Docket No. 2132	Date of Decision: 7/27/00
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: Under DGS Contract No. P 020-942-010	
Appellant/Respondent: Beka Industries, Inc. Dept. of General Services	

Decision Summary:

Specifications - Implied Warranty - By issuing the plans and specifications, the State impliedly warrants that the plans and specifications are adequate and sufficient.

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

APPEAL OF	:	
	:	
BEKA INDUSTRIES, INC.	:	
	:	
	:	Docket No. MSBCA 2132
	:	
Under DGS CONTRACT	:	
NO. P 020-942-010	:	

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OPINION BY BOARD MEMBER STEEL[1]

This contract dispute arose between Appellant BEKA Industries, Inc. ("BEKA"), a construction contractor from Baltimore, Maryland, and the Maryland Department of General Services ("DGS"), supervising a contract for replacement of a roadway bridge on behalf of the using agency, the Maryland Department of Natural Resources ("DNR").

Findings of Fact

1. Prior to 1997, State officials had long been considering the need to remove and replace the existing roadway bridge at Patapsco State Park. From 1992 through 1996, DNA entered into consulting contracts with KCI, Inc. ("KCI") and URS Greiner ("Greiner") to design a new bridge. According to the testimony of one individual during the hearing in this matter, the drawings

[1] Mr. Harrison and Mrs. Steel heard this appeal. Mr. Rosencrantz was recused in the matter.

prepared by KCI and Greiner during this initial process showed that a new bridge aligned with the roadway, if 24-feet wide, would interfere with certain existing utilities, including a 12" corrugated metal pipe drain ("CMP"), and a BGE transformer, as well as the historic stone abutments (called wing walls) from the original bridge. It was intended that the old wing walls would remain on site.

2. The cost estimates provided by Greiner exceeded the available budget, and eventually the State dismissed Greiner and determined to use a pre-fabricated bridge. Appellant was unaware until the appeal process of these initial attempts to plan for replacing the bridge.
3. In the Spring of 1996, DNR assigned a new employee, Mr. David Decker, to create design specifications for a replacement bridge at Patapsco Park, and to serve as the Architect Engineer ("A/E") on the project. Mr. Decker had not previously designed a bridge or its abutments, nor had he prepared specifications or reviewed shop drawings for a bridge.
4. During 1996, Mr. Decker believed he identified a modular pre-fabricated, pre-engineered bridge that the State could specify to fit in the project site, i.e. with a clear roadway of 20 feet 6 inches, and an overall width of 24 feet. From this identification stem all of the problems in this contract.
5. In fact, Mr. Decker was variously told by Mabey Bridge & Shore, Inc. ("Mabey") about two bridges, while he believed he was being told during different conversations and through different submissions about the same bridge. The first was a "fully-welded bridge" which was heavy and expensive, and normally only available from Mabey for rent as a temporary bridge. This fully-welded bridge was normally fully fabricated at the factory and installed in one piece by a crane, and did not have "orthotropic steel decking". The normal price for a "fully-welded bridge" was over $80,000, though this price was not conveyed to Mr. Decker.
6. However, Mr. Decker was also sent brochures and specifications for Mabey's

"bolted bridge", a modular-pre-fabricated bridge that is bolted together at the project site, together with the specifications for that bridge. The price of this bridge, which included "orthotropic steel decking" and was described as a 24-foot bridge, was quoted to Mr. Decker by Mabey at $46,700.

7. When Mr. Decker received the price quote for a 24 foot bridge, he did not inquire whether the 24 feet referred to clear roadway width or the overall width of the bridge. He determined that the contractor would be required to design the abutments for the bridge.

8. Mabey's narrative specifications for the bolted bridge were incorporated wholesale by Mr. Decker in the specification section of the 1996 Invitation for Bids ("IFB"), although he changed the preliminary specifications to require a 22 foot clear roadway width bridge instead of a 24 foot bridge when he finalized the specifications in the IFB. Thus, the specifications describe a modular pre-fabricated bridge that is "bolted" together at the project site.

