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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. 2409	Date of Decision: 08/24/05
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification: Under SHA Contract No. HA1585177	
Appellant/Respondent: Gray & Son, Inc. State Highway Administration	

Decision Summary:

Contract Interpretation - In interpreting bid documents all provisions will be read together and interpreted as a whole.

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**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of Gray & Son,)
 Inc.)
)
) Docket No. MSBCA 2409
)
Under SHA Contract)
 No. HA1585177)

APPEARANCE FOR APPELLANT: Scott A. Livingston, Esq.
 Lydia B. Hoover, Esq.
 Rifkin, Livingston, Levitan
 & Silver, LLC
 Greenbelt, Maryland

APPEARANCE FOR RESPONDENT: Leight S. Halstad
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OPINION BY CHAIRMAN HARRISON

The Appellant timely appeals the denial of its claim that shoulder patching should be paid for under Pay Item No. 5005, where Appellant submitted a \$42.00 unit price bid, rather than, as contended by the State Highway Administration (SHA), Pay Item No. 5001, where Appellant submitted a one penny unit price bid.

Findings of Fact

1. The above captioned Contract, under which Appellant's claim arises, involves patching, resurfacing and tie-ins on Maryland Route 23 in Harford County.
2. The Special Provisions of the Contract contain a paving legend and typical paving sections.
3. The paving legend states in relevant part:

....

5. 7.5" Hot Mix Asphalt Superpave 19.0 mm - PG
64-22, for Mainline Full Depth Patching, Level 3
(2" minimum and 3" maximum lift thickness)

6. 5.0" Hot Mix Asphalt Superpave 19.0 mm - PG
64-22, for Shoulder Full Depth Patching, Level 3

(2" minimum and 3" maximum lift thickness)

....

4. These pavement legend numbers are then identified in typical paving sections to demonstrate their use.
5. #5 of the paving legend, the typical paving section entitled "Mainline Full-Depth Patching," shows the patching being used to the full-depth of the existing Hot Mix Asphalt (HMA) pavement and above the aggregate base. Because full depth is 7.5 inches with lift thickness between 2 and 3 inches, this mainline patching would typically result in 3 lifts.¹ Pursuant to #5 in the legend, the material to be used is 19.0 mm hot mix asphalt superpave.
6. As described in #6 of the paving legend, the typical paving section entitled "Shoulder Full-Depth Patching" shows the patching being used to the full-depth of the existing HMA shoulder and above the aggregate base. Because full depth is 5.0 inches and the lift thickness is between 2 and 3 inches, the shoulder patching typically would result in two lifts. Pursuant to #6 in the legend, the material to be used is 19.0 mm hot mix asphalt superpave. Correspondingly, Pay Item No. 5001 is the only pay item which contains the words shoulder and 19 mm HMA Superpave in its description.
7. The other typical paving sections depict "resurfacing" and "tie-ins." The material used for resurfacing and tie-ins over the existing HMA shoulder is described as 12.5 mm. No typical paving section depicts the complete removal and replacement of the base of the shoulder (as opposed to patching) with 19 mm material. Only the shoulder tie-in reflects any grinding on the shoulder, and the replacement is with 12.5 mm material.

¹A "lift" is a course of asphalt placed in one pass.

8. The original Schedule of Prices included the following:

ITEM NO. CCS NO.	APPROXIMATE QUANTITIES	DESCRIPTION OF ITEMS SECTION	UNIT PRICE DOLLARS CENTS	AMOUNTS DOLLARS CENTS
5001 500000	150	SQUARE YARDS OF XXX HOT MIX ASPHALT SUPERPAVE 19.0MM FOR SHOULDER, FULL DEPTH		
5005 504320	9,200	SQUARE YARDS OF 505 HOT MIX ASPHALT SUPERPAVE 19.0MM FOR FULL DEPTH PATCH, PG64- 22, LEVEL-3		

This information was available to all bidders when the Contract was advertised on March 3, 2003. The written description of these items never changed. However, the approximate quantities changed as described below.

