SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2111	Date of Decision: 5/16/00
Appeal Type: [ ] Bid Protest	[X] Contract Claim
Procurement Identification: SHA Contract No. W-890-501-070	
Appellant/Respondent: Williams Construction Co., Inc. State Highway Administration	

Decision Summary:

Equitable Adjustment - Attorney's Fees - The provisions of Section 15-221.2 of the State Finance and Procurement Article places the burden upon the contractor to show that the conduct of unit personnel in processing the claim under a contract for construction was in bad faith or without substantial justification.

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of WILLIAMS CONSTRUCTION COMPANY, INC.	)	
Under State Highway Administration SHA Contract No. AW-890-501-070	)	**Docket No. MSBCA 2111**

APPEARANCE FOR APPELLANT: **Thomas A. Baker, Esq.**
Baltimore, MD

APPEARANCE FOR RESPONDENT: **Dana A. Reed**
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment relating to payment for Type II borrow.

Findings of Fact

1. Appellant and the State Highway Administration (SHA), entered into Contract AW-890-501-070 to construct Maryland Route 100 between I-95 and a point just West of Maryland Route 295 (Route 100 project or project).
2. The Contract contained as set forth on line 2007 of the bid an estimated quantity of 260,000 cubic yards of Borrow Excavation Type II or "Type II borrow," a type of earth or dirt that comes from, i.e. is borrowed, from off-site. Uses for the Type II dirt included capping above the embankments for extra drainage support and as Class 1A backfill in low-lying wetland areas. Appellant bid one cent per cubic yard for bid line item 2007.
3. During Contract performance, SHA determined that it would enlarge the project by adding an additional interchange to accommodate the

construction of a station for the MARC train line at Dorsey Road adjacent to the project. The work, iden-tified as part of Redline Revisions 3 and 4 in the Contract documents, encompassed Type II earth work. This interchange work constituted a change to Appellant's Contract and, as discussed further below, Appellant and SHA agreed that Appellant would furnish Type II borrow for the MARC station interchange construction at the rate of $8.50 per cubic yard.

4. To compensate Appellant for the MARC station interchange work, SHA issued Extra Work Orders (EWO's) 11 and 12 which added new pay items 2019-A and 2019-B for an estimated quantity of 12,000 cubic yards (10,000 under EW0 11, 2,000 under EW0 12) of special fill of borrow Type II material at $8.50 per cubic yard. Pursuant to these EWO's, it was contemplated that Appellant would obtain the Type II dirt from a nearby project being performed by another contractor known as the Haverhill project and that Appellant would furnish this Type II borrow material from the Haverhill project at $8.50 per cubic yard. However, Appellant and SHA later agreed to Appellant's request that Appellant would furnish Type II material dug up from on-site rather than from off-site, and Appellant furnished 12,028 cubic yards of Type II material from the Route 100 project limits which was incorporated into the MARC station interchange. SHA paid Appellant for this Type II dirt that came from the Route 100 project limits based on a price of $2.35 per cubic yard which was the Appellant's Contract bid price for Class I excavation for the Route 100 project under bid line item 2002. The interchange work was completed in the late 1993 or early 1994 time period.

5. Over a year and a half later, in September, 1995, Appellant asked SHA's project representative to pay for 12,000 cubic yards of Type

II borrow at the $8.50 per cubic yard price set forth in EWO's 11 and 12. At that time Appellant had a source of Type II borrow on its I-97 job, another highway construction contract that it had entered into with SHA.

6. In the fall of 1995, there was a need for Type II borrow to be used on the project and SHA allowed Appellant to bring in 1,827 cubic yards of Type II borrow and incorporate it into the project as capping or Class 1A backfill. Accordingly, SHA paid Appellant $8.50 a cubic yard under pay item 2019-A (EWO 11) for this 1,827 cubic yards of Type II borrow. Ultimately, agreement was reached that Appellant would be paid $8.50 per cubic yard under pay items 2019-A and 2019-B for up to 12,000 cubic yards of Type II borrow, when and if it was needed and incorporated into the project. SHA's letter to Appellant dated October 6, 1995 from the Acting District Engineer reflects this agreement.

