BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	**)**	
Brawner Builders, Inc.	**)**	
	)	
	)	
	)	**Docket No. MSBCA 2813**
Under	**)**	
State Highway Adminstration	**)**	
Contract No. AA4805180	**)**	

APPEARANCE FOR APPELLANT: **Thomas A. Baker**
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: **Ian R. Fallon**
Lawrence F. Kreis, Jr.
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This contract dispute comes before the Maryland State Board of Contract Appeals (Board) for ruling on Cross-Motions for Summary Disposition. There being no dispute between the parties concerning the principal operative facts at issue, the Board determines as a matter of law prior to full hearing on the merits that no change order arose as a result of the State's direction to appellant to perform certain work in accordance with the terms of the underlying contract.

Findings of Fact

1. On January 12, 2011, appellant, Brawner Builders, Inc. (Brawner) was notified by the State Highway Administration (SHA) that it was the successful bidder on a certain bridge deck replacement contract for the purpose of upgrading two directions of road surface carrying vehicular traffic on each of two bridges located in Anne Arundel County, Maryland, namely, Bridge Nos. 02013 and 02216 on Hammonds Ferrry Road

over MD 295, and Bridge Nos. 02012 and 02219 on MD 168 (Nursery Road) over MD 295. (State's Ex. Tab 1.)

2. Placing bidders on notice of the as-built condition of the existing bridge decks needing replacement the "General Notes" sections of the as-built plans referenced March 1942 SRC (State Roads Commission, predecessor to SHA) specifications as well as 1944 AASHO (American Association of State Highway Officials) standard specifications for highway bridges. The SRC specifications at that time mandated the application of three coats of lead paint on structural steel and the AASHO specifications also required the use of lead paint for at least two paint coatings. (State's Ex. Tabs 4 & 5.)

3. The contract in question also contained a Special Provision providing appellant and all other bidders advance warning as follows: "The Contractor is alerted to the fact that paint on the existing bridges contains 'TOXIC METALS.'" (State's Ex. Tab 6.) Another section of the contract specifications also advised contractors to assume the presence of lead paint at the work site, unless the contractor's testing of the paint determined otherwise. (State's Ex. Tab 7.)

4. The contract also included a Cleaning and Painting Table which stated that the facia of the beams needed to be cleaned and then re-painted. (State's Ex. Tab 23.) Appellant asserts that only the vertical surfaces of I-beams constitute beam facia, with the upper horizontal suface considered to be the top flange and the bottom horizontal surface the bottom flange. Therefore, Brawner argues, by stating the obligation to paint only beam facia without a corresponding duty to paint beam flanges, that section of the contract created a false expectation on the part of the contractor that the beam flanges would not need to be cleaned and painted. (State's Ex. Tab 23.)

5. Both parties recognized at all pertinent times that lead paint was commonplace in 1948 and they fully anticipated the

presence of lead paint on at least some portions of the structural steel components of the bridge decks being replaced. The more precise question presented by the contest here is whether the contractor should reasonably have known or foreseen the presence of lead paint on the top flange of the structural support beams.

6. Lead paint was visible on the exposed portions of the steel beams supporting the bridge deck, but the top flange of the beams, known as I-beams or H-beams, were covered by concrete as a result of which it was unknown to the parties prior to the commencement of work on this job whether the top flanges of the beams had been painted when the bridges were initially constructed in 1948.

7. Part of the work to be done to replace the subject bridge decks required the contractor to weld spiral shaped reinforcing rods, also known as steel stud shear developers, onto the tops of the load-bearing steel beams spanning the bridges. (State's Ex. Tab 10.) That work was required to be performed after the contractor removed the old spiral reinforcing rods initially installed in the bridges by welding onto the tops of the beams.

8. The custom in the bridge-building industry in 1948 when the bridges were initially constructed did not mandate painting of the concealed areas of reinforcing rods welded onto the top flange of the bridge beams later covered by concrete. During that time, the practice of painting or not painting the top flanges of bridge beams varied from bridge to bridge. Some were painted, others were not. (McComas Depostion, pg. 69.)

9. The American Association of State Highway and Transportation Officials (AASHTO) promulgates accepted industry standards which require structural steel to be clean and free of paint prior to welding. (State's Ex. Tab 11.)

10. In the course of removing the deteriorated concrete constituting the old bridge deck in order to expose the beams,

it became apparent that the top flanges of the beams in the bridges here at issue had been painted with red lead paint at the time of the original construction.

11. When the foregoing condition was identified, the State directed appellant to remove all lead paint from the top flanges of the bridge beams and Brawner reluctantly did so by hiring a subcontractor, Blastech Enterprises, Inc. (Blastech) to perform that portion of the required work at a cost in excess of $100,000, not including overhead, interest, and alleged delay damages arising from the time extension incurred on the job.

12. Claiming the presence of a differing site condition undisclosed by the State, Brawner requested that SHA approve a change order allowing appellant additional compensation for the extra work that was required to remove lead paint from the top flanges of the bridge beams after the spiral reinforcing rods were removed. SHA denied that request, as a result of which the instant appeal was filed with the Board. (State's Ex. Tabs 15 thru 21.)

