STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2311	Date of Decision: 5/15/03
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: Maryland Transportation Authority Contract No. 30231156	
Appellant/Respondent: TPH Industries, Inc. Maryland Transportation Authority	

Decision Summary:

Equitable Adjustment - Determine With Reasonable Certainly - The Board does not require that the amount of damages be ascertainable with absolute exactness; it is enough that the evidence adduced be sufficient to enable the Board to make a fair and reasonable approximation.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of TPH Industries, Inc.	)	
	)	
Under Maryland Transportation Authority Contract No. 30231156	)	**Docket No. MSBCA 2311**

APPEARANCE FOR APPELLANT: **Sandon L. Cohen, Esq.**
Cohan & West, P.C.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT **Sandra E. Clifford**
Assistant Attorney General
Baltimore, Maryland

OPINION BY BOARD MEMBER HARRISON

This timely appeal concerns a dispute over payment for removal of pigeon debris from several bridges on I-395.

Findings of Fact

1. On or about May 16, 2002, the Maryland Transportation Authority (MdTA) issued an Invitation for Bids (IFB) concerning the above captioned Contract for removal of pigeon debris from inside the steel box girders of several bridges on I-395.
2. The sixth paragraph of the "Scope of Contract" section of the IFB states that the work to be performed under the Contract "will be measured and paid for at the Contract unit price per ton of debris and feces removed and disposed of for the facility (I-395)." The first paragraph of the "Scope of Contract" section of the IFB provides in part in bold face type: "It is anticipated there will be approximately sixty (60) tons of pigeon debris located within the box girders on I-395."
3. The bid sheet which bidders for the Contract were required to use required them to bid on approximate quantities of sixty

(60) tons of the material to be removed, at a price per ton to be multiplied by sixty (60) for an estimated total cost.

4. In addition to the language in the IFB and the bid sheet indicating that the work to be performed under the Contract would involve the removal of approximately sixty (60) tons of material, the MdTA issued Addendum No. 1 to the bid documents in which it made the following representation as a "clarification":

> We estimated the total amount of debris by first determining the amount of cubic feet and then converted it into tons, using weight of 65 lbs. per cubic foot. This is a reasonable weight when considering the potential "voids" in this type of debris, as opposed to solid waste.

5. Appellant submitted the low bid of $550.14 per ton, for a total price of $33,008.40. The MdTA received seven (7) other bids with total prices ranging from $37,450.00 to $75,000.00.
6. Work under the Contract began on September 9, 2002.
7. At no time did Appellant ever raise any questions, pre-bid or prior to award, based on the manner in which the bid amount was calculated.
8. In September, 2002, after Appellant had begun performance on the Contract, it discovered that there was apparently less tonnage of debris than the State estimated in the IFB.
9. On September 24, 2002, Appellant filed a notice of claim with MdTA, asserting that the reduction in actual tonnage (weight) of pigeon debris had a material affect on Appellant's bid which was derived on the basis of the sixty (60) ton multiplier set forth on the bid sheet.
10. MdTA treated Appellant's September 24, 2002 letter as a claim and denied Appellant's claim by letter dated October 3, 2002, finding that the claim had no merit because the not-to-exceed contract amount was based on an estimate of "approximately" sixty (60) tons, with no guaranteed amount of pigeon debris to

be removed by the contractor. Appellant fully performed the Contract. However, the weight of the material removed from the various bridge girders totaled only 9.85 tons.

11. On October 31, 2002, Appellant filed an appeal with the Board. On December 3, 2002, Appellant filed its Complaint and elected to proceed under the accelerated procedures set forth in Board Rule 12.

Decision

Respondent MdTA asserts that the Board must deny this appeal because Appellant failed to make pre-bid inquiry under the patent ambiguity doctrine.

The Board has held in a number of cases that a claim of patent ambiguity in specifications must be raised pre-bid or it is waived. For instance, in Adler Services Group, Inc., MSBCA 2114, 5 MSBCA ¶482 (2000), the Board observed that:

> In a public procurement, pre-bid inquiry by a contractor concerning the meaning of the specifications it may bid upon is required before any ambiguity in the specifications that gives rise to a dispute may be construed against the government as drafter of the specifications, unless the ambiguity is latent or hidden. *See* Jackson R. Bell, Inc., MSBCA 1851, 5 MSBCA ¶392 (1996)....

See also State Highway Administration v. David A. Bramble, Inc., 351 Md. 226 (1998); Avedon Corporation v. U.S., 15 Cl. Ct. 771 (1988).

