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BOARD OF CONTRACT APPEALS  
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SUMMARY ABSTRACT  
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2092	Date of Decision: 4/26/01
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: Under SHA Contract No. F-157-501-771	
Appellant/Respondent: Richard F. Kline, Inc. State Highway Administration	

Decision Summary:

Equitable Adjustment - How Computed - Equipment Costs - When records are available from which actual equipment costs may be ascertained such records shall be used rather than a rate schedule approach.

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BOARD OF CONTRACT APPEALS

MSBCA No.: \_\_\_\_\_

Company (Vendor): \_\_\_\_\_

Subject: \_\_\_\_\_

Decision Summary:

Name: Robert B. Harrison III, Chairman

Phone #: (410) 767-8228

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of )  
Richard F. Kline, Inc. )  
 )  
Under State Highway ) Docket No. MSBCA 2092  
Administration )  
Contract No. F-157-501-771 )  
 )

APPEARANCE FOR APPELLANT: Douglas G. Worrall, Esq.  
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APPEARANCE FOR RESPONDENT: William A. Kahn  
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OPINION BY BOARD MEMBER HARRISON

This appeal involves a claim arising under a contract for construction of the Woodsboro Bypass Project (project).

By interlocutory decision dated April 14, 2000, the Board found that Appellant had proven all the elements required to establish the entitlement portion of its claim for an equitable adjustment under the Contract's Differing Site Condition Clause.<sup>1</sup> The Board made no actual findings concerning quantum, however, and a hearing on quantum was scheduled. The following is the Board's decision on quantum.

Findings of Fact

1. While Richard F. Kline, Inc. (Kline) is the general contractor for the project and Appellant herein, the real party in interest is AccuBid Excavation, Inc. (AccuBid), Appellant's excavation subcontractor.

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<sup>1</sup> The Board's interlocutory decision (Interim Opinion) of April 14, 2000 is incorporated herein by reference. See Richard F. Kline, Inc., MSBCA 2092, 5 MSBCA ¶479(2000).

2. The hearing on quantum commenced on November 8, 2000. At issue was the cost to AccuBid and its demolition contractor, J.E. McKeever, Inc. (McKeever), to deal with and overcome the differing site condition encountered at the Route 550 Cut area in 1995.
3. On the second day of hearing, November 9, 2000, it was disclosed that AccuBid had generated a company wide 1995 equipment operators hours calculation. The Board recessed the hearing to permit the Respondent's accountant Rubino & McGeehin, Chartered (R & M) to review this information. The hearing recommenced on January 3, 2001. During the recess, additional information was also reviewed by R & M.
4. Subject to the various defenses discussed below AccuBid and Respondent (SHA) have stipulated to the following amounts in the R & M audit report. Labor, \$56,454; Labor Overhead, \$22,581; Superintendent, \$21,516; Tandem Dump Truck Costs, \$27,691; Vibrateck, \$17,589; and S.W. Barrick and Maryland Stone Costs, \$3,583. Also subject to the defenses discussed below, SHA does not challenge that \$198,551 represents the total of McKeever's costs at the 550 Cut.
5. The Board finds that the conduct of unit personnel processing the claim herein was not in bad faith or without substantial justification pursuant to Section 15-221.2 of the State Finance and Procurement Article. Accordingly, Appellant's claim for the reasonable costs of filing and pursuing the claim including attorney's fees is denied.
6. The Board accepts the use of a total cost approach in the pricing of AccuBid's claim. However, for reasons explained below, the Board rejects the use of Blue Book to capture equipment costs.
7. It was not until after bids to SHA were opened on October 25, 1994, that Appellant, the apparent low bidder, solicited a

- quotation from AccuBid. AccuBid's first bid was sent to Kline on November 3, 1994 and, subsequently, Kline entered into a subcontract with AccuBid for \$961,273.90, which included \$521,400 for Class 1 Excavation at \$3.90 per cubic yard. Class 1 Excavation included earthwork, the rock excavation at Maryland Route 194, and the rock excavation at the 550 Cut at issue in this appeal.
8. For its bid to SHA Appellant, Kline, relied on a quotation from Explosives Experts, Inc. to excavate the rock, including the rock in the 550 Cut. That quotation was 60 percent higher than the amount that Accubid included in its subsequent bid for the same work.
  9. AccuBid entered into a subcontract with McKeever for \$140,000.

