BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of ALLIED CONTRACTORS, INC.	)	
	)	Docket No. MSBCA 1884
Under SHA Contract No. AA 400-501-580	)	

November 12, 1997

Constructive Change - Defective Specifications - A contractor may not in compiling its bid or thereafter choose to reject a design set forth in the contract documents in favor of a design it finds preferable and later prevail in a claim under the changes clause based on the subsequent discovery that the design set forth in the contract documents contains a latent defect.

APPEARANCE FOR APPELLANT: Robin John Pecora, Esq.
Baltimore, MD

APPEARANCES FOR RESPONDENT: Jennifer L. Forrence
Scott D. Morrell
Assistant Attorneys General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment for alleged acceleration and design costs arising out of a bridge deck widening and replacement project over a high speed railroad track.

Findings of Fact

1. This appeal concerns a claim for an equitable adjustment arising out of a State Highway Administration (SHA) contract for the widening and deck replacement for bridge no. 2051 on Maryland Route 176 (Dorsey Road) over Amtrak in Anne Arundel County. The Contract called for completion of the work in 140 working days from Notice to Proceed.
2. The Contract, bid opening for which occurred on February 20, 1986, includes the Standard Specifications for Construction & Materials, published by the Maryland Department of Transportation State Highway Administration, January 1982 ("Red Book" or the "General Provisions", or "GP"), the Special Provisions, Contract Drawings 1-32, and all materials incorporated by reference.

3. A Notice of Award was issued to Appellant on April 7, 1986.

4. On May 23, 1986, SHA notified Appellant and Amtrak that a pre-construction meeting would be held on June 2, 1986. Sometime after receipt of this notice, Appellant called SHA and asked that the meeting be postponed and the meeting was rescheduled for June 9, 1986.

5. Notice to Proceed was issued on May 27, 1986, directing Appellant to "proceed with the prosecution of the subject contract on or before June 12, 1986." As noted above, the contract called for completion of the work in 140 working days. On June 16, 1986, Appellant began clearing and grubbing at the site.

6. On June 9, 1986, a pre-construction meeting was held at the SHA District 5 office. Representatives of Appellant included Alfred Simpson and Daljit Makar. Representatives of SHA included Ernest Hodshon, Robert Zell, and Paul Goldbeck. The meeting was taped and a transcript was provided.

7. Amtrak representatives were planning to attend the June 9, 1986 pre-construction meeting, but called the morning of the meeting to say they could not make it. At the pre-construction meeting Appellant was told by SHA to reschedule the meeting with the Railroad.
At the June 9, 1986 pre-construction meeting when the parties were discussing deck and bridge construction, Appellant's Mr. Simpson advised that a different type of demolition protective shield would be proposed:

> We were going to propose to Amtrak a different type of shielding than shown on the contract drawings. Is there any objection as far as the State's concerned? For the overhand portions?
>
> Zell: No. I don't have any, if Amtrak likes it I'm gonna like it probably. As long as it's not going to cost us anything.
>
> Simpson: No.

8. The protective shield is necessary to keep debris from the bridge demolition work near the parapets (sides) off the tracks below.[1] The draft created by high speed trains going under the bridge requires that the shield be designed to absorb a 30psf (pounds per square foot) perpendicular windload so it will not blow over while the deck is removed.

9. The parties have stipulated that the temporary protective demolition shield shown on contract drawing 19 of 32 was defective. This defect concerning how the protective shield was to be attached to the bridge, was described at the hearing by Appellant's Mr. Simpson, in relevant part, as follows:

> *There was some thought put into the [protective shield] system. The engineer designed this specifically for this job. If you look at it, when this thing is mounted with the proper hole spacing and all, distance from here to here is the exact distance that's shown on the drawings. There's an exact distance shown from the center of this beam to the underside, center of that beam to the center of your bolt connection here. I mean it's very well detailed. It's detailed closely.*

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1 The temporary protective shield would be erected on one side of the bridge and when work on that side was completed the shield would be moved to the other side. A different protective methodology was used respecting deck removal that did not require a demolition shield between the beams.

The problem is there's in both cases one row of bolts, what was shown on the as-builts, what actually appeared in the field. And in order to carry the load that was going to be applied on this demolition shield, by calculations it takes four bolts, not just these -- not just two here and one clip angle. You've got to have both clip angles. So in order to get that you have to weld the other clip angle of the beam or you would have to put more holes in the existing girder. And that's where the question came up.

* * * *

Q. Now, with regard to the welding or drilling of these extra holes that you have illustrated that the model shows that the drawing required, what if anything could you do in that regard under special provisions, if you know?

A. Well, by the, which we covered earlier, I think it's page 88 and 81, it's very clear you are not allowed to drill holes or weld to the existing structural steel.

Transcript pp. 2269-2271.

Mr. Simpson further testified that he became aware of this problem in April or May of 1986. Appellant testified that the nature of the problem was orally communicated to SHA and Amtrak at a pre-construction meeting on June 20, 1986 at the jobsite. See Finding of Fact No. 14 below. The Board finds that the bolt hole defect was latent and should not reasonably have been discovered by contractors prior to bid opening.

10. However, at the June 9, 1986 pre-construction meeting Appellant did not raise any issue of defective design of the temporary protective shield depicted by the contract documents. Further, Appellant gave no indication at the pre-construction meeting that the substitute demolition shield was being proposed for any reason other than Appellant's convenience.

11. Appellant was also advised at the June 9, 1986 pre-construction meeting, of SHA's interpretation of the Contract, that whether Appellant chose to use the demolition shield shown in the contract drawings, or a substitute shield, the submission would go to Amtrak:

Simpson: Okay, now, are, if we were to follow the temporary shield shown on the drawings, would we have to submit a shop drawing on that to JMT [Johnson, Mirmiran & Thompson, PA, SHA's consultant] or just to the railroad?