However, the real issue herein is whether there is any ambiguity (patent or otherwise), and we find there is none. Appellant does not allege that the specifications are ambiguous. It alleges that it understood them, calculated its bid accordingly and then found during performance that there was less tonnage of the pigeon debris material than the State's estimate indicated.

Appellant is an environmental engineering contractor which regularly engages in the business of waste removal. Appellant did

not raise any questions pre-bid concerning the manner in which the MdTA calculated the amount of debris to be removed under this Contract. However, prior to submitting its bid, Appellant inspected the work site. In its Complaint and at the hearing, Appellant, an experienced contractor, advised that the cost involved in removing pigeon debris from bridge girders has little or nothing to do with the weight of the material to be removed. Appellant further advised that the costs involved are incurred based upon the amount and location of the surface area to be cleaned, the volume (not the weight) of the material to be removed, the nature of the equipment to be used, and the number and expertise of the personnel who must be employed to perform the work properly in accordance with applicable requirements. Appellant's President testified that Appellant would have submitted a bid totaling approximately $33,000.00 without regard to the weight of material specified by MdTA. Thus, for example, if the IFB had specified only twenty (20) tons on the bid sheet, Appellant would have tripled its price per ton to derive a total bid of $33,000.00.

In the IFB documents, the MdTA provided an estimated amount of tonnage concerning the quantity of debris to be removed. The MdTA also invited bidders to go and perform a pre-bid site visit in order to view the areas and amounts of pigeon debris to be removed. We find that there was nothing in either the Contract documents or physically observable through site inspection to alert Appellant or any other bidder that the sixty (60) tons of estimated weight was not approximately correct relative to calculating a bid based on real costs associated with volume, location, equipment, and personnel factors.

In its Complaint, Appellant alleges that it was both a material representation of the MdTA and a material representation of the resulting Contract that the job involve the removal of approximately sixty (60) tons of material.

In PHP Healthcare Corporation, MSBCA 2076, 5 MSBCA ¶489 (2001)

at p. 9, the Board stated: "the State may not mislead a contractor regarding material information it possesses upon which the contractor may be expected to rely and does reasonably rely in preparing its bid or proposal."

The MdTA argues that in this case there was no misrepresentation made on the part of the MdTA and that the estimate concerning the approximate amount of pigeon debris provided at the time the specifications were issued was just that – an estimate. It was provided by the MdTA to assist bidders in submitting their bids.

In *PHP Healthcare Corporation, supra*, an appeal involving a contract dispute arising out of a contract to provide medical services to correctional system inmates, the Board found that the appellant, an experienced contractor, had evaluated the proposed scope of work and submitted a proposal based on its evaluation of it and did not reasonably rely on the alleged representation by the State concerning the number of inmates to be expected that formed the core of the dispute between the parties.

However, herein we find that the sixty (60) ton estimate was one that bidders were reasonably entitled to rely upon, and we find that Appellant did reasonably rely upon the sixty (60) ton estimate to derive its price that would be driven by the factors of volume, location, equipment, and personnel. In this regard we accept Appellant's testimony that the cost of obtaining an independent assessment of the weight of the debris was prohibitive and not practical timewise given the size of the job.

Respondent finally argues that Appellant is wrongfully seeking payment of over $26,000.00 for work it has not performed because only 9.85 tons of debris were removed rather than sixty (60) tons. Respondent argues the claimed amount is not recoverable under the Board's decision in Delle Data Systems, Inc., MSBCA 2146, 5 MSBCA ¶493 (2001), where the Board stated at p. 19:

> However, should Appellant also be arguing that it should be paid for customers it allegedly

> would have served through various pay out points but for the State's alleged contract breaches up to the not-to-exceed Contract amount of $777,285.00, we would deny such a claim because of our belief that a contractor may not be compensated (beyond recovery of expenses where it is required to stand ready to perform) for work that it does not perform to include any anticipated profit on such unperformed work in a Maryland public procurement involving public funds. *Id.* at 31-32.

In the instant appeal, however, the Appellant has actually performed the work and seeks to be paid therefore. In *Delle Data Systems, Inc.*, that appellant sought to be paid for work it did not perform but claimed it would have performed if only the State had provided it with more clients to serve.

The record in this appeal reflects that the Appellant reasonably relied on the sixty (60) ton estimate in compiling its bid.

