BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Brawner Builders, Inc.	*	**Docket No. MSBCA 3073**
Under SHA		
Contract No. AW1395Q80	*	
Appearance for Appellant	*	**David B. Applefeld, Esq.**
	*	**Shapiro, Sher, Guinot & Sandler, P.A.**
	*	**Baltimore, Maryland**
	*	**Jeffrey N. Pritzker, Esq.**
	*	**Brawner Builders, Inc.**
	*	**Hunt Valley, Maryland**
Appearance for Respondent		**Douglas G. Carrey-Beaver, Esq.**
	*	**Mary Cina Chalawsky, Esq.**
	*	**Assistant Attorneys General**
	*	**Office of the Attorney General**
	*	**Contract Litigation Unit**
	*	**Baltimore, Maryland**

* * * * * * * * * * * * *

OPINION AND ORDER BY MEMBER KREIS

The Board conducted a merits hearing in this Appeal on December 1-2, 2021. After considering all witness testimony, the admitted exhibits, and the arguments made by counsel, both at the hearing and in their post-hearing briefs, the Board denies the Appeal.

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

In 2014, the Maryland Department of Transportation State Highway Administration ("SHA" or "Respondent") issued an Invitation for Bids ("IFB") on Contract No. AW1395T80 – Maintenance of Traffic for Inspection of Structures – Statewide. The project was for "providing labor, materials, equipment, etc., necessary to provide for the safe maintenance of highway traffic

on short notice anywhere in the State of MD," and included "providing bucket trucks and underbridge inspection cranes, with operators, and any other necessary equipment and traffic control devices, on a daily basis for the duration of the project."

The IFB advised potential bidders that "[p]ortions of this work may have to be performed on an emergency basis" and "[c]ontractor shall give the emergency situation top priority until the emergency is resolved, even though this may be at the expense of other projects." Additionally, the IFB warned that SHA would assess liquidated damages of $950.00 per day for the contractor's failure to comply with a request for equipment or labor. The liquidated damages provision also stated that the contractor was required "at all times to have the ability to provide the necessary equipment and manpower for six separate Maintenance of Traffic Crews for the exclusive use by the administration."

Brawner was the sole bidder. Its $6,479,752.00 bid was premised upon estimated quantities SHA set forth in the IFB for various items, including arrow board signs for maintenance of traffic, traffic cones, drums, variable message signs, protection vehicles, manpower and labor bucket trucks, flatbed trucks, pickup trucks, and underbridge inspection cranes. On October 23, 2014, SHA issued its Notice of Award accepting Brawner's bid.[1] The Contract was signed on January 20, 2015, and SHA issued the Notice to Proceed for work to begin on or before February 3, 2015.

The Contract duration was 24 months, and the completion date was January 31, 2017. Brawner was called and successfully performed over 1,800 times. There were only ten instances when Respondent assessed liquidated damages for Brawner's failure to provide the requested

[1] Brawner's bid amount of $6,479,752 was $577,148 less than the SHA engineer's pre-bid estimate of $7,056,900.

equipment/manpower. Based on this 99.5% effective performance rate, SHA gave Brawner an overall "A" rating on the Contract.

The issue in this Appeal, however, is not about the quality of Brawner's performance, but the quantity. Many of SHA's estimated quantities for work items as set forth in the IFB, upon which Brawner relied in preparing its bid, turned out to be substantially higher than the actual quantities used. SHA ultimately paid Brawner only $3,783,180.35 for all work performed under the Contract, even though Brawner's winning bid amount was $6,479,752.00.[2]

On April 25, 2017, Brawner submitted a request for an equitable adjustment ("REA") to SHA's Office of Structures ("SHA's OS") for $360,356.74 to address the underrun on the following thirteen (13) bid items:

Item No. 1001 – arrow boards
Item No. 1002 – signs for maintenance of traffic ("MOT")
Item No. 1003 – traffic cones
Item No. 1004 – drums
Item No. 1005 – portable variable message boards
Item No. 1006 - protection vehicle
Item No. 4007 – MOT foreman
Item No. 4008 – MOT laborer
Item No. 4010 – vehicle operator
Item No. 4011 – bucket truck 40 ft. reach
Item No. 4012 – flat bed truck 12 ft. – 15 ft.
Item No. 4013 – pick-up truck
Item No. 4015 – underbridge inspection crane 40 ft. reach

Brawner invoked the Variation in Estimated Quantities clause ("VEQ Clause") in General Provision 4.04 ("GP 4.04"), which states, in relevant part:

> Where the quantity of a pay item in this Contract is an estimated quantity and where the actual quantity of such pay item varies more than 25 percent above or below the estimated quantity stated in this Contract, an equitable adjustment in the Contract price shall be made upon demand of either party. The equitable

[2] Brawner has alleged that the underrun was caused by SHA self-performing some of the work under the Contract, although there was no evidence presented at the hearing to support the allegation. Further, the Board has not been made aware of any prohibition against self-performance by SHA.

> adjustment shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity.

Brawner claimed that it had sustained an increase in its costs due solely to the fact that the actual quantities used of the 13 bid items varied more than 25% below the estimated quantities provided in the IFB.

On May 12, 2017, SHA's OS denied the REA, citing Brawner's failure to include supporting documentation showing actual costs incurred due to the variation in estimated quantities.