Hodshon: Everything has to go to Amtrak.

Simpson: Okay, and the temporary revised, temporary demolition shield also goes to JTM? They'll get erection drawings, the structural steel and all that.

Hodshon: It's my understanding that . . .

Zell: The way the proposal is written, it doesn't

differentiate, so everything will go to JMT.

Simpson: Okay. . . .

12. The Contract requires the contractor to submit for Amtrak review and approval shop and/or working drawings of temporary protective structures over railroad tracks, along with the design calculations for supports, sixty days in advance of their being required for the work. Special Provisions, at p. 125. The contract also requires the contractor to submit nine (9) copies of the proposed temporary protective shield for SHA and Amtrak approval. Special Provisions, at p. 91.

13. Appellant took the position at the hearing of the appeal that but for the bolt hole defect it would have used the shield shown in the drawings (19 of 32), and that it would not have had to submit that shield through the formal shop drawing approval process, but through a simplified review process that would have allowed it to begin work much earlier. According to Appellant, alleged submission of a substitute shield design to overcome the bolt hole defect constituted a change to the Contract entitling Appellant to the costs of the redesign and the costs associated with the State's alleged subsequent order to accelerate.

14. On June 20, 1986, a pre-construction meeting was held at the jobsite with Amtrak. Representatives from Amtrak included Mr. Larry Lewis. Representatives from Appellant included Mr. Timothy Crawford. Mr. Paul Goldbeck represented SHA. Appellant presented its proposed new shield. Mr. Lewis noted an error in that the proposed shield did not extend a minimum of 6=6" above the existing deck. Nothing was said about the shield being a substitute as a result of a defective design provided in the plans. Mr. Lewis stated that if the submittals were sent directly to him, he would try to get them approved by Amtrak's Philadelphia office in 30 days. Appellant alleges that it orally advised SHA and Amtrak of the bolt hole defect at this meeting. Such oral advice was not recalled by SHA and Amtrak and it is not reflected in Appellant's own contemporaneous notes of the meeting.

15. In Mr. Crawford's cover letter of June 23, 1986 accompanying Appellant's submittal of the shop drawings for the proposed new protective demolition shield design to SHA, no mention is made that the original shield was defective and a substitute shield was being submitted for that reason.

16. On June 26, 1986, Amtrak's Mr. Lewis received Appellant's first two submittals from Mr. Crawford. These submittals were Appellant's proposed demolition shield and its deck demolition and lifting procedures and details. No mention was made of defective design. These were received two weeks after the Notice to Proceed date of June 12, 1986, on or before which work was to begin on site. Mr. Lewis, following Amtrak procedures, forwarded the submittals to Amtrak design engineers in Philadelphia.

17. On July 3, 1986, SHA wrote to Appellant expressing its concern about progress made on the project, citing the failure to complete the field office, to complete sources of supply, and to designate borrow pits. SHA suggested weekly progress meetings to aid Appellant if any problems arose, and scheduled the first meeting for July 18, 1996. This letter in its entirety states:

Gentlemen:

On the above referenced contract it appears that little or no progress is being made

toward completion of this project in a timely manner. As of this date, July 3, 1986, the field office has not been completely set up, many sources of supply are not complete, borrow pits have not been designated by your company for sampling and the clearing is progressing at a very slow rate. It is imperative that progress be accelerated by your forces. Continued delay on your part can not be ignored.

During the pre-construction conference this office requested that your company submit a progress schedule based on the critical path method. We have seen neither this progress schedule nor the costs for the preparation of said critical path method. Section GP-8-04 requires that a progress chart be submitted within thirty days of a notice to proceed. Please have the critical path method in this office by July 13, 1986. Prior to July 13, 1986, please remit to this office a copy of your bar type progress chart for review.

In reference once more to the apparent slow progress to this project, it is suggested that weekly progress meetings take place on the project site. This may aid your company if any problems arise which could delay project completion. The first meeting will be on July 18, 1986 at 10:00 AM in the field office.

The Board finds that use of the word "accelerated" in the third sentence in this letter is not used in its technical sense as a directive to accelerate but only to convey a sense of urgency.

18. On July 9, 1986, Mr. Crawford wrote to SHA and asked for a partial shutdown "until such time as the critical demolition and excavation plans are approved. . . . If a partial shutdown is not acceptable to your office, we request a time extension be granted to cover the time period prior to the approval of the critical demolition and excavation plans."

19. The identity of the "critical demolition and excavation plans" was described in Mr. Crawford's July 8, 1986 letter to Amtrak's Mr. Lewis, in which Appellant provided a schedule for track outages, and stated: "[i]n order to maintain this schedule we need approval on the following shop drawings by the dates indicated. . . .[indicating the parapet demolition shield, the deck demolition procedure, the road support & abutment excavation plans, and the footing excavation & abutment demolition shield as the critical shop drawings]." The letter acknowledges that it is not a single drawing, but a group of drawings which are critical to the project. No mention is made of any problems with the original design for the demolition shield.

20. Also in response to SHA's letter of July 3, 1986, Mr. Crawford wrote to SHA on July 9, 1986 and enumerated Appellant's submissions to date, stating: "in each case we have submitted the shop drawing in accordance with the contract specifications . . ." The letter asks for SHA to hasten the approval of the shop drawings. Again, Appellant acknowledges that it is not a single drawing, but a group of drawings which are needed to proceed with work on the bridge. No mention is made of any problems with the design of the demolition shield.

21. On July 11, 1986, Appellant's proposed demolition shield submittal was rejected for several asserted reasons: 1) failure to comply with Amtrak's requirement that the vertical portion of the structure resist a 30 pound per square foot wind load; 2) failure to provide calculations for the vertical wind load; 3) failure to provide attachment details of the vertical portion of the shield to the horizontal portion; 4) failure to provide weld details and designs at the three weld locations; 5) failure to supply the specified size plywood; and 6) failure to provide

evidence that a professional engineer had reviewed the shop drawing prior to submission.