9. Prior to issuance of the IFB there was some confusion in SHA concerning Pay Item Nos. 5001 and 5005.

In December 2002, SHA created a draft Schedule of Prices that included a line item for Pay Item No. 5001 described as "SY of HMA Superpave 19.0mm for Shoulder, Full Depth Patching PG 64-22 Level-3" and a line item for Pay Item No. 5005 described as "SY of HMA Superpave 19.0mm for Mainline, Full Depth Patching PG 64-22 Level-3." Mr. Peter Placke, Appellant's estimator for this project, testified that if the IFB had contained these provisions for Pay Item Nos. 5001 and 5005, Appellant would have bid the project differently because there would have been a clear split between full depth patching for mainline and full

depth patching for shoulder.

By memorandum dated February 12, 2003, the SHA Team Manager for Project Review notified the SHA Team Manager for Special Projects of various "errors and/or omissions that should be addressed before the project is advertised." Among the errors listed under the Schedule of Prices was "item 5001, isn't this item the same as item 5005? If so, suggest combining items 5001 and 5005."

Another note in the February 12, 2003 memorandum appeared under Pay Items and stated "[a]ny pay item(s) that has X's (XXX) right of the description indicates that there is no specification for that item. Since there is no specification available a special provision will have to be written and included in the invitation for bids." In the IFB, SHA did not identify any Special Provision to which Pay Item No. 5001 was supposed to refer.

In a handwritten note of March 11, 2003, an SHA employee observed that, "Item 5001 SY Hot Mix Asphalt Superpave 19.0 MM for Shoulder Full Depth Should Show PG 64-22 Level 3 and 150 SY. Need More Quantities."

After the issuance of the IFB, SHA acknowledged that some of the "Final Review comments for this project were not incorporated into the Advertised IFB." The design team had suggested in November 2002, updating the quantity of Pay Item No. 5001 to 8,100 square yards; and updating the quantity of Pay Item No. 5005 to 1,100 square yards. These items were not revised until the issuance of Addendum No. 2 to the IFB on April 9, 2003.

10. Addendum No. 2 changed the 150 square yard quantity in Pay Item No. 5001 to 8,100 square yards and, correspondingly, deleted 8,100 square yards from Pay Item No. 5005.

Thus the final Schedule of Prices for these items upon which

bids were to be based read:

ITEM NO. CCS NO.	APPROX-IMATE QUANTITIES	DESCRIPTION OF ITEMS SECTION	UNIT PRICE DOLLARS CENTS	AMOUNTS DOLLARS CENTS
5001 500000	8,100	SQUARE YARDS OF XXX HOT MIX ASPHALT SUPERPAVE 19.0MM FOR SHOULDER, FULL DEPTH		
5005 504320	1,100	SQUARE YARDS OF 505 HOT MIX ASPHALT SUPERPAVE 19.0MM FOR FULL DEPTH PATCH, PG64- 22, LEVEL-3		

11. Of the 5000 series pay items, Pay Item Nos. 5001 and 5005 are the only asphalt materials whose placement is measured in square yards; the use of square yards (as opposed to cubic yards) makes the depth of each of these two items of work a factor in pricing. All asphalt items for base and surface (as opposed to patching) are calculated in tons of asphalt. Of the 5000 series, Pay Item Nos. 5001 and 5005 are also the only two items described as "full depth."
12. Bid opening occurred on April 10, 2003. The total bids for the Contract, as determined by utilizing all the pay items, were as follows: Appellant (\$1,380,000), American Infrastructure (\$1,412,000), Melvin Benhoff Sons, Inc. (\$1,479,598.69), and Daisy Concrete, Inc. of Maryland (\$1,625,582.99). Appellant was determined to be the lowest bidder.
13. The paving legend and typical sections include only shoulder patching; no complete shoulder replacement work is present in these special provisions or elsewhere in the Contract.
14. Appellant's Mr. Peter Placke, an experienced estimator who estimated the project for Appellant, testified that the

replacement of the shoulder would require 20,000 square yards of material. However, no pay item included 20,000 square yards of material.

According to Mr. Placke, complete shoulder replacement would require some removal of material through Class 2 Excavation. However, no Class 2 Excavation is called for in the Contract.