7. Respondent observes that nothing in the letter of October 6, 1995 indicates that the Type II borrow is reserved for any particular purpose other than the general use to which Type II borrow can be put under an SHA project. Thus, Respondent argues that the intent of the parties was that SHA would pay $8.50 per cubic yard for up to 12,000 cubic yards of Type II material used in any yet to be determined extra work and then only pay one penny per cubic yard for the replacement Type II borrow (up to 12,000 cubic yards) necessary to do basic Contract work such as capping and backfill. However, the Board finds that it was the intent of the parties that the use intended for the 12,000 cubic yards of dirt in dispute herein was to replace the Type II material used in the MARC station interchange, for future use as capping above the embankments and as Class 1A backfill for low-lying areas within the project limits. Thus, the Appellant would be paid $8.50 per

cubic yard up to a total of 12,000 cubic yards so long as such Type II material was used as backfill or capping; i.e. basic project work exclusive of extra work. As discussed below, the parties did not intend to include as a use of such Type II borrow material the performance of extra work such as slope stabilization for deteriorating slopes (or ramps) notwithstanding that such slopes were within the project limits. The agreement of the parties, as reflected in the October 6, 1995 agreement, was that Appellant would be paid $8.50 per cubic yard for any Type II borrow that was necessary to complete basic anticipated project work such as capping and backfill up to the amount of the 12,000 cubic yards that had been removed from the project limits to construct the interchange.

8. Respondent further asserts that the October 6, 1995 letter also provides that a deduction for the money already paid to Appellant for the Class 1 excavation (the $2.35 per cubic yard paid for the MARC station interchange work) would be made from the $8.50 price and that such a deduction was never made. The Board reads the language of the October 6, 1995 letter as only providing that the $8.50 price was to be substituted for the $2.35 price on the Engineer's Estimate. However, we make no finding on this issue of a possible deduction of $2.35 from the $8.50 price.

9. Contemporaneously with and in conformance to this agreement of October 6, 1995, Appellant began to stockpile dirt for future use on the project and was paid for such stockpiled dirt under pay item 2019-A. SHA was permitting Appellant to stockpile the Type II dirt and get paid for it at $8.50 per cubic yard as an accommodation to Appellant. The project had no immediate need for Type II borrow, beyond the aforementioned 1,827 cubic yards. However, the dirt from Appellant's I-97 project would not have

been available later.

10. In February, 1996, Appellant again approached SHA about getting paid $8.50 a cubic yard for 12,000 cubic yards of Type II borrow. At this point approximately 5700 cubic yards of Type II borrow had been brought on site. SHA agreed to let Appellant bring the rest of the 12,000 cubic yards of Type II borrow onto the project at that time and stockpile it to be used as needed on the project. This understanding was stated in a letter of February 7, 1996 from SHA's Assistant Project Engineer to Appellant and provides for payment under pay items 2019-A and 2019-B as appropriate for material incorporated into the project up to the previously agreed (12,000 cubic yards) quantity as reflected in the October 6, 1995 letter signed by the Acting District Engineer.

11. During the course of the Maryland Route 100 project work, as a result of unexpected soil moisture, slopes constructed by Appellant began to deteriorate in the winter of 1995/1996. SHA ordered Appellant to repair the slopes. Appellant was not responsible for the slope deterioration. This slope repair work was, thus, extra work and the parties originally agreed that Appellant would be paid for all slope restoration work on a force account basis. Appellant furnished somewhere in the approximate range of between 23,000 and 26,000 cubic yards of Type II material for the slope restoration. After the work commenced and at the direction of SHA, some 12,000 cubic yards of the material was provided from off-site or from the on-site stockpile for which Appellant was paid under EWO's 11 and 12 at $8.50 per cubic yard. The remainder came from off-site and was paid on a force account basis under Extra Work Order #33. For the <u>replacement</u> of the 12,000 cubic yards used in slope restoration that had been stockpiled on the project or brought from an off-site source and

paid at $8.50 per cubic yard under EWO's 11 and 12, SHA's position as reflected in the Procurement Officer's final decision (letter of December 9, 1998) is that SHA agreed to pay only the "trucking" costs on a force account basis. SHA subsequently paid Appellant $38,896.11 for the transportation (trucking) costs pursuant to Extra Work Order #39. The cost of the replacement dirt itself according to SHA was to be paid for at only one penny per cubic yard pursuant to Appellant's one penny bid for Type II borrow as set forth in Appellant's bid for Item 2007.