22. On July 14, 1986, Appellant's lifting details and procedures for the deck demolition were returned for resubmittal based on Appellant's asserted failure to implement the Railroad's 150% lifting capacity for all areas of the "procedures and equipment," and failure to have the submittal and calculations "sealed" by a professional engineer.

23. At the first progress meeting on July 18, 1986 no complaint was made that the design of the protective shield shown in the contract documents was defective.

24. Appellant resubmitted its deck demolition details and calculations to the Railroad and JMT on July 18, 1986.

25. Appellant resubmitted the demolition shield to the Railroad and to JMT on July 21, 1986.

26. SHA wrote to Appellant on July 24, 1986, complaining that of the five submittals made to date, four had been rejected and one awaited additional information. In this letter SHA also complained about the lateness of the materials source letters, and the failure to complete the field office installation, including the utilities and office equipment.

27. Appellant's first claimed acceleration period was from July 29 through August 1, 1986. There is nothing in the record that would constitute a notice to SHA that Appellant was going to begin to accelerate. The work done during this period was contract work and not an extra to the contract. In time sheets kept in the normal course of Appellant's business, it identified "the reason for delay" during the July 29 through August 1, 1986 time period as "[f]ailure of Amtrak to approve submittal quickly. Amtrak can take up to 40 days to do so. We need it sooner to proceed on time." (7/29/86); "Amtrak using total time allotted in approving submittals." (7/30/86); and "Amtrak taking allotted time to approve submittals." (8/1/86). However, none of this work performed during the July 29 - August 1 period was critical work restrained by lack of receipt of the demolition shield approval. Appellant has failed to demonstrate that this work could not have been done earlier in the job, within the normal workday.

28. On July 31, 1986, SHA denied Appellant's request for a partial shut-down, on grounds that the submittals could have been submitted earlier, and that most were rejected because of Appellant's errors when first submitted, resulting in longer delays. SHA also informed Appellant that time extensions would only be granted for extra work performed beyond that required by the original contract.

29. On August 5, 1986, Mr. Crawford wrote to Amtrak with a work schedule and track outage request. Mr. Crawford stated that the schedule "is dependent upon receipt of approved shop drawings for the demolition shield, footing excavation and deck removal procedure." Appellant had not received any of these approvals as of August 5, 1986.

30. On August 7, 1986, Mr. Crawford submitted various construction procedures to Amtrak, including Appellant's demolition shield erection procedure.

31. Also on August 7, 1986, Appellant and SHA met for the second progress meeting. The only contemporaneous record of the discussion at the meeting are two separate sets of handwritten notes on Appellant's stationery. Nothing in the contemporaneous notes indicates that there was any discussion of defective drawings or any kind of problem with the demolition shield shown in the contract drawings.

32. On August 12, 1986, Amtrak returned Appellant's second submission of the demolition shield marked "Approved as Noted." Also on August 12, 1986, Amtrak returned Appellant's submission of the footing excavation support system stamped "Approved as Noted."

33. In response to concerns expressed by SHA several times in September about project delay, Appellant's Mr. Crawford wrote SHA on October 1, 1986 providing general complaints, notifying SHA that Appellant began acceleration on September 26, 1986, and that Appellant was working 16 hours per day to increase progress. Mr. Crawford noted in part:

> As discussed at several progress meetings, and as indicated in Allied's letter dated July 9, 1986, we have been unable to work on any of the critical bridge items due to the lack of approved shop drawings for our demolition plans. During the period prior to receipt of the approved plans, the time has been inequitably charged which has erroneously portrayed the project as being behind schedule. We will provide more details concerning this situation along with a request for time extension due to delays to the shop drawings and railroad outage problems in the near future. . . . Since we feel that we have been delayed in our progress through contract changes, revisions, job occurrences beyond our control and since we believe that the time charges to date have not been equitable, we do not believe that the accelerating costs are our responsibility and we will file a claim for reimbursement in the future.

No mention is made in this letter of any design defects found in the contract drawings, even though the letter attempts to itemize the delaying factors. The wording of this letter does not constitute a notice of claim respecting the claims that are the subject matter of this appeal as contemplated by GP-5.14 of the Contract.[2]

34. During the period from October 20, 1986 until January 21, 1987, Appellant claims it was "accelerating" because it worked some overtime. Appellant's records show that approximately 17% of its work during this time period was done on an overtime basis. It is undisputed that the work done from October 20, 1986 through January 21, 1987 was work required pursuant to the Contract. The nature of the work required some night work (when trains were not running) and Appellant planned to do night work, i.e. overtime work, accordingly.

35. On October 3, 1986, Appellant responded to letters from SHA dated July 3rd and 24th, regarding shop drawings and project progress. Appellant asserted that it had met the late finish date according to its schedule for all shop drawings except for structural steel, which was delayed due to a contract revision, and asked that SHA "approved as noted" rather than reject drawings. Despite the fact that this letter is defending Appellant's shop drawing

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2 GP-5.14 Claims sets forth the time requirement for filing a claim. GP-5.14 as set forth in the 1982 Red Book which was part of the Contract provided in relevant part:

> [A]ny claim of Contractor against the Administration for extension of time, extra compensation or damages, whether under this contract or otherwise, *shall be* conclusively deemed to have been *waived* by Contractor, *unless said claim is set forth in writing, accompanied by itemized supporting data specifically identifying the basic elements of cost* that Contractor claims to have incurred or claims he will incur, and filed with the procurement officer *within 30 days* after the conditions upon which said claim is based become known to Contractor.