On July 5, 2017, Brawner submitted a further explanation of its REA ("Revised REA") to SHA's OS that contained a revised cost summary in the amount of $433,697.04 for the same bid items as the original REA, but with the costs associated with "Item No. 4010 – vehicle operator" removed.[3]

In a letter dated August 3, 2017, SHA's OS denied Brawner's Revised REA stating that the Revised REA was untimely and that Brawner still had not provided any documentation showing an actual increase in costs for any of the items being claimed.

On August 10, 2017, Brawner submitted a Claim to Steve Marciszewski, Director of SHA's Office of Construction ("SHA's OC"), for the twelve (12) bid items in the Revised REA, seeking $433,697.04 under the VEQ Clause. On February 14, 2018, Stephen A. Bucy, P.E., Acting Director of SHA's OC/Procurement Officer ("PO" or "Bucy") issued his PO's decision denying Brawner's Revised REA.[4] The PO found that (1) Brawner did not show that it reserved equipment for the exclusive use of SHA; (2) there were occasions when equipment or labor was requested and Brawner was unable to provide it; (3) pursuant to Brawner's admission in its July 5, 2017

[3] On this same date, Brawner's president, Jeffrey Bird, signed Contract Change Order #1, in which Brawner agreed to a reduction of 160 hours from the bid quantity of 43,200 for Item No. 4010, resulting in a credit to SHA of $4,000.00.
[4] Mr. Bucy was named Acting Director after Mr. Marciszewski retired from SHA.

letter, there were times it was able to re-allocate equipment and labor; and (4) Brawner failed to provide support for an increase in unit cost due solely to the decrease in hours or units used for labor and equipment on the Contract.

On February 23, 2018, Brawner appealed the PO's decision to this Board. We issued an Order on May 16, 2018, requiring that Appellant file a Proof of Costs ("POC") supporting its damages claim, which is the Board's standard procedure when an appellant is pursuing a contract claim. Over the next two years of litigation, Brawner filed four.

On August 17, 2018, Brawner filed its first POC seeking $361,648.06, claiming that its damages calculation was based upon the methodology set forth in *Genstar Stone Paving Prods. Co., Inc. v. State Highway Admin.*, 94 Md. App. 594 (1993). Brawner filed an Amended POC on July 10, 2019, now seeking $367,266.56 under its purported *Genstar* analysis, but which also included a second alternative damages amount of $379,980.40 calculated based on *TPH Industries, Inc.*, MSBCA No. 2311 (2003). On November 12, 2019, Brawner filed its First Amended POC, which corrected some erroneous exhibits that had been previously attached to the Amended POC. Brawner's first three POCs were all based on the 12 bid items identified in the Revised REA that had been submitted to the PO.

Finally, on March 23, 2021, just days before the end of discovery, Brawner filed a Second Amended POC, which now sought $1,806,493.63 under its purported *Genstar* analysis, and $1,784,300.93 under its *TPH* analysis.[5] The Second Amended POC also re-inserted the 13th bid item (No. 4010 -vehicle operator) from the original April 25, 2017 REA, an item which had not been presented to or considered by the PO.

[5] These much larger damages calculations resulted from eliminating a substantial "settlement credit" for Brawner's claimed reassignment of unused labor and equipment. The Second Amended POC also contained Net Incurred & Unreimbursed Cost damage calculations, which still contained the credit, and were now alleged to amount to $581,807.70 under *Genstar* and $405,018.73 under *TPH*.

On April 5, 2021, SHA filed two Motions for Partial Summary Decision and Brawner filed a Cross Motion for Partial Summary Decision. The Board heard and denied all motions on June 2, 2021.

Four witnesses testified during the two-day merits hearing held on December 1-2, 2021. Brawner called David Berkhimer ("Mr. Berkhimer") and John Martin ("Mr. Martin") in its case in chief, and Robert Carter ("Mr. Carter") as a rebuttal witness. SHA called William Kime ("Mr. Kime") in its case. Additionally, Brawner and SHA stipulated to the admission of portions of two additional witnesses' deposition transcripts.[6]

Mr. Berkhimer has been in the construction industry since 1998. He started working for Brawner in 2010 and is currently the Vice President of its Infrastructure Division.[7] He oversees bid preparation, cost analysis, and costs projections, and manages both field and office employees. Mr. Berkheimer prepared Brawner's bid in this appeal. Without objection, we admitted him as an expert witness in cost estimating, scheduling, means and methods, and construction administration.

Mr. Martin has been in the construction industry since 1976 and has been working full time with Brawner since May 5, 1983. He is currently the Vice President and Secretary for Brawner. He oversees the Infrastructure Division and buys and sells equipment.

Mr. Kime has been a certified public accountant for over 40 years and is certified in financial forensics. He is a Senior Managing Director - Forensic & Litigation Consulting with FTI Consulting. Additionally, he owns and operates Afa Consulting, a single member limited liability company, and also works as an employee of the U.S. Department of Justice maintaining costs on

[6] The first set of excerpts came from the deposition of Mary Cecelia Lottes, who was employed by JMT and working for SHA as a consultant on this Contract. She was responsible for scheduling maintenance of traffic and equipment needs. The second set of excerpts came from the deposition of the PO, Mr. Bucy.