12. SHA, thus, refused Appellant's request for payment for the cost of the 12,000 cubic yards of Type II borrow replacement dirt at the force account rate[1] and as noted determined that Appellant was only entitled to payment at the rate of 1 cent per cubic yard for the 12,000 cubic yards of Type II borrow replacement material pursuant to Appellant's one penny bid for Type II borrow as set forth in Appellant's bid for bid line item 2007. However, as also noted, SHA did agree to pay (and paid) transportation costs under EWO #39 for the replacement dirt.

13. The Board determines that the dispute over payment for the 12,000 cubic yards of the replacement Type II material did not arise in the context of when Appellant "knew or should have known" for purposes of Section 15-219(a) of the State Finance and Procurement Article, Contract GP-5.14 and COMAR 21.10.04.02, until SHA's letter from the District Engineer dated February 2, 1998 rejecting Appellant's assessment that it was entitled to compensation as set forth in Appellant's letter to SHA of January 5, 1998. Appellant timely appealed the District Engineer's denial to the Chief

[1] As discussed below some of the 12,000 cubic yards of off-site borrow stockpiled Type II material was already placed in the project as capping for embankments or Class 1A backfill before SHA directed use of stockpiled material for slope restoration.

Engineer (the Procurement Officer) by letter dated February 18, 1998. The Chief Engineer denied the claim by letter dated December 9, 1998. This determination led to the filing with this Board of a notice of appeal by Appellant on December 28, 1998.

14. The Board finds that from dialogue at a meeting of the parties on May 8, 1996, Appellant formed the reasonable belief that it was entitled to payment for its transportation cost to bring 12,000 cubic yards of Type II material on site from an off-site source for use in Route 100 project work to replace 12,000 cubic yards of Type II material used in the slope restoration work and also receive payment for the actual cost of the replacement dirt itself at the force account rate rather than at the one penny per cubic yard bid price reflected in its bid for Item 2007.

15. The record reflects that the actual cost under force account of the 12,000 cubic yards of Type II dirt brought to the site to replace the Type II dirt that went into slope restoration was $4.60 per cubic yard. The record further reflects that this 12,000 cubic yards of Type II borrow replacement dirt was incorporated into the Route 100 project as capping for embankment and as Class 1A backfill.

Decision

The resolution of the dispute herein turns on whether SHA agreed to the following. First, it would pay Appellant $8.50 per cubic yard for up to 12,000 cubic yards of Type II borrow used in the extra work involving the MARC station interchange. Second, SHA and Appellant agreed that the Type II dirt necessary for the MARC station interchange could be obtained and was obtained from the Route 100 project "template" or limits. Third, SHA then agreed to pay Appellant $8.50 per

cubic yard, under pay items established for the MARC station interchange, for stockpiling on the Route 100 project Type II dirt obtained from off-site at a project Appellant was working on at Route I-97 in an amount equal to the amount of Type II dirt that went into the MARC station interchange, provided such stockpile dirt eventually went into the Route 100 project as capping or backfill. Fourth, after directing use of the stockpile dirt for slope restoration work, SHA continued to agree, consistent with its October 6, 1995 letter from the Acting District Engineer, that Type II material up to a total of 12,000 cubic yards from an off-site source would be paid as such dirt was used somewhere in the Route 100 Project for capping or backfill. However, payment for such Type II borrow would be at the force account rate established (paid) for use of Type II material in the slope restoration work rather than at the rate of $8.50 per cubic yard as set forth in the October 6, 1995 agreement.[2]

From our review of the written record and observation of witnesses who testified we find as follows.

Appellant used Type II dirt obtained from within the project limits for the MARC station interchange and was paid $2.35 per cubic yard for such dirt under its bid price for Class I excavation. Appellant later replaced some of this Type II dirt that came from the project limits and was used in the interchange work with Type II dirt that came from off-site. The dirt that came from off-site was then stockpiled to be used for capping and Class 1A backfill dirt requirements of the Route 100 project. However, before the stockpiled dirt was completely used for these anticipated Route 100 purposes, it was

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[2] SHA paid Appellant $8.50 per cubic yard for under one half (10,200) of the total cubic yards of Type II dirt used in the slope restoration pursuant to pay items 2019-A and 2019-B and SHA paid for the remaining cubic yards of Type II dirt used in the slope restoration work on a force account basis.

used at SHA's direction in the slope restoration work. Both the MARC station interchange work and slope restoration work were extra work. The use of Type II borrow in the slope restoration work was not the kind of use for Type II borrow contemplated by the October 6, 1995 letter from the Acting District Engineer.