GP-5.14, at 37 (emphasis added).

submittal progress, it fails to note any problem with defective contract drawings regarding the demolition shield, although it does note that Appellant was delayed by a contract revision to the structural steel.

36. While Appellant asserted that its initial CPM schedule allowed three weeks, the CPM as submitted only allowed 10 to 11 working days for submittals to Amtrak. Appellant supplied a revised CPM schedule on October 6, 1986. It did not allow for the 60-day submittal review period specified in the Contract for Amtrak either, but did increase the submittal review time to 30 calendar days.

37. On November 18, 1986, Appellant wrote to SHA requesting a 24- daytime extension "due to wind load modifications required on the temporary demolition shield." The 24 days reflects the time charged by SHA during the period July 10, 1986 to August 14, 1986 when Appellant was not working on critical items due to lack of an approved demolition protective shield. No mention is made of Appellant's later assertions that it had planned to use the shield shown in the Contract but for the fact that the Contract shield was defective, and that Appellant was delayed simply because it was required to submit a different design to overcome the bolt hole defect. Instead, the letter focuses on the wind load issue and discussed Appellant's assertion that its initial submittal was timely.

38. On December 1, 1986, Appellant again requested a time extension "due to the untimely addition of the wind load modification requirements to the temporary demolition shield." Again Appellant identified various factors as slowing their progress, without mentioning anything about defective drawings forcing it to submit an alternate design for the demolition shield.

39. On January 8, 1987, Appellant requested in writing that a partial shutdown be granted for winter weather. On January 20, 1987, Appellant's request was granted, retroactive to January 1, 1987. During a partial shutdown, time is charged proportionately to the actual work completed.

40. On January 21, 1987, SHA denied Appellant's November 18th and December 1, 1986 requests for a time extension, noting that the "contract was formally awarded on April 7, 1986 and Notice to Proceed given on May 27, 1986. This office believes that if the submittal had been made on or before May 27, 1986, there would not have been any delay."

41. Appellant responded on March 9, 1987, arguing that the submittal could not have been made any earlier. However, Appellant made no mention of its later-adopted assertion that until it discovered the defective contract drawing it had not planned on submitting anything at all based on its position that if it used the demolition shield depicted in the drawings it did not have to submit shop drawings and calculations to SHA (JMT) and Amtrak for review and approval.

42. The original CPM schedule was not approved by SHA until May 1987. In February 1987, SHA wrote Appellant with comments, including the fact that Appellant still had not incorporated the contractually specified review time for submissions to Amtrak into the CPM schedule despite the fact that they had been directed to do so by letter dated September 18, 1986. On March 9, 1987, Appellant responded, arguing that the 60-day review period should not apply to "the initial submittals which prevented Allied from performing any critical work." Appellant did not argue in the correspondence that the 60-day review period should not apply to the demolition shield because Appellant planned on using the drawings shown in the Contract, only to find it was defective as Appellant argued at the hearing of the appeal.

43. On November 16, 1987, final inspection was conducted on the project and the project was accepted for maintenance.

44. On May 11, 1988, Appellant wrote to SHA and enumerated the "outstanding issues" on compensation items. Included in this list was "[a]cceleration required due to demolition shield load requirement changes." No mention was made of defective contract drawings. Appellant stated that the items had either been fully or partially submitted, or they would be submitted in the near future.

45. On November 8, 1989, more than three years after the substitute shield design was submitted, revised, and resubmitted, and about two years after the project was accepted for maintenance, Appellant submitted its claim[3] for an equitable adjustment and time extension under the contract changes clause, GP-4.05 as set forth in the Red Book. The claim was stated to be "due to the untimely changes made to the demolition shield" and the State's allegedly having directed the Appellant to accelerate, by SHA's letter dated July 3, 1986, to overcome the delay attributable to the wind load submittal approval time.[4] The narrative contained in the Appellant's November 8, 1989 letter indicates that the claim is referencing the 30psf wind load redesign issue only; i.e., the alleged time lost pending approval of the wind load design resubmittals. There is no reference to any problem with the contract drawings or deficiencies therein related to the bolt hole issue. Appellant claimed $152,998.89 for alleged acceleration and sought a time extension of 24 working days.

46. Appellant's own back-up documents reflect that Appellant was able to, and did, compile the numbers that support their claimed amount for the "wind load claim" as of November 8, 1988. Approximately 26 pages into Appellant's 8/15/94 claim, Appendix E-Part II, as filed with this Board on May 30, 1995, are 3 pages titled "Breakdown No. X14, Description: Costs related to Job Acceleration." The first two pages are dated 11/10/88. The third is dated 11/8/88. The total claim described on the first of these pages indicates a claim of $152,998.89, the same amount used when Appellant submitted its claim a year later on November 8, 1989. Nothing, however, was submitted to SHA in November of 1988.

47. Upon receipt of the wind load claim, SHA sent it to its claims analyst (Alpha Corporation, previously known as Hill International, Inc.)[5] to be reviewed. Upon receipt of the analysis

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3 Pursuant to SHA claims practice, the claim was submitted to the SHA District Engineer.

4 Appellant specifically relied on paragraph (4) of the changes clause as set forth in GP-4.05 of the Red book respecting its defective design (bolt hole) assertions. Paragraph (4) provides:

> (4) if any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. Provided, however, that except for claims based on defective specifications, no claim for any change under (2) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: And provided further, that in the case of defective specifications for which the State is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

GP-4.05 read in its entirety requires a written notice of the alleged change and written cost documentation.

5 "The Hill Report," Respondent's Exhibit 2, was the analysis provided of the wind load claim. Because the Hill Report did not address the defective drawing claim (because it had not yet been raised), SHA needed to get a new analysis of the revised claim. SHA's analysis of the claim was completed by Alpha Corporation in 1994.

of the claim, which denied liability, SHA met with Appellant on April 18, 1990, and provided a copy of the analysis to Appellant. SHA asked Appellant to respond in writing to this denial of Appellant's claim. SHA received no response to this request.

48. On July 9, 1992 Appellant met with SHA. The Board finds, that for the first time in the July 9, 1992 meeting Appellant raised the issue that the demolition shield shown in the drawings would not work as designed because of the clip angle bolt hole attachment problem; i.e., there was only one row of bolt holes rather than the required two rows and the specifications prohibited drilling of the necessary extra holes in or welding to the existing steel work.

49. On January 26, 1993, the SHA District Engineer wrote to Appellant and recommended that Appellant file its claim with the Chief Engineer because the parties had been unable to settle the matter in the $25,000 - $30,000 range and the State wanted to close its books. On March 8, 1993, the Chief Engineer wrote to Appellant asking that it submit a full claim package, and providing information about the required format.

50. On August 31, 1993, the SHA District Engineer again wrote to Appellant giving Appellant his final decision offering to pay $500.00 for the demolition shield redesign and informing Appellant that his decision could be appealed to the Chief Engineer.

51. On November 16, 1993, Appellant wrote to the SHA District Engineer, and for the first time increased its claim to include the "first redesign" and the "second redesign" (referring to Appellant's initial submission of a shield design and its revision after rejection by Amtrak). Appellant's total claim as set forth in this letter is for $159,498.89 of which $152,998.89 is for alleged acceleration costs and $6,500.00 for redesign costs.

52. On December 22, 1993, the SHA District Engineer again wrote to Appellant giving Appellant his final decision agreeing to forgive liquidated damages and pay $500.00 for the redesign work on the protective shield, and informing Appellant that it could appeal his decision to the SHA Chief Engineer.[6] On August 15, 1994, Appellant furnished the Chief Engineer with a claim noting that of the $159,498.89 claimed only the amount of $152,998.89 was for the alleged acceleration costs. The parties agreed to extend the final decision due date to March 31, 1995. On March 31, 1995, the Chief Engineer issued his final decision.

53. At all relevant times the SHA Procurement Officer was the Chief Engineer. At all relevant times SHA procedure authorized the initial filing of a written claim with the SHA District Engineer.

54. Appellant timely appealed to this Board on April 27, 1995. As a result of events beyond the Board's control, the appeal was placed in suspense for several months. Further delays outside of the Board's control resulted in the hearing being delayed until February 18, 1997.

55.

Decision

The events that formed the basis for the claim that is the subject matter of this appeal occurred in 1986 and 1987. Appellant's claim which the parties stipulated was filed on November 8, 1989 was for costs allegedly incurred: (1) to redesign a demolition protective shield for a 30psf

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6 The SHA District Engineer erroneously stated that the Appellant was requesting $159,498.89 for acceleration costs rather than $152,998.89.

vertical windload factor allegedly not called for by the contract documents and thus constituting a change; and (2) costs for alleged acceleration to overcome delay caused by having to submit and obtain approval of an acceptable protective shield designed for a 30psf windload. The claim filed on November 8, 1989 was therefore not timely filed as required by the provisions of GP-5.14 Claims of the Contract General Provisions as set forth in the Standard Specifications for Construction & Materials, 1982 (the Red Book) which provisions require the filing of a claim within 30 days of the time when a contractor should have reasonably been or was aware of the alleged grounds of the claim.

Appellant was obviously aware of the alleged windload claim in 1986 but did not file its claim for over three years. Appellant's acceleration claim was for alleged acceleration occurring during the second half of 1986 and through January 21, 1987. Thus the alleged acceleration was occurring two to three years prior to the filing of the claim. Furthermore, the claim was not documented as required by Section 17-201(c) of the State Finance and Procurement Article (effective July 1, 1985 and applicable to the contract) within thirty (30) days of the time when Appellant would have reasonably known of the extent of the costs of its claim.

Section 17-201(c) provided as follows:

> *(c) Same - Exception for construction contracts. - (1) this subsection applies to the resolution of disputes relating to construction contracts that have been entered into.*
>
> *(2) Within 30 days of the filing of a notice of a claim, the contractor shall submit to the procurement agency a written explanation of the claim containing:*
>
> *(i) The amount of the claim;*
>
> *(ii) The facts upon which the claim is based; and*
>
> *(iii) All pertinent data and correspondence that may substantiate the claim.*
>
> *(3) The claim shall be reviewed by the procurement agency head or, if the agency is a part of a principal department or an equivalent unit of State government, by the Secretary or the equivalent official unless review has been delegated to the agency head by regulation.*
>
> *(4) Within 180 days after receipt of the claim, the agency head, Secretary, or equivalent official shall investigate the claim and notify the contractor, in writing, of a decision regarding resolution of the claim. The 180 day time limit may be extended by mutual agreement of the parties.*
>
> *(5) (i) A decision not to pay a claim is a final action for the purposes of appeal to the Board of Contract Appeals.*
>
> *(ii) Failure to reach a decision within the time limits under paragraph (4) of this subsection shall be deemed to be a decision not to pay the claim.*
>
> *(6) At the time of final payment, the agency shall:*
>
> *(i) Release the retainage due to the contractor; and*
>
> *(ii) Pay any interest accrued on the retainage due and payable to the contractor from the time of payment of the semifinal estimate.*

The Board recognizes that the provisions of GP-5.14 require that both the notice of claim and documentation thereof be filed within 30 days after the conditions upon which the claim is based

become known. However, the provisions of the statute override the general provisions to the extent of any inconsistency. Therefore, the Appellant had 30 days to document its claim upon a literal reading of the provisions of Section 17-201(c)(2).