[7] The Infrastructure Division at Brawner is generally responsible for what is known as "horizontal construction," which includes bridge building, rehabilitation and demolition, concrete paving, and curbing.

Superfund cases. Mr. Kime has been qualified as an expert witness in forensic accounting on numerous occasions, including previously by this Board. Without objection, we admitted Mr. Kime as an expert in forensic accounting and cost analysis as it pertains to construction and government contracts. We admitted his two expert reports dated October 11, 2019 and January 22, 2021 as Respondent's Exhibits 9 and 11.[8]

Mr. Carter works for BDO USA, LLP. He is a certified public accountant, certified fraud examiner, and certified valuation analyst. He is also certified in financial forensics. Brawner retained him to review Mr. Kime's January 22, 2021 Report. Mr. Carter issued his own report on March 22, 2021. Without objection, we admitted Mr. Carter as an expert in accounting, forensic accounting, and construction claims analysis.

DECISION

I. The Board Lacks Jurisdiction to Consider Item 4010 – Vehicle Operator.

Under MD. CODE ANN., STATE FIN.& PROC. § 15-211, the Board "shall have jurisdiction to hear and decide all appeals arising from the final action of a unit." However, the Board lacks jurisdiction "over a contract claim dispute that has yet to be determined by the agency and appealed to this Board." *Midasco, Inc.*, MSBCA No. 2209 at 5 (2001). An issue not raised before the PO "is not ripe for Board consideration." *Mercier's Inc.*, MSBCA No. 2629 at 4 (2008).

Although Item No. 4010 – Vehicle Operator was included in the REA submitted to SHA's OS on April 25, 2017, that REA was denied on May 12, 2017. The Revised REA, submitted to SHA's OS on July 5, 2017, did not include Item 4010. Most importantly, the August 10, 2017 Claim submitted to, and denied by, the PO did not include Item 4010. Since there has never been

[8] Mr. Berkhimer responded to Mr. Kime's reports and deposition testimony with a March 19, 2021 report of his own that was admitted as Appellant's Exhibit 2.

a final action by the unit (here, SHA), the Board lacks jurisdiction to consider Brawner's attempted resurrection of Item No. 4010 in its Second Amended POC, filed shortly before the end of discovery and almost four years after it was abandoned.[9]

II. The *TPH* Case Does Not Apply to Contracts Containing a VEQ Clause.

TPH concerned a dispute over payment for the removal of pigeon debris from several bridges on I-395. *TPH Industries, Inc.*, MSBCA No. 2311 at 1. In *TPH*, the IFB estimated that there would be approximately 60 tons of debris located on the bridges, and the bid sheet required bidders to bid a price per ton for removing the approximate quantities. TPH bid $550.14 per ton, for a total contract price of $33,008.40 ($550.14 x 60). TPH satisfactorily removed all the debris from all the bridges, but it only totaled 9.85 tons and, therefore, it was only paid $5,418.97 ($550.14 x 9.85). TPH claimed that the substantial reduction in debris tonnage affected its bid and requested an equitable adjustment. *Id*. at 1-2.

The Maryland Transportation Authority denied the claim, but the Board reversed and awarded an equitable adjustment in an amount approximating the balance of the Contract. *See id.* at 6. The Board credited the contractor's testimony that costs incurred on the contract were based upon the amount and location of surface area to be cleaned, the volume (not weight) of the material to be removed, and the number and expertise of the personnel needed. Because the weight of debris had little to do with the bid calculation, if the estimated weight had been 20 tons rather than 60 tons, TPH would have tripled its per ton rate and still bid $33,000.

The *TPH* decision is unique to the facts in that case. More importantly, notably absent in *THP* was a dispute under a VEQ clause. This Board holds that when a contract contains a VEQ clause, and that clause is triggered by the requisite overrun or underrun, the reasoning and

[9] Whether Brawner's removal of Item No. 4010 was inadvertent or intentional is not relevant to jurisdiction.

methodology set forth in *Genstar* is controlling in determining entitlement and damages. Accordingly, we find that Brawner's *TPH* damages calculation in the Second Amended POC inapposite.[10]

3. Brawner Failed to Establish Entitlement or Damages under *Genstar*.

In 1993, the Court of Special Appeals in *Genstar* established the elements of proof required in a contract dispute involving a VEQ clause like the one in this Appeal. Under *Genstar*, a party must satisfy all four prongs of the following formula to be entitled to an equitable adjustment:

1. The existence of adjustable units and the requisite overrun or underrun;
2. The **actual unit cost** of the adjustable units varies, in his favor from the contract price, for unless he can show such a difference, no adjustment is warranted;
3. The **actual unit cost** of the adjustable units is greater or lesser, as the case may be, than the actual cost of the base units; and
4. The difference in actual unit cost is due solely to the overrun or underrun and not to any other cause.

Genstar, 94 Md. App. at 612-613 (emphasis added).[11]

Genstar was a case of first impression in Maryland. The Court first noted the lack of helpful legislative history concerning the regulation implementing the VEQ clause. Commenting further that the parties had "very different, and inconsistent views" on the comparable federal procurement regulation and cases cited as persuasive authority, the Court declined to adopt the law set forth in these federal decisions, concluding that they were "simply guides" in construing the

[10] *TPH* is also distinguishable because TPH actually performed all of the work required under the contract. It cleaned all the bridges, but there just was not as much debris as estimated. As discussed in more detail *infra*, in contrast to TPH, Brawner seeks payment for equipment not used and labor not performed.