15. Mr. Placke conducted a site inspection during the week of March 31, 2003 and observed significant deterioration in the shoulder and mainline. He testified that he believed that the required shoulder patching alone would exceed 8,100 square yards.
16. Mr. Placke further testified that, after receiving Addendum No. 1, he called SHA and verbally inquired whether both Pay Item No. 5001 and a 4.75 mm asphalt item were superfluous.
17. On the morning of April 9, 2003, all bidders received Addendum No. 2 which deleted the 4.75 mm asphalt item and increased the quantity for Pay Item No. 5001 from 150 square yards to 8100 square yards.
18. After Appellant received Addendum No. 2, Mr. Placke sent a Fax to SHA at 6:33 p.m. on April 9, 2003 which stated:

We are requesting the postponement of the above referenced bid due to the late issuance of Addendum #2 and related questions to changes in Addendum #2. Please explain/clarify the following: 1. Why was the HMA Patching Special provision deleted when it appears that patching is still required on this project? 2. What is the revised Item No. 5001 - "SY of HMA Superpave 19.0 MM for Shoulder, Full Depth" for? It does not refer to patching and a patching (Full Depth) item already exists [arrow] Item #5005. Is Item #5005 (Full Depth Patching) for Both Mainline + Shoulder? Is Item #5001 for Full Depth Paving on Shoulder? What detail should be used. We assume that all patching will be paid under Item #5005!

19. No other bidder asked a question about Pay Item No. 5001.

20. Some six hours after issuing this Fax, Mr. Placke completed an estimate interpreting Pay Item No. 5001 as shoulder patching and Pay Item No. 5005 as mainline patching.
In this estimate prepared early on the morning of bid opening (April 10, 2003), Mr. Placke had specifically and separately calculated Appellant's projected costs for performing 8100 square yards of 5 inch shoulder patching under Pay Item No. 5001, and 1100 square yards of 7½ inch mainline patching under Pay Item No. 5005. Notably, Mr. Placke bid Pay Item No. 5001 at a unit price of \$19.925 (\$19.93) in this early morning estimate.
21. SHA reviewed Appellant's 6:33 p.m. April 9, 2003 Fax early on April 10, 2003. Responding to this Fax would have required postponing the bid opening given the time needed for addenda processing, distribution, bid recalculation and bid submission.
22. District 4 representatives including the Assistant District Engineer for Design and the Assistant District Engineer for Construction determined that postponement and issuance of an addendum was not necessary because adequate information to understand the pay items was already contained in the bid documents. Accordingly, at 8:10 a.m., District 4 responded, "bid it as you see it" which Appellant understood to mean that the bid would have to be based on the information available in the bid documents and that no further information would be provided.
23. Appellant did not bid Pay Item No. 5001 at the \$19.93 price it had estimated early on the morning of bid opening. Instead, Appellant, through Mr. Placke, printed out the final version of its bid totals at 10:03 a.m. with a new unit price of one penny for Pay Item No. 5001, and it submitted that price at the noon bid opening. Appellant's bid for Pay Item No. 5005 was at a unit price of \$42.00, an increase from Mr. Placke's previous estimate of \$39.63 early on the morning of bid opening.

24. Had Appellant bid Pay Item No. 5001 under Mr. Placke's earlier estimate, Appellant would not have been the low bidder.
25. Mr. Placke testified that in submitting the penny bid for Pay Item No. 5001, he took the position that Pay Item No. 5001 was superfluous, *i.e.* that it represented nothing and would not be used on the project. Mr. Placke took this position notwithstanding that SHA had increased the quantity for this item from 150 square yards to 8,100 square yards the day before bid opening after being asked by Mr. Placke whether the item was superfluous.
26. On April 10, 2003, Mr. Placke attended bid opening, and learned that Appellant had submitted the lowest total bid.
27. On May 16, 2003, SHA personnel involved in the bid opening (BAMS Review Team or BAMS) wrote to Mr. Robert K. Harrison, SHA Deputy Chief Engineer, recommending award to Appellant as having submitted the lowest total bid, and noting penny bids for Pay Item Nos. 5001 and 5004.
28. On May 16, 2003, Mr. Gradon Tobery, Area District Engineer for Construction for District 4, called Mr. Placke to discuss the penny bids. Mr. Tobery recalled specifically discussing barrels (Drums for Maintenance of Traffic found at Pay Item No. 1012 at a two cent bid), patching (Pay Item No. 5001) and overlay (Pay Item No. 5004 at a one cent bid) with Mr. Placke. Mr. Tobery testified that Mr. Placke said that he had enough money in the project to cover these items. According to Mr. Tobery, Mr. Placke never told Mr. Tobery that he would not perform his penny bid for patching under Pay Item No. 5001, and Mr. Tobery never told Mr. Placke that he would agree to pay all patching under Pay Item No. 5005 and would not require that any patching be paid under the penny bid for Pay Item No. 5001. Mr. Tobery's understanding was that Appellant would honor its penny bids including the penny Mr. Placke entered in the bid for Pay Item