#### Decision

The Board has previously determined in its interlocutory decision of April 14, 2000 that Appellant has proven all the elements required to establish the entitlement portion of its claim for an equitable adjustment. This opinion deals with the quantum aspects of Appellant's claim; particularly use of the total cost method to determine an equitable adjustment. While the Appellant is Kline, the real party in interest is AccuBid. Respondent (SHA) raises many objections to Appellant's request for an equitable adjustment.

Respondent argues that AccuBid should be denied all recovery for two reasons. First, SHA argues that the prime contractor, Kline, did not rely on a quotation from AccuBid when Kline prepared and submitted its bid and, absent such reliance, AccuBid is not entitled to any recovery. Second, SHA argues that the claim employs the total cost method and, since the requirements for proving quantum by the total cost method allegedly have not been met, recovery should be denied for this reason as well.

SHA also argues that AccuBid's claimed costs are overstated and

must be reduced. In particular, SHA argues that:

1. McKeever's costs are not recoverable, and in any event, should be reduced;
2. claim preparation costs are not recoverable;
3. the deduction for AccuBid's bid price must be adjusted to account for (i) the bid that AccuBid actually made to Kline and (ii) the basis of Kline's bid, which was a quotation from a different subcontractor;
4. AccuBid has failed to satisfy its burden of proof that its methodology for equipment costs - use of "Blue Book" hourly rates - is representative of, or even closely approximates, its actual incurred costs. Equipment cost recovery should thus be denied or awarded on the basis of SHA's methodology; and
5. any award should be reduced by \$9,394, the cost incurred by SHA for Rubino & McGeehin's services after the quantum hearing on November 9, 2000.

Respondent's first argument that recovery is barred because Appellant (Kline) did not rely on AccuBid's quotation in submitting its bid to SHA is rejected. Kline submitted the low bid for the Contract on October 25, 1994. Concerning excavation work, Kline included in its bid price an amount of \$220,500 for blasting. This amount was based on a quotation from Explosives Experts, Inc. In addition, Kline included in its bid \$11,288 to break up surface boulders that would not be blasted. At the time that it bid, Kline did not have and had not solicited a quotation from AccuBid for any portion of the excavation work that the Contract required.

The Board finds, however, that Kline's bid prices for blasting and boulder breaking are commercially reasonable and that the fact that the prices were not obtained pre-bid from AccuBid does not defeat the

claim. As discussed further below we do have some concerns about the post bid opening submission of prices. However, we decline to hold as a matter of law that only an entity that submits a pre-bid quote is entitled to participate in the claims process provided under the General Procurement Law and COMAR Title 21.

The Board also finds from the testimony of Mr. Strawsbery, Kline's estimator, that Kline did not anticipate the differing site condition. We also find no merit to Appellant's argument that McKeever's costs are not recoverable because AccuBid's contract with McKeever did not contain a differing site condition clause. Second tier contractors are entitled to the protection afforded by the clause whether included in their contract or not. However, as discussed further below we shall reduce the amount of AccuBid's claim based in part on the difference between the quotation of Explosives Experts and AccuBid's quotation.

SHA next argues that use of the total cost method to prove the claim and alleged failure to meet the requirements that permit use of this method defeat the claim.

As presented to SHA and thereafter to this Board, the quantum aspects of the claim by AccuBid are contained in Accubid's Request for Equitable Adjustment (REA) filed with SHA on or about October 9, 1997.

Kline gave notice to SHA of the differing site condition on April 12, 1995. The claim or REA in the amount of \$525,316 encompassed all costs incurred at the 550 Cut from February 24, 1995 through August 25, 1995, the entire period during which AccuBid excavated there, less the amounts bid for excavation in that area. Thus, the claim or REA employs the total cost method as follows:

AccuBid claims a total of \$525,316, consisting of:

AccuBid's Additional Hands on Costs	\$462,624
Extra Contract Administration	14,936
Subtotal	\$477,560
Overhead & Profit @ 10%	<u>47,756</u>
	\$525,316

AccuBid's "Additional Hands on Costs" of \$462,624 are calculated (in the REA) as follows:

AccuBid's Equipment Costs:	\$379,950
AccuBid's Labor Costs	56,454
AccuBid's Labor Overhead/adj. (40%)	22,581
AccuBid's Superintendent Costs	24,590 <sup>2</sup>
Tandem Dump Truck Costs	34,325 <sup>3</sup>
McKeever Labor & Equipment Costs	198,551
Vibrateck Costs	17,589
S.W. Barrick & Maryland Stone Costs	<u>3,583</u>
TOTAL COST for MD Rt. 550	\$737,623
Deduct Bid Price for Rock/Blast 28,761 cy X \$4.25	<122,234>
Deduct Bid Price for Rock/Move 28,761 cy X \$3.00	< 86,283>
Deduct Bid Price for Soil/Move 33,241 cy X \$2.00	< <u>66,482</u> >
Total Added Costs for Differing Site Conditions	\$462,624

AccuBid did not calculate the cost directly attributable to the differing site condition. Instead, AccuBid used the total cost method for its claim. Thus, as shown above, AccuBid prepared an estimate of all of the costs that it incurred from the date that it started work in the 550 Cut, February 24, 1995, until the date that it completed excavation, August 25, 1995, and, from such total costs, deducted an amount that it described as the bid prices for blasting and moving rock and moving soil.

The total cost method of proving an equitable adjustment is not generally favored. The method assumes that the contractor's costs are prima facie reasonable, that the bid was accurately and reasonably computed, that the contractor (or subcontractor) is not responsible for any increases in cost, and that there is no practical means of proving

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<sup>2</sup> As noted above the parties have stipulated that the Superintendent costs are \$21,516.

<sup>3</sup> As noted above the parties have stipulated that the Tandem Dump Truck costs are \$27,691.



actual costs. Youngdale & Sons Construction Co., Inc. v United States, 27 Fed. Cl. 516, 541 (1993); Neal & Company, Inc. v. United States, 36 Fed. Cl. 600, 638 (1996). SHA argues that AccuBid has not demonstrated that it meets these criteria and therefore is not entitled to recover.

The Board is satisfied that AccuBid could not have established its actual costs directly attributable to the differing site condition. The record reflects that AccuBid did not make any contemporaneous effort to segregate and account for those costs directly attributable to the differing site condition. After the work was completed it attempted to reconstruct all of the labor and equipment used in the 550 Cut from SHA records and from its own daily reports.

No reason was given by AccuBid as to why no effort was made to track costs actually arising from the differing site condition. Mr. Pank, AccuBid's President, testified that AccuBid did not maintain a company-wide job cost accounting system. AccuBid is a small company and was required to devote much time and effort to overcoming the differing site condition. Although AccuBid knew of the differing condition before April 12, 1995 we find that personnel constraints, AccuBid's existing in-place cost accounting system, and the nature of the site condition excuse AccuBid from segregating the additional costs from other costs that had been contemplated in its bid.

Based on the record herein we find AccuBid has satisfied its burden that it was impracticable to prove directly the costs attributable to the differing site condition. We shall approve use of the total cost approach herein to capture the additional costs attributable to the differing site condition. However, as discussed below, where existing records permit a more accurate assessment of costs we shall rely on such records.

We next consider AccuBid's quote (bid) to Appellant which SHA argues was not accurately and reasonably computed, i.e., it was too low.

AccuBid's bid to Kline was based on McKeever's price of \$140,000 for blasting 30,000 cubic yards of rock at the 550 Cut, and 12,500 cubic yards of rock at Route 194. AccuBid included nothing in its price to Kline for breaking oversize rock. On the other hand, Kline's bid to SHA was based on \$220,500 for (all) blasting and on \$11,288 for breaking surface boulders. Thus, AccuBid's quotation was lower than the amount bid by Kline, i.e., the difference between \$220,500 + \$11,288, or \$231,788, and \$140,000, a difference of \$91,788. Kline's bid to SHA for rock excavation was 65 percent greater than AccuBid's quotation for the same work.

AccuBid made efforts at the hearing to justify the amount of its bid. SHA argues that AccuBid's bid to Kline was artificially low and urges that we limit the award of an equitable adjustment to adjust for the \$91,788 difference between Kline's bid to SHA and AccuBid's bid to Kline. While we are concerned about the potential for submission of an artificially low second tier bid when submitted after bid opening when prices have been exposed, we will not increase the amount of AccuBid's quote to Kline to adjust for this potential. Based on this record, we find that AccuBid's quote to Kline represented a good faith commercially reasonable estimate of costs to perform the 550 Cut work assuming that no differing site condition had been encountered. We will, however, deduct \$11,288 from the equitable adjustment to account for the inclusion of such amount for breaking surface boulders in the Kline bid to SHA and the absence of any amount for such work in the AccuBid quote to Kline.