[11] A VEQ Clause can be used to address both overruns and underruns. The facts in *Genstar* presented an overrun situation, in which the State was trying to recover a unit price adjustment/reduction for using more than 125% of the quantity estimated in the Contract. However, this Appeal presents an underrun situation, in which Brawner is trying to recover a unit price adjustment/increase from the State for increased fixed costs associated with the State's failure to use 75% or more of the quantities estimated in the Contract. The methodology set forth in *Genstar* is applicable to both.

VEQ clause at issue. *Id*. at 612. Ultimately, the Court rejected the arguments of both parties and, instead, formulated the four prongs of proof listed above. The Court emphasized that in construing the VEQ clause this was to be "its ordinary application," and that "[t]he standard being an equitable one," there needs to be flexibility in its application. *Id.* at 614. It found both the Board and the Court applied it too rigidly in different ways and reversed and remanded the case to the circuit court for further remand to the Board. *Id.*[12]

Even with the 30-year anniversary of *Genstar* quickly approaching, there has been remarkably little development of precedent in this area. Today, this Board still faces the challenge of untangling the rat's nest that often is an attempt at calculating damages under the *Genstar* methodology.[13] But begin we must and, as a precursor to determining entitlement to an equitable adjustment under the VEQ Clause here, it is necessary to first understand the difference between fixed costs versus variable costs. As the Court in *Genstar* noted, the VEQ Clause does not define "costs" nor state how an alleged increase or decrease in "costs" is to be calculated.

A good starting point is to look at an example showing how *Genstar* is designed to work. At the hearing, Mr. Kime explained using the infamous "widget":

> Well, what it is, is that there was an – established price for that widget. And that price was developed based upon assumptions that there was going to be costs to get the process up and running. Then there would be variable costs to actually make that widget, and there would be markup for profit. … So then they take that amount. They divide it by the number of widgets they think they're going to make, and they say, oh, that's my price per widget. … Then what happens is the number of widgets explodes, and the widgets being sold, maybe the price was [built] on 1,000 widgets, and now 2,000 widgets are being sold. Well, in that initial price buildup of those first 1,000 widgets were fixed costs. The setting up of the production line. The purchase of equipment that can produce a million widgets. There were a lot of these one-time up-front charges that were baked into the first

[12] On remand, the Board held that "SHA is entitled to an equitable adjustment based upon the finding that the ordinary application of the estimated quantities clause is not appropriate." It found that SHA was entitled to an adjustment of $84,480. *See Genstar Stone Paving Products Co.*, MSBCA No. 1532 at 9 (1993).

[13] Often an appellant claims its accounting procedures do not support what it is needed to provide a proper *Genstar* calculation, and the State's experts merely opine on all the ways the appellant failed to comply with *Genstar*.

> 1,000 widgets. So once they got beyond a 1,000 widgets, their cost per widget plummets. And then also you're sitting back, oh, wait a minute, wait a minute. You're still charging me $30 per widget, and your cost has just dropped from 20 to 10.

Dec. 2, 2021 Hr'g Tr. II at 289:18-290:14. This example is an overrun, as was the case in *Genstar,* in which the State would try to recover for a decreased unit price on adjustable units beyond the quantity estimated in the contract. However, it applies equally to an underrun scenario. In an underrun, a contractor would have allocated its fixed costs over the entire estimated quantity in setting its unit price but, because not all units were used, the contractor would not be paid for some portion of the fixed costs that were allocated to the estimated units. The argument is that the unrecovered fixed costs should be reallocated over the fewer units actually used by increasing the per unit cost of the used quantity to make the contractor whole.

Here, Brawner contends that the Contract's Liquidated Damages provision required all equipment and labor to be on "standby" for the "exclusive use" of SHA and, therefore, the under-used equipment and labor hours on this Contract are unrecovered fixed costs. We disagree.

All that the Contract required was for Brawner "to have the ability" to provide the necessary equipment and manpower for six separate Maintenance of Traffic Crews "for the exclusive use by the Administration." We do not read the Contract to require Brawner's equipment and labor to be maintained for the exclusive use of the State such that they must remain on stand-by and kept off other jobs. Nothing in the Contract states that they could not be used on other jobs when not needed by SHA. Furthermore, the Contract explicitly precludes payment for equipment sitting idly by in Brawner's equipment yard, unless such payment is authorized by the SHA

Engineer.[14] There was no evidence presented of any SHA Engineer's authorization being provided in this case.

Our view is further supported by Column D in Appellant's Second Amended POC titled, "Actual Quantities Performed but not Requesting Reimbursement." This heading, described in Footnote 1, states: "In an effort to mitigate the unreimbursed costs incurred, Brawner was able to reallocate a portion of some of the items to other contracts. This represents our good faith effort of the approximate quantity reallocation."[15] Similar reallocation numbers were previously included in Mr. Berkhimer's July 5, 2017 letter (Jt. Ex. 39) and Mr. Pritzker's February 4, 2019 letter (SHA Ex. 39).