Pursuant to the October 6, 1995 letter SHA agreed to pay Appellant $8.50 per cubic yard for up to 12,000 cubic yards of Type II borrow so long as it was incorporated into the Route 100 project. While the October 6, 1995 letter does not restrict the uses of Type II borrow to capping and Class 1A backfill requirements we find that such restricted use was intended. The slopes had not failed, thus requiring restoration work, at the time the October 6, 1995 letter was issued. The use of Type II borrow in slope restoration constituted a use for extra work and was not one of the uses of Type II borrow contemplated by the agreement of the parties.

We further find that the Appellant reasonably concluded, based on the conduct of the parties, SHA's letter of October 6, 1995, EWO's 11 and 12 and their dialogue at the May 8, 1996 meeting, that the parties had agreed that Appellant would be paid its cost per cubic yard at the force account rate for the Type II dirt brought from off-site to replace the Type II stockpiled dirt that was used in the slope restoration work up to a total of 12,000 cubic yards so long as this replacement Type II dirt was eventually used in the Route 100 project as capping for embankments and Class 1A backfill. The Appellant apparently also agreed to a modification of the price from $8.50 per cubic yard as set forth in the October 6, 1995 agreement to a price set by the force account provisions of the Contract.

Respondent points out that there is no written agreement signed by an authorized SHA official (in this case the District Engineer or Acting District Engineer) that specifically encompasses the payment of

the Contract force account rate for the Type II borrow replacement dirt.[3]

We do not interpret the decision of the Court of Appeals in ARA Heath Services, Inc. v. Dept. of Public Safety and Correctional Services, 344 Md. 85(1996), cited by Respondent, as precluding this Board from awarding an equitable adjustment whenever the record reflects the absence of a written agreement specifying the State's assent through authorized officials to payment of the disputed amount. It appears to the Board that if such authorized written agreement existed there would be no dispute. Here there are written agreements executed by officials with proper authority. The dispute is over the reach of the understanding reflected in these agreements. We appreciate that the Appellant benefitted from these agreements and that in hindsight SHA believes that it did not enter into the best bargain for the extra work involved in the MARC station interchange and the slope restoration. However, the State did agree to such extra compensation for the replacement dirt in dispute based on the extra work events.

The Board lacking equitable powers operates under the good faith assumption that a final decision of the Board (either through absence of judicial review or by judicial affirmance) will result in the agency executing the necessary documents and securing approval from all necessary persons and entities to effect an equitable adjustment. We would expect such a result in this appeal should this decision become final. We now proceed to examine the extent to which Appellant is entitled to an equitable adjustment.

The record reflects that Appellant brought on to the site and used 1,827 cubic yards of Type II dirt (out of the 12,000 cubic yards for

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[3] I.e., the replacement Type II borrow for the Type II borrow stockpile dirt that was used in the slope restoration work as such Type II borrow replacement dirt was incorporated into the project as capping for embankments and as Class 1A backfill.

which SHA agreed to pay Appellant at $8.50 per cubic yard) for capping or Class 1A backfill on the Route 100 project prior to SHA's direction to use such material for the slope restoration. Upon such direction the parties agreed that the force account rate for the Type II dirt used in the slope restoration work was $4.60 per cubic yard. This amount is derived as follows. The per cubic yard material cost was $3.65. Sales tax at 5% on this dirt raises the per cubic yard price to $3.83, and a 20% markup raises the price to $4.60. Appellant has been paid one penny for the 12,000 cubic yards in dispute pursuant to line item 2007 of the Route 100 project bid[4] reducing the uncompensated cost of dirt from $4.60 per cubic yard to $4.59 per cubic yard. Thus, Appellant seeks an equitable adjustment of $55,080. The record reflects that Appellant incorporated 12,000 cubic yards of Type II borrow replenishment dirt into the Route 100 project as capping for embankments or Class 1A backfill, uses specified by the Route 100 Contract. However, of the 12,000 cubic yards in dispute, i.e. the replenishment Type II dirt for the Type II dirt that went into the slope restoration, we have noted that Appellant had previously placed as capping for embankments or Class 1A backfill in the Route 100 project 1,827 cubic yards of Type II material that SHA had already paid for at the rate of $8.50 per cubic yard under pay item 2019-A. Appellant may not be paid twice for the same Type II dirt actually used in the project as capping for embankments or as Class 1A backfill. See Williams Construction Company, Inc., MSBCA, 1860, 5 MSBCA ¶405 at p. 4 (1996) rev. on other grounds, Williams Construction Company, Inc. v. State Highway Administration, Ct. Spec. App. No. 999, Sept. Term 1997 (March 27, 1998). Therefore, Appellant is only entitled to an

