

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

S.D. WARREN COMPANY,)
)
 PLAINTIFF)
)
 v.)
)
 MOORHEAD COMPANY, INC.,)
)
 DEFENDANT)

Civil No. 96-53-P-H

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a bench trial held on March 10, 11, and 13, 1997, I make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. S.D. Warren Company (“S.D. Warren”) runs a paper mill in Westbrook, Maine. Several silos, originally manufactured by Columbian Steel Tank Co. (“Columbian”), hold clay and starch used in paper production. The silos were constructed in the late 1960’s and, due to increasing corrosion and rust, two clay silos, one starch silo, and one swing silo were in need of repairs and maintenance in 1994. In addition, a stairway needed to be built around the outside of one silo.

2. S.D. Warren considered Columbian parts and labor too expensive (and Columbian parts alone were not available). As a result, S.D. Warren chose parts from Peabody TecTank Company (“Peabody”) for its repairs.

3. Silos are generally comparable among manufacturers and there was nothing inappropriate about using Peabody parts on the Columbian silos.

A. The Contract

4. In 1994, S.D. Warren contracted with Moorhead Company, Inc. (“Moorhead”) to perform the repairs. S.D. Warren and Moorhead entered into a binding, enforceable contract consisting of S.D. Warren’s RFQ (Request for Quotation), Moorhead’s bid, the purchase order, and other incorporated documents such as construction drawings. The incorporated documents also included the Peabody Standard Erection Manual, Dry Storage Tanks (“Peabody Manual”). The contract provided that Moorhead “shall comply” with the procedures in the Peabody Manual.

5. The contract originally bound Moorhead to repair roofs on S.D. Warren silos ##4, 5 and 8. In addition, under the contract Moorhead was to construct a winding stairway around silo #4 in accordance with the Peabody Manual. A subsequent addendum to the contract included partial repairs on silo #6.

6. Before commencing work, Moorhead’s president, Rob Moorhead, made at least one on-site inspection with S.D. Warren’s project supervisor Tom Howard.

B. THE STAIRWAY

7. Moorhead employees had never before constructed a silo stairway.

8. Moorhead failed to install the spiral staircase in accordance with the plans provided under the contract.

9. As a result, various parts of it were incorrectly installed and the staircase was out of plumb.

10. Despite assistance from S.D. Warren representatives, Moorhead was unable to correct the mistakes it had made.

11. At S.D. Warren's request, Bancroft completely disassembled and then reassembled the staircase correctly, at a reasonable cost.

C. LEAKAGE

12. In repairing the roofs, Moorhead failed to follow the Peabody Manual and the plans on such matters as installing the proper gaskets at various points, proper caulking and locating roof joints in relation to side panel joints.

13. As a result, the joints were not watertight, and water came inside the silos, causing the clay and starch to cake and thereby be unusable.

14. Other sources of water penetration were either insignificant (for example, an open hatch cover) or speculative (dew-point condensation, railway car entry, rusted steel, oxidation due to nuts backed off from bolts, bolts without washers, and oxidation surrounding deteriorating and corroding portions of the silos).

15. Moorhead argues that a pressure testing procedure used by S.D. Warren was improper and responsible for damage to the seals, thereby causing any leaking. I find no credible evidence that the testing procedure caused the leaks.

16. Bancroft's charges for repairing the stairs and roofs were \$65,319.92. These charges include the cost of repair for the roof collapse of silo #4, which I discuss infra.

17. Aside from the collapse of the roof, I find Bancroft's charges for the roof repairs reasonable.

18. Despite the Bancroft repairs, silo #5 leaked during the heavy rains of October, 1996. Additional repairs of \$11,000 are projected. However, S.D. Warren has not persuaded me by a preponderance of the evidence that the October, 1996, leakage was caused by Moorhead's workmanship. These projected costs are not recoverable.

D. Roof Collapse

19. During the course of repairing the roof on silo #4, Bancroft's procedures allowed the roof structure to collapse partially inside the tank. S.D. Warren has not shown by a preponderance of the evidence that this collapse was due to Moorhead's workmanship. Therefore, the portion of the Bancroft charges related to the roof collapse, \$22,047, is not recoverable.

