BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	)	
Fiber Plus, Inc.	)	
	)	
	)	
Under	)	**Docket No. MSBCA 2810**
DoIT Master Contract No.	)	
060B9800012 and TORFP Nos.	)	
F50P2400074 and F50P2400119	)	

APPEARANCE FOR APPELLANT: **G. Randall Whittenberger**
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APPEARANCE FOR RESPONDENT: **Sachin Bhatt**
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OPINION BY BOARD MEMBER DEMBROW

This contract dispute is for the purpose of resolving appellant's request for approval of an alleged change order arising from the State's directive to substitute certain heavier grade materials in place of those initially installed pursuant to task orders issued under a Master Contract for excavation and installation of underground fiber optic cable routes. The contract documents contained a patent ambiguity between the specifications set forth in the materials list and those depicted in the attached schematic drawings of product components. Because appellant failed to bring that patent ambiguity to the attention of the State in timely fashion prior to bid submission, the State's reasonable interpretation of the contract specifications may be imposed upon the contractor under the terms of the parties' initial agreement without the necessity of a change order.

Findings of Fact

1. Respondent, the Maryland Department of Information Technology (DoIT) is responsible for construction of a fiber

optic broadband system known as the One Maryland Broadband Network (OMBN), which is supported by federal funding and is intended ultimately to link government facilities and Community Anchor Institutions (CAI's) across the State. Appellant, FiberPlus, Inc. (FiberPlus), is a Master Contractor under the State's Cable and Wiring Services Master Contract issued in 2006 known as No. 060B9800012, as a result of which FiberPlus is eligible to bid on specific task orders under the Master Contract. (McElligot, Tr. II-368.)

2. On or about July 14, 2011, DoIT issued a Task Order Request for Proposals (TORFP) known as No. F50P2400074, also referred to as Task Order '74 or TORFP '74. A similar TORFP was issued by DoIT on or about August 1, 2011 identified as No. F50P2400119, also known as Task Order '119 or TORFP '119. Both TORFPs called for the lateral drilling excavation of underground fiber optic cable routes into which a conduit is placed and fiber optic cable is thereafter pulled through the underground conduit. At various locations along these underground fiber optic pathways, junction boxes known as "handholes" are installed to provide access points to the cable and allow cable splicing. (McElligott Tr. II-371-372.) Both of the TORFPs here at issue concern the installation of off-road fiber optic cable routes in Charles County, Maryland, generally adjacent to macadam road surfaces and shoulders, sometimes on the opposite side of guard rails from the traveled portion of the road surface. (App. Ex. 11; Caswell, Tr. I-57-58; Burt, Tr. II-335-336.) TORFP '74 resulted in a fixed price contract calling for the expenditure of $840,263 for installation of fiber optic cable in Charles County Segments 4 and 5; TORFP '119 resulted in a fixed price contract calling for the expenditure of $1,618,418 for installation

of fiber optic cable in Charles County Segments 1, 2, 3, and 6. (App. Ex. 7; Caswell, Tr. I-27.)

3. On or about July 26, 2011, prior to contract award, during the question and answer phase of pre-bid activity, a prospective contractor inquired of the State, "What rating do the vaults need to be and will they need to be higher in the shoulder and the shoulders of the road?" DoIT responded, "Vault specifications were provided in the construction drawings and materials specifications." (App. Ex. 5; State's Ex. 27, pg. 3; Bland, Tr. I-218.) No question was raised concerning the discrepancy arising from different strength ratings being specified for handhole components as set forth in the materials list contained in the TORFPs as compared to the schematic drawings of the handhole components attached thereto. (McElligot, Tr. II-381.)

4. Although a fierce controversy is asserted by the respective parties as to the precise meaning of the word, "handholes", in the context of the pertinent contract specifications, essentially a handhole is simply a hole in the ground into which a pre-fabricated concrete polymer box is placed and then covered with a lid that is flush with ground level. (Caswell, Tr. I-66.) Underground fiber optic cable is fed into such junction boxes that are buried just below ground level. These small, protected, underground vaults afford access by hand below the ground surface to the cable and spliced cable connections at the locations of the handholes. Various witnesses for appellant contend that the box and the lid are two separate components and that "handhole" means only the box portion of the structure which is buried in the ground. (Caswell, Tr. I-91-92; Bland, Tr. I-209 *cf.* Bland, Tr. I-218; Burt, Tr. II-327.) The State asserts that "handhole" means the entire structure, including the box as

well as the matching lid which is affixed to the top of the underground box. (McElligot, Tr. II-372.)

5. Ordinarily a contractor purchasing hand hole boxes and lids will place an order from a single manufacturer for boxes at a particular price per box and the same number of lids, which are separately priced and ordered. (Caswell, Tr. I-74-75, 90-93; Bland, Tr. I-209-210, 213-214.) The reason to order both boxes and lids from the same manufacturer is to assure that the lids match the boxes. (Bland, Tr. I-219.) Due to product availability or other reasons, sometimes a box bearing one strength rating will be matched with a lid bearing a different rating, either higher or lower. When this occurs, the overall strength rating of the combined hand hole structure is the lower of the two ratings of the two component parts, e.g., a Tier 22 box with a Tier 15 lid has an overall rating of Tier 15. (Caswell, Tr. I-84.)

6. The Scope of Work section of TORFP '74 required the contractor to supply and install "Approximately (7) 30 x 48 x 36 *hand holes*" and "Approximately (74) 24 x 36 x 36 *hand holes*." (State's Ex. 7, pg. 7, TORFP Sec. 2.2.) (Emphasis supplied.) Such references to three dimensions pertain respectively to the width, length, and depth of the box. The dimensions of the matching lids are fully specified by the first two dimensions for length and width because no depth specification is needed for a lid. No separate specification was set forth in either TORFP for box vs. lid, nor was further specification needed. The required number and dimensions for both box and matching lid are fully defined by the specification as written above in Section 2.2. The same TORFP further prescribed in the subsequent section, "The TO [task order] Contractor will install a total of (7) 30 x 48 x 36 *hand holes* and (74) 24 x 36 x 36 *hand holes*." (State's Ex. 7, pg. 8, TORFP Sec. 2.2.1.)