9. By contrast, Attachment 5 to the IFB was taken directly from the brochure illustrating the fully-welded bridge. It appeared that this bridge would have fit in the site. Neither Mr. Decker, his superiors, the DGS officials or bidders on this IFB were aware that the brochure at Attachment 5 described a bridge different than that set forth in the narrative portion of the IFB specifications.

10. Although he (and DGS) had access to the design documents previously prepared by KCI and Greiner, they did not carefully review these documents, or alert bidders in the new IFB that the documents existed. Mr. Decker also did not alert contractors that it would be their responsibility to supply the engineer with all field dimensions required to check the adequacy of the drawings. Including such a note might have indicated to bidders, including Appellant, that there may have been difficulties fitting the new structure into the site because of existing site constraints.

11. In reviewing the IFB, Appellant assumed that the project designer had measured the project site before any plans were drawn. In developing its bid

price, Appellant contacted Mabey to see if they would furnish a price quotation. Mabey personnel indicated that they already had the specifications for the project, because they had specified the bridge to Mr. Decker several months earlier. Therefore, Appellant's Mr. North requested that Mabey provide a price quotation for the bridge that would satisfy the specifications of the IFB. Mabey gave BEKA (and all other potential bidders who called) a price quotation on the bolted bridge, and this quotation was included in Appellant's bid estimate.

12. Appellant's officials, as well as those of Mabey Bridge, reasonably believed that the bolted bridge conformed to the IFB specifications.

13. At bid opening, Appellant was identified as the apparent low bidder with a bid price of $128,821.

14. After bid opening and prior to award, Appellant submitted its methodology for the temporary support of cable conduits running under the existing bridge at the project site. Appellant did not plan on relocating the conduits because the specifications did not require relocation. Rather, Section IV.C.1 of the IFB provided that the Contractor was responsible for protecting site utilities during demolition of the existing bridge, and that bidders should provide how they intended to temporarily support the utilities during all phases of the project. DGS approved Appellant's methodology which did not include relocation of the conduits.

15. The contract was entered into on or about May 8, 1997, and shortly thereafter Appellant negotiated with Mabey the final price and contracted to purchase the bridge which conformed to the narrative specifications, the "bolted bridge", also known as the Compact-200 Quick Bridge.

16. At the request of Appellant, Professional Engineer Daniel A. Matonak (who had performed such work on many occasions for Mabey Bridge in the past) drafted shop drawings for appropriate abutments for the bridge, including closure walls to attach to and incorporate the existing wing walls. His

drawings included calculations of the live loading capacities, values of the stresses in the bridge, and other information showing that the Mabey bridge would support the required loads.

17. Mr. Matonak assumed that the architect who designed the project and specified the Mabey "bolted" bridge had ascertained that it would fit the site without interfering with existing site constraints, and that therefore the bridge abutment he designed would likewise fit in the site without conflict. Mr. Matonak relied upon IFB Attachment 4, and designed abutments only slightly larger than the new bridge. The abutments still would have extended beyond the conflicting wing walls even if the abutment design had been slightly narrower (i.e. the width of the bridge) and had omitted the closure walls. According to his deposition testimony, if Mr. Matonak had been provided the Greiner drawings, he would have recognized that the new bridge and its abutments would conflict with the location of the CMP and other constraints. The Board finds that the abutments designed by Mr. Matonak were appropriate for the bridge specified, and satisfied reasonable professional engineering standards.

18. Appellant submitted the shop drawings of the Mabey bridge and the Matonak designed abutments to Mr. Decker on or about June 18, 1997, the date of the pre-construction meeting.

19. On June 30, 1997, Mr. Decker, as the project A/E, approved the shop drawings for both the bridge and the abutment design. He did not check these drawings against the previously received KCI and Greiner drawings, although he did comment to Appellant's Mr. North that the bridge was wider than he had expected it to be. He did not ask that Appellant measure the site, and told BEKA to "go ahead and order the bridge."

20. Mr. Decker made a contemporaneous memorandum of his conversation with Mr. North of BEKA as follows:

> Regarding the bridge drawings and calculations for the

> Mabey bridge, I told Mr. North that they are acceptable. I mentioned that the bridge was wider than I had expected based upon the brochure information I had received from Mabey. The Mabey brochure indicates that a four section wide bridge would be about 22 feet wide as compared to the 25 foot wide bridge indicated on the bridge drawing. I asked if Mabey Bridge supplies any additional information that address the construction process. [sic] He said that they don't. I asked him how much of the bridge will be prefabricated prior to delivery to the site, and he said that the bridge will be constructed entirely onsite.
>
> *Mr. North said that if I approved of the bridge drawings, that he was going to order it. I said that the Mabey drawings are approved as-is, and that he may order the bridge.*

(Emphasis supplied.)

21. The shop drawings for the abutment design which Decker approved included a structural note that provided that "The contractor shall verify all dimensions *prior to starting construction* [rather than prior to submission of shop drawings]. The engineer shall be notified of any discrepancies or inconsistences." (Emphasis supplied.)
22. Appellant's Mr. North therefore ordered the Mabey Compact-200 Quick Bridge whose specifications were incorporated in the IFB, on or about June 30, 1997.
23. By August, Mabey was ready to ship the bridge, and notice to proceed was issued on August 4, 1997. As agreed through the shop drawings, prior to construction, Appellant's personnel on August 6 went to the site to layout the bridge, and discovered that the ordered bridge and abutments would encounter certain conflicts: the 13,000 electrical conduit was not deep enough. The conduit where it was buried in the ground was too shallow (10" as opposed to 2 or 3 feet), and where it traversed the underside of the existing bridge, would have to be lowered in order to accommodate the new bridge, contrary to

Appellant's proposed methodology approved by DGS. The corrugated metal pipe ('CMP") would have to be relocated so as to avoid interference with the abutment footers on the upstream side of the north abutment, and most significantly, the abutments would not fit the existing stone wing walls.

24. These alignment problems resulted from the fact that the bridge supplied by Mabey had a clear roadway width of 24 feet and an "out-to-out" width of 25 feet 4.5 inches, although it was compliant with the specification requirement that the bridge have a "clear roadway width of no less than 22 feet." The fully-welded bridge depicted in the brochure used at Appendix 4 of the IFB had a roadway width of 22.10 feet and an overall out-to-out width of 24.35 feet and would still have conflicted with site constraints such as the CMP.

25. Mr. Decker confirmed in August of 1997 that the bolted Mabey bridge ordered by Appellant did comply with the specifications. However, it did not fit the site, and some fix would be required. Therefore, on or about August 13, 1997, Mr. Decker requested that Appellant come up with solutions to fitting the new bridge into the pre-existing conditions. He suggested that the problem could be corrected by, inter alia, realigning the bridge so that the centerline would be moved. Appellant suggested that the project proceed on force account or on a time and material basis. As of August 15, 1997, Appellant was notified that DNR did not want a narrower bridge, so Appellant should use the Mabey bridge it had purchased. DNR and DGS were notified by Appellant that the site was shut down until a solution could be reached.

26. For Appellant, professional engineer Mr. Matonak visited the site and suggested engineering solutions. Mr. Matonak and Appellant determined that the least expensive corrective measure was to move the centerline of the bridge approximately 18" upstream from the existing centerline. On August 26, Mr. Matonak further proposed that the abutment be modified, including the use of concrete vs. stone to rebuild the existing stone wall, and that the CMP and electrical conduit be relocated. These changes were submitted to

Mr. Decker on the same day.

27. From that point, Appellant waited for written direction from the procurement officer as required by Respondent at the pre-construction meeting:

> Should it be necessary at any time or times during the progress of the work to make any alterations or changes or to add to or delete work, the State has the undisputed right to make such changes, omissions, additions or alterations by written order. All changes will be issued in the form of a written change order.

28. Section 3.08 of the Contract General Conditions stated that "the Contractor shall not be paid for any work outside the scope of the contract not authorized in writing by the Procurement Officer."

29. Mr. Decker agreed that he could not authorize changes to the Contract requirements, although as A/E he approved the changes proposed by Appellant and Mr. Matonek, and asked Appellant to submit a detailed cost proposal for additional costs arising out of the additional work.

30. By letters dated September 3 and 4, 1997, Appellant requested from DGS instruction as to how to proceed and submitted costs proposals based on the assumption that Appellant's proposals would be approved by written change order.

31. On September 9, 1997, Mr. Decker met with Mr. Lombardi and Mr. Yastrzemsky of DGS to discuss Appellant's proposals. Mr. Yastrzemsky stated that he would call Appellant to authorize it to proceed, but did not do so.

32. While still awaiting direction as to how to proceed with the work, Appellant filed, by letter dated September 10, 1997, a timely notice of claim to Robert Langton, the delegee procurement officer.

33. On September 12, 1997 at the site Appellant suggested to DGS that the project be shut down until direction for how to proceed was issued so that Appellant would be able to minimize the continuing expenses of superintending the site, but DGS refused. However, Mr. Lombardi agreed

that the additional work necessary was a change to the Contract requirements.

34. On September 17, DGS Procurement Officer John Cook sent a letter to Appellant stating that he would investigate and respond to the Appellant's September 10 letter. On September 16, the possibility of force account work was discussed, but not approved, and it was suggested that direction would formally be given, though it did not occur.

35. On September 18, 1997, Appellant resubmitted cost proposals for the additional work, although the proposals did not reflect increased costs or contract time incurred while it was delayed waiting for a written change order. On the same date, Mr. Langton asked Mr. Decker to give his professional opinion of the claim. On September 19, in fact, Mr. Yastrzemsky and Mr. Lombardi instructed Mr. Decker (as noted in his contemporaneous memo) to disregard Mr. Langton's request:

> I discussed project status with Jim Yastrzemsky and Tony Lombardi. They instructed me to disregard Mr. Langton's request, and that they were going to start playing hardball with BEKA.

As a result, Mr. Decker never responded to Mr. Langton's request.

36. Neither Mr. Langton nor Mr. Cook ever contacted Appellant for the purpose of investigating its claims.

37. During the week of September 22, 1997, Appellant again asked for direction in writing how to proceed.

38. On September 30, 1997, Mr. Yastrzemsky told Appellant that all of the changed work was Appellant's responsibility and that DGS was going to direct it to go back to work.

39. Over the next couple of weeks, Appellant continued to seek direction in writing, but DGS declined to recognize Appellant's claim for additional compensation, and declined to instruct it how to proceed in writing. Rather,

by letter dated October 10, 1997 (and mailed October 15), Mr. Yastrezmsky responded to Appellant's September cost proposals by asserting that Appellant was responsible for the cost of any changes because, he stated (incorrectly), Appellant had contracted to design and build a bridge and its abutments. Appellant had contracted only to design abutments for a particular bridge designed by Mabey bridge and specified in the contract documents. This letter further threatened the Appellant with the assessment of liquidated damages.

40. By letter of October 16, Appellant more fully described its claim, and indicated again that it had not received written direction of how to proceed.

41. On October 17, Appellant was instructed to submit official Requests for Information ("RFI"). Appellant therefore submitted on October 21 seven RFI's for the issues initially raised on August 26 regarding:

    a) whether the stone wing walls should be rebuilt in stone or concrete;
    b) whether the bridge should be realigned by moving the centerline upstream 18";
    c) how to relocate the CMP;
    d) determining if the stone wing walls had a rear face that could interfere with the new abutments;
    e) whether the wing walls should be lowered and capped with concrete;
    f) whether Appellant was required to redesign the concrete footers to accept concrete wing walls or whether the two areas were to be rebuilt with existing stone, and
    g) Whether the telephone line should be placed in a conduit or duct bank.

42. Mr. Decker prepared six responses, and those and the seventh response were provided to Appellant on November 19, 1997.

43. By letter dated November 6, 1997, and received by Appellant on November 7, 1997, the Procurement Officer, Mr. Cook, instructed Appellant how to proceed

(as suggested on August 26, 1997 by Mr. Matonak and Appellant) by moving the centerline upstream 18", relocating the CMP and conduit; and stating that DGS would arrange for BGE to relocate the transformer, but threatened it with termination for default, since DGS was still maintaining erroneously that Appellant was responsible for designing the bridge itself. Mr. Decker never informed the Procurement officer that the bridge supplied by Appellant did meet the specifications as set forth in the IFB, or that he himself had been confused regarding the Mabey Bridge products so that two different bridges were described in the IFB.

44. During the 13 weeks that Appellant awaited instruction from Respondent, it could not have accepted other work during the delay period. However, it could not proceed with any work under the instant contract until BGE moved the conduit and Appellant was given written direction to proceed with changed work. Appellant had to maintain the project site and be ready to go back to work when approval was given by Respondent. Among other things, this included installing and re-installing security fence around the site.

45. On November 11, Appellant replied to the Procurement Officer's letter of November 6 with a signed (although disputed) work order in accordance with §3.06 B(1) of the General Conditions.

46. By letter of December 1, 1997, the Procurement Officer stated again that Appellant had submitted a bridge not suitable for the project site.

47. Appellant substantially completed the work on January 7, 1998 when the bridge was open to traffic. But for DGS's failure to timely instruct Appellant how to proceed, the project might have been completed as much as 13 weeks earlier.

48. There were additional change orders issued regarding the guardrail, as well as some minor paving work, which Appellant performed in the spring of 1998. Appellant, however, has not been paid for this work.

49. Appellant claims (a) $1,193.60 for the additional guardrail work, (b) $1,004.70

for the additional paving work, (c) $6,604.07 for extra work resulting from the Nov. 6, 1997 work order including removing certain guardrail, work performed on the stone wing walls, forming and placing concrete in the wing walls, relocation and installation of the CMP, relocation of the conduit, removal of the electric duct bank, placing and tying rebar in the wing wall/abutment connecting corner, and installing PVC pipe under the bridge, and (d) direct delay costs of $28,476.30 for the wait for direction from DGS from August 13 through November 10, 1997 (including the salary of the superintendent, labor to maintain the site, field office costs, superintendent vehicle expenses and backhoe rental, and (e) indirect costs of $19,228 ($11,000 for Mr. Reinhardt, Appellant's President, $4,875 for Mr. North, Appellant's Vice President, and $3,353.48 for administrative staff).

50. The claim was denied by the procurement officer by letter dated May 11, 1999 and this timely appeal, also seeking 10% pre-decisional interest and reasonable attorneys' fees under COMAR §15-221.2, followed.

Decision

Appellant argues that DNR, through DGS, issued an Invitation for Bids that contained defective *bridge* design specifications. Respondent, by contrast, argues that the problem here is that the *bridge abutments* as designed were defective, not the bridge specifications. The Board agrees with Appellant that the original bridge specifications were defective because following the specifications as written would lead to installation of a bridge which would not fit within the footprint of the project limits. It was clear from the specifications that the State wished to have a particular bridge, designed and constructed by the manufacturer, and installed with abutments designed by the bidder. This was not a contract to build a bridge, it was a contract to install a bridge. Therefore, the Appellant, and other bidders, were entitled to rely on the implied warranty that the bridge would fit, and further to rely on the approval of the Architect/Engineer of the shop drawings for the selected bridge and its appropriately designed abutments.

By issuing the plans and specifications, the State impliedly warranted that the plans and specifications were adequate and sufficient. *W.M. Schlosser Co.*, Inc., 3 MSBCA ¶ 238 at 5 (1990); *Martin G. Imbach, Inc.*, MDOT 1020, 1 MSBCA ¶52 (1983). The State breached this implied warranty by issuing plans and specifications that were defective.

First, Appellant made a reasonable pre-bid site investigation and reviewed the plans and specifications, and Respondent did not provide evidence that a reasonable pre-bid site investigation would have disclosed that the specified Mabey bolted bridge, and its corresponding abutments, would not fit within the project site. There was no evidence presented that any other bidder ascertained and told DGS about the design deficiencies or conflicts. Appellant could not at the time of a pre-bid inspection determine whether the abutments would fit because the abutments appropriate for the bridge specified had not yet been designed.

Appellant relied upon the specifications when it, through its professional engineer, Mr. Matonek, designed the abutments which were approved by Mr. Decker. The Board finds that the abutments as designed were appropriately designed, including that they were slightly wider than the bridge they were intended to support. For the design of such abutments, Appellant was not required to independently take field measurements, and instead was entitled to rely upon the measurements of the bridge specified by Respondent. This they did. Appellant measured the site when it was ready to construct the abutments, and upon commencing layout of the bridge, it discovered that the bridge selected by the State would not fit, and notified the State immediately.

At this point, the Respondent could have made several determinations. It could have followed the recommendations made by Appellant and Mr. Decker to move the bridge upstream from the centerline by 1.5 feet, it could have ordered that a smaller bridge be purchased, or it could have required that the abutments be redesigned.

Unfortunately, the State, through its procurement officers, mistakenly

assumed that the contractor had been tasked with designing as well as installing the bridge, and further assumed that the fault in the project design lay with the contractor. This combined with the posture taken by the State, that the Contractor was therefore fully responsible for the problems encountered, as well as the delay in providing written direction to the Contractor as to how to proceed with a remedy for the discovered problem, left the Contractor in the position of insisting on formal written direction from the Procurement Officer. While it may have been ideal if the Appellant had field- measured the site before ordering the approved bridge, once the layout was performed, like the contractor in *Lamb Eng. & Const. Co.*, 97-2 BCA ¶29,207, EBCA No. C-9804172 (July 28, 1997), "the evidence establishes that overall it acted with reasonable prudence and diligence. It applied its expertise under the difficult circumstances which were not of its own initiation and were made worse by Respondent, whose own inability to correctly assess the situation and take appropriate measures left [Appellant] in a virtually impossible position."

Likewise, the Contractor was not unreasonable in maintaining a presence at the site during the period of the delay. The Procurement Officer could have, at any time, issued written direction which might have instructed the Appellant how to proceed, and permitted it to commence work. While Appellant's decision to await written direction from the Procurement Officer can be challenged, "it was clearly rational and we conclude that it was within its zone of prudence." *Id.* at 145,347.

Appellant next seeks payment for the delay encountered between August 13, 1997 and November 19, 1997 when it had received final written direction as to how to proceed (including the responses to the RFI's received from Mr. Decker on November 19, 1997). The Respondent is entitled to a reasonable period of time within which to digest information regarding a problem such as that the bridge as specified, approved and ordered would not fit within the project footprint. Therefore, the Board will consider the delay period to run from September 10, 1997, the date of filing of the notice of claim, and the date that the Appellant returned to work following the letter from Mr. Cook, November 11, 1997. This constitutes a delay period of 62 days. The

original project completion date was November 1, 1997. Although the Respondent states that a "substantial completion" inspection was held on May 19, 1998, and the bridge was accepted, the Board, for the purpose of this decision, has determined that "substantial completion" occurred on January 7, 1998, the date that the bridge was again utilized for park traffic. The total days between November 1, 1997 and January 7, 1998 is 61 days, so the Appellant, in effect, has substantially completed the job with one day to spare. Thus, this Board declines to grant Respondent liquidated damages, and grants the Appellant an extension of time sufficient to cover the delay period.

The Board finds that the Appellant is entitled to equitable adjustments arising from changes in the contract as a result of the necessity to correct for the failure of the bridge specified to fit within the project footprint as adjusted as follows:

Appellant first seeks $1,193.60 for additional guardrail work required in the Spring of 1998 when the Department of Natural Resources determined that it would not allow the contractor to reinstall weathered guardrail that was in the possession of the Park, and instead would require that the Appellant install new galvanized guardrails. The Board finds that this was a change in the scope of work, and therefore allows Appellant's request for $1,193.60, the amount it paid to Guardrails, Etc. for performance of the work.

Next, Appellant seeks $1,004.70 for the cost of paving areas of roadway cut to relocate the CMP and utility conduits. The Board believes that this does constitute a change in the work, but agrees with Respondent that Appellant claims overhead and profit twice for the work. Therefore, the amount awarded is $896.89.

Appellant seeks payment for extra work performed as a result of the responses to the Requests for Information submitted by Appellant and issued by Respondent, including the removal of guardrail, work on the stone wing walls, forming and placing concrete in the wingwalls, relocation and installation of the CMP, relocation of the conduit, removal of the electric duct bank, placing and tying rebar in the abutment in the wing wall connecting corner, installing PVC pipe under the bridge,

lowering the guardrail beam, and rehanging conduit under the bridge. The Board grants it $6,604.07 for this work.

Next, Appellant seeks field delay costs for waiting for direction from DGS from August 23, 1997 through November 10, 1997 (including the salary of the superintendent, labor to maintain the site, field office costs, superintendent vehicle expenses and backhoe rental.) As previously stated, the Board is willing to allow 62 days of delay, not 80 days of delay. In addition, the Board is persuaded by Respondent that Appellant seeks 100% payment for its superintendent's salary when a more reasonable estimate of his time on the project was 50%. In addition, it appears that Superintendent Light maintained the safety fence while on the job rather than delegating the task to another person. Therefore, the Board awards Appellant $7,586.00 for direct labor, field office costs of $285.00, and backhoe rental costs of $2,467.50 for two months, or a total of $10,338.50 for direct delay costs.

Appellant then seeks additional costs for the salaries of President Reinhardt ($11,000), Vice President North ($4,875) and administrative salaries ($3,353.48), for the for work performed on the project by these persons directly related to resolution of the problem that caused the delay. After again adjusting for the allowable delay period, the Board will allow $7,668 for Mr. Reinhardt, $3,656 for Mr. North, and $2,515 for the administrative staff, or a total of $13,839.00.

Thus, the total amount that the Board awards to Appellant in quantum is $32,872.06:

Additional or Extra Work		
Guardrail work	$1,193.60	
Paving work	896.89	
RFI work	6,604.07	
		$ 8,694.56
Direct Delay Costs		
Labor	7,586.00	
Field Office	285.00	

Equipment rental	2,467.50	
		10,338.50
Salary Costs related to the Delay		
Mr. Reinhardt	7,668.00	
Mr. North	3,656.00	
Administrative Staff	2,515.00	
		13,839.00
Total Costs		$32,872.06

Pre-decision Interest

Appellant seeks pre-decision interest. Pursuant to §15.222 of the State Finance and Procurement Article, the Board awards pre-decision interest in the amount of 10% from the close of the hearing on March 28, 2000.

Attorney's fees

Appellant requests that this Board award attorneys' fees and costs associated with the prosecution and presentation of the appeal because "Respondent lacked substantial justification pursuant to §15-212.2 of the State Finance and Procurement Article for the denial of Appellant's claims and for the defenses it has asserted in the appeal."

Section § 15-221.2 [2] of the State Finance and Procurement Article provides, in part:

> The Appeals Board may award to a contractor the reasonable costs of filing and pursuing a claim, including reasonable attorneys fees, if the Appeals Board finds that the conduct of unit personnel in processing a contract claim is in bad faith or without substantial justification."

[2] See also COMAR 21.10.06.32, Costs, requiring that the Board make "a finding that the conduct of unit personnel in processing a contract claim under a contract for construction is in bad faith or without substantial justification."

First, the statute is limited to conduct during the processing of a contract "claim". Thus, the possibility of recovery of attorneys' fees arises only after a claim has been filed, and is in the process of being reviewed. COMAR distinguishes between "Claim"21.10.04.01(B)(1)[3] and "Notice of Claim", 21.10.04.02(A) and (B)[4] . However, this attorneys' fee statute and COMAR are not clear whether for the purpose of the provision the Board must look to the date of the filing of *notice of claim*, or the filing of the *claim*. For the purposes of the instant appeal only, the Board assumes that the legislature meant "claim" to include the filing of the notice of claim, which in in this case was filed September 10, 1997. The claim itself was only perfected in November 1998 when final financial documents in support of the claim were filed.[5]

Second, in order to make such a finding, the Board must next determine *who's* conduct might arguably be in bad faith or without substantial justification. Since the only person or persons charged with processing a contract claim, pursuant to COMAR 21.10.04.03 is the procurement officer[6], this Board finds that the conduct in

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[3]"Claim" means a complaint by a contractor or by a procurement agency relating to a contract subject to this title, except a real property lease. The claim, defined as a complaint, has two components. There is the notice component, and the quantification component, both of which must be satisfied within specific statutory and regulatory timeframes. S&F Article §15-219.

[4] A "notice of claim" must be filed within 30 days after the basis for a claim is known. The claim (cost quantification) may be filed contemporaneously with the notice of claim or within 30 days of the filing of the notice or as soon as practicable when costs become known.

[5]Assuming that Appellant admits that its documentation was not available until November 1998, there is no evidence in the record that the Procurement Officer acted in bad faith or without substantial justification in processing the claim after November 1998, i.e., there is no evidence of malfeasance, misfeasance or misconduct.

[6] COMAR 21.20.04.03 states:
Upon receipt of a contractor's claim, the procurement officer:
A. Shall investigate and review the facts pertinent to the claim;
B. May request additional information or substantiation through any appropriate procedure; and

question is that of the procurement officers in this case, Mr. Langton and Mr. Cook.[7]

There are three issues of conduct, that must be examined. Were the procurement officers acting in bad faith or without substantial justification in 1) determining that the Appellant had contracted to design the bridge, 2) in delaying the issuance of written directives as to how Appellant should proceed after the bridge design problems were discovered, and 3) in denying Appellant's claim?

It is clear from the evidence that Mr. Langton and Mr. Cook were mistaken on at least one critical issue, whether the Appellant was charged with designing the bridge and its abutments, or simply the abutments. The Board finds, however, that such mistake does not rise to the level of "bad faith or without substantial justification". This mistake compounded another mistake on the part of the Procurement Officers: a failure to appreciate the confusion in the invitation for bids discovered by Mr. Decker or Appellant in August 1997.

With regard to the delay in issuing written instructions as to how the work should proceed until November 7, 1997, the Board finds, as set forth above, that this is delay chargeable to the Respondent not the Appellant, but that this likewise does not rise to the level of "bad faith or without substantial justification."

Finally, with regard to the denial by the Procurement Officer of the claim of the Appellant, we note that this is not a circumstance where it has been proven, for example, that a procurement officer knows that the Appellant has a valid claim but because of some animus, denies the claim. Such action would rise to the level of malfeasance or misfeasance, and therefore equate with "bad faith or without substantial justification". This Board will not find that a denial of a claim based on mistake rises to the level

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C. Unless clearly inappropriate, shall seek the advice of the Office of the Attorney General.

[7]Thus, any actions taken pursuant to an alleged attitude of "playing hardball" by the DGS inspector Mr. Lombardi, or Mr. Yastrzemsky, the Board finds, are not the subject of this statute and regulation.

of malfeasance or misfeasance, or that it is an action taken in bad faith or without substantial justification.

Wherefore, this Board grants in part and denies in part the appeal of Appellant BEKA Industries, Inc., awarding to it $32,872.06 with pre-decision interest from March 28, 2000 until the date of this decision and post-decision interest from the date of this decision until paid, granting it an extension of time for completion of the project, denying Appellant's request for attorneys' fees under §15-221.2, and denying Respondent its claim for liquidated damages. So Ordered, this _____ day of _________, 2000.

Dated:

____
Candida S. Steel
Board Member

I concur:

____
Robert B. Harrison III
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2132, appeal of BEKA Industries, Inc., under Department of General Services Contract No. P-020-942-010.

Dated:

____
Mary F. Priscilla
Recorder