E. PEABODY CHARGES

20. S.D. Warren engaged Peabody to advise it on how to repair the defective staircase. This ultimately included re-identifying all the parts (some of whose identifying parts numbers had worn off) and replacing some parts. The Peabody charges for parts and labor, \$12,903.11 (\$17,270.33 less \$4,367.22 attributable to the roof collapse), are reasonable and recoverable.

F. PRODUCT LOSS

21. Water leaking into the silos as a result of Moorhead's faulty workmanship caused lumping in the clay and starch making the product unusable.

22. The reasonable value of the lost product is \$23,530.50 and is recoverable.

G. ALLWASTE CHARGES

23. S.D. Warren hired Allwaste Environmental Services (“Allwaste”) to remove the lumps from the tanks, clean up the silos, and vacuum up the clay. Although Allwaste regularly attends to S.D. Warren’s cleaning needs, I find that Allwaste’s charges in the amount of \$29,213.04 were reasonable and were caused specifically by Moorhead’s faulty workmanship.

H. DEMURRAGE

24. In expectation of adequate roof repairs, S.D. Warren’s operations manager had ordered railway cars full of product for the emptied silos.

25. However, delays in completion of the silos, as well as the unexpected leakage and risk of product loss prompted him to delay filling the silos. This caused extra charges for longer use of the railway cars.

26. These excess demurrages took place in July, 1994 (for lustra clay in the amount of \$6,990) and November, 1994 (for alphacote clay in the amount of \$9,380).

27. Silo #4 was completed late under the contract and leaked, and I find that the July excess demurrages were a direct consequence. The contract did not specify a completion date for the other silos, however, and I therefore decline to award the November demurrages (I cannot separate the delay from the leaking claim).

28. The total amount for the July excess demurrages, \$6,990, is reasonable.

I. THE COUNTERCLAIM

29. The balance due Moorhead on the contract (invoice #254) is not disputed. Thus, \$16,528. is to be subtracted from any damages ultimately recovered by S.D. Warren.

30. In addition to the balance due, Moorhead counterclaims for amounts attributable to “extras” for work performed but not included under the contract. The first extra (invoice #255) claims amounts for removing a brick wall between the silos in order to perform the project. Having conducted a pre-project on-site inspection, Moorhead was on notice that the job would include removal of a brick wall to complete the project. Moreover, this task was not specifically excluded from the contract RFQ. Therefore, I find that removal of the brick wall was within the scope of the contract and does not qualify as an extra.

31. The second extra claimed by Moorhead relates to the cost of a stainless steel air line on silo #9 (invoice #202) in the amount of \$2,771.28. Moorhead has not carried its burden of proof on this claim, and therefore will not be allowed to recover these costs as extras. Silo #9 does not contain a stainless steel airline.

32. Finally, the parties contest the amount of the credit Moorhead allotted to S.D. Warren for three panels that were never installed (invoice #514). S.D. Warren’s calculations that would increase the credit are uncertain and speculative. Thus, the original credit of \$1,537.35 will remain.

J. DAMAGES

33. S.D. Warren’s total recoverable damages are \$115,909.57 (Bancroft \$43,272.92; Peabody \$12,903.11; lost product \$23,530.50; Allwaste \$29,213.04; demurrage \$6,990). From this

amount I offset the amount due Moorhead on the contract, \$16,528. The net amount due S.D. Warren is \$99,381.57.

II. CONCLUSIONS OF LAW

A. JURISDICTION

1. S.D. Warren is a Pennsylvania corporation with its principal place of business in Massachusetts.
2. Moorhead is a New Hampshire corporation.
3. S.D. Warren's claim against Moorhead exceeds the jurisdictional amount.
4. This court has diversity jurisdiction over this claim pursuant to 28 U.S.C. § 1332.

B. DAMAGES

5. In accordance with my findings of fact, S.D. Warren is entitled to recover Ninety-nine Thousand Three Hundred Eighty-one Dollars and Fifty-seven Cents (\$99,381.57) from Moorhead. No costs. The Clerk shall enter such judgment accordingly.

SO ORDERED.

DATED THIS 19TH DAY OF MARCH, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE