BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	**)**	
Brawner Builders, Inc.	**)**	
	)	
	)	
	)	**Docket No. MSBCA 2813**
Under	**)**	
State Highway Adminstration	**)**	
Contract No. AA4805180	**)**	

APPEARANCE FOR APPELLANT: **Thomas A. Baker**
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: **Ian R. Fallon**
Lawrence F. Kreis, Jr.
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MEMORANDUM ORDER AND OPINION
DENYING APPELLANT'S MOTION FOR RECONSIDERATION

Following the July 19, 2013 hearing in this matter and final decision denying the appeal by Order dated July 24, 2013, appellant Brawner Builders, Inc. (Brawner) on August 21, 2013 filed a Motion for Reconsideration to which the State Highway Administration (SHA) filed its Opposition on September 6, 2013. Upon consideration of the entirety of the record herein, the Maryland State Board of Contract Appeals (Board) determines to and hereby does deny appellant's Motion for Reconsideration and in response to the various points and objections set forth in appellant's Motion for Reconsideration, the Board supplements its July 24, 2013 Order with the following elaboration and clarification of that decision.

With respect to Brawner's first correct contention that the "as built" drawings of the subject bridge fail to show paint on the hidden top flange of the steel beam supporting the bridge decks, those drawings are neither deficient nor incomplete. Simply put, the "as built" depictions and descriptions of the subject bridges did not disclose whether the top flange of the I-beams in the

bridge deck structure had been painted, nor did they need to make any disclosure of that nature. Typical of most "as built" drawings, the contract depictions of the bridges in question showed structural characteristics, not paint coverings. The presence or absence of paint on the top flanges of the bridge deck I-beams is not misrepresented by the "as built" drawings. If the "as built" plans had actually represented that the top flange was not painted, Brawner's claim of a differing site condition would indeed be meritorious. But they did not. Appellant is unjustified in its attempt to shift from the contractor to the State the risk that appellant assumed when it bid the job not knowing whether the top flanges had been previously painted, offering and committing by acceptance of the contract documents to remove old paint from the beams without the necessity that the State bear any additional obligation to remit a bonus to the contractor in the event that removal of the concrete covering the bridge decking I-beams revealed that the top flanges of those beams had been previously painted during the course of the earlier construction. Moreover, there was no error or ambiguity in the bid documents and thus no equitable adjustment is warranted under the circumstances present. The contractor bears the obligation to do all of the tasks necessary to complete the work specified and required.

Without providing the Board with any new evidence, appellant's Motion for Reconsideration modifies its earlier assertion that the horizontal surfaces of an I-beam are not fascia but flanges, as distinguished from the vertical surfaces, which are fascia; and therefore the terms of the contract required Brawner to paint the vertical services of the I-beams but not the horizontal surfaces. The Motion for Reconsideration conjures a somewhat different interpretation. Contrary to Brawner's latest assertion, the word, fascia, does not have a defined meaning in SHA Standard Specification No. 436.01.01. Furthermore, it is incorrect and unreasonable for appellant now to contend, in variance to its previous position, that fascia means only "exposed parts of the

beam [whether horizontal or vertical] and it does not include the hidden top flange." The ordinary meaning of the word, fascia, has been defined by Webster's Dictionary as "a flat, horizontal band, esp. one of two or three making up an architrave." The Board will continue to interpret that term in accordance with its ordinary meaning.

As the Board earlier stated, and perhaps the reason for appellant's latest incarnation of the meaning of the word, fascia, Brawner's contention at the hearing that it had no obligation under the terms of the contract to paint the horizontal surfaces of the I-beams is belied by its conduct at the work site and its admission that it fully understood its duty to paint the visible bottom horizontal surface. Appellant's revised argument in its Motion for Reconsideration is that Brawner apparently understood throughout the procurement its duty to paint the exposed bottom flanges but not to remove paint from the other horizontal flanges at the tops of the I-beams. The Board's view is that appellant cannot make a *bona fide* argument either that the word, fascia, does not include any horizontal surfaces, as it argued at the hearing, nor that fascia means only exposed surfaces, whether horizontal or vertical, as Brawner apparently contends now.

In further correction of appellant's assertions in its Motion for Reconsideration, the Board has not and does not "hold that a contractor must assume that the top flange is painted because the bottom flange is painted." Indeed, the Board continues fully to understand and appreciate why it may have been a perfectly logical and acceptable practice for SHA to insist in prior bridge deck construction work that an exposed bottom flange of an I-beam be required to receive surface covering, while the unexposed surface of a beam encased in concrete need not be painted. The Board's more limited observation in its extant Order remains unmodified by appellant's Motion for Reconsideration, namely, that prior to demolition and removal of the pre-existing concrete, neither party knew whether the top flanges of the I-beams had been painted. That

is not to suggest that SHA is obligated to pay charges above and beyond the contract price in the event that it turned out that the top flange had been previously painted, as was discovered here. Provided a condition is not misrepresented in the State's disclosure of existing site conditions, the risk of overcoming all obstacles ultimately confronted in performing required work falls upon the contractor without the necessity of approval of a change order.

At the hearing appellant offered into evidence and emphasized in its presentation to the Board that one of the experienced welders on this job had seen prior bridge construction work for which there was no paint on the top surface of the decking I-beams. In fact, he stated that that was usually the case. But that is a far cry from proof of Brawner's apparent position that the top flange should not be painted and as a result, the discovery of paint on the top flange constitutes a differing site condition. Indeed, the precise deposition testimony of that welder was merely, "most of the times there's no paint [on the] top flange." (McComas Deposition, pg. 69, line 6.) The implication of this testimony is that sometimes there is paint on the top flange, a factual finding opposite of appellant's desired and intended inference.

Brawner's position in its Motion for Reconsideration apparently is that its own evidence presented at the hearing from the deposition testimony of an individual present at the job site and working on this particular bridge renovation project should now not be considered because the prior experience and knowledge of a welder working directly for a Brawner subcontractor cannot be imputed to the general contractor. But irrespective of that point, there was no evidence adduced at the hearing to support a factual finding that the top flanges of I-beams in bridge decks should not be painted. To the contrary, the evidence supports a finding as appellant correctly claims in its Motion for Reconsideration that "some flange tops are painted, but most are not painted." This finding does not mean that the discovery of paint on the top

flanges of the beams constitutes a differing site condition. To the contrary, the discovery of paint on the top flange constituted a condition which appellant knew or should have known that it might well encounter, but not necessarily expect to find on any particular bridge job.

Finally, the Board addresses two concluding peripheral points made in Brawner's August 21, 2013 Motion for Reconsideration. First, Brawner takes exception to the Board's finding that parts of the beams were visible and painted with lead paint, stating merely, "the parties did not offer this as an undisputed fact." The Board is not constrained to include in its findings of fact only those facts to which the parties specifically and affirmatively stipulate to a given condition. In fact, in the case of this bridge renovation work, parts of beams were indeed visible and painted with lead paint, and neither party contested this fact at the hearing, though it is equally correct that appellant did not specifically dispute this uncontested fact either, nor could Brawner truthfully do so in good faith.

Lastly, appellant correctly asserts that the discovery of paint on the top flange of the I-beams in these bridge decks occurred after demolition and prior to reconstruction of the bridge deck. Brawner states in its Motion for Reconsideration, "there was no finding as to when that paint had been applied to the top flange." Like appellant's other questions concerning the Board's factual findings, that assertion is correct, but at the same time the Board is confident in standing by its prior finding that of course the top flanges of the beams encased in concrete were painted before, and not after, they were so encased, as a result of which the top flanges became no longer exposed to human vision nor accessible to receive paint covering. This obvious, accurate factual finding is immaterial to any point of fact establishing a differing site condition, for which appellant bears the burden of proof.

In the absence of proof that the "as built" drawings were

different from the conditions actually discovered after the demolition phase of this bridge renovation construction project and for all of the reasons previously set forth, and for the additional reasons referenced in the State's Opposition to the Motion for Reconsideration and the other evidence and argument adduced, appellant's Motion for Reconsideration must be and hereby is DENIED.

So ORDERED this _____ day of September, 2013.

Dated:

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Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
Board Member