The Board has previously had occasion to consider similar language in interpreting the notice provisions of COMAR 21.10.04.02 and GP-5.14 as such provisions existed in 1991 and which read literally required documentation of the claim within 30 days of the filing of the notice of claim. We determined that such language required documentation of a claim within 30 days of the filing of the notice of claim or as soon thereafter as reasonably possible when the nature of the problem makes contemporaneous cost quantification impossible (provided that the claim must be filed no later than final payment). Orfanos Contractors, Inc., MSBCA 1849,5 MSBCA ¶410 (1996). In similar fashion, the Board interprets the then - applicable provisions of Section 17-201(C)(2) supra to mean that the contractor had 30 days to document its claim costs after the extent of such costs became or should have become reasonably apparent since costs in many construction contract claim scenarios may not be known within thirty days of the events giving rise to the claim.[7] See Rice Corporation, MSBCA 1301, 2 MSBCA ¶167(1987) at p.8.

The Board finds that Appellant would have reasonably known of the extent of the redesign within 30 days of when such work was performed in the summer of 1986 and would reasonably have known of the extent of the alleged acceleration costs of its claim not later than the end of calendar year 1987. The project was accepted for maintenance on November 16, 1987. The period of alleged acceleration was from July 29, 1986 to January 21, 1987. Thus, Appellant would have had some 10 months to determine its costs for the alleged acceleration from the time of the alleged acceleration until the project was accepted for maintenance. Regardless of when the Appellant should have reasonably known of the extent of its acceleration claim costs, the record reflects that by November, 1988, Appellant had compiled its claim for acceleration to the penny: $152,998.89. See Finding of Fact No. 46. Appellant, however, did not submit its documentation until November 8, 1989. Even if the claim had been timely filed, Appellant's claim would also be denied on the merits because the record reflects that the Appellant's substitute shield design submittals were approved by SHA and Amtrak within the contractually allowed sixty (60) days and that the reasons for the rejections that required resubmittals were valid.

At the hearing Appellant presented evidence concerning a reason for its claim that was not articulated in its written claim filed on November 8, 1989 and was first raised in a meeting July 9, 1992 between SHA and Appellant. This evidence concerned the design of the demolition protective shield shown on the contract drawings. This design was defective because it required the shield to be bolted to the existing structure and, notwithstanding the representation in the contract drawings, there were not enough bolt holes in the existing structure to bolt the protective shield to the structure and support the load. The drilling of additional bolt holes in or welding to the existing structure was

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7 We also note that as to the claim related to the asserted defective bolt hole design, paragraph 4 of the changes clause, GP-4.05, does not contain the twenty (20) day cost notification limitation for costs reasonably incurred by the contractor in attempting to comply with defective specifications. Such defective specification claim notice and cost documentation is still required to be in writing and the documentation pursuant to the Board's interpretation of Section 17-201(C)(2) is required within 30 days of the date such costs were known or should have been known.

otherwise prohibited by the special provisions of the Contract. Appellant also presented evidence at the hearing concerning alleged costs for alleged acceleration to overcome delay allegedly caused by having to submit and obtain approval of an acceptable protective shield design to overcome the defective bolt hole attachment design depicted in the contract documents. We shall briefly examine Appellant's evidence concerning the bolt hole design defect issue.

Appellant alleged it orally notified SHA and Amtrak about the defective bolt hole design during a pre-construction meeting on June 20, 1986 at the job-site after discovering the bolt hole problem in April or May of 1986. Such alleged oral notification is not reflected in Appellant's contemporaneous notes of the meeting and was not recalled by Amtrak and SHA personnel. However, the statute and Contract provisions require that the notice of claim be in writing. The Appellant further asserted at the hearing that it filed its written notice of claim in a letter dated October 1, 1986. This letter, a portion of which is set forth in Finding of Fact No. 33, provided in relevant part as follows:

> We wish to acknowledge receipt of your letter dated September 16, 1986 regarding progress on the referenced project.
>
> As discussed at several progress meetings, and as indicated in Allied's letter dated July 9, 1986, we have been unable to work on any of the critical bridge items due to the lack of approved shop drawings for our demolition plans. During the period prior to receipt of the approved plans, the time has been inequitably charged which has erroneously portrayed the project as being behind schedule. We will provide more details concerning this situation along with a request for a time extension due to delays to the shop drawings and railroad outage problems in the near future.
>
> In response to your letter, and the directive by your representatives that we increase the project progress given at Progress Meeting No. 3, on September 26, 1986, we are accelerating our work schedule to complete the project in accordance with your directed acceleration. We began this acceleration on September 26, 1986 and we are presently working 16 hour days in order to increase progress. Please be advised that we will complete the project in accordance with your desires.
>
> In summary, we feel that the time to date has been charged unjustly and therefore provides a slanted view of the actual progress, but, in response to your request to increase the job progress, we are accelerating. Since we feel that we have been delayed in our progress through contract changes, revisions, job occurrences beyond our control and since we believe that the time charges to date have not been equitable, we do not believe that the accelerating costs are our responsibility and we will file a claim for reimbursement in the future.

This letter does not constitute notice that the protective shield design set forth in the contract documents was defective due to the bolt hole problem or for any other reason. However, if Appellant know about the bolt hole issue in April, May or June of 1986 and was told to accelerate (as Appellant asserts it was initially directed to do by SHA's letter dated July 3, 1986) then

Appellant's written notice of claim pursuant to GP-4.05 and GP-5.14 was due in August, 1986. A written notice of claim filed in October 1986 was thus not timely.

There is oral discussion (as reflected in tape recordings and written transcription of the tape recordings) at a pre-construction meeting of June 9, 1986 of the length of time that the State (JMT) and the Railroad (Amtrak) would take to approve shop drawings relating to the temporary protective demolition shield shown on the drawings and how long it would take the State and the Railroad to approve shop drawings relating to a different type of temporary demolition protective Shield that Appellant might propose. There is also oral discussion at a progress meeting of July 18, 1986 (as reflected in tape recordings and written transcription of tape recordings) concerning Railroad and State approval time for revised shop drawings, that were to be resubmitted to reflect design for a 30 pound per square foot vertical windload for the substitute demolition protective shield. During this discussion the Appellant expressed concern that approval be obtained quickly because bridge demolition work (that may not start until the demolition protective shield is approved and erected) was on the critical path and the Appellant was required to complete the project in 140 working days.

However, neither the oral discussions of June 9, 1986 or July 18, 1986 reflect that Appellant raised or was making a claim for alleged defective design relating to the bolt hole issue.

The record also reflects that the Appellant failed to submit necessary vertical support data with the proposed substitute protective shield design it submitted and that the contract documents required submission of vertical support data. The requirement that a protective shield be designed for a 30psf vertical windload was not specifically set forth in the contract documents but was incorporated therein by reference to certain Amtrak requirements that a protective shield be designed for a 30psf windload. The record further reflects and the Board finds that the shield shown on drawing 19 of 32 as designed satisfied a 30psf windload requirement. Provisions may be incorporated into a contract by reference with the same force and effect as if actually written into the contract. American Electric Contracting Corporation v. United States, 217 Ct.Cl. 338 (1978) at p. 349. For example, both parties rely on provisions of the Red Book which were incorporated into the Contract by reference.

There was an overrun of several hundred thousand dollars on this Contract. Appellant asserts that the fact that the State paid the amounts involved in the overrun shows that the State is treating Appellant's claim in this appeal in a disparate manner. The Board has noted than the record reflects that in early 1993 the SHA at the District level was willing to pay $25,000 to $30,000 to Appellant to settle the matter involved in the instant appeal in order to close the books without having received a timely notice of claim under GP-5.14 and timely claim documentation as required by Section 17-201(c) of the State Finance and Procurement Article effective July 1, 1985 and applicable to this contract. Appellant argues that this offer of settlement constitutes a waiver of any timeliness requirements. This offer of settlement does not constitute either a waiver of the contractual and statutory requirements for notice and documentation of a claim or evidence of disparate treatment. Settlement offers are that and nothing more. It is inappropriate for the Board to consider settlement efforts of the parties in the Board's decision-making process and it is a rare occasion that the Board is ever provided even a glimpse of the details of such efforts.

Appellant has stipulated that its claim was filed on November 8, 1989. It is Appellant's position, however, that prior to November 8, 1989, Appellant was awaiting decision at lower echelons in the SHA on whether the claim, notice of which was allegedly filed by Appellant's letter of October 1, 1986, would be paid. The Board has found, however, that no notice of claim was filed until November 8,1989 when Appellant's notice of claim as it related to the windload resubmittal and alleged directed acceleration that is the subject matter of this appeal was filed. The Board has also found that Appellant's costs for alleged acceleration were not submitted until November 8, 1989, notwithstanding that such alleged costs were known in November of 1988. Appellant's windload or vertical support design resubmittal costs should have been known in 1986 when the submittal work was being performed. Therefore, Appellant's claim could have been denied by SHA on timeliness grounds. However, the offer of settlement so as to close the books in 1993, which was not accepted by Appellant, does not waive SHA's right to deny the claim.

During the hearing Appellant also argued that the State improperly charged time against the Appellant for causes other than alleged delay related to the defective design of the protective shield. The Board has no jurisdiction to consider such asserted owner-caused delay because no claim concerning such alleged delay was ever filed.

The only claim filed in this appeal over which this Board has jurisdiction is the claim related to the protective shield and the alleged costs of acceleration that Appellant argues was directed by the State in order to overcome alleged owner - caused delay resulting from asserted delay in the approval of the protective shield by the State and Amtrak. This claim, however, (whether the Board focuses either on the notice of claim allegedly filed by letter dated October 1, 1986 or the claim filed on November 8, 1989) was not timely filed and not timely documented and must be dismissed and denied.

The Board finds that the work contingent upon approval and erection of a protective shield, i.e. bridge demolition work (excepting saw cutting of the bridge deck), was work on the critical path. The parties have stipulated that the protective shield design shown on the contract documents was defective and could not be used. The record reflects, however, that the defective design of the protective shield relative to the bolt hole issue was not discussed contemporaneously with the windload (or vertical support) issue. The record contains no contemporaneous written advice from Appellant to SHA that the protective shield contains the latent bolt hole defect. Based on the absence in this voluminous record of contemporaneous written expression of concern with the bolt hole design shown on the contract documents, the Board is not persuaded that Appellant would have used a shield based on the protective shield bolt hole design as shown on the contract drawings but for the bolt hole defect, rather than the different shield attachment design it actually submitted. Memories of events fade after eleven years and even if claims could be made orally it is not appropriate to rely on testimony that eleven years earlier such advice on a matter of importance was conveyed orally to the owner (SHA) and the Railroad at a June 20, 1986 jobsite pre-construction meeting at least where the record reflects SHA and Railroad personnel do not remember such advice having been given. Therefore, not only would the claim based on the bolt hole design defect not be timely but the State would not be responsible for any delay associated with the defective bolt hole design. From an evidentiary perspective the Board must find Appellant did not, in fact, intend to use the defective bolt hole type attachment method as shown on the contract drawings, but had

determined to use another method of attachment by use of brackets prior to becoming aware of the defect. In other words a contractor may not in compiling its bid or thereafter choose to reject a design set forth in the contract documents in favor of a design it finds preferable and file a claim based on the subsequent discovery that the design set forth in the contract documents contains a latent defect.[8]

The Board, based on the above findings, has determined that the Appellant may not prevail in this appeal on procedural grounds because the claim was not timely filed at the agency level regardless of which theory for the basis of its claim is advanced by Appellant. The Board has also determined as set forth in the above findings that if the Board had jurisdiction to determine the matter, Appellant's claim based on alleged defective drawings would be denied on the merits. Accordingly, the Board ordinarily would conclude its opinion without any further discussion of the claim. However, the operative events herein occurred over eleven (11) years ago. In view of the passage of time the Board has determined to discuss, albeit briefly, the merits and the issues of quantum that surfaced during the appeal process. We do so despite the absence of a basis for entitlement upon which to predicate a monetary award since we have noted that Appellant's claim was not timely and would otherwise have been denied because the record reflects that Appellant did not intend to use the defective bolt hole design. We shall now briefly discuss highlights of quantum issues.