[4] Appellant has also been paid for its off-site to on-site transportation cost for the 12,000 cubic yards of replenishment dirt under EWO #39 in the amount of $38,896.11.

equitable adjustment of $46,694; i.e. 12,000 cubic yards minus 1,827 cubic yards paid at $8.50 used in the Route 100 project for capping = 10,173 cubic yards to be compensated at $4.59 per cubic yard rate (force account minus one penny) = $46,694.

Appellant seeks costs to include attorney's fees pursuant to Section 15-221.2 of the State Finance and Procurement Article asserting that the conduct of SHA personnel in processing the claim was in bad faith or without substantial justification. Appellant bases that assertion on alleged "feigned" confusion by SHA personnel over the basis for Appellant's claim. However, in order to understand the Appellant's claim and the nature of the dispute it is necessary to look at two discreet events, one involving a completely different project (the MARC station interchange) and the other involving slope restoration on the Route 100 project, events separated in time by approximately two years. We are of the opinion that the provisions of Section 15-221.2 of the State Finance and Procurement Article places upon the contractor the burden to prove that the conduct of unit personnel in processing the claim was in bad faith or without substantial justification. We find that Appellant has not met its burden to show that confusion was "feigned" by SHA personnel concerning what was agreed to by the parties, based on this record.

Appellant also seeks pre-decision interest. Section 15-222, State Finance and Procurement Article provides that pre-decision interest may accrue on a claim from a date (after the Procurement Officer has received the claim) that the Board determines to be fair and reasonable after hearing all the facts. Applying this standard to the record before us we find that the record does not support an award of pre-decision interest until after the hearing of the appeal before the Board, which hearing ended on February 9, 2000. It was not until the evidentiary record closed that the nature and amount of the claim was

made sufficiently clear that SHA personnel should have been able to properly assess its merits. Appellant sought to use on-site Type II material for the MARC station interchange rather than borrow material and accepted payment therefore at the Class I excavation rate of $2.35 per cubic yard rather than the $8.50 per cubic yard rate for Type II borrow set forth in EWO 11 and EWO 12. A year and a half passed before Appellant sought to bring in Type II borrow to the project to replace the material used in the MARC station interchange work. This created certain confusion for which Appellant is partially responsible and required a separate agreement as set forth in the October 6, 1995 letter from SHA to Appellant. The lingering effects of this confusion affected SHA's ability to comprehend that it had agreed in principle to compensate Appellant for replacement of Type II borrow at $8.50 per cubic yard as later changed to the force account rate (provided the material was ultimately incorporated into the project as capping or backfill) for the stockpiled Type II borrow used at SHA's direction in the slope restoration work, which restoration work constituted extra work that was not part of Appellant's original Route 100 project Contract.

As noted in Finding of Fact No. 8, we have made no determination concerning whether the intent of the October 6, 1995 agreement was that $2.35 should be deducted from the $8.50 per cubic yard cost reflected in the letter for the Type II borrow. We assume the parties are aware of the particulars of this matter and whether there is a dispute concerning such payment and any accounting or affirmative State claim issues that may be involved.

Accordingly, the Appellant is awarded an equitable adjustment in the amount of $46,694. Pre-decision interest thereon is to run from February 9, 2000 until the date of this decision. Post-decision interest is to run from the date of this decision until the day on

which the Board's award herein is paid. Pre-and post-decision interest is at the rate of interest on judgements as provided for in Section 11-107(a) of the Courts Article.

The matter is remanded to SHA for appropriate action.

Wherefore, it is ORDERED this day of May, 2000 that the Appellant is awarded an equitable judgement of $46,694 with pre-and post-decision interest as aforesaid and the matter is remanded to SHA for appropriate action.

Dated:

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 2111, appeal of Williams Construction Company, Inc. under State Highway Administration SHA Contract No. AW-890-501-070.

Dated:

Mary F. Priscilla
Recorder