office of General Counsel
The University of Texas System
201 West 7th Street
Austin, Texas 78701

Re: Appeal of Kunz Construction
Company, Inc.

Gentlemen:

I enclose my recommendation to The Board of Regents in the above styled cause. I had prepared a rough draft of this letter shortly after January 1, 1991, but I deliberately set it aside in order to give myself time to see if I had any nagging doubts about my recommendation. Although my decision completely favors The University of Texas it does so only because I became convinced of the justness of its position. Had my opinion been otherwise, I could have easily made a recommendation against The University of Texas. I am convinced, however, that they are correct in their position in this dispute.

I have all of the exhibits that were delivered to me at the close of the hearing and I would like very much to turn them over to someone else for safe keeping.

Sincerely yours,

James R. Meyers

James R. Meyers
P.O. Box 12203
Capitol Station
Austin, Texas 78711

February 1, 1991

Board of Regents
University of Texas Systems
Austin, Texas

This report contains my recommendations to the Board of Regents of The University of Texas Systems in the appeal of Kunz Construction Company, Inc. from the denial by Chancellor Mark of the claim of Kunz for extra compensation arising under its contract for the construction of Chilling Station Number 5 at The University of Texas at Austin.

After considering all of the testimony, the exhibits offered by the parties and their arguments, I am convinced that the decision of the Chancellor was correct.

Pursuant to the agreement dated August 10, 1989, I served as hearing officer in the Kunz Appeal from that date. After several pre-trial conferences and a number of postponements resulting from events beyond the control of any parties to the hearing, the testimony began on November 12, 1990, and ended December 12, 1990. The testimony was extensive and the exhibits voluminous. At my request, the parties submitted suggested questions which needed consideration in order to determine if the appeal had been correctly decided. Kunz submitted a four-page letter consisting of fourteen questions, some with subparts, and The University submitted a ten-page letter consisting of forty-five questions, some with multiple subparts. Both of those requests go into far greater detail than is necessary in recommending a decision in this case or that would be appropriate as findings of fact or jury issues if this were a court case.

My recommendation is not based upon the failure of Kunz to meet a burden of proof to prove by a preponderance of the evidence that the delay with which it is charged was the result of actions or omissions by The University. While that alone would be a sufficient basis to deny the claim, the evidence convinced me that

Kunz Construction Company failed to coordinate the activities of the independent contractors and suppliers (as well as the activities of some of his own subcontractors) as required by paragraph 7.3 on page 1D-4 of Volume I of the project manual. I also believe that Howard Electric and Mechanical, Inc. (Howard) the electrical subcontractor on the job under the Kunz contract inadequately staffed the job and inadequately understood the work it was supposed to do until November of 1985 when Ken Tollett came to the job as the electrical superintendent. Furthermore, while The University clearly made an error in failing to notify Kunz that it had granted change order number one (Plaintiff's Exhibit 14) extending the time for the delivery of the Westinghouse equipment, I do not find that a delay to the project was occasioned by that omission. Had Mr. Kunz carried out his contractual obligation to coordinate the work of the independent equipment suppliers he would have learned of that extension. Mr. Kunz's position in this is ambiguous. He contends that he did coordinate but he also contends that he could not coordinate since he did not have a contractual relationship with the independent equipment suppliers and accordingly could not affect their compensation and thus had no authority over them. The fact of the matter is he made no effort whatsoever that I heard or believed to coordinate with the independent equipment suppliers so that he would know what their problems were and what their scheduling would be. I furthermore do not believe that the failure of York to deliver its equipment timely caused a delay in the job; that is, I believe the job would have been delayed for the length of time it was irrespective of the failure of Westinghouse and York to deliver the equipment as called for in their contracts with The University of Texas.

That disposes of the claims of Kunz under Article VIII of the General Conditions of the contract in this appeal. There remain claims asserted under Article VI of the contract. I believe that by unilateral change order number 9, all additional claims which Kunz could make properly under the contract have been allowed. Indeed, I agree that the Board of Regents is free to reduce the amount of time initially allowed in the unilateral change order number 9 with respect to field order number 29 from thirteen days to two days thus increasing the claim for liquidated damages by \$5,500.00. In short, my recommendation to the Board of Regents is that the action of Chancellor Hans Mark be upheld in its entirety. In addition, I advise the Board of Regents that, in my opinion, they are free to revise the action of Chancellor Mark by deleting eleven days of extension allowed in change order number 9 pursuant to the claim made in field order number 29 and thereby increase the amount of liquidated damages by \$5,500.00.

Liquidated damages have been made a legal issue in this appeal although it is not a factual issue. Kunz Construction Company contends that liquidated damages cannot be collected absent a showing of actual damages and that the actual damages bear some reasonable relationship to the liquidated damages. There are many Texas cases on this subject and I will not write a legal treatise on it. However, one legal treatise, 29 Tex.Jur.3rd, Section 168

indicates that damages sustained by governmental agencies are frequently too conjectural to be ascertained and hence liquidated damages would be sustained as a method of protecting the public against delinquent contractors. I call two cases to your attention involving governmental agencies. First is Commercial Union Insurance v. LaVilla School District, S.W.2d 102 (Corpus Christi App. 1989, no writ). In that case, the Corpus Christi Court held in a construction contract where the school district was claiming liquidated damages that it was the burden of the contractor to plead and prove that liquidated damages stipulated in the contract bear no reasonable relationship to actual damages. In the case of Kunz Construction Company that burden was not met. The second case is Loggins Construction Company v. Stephen F. Austin State University, 543 S.W.2d 682 (Tyler Civ.App. 1976, writ refused, n.r.e.). In that case, the Court held that the liquidated damages in a construction contract for the erection of a football stadium constituted a penalty and was unenforceable. As I read the case, the Assistant Attorney General representing Stephen F. Austin University virtually stipulated that the liquidated damages did constitute a penalty. Otherwise, I am unable to explain the result and think it must be wrong. I believe the University is entitled under the law to enforce the liquidated damages provision of the contract.

To reiterate, my recommendation is that the decision of Chancellor Mark be upheld in its entirety. While I have no hesitation or doubt in my recommendation, it was reached with great difficulty. The contractor here, Kunz Construction Company and its attorneys, felt strongly the justness of Kunz's claim and presented a well prepared, well organized case in support of that belief. It was also a very expensive presentation in terms of length of time and accordingly attorneys' fees. There is always the temptation of a judge or a hearing officer to attempt to moderate the views and positions of each side and reach a compromise result. Had the evidence justified a compromise result or had the evidence of Kunz Construction Company carried the burden of persuasion I could have easily recommended another result. However, I am convinced that The University has extended Kunz Construction Company every consideration to which it was entitled. Indeed, with respect to change order 29, The University of Texas extended Mr. Kunz eleven additional days of time to which, in my view, he was not entitled and which the Board of Regents may withdraw if it wishes.

Sincerely yours,



James R. Meyers
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