(Emphasis supplied.) (McElligot, Tr. II-374.) Again, no separate specification was set forth or needed for box vs. lid. The required number and dimensions for both box and matching lid are fully defined by the specification as written. It is undisputed that the State sought to have a lid placed on every installed handhole box, and that appellant fully appreciated that intent. No *bona fide* argument is made by appellant that the use of the words, "hand holes" in the foregoing contexts was not intended nor understood to include both boxes and lids.

7. The itemized form Price Proposal known as Attachment 1 to the TORFP required pricing details as follows: "2. Fixed Price to furnish & install (74) 24 x 36 x 36 *hand holes*" and "Fixed Price to furnish & install (7) 30 x 48 x 36 *hand holes*." (State's Ex. 7, Pg. 17.) (Emphasis supplied.) No separate itemization was requested for bidders to list the cost of lids apart from the cost of the boxes. The cost for both box and lid was intended by the State to be included in the word, "hand holes", and appellant completed its Price Proposal stating a single price for both box and lid in the charge it identified as its price for "hand holes," including box and lid. (McElligot, Tr. II-375.) Thus, at least in the context of these additional references to "hand holes," all parties understood and intended for those words to include both a box and a lid.

8. Turning from Task Order '74 to Task Order '119, with respect to use of the words, "hand holes", TORFP '119 contained identical language in both the Scope of Work and the Price Proposals, except that TORFP '119 differed from TORFP '74 only as to the number of the required hand hole boxes and lids in the two separate sizes specified. Therefore, again, in the context of all six of the foregoing references to "hand holes" in the second issued TORFP, all parties

understood and intended those words to include both a box and a lid for each hand hole installed.

9. Except for the hand hole schematics erroneously attached to the TORFPs, and appellant's interpretation of the meaning of the language contained in the contract materials list as more specifically set forth immediately below, neither party has claimed that any of the voluminous written materials incorporated into the contract here at issue included the word "lid," "box cover," or comparable term, as a separate product or construction obligation apart from what was uniformly and universally described in the contract documents as installation of "hand holes," including both a box and a lid.

10. The materials list contained in both TORFPs as Attachment 11 set forth the following specifications:

> 2. HANDHOLES:
>
> HANDHOLE TIER 22 RATED. (22.5 KLBS. DESIGN LOAD, 33.75 KLBS. TEST LOAD), COMPOSITE CONSTRUCTION, ANSI 77 2010, (W x L x D), RUS LISTED, STRAIGHT-WALLED, OPEN BOTTOM:
>
> 2.1 TYPE 2 – 24″ X 36″ X 36″
>
> 2.2 TYPE 3 – 30″ X 48″ X 36″."

(App. Ex. 2, 3; State's Ex. 7, pg. 37.) FiberPlus contends that in the context of the foregoing materials list, because the description refers expressly to "straight-walled, open bottom" handholes, unlike the meaning implied by the other uses of the term, the above use of the word, "handholes", refers only to the box and not to the lid. (Bland, Tr. I-216; McGowan, Tr. II-295; Burt, Tr. II-326-327.) Of course, just as no depth dimension need be specified for a lid, the foregoing reference to "straight-walled, open bottom" refers not to the lid, and does indeed refer only to the box upon which the lid is affixed as a cover. This, however, is not

to imply that the materials list mandated only the installation of boxes but not lids. Both were required. Appellant concedes as much, but insists that the foregoing materials list requirement of installing Tier 22 rated handholes is satisfied by the installation of Tier 22 rated boxes with Tier 15 rated lids.

11. In its offer to DoIT in response to TORFP ‘74, appellant stated, “FiberPlus, Inc. will furnish and install the following:. . .(7) 30” x 48” x 36” *Hand holes*” and “(74) 24” x 36” x 36” *Hand holes*.” (State’s Ex. 8 & 9.) (Emphasis supplied.) Similarly, in response to TORFP ‘119, appellant’s assurance to the State promised as follows: “FiberPlus, Inc. will furnish and install the following:... (4) 30” x 48” x 36” *Hand holes*” and “(145) 24” x 36” x 36” *Hand holes*.” (State’s Ex. 12.)(Emphasis supplied.) By these statements, Fiberplus intended to offer and did offer to the State installation of the specified hand hole boxes along with matching lids even though appellant used only the words, “hand holes”, to incorporate both components.

12. Handhole boxes and lids come in various sizes and are rated for strength as Tier 5, 8, 15 or 22. The two tier ratings here at issue pertain to Tiers 15 and 22. Tier 15 has a vertical design load of 15,000 pounds; Tier 22 has a vertical design load of 22,500 pounds. The American National Standards Institute (ANSI) through the Society of Cable Telecommunications Engineers (SCTE) promulgates standards for hand hole boxes and lids which include the foregoing as load strength assurance ratings. They are set forth in a document of standards generally accepted in the industry known as ANSI/SCTE 22 2010, which is specifically referenced in the materials list of the subject TORFPs specifying only, “HANDHOLE TIER 22 RATED.” (Caswell, Tr. I-56; McGowan, Tr. II-285.) According to ANSI/SCTE 22 2010,

Tier 15 and Tier 22 have identical applications, namely, "Driveway, parking lot, and off-roadway applications subject to occasional non-deliberate heavy vehicular traffic." (App. Ex. 14, pg. 9; Caswell, Tr. I-57; McGowan, Tr. II-286.) Both Tier 15 and Tier 22 hand holes are perfectly suitable to the off-road installation applications of the fiber optic network resulting from implementation of the Charles County task orders here at issue, but the State Highway Administration (SHA) demanded Tier 22 rated hand holes in SHA rights of way and instructed DoIT not to permit hand holes with only a Tier 15 rating. (State's Ex. 17, pg. 8; Bland, Tr. I-240-241; McElligott, Tr. II-384, 388.) DoIT followed those SHA directives for excavation and product installation in the SHA rights of way here impacted, though Tier 15 lids may have been used in other projects in other SHA rights of way. (App. Ex. 12; Bland, Tr. I-247.)

