BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of Dick Corporation	)	
	)	
	)	**Docket Nos. MSBCA 2458 and 2459**
	)	
Under SHA Contract No. BA3335172	)	
	)	

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DECISION

On February 28, 2007 the Board issued a unanimous Opinion and Order in these consolidated appeals, granting appellant's claim for equitable adjustment due to an alleged differing site condition encountered during appellant's construction of a certain retaining wall built in connection with a State Highway Administration (SHA) road improvement project. Roughly speaking, the $50 million project at issue was for the purpose of widening a three-mile section of the southwest portion of the Baltimore Beltway (U.S. Rt. 695). The Board found in favor of appellant but allowed only partial relief, awarding liquidated damages totaling one million five hundred and eight thousand three hundred and eighty-eight dollars ($1,508,388) a reduction from

appellant's request in its Proof of Costs for a total of four million nineteen thousand seven hundred and twenty-one dollars ($4,019,721). On March 30, 2007 appellant noted a timely Motion for Reconsideration which was opposed by the State on April 20, 2007 to which appellant submitted rebuttal on April 30, 2007.

In part, appellant's Motion for Reconsideration seeks the Board to reverse its determination that only a Type II differing site condition existed in this matter and not a Type I differing site condition. In addition, appellant seeks to increase the amount of the equitable adjustment allowed by the Board by supplementing the Board's quantum calculations by the sum of $429,224 in field office overhead, $63,329 in additional costs associated with paving delay and $38,353 in direct costs for the redesign of Retaining Wall 8. Finally, appellant seeks an award of predecisional interest in the amount of $286,936, for a total additional sum of $817,842.

With respect to the determination of whether a Type I or Type II differing site condition existed at Retaining Wall 8, or both, the Board reiterates its previously stated Findings of Fact and Decision. The Board's determination in this regard represents a rejection of arguments made by counsel for both parties, a decision which, for the reasons set forth below, stands unamended with the following supplemental explanation of the Board's denial of appellant's Motion for Reconsideration in this respect.

Citing C.J. Langenfelder & Son, Inc., MDOT 1000, 1003 & 1006, 1 MSBCA ¶2 at p. 43 (1980), *aff'd* MPA v. C.J. Langenfelder & Son, Inc., 50 Md. App. 525, 438 A.2d 1374 (1982), the State argued in its Post-Hearing Brief that Board precedent restricts the determination of a Type II differing site condition only to those instances where a contract for

excavation contains no indication of subsurface conditions. (SHA Post-Hearing Brief at pg. 71.) The Board simply does not read Langenfelder as broadly as SHA here suggests. Langenfelder involved a contractor's maintenance dredging of a channel bottom in order to restore navigation capacity of a waterway. Because the contract there in question did not definitively assert the presence or absence of underwater debris, the Board held that a Type I differing site condition could not exist. That is because a Type I differing site condition requires proof that concealed subsurface conditions encountered on a job differ materially from those that are described in contract documents. Without any contractual description of subsurface conditions, it is impossible as a matter of law to conclude the presence of "[s]ubsurface or latent physical conditions at the site differing materially from those in the [c]ontract," as required to support a finding of a Type I differing site condition.

But to assert correctly that a Type I differing site condition is impossible absent contract specifications later found to be wrong is not to suggest the accuracy of the corollary position that "a Type II claim may only be brought when a contract does not contain indications of the subsurface conditions," as claimed by the State. (SHA Post-Hearing Brief at pg. 71.) A Type II differing site condition can exist, where, as here, contract descriptions of subsurface conditions exist and are not inaccurate, but at the same time, those contract specifications are found in hindsight to be inadequate fully and fairly to disclose unknown excavation obstructions, as was the circumstance in the case at bar. Of course, this basis for the Board's rejection of the State's argument is irrelevant to appellant's Motion for Reconsideration on the question of whether a Type I or Type II differing site condition existed at Retaining Wall 8, but the foregoing analysis makes a

useful prelude to the Board's concomitant rejection of appellant's position on this point.

SHA contends that neither a Type I nor a Type II differing site condition was present at this work site. Appellant submits that both Type I as well as Type II differing site conditions were proven. The Board adopts neither position, holding that, depending on the facts, a Type I and a Type II differing site condition can co-exist and they may also exist separate and independent from one another. To sum, a Type II differing site condition standing alone is possible and was present in this instance.

