

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

Docket No. 2358	Date of Decision: 12/05/03
Appeal Type: <input type="checkbox"/> Bid Protest	<input checked="" type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Aviation Administration Contract No. MAA-CO-02-011	
Appellant/Respondent: A & S Associates, Inc. Maryland Aviation Administration	

Decision Summary:

Expedited Procedure - Value as Precedent - Since it was issued pursuant to COMAR 21.10.06.12B and C, this decision is without precedential value.

Contract Changes Clause - Change met requirements of Changes Clause of Contract - The change involved in this case constituted a change pursuant to the Changes Clause of the Contract. Appellant's appeal sustained.

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extension. Both are related to Appellant's claim in which Appellant asserts that MAA changed the electrical conduit depth from 18 inches, which depth it based its bid on, to 24 inches, involving one (1) straight run of approximately 150 feet through the garage parking lot and six (6) straight runs of approximately 25 feet each through vehicular traffic lanes between ticket dispenser islands.

3. The MAA alleges that the subject conduit was required to be installed at a depth of 24 inches. Thus, according to MAA, there was no change, and the Procurement Officer correctly denied the claim. MAA also argues that, even if there had been a change, Appellant's claim for direct costs of \$4,264.80 and four (4) days of non-compensable project performance time is excessive and unsupported.
4. The Contract was put out for bid in November of 2001. A pre-bid conference was held on December 11, 2001. Potential bidders were permitted to submit pre-bid questions. Potential bidders did submit questions, and answers were provided in Addendum No. 3 to the solicitation. During the pre-bid period, no questions were asked by any bidder regarding the depth of the conduit. Bids were opened on January 17, 2002.
5. On or about March 1, 2002, MAA issued a Notice of Recommended Award to Appellant for the Contract. A Notice to Proceed was issued with a start date of September 3, 2002.
6. On September 17, 2002, Appellant, at the suggestion of the MAA construction manager, Parsons Transportation Group, Inc., submitted a Request For Information (RFI) requesting clarification of the electrical conduit depth, observing that "General Note No. 10 on drawing E1.0 requires it to be 18 inches, while pole foundation on drawing E3.0 requires it to be 24 inches."
7. The architect/engineer reply to the RFI was "conduit shall be 24 inches below grade."
8. Sheet E1.0 sets forth electrical general notes and

specifications. Pertinent to the instant appeal are the following notes:

1. All work shall be in accordance with the 1999 edition of the National Electrical Code (NEC).
- ...
10. All conduit shall be buried a minimum of 18" below grade.

Also pertinent are the electrical drawings. Sheet E2.0, the Electrical Site Plan, identifies locations where electrical conduit may be run. Conduit is shown running through the garage parking lot and through six (6) vehicular travel lanes between ticket dispenser islands.

9. Sheet E3.0, Electrical Details, provides a minimum depth of 24 inches for conduit at electrical poles.² These drawings do not specify a conduit depth under the garage parking lot and the travel lanes.
10. The NEC, referenced in Note No. 1 on Sheet E1.0, provides at p. 70-108 various conduit depths based upon location. As set forth in the NEC, where the location is "under streets, highways, roads, alleys, driveways and parking lots," the required depth is 24 inches for all types of wiring.
11. In addition to the specific reference to the NEC, the Contract obligates the contractor to comply with all applicable codes, and it states:

- L. The Bidder or Contractor shall have made himself/herself familiar with all federal, state, local, and municipal laws, ordinances, rules, codes and regulations which in any manner affect those engaged or employed in the work, or the materials or equipment used in or upon the work, or in any way affect the work; and no plea of misunderstanding

²On or about August 2, 2002, MAA issued Document Clarification Letter No. 1 making minor modifications. This was accompanied by Exhibit No. DCL-1A, which also showed conduit depth at mounting poles of 2 feet 0 inches.

will be considered on account of the ignorance thereof. If the Bidder or Contractor shall discover any provision in the plans, specifications, or other Contract Documents which is contrary to, or inconsistent with any such law, ordinance, rule, or regulation, he/she shall immediately report it to the Engineer in writing.

- M. The contractor shall perform all phases of the Contract work in accordance with but not limited to the latest editions of the following codes, standards and regulations:

. . .
7. The National Electrical Code

- 12. Appellant's request for an equitable adjustment and time extension is contained in a letter to the Procurement Officer dated April 17, 2003. The request (claim) was denied by final agency decision dated June 13, 2003, and this appeal followed.

Summary Decision

With respect to entitlement, the single issue before the Board in this expedited appeal is whether the 24-inch depth requirement through the garage parking lot and traffic lanes constitutes a change pursuant to the Changes Clause of the Contract. See COMAR 21.07.02.02. With respect to quantum, the issues are, assuming entitlement, whether Appellant is entitled to compensation of \$4,264.80 and a four (4) calendar day time extension.

Appellant claims that MAA's response to the RFI informing it of the 24-inch depth for electrical conduit constitutes a change to the Contract. In its submission to the Board dated August 12, 2003, Appellant asserts that MAA "required all contractors to install underground electrical conduits at minimum of 18" depth" and that "MAA unilaterally changed this depth requirement to minimum 24".