13. Nowhere in the TORFPs does there appear any express statement that Tier 15 rated hand holes were acceptable under the terms of the contract; however, attached to the TORFPs promulgated by DoIT were schematic blueprints which depicted hand hole boxes identified as "SYNERTECH BOX No. SYN1730T-12" and lids identified as "SYNERTECH LID No. SYN1730-T." (App. Ex. 4; State's Ex. 26.) Synertech is the name of a particular manufacturer of hand hole boxes and lids. Contractors were not bound to use Synertech products but were free to substitute equivalent or superior parts as those specified in the TORFP. (Caswell, Tr. I-59, 75, 90, 93.) FiberPlus used products manufactured by Quazite and distributed by Graybar. (State's Ex. 29, 49.) Although the drawings did not expressly identify the depicted products as Tier 15, both of the Synertech box and lid products precisely shown in the drawings attached to the TORFPs are rated Tier 15. (Bland, Tr. I-219; McGowan, Tr. II-291, 303;

McElligot, Tr. II-377.) The dimensions of the Tier 15 rated boxes and lids contained in the schematics attached to the TORFPs did not match the dimensions of hand hole materials elsewhere stated in the TORFPs. The schematics showed handholes with exterior box dimensions of 19-3/4″ in width and 32-3/4″ in length while the handholes otherwise specified in the TORFPs were either 24″ x 36″ or 30″ x 48″. (App. Ex. 7, 26; State's Ex. 2, 3, 4.) There is no indication that anyone was confused over the actual correct dimensions of the boxes and lids required to be installed under the terms of the contract here at issue as specified in the materials list; only the Tier rating required, as FiberPlus contends that its installation of handholes matching the dimensions set forth in the materials list met the terms of the contract specifications when FiberPlus affixed Tier 15 lids to the top of Tier 22 boxes.

14. The schematic attachments to the TORFPs depicting the smaller Synertech boxes and lids also contained brief written descriptions of some features of the box and lids, including, "20K LOAD RATING." That statement did not indicate whether the promised load capacity represented a vertical or lateral rating, nor whether the rating was design load or test load strength. Test load is greater than design load according to the pertinent ANSI standards. Specifically, although a Tier 15 rated box or lid is sufficient to achieve a design load limit of only 15,000 pounds, it possesses a test load capacity of 22,500 pounds. By comparison, a tier 22 rated box or lid has a design load of 22,500 pounds and a test load of 33,750 pounds. The Tier 15 rated Synertech hand holes shown in the subject schematic satisfy a 20,000 pound test load rating, but not a 20,000 design load rating. Therefore the reference to "20K LOAD RATING" in the schematic may be presumed to refer not to

design load, but test load. So the schematic attached to the TORFPs unquestionably depicts and describes a Tier 15 box and a Tier 15 lid for a Tier 15 rated hand hole of a different dimension than any of the hand holes otherwise specified in the two TORFPs. (McGowan, Tr. II-300, *et seq*.)

15. The schematics described above and attached to the TORFPs were erroneous. Not only were the stated handhole dimensions inconsistent with the correct materials list requirement of the contract, DoIT wanted Tier 22 rated handholes, including box and lid, and not Tier 15 rated handholes as shown in the drawings. The error likely arose because, for the drawings attached to the TORFPs, DoIT relied upon outside engineers for drafting support and they provided the wrong schematic of hand holes, differing in size and strength from those intended to be installed under the subject task orders. (McElligot, Tr. II-379-382.) Those errors in the schematic drawings were not recognized by the State until on or about November 11, 2011, immediately after DoIT discovered from field inspections that appellant had installed Tier 15 rated handhole lids. (McElligott, Tr. II-382.)
16. As a result of the foregoing discrepancy between the written specifications set forth in the TORFPs and the product detail shown in the schematics attached thereto, contractors had been directed by the materials list contained in the written contract documents to install Tier 22 rated hand holes, while the drawings attached to the TORFPs showed Tier 15 rated hand holes of a different dimension than those required to be installed.
17. Initially, the hand holes installed by appellant consisted of Tier 22 boxes with Tier 15 lids.
18. FiberPlus employees claim in testimony that one or more authorized representatives of the State generally approved

the use of its materials, including Tier 15 hand hole box lids, in the course of routine inspections made for DoIT by its agent, Skyline Engineering, LLC, but not a shred of documentary evidence was introduced to establish such approval, nor was any testimonial evidence adduced other than by employees of appellant, who failed to provide any details regarding the date, basis, or context of the alleged approval; and scant legal argument in support of that claim was submitted to the Board except in appellant's June 21, 2013 rebuttal brief. (Caswell, Tr. I-69; Burt, Tr. II-331.)

19. When DoIT became aware of the installation of the Tier 15 rated lids, it expressed objection to Fiberplus and a series of communications continued between appellant and DoIT regarding the dilemma and the possibility of allowing the deficiency to be cured by permitting installation of the Tier 15 hand hole lid products that had been purchased by FiberPlus and already affixed to the tops of Tier 22 rated hand hole boxes. Beginning with e-mails on or about November 15, 2011, discussions occurred by and between FiberPlus and DoIT regarding the adequacy of using Tier 15 lids on top of Tier 22 hand hole boxes for contract compliance. (State's Ex. 50.) Those e-mail communications intensified through December 14, 2011, as FiberPlus continued to seek permission for the installation of Tier 15 lids and DoIT continued to insist on the installation of Tier 22 lids. (State's Ex. 17.)