Following the filing of the Complaint in this appeal on December 3, 2002, the MdTA paid Appellant the sum of $5,418.97, calculated by multiplying the 9.85 tons of material removed by Appellant by the unit price of $550.14 per ton. The bid submitted by Appellant reflected an estimated total amount for the project of $33,008.40, based on sixty (60) tons. The difference between the amount paid by MdTA, $5,418.97, based on 9.85 tons, and the amount bid equals $27,589.43.

The evidence reflects that Appellant had $1,008.40 in savings in reduced dump fees due to the weight of the material disposed of being 9.85 tons rather than sixty (60) tons. This savings results in a balance due of $26,581.03 based on Appellant's bid minus the amount paid by MdTA and the dump fees. Appellant's bid of $33,008.40 was the low bid with the range of the other seven (7) bids being $37,450.00 to $75,000.00. Appellant requests that the Board award it as an equitable adjustment the sum of $32,000.00 (reflecting the savings in reduced dump fees) less the amount which

the MdTA subsequently paid, $5,418.97, which results in an adjustment sought of $26,581.03. As may be observed, Appellant's bid reflecting its estimated cost to do the work plus profit is four (4) thousand to forty-two (42) thousand dollars less than the bids of the other bidders.

As shown by Appellant's Board Rule 4 submission and testimony relating to it presented at the hearing, Appellant incurred direct costs for materials, wages, and other payroll costs exceeding $20,000.00. Appellant used some of its own equipment in performing this job for which the Board is unable to determine an exact cost, but to which Appellant allocated over $10,000.00 in preparing its bid, which allocation we find to be reasonable. Appellant is also entitled to an allowance for depreciation, overhead, and a reasonable profit. The Board finds, based on the record, that an equitable adjustment based on total compensation of $32,000.00 as sought by Appellant in its Complaint for performing the Contract work is reasonable. See Hardaway Constructors, MSBCA 1249, 3 MSBCA ¶227 (1989) at p. 77 (Board does not require that the amount of damages be ascertainable with absolute exactness; it is enough that the evidence adduced be sufficient to enable the Board to make a fair and reasonable approximation). The reduction of $1,008.40 from Appellant's bid price of $33,008.40 for reduced dump fees represents an allowance for approximately 1.83 tons of material at the unit price of $550.14 per ton and is consistent with the IFB estimate of approximately sixty (60) tons and the not-to-exceed price level of the Contract. Accordingly, the Board awards the requested equitable adjustment of $32,000.00 (which reflects the $1,008.40 savings on the dump fees) less the amount already paid by MdTA, $5,418.97, for a total balance due and owing Appellant of $26,581.03.

Pursuant to *§15-222* of the *State Finance and Procurement Article* of the *Annotated Code of Maryland*, the Board may award Appellant interest on money that the Board determines to be due

"from a day that the Appeals Board determines to be fair and reasonable after hearing all of the facts until the day of the decision by the Appeals Board" provided that interest may not accrue before the procurement officer receives a contract claim from the contractor. Herein, the MdTA Procurement Officer treated the September 24, 2002 letter as a claim, although at this time the work had apparently not been finished. However, by the time the Appellant's Complaint was filed with the Board in December, 2002, the work was apparently finished because MdTA paid Appellant the amount of $5,418.97 based on MdTA's belief that this was all that Appellant was entitled to due to the actual tonnage of pigeon debris removed. Appellant submits that it has been deprived of just and reasonable compensation for the work it performed from the date when payment was due under the Contract documents. Appellant submitted an invoice as directed by the MdTA for the $5,418.97 amount the MdTA was willing to pay on October 24, 2002, and Appellant requests that the Board award interest from November 23, 2002, the thirty (30) day payment due date reflected on the invoice. Interest at the applicable rate of interest on judgements (*see Id. §15-222(d); Md. Cts. & Jud. Proc. Code Ann. §11-107(a)*) is awarded from November 23, 2002 on the equitable adjustment principle balance of $26,581.03.

Wherefore, it is Ordered this day of May, 2003 that Appellant is awarded an equitable adjustment under the Contract of $26,581.03 plus pre-decision interest from November 23, 2002 and post-decision interest from the date of this decision.

Dated:

_____
Robert B. Harrison III
Board Member

I Concur:

_____
Michael J. Collins
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 2311, appeal of TPH Industries, Inc. under Maryland Transportation Authority Contract No. 30231156.

Dated:

Michael L. Carnahan
Deputy Recorder