The 18-inch depth referred to by Appellant is reflected on Sheet E1.0. There, Note No. 10 states "All conduit shall be buried a minimum of 18" below grade." In all circumstances, therefore, the contractor is required to install conduit 18 inches below

grade. However, Note No. 1 states that "All work shall be in accordance with the 1999 edition of the National Electrical Code (NEC)," and the NEC requires a 24-inch depth below grade. Thus the bid documents present an ambiguity in this regard. In order for the Appellant's interpretation to prevail, the answers to two questions need be sought. First, is there patent, i.e. obvious or glaring, ambiguity created by the notes that requires pre-bid inquiry by a contractor, or is the ambiguity latent, thus excusing pre-bid inquiry? See Jackson R. Bell, Inc., MSBCA 1851, 5 MSBCA ¶392 at pp. 7-10 (1996) and cases cited therein. Second, assuming the ambiguity to be latent, is Appellant's interpretation, absent inquiry, reasonable? *Id.*

The work at issue here is one (1) straight run of approximately 150 feet of conduit through a garage parking lot and six (6) straight runs of approximately 25 feet each through the roadway between ticket dispenser islands. This type of work is identified in the NEC in a chart at page 70-108. The NEC chart identifies different applications across five columns, and it has seven rows identifying locations. Conduit is specifically referenced in Column 2. The location applicable here is in the fifth row "Under streets, highways, roads, alleys, driveways and parking lots." For all applications in these locations the required depth is 24 inches.

Note No. 10 calling for 18-inch depth is inconsistent with Note No. 1 wherein the NEC calls for 24-inch depth. There is an ambiguity between the 18-inch requirement of Note No. 10 and the 24-inch requirement for conduit in parking lots set forth in the NEC at page 70-108. What constitutes an obvious ambiguity requiring pre-bid clarification is not always easy to discern. Herein, the ambiguity is not obvious. It is latent, thus excusing the absence of pre-bid inquiry. Nevertheless, the contractor's interpretation of the matter must also be reasonable. Appellant's reading of the bid documents as calling for 18 inches is reasonable. There would be no reason to put the 18-inch depth in

Note No. 10 if a contractor was not to be guided by it rather than by the 24-inch depth requirement found at page 70-108 of the NEC.

Accordingly, the Appellant is entitled to a change for the work involving digging the greater depth. Is the change compensable?

By letter dated November 29, 2002, at a time when it was clear to the parties that the required depth of conduit was 24 inches, Appellant submitted a schedule along with a bar chart update showing a substantial completion date of January 26, 2003. MAA advised Appellant that bar chart schedules would be acceptable, and ultimately MAA granted Appellant extensions to mid March, 2003. Nonetheless, the project was still considered by MAA to be 14 days late. However, as part of the Procurement Officer's decision at issue in the instant appeal, MAA granted Appellant ten (10) days additional time for adverse weather in February, 2003 and assessed four days of liquidated damages.

As set forth in Appellant's request for equitable adjustment (claim) dated April 17, 2003, Appellant requests quantum of \$4,264.80. Appellant estimated the cost of hand digging the additional six (6) inches as follows:

Working Foreman: (80 hrs. @ \$25.00) x 50%	\$ 1,000.00
Two Laborers, 80 hrs. @ \$12.00	\$ 1,920.00
	<u>\$ 2,920.00</u>
Misc. Tools	\$ 50.00
	<u>\$ 2,970.00</u>
Fringes @ 20% (\$2,920.00)	\$ 584.00
	<u>\$ 3,554.00</u>
OH & Profit @ 20%	\$ 710.80
Total Cost Estimate	<u>\$ 4,264.80</u>

As described in the initial bar chart schedule submission, the total time planned for all conduit work, including layout of the work, saw cutting and removal of existing surface, excavation,

installation of conduit, backfilling, and replacement of concrete and asphalt was ten (10) work days (two weeks). However, based on the record, the requested four (4) days for the additional six-inch work is reasonable.

Due to the presence of underground utilities, airport traffic and cold temperatures at night, combined with the requirements that all work be done at night and that the area be restored to permit vehicular traffic during the day, the hand digging of approximately 300 feet of straight runs was necessarily time consuming. One (1) calendar day for hand digging of approximately 75 feet of six (6) inches additional depth is reasonable.

The hourly rates, labor distribution and overhead charges set forth above are also reasonable.

Appellant's appeal for additional compensation of \$4,264.80 and a time extension of four (4) calendar days is thus sustained. Pre-decision interest is awarded, pursuant to §15-222 of the *State Finance and Procurement Article*, commencing May 17, 2003, 30 days after the date of Appellant's claim by which time the validity of the claim could have been determined. Post-decision interest shall accrue from the date of this decision.

Wherefore, it is Ordered this _____ day of December, 2003 that the appeal is sustained.

Dated:

Robert B. Harrison III
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 summary decision in MSBCA 2358, appeal of A & S Associates, Inc. under MAA Contract No. MAA-CO-02-011.

Dated:

Michael L. Carnahan
Deputy Recorder