20. On or about December 21, 2011, appellant made formal request for approval of a change order for the work that was required to swap the Tier 15 hand hole lids for lids rated Tier 22. On or about March 13, 2012, DoIT directed FiberPlus to replace the Tier 15 lids with Tier 22 lids, which was done as the State directed. (App. Ex. 9, 10; Caswell, Tr. I-93, 95; Burt, Tr. II-338; McGowan, Tr. II-

389.) On March 20, 2012 DoIT rejected appellant's request for approval of a change order. (State's Ex. 18; Attachment to Notice of Appeal.)

21. The instant appeal arises out of the State's denial of appellant's request for approval of a change order by which FiberPlus seeks payment by the State of an additional $90,568.23 representing the cost alleged for swapping out the Tier 15 lids for Tier 22 lids. (App. Ex. 8; Caswell, Tr. I-104.) Based upon the assumption of appellant's full entitlement, the State's expert accountant for claim analysis found documented justification for recovery of $89,697 out of the total claim of $90,568, inclusive of the question of ownership and value of the 230 Tier 15 lids purchased by FiberPlus for these jobs at a cost of $55,204 and thereafter placed in storage. (State's Ex. 43; Goode, Tr. II-478-480; Malengo, Tr. II-435, 441-447.)

22. According to the terms of the TORFPs and resulting contract between the parties, "The State will not pay for unused materials and will not accept unused materials for delivery." (States Ex. 3, pg. 19, TORFP Sec. 2.2.5.)

23. The actual cost differential between the purchase price of the requisite number of Tier 22 lids in place of Tier 15 lids to complete both task orders would have been only $10,469. FiberPlus is currently in possession of the rejected Tier 15 lids for which it paid $55,204 but claims a current fair market value of only $3,000 for those lids now in used and weathered condition. Appellant claims that return of the subject lids to the manufacturer for refund is commercially impractical without incurring risk of return rejection and certainty of substantial losses in costs of shipping and re-stocking, though the State claims that FiberPlus failed to take advantage of guaranteed approval of full refund had the lids been returned at an earlier date.

(State's Ex. 48; Caswell, Tr. I-107-109; Burt, Tr. II-343-344; Malengo, Tr. II-441.)

Decision

In its written closing argument filed with the Maryland State Board of Contract Appeals (Board) on June 4, 2013, FiberPlus raises six arguments in support of its prayer for approval of the change order that appellant claims to have occurred when DoIT demanded the installation of handholes with Tier 22 rated lids, forcing FiberPlus to remove the Tier 15 lids initially installed and replace them with stronger materials. Appellant identifies those six arguments by headings 'A' through 'F' which are quoted *ver batim* below:

A. There is Nothing Ambiguous About the Drawings, Which Required Tier 15 Lids.

B. Tier 15 Lids Were Perfectly Suited For the Off-Road Locations.

C. When Reading the Contract as a Whole, FiberPlus Fully Complied with the Specifications for Hand Hole Boxes as Well as Lids.

D. The Drawings Were Consistent, and Not In Conflict, With Other Parts of the Contract.

E. No Contractual Provision Required FiberPlus to Seek a Pre-Bid Explanation.

F. If Ambiguity, Contracts are Construed Most Strongly Against the Drafter.

The Board commences its analysis of the instant appeal by addressing each of the foregoing points *seriatim*.

With respect to Point 'A' of appellant's argument, FiberPlus is absolutely correct in asserting that "there is nothing ambiguous about the drawings, which required Tier 15 lids." But that point is immaterial. The ambiguity in the contract documents arises not by viewing the schematic drawings in isolation from the other specifications set forth in the subject

TORFPs, but instead, by comparing the drawings to the materials lists which were also a part of the TORFPs. The materials lists plainly specified Tier 22 handholes. Testimony at the hearing established that that requirement cannot be fulfilled by placing Tier 15 lids on top of Tier 22 rated boxes.

The Board finds somewhat disingenuous appellant's assertion that the term, "handhole," refers only to the box that is buried in the ground and not to the lid that is almost always affixed to the top of such boxes. In a dozen instances in the subject TORFPs, the word, "handhole," is used in the State's contract documents to refer to the lid as well as the box. It is undisputed that FiberPlus understood the word, "handhole", in those separate multiple uses of the word in the contract documents to require boxes with lids for each of those repeated references. FiberPlus itself expressly used the same word, "handholes", when it promised to provide the State boxes with lids. It also priced its promised installation of "handholes" to include boxes and lids.

Only with respect to the single reference to "handholes" as set forth in the materials list does FiberPlus claim that in this instance, the word no longer implies a box with a lid, but only a buried box. Appellant contends that the basis of this odd and inconsistent interpretation of the meaning of the word, "handholes", is caused because DoIT's materials list stated a depth dimension for the box but not for the lid, and also because the handhole boxes described in the materials list were expressly described as "straight-walled, open bottom."

It is clear to the Board that the absence of a specified depth dimension for lids is merely because lids are sized using only two dimensions, namely, length and width. Only boxes need to have a depth specified to identify the proper size. The specification of depth for a handhole does not fortuitously convert the meaning of that word into a box without a lid, as

FiberPlus argues. If it did, appellant would have been free to offer and price to the State handhole boxes without lids, but the evidence adduced universally supports the finding that throughout the process of bidding on the job and performing the required work, FiberPlus knew full well that it was obliged to install not only handhole boxes but also matching lids.

