BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Premium Transit Services, Inc.	)	
	)	**Docket No. MSBCA 2530**
Under MTA Bid # 04205-Z and 09285-Z, Blanket Contract TT14583	)	

APPEARANCE FOR APPELLANT: **Angela S. Robinson, Esq.**
Washington, D.C.

APPEARANCE FOR RESPONDENT: **T. Byron Smith**
Assistant Attorney General
Baltimore, MD

DECISION ON APPELLANT'S MOTION FOR RECONSIDERATION

On November 16, 2007, this Board issued its Final Order in the instant matter, awarding to appellant Premium Transit Services, Inc. (PTS) the sum of $15,264.31 in damages, as itemized and explained therein. On November 28, 2007, the Board received correspondence from counsel for appellant seeking modification of the Board's quantum calculation to permit appellant to recover an additional $16,578.00. The Board treats that correspondence as a Motion for Reconsideration as allowed by the Code of Maryland Regulations (COMAR) §21.10.06.28. Counsel for respondent Maryland Transit Administration (MTA) filed timely opposition to appellant's post-decision Motion, which opposition was received by the Board on December 26, 2007.

In denying appellant's Motion for Reconsideration, the Board notes that appellant bears the burden of establishing its damages. That burden is not unduly onerous. With

respect to determination of the extent of damages, it is merely incumbent upon appellant to adduce factual support sufficient for the Board to ascertain by a preponderance of the evidence the amount of losses which appellant incurred. The Board made it known at the time of the evidentiary hearing in this matter on May 2 and 3, 2007 that appellant's testimony adduced adequate evidence of entitlement, leaving only the issue of quantum for fuller, final determination. If that conclusion was not evident to appellant at the time of the hearing, it surely became clear at the time the Board issued its October 2, 2007 Opinion, which formally ruled in favor of appellant and gave to appellant the unusual opportunity of submitting a supplemental statement to clarify and complete its precise claim for liquidated damages. That was facilitated by appellant on October 24, 2007 by submission of its Statement of Verified Costs, which gave rise to the Board's quantum calculation approving an award of appellant's damages in the total sum of $15,264.31.

By correspondence dated November 26, 2007, appellant seeks yet another opportunity to submit proof of its losses, claiming that the Board miscalculated appellant's damages due to an admitted printing error set forth in the supplemental Statement of Verified Costs prepared and submitted by appellant. Specifically, under a column entitled "Supplies," appellant's October 24, 2007 Statement of Verified Costs set forth a claim for "########," which appellant now states was intended to claim $16,578. In the "Description" column explaining such "Supplies," appellant does not indicate either that "########" or $16,578 was expended by appellant as out-of-pocket expenses to purchase the long table brake assemblies that appellant provided to MTA. Instead, appellant's spreadsheet notes as follows:

> "Seek Cores. Prepare MTA-L.Dickerson, 'FINAL ADMINISTRATIVE REMEDY UPDATE'; Last attempt to secure cores by G.Garrettson PTSINV 6570 & letter for reimbursement of PTS/ABC CORES & Long Table Upgrade."

The date indicated for the foregoing was December 8, 2005, a few days *after* appellant's delivery of parts to MTA.

Unfortunately for appellant, it remains unclear to the Board even to the current point in time what, if anything, was expended by appellant for "Supplies" on December 8, 2005 and what those supplies may have been. Appellant made its first delivery of long table brake assemblies to MTA on December 2, 2005. That initial delivery represented more than half of all of the parts ultimately provided by appellant to MTA per MTA's initial order for 72 brake tables on October 14, 2005. Appellant's spreadsheet entitled "Contract Performance Expenses" includes innumerable notations which are not expenses but instead, itemizations of time incurred by appellant, for which appellant continues to attempt to assert the right to bill MTA at the grossly excessive rate of $474.20 per hour, even though the Board has previously ruled that appellant's formerly claimed hourly rate of $325.00 is also grossly excessive.

As set forth above, appellant's own "Description" of "Expenses" on December 8, 2005 references as follows: "seek cores…prepare…administrative remedy update…last attempt to secure cores…&letter for reimbursement." Did appellant actually expend $16,578.00 for long table brake assemblies on December 8, 2005? Despite four (4) separate opportunities (testimony at the hearing, followed by submission of its brief, followed by submission of its Statement of Verified Costs, followed by its Motion for Reconsideration) to present factual support to the Board to

answer this principal question seminal to just resolution of the instant dispute, the answer remains unproven by appellant and unknown to the Board.