The Board finds this important because it shows that Brawner had the ability to, and did, reallocate equipment and labor hours to other jobs. Although Brawner witnesses testified as to the difficulties associated with providing temporary/replacement/additional crews or equipment on short notice due to contractual training and certification requirements, doing so was part of the basic scope of the Contract work and the risk that Brawner took in bidding this job. Perhaps the very onerous requirements of the Contract were one of the reasons why Brawner was the only bidder.

Mr. Berkhimer testified that he was not really looking at any documents when calculating the reallocation/mitigation numbers. It was a "best guess" or "back of the envelope" estimate. He

[14] *See* Jt. Ex. 1 at pp. 67-68 (For bucket trucks, flatbed trucks, pick-up trucks, and 40-foot and 60-foot underbridge inspection cranes, "[n]o standby or idle time will be paid for this Contract on days when no work is performed unless authorized by the Engineer.") and pp. 73-76 (For protection vehicles, "[n]o standby or idle time will be paid for on this Contract on days when no work is performed unless authorized by the Engineer.")

[15] Although this heading and footnote would appear to be self-explanatory, there was substantial testimony about what this meant and whether the numbers in the Column D were supported. As a result of SHA repeatedly asking for supporting documentation, Brawner ultimately added a second *Genstar* damage calculation in the Second Amended POC eliminating the reduction and substantially increasing Brawner's damage claim from $581,807.18 to $1,806,493.63.

further indicated that it was included early on as an attempt to quickly settle matters via a change order. Although it is possible to track equipment and labor hours reallocated to other jobs, Brawner contended that its system just did not track it.

We find that there were no fixed costs associated with the unused labor and equipment. They are completely variable and, thus, incurred only if used. Brawner was only to be paid for quantities provided. We agree with Mr. Kime's testimony that there is no evidence that Brawner incurred any costs for hours and equipment not used.

Having established that Brawner was not required to keep its equipment on standby for the exclusive use of SHA, and that the unused equipment and labor were variable costs that are incurred only when used, we now turn to the four *Genstar* criteria for showing entitlement to an equitable adjustment.

Mr. Berkhimer's testimony and the Second Amended POC establish the requirements of the first prong: 13 Items had underruns below 75% of the estimated quantity in the Contract, triggering the application of the VEQ Clause contained in GP 4.04 of the IFB.[16] For example, Item 1001 - Arrow Boards, had an original contract quantity ("OCQ") of 2,600, but Brawner was only actually reimbursed for 1,426.05 or 54.8% of the OCQ; and Item 4012 Flatbed Truck 12-15FT, had an OCQ of 1,500, but Brawner was only actually reimbursed for 824.77 or 55% of the OCQ.

Other than establishing the underrun, however, Brawner's Second Amended POC fails to satisfy the remaining three prongs of a *Genstar* calculation. Based on the undisputed testimony of Brawner's witnesses, the Board finds that Brawner did not track any actual equipment costs nor

[16] Attachment A to the Second Amended POC, a larger version of which was admitted as Joint Ex. 4, is a table representing Brawner's *Genstar* calculation. It shows "All Contract Items," 13 of which have underruns below 75%.

equipment and labor costs that were reallocated to other projects, even though Mr. Kime and Mr. Carter agreed that both are trackable.

In the current underrun scenario, Brawner must show that:

> #2. The actual unit costs of the adjustable units vary in Brawner's favor from the contract price.
>
> #3. The actual unit cost of the adjustable units is greater than the actual cost of the base units.

Mr. Berkhimer took this Board step-by-step through the calculations performed to arrive at both the Net and Total Incurred & Unreimbursed Costs for Item No. 1001 - Arrow Boards. He then walked through two other examples: Item No. 4015 Underbridge Inspection Crane 40 ft. and Item No. 4010 Vehicle Operator.[17] He also confirmed that the calculations for the remaining nine items with underruns were performed in the same manner and, at first blush, it appeared that the actual unit costs of the adjustable units varied in Brawner's favor (*i.e.*, they increased) and, further, that they were greater than the actual cost of the base units.

However, Mr. Kime's testimony and report (SHA Ex. #9) prove that appearances can be deceiving. Mr. Kime pointed out that Brawner had not used the actual costs incurred to perform the work. Instead Brawner had calculated its damages by applying "representative" or "estimated" unit rates to unperformed work. Mr. Berkhimer did not dispute the use of "representative" unit costs instead of actual unit costs for setting the "Original Unit Cost." In fact, he testified as to how they were calculated and included supporting documentation in Jt. Ex. #6.

Brawner's expert, Mr. Carter, confirmed further that representative costs had to be used because Brawner's system did not always track the actual costs. In his opinion, Brawner did the

[17] A copy of Jt. Ex. 4 – Attachment A to Brawner's Second Amended POC has been attached as Ex. #1 to this Opinion. It shows exactly how Brawner calculated its damages.

best it could to support the numbers. The Board need not decide whether using "representative" or "estimated" costs in place of actual costs is a reasonable deviation from *Genstar*, however, because we conclude that Brawner's entire methodology is flawed.[18] It is not a *Genstar* calculation at all but, as Mr. Kime called it, an "Idle Time Calculation."