We next focus on the requirement that the contractor (or subcontractor) is not responsible for any increases in cost.

In large measure, the costs claimed by AccuBid are not derived from its books and records. Rather, the costs are an attempted reconstruction of the costs that could be attributed to the excavation work at the 550 Cut, from the day work began, February 24, 1995, until

excavation concluded on August 25, 1995. To use the total cost approach the record must reflect that costs were reasonably incurred on account of the differing condition and/or to overcome such condition.

SHA argues that AccuBid was substantially responsible for the increased costs that were incurred, asserting that both AccuBid and McKeever used inadequate and inefficient methods that were inappropriate to the actual rock problem that they encountered and that they never deviated from these methods. Our review of the record does not suggest inefficiencies in overcoming the differing site condition that requires a denial of the equitable adjustment sought. After the fact expert analysis might suggest that:

1. McKeever continued to shoot in the buffer for too long a period and thus, because the rock was not uncovered, a primary source of information for making blast-to-blast adjustments was not obtained because the rubble was not removed.
2. McKeever used mostly ammonium nitrate, a weak explosive per foot of hole that works well only in weaker rock and that stronger explosives could have been used without causing a ground vibration problem.
3. That McKeever started with hole burden and spacing of four and a half feet and increased these to five feet and that he should have decreased rather than increased hole burden and spacing in order to achieve desired rock fragmentation, and
4. McKeever should have decked blast holes and such decking as was done, was ineffective.

Despite these and certain record keeping deficiencies relative to blasting, the record reflects that McKeever's efforts to deal with and overcome the differing site conditions were appropriate and did not substantially increase the costs that were incurred. It must be remembered that we have found in our opinion on entitlement that a differing site condition existed and that McKeever reasonably believed

that he was blasting a soft rock, not diabase.

Similarly, SHA points to inefficiency in AccuBid's efforts to overcome the differing site condition. The 3,800 ft-lb impact breaker that AccuBid attempted to use in April, 1995 was inadequate. Although a 10,000 ft-lb impact breaker would have been adequate, AccuBid did not bring such a breaker to the project until August, 1995, after most of the boulders had been removed. At that time, this breaker was used successfully to break diabase in place and diabase boulders that had been stockpiled. SHA argues that an adequate impact breaker, timely available, would have allowed rock to have been used in the fill, as planned, and obviated some of the cost for additional fill.

However, like the inefficiencies identified above with respect to McKeever's blasting, AccuBid's efforts in dealing with and overcoming the differing site conditions were reasonable and did not substantially increase the costs that were incurred. Since we deal with an equitable adjustment, one that is fair to both the contractor and the State, we will apply a jury verdict approach. See Hardaway Contractors, Inc., MSBCA 1249, 3 MSBCA ¶227 (1989) and cases cited therein at p. 77. Applying a jury verdict approach, and recognizing that such approach to determine damages, or an equitable adjustment, is not an exact science, we think a fair and reasonable approximation of damages is yielded if the request for equitable adjustment herein is reduced by 5% to account for any inefficiencies.

AccuBid seek to recover \$12,776 expended by T. A. McMullen Consultants, Inc. to prepare the Request for Equitable Adjustment (REA). The REA was prepared on September 29, 1997 and thereafter submitted to SHA by AccuBid after AccuBid's work for Kline under the Contract had been completed. Nothing in the record indicates any contemporaneous benefit to the project. Rather, like the costs at issue in Correctional Medical Services, Inc., MSBCA 1822 et al., 5 MSBCA ¶411(1996) the consultant costs were incurred "as a necessary

part of the process Appellant was required to undertake to secure the jurisdiction of this Board. . .” Id. at p. 19. This Board has found that Section 15-221.2 of the State Finance and Procurement Article providing for certain costs is not implicated. See Finding of Fact No. 5. Thus there may be no recovery for preparation of the REA. See also COMAR 21.09.01.19.

We return now to the principle issue which is use of the total cost approach. While the Board will permit use of a total cost method for recovery of an equitable adjustment herein, AccuBid’s bid price must be adjusted for its actual bid to Kline and for the costs on which Kline relied for its bid to SHA.

In the REA, AccuBid deducted from its total cost for work at the 550 Cut the following amounts:

Rock/Blast	28,761 cubic yards at \$4.25	\$122,234
Rock/Move	28,761 cubic yards at \$3.00	<u>86,283</u>
		\$208,517

The quantity of 28,761 cubic yards of rock is the quantity on AccuBid’s takeoff. However, it is not the quantity that AccuBid used to derive its unit price of \$3.90 per cubic yard to Kline for Class 1 Excavation.

To price blasting and moving rock, AccuBid used a quantity of 42,500 cubic yards (at \$4.25 for blasting and \$3.00 for moving). This quantity consisted of 30,000 cubic yards at the 550 Cut and 12,500 cubic yards at Route 194. Thus, AccuBid did not use its take-off quantity of 28,761 cubic yards for the 550 Cut but arrived at its bid price to Kline by including an additional 1,239 cubic yard contingency for the 550 Cut.

Since AccuBid based its bid to Kline for 550 Cut work on 30,000 cubic yards, the portion of its bid allocable to the claim is:

Rock/Blast	30,000 cubic yards at \$4.25	\$127,500
Rock/Move	30,000 cubic yards at \$3.00	<u>90,000</u>

\$217,500

AccuBid's bid price to Kline for these items was not \$208,517, as stated in the REA, but was \$217,500. The bid price set forth in the REA therefore is understated by \$8,983 and we will adjust the amount of the equitable adjustment accordingly.

As indicated above we will not adjust the amount of the equitable adjustment to reflect the excavation prices upon which Kline based its bid to SHA. As noted above Kline's bid to SHA was based on \$220,500 for blasting and \$11,288 for breaking surface boulders, a total of \$231,788 for the excavation work. AccuBid's post bid opening price to Kline for excavation was \$140,000 (blasting only), a difference of \$91,788. We have found that Kline's bid to SHA was commercially reasonable and have articulated our concern that AccuBid's post bid opening quotation to Kline may be artificially low. Despite our concern, we shall use AccuBid's bid to Kline as the appropriate bid amount and will not deduct from AccuBid's total cost as set forth in the REA the \$91,778 difference between the Kline bid to SHA and the AccuBid post bid opening quote to Kline except for the \$11,288 amount for breaking surface boulders.

Perhaps the most troubling aspect of the REA is the \$370,950 pricing of additional equipment costs. We shall further reduce Appellant's claim based on our determination that AccuBid has failed to satisfy its burden of proof that its methodology for determining equipment costs fairly approximates actual costs.

AccuBid calculated its claimed equipment costs of \$379,950 using Blue Book Rental Rate hourly rates for ownership and operating costs applied to the hours worked, as presented in the REA, for each piece of equipment. No claim was made for idle equipment. The asserted justification for using Blue Book Rental Rate hourly rates was that AccuBid did not maintain internal rates for bid or cost purposes, that

it did not charge equipment costs to each project, that it maintained no equipment utilization records, and that it did not maintain any job cost reports in 1995.

However, AccuBid's methodology will not be permitted because a fair approximation of equipment costs actually incurred can be derived from AccuBid's books and records.

This Board has followed the general principle that a contractor entitled to an equitable adjustment should recover the reasonable cost of performing the work as changed (less the reasonable cost of performing as originally required). Granite Construction Co., MDOT 1014, 1 MSBCA ¶66 at p. 33(1983). The contractor has the burden of proving the increase in its costs, i.e., that the changed circumstances attributable to the differing site condition caused an increase in costs above the costs reasonably anticipated. Hardaway Constructors, Inc., MSBCA 1249, 3 MSBCA ¶227 at pp. 72-73(1989). Reasonable cost is not a "universal, objective determination of what the cost would have been to other contractors at large," Granite Construction at p 34, citing Bruce Construction Corp et al. v United States, 163 Ct. Cl. 97, 101, 324 F.2d 516, 519 (1963). Rather, reasonable costs "must be viewed in the light of a particular contractor's costs." Id. at 101, 324 F.2d at 518. It is for this reason that historical cost, i.e., the actual cost incurred by the contractor seeking the adjustment, is presumed reasonable. Bruce Construction Corp., at 101, 324 F.2d at 519. Generally, then, the goal is to determine the actual cost impact on the contractor or to approximate the contractor's actual costs. Fruin-Colnon Corp. and Horn Construction Co., Inc., MSBCA 1025, 2 MSBCA ¶165 at p. 83(1987); Dick Corp & Sofis Co., Inc., MSBCA 1472, 4 MSBCA ¶350 at pp. 5-6(1994).

AccuBid is not a small business pursuant to COMAR 21.01.02.01(8). At the time the REA was filed AccuBid employed over 100 persons and had an annual volume of work exceeding approximately \$10,000,000.00.

McKeever's annual gross income was in the 2-3 million dollar range and we assume it had fewer employees than AccuBid. Nevertheless, neither AccuBid nor McKeever are large companies. Whether or not they are small companies we believe that what we said in Dick Corp. where we acknowledged the risk of undervaluing additional costs by a small contractor to be applicable to both companies. In Dick Corp. we noted:

Sofis Co. [co-appellant] is a small company that does not have a sophisticated accounting system, such that it is difficult to capture certain indirect equipment costs that would be necessary to determine actual cost... This is a common situation for entities the size of Sofis Co...., and where, as here, a sophisticated accounting system is absent, and detailed fixed asset records and asset utilization records are unavailable, job costs are likely to be understated... In these circumstances, in order to reliably ascertain equipment costs, it is acceptable to use a rate schedule approach, like Sofis Co. did when it used the Blue Book ... to compute its claim for equitable adjustment.... Dick Corp., at p 6 (*transcript citations omitted*).

Herein the record reflects that both AccuBid and McKeever are entities that do not have sophisticated cost-tracking systems.

However, AccuBid's use of the Rental Rate Blue Book based on this record is not appropriate.

SHA's response to AccuBid's REA was developed by R&M. Three different methods of approximating AccuBid's actual equipment costs for the differing site condition were used. Each of these three methods use actual cost information derived from AccuBid's books and records.

The first method was based upon the limited company-wide information for 1995 made available by AccuBid prior to November 8, 2000, the first quantum hearing day.

The second method was based on the same company-wide information available before November 8 but takes into account the company-wide 1995 equipment operator hours calculation first disclosed on the second quantum hearing day, November 9, 2000.



Between November 9 and the resumption of the quantum hearing on January 3, 2001, during R&M's review of AccuBid's equipment operator hour calculation, additional project-specific cost information was presented that allowed R&M to develop the third method. The record reflects that this third method permits a reasonable determination of the equipment costs actually incurred by AccuBid for its work at the 550 Cut. Because this method is more accurate than Blue Book it is the method that the Board will adopt relative to the equipment costs portion of the equitable adjustment herein.<sup>4</sup>

This is the best and most accurate method, because it is based solely on AccuBid's project costs for the Woodsboro Bypass Project, and is not dependent on the generic assessment of costs that Blue Book is predicated upon. Starting with a total job cost of \$1,068,400 for the Woodsboro Bypass Project as set forth in AccuBid's 1995 financial statement, R&M eliminated total job direct costs (*i.e.*, all non-labor and non-equipment costs) of \$310,683 found on AccuBid's 1995 Job Costs by Job for 1995 report; total job direct costs of \$225,463 from AccuBid's 1995 Time Slip Job Detail for 1995 report and \$90,185 job cost labor burden at the 40 percent rate used by AccuBid in its REA. The result of this subtraction is the \$442,069 that R&M derived from AccuBid's books and records for AccuBid's total equipment costs for the Woodsboro ByPass Project.

Next, the total project equipment cost of \$442,069 was allocated between the equipment usage included in the REA and the equipment usage

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<sup>4</sup> AccuBid's 1995 financial statement, which contains the amount for total job cost, and AccuBid's payroll burden rate were available to R&M before the hearing on November 8 and 9, 2000. The additional records that made this best and most accurate equipment cost estimate possible - AccuBid's 1995 Job Cost By Job and its Time Slip Detail reports - were not examined before that hearing, but were subsequently examined because of SHA's desire to verify AccuBid's calculation of its 1995 equipment operator hours.

on the remainder of the Woodsboro project. The total equipment hours claimed in the REA is 4,059.25. The total equipment hours for the project, based on equipment operator hours charged to the project, as recorded in AccuBid's weekly certified payrolls, is 13,541.75. R&M arrived at a total equipment cost per hour for the project by dividing the project equipment cost of \$442,069 by the total equipment operator hours, 13,541.75, yielding an equipment cost per hour of \$32.64. Then R&M allocated equipment costs to the REA by multiplying this \$32.64 equipment cost per hour by 4,059.25, the total hours claimed in the REA. The result, \$132,514, is the amount that this Board will allow for AccuBid's equipment costs.

The lack of a detailed job cost accounting system and of internal equipment rates does not present an acceptable basis for recovery of equipment costs on the basis of Blue Book. The SHA has demonstrated that it is practicable to derive fair and reasonable actual equipment costs for the 550 Cut. Therefore, no proxy such as Blue Book will be allowed. Instead of the \$379,950 Blue Book calculation included in the REA, AccuBid will only be allowed \$132,514 for its equipment costs as most reflective of its actual costs.

Finally, SHA argues that any equitable adjustment must be adjusted for certain consultant or expert witness fees incurred by SHA in connection with this appeal. SHA has an obligation to pay R&M the amount of \$9,394 for services rendered after the November 9, 2000 hearing and argues that any award to AccuBid should be reduced by that amount. According to SHA, these services were made necessary because of AccuBid's disclosure at the November 9 hearing of its compilation of 1995 equipment operator hours.

While we find the R&M fees reasonable the record does not permit this Board to find that the post November 9, 2000 efforts by R&M were necessitated by Appellant's improper failure to disclose or make all relevant information available on a timely basis. Accordingly, based on

this record, the Board will not reduce Appellant's equitable adjustment for the R&M fees.

In summary we find Appellant entitled to an equitable adjustment as follows:

AccuBid		
Equipment		\$ 132,514
Labor		56,454
Labor Overhead		22,581
Superintendent		21,516
Tandem Dump Truck Costs		27,691
McKeever Labor and Equipment Costs		198,551
Vibrateck Costs		17,589
S. W. Barrick and Maryland Stone Costs		<u>3,583</u>
Total Cost		\$ 480,479
Less 5% inefficiency deduction discussed at pp 8 - 10 <u>supra</u>		<u>24,024</u> \$ 456,455
Less		
Rock/Blast Bid (pp 10 - 11 <u>supra</u> )	127,500	
Rock/Move Bid (pp 10 - 11 <u>supra</u> )	90,000	
Soil/Move (REA)	66,482	
Breaking Surface Boulders	<u>11,288</u>	<u>          </u>
		(295,270)
Total Cost Less Bid		\$ 161,185
Add Overhead and Profit at 15% <sup>5</sup>		<u>24,178</u>
Total Equitable Adjustment		\$ 185,363

Pre-decision interest pursuant to Section 15-222 State Finance and Procurement Article is awarded commencing 180 days following the date the contract claim (REA) was received by SHA. The REA was received on or about October 9, 1997. Thus, pre-decision interest shall commence to run from April 9, 1998 until the date of this decision.

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<sup>5</sup> The Board is satisfied that the 10% component for overhead and profit in the REA was, as asserted by AccuBid, an error and that a 15% rate as presently requested is appropriate.

The notice of the differing site condition was given SHA on April 12, 1995. In the ensuing almost 2 ½ years preceding the filing of the REA, SHA could have determined, as did the Board, that Appellant encountered a differing site condition. After receiving the REA, six months should have been sufficient time for SHA to have realized that Appellant had encountered a compensable differing site condition and that the State faced substantial financial exposure. As the Board previously stated in determining when interest shall begin to run, it will attempt to ascertain when the State was in an adequate position to know the details of the claims and the extent of the equitable adjustment being requested, and thereafter allow a reasonable period for review and payment by the State. See Cam Construction Company of Maryland, Inc., MSBCA 1926, 5 MSBCA ¶394(1996) at p. 8. Use of the total cost method in the REA presented difficulties as discussed in this opinion concerning exactly what costs were involved. However, an approximation of the costs as found by the Board herein could have been made by SHA and payment affected within six months of receipt of the REA. It should also be recalled that pre-decision interest is awarded to make a contractor whole and not as a punitive measure. Based on the entire record as developed in this appeal (entitlement and quantum) we believe that it is fair and reasonable to award pre-decision interest from the date set forth above not to punish the Respondent, but in order to make the Appellant whole.

In summary, we approve the award of an equitable adjustment of \$185,363 with pre-decision interest at the applicable rate of interest on judgments from April 9, 1998 until the date of this decision as set forth below. We remand this matter to SHA for appropriate action.

Post-decision interest shall run from the date of this decision as set forth below until paid.

So ORDERED this    day of    2001.

Dated:

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Robert B. Harrison III  
Board Member

I concur:

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Randolph B. Rosencrantz  
Chairman

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 2092, appeal of Richard F. Kline, Inc. under Contract No. F-157-501-771.

Dated:

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Mary F. Priscilla  
Recorder