Irrespective of contract specifications, a Type II differing site condition is predicated upon the presence of "[u]nknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract." Ordinarily, use of the word, "unknown" in this context may imply the absence of any contract specifications at all; however, that adjective may also find fair and appropriate application where contract specifications attempt to describe underground conditions but that attempt is ultimately revealed to be merely imperfect rather than wrong. Contract specifications being absent or wrong would justify finding of a Type I differing site condition, but neither of these conditions were found in this matter. At the same time, the Board does find the foregoing delineation of a Type II differing site condition aptly to describe the subsurface profusion of unusually hard boulder obstructions encountered by appellant's excavation subcontractor when it attempted to drill caissons at Retaining Wall 8, which is why the Board granted relief in appellant's favor. Those obstructions were not reasonably anticipated and were therefore unknown, even though the possibility of their presence was accurately but

only partially set forth in the contract specifications, due to technical limitations inherent in projecting underground conditions.

Based upon the evidence adduced, the Board is unable to conclude as a matter of fact that the subsurface conditions here encountered differed materially from those indicated in the contract. Indeed, the contract specifically provided as follows: "**Section 201.01.04 Rock.** The Contractor shall note that rock…was encountered in the borings at [Retaining Wall 8]." Another section of the contract included a further and unique warning, namely: "The contractor is advised that boulders and/or cobbles were encountered in test holes for this project and that the presence of these materials may require special equipment." Furthermore, Respondent's Trial Exhibit Nos. 20 and 22 demonstrate that in at least one instance, appellant struck subsurface obstructions in precisely the places were the physical samples of test borings revealed the likelihood of underground boulders. While the Board is persuaded by appellant's argument that the boring chart could and should have specifically included the word, "boulder" in some narrative description, the Board is also persuaded that a site engineer's failure to include that particular word as an interpretative conclusion in that particular and critical record is not as a matter of fact or law sufficiently misleading to qualify as a Type I differing site condition when all of the other characteristics of the sample core borings are accurately set forth in the records which become a part of the contract and where actual chunks of boulders are readily visible by physical inspection of core samples. Moreover, the mere absence of the word, "boulder," on the boring chart is not in this instance sufficient to justify a determination that subsurface conditions at the site differed materially from those in the contract.

Under these circumstances it would constitute an error of factual finding for the Board to conclude that a Type I differing site condition existed at this work site. At the same time, the Board deems appellant to be entitled to relief under the second basis of invoking the differing site conditions clause that is mandatory in state construction contracts. Of importance to this determination is the undisputed evidence that appellant's anticipated excavation charge of $438,750 was higher than any of the four firms that bid on this job, two (2) of which reviewed the same boring logs and contract specifications and determined to estimate less than $300,000 in drilling costs. If every other contractor examined the same pre-excavation diagnostics and also assumed easier drilling conditions, it is hardly fair to penalize appellant for making the same error to a lesser degree. The evidence of a Type II differing site condition is adequate to support that finding and equitable adjustment is justified.

Turning to the question of quantum calculations, appellant raises three (3) points of objection which, as the State contends, may be modified at this juncture due to fraud, surprise, mistake or inadvertence, only the last two bases being pertinent to the present discussion. Specifically, appellant now seeks an additional $429,224 in field office overhead, a sum first reduced to $499,098 from appellant's original claim of $943,713 in field office expenses, an adjustment recommended by the State's audit of appellant's cost claim, and now reduced by another 14%, in accordance with the Board's allocation of entitlement to only 86% of delay costs as attributable to differing site conditions. Appellant does not now seek reconsideration of either of these reductions, requesting only the $429,224 balance of the original $943,713 claim which was denied in its entirety except for $21,283 in bond costs.

Appellant's field office overhead claim is supposed to represent charges attributable to the cost of maintaining necessary supervisory personnel and equipment on the work site during the period that appellant would not have been on the job except for the presence of a differing site condition. The burden of proving entitlement to these claims for compensation is borne solely by appellant. In other words, appellant must demonstrate by a preponderance of the evidence both the reasonable expenditure of those funds and that the proximate causation of such spending was delay resulting from unanticipated subsurface obstructions. Appellant's reduced claim of $499,098 appears in Rubino & McGeehin's February 2006 audit report in Section C of Schedule 3, also known as Respondent's Trial Exhibit No. 66, under the "Time Extension Costs" itemization of the accounting chart entitled "Summary of Damages Assuming Full Entitlement." Appellant seeks 86% of the $499,098 figure adjusted by audit, or $429,224.