With respect to appellant's second point, FiberPlus appears to be correct in asserting that "tier 15 lids were perfectly suited for the off-road locations." But that factual averment is equally immaterial to the question of what tier rating for handhole lids was required to be installed by the express terms of the contract entered into by the parties to this appeal. It is entirely unknown to the Board why SHA demanded the use of Tier 22 handhole materials when cheaper Tier 15 rated lids and boxes may well have been sufficient in the particular locations where handholes were installed by FiberPlus in Charles County pursuant to the two TORFPs here at issue. Industry standards provide that a Tier 15 strength rating is adequate for off-road use such as the placement locations set forth in the subject TORFPs. But it is not for the Board to determine for SHA what handhole rating strength SHA requires to be installed in SHA rights of way. That is for SHA to decide. It is certainly not for the contractor to dictate to the State whether Tier 22 or Tier 15 materials should be required for the particular sites of handhole installation here in dispute, at least in the absence of express State authorization for that decisional right. If FiberPlus sought to be able to use Tier 15 rated materials for its handholes, it had the chance to make that request prior to its bid submission, and if at that early juncture the State recognized that it might be able to save some costs by using slightly weaker lids in place of Tier 22 materials as specified, DoIT may well have amended its TORFPs to allow Tier 15 lids to be placed on top of Tier 22

handhole boxes. But FiberPlus made no such request prior to bid submission.

Short of TORFP modification ahead of award, appellant might also have simply sought post-award approval from DoIT of its intention to use Tier 15 lids before installing the same. But it did not. Instead, FiberPlus unilaterally elected to affix Tier 15 lids onto the top of its handhole boxes, despite the presence of a plain specification in the TORFP materials lists requiring "HANDHOLE TIER 22 RATED." The assertion by appellant that in its view, Tier 15 lids were suitable to the task at hand is irrelevant to what the State determined as the requisite strength rating of the products it sought, which is the only dispositive issue governing what handhole tier rating was required to be installed.

Point 'C' of appellant's argument, that FiberPlus complied with the contract as a whole, is also undermined by the express conditions of the TORFPS, inconsistent though they were. On the one hand, FiberPlus correctly asserts that the handhole lids diagramed in the contract schematics were in fact Synertech Lid No. SYN1730T, and further research reveals that those particular lids are rated only Tier 15, not Tier 22, as required by the contract materials list. Therefore, appellant avers, installation of the equivalent Quazite Tier 15 lids was in full compliance with the illustrated description of work materials.

But appellant fails to mention that the Synertech lids shown in the incorrect TORFP schematics were of an entirely different dimension than the sizes of the handholes that FiberPlus understood were required to be installed from its inspection of the materials list. The Synertech lids depicted in the schematic drawings attached in error to the TORFPs bore exterior handhole box dimensions of 19-3/4" in width and 32-3/4" in length. But no one is claiming that the contract called for the installation of boxes of that size. Appellant fully recognized, understood,

priced, and agreed to install handholes of two entirely different dimensions, namely, 24″ x 36″ and 30″ x 48″. It did so because these were the dimensions set forth in the TORFP materials list, not the smaller sizes shown in the schematics, namely, 19-3/4″ x 32-3/4″.

To sum, FiberPlus claims that it is entitled to rely upon the unwritten tier rating of the SYN1730T lid product depicted in the schematic, even though it concedes that it has never believed that the handhole dimensions set forth in the schematics were correct and those set forth in the materials lists were incorrect. A reasonable purchasing agent, and the testimony of appellant's employees reveal them to be so, should have recognized the discrepancy in handhole sizes and tier ratings between the materials list and the schematics. Surely appellant's estimator noted the incorrect handhole sizes shown in the schematics when he reviewed those drawings so thoroughly as to decipher by reference to an independent source the inconsistent tier rating of the components depicted. That should have raised some concern and uncertainty regarding which portions of which product descriptions were correct. Yet no inquiry appears to have occurred to resolve that uncertainty. Appellant simply elected on its own to use the dimensional specification from the materials list and the tier rating from the schematic.

FiberPlus departed from the materials list in determining what tier rating was required of the handhole lids, offering no explanation as to why it knew the dimensions of the handhole components from that materials list but simultaneously determined to reject the Tier 22 specification set forth therein and instead use the unwritten Tier 15 rating of the handhole components shown in the schematic while ignoring the size dimensions of the same materials depicted therein. Moreover, the Board is not convinced that the contractor is or should be permitted to select only a single descriptive feature from the inaccurate schematics, while

ignoring the other aspects of the drawings, and then claim that its materials were in compliance with the contract as a whole. The original handhole installation did not conform to all of the specs contained in either the schematics or the materials lists.

The foregoing discussion also bears upon appellant's fourth argument, the contention that "the drawings were consistent, and not in conflict, with other parts of the contract." In this regard, Fiberplus asserts that the schematic drawings were more specific than the materials list and therefore take precedence over the less specific contract terms. It is unclear to the Board why appellant deems a portion of the schematics to be more specific than the contract materials lists. As set forth above, lid dimensions are ordinarily identified by width and length alone, not by depth, which applies only to handhole boxes. Lids simply match the uppermost width and length dimensions of the boxes. The board does not discern how appellant can legitimately claim that the schematics are more specific as to tier rating, while the materials lists are more specific as to dimensions. The strength and sizes of the handholes correctly set forth in the materials lists are not less specific than those established by the schematics. Indeed, the drawings do not even specify a lid or box tier rating at all except by the bulleted phrase, "20K load rating," without precise reference to the normally specified product characteristic of tier rating, either 15 or 22. Uncontested testimony reveals that appellant's estimator discerned the Tier 15 rating of the depicted Synertech 1730T lid only by reference to an outside source not included in the TORFP specifications or the four corners of the documents included in the parties' written contractual agreement. As a result, it cannot be fairly said that the drawings were consistent with the other parts of the contract, as appellant asserts.