According to Mr. Kime, the methodology Brawner used did not comport with the *Genstar* methodology as he understood it. He stated: "[B]rawner [is] basically claiming the estimated cost of work they haven't done for unidentified employees … or no specific piece of equipment." Dec. 2, 2021 Hr'g Tr. II at 298:4-7. Brawner "looked at unperformed, unpaid quantities, and said pay me for that." Dec. 2, 2021 Hr'g Tr. II at 305:15-17. Schedule 5 to SHA Exhibit 9 -William Kime Report dated October 11, 2019 (reproduced below in its entirety) shows how Brawner's unnecessarily complex calculation obfuscates the fact that it is asking to be paid the full estimated or representative unit cost for all unperformed units.[19]

[18] Additionally, since these representative rates are not a determining factor in our decision, the Board need not address the flaws that Mr. Kime points out in Brawner's calculation of the representative rates.

[19] When Mr. Kime's report was issued on October 19, 2019, it was directed at addressing Brawner's Amended POC. For purposes of the merits hearing and this Opinion, the applicable POC is the Second Amended POC. Although the "Representative Rate" for the Arrow Board Mr. Kime discussed at the hearing had changed from $9.11 to $6.81, he did not amend his report and, therefore, testified at the hearing based on the only information that was available to him at the time of his report. In any event, any changes from the Amended POC to the Second Amended POC are not relevant to the point he was making, which was simply that Brawner's analysis was an Idle Time Calculation, and not a *Genstar* Calculation.

Appeal of Brawner Builders, Inc.
Maintenance of Traffic for Inspections of Structures - Statewide
Docket No. MSCBA 3073

Schedule 5

Brawner Genstar Method

	Item 1001 - Arrow Board			Item 1002- Signs			Item 4013 - Pick-up Truck		
	Brawner Calculation	or	Simplified Calculation	Brawner Calculation	or	Simplified Calculation	Brawner Calculation	or	Simplified Calculation
Contract Quantity	2,600		2,600	21,200		21,200	350		350
Performed	(1,426)		(1,426)	(12,627)		(12,627)	(24)		(24)
Unperformed	1,174		1,174	8,573		8,573	326		326
Contract Quantity	2,600			21,200			350		
"Representative Rate"	$ 9.11		$ 9.11	$ 5.00		$ 5.00	$ 44.17		$ 44.17
Revised Amount	$ 23,686			$ 106,000			$ 15,460		
Performed Quantity	1,426			12,627			24		
Revised Unit Rate	$ 16.61			$ 8.39			$ 647.11		
Less: "Representative Rate"	$ (9.11)			$ (5.00)			$ (44.17)		
Incremental Rate	$ 7.50			$ 3.39			$ 602.94		
Performed Quantity	1,426			12,627			24		
Claim	$ 10,695		$ 10,695	$ 42,865		$ 42,865	$ 14,404		$ 14,404

Notes:
(1) Either the total rate by unperformed units or the incremental costs rate on performed units produces the same total.
(2) If units are changed (i.e. Protection Vehicle), the incremental rate $65.16 on "calculated" units not accurate incremental rate (only $28.52).

At the hearing, Mr. Kime walked the Board through the comparison calculations for Item 1001 – Arrow Board. His testimony, below, provides a better explanation of the calculations than any summary this Board could muster:

> THE WITNESS: That's why we put Schedule 5 in 7 here. I knew you'd ask that question. Looking at the arrow board, looking -- there's two calculation here. Brawner is the one I call the simplified calculation the way I'm looking at this. And Brawner comes down, and goes, well, we have contract quantities of 2600. We've performed 1426 -- unperformed quantities 1174. Now, leave that alone for a second. Go back, and say, well, I've got contract quantities of 2600, and you saw the unit price was $9.11 a day. That was -- that's their estimated cost for every day of an arrow board, 9.11. So Brawner says –
>
> CHAIRMAN BEAM: If they were fully utilized as estimated under the contract.
>
> THE WITNESS: Correct.

CHAIRMAN BEAM: Okay.

THE WITNESS: All 2600 days. They would incur $23,686 in estimated cost. Brawner then takes the 24 23,686, divides it by the 1426 performed quantities, and says my revised unit rate is $16.61. That's the rate you're looking at. So all Brawner's done here is allocated the total estimated cost for all the quantities over the paid quantities to get 16.61. They further come down, and then go, well, let's take the 16.61, reduced by the representative cost rate of 9.11, I get an incremental cost of $7.50.

CHAIRMAN BEAM: Wait. Let me back up just a second.

THE WITNESS: Sure.

CHAIRMAN BEAM: Go back to -- say that again, from 23,686. I understand how you got to that point.

THE WITNESS: Yeah.

CHAIRMAN BEAM: And go from there.

THE WITNESS: Now the 23.86 [sic], they divide that over the performed quantities of 1426. So they say, I -- they're saying that we have $23,686 in estimated cost had we done all the quantities but –

CHAIRMAN BEAM: But we only did --

THE WITNESS: 14.

CHAIRMAN BEAM: 1426.

THE WITNESS: So that then works out to $16.61 a unit a day for arrow board.

CHAIRMAN BEAM: Okay.

THE WITNESS: Then they reduce that by the 9.11, which they were paid for. They say, well, I've got an increase that is $7.50, which they again apply to the performed quantities, and they say I'm owed $10,695. So that's the calculation you see across that top line. I think this is a kind of a roundabout approach. Because all you do is go to the next column where I've calculated this. And if I say 2600 total quantities less what they've been paid for, 1175, times the cost rate per hour, 9.11, 10,695. Because all Brawner has done is allocated the units they haven't performed, estimated cost of units they haven't performed over the units they've been paid for, and then determined the difference in the rate, and applied it by, again, those units they've been paid for, and say, oh, 10,695.