Unfortunately, appellant's initially calculated claim of $943,713 in this line item included $170,250 for "employee retention payments" which are actually coded by appellant's own personnel records not as retention payments but as severance payments, and for which there was persuasive testimony proving to the satisfaction of the Board that such payments were actually not retention payments at all, but were indeed severance payments made by a firm that was being liquidated to various employees whether or not they had anything to do with the job here at issue. Another $253,082 of appellant's initial claim of $943,713 in field overhead was reduced following the State's audit due to "incorrectly coded direct charges," which the Board disallows. Quite deliberately and for good cause, the Board does not permit reimbursement for either of these two (2) components of the field office overhead claim. However, in disallowing these

inflated aspects of this portion of appellant's claim, it was not the Board's intention to disregard appellant's potential entitlement to 86% of the balance of legitimately documented and proven costs necessarily expended for extended field office overhead resulting from delay caused by differing site conditions.

For this reason, the Board will allow appellant thirty (30) calendar days from the date of this determination within which to submit further argument to the Board drawing to the Board's attention those specific proofs already admitted into evidence which document appellant's entitlement to an additional $429,224 as claimed in appellant's Motion for Reconsideration. The State will thereafter have fifteen (15) calendar days within which to respond to that submission. The Board will reserve judgment on this aspect of appellant's Motion until the parties have had this opportunity to provide further particular reference to proofs on this limited point, recognizing that the burden of establishing entitlement to additional damages falls entirely upon appellant. The Board is not infallible. If the Board has inadvertently erred and a genuine calculation mistake has been made, it must be corrected.

With respect to appellant's second claim for modification of quantum calculations, appellant seeks an additional $63,329 to which appellant contends it should be entitled but for the Board's calculation error in making a duplicate deduction for certain disallowed components of appellant's claims for Eichleay damages, retention benefits, and incorrectly coded supervisor charges, none of which charges are allowed by the Board. That is because, unrelated to and outside of the scope of the instant appeal, the parties agreed to reduce by 30 days a 295-day time extension due to a shoulder paving change order totaling $1,731,271, for which a deduction of $159,521 was made as a result of the

agreed upon 30-day reduction to 265 days of delay occasioned by that change order. Appellant calculates that the delay costs rejected by the Board constitute 39.7% of the total time-related costs claimed for the full 295 shoulder paving extension and therefore appellant should be entitled to an additional 39.7% of the $159,521 claim reduction for 30 of the 295 day delay, or $63,329. The State, on the other hand, argues correctly that the finding of a double deduction is dependent upon evidence that is not a part of the record of the extensive proceedings before the Board. While appellant's legal argument and arithmetic may be logical and accurate, the Board concurs with the State's assertion that because the record in these proceedings contains no evidentiary basis for the paving delay calculations made outside of the context of this appeal, there is inadequate factual proof to conclude that a double deduction occurred. Appellant's request to reverse the Board's decision and approve an award of an additional $63,329 for paving delay is therefore denied.

Appellant's third proposal for quantum correction seeks an additional $38,353 in direct costs for construction of the redesigned section of Retaining Wall 8, due to the substantial design modification change order that was proposed by appellant and approved by the State as a result of the tortuous excavation difficulties that appellant encountered in its attempt to perform the project as initially conceived and planned. Though appellant's project manager offered evidence in support of this claim, $38,353 of those costs were classified by the State's audit as "estimated/unsupported" and for that reason were disallowed. Notwithstanding appellant's desire for "internal consistency," the Board elects to treat this category of expense separately from other costs actually incurred in building the subject retaining wall as compared to materials

not used. For this reason, appellant's Motion for Reconsideration in this respect is denied.

Finally, Appellant seeks an additional $286,936 in predecisional interest, calculated at the rate of ten percent (10%) per annum from the date of filing of appellant's Proof of Cost Statement until the date of the Board's decision. The statutory basis of the Board's authority and discretion to award predecisional interest is *§15-222* of the *State Finance and Procurement Article* of the *Annotated Code of Maryland*, which provides as follows:

> **§15-222. Interest.**
>
> (a) *Award – Authorized.* – Notwithstanding any provision of a procurement contract, the Appeals Board may award interest on money that the Appeals Board determines to be due to the unit or the contractor under a contract claim.
>
> (b) *Same – Accrual.* – (1) Subject to paragraph (2) of this subsection, interest may accrue from a day that the Appeals Board determines to be fair and reasonable after hearing all the facts until the day of the decision by the Appeals Board.
>
> (2) Interest may not accrue before the procurement officer receives a contract claim from the unit or the contractor.