Like Points 'A' and 'B', Point 'E' of appellant's argument is another contention that is true, but not probative of any

material fact that is pertinent to the outcome of this appeal. It is certainly correct that no contractor has a duty to seek pre-bid clarification or correction of ambiguities nor any other explanation of any element of a solicitation. The State has not argued to the contrary. But at the same time, a prospective contractor who fails to raise any inquiry acts at his or her own peril by proceeding to bid on and thereafter to perform a contract containing a patent ambiguity. When FiberPlus observed in the materials list the requirement of installing handholes that were Tier 22 rated, it should have priced and installed handholes, including boxes and lids, that were Tier 22 rated. When appellant departed from the plain specification set forth in the materials list and decided to use lids rated Tier 15 because the Synertech components shown in the schematics were rated Tier 15, it assumed the risk that its interpretation of ambiguous contract requirements might later prove to be unacceptable to the State. The ambiguity was evident on the face of the inconsistent specifications set forth in the procurement documents, and though appellant had no affirmative duty to seek clarification, it certainly would have been a wise business practice to avoid a later dispute if appellant had elected to inquire of the State further for advance explanation from DoIT regarding the acceptability of using handhole lids rated Tier 15 affixed to the top of Tier 22 boxes.

Of course, the previous observation is made with the advantage of 20/20 hindsight. With that same benefit, the Board also faults DoIT; first and most importantly, for including unnecessary incorrect schematics in its procurement documents; second, for failing to correct those inaccurate drawings in timely fashion; and third, for refusing to answer a question that was posed by one of the prospective vendors during the question and answer phase of the procurement process by offering a response which might have avoided the entire regrettable waste

and confusion that resulted from the ambiguous provisions included in the subject TORFPs.

The question and answer phase of procurement activity should not be a pointless exercise. Q&A should have genuine purpose, meaning, and benefit. Here, when query was made, "What rating do the vaults need to be...?" DoIT responded, "Vault specifications were provided in the construction drawings and material specifications." That answer merely compounded the ambiguity contained in the inconsistent procurement documents. The construction drawings said one thing and the material specifications another. Clearly, no one at DoIT carefully compared the two before providing a reply that was evasive and worthless. When a prospective vendor asks a simple, straightforward question during pre-bid Q&A, the State should provide a direct, straightforward, and meaningful reply. Especially in this case in which the vendor eventually became all too aware of the evident importance of Tier 22 rated materials imposed by SHA, the State should have simply responded, "Tier 22." Such a substantive reply would almost certainly have avoided the necessity of this entire appeal, and would have saved a state contractor significant effort and resources expended in corrective action required by the State to be wasted to cure a simple mistake for which the State bears significant responsibility. But the foregoing *dicta* is not to imply that FiberPlus was not duty bound to use Tier 22 materials. It was. That obligation simply should have been made more obvious during the entire procurement process.

Before departing from fair and hopefully constructive criticism of the State's actions in this procurement, the Board also observes by way of *dicta* that no evidence was offered in the course of the instant appeal regarding the reason that SHA demanded Tier 22 rated handholes when industry standards also allow the use of Tier 15 handholes for the off-road applications

here presented. As stated above, the Board will not second-guess that determination, nor enter into speculation on the subject; and most certainly will not permit a contractor to dictate to the State what excavation retention product strength ratings are appropriate and required to be used in State rights of way.

The Board notes that the product price differential between Tier 15 and Tier 22 lids was in the comparatively miniscule amount of $10,469, less than one-half of one per cent of the total contract cost of $2,458,681. But notwithstanding the relatively small additional cost that should have been incurred by the contractor and was paid by the State for Tier 22 instead of Tier 15 lids, the Board hopes that some rational and reasonable thought and consideration was invested by SHA in its unexplained decision to require Tier 22 handhole lids, a demand which SHA is said to have refused to modify even at the consequence of forcing a contractor to expend nearly $100,000 to remove perfectly good handhole lids in order to replace them with the slightly stronger superior product specified in the materials lists of the TORFPs.

Also as an aside, and because much was made at the hearing about the proper disposition of the 230 Tier 15 handhole lids wrongly purchased by FiberPlus for this job at a cost of some $55,204, the bulk of appellant's claim for approval of a change order in the amount of $90,568, the Board notes that if FiberPlus had prevailed in the instant appeal, those Tier 15 lids would conceivably become the State's property, which appellant has to date wisely preserved in storage pending the outcome of the instant appeal. But because this appeal is dismissed with a ruling unfavorable to appellant, the subject Tier 15 lids remain the property of FiberPlus to enjoy in whatever fashion appellant may deem most economically favorable to it. It is the hope of the Board that those lids are still in nearly new condition and may be readily used in appellant's future cable excavation work,

offsetting and mitigating at least a portion of its unfortunate losses on this job, but that is not the business or concern of DoIT or the Board. Suffice it to say that the handhole components wrongly ordered by appellant and therefore unusable for the Charles County cable network are owned by FiberPlus for FiberPlus to re-use, store, return, sell, discard, or otherwise dispose of at appellant's sole election.