It should have been a simple matter for appellant to provide this essential testimony to the Board at the time of the evidentiary hearing. Appellant could have been asked by counsel on the record, "Did you purchase long table brake shoes and provide them to MTA? From whom? When? What did they cost? Would you identify your receipt for those out-of-pocket expenses?" These questions were never asked. The closest that appellant came to asserting this information on the record was in response to a question raised *sua sponte* by the Board at Page 100, Line 21:

> "PRESIDING MEMBER DEMBROW: What did you pay for the seed cores?
>
> "THE WITNESS [Andrew Brown, President, PTS]: It's written down, sir. I just – telling you from a market point of view, those heavy cast iron shoes to MTA on the open market are going to be anywhere from 125 to 175 dollars each, somewhere in there."

Appellant ultimately provided no more than 12 long table front brake assemblies and 60 long table rear brake assemblies, for a total of 72 assemblies. According to the sworn testimony of appellant's principal witness, therefore, the cost of purchasing all of the new long table brake assemblies provided to MTA by appellant should have been no more than $12,600, if all 72 assemblies cost the maximum amount of $175 each, as reflected by appellant's own sworn testimony. Though inconsistent with that testimony, the price adjustment initially sought by appellant from MTA was in the amount of $2,448 as the cost of the 12 new front brake tables and $14,100 as the cost of the 60 new rear

brake tables, for a total of $16,548 exclusive of appellant's field expenses.

At this late date in the course of resolving this dispute it should be a simple matter for appellant to be able to cite the Board to a documentary exhibit and a page and line number of the transcript of proceedings at which appellant plainly and firmly sets forth its proof of damages, but despite being given multiple opportunities to do so, no such reference has been forthcoming.

The Board has been more than sympathetic to appellant's claim and fully receptive to rendering an award that makes appellant completely whole for the costs appellant incurred to perform this contract as demanded by MTA beyond the requirements of the mere core exchange program that appellant reasonably believed it was bidding to perform. But it is not for the Board to establish appellant's proofs. Nor is the Board permitted to award damages that are not substantiated by credible evidence. Especially in a claim such as the instant one, in which appellant seeks to recover hundreds of dollars per hour for exorbitant work alleged to have been done to locate certain bus components, totaling hundreds of thousands of dollars in claimed entitlement to price adjustment, and thereafter files a complaint before this Board seeking a judgment for millions of dollars more, it is incumbent upon the Board to sort through and discard the excessive or unsubstantiated components of appellant's claim and enter an award only for damages which are proven by a preponderance of the evidence. Here, appellant has alternatively asserted claims for $5,718.00 (as set forth in appellant's originally filed Statement of Verified Costs), or no more than $12,600.00 (the maximum established by appellant's testimony at the hearing), or $16,548.00 (as set

forth in one of appellant's trial exhibits), or $16,578.00 (as now being claimed by appellant's modified Statement of Verified Costs), or $22,546.00 (as set forth in appellant's post-hearing brief), or some other grossly excessive figure such as $438,269.71 (as set forth in appellant's Proof of Costs), or $802,000.00 (as claimed in appellant's Post-Hearing Brief), or $3,834,000.00 (as claimed in appellant's Complaint) if overhead field expenses and other damages were also to be recovered.

Regrettably the Board shares appellant's frustration that appellant can recover no more than the minimum amount positively established as its damages, namely, $5,718. The Board has allowed appellant to remedy its evidentiary deficiencies in this regard not once, but twice; yet appellant has still been unable or unwilling to call to the Board's attention any definitive and specific proof of its damages beyond $5,718. Such proof could have taken the form of direct testimony, presentation of a written receipt or letter from a vendor, or even a self serving spreadsheet, if this latter form of proof unambiguously set forth certain costs. All that was necessary for appellant to assert was, "This is the amount we paid to purchase long table brakes." But despite multiple opportunities for appellant to adduce this proof by any of a variety of potentially available forms of reliable evidence, the Board at this late juncture would be engaging in mere speculation and conjecture to interpret appellant's spreadsheet as sufficient to substantiate recovery of an additional $16,578. As a result, appellant's Motion for Reconsideration must be and hereby is DENIED.

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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Final Order in MSBCA 2530, appeal of Premium Transit Services, Inc. under MTA Bid # 04205-Z and 09285-Z, Blanket Contract TT14583.

Dated:

Michael L. Carnahan
Deputy Clerk