

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of Dick Corporation)
)
) Docket Nos. MSBCA 2458 and 2459
)
Under SHA Contract No. BA3335172)
)

APPEARANCE FOR APPELLANT: Brian W. Craver, Esq.
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APPEARANCE FOR RESPONDENT: Dana A. Reed, Esq.
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DECISION ON MOTION FOR RECONSIDERATION

The limited issue that remains pending in these consolidated appeals is raised by appellant's March 30, 2007 Motion for Reconsideration of the Board's February 28, 2007 decision allowing equitable adjustment due to a differing site condition encountered on a road improvement project previously described in detail by prior Board rulings. That issue is whether the Board made an error in quantum calculation with respect to appellant's claim for an additional \$429,224 in damages accruing from field office overhead, as reconsideration on that point was permitted by the Board's May 11, 2007 Order. As allowed by that Order, on May 21, 2007, appellant filed a Supplemental Submission to which the State responded by opposition filed on June 1, 2007 and on June 8, 2007 appellant submitted its Reply to the State's

Supplemental Submission.

The \$429,224 calculation correction requested by appellant represents 86% of its adjusted claim for \$499,089 in overhead expenditures, reduced from appellant's initial extended field overhead claim in the amount of \$943,713 prior to the State's audit. Appellant's project director and primary witness testified in support of a total field office overhead claim of \$1,128,786, a sum inflated from \$943,713 by the inclusion of mark-up and profit. As argued in appellant's supplemental submission and apparently conceded by the State, the \$499,098 claimed by appellant to have been expended was actually spent, as verified by the audit. Appellant rests its claim in this respect with the assertion that because it spent \$499,098 and the Board has determined that it is entitled only to 86% of time-related costs, appellant should receive an additional \$429,224. But the Board is simply not satisfied that there is adequate proof on the record that the \$499,098 admittedly spent was necessarily or reasonably expended as a result of the delay at Retaining Wall 8. Does that amount include equipment rental to establish an on-site office trailer? Was one needed? If so, what was its cost? How many persons worked for what periods on which tasks at what salary rates? Could the delay have been reduced by modifying the work tasks as suggested by the State's expert witnesses? Despite being given a second opportunity of providing supplemental specific reference to particular proofs as to the basis of causation of the subject expense, appellant's closest assertion beyond establishing merely the accuracy of the amount expended is the averment that "[t]he upshot of Mr. Contino's testimony is that all of the claimed field office overhead, including the \$499,098 that was overlooked in the Board's initial decision, was expended due to delays caused by the boulders, and hence that amount should be awarded (after reducing it by 14% like the rest of the claim [sic] items)." (Page 6 of Appellant's Supplemental Submission in response to the Board's Decision on Appellant's

Motion for Reconsideration.)

Appellant further points to Mr. Contino's testimony at Tr. 364-371, in which he describes the three (3) phases of work during which job completion was delayed from May 26, 2004 until October 19, 2004 and the following testimonial exchange occurs at Tr. 370-371:

Question from Mr. Craver: "And so is it correct that almost any - if there's any significant work on site you have to have a certain supervisory structure in place to attend to different aspects of the site?"

Answer from Mr. Contino: "Yes, sir."

Question from Mr. Craver: "And so you incur those costs as a function of each day that the site has work ongoing, is that correct?"

Answer from Mr. Contino: "Yes, sir."

On the basis of this scant testimony appellant seeks to increase its equitable adjustment from \$1,508,388 to \$1,999,986, but the Board remains frustrated that it simply did not receive and does not have before it adequate factual foundation to support an award of this aspect of appellant's overhead field expenses. Whatever appellant's "supervisory structure" may have been, its itemized composition, cause and reasonableness are all in doubt, inadequately established by the appropriate standard of proof, namely, a preponderance of the evidence.

It is important to note in this regard that appellant during the time frame in question was winding down and closing its Bridge and Highway Division, reassigning or terminating employees, and liquidating its related assets. Under such extraordinary circumstances it becomes even more critical that appellant carry its burden of proving that all claimed overhead field expenses were reasonable and caused by excavation delay at Retaining Wall 8 rather than other factors unrelated to the underground boulders it encountered. Establishing merely that appellant spent \$499,098 is not enough. Appellant must also prove that that expense was necessary or reasonable and caused by

unexpected excavation delay due to differing site conditions. Without sufficient proof of reasonableness of the expenses and without documenting a direct nexus to the differing site condition, other than the conjectural implication of expenditure to causation, appellant fails to sustain this component of its claims. For these reasons and others set forth in the State Highway Administration's Supplemental Submission in Opposition to Motion for Reconsideration, the Board's final May 11, 2007 determination and award of \$1,508,388 in favor of appellant shall remain unmodified except as clarified by the foregoing explanation of the basis of the Board's denial of additional field office overhead expenses as claimed by appellant's Motion for Reconsideration, which is hereby denied.

Wherefore, it is Ordered this _____ day of June, 2007 that appellant's Motion for Reconsideration is denied.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael W. Burns
Chairman

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 on appellant's Motion for Reconsideration in MSBCA 2458 and 2459, appeals of Dick Corporation under SHA Contract No. BA3335172.

Dated:

Michael L. Carnahan
Deputy Clerk