Turning to another ancillary position emphasized by FiberPlus late in these proceeding, conceivably the Board might sustain the instant appeal if appellant had established that authorized agents of the State, namely, employees of Skyline Engineering, LLC, specifically approved of the use of Tier 15 lids, as appellant alleges. Had Skyline and thus DoIT expressly allowed Tier 15 lids, and DoIT thereafter changed its position and demanded the substitution of Tier 22 lids, that would constitute a change order and FiberPlus would prevail in the instant appeal. But on this point appellant did not establish by a preponderance of the evidence that such approval actually occurred. No documentary evidence was adduced to support this contention. No one provided to the Board particularized testimony of what Skyline may have inspected on site, nor the purpose or detail of its inspections, nor any indication that Skyline employees in particularity actually examined the handhole lids for tier rating. The Board is left to conclude that at some point someone from Skyline performed a site visit and no issue was raised at that time concerning the installation of Tier 15 lids, as a result of which FiberPlus now contends that it was able to infer the State's approval of Tier 15 lids. But that is a far cry from express and specific authorization, which was not proven by the limited self-serving testimony presented at hearing. Counsel for appellant now argues that the State should have called a witness from Skyline to rebut the allegation, proving that no such approval occurred, but the burden of proof

falls upon appellant to establish that specific approval of the use of Tier 15 lids did occur. If this had taken place, appellant had every opportunity to subpoena for testimony at trial the individual working for Skyline who wrote or uttered approval of Tier 15 lids. No such witness was called. The State denies that it ever approved of the use of Tier 15 lids and no sufficient and specific proof or allegation was entered into evidence by appellant to overcome the State's assertion, only general reference to what FiberPlus now claims it understood in retrospection of Skyline's site visits for which detail is lacking.

Finally, regarding the last basis of appellant's six arguments itemized above, the Board rejects the contention advanced by FiberPlus that the long established doctrine concerning the import of patent vs. latent ambiguities is contrary to Maryland procurement law. Had the underlying contract been entered into between private parties, appellant is correct that under the principle of *contra proferentem*, an ambiguous provision in a contract may be construed against the drafter thereof. As a result, FiberPlus might well have been able to prevail in its claim that a reasonably asserted ambiguity arising from documents imperfectly authored by the opposing party should be interpreted in favor of the non-drafting party. But the patent ambiguity rule in public procurement abrogates that rule.

A well established principle of government contract law, including public procurements in Maryland, holds that patent ambiguities must be resolved prior to bid submission. Because appellant in this matter challenges the validity of that legal precept, it may be useful for the Board to review some of the precedential authority supporting that premise.

Early iterations of the doctrine in Maryland relied upon federal procurement authority, citing a dispositive opinion by

the United States Court of Claims, namely, George E. Newsom V. United States, 230 Ct.Cl. 302, 676 F.2d 647 (1982). Relying on Newsom, Id., the opinion in Cherry Hill Construction, Inc., MSBCA 1313, 2 MSBCA ¶172 (1988), explained as follows:

> The Board has stated on several occasions that a bidder has an affirmative obligation to seek prebid clarification of such patent ambiguities. See Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 at pp. 10-11, 22-24 (1984); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 (1984); American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985); Hanks Contracting, Inc., MSBCA 1212, 1 MSBCA ¶110 at pp. 4-5 (1985). The rule is one of common sense.
>
> > "The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem* which requires that a contract be construed against the party who wrote it. If a patent ambiguity is found in the contract, the contractor has a duty to inquire of the contracting [procurement] officer the true meaning of the contract before submitting a bid. This prevents contractors from taking advantage of the Government; it protects other bidders by insuring that all bidders bid on the same specifications; and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact."
>
> George E. Newsom v. United States, 230 Ct.Cl. 302, 303, 676 F.2d 647 (1982).
>
> The practical application of the doctrine of patent ambiguity may be summarized as follows:
>
> > ... First, the court [Board] must ask whether the ambiguity was patent. This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum: Is it so glaring as to raise a duty to inquire? [citation omitted]. Only if the court [Board] decides that the ambiguity was not patent does it reach the question whether a plaintiff's interpretation was reasonable. [citation omitted]. The

> existence of a patent ambiguity in itself raises the duty of inquiry, regardless of the reasonableness *vel non* of the contractor's interpretation. [citations omitted]. ... The court [Board] may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist.
>
> George E. Newsom v. United States, supra at 230 Ct.Cl. 304 citing Mountain Home Contractors v. United States, 192 Ct.Cl. 16, 425 F.2d 1260 (1970). See Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 at pp. 13, 22-23 (1984).

The same federal authority set forth in Newsom, op cit., has also been quoted extensively and relied upon in other cases before the Board, such as Dr. Adolph Baer, et al., MSBCA 1285, 2 MSBCA ¶146 (1987) and American Bldg Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985).

David A. Bramble, Inc., MSBCA 1853, 5 MSBCA ¶389 (1996) is perhaps the most exhaustive review of Maryland law concerning the subject of contractor duties in the face of a patent ambiguity included in contract documents. In Bramble, Id., a dispute arose over the proper unit price classification of several thousand tons of bituminous concrete; specifically, whether the contractor's entitlement to payment should fall under the charge category established for regular paving for permanent roads, or by contrast, under a separate category for maintenance of traffic, for which the contract called for concrete quantities to be billed at about triple the cost. The State claimed that the estimated quantities for the two charge categories set forth in the contract made it clear to any reasonable paving contractor that the huge amounts of concrete pourings in question were to be priced as regular paving material. Giving the contractor the benefit of the doubt as to whether an ambiguity actually existed

in the contract specifications, the Board in that case held as follows:

> Appellant should have raised the issue with the State prior to establishing its bidding price.
>
> Assuming *arguendo* that Appellant's interpretation, while incorrect, was reasonable, we note that if two reasonable meanings appear from a reading of the bid documents a patent ambiguity may be said to exist requiring attempt at pre-bid clarification for a bidder to prevail regarding its interpretation. Intercounty Construction Corp., MSBCA 1036, 2 MSBCA ¶164 at p. 9 (1987).
>
> A patent ambiguity is an obvious contradiction. In Concrete General, Inc. v. SHA, MSBCA 1062, 1 MICPEL [¶87] (1984) this Board found that a contractor presented with an obvious discrepancy is required to inquire about the discrepancy prior to bid or risk being awarded the contract and held to the State's interpretation. As the Board stated in Concrete General, supra, what constitutes an obvious or glaring discrepancy cannot be defined generally but is made as a case-by-case determination based upon an objective standard of what a reasonable contractor would determine to be patent and glaring.
>
> If the contractor either knew or should have known of a patent ambiguity, a failure to seek clarification prior to bidding bars recover. Concrete General, Inc., MSBCA 1836, ___ MSBCA ___ (1995), aff'd, Civ. No. 135442 (Cir. Ct. Mont. Co. November 3, 1995); John C. Grimberg Co., Inc., MSBCA 1761, 4 MSBCA ¶371 (1994); Hanks Contracting, Inc., MSBCA 1212, 1 MSBCA ¶110 at pp. 4-5 (1985); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 at pp. 10-13 (1984), aff'd, Civ. No. 3296 (Cir. Ct. Mont. Co. August 23, 1985); Avedon Corp. v. United States, 15 Cl. Ct. 771 at pp. 776-777 (1988); Dominion Contractors, MSBCA 1041, 1 MSBCA ¶69 at pp. 10-11 (1984).
>
> A contractor is obligated to bring to the State's attention major discrepancies or errors which it detects in the specifications or plans, unless it innocently construes in its favor a hidden ambiguity equally susceptible to another construction. Martin G. Imbach, Inc., MSBCA 1020, 1 MICPEL ¶53 (1983). Quoting from Blount Brothers Construction Co. v. United States, 171 Ct. Cl. 478, 496-97, 346 F.2d 962 (1965) the Board

noted,

> ...contractors are businessmen, and in the business of bidding on government contracts they are usually pressed for time...The are obligated to bring to the Government's attention major discrepancies or errors which they detect in the specifications or drawings, or else fail to do so at their peril.
>
> The contractor must bring the conflict to the attention of the State prior to bid opening and must not take advantage of the conflict to bid low and then seek additional compensation when the work is completed. S.J. Groves & Sons, Inc., 1 MSBCA ¶97 at p. 12 (1985).

A closer inspection of one of the above cited cases may also shed some light on the obligations imposed upon state contractors under the patent ambiguity rule in government procurement. At the hearing in John C. Grimberg Co., Inc., MSBCA 1761, 4 MSBCA ¶371 (1989), experienced experts in air ductwork installation offered competing interpretations of whether certain ducts specified in the contract documents should have been classified as air supply ducts and therefore required to be insulated. Finding that both of the posited reasonable but conflicting interpretations established a patent ambiguity, the Board concluded, "Appellant was required to seek prebid clarification from the State or 'risk being awarded the contract and held to the State's interpretation.'" Citing Concrete General, Inc., supra, at p. 12. The Board in Grimberg, supra, also noted the significant cost difference arising from the dueling interpretations, holding that it "imposes a duty to seek clarification [prior to bid submission]." at p. 11.

Of course, in contradistinction to patent ambiguities, the same doctrine posits that latent ambiguities in contract documents may be asserted in contract disputes even though they are not brought to the attention of the State prior to bid submission. Kinsail Corp., MSBCA 2697, ____ MSBCA ¶____, (2010),

Barton Malow Co., MSBCA 2568, ___ MSBCA ¶___ (2008); Harbor Construction, Inc., MSBCA 2015, 5 MSBCA ¶439 (1998); Jackson R. Bell, Inc., MSBCA 1851, 5 MSBCA ¶392 (1996); Colt Insulation, Inc., MSBCA 1426 & 1446, 3 MSBCA ¶231 (1989); Paul J. Vignola Electric Co., Inc., MSBCA 1226, 2 MSBCA ¶120-1 (1986). But because the instant dispute arises from a patent ambiguity evident on the face of the contract documents, no fuller discussion of latent ambiguities is warranted in this Opinion.

To conclude by returning to another aspect of the first referenced Board decision discussed above in the instant opinion, namely, Cherry Hill Construction, Inc., *op cit.,* a claim not wholly unlike the case at hand, appellant contended that it did seek prebid clarification of an ambiguous pricing provision, but in response to its inquiry the State still failed to afford notice of whether the cost of a particular wall gravel base was intended to be included in one of the contract's unit price items. Even in that situation, the Board imposed a high duty and burden upon the contractor, holding, "If prebid inquiry may prove futile, it should nevertheless be attempted and a protest filed if the inquiry falls on deaf ears. See William F. Wilke, Inc., MSBCA 1162, 1 MSBCA ¶61 (1983)."

From the evidence available to the Board in the instant appeal, it is unclear exactly when appellant actually discovered the patent ambiguity which resulted from the inconsistent product specifications contained in the contract documents, but certainly if FiberPlus was aware of the discrepancy prior to its bid submission, it should have sought specific clarification from DoIT; and if it received the response provided by the State to the question that was posed in response to the inquiry about requisite vault strength, which failed to correct the ambiguity, appellant should have filed a bid protest in advance of the due date for submitting proposals, by which the State would have had a fuller opportunity to correct its error in this procurement.

Instead, in this procurement no bid protest was filed to challenge the patent ambiguity that existed in the contract documents, which specified the requirement of handholes rated Tier 22, while the attached schematics depicted completely different handholes rated only Tier 15. As FiberPlus ultimately discovered to its substantial detriment, the State refused to allow Tier 15 handholes and demanded the installation of Tier 22 lids, even after appellant had already installed a slightly lesser product. In accordance with the plain specifications set forth in the materials list, DoIT had the right to make such a demand and appellant had the obligation to provide the specified materials without the necessity of the State paying extra for a change order.

For all of the foregoing reasons, and as more fully set forth in the pleadings filed here and evidence adduced at hearing, this appeal must be denied.

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 Fiber Plus, Inc. Under DoIT Master Contract No. 060B9800012 and TORFP Nos. F50P2400074 and F50P2400119.

Dated:

_____
Michael L. Carnahan
Deputy Clerk