Cross-referencing *§11-107* of the *Courts Article* of the *Annotated Code*, the rate of interest thereby generously established is ten per cent (10%). But it is plain that very substantial discretion is invested in the Maryland State Board of Contract Appeals to award interest or establish dates for the accrual of interest depending on what the Board deems to be "fair and reasonable after hearing all the facts." This language, and particularly the use of the word, "may" instead of "shall" in the foregoing statute is not susceptible to being morphed into a compulsory element of relief regardless of how many prior cases the Board may have allowed periods of predecisional interest. Predecisional interest is not mandatory or automatic, but allowed when the

Board deems it warranted.

The Board is sympathetic to appellant's desire to recover interest retroactively in order to make itself fully whole for sums it expended years ago in fulfillment of its obligations under a contract with the State for an important public improvement project. Without disclosing internal deliberations within the Board in the instant appeal, the question of whether to award predecisional interest in this matter has been a matter of considerable discussion prior to the Board's determination which gave rise to appellant's Motion for Reconsideration. The seminal judicial direction on the question is afforded in Langenfelder, *Id.*, where the Court of Appeals observed:

> "…there can be no equitable adjustment until the contractor recovers the entire cost of doing the extra work, and…the cost of money to finance that additional work is a legitimate cost of the work itself. That is true whether the cost of money is in the form of interest paid on borrowed funds or the loss of income on the contractor's own capital invested in the additional work." Maryland Port Administration v. C. J. Langenfelder & Son, Inc., 50 Md.App. 525, 543 (1982)

Prior to codification of the current interest rate of ten per cent (10%), the statutory post-decisional interest rate was six per cent (6%), but in light of the high fair market interest rates that existed in the early 1980's, using the rationale set forth above, the Board allowed predecisional interest at a rate of ten percent (10%), stating also:

> "In determining when predecision interest should begin to run, we consistently have attempted to ascertain when the State was in a position to know the details of the claim and the extent of the equitable adjustment being requested. From this point, we add a reasonable period for review and processing of the claim, thus arriving at a date when the claim theoretically became liquidated and the obligation to pay actually arose. Taylor Brothers & Assoc., MDOT 1028, 1 MSBCA ¶86 at pp. 36-37 (1984).

The implication of Board precedent in this regard is that the allowance of predecisional interest should not date back prior to the time at which the State had a reasonable opportunity to review and remit on a claim for a liquidated sum. The proper basis for establishing a date for the commencement of predecisional interest is further elaborated by Board precedent under the reasoning simply that the State should not withhold payment of an invoice for a sum certain which is later determined to have been justly due and payable. Reliable Janitor Service, MSBCA 1247, 2 MSBCA ¶122 (1984); Standard Mechanical Contractors, MSBCA 1145 & 1165, 2 MSBCA ¶127 (1986). Even in the face of complex technical entitlement and quantum issues preventing simple assertion of a liquidated demand, the Board has allowed predecisional interest on unilateral change orders imposed by the State. Fruin-Colnon Corp., MDOT 1025, 2 MSBCA ¶165 (1987); Hardaway Constructors, Inc., MSBCA 1249, 3 MSBCA ¶227 (1989). But the Board has also dramatically limited the award of predecisional interest and tolled its imposition during periods except those during which both the validity and amount of the claim are capable of being fully appreciated. Cam Construction Co., MSBCA 1926, 5 MSBCA ¶394 (1996).

The Board's unusual decision on this point in this instance was certainly not "inadvertent," a ground that would qualify for correction of the extant Order. The Board's determination to deny predecisional interest was based principally upon the reasons earlier set forth. Whether that decision constitutes a "mistake" is also highly doubtful in light of the range of discretion afforded to the Board by statute. Therefore, and for the reasons previously set forth in the Board's initial Order, appellant's Motion for Reconsideration of the denial of predecisional interest shall be denied and that issue shall remain closed as fully and

finally resolved.

Wherefore, it is Ordered this day of May, 2007 that Appellant's Motion for Reconsideration is denied except for potential correction of quantum calculations with respect to field office overhead in the amount of $429.224 as more fully set forth in this decision.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael W. Burns
Chairman

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 on appellant's Motion for Reconsideration in MSBCA 2458 and 2459, appeals of Dick Corporation under SHA Contract No. BA3335172.

Dated:

_____
Michael L. Carnahan
Deputy Clerk