- No. 5001. Mr. Placke, on the other hand, testified that it was his understanding that all patching work would be paid for pursuant to Pay Item No. 5005.
29. Mr. Phil Humbertson, the Assistant District Engineer for Project Development at District 4, testified that, after talking with Mr. Tobery and prior to contract award, Mr. Humbertson understood that Appellant would honor its penny bid under 5001 and that Appellant would honor its penny bid under 5004.
 30. Mr. Harrison testified that, on or about the date he got the BAMS memo recommending award, Mr. Tobery reported back to him that neither penny bid for Pay Item Nos. 5001 and 5004 was a concern and that Appellant could do the work as bid.
 31. A memo dated May 27, 2003 from District Engineer David J. Malkowski of District 4 (signed by Phil Humbertson) to Mr. Harrison, states, "[w]e have contacted the contractor who was the low bidder and asked them for a letter stating that they could do this project based on the prices bid per item."
 32. In the attached letter dated May 19, 2003, Mr. Placke wrote that he would perform Pay Item No. 5004 for the penny bid; the letter does not refuse to perform Pay Item No. 5001 for the penny bid and does not indicate any agreement at all that all patching would be paid under Pay Item No. 5005.
 33. In a memo to Douglas R. Rose, SHA Chief Engineer for Operations, dated June 17, 2003, Mr. Harrison recommended award of the contract to Appellant. The recommendation for award was subsequently approved by Mr. Rose.
 34. In a September 2, 2003 meeting after Contract award, Mr. Placke told SHA that Appellant wanted to be paid for shoulder patching under Pay Item No. 5005, and, on October 6, 2003, Appellant submitted a letter to District 4 requesting payment under that item.
 35. The District Engineer denied the request for payment under Pay

- Item No. 5005 on October 24, 2003, and on November 24, 2003, Appellant appealed that decision to Mr. Rose.
36. In a letter dated May 4, 2004, Mr. Harrison, acting as SHA Procurement Officer, denied Appellant's claim, and this timely appeal followed.
 37. Appellant performed the shoulder patching in the Spring of 2004 and determined that its actual cost for performing this item before mark up was \$16.41/SY. Mr. Placke testified that his original pre-bid estimate for shoulder patching (\$19.93) was very close to the actual cost of shoulder patching (\$16.41).
 38. According to State Highway records, the actual quantity of shoulder patching under Pay Item No. 5001 was 9,345.77 square yards as compared to the bid quantity of 8100; the actual quantity of mainline patching under Pay Item No. 5005 was 1904.67 square yards as compared to the bid quantity of 1,100.

Decision

What is at issue in this appeal is not whether penny bids are inappropriate. Nor is the issue whether Appellant's bid would have remained the low bid had it bid its earlier estimated costs for shoulder patching under Pay Item No. 5001. The issue is whether Pay Item No. 5001, in fact, covers shoulder patching and should reasonably have been understood by bidders to do so. In making this determination, the focus must be on what the bid documents actually provide when issued or as amended thereafter prior to bid, not on any pre-bid opening confusion, as there may have been here, before the documents are issued.