Decision

One may easily imagine a contract dispute arising as a result of a contractor's encountering lead paint, and incurring extra costs arising from the removal and handling of such hazardous waste, after being informed by the State that lead paint was not present at the work site. That scenario could well constitute a differing site condition entitling the contractor to an equitable adjustment of the bid price. The Board underscores at the outset that that set of alleged facts is not the instant claim. In this dispute, all parties fully appreciated and understood the consequences of encountering the anticipated presence of lead paint during this reconstruction of bridges that were built in 1948. All of the bridge surfaces that were painted were presumed by all parties to be painted with lead paint. Instead, the more

particularized question at the heart of the instant dispute is whether or not a change order occurred when the contractor was directed by the State to remove the lead paint that was present on the top flanges of the I-beams. The presence of lead paint at this location was unknown with certainty until after the concrete that constituted the bridge decking was removed, exposing the condition of the tops of the beams.

The gist of Brawner's request for SHA approval of additional funds to cover the cost of removing the lead paint found at the top flange of the I-beam is the "Cleaning and Painting Table" included in Section 436.01.01 under the table heading, "AREAS TO BE CLEANED AND PAINTED," in which SHA states, "Fascia of Beam Nos. 2 and 9 on Bridge Nos. 02216, 02013, and 02012 using Paint System C." Appellant asserts that this portion of the contract lead Brawner to believe that it only had to remove lead paint from the surfaces of the vertical planes of the bridge I-beams, and not the top flanges. The Board concludes that such an interpretation of the meaning of the words set forth in the Cleaning and Painting Table is strained at best and decidedly incorrect.

Appellant's own behavior at the work site belies its argument. There is no allegation made by appellant in this appeal that when it submitted its bid, Brawner actually believed that it only had to paint the vertical surfaces of the I-beams. Appellant well understood at the time of its bid and throughout the performance of its work on this job that the exposed horizontal bottom flanges of the bridge I-beams also needed to be painted in addition to the vertical beam surfaces. As a result, Brawner's newly constrained definition of the word, "facia," is inconsistent with its actual on-site work. And because appellant knew its obligation included painting the bottom flanges of the I-beams, it stands to reason that Brawner also anticipated and understood its contractual duty to paint the top flanges as well.

The deposition testimony of appellant's welder further supports the conclusion that Brawner should have anticipated the

presence of lead paint on the top flanges of the bridge I-beams. Asked, "What about existing beams where you have seen the deck where the beams have been exposed? Have you ever seen where there's been no paint on a beam?" Dennis McComas stated, "Yes." But when the follow-up question was posited, "How many times?" McComas replied, "Well, I don't remember how many times, but most of the times there's no paint [on the] top flange." Appellant argues that the foregoing deposition exchange proves that Brawner should not have anticipated the need to remove lead paint from the top flanges of the bridge I-beams. But quite the opposite is proven. The testimony of appellant's own subcontractor that most of the time no paint is found on the unexposed top flanges of bridge I-beams, implies that on at least some occasions, paint is discovered on the top flanges. This admission comes from a person whose principal job function at the work site is welding after paint is removed, but it is clear that even workers who appear at the site after paint removal know that sometimes the top flanges of bridge I-beams are painted even though they are later covered by concrete. This knowledge by Brawner's subcontractor is fairly imputed to appellant, who knew or should have known when bidding on and later peforming the job, that it might encounter paint on the top flanges of the bridge I-beams, and that if encountered, it would need to be removed.

As a result, the Board determines that no change order occurred when Brawner was directed by SHA to remove the lead paint that was discovered on the top flanges of the I-beams of the bridges being repaired under the terms of the subject contract. No differing site condition existed. Moreover, SHA did not express or create the false impression that no lead paint would be encountered on the top flanges of the I-beams because the State made no assurance one way or the other as to whether the top surfaces of the I-beams had been painted. The evidence adduced supports the Board's finding that the contractor knew or should have known that it might find lead paint on the top flanges of the I-beams. The

risk of encountering that condition falls squarely on the contractor to perform the work it promised to do, whether or not lead paint was discovered after removal of the concrete bridge decking. Finally, the Board notes that appellant carries the burden of proof by a preponderance of the evidence in demonstrating the presence of a differing site condition. That level of proof is lacking here.

For all of the foregoing reasons, and as more fully set forth in the pleadings filed here and evidence adduced at the Motions hearing, this appeal must be denied. Therefore, the Motion for Summary Disposition filed by appellant is hereby denied and the Motion for Summary Disposition filed by SHA is hereby granted.

Wherefore it is Ordered this _____ day of July, 2013 that this appeal be and hereby is DENIED.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
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 2810, appeal of Brawner Builders, Inc. Under State Highway Adminstration Contract No. AA4805180.

Dated:

_____
Michael L. Carnahan
Deputy Clerk