Dec. 2, 2021 Hr'g Tr. II at 307:6-309:13. The Board agrees with Mr. Kime and finds that Brawner performed not a *Genstar* calculation, but rather an "Idle Time" calculation.

Since the Contract prohibits payment for idle time, we conclude that Brawner has failed to meet the fourth element of *Genstar*, which is to show that the difference in actual unit costs is due solely to the underrun and not to any other cause. Brawner has merely shown what it would have been paid for the unperformed work at the new "representative or estimated rate," had the work been actually performed. Considering the Board's earlier finding that the underused equipment and labor hours were variable costs, there is no evidence presented of any difference in actual unit price caused by the underruns.

For all of the foregoing reasons, the Board concludes that Brawner failed to prove entitlement to any damages for an alleged variation in estimated quantities under the Contract and, therefore, denies the Appeal.

ORDER

Based on the foregoing, it is this 15th day of December, 2022, hereby:

ORDERED, that Appellant's Appeal is DENIED, and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review or appeal shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Lawrence F. Kreis, Esq., Member

I concur:

/s/
Bethamy B. Brinkley, Esq., Chairman

/s/
Michael J. Stewart Jr., Esq., 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 contested cases.

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 Appeal Opinion and Order in MSBCA No. 3073, Appeal of Brawner Builders, Inc., under Maryland State Highway Administration Contract No. AW1395Q80.

Date: December 15, 2022

/s/
Ruth W. Foy
Deputy Clerk

Variation in Estimated Quantities
Cost Increase Summary
Genstar Method
All Contract Items

03/16/21

Item #	Description	Unit	A Original Contract Quantity	B Percent of Original Contract Quantity Actually Reimbursed (C / A)	C Actual Quantity Reimbursed at Original Unit Cost	D Actual Quantities Performed But Not Requesting Reimbursement[1]	E Actual Quantities for Net Incurred & Unreimbursed Cost (C + D)	F Original Unit Cost	G Avoided Unit Cost (Fuel)	H Original Unit Cost less Avoided Cost (F + G)	I Actual Costs Incurred less Avoided Cost (H * A)	J Adjusted Unit Cost (I / C)	K Unit Cost Increase (J - H)	L Net Incurred & Unreimbursed Cost (E * K)	M Total Incurred & Unreimbursed Cost (C * K)
1001	Arrow Board	UO	7,600	54.8%	1,426.05	-	1,426.05	$ 6.81	$ -	$ 6.81	$ 17,706.00	$ 12.42	$ 5.61	$ 8,000.14	$ 8,000.14
1002	Signs for Maintenance of Traffic Rental Per Day	EA	21,200	59.6%	12,627.00	-	12,627.00	$ 5.00	$ -	$ 5.00	$ 106,000.00	$ 8.39	$ 3.39	$ 42,805.53	$ 42,805.53
1003	Traffic Cones, Rental Per Day	EA	111,300	60.2%	66,972.00	-	66,972.00	$ 0.25	$ -	$ 0.25	$ 27,825.00	$ 0.42	$ 0.17	$ 11,385.24	$ 11,385.24
1004	Drums, Rental Per Day	EA	52,700	65.0%	34,246.00	-	34,246.00	$ 1.00	$ -	$ 1.00	$ 52,700.00	$ 1.54	$ 0.54	$ 18,492.84	$ 18,492.84
1005	Portable Variable Message Sign (Minimum $30 Per Day)	UO	1,300	32.8%	426.31	(101.31)	325.00	$ 50.39	$ -	$ 40 39	$ 65,507.00	$ 153.66	$ 103.27	$ 33,562.75	$ 44,025.03
1006	Protection Vehicle (Minimum $60 Per Day)	UO	3,300	56.8%	1,873.28	(1,048.28)	825.00	$ 180.39	$ (96.00)	$ 84 39	$ 278,487.00	$ 148.66	$ 64.27	$ 53,032.75	$ 120,395.71
4007	Maintenance of Traffic Foremen (Minimum $12 Per Hour)	HR	25,100	58.3%	14,635.25	(12,125.25)	2,510.00	$ 48.63	$ (8.00)	$ 40 63	$ 1,019,813.00	$ 69.68	$ 29.05	$ 72,915.50	$ 425,154.01
4008	Maintenance of Traffic Laborer (Minimum $12 Per Hour)	HR	32,400	56.8%	18,399.50	(13,539.50)	4,860.00	$ 22.00	$ -	$ 22.00	$ 712,800.00	$ 38.74	$ 16.74	$ 81,358.80	$ 308,007.63
4011	Bucket Truck 40 FT. Reach (Minimum $80 Per Day)	UD	1,750	61.3%	1,072.63	(635.13)	437.50	$ 205.29	$ (96.00)	$ 109.29	$ 191,257.50	$ 178.31	$ 69.02	$ 30,196.25	$ 74,037.92
4012	Flatbed Truck12 FT.-15FT	UO	1,500	55.0%	824.77	(449.77)	375.00	$ 128.61	$ (80.00)	$ 48 61	$ 72,915.00	$ 88.41	$ 39.80	$ 14,925.00	$ 32,825.95
4013	Pick Up Truck (Minimum $20 Per Day)	UO	350	6.8%	23.89	-	23.89	$ 106.96	$ (64 00)	$ 42 96	$ 15,036.00	$ 629.38	$ 586.42	$ 14,009.57	$ 14,009.57
4015	Underbridge Inspection Crane 40 FT Reach (Minimum $300 Per Day)	UO	300	56.3%	168.99	(93.99)	75.00	$ 916.89	$ (192.00)	$ 724 89	$ 217,467.00	$ 1,286.86	$ 561.97	$ 42,147.75	$ 94,967.31