This Board has noted that, "[i]n interpreting the contract language we must ascertain the meaning attributable to the relevant contract language by a reasonably intelligent bidder In this regard, a primary rule of contract interpretation requires that all written provisions be read together and interpreted as a whole giving

effect to each clause if reasonably possible.” CAM Construction Company, MSBCA 1088, 1 MSBCA ¶62 (1983); accord DIRECTV, Inc. v. Mattingly, 376 Md. 302, 320 (2003) (“this Court has long declined to unnecessarily read provisions of contracts as meaningless.”); Sagner v. Glenangus Farms, Inc., 234 Md. 156, 167 (1964) (recognizing the rule of construction that a contract “must be construed in its entirety, and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed.”); see Marsh v. Loffler Housing Corp., 102 Md. App. 116, 127 (1994) (noting that one paragraph in a contract may not be read alone without reference to other provisions on the same subject). The Board also observes that parties to an agreement are deemed to have contracted with knowledge of existing law. Young v. Anne Arundel County, 146 Md. App. 526, 586, cert. denied, 372 Md. 432 (2002). These same principles apply to the bid documents including pay items that lead to and are a part of an awarded contract.

Looking at all of the relevant provisions in this Contract, and giving effect to all of these provisions, the only reasonable interpretation is that Pay Item No. 5001 covers shoulder patching and Pay Item No. 5005 covers mainline patching. To construe Pay Item No. 5001 as though it does not exist as Appellant allegedly did is unreasonable.

In the schedule of pay items, Pay Item No. 5001 is described as (1) 8100 square yards, (2) hot mix asphalt superpave 19.0 mm, (3) shoulder, (4) full depth and (5) XXX. XXX indicates the item is a write-in item and refers to the special provisions - in this case the paving legend within the special provisions. When this pay item is read in conjunction with the paving legend and typical sections found in the special provisions, the only reasonable conclusion is that it covers shoulder patching. The only 19 mm hot mix asphalt superpave

found on the shoulder in the paving legend and typical sections is patching. In order to give effect to Pay Item No. 5001, it should be interpreted as representing shoulder patching. Since Pay Item No. 5001 pays for shoulder patching, Pay Item No. 5005 would necessarily pay for mainline patching.

This reading of the Contract is supported by other matter. After SHA issued Addendum No. 1, Appellant inquired as to whether a 4.75 mm asphalt item as well as Pay Item No. 5001 was superfluous. SHA responded by deleting the 4.75 mm asphalt item and increasing Pay Item No. 5001 from 150 square yards to 8,100 square yards. This increase of Pay Item No. 5001 to 8,100 square yards the day before bid opening reflects that the item is not superfluous and that the item will be used. Addendum No. 2 further underscored that Pay Item No. 5001 would be used for patching because the 8,100 square yards that was simultaneously removed from Pay Item No. 5005 and inserted into Pay Item No. 5001 is the same quantity and unit of measurement, reflecting a relationship between the two items, *i.e.*, that they were both patching items.

In addition, outside of Pay Item No. 5005, Pay Item No. 5001 was the only hot mix asphalt item measured in square yards. Base and surface asphalt is measured in tons on this Contract. Therefore, the square yard unit of measurement is further indication that the item covers patching.

Finally, the description of "full depth" found in Pay Item No. 5001 is found in the paving legend as describing only two items: (1) legend item 5 (mainline patching) and (2) legend item 6 (shoulder patching). Thus, the use of the description "full depth" in Pay Item No. 5001 indicate that the item represents one of the two patching items, and the use of the term "shoulder" in Pay Item No. 5001 reflects that it covers shoulder patching.

The record does not support Appellant's assertion that it was not reasonably possible to interpret Pay Item No. 5001 as shoulder

patching. Appellant itself, as demonstrated in its own bid documents, at one point in time early on the morning of bid opening interpreted Pay Item No. 5001 as covering shoulder patching. Mr. Placke specifically and separately calculated Appellant's projected costs for performing 8,100 square yards of 5 inch shoulder patching under Pay Item No. 5001, and 1,100 square yards of 7½ inch mainline patching under Pay Item No. 5005 prior to a last change hours later reducing the bid on Pay Item No. 5001 to one penny on grounds that the item was superfluous.

In summary, Appellant's interpretation that Pay Item No. 5001 did not cover shoulder patching and was superfluous and that all patching, shoulder and mainline, was covered by Pay Item No. 5005 was not reasonable. Accordingly, Appellant's appeal is denied.

Wherefore it is Ordered this _____ day of August, 2005 that the appeal is denied.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2409, appeal of Gray & Son, Inc. under SHA Contract No. HA1585177.

Dated:

Michael L. Carnahan
Deputy Recorder