			$ 422,619.72		$ 1,194,101.78
$ 25,622.88	Overhead	6.06% [5]	$ 72,362.57	Overhead	6.06% [5]
$ 44,884.88	Profit	9.96% [6]	$ 126,139.85	Profit	9.96% [6]
$ 493,107.48	SUBTOTAL DUE		$ 1,392,604.20	SUBTOTAL DUE	

Item #	Description	Unit	A Original Contract Quantity	B Percent of Original Contract Quantity Actually Reimbursed (C / A)	C Actual Quantity Reimbursed at Original Unit Cost	D Actual Quantities Performed But Not Requesting Reimbursement[1]	E Actual Quantities for Net Incurred & Unreimbursed Cost (C + D)	F Original Unit Cost	G Avoided Unit Cost (Fuel)	H Original Unit Cost less Avoided Cost (F + G)	I Actual Costs Incurred less Avoided Cost (H * A)	J Adjusted Unit Cost (I / C)	K Unit Cost Increase (J - H)	L Net Incurred & Unreimbursed Cost (E * K)	N Total Incurred & Unreimbursed Cost (C * K)
4001	OT for MOT Foreman[2]	EA	50,000	12.5%	6,237.00	-	6,237.00	$ 1.00	$ -	$ 1.00	$ 6,237.00	$ 1.00	$ -	$ -	$ -
4002	OT for MOT Laborer[2]	EA	70,000	2.9%	2,000.00	-	2,000.00	$ 1.00	$ -	$ 1.00	$ 2,000.00	$ 1.00	$ -	$ -	$ -
4003	OT for Snooper Operator[2]	EA	50,000	2.6%	1,320.00	-	1,320.00	$ 1.00	$ -	$ 1.00	$ 1,320.00	$ 1.00	$ -	$ -	$ -
4004	OT for Vehicle Operator[2]	EA	50,000	6.5%	3,243.75	-	3,243.75	$ 1.00	$ -	$ 1.00	$ 3,243.75	$ 1.00	$ -	$ -	$ -
4005	Specialized Equipment[2]	EA	250,000	8.5%	21,152.06	-	21,152.06	$ 1.00	$ -	$ 1.00	$ 21,152.06	$ 1.00	$ -	$ -	$ -
4006	Travel Expense[2]	EA	150,000	57.4%	86,153.04	-	86,153.04	$ 1.00	$ -	$ 1.00	$ 86,153.04	$ 1.00	$ -	$ -	$ -
4009	Snooper Operator[3]	HR	4,800	103.9%	4,986.50	-	4,986.50	$ 34.94	$ -	$ 34.94	$ 174,228.31	$ 34.94	$ -	$ -	$ -
4010	Vehicle Operator[4]	HR	43,700	69.6%	30,050.25	(23,810.25)	6,440.00	$ 27.00	$ -	$ 27.00	$ 1,166,400.00	$ 38.81	$ 11.81	$ 76,056.40	$ 354,893.45
4014	Underbridge Inspection Crane 60 FT Reach (Minimum $500 Per Day)[4]	UO	300	91.5%	274.37	-	274.37	$ 1,000.00	$ -	$ 1,000.00	$ 274,370.00	$ 1,000.00	$ -	$ -	$ -

			$ 76,056.40		$ 354,893.45
$ 4,809.02	Overhead	6.06% [5]	$ 21,506.54	Overhead	6.06% [5]
$ 8,834.28	Profit	9.96% [6]	$ 37,688.44	Profit	9.96% [6]
$ 88,699.70	SUBTOTAL DUE		$ 413,088.43	SUBTOTAL DUE	

$ 581,807.18	TOTAL DUE
$ 1,806,693.63	TOTAL DUE

Footnotes

1. In an effort to mitigate the unreimbursed costs incurred, Brawner was able to reallocate a portion of some items to other contracts. This represents our good faith effort of the approximate quantity reallocation.
2. Allowance items; Quantities and Contract Unit Prices provided by SHA at the time of the bid. No overhead or profit accounted for on these items. SHA reimburses direct costs relating to these.
3. Quantities performed and reimbursed on these items was not less than 75% or greater than 125% of the original quantity and therefore no adjustment warranted or requested.
4. Quantity performed and reimbursed on this item was less than 75% of the original quantity. This was discovered during the reevaluation of the items of work on 3/1/21. Adjustment is now being requested in accordance with GP - 4.04.
5. Overhead percentage is for field overhead only. No home office overhead has been included or being requested.
6. Profit percentage is the anticipated profit included at the time of the bid.

Exhibit 1