At the time Appellant filed its claim in 1989 (as amended for first and second redesign costs in 1993) and at the time of the noting of its appeal with the Board in 1995, Appellant's claim for $159,498.89 was broken down as follows:

1. Additional Costs for Redesign of Temporary Protection Shield (Revision 1).	$ 2,100.00
2. Additional Costs for Redesign of Temporary Protection Shield (Revision 2).	$ 2,100.00
3. Additional Costs for Strengthening of Temporary Protection Shield for Added Wind Load	$ 2,300.00
4. Additional Cost for Directed Acceleration	$152,998.89
	Total $159,498.89

Prior to the hearing, in response to the Board's Order on Proof of Costs, the Appellant's claim was reduced to $136,413.96, broken down as follows:

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8 If the bid documents contain a defect which is patent, the contractor should notify the State of the defect prior to bid opening. See Blount Brothers Construction Co. v. United States, 171 Ct.Cl. 478, 496-97(1965); S.J. Groves & Sons Company, MSBCA 1122, 1 MSBCA ¶97(1985).

1. Additional Costs for Redesign of Temporary Protection Shield (Revision 1).		$ 2,100.00
2. Additional Costs for Redesign of Temporary Protection Shield (Revision 2).		$ 2,100.00
3. Additional Costs for Strengthening of Temporary Protection Shield for Added Wind Load		$ 2,300.00
4. Additional Cost for Directed Acceleration		$128,627.68
5. Bond		$ 1,286.28
	Total	$136,413.96

The "Hill Report", while concluding that Appellant was not entitled to an equitable adjustment, noted that $103,629.93 was "potentially eligible for recovery" assuming entitlement. The report prepared by the State's consultants, Rubin & McGeehin, Chartered, based on a review of Appellant's books and records pursuant to the Board's Order on Proof of Costs, allowed only $39,052, assuming full entitlement on the merits. While we express no opinion on the matter due to our determination that Appellant is not entitled to an equitable adjustment on timeliness grounds and on the merits, we note that a full written record has been developed on cost issues and that assuming entitlement the Appellant faces severe evidentiary hurdles to establish its claimed costs, particularly as to its alleged acceleration costs as reduced during the hearing to $128,627.68.

We also note that Appellant, upon an award of an equitable adjustment, would not be entitled to pre-decision interest thereon, potentially involving tens of thousands of dollars given the passage of time since the claim was filed.

This Contract specifically bars the award of predecision interest, and the statute which was enacted to avoid the effect of such contractual provisions did not take effect until after this Contract was executed. As explained below, the Board has previously determined that this statute was not intended to have retroactive effect, and the contractual provision should prevail barring award of pre-decision interest.

The General Provisions of this Contract provide:

> Notwithstanding any other provision in this Contract, the Contractor hereby waives the right to pre-decision interest in the event of an award of an equitable adjustment under any provision of these General Provisions including, but not limited to G-4.03 "Variations in Estimated Quantities"; GP-4.04 "Differing Site Conditions"; GP-4.05 "Changes";
> GP-8.07 "Suspension of Work"; or GP-8.10 "Termination for Convenience of the State."

GP-10.01, at 77.

The State Legislature passed a law, effective July 1, 1986, which provides that, notwithstanding any contractual provision to the contrary, this Board may award pre-decision interest. Md. State Fin & Proc. Code Ann. §15-222 (1995 Repl. Vol.) (previously Md. State Fin. & Proc. Code Ann. §11-137 (1986 Supplement).

This Board has previously examined similarly situated cases and found that the law was not intended to operate retroactively to impair an obligation of contract. Rice Corp., MSBCA 1304, 2 MSBCA ¶167(1987) at p. 12; Corman Construction, Inc., MSBCA 1254, 3 MSBCA ¶206(1989) at pp. 46-47. In Rice, the Board observed that:

> The Board may award pre-decision interest in its discretion. However, the contract under consideration herein provides that "[t]he contractor and the State agree that no prejudgment or post judgment interest on any claims asserted by either party will be allowed." Effective July 1, 1986, the procurement law specifically provides that "[n]otwithstanding any contract provision to the contrary, the Board of Contract Appeals, in its discretion, may award interest on amounts found due the contractor on a claim . . . beginning on a date prior to the decision of the Board, determined by the Board to be fair and reasonable after hearing all of the facts of the claim, until the date of the decision, but interest many not accrue from a date that is before the receipt of a claim by the procurement officer." Section 17-201(d), Division II, State Finance and Procurement Article. Here, the contract was entered into on April 19, 1985 prior to the July 1, 1986 effective date of Section 17-201(d). We do not believe that the underlined portion of Section 17-201(d) whereby contract provisions that preclude award of pre-decision interest are rendered of no effect was intended to operate retroactively.

Rice Corp., supra, at p. 12 (citations omitted) (emphasis in original). This Board went on to note in a footnote that: "Such a provision overriding contrary contractual agreement we perceive to be substantive and not merely remedial. Thus to apply it retroactively would involve impairment of the obligation of contract." Id., at p. 12, note 22.

Accordingly, this Board has already decided that provisions barring the award of pre-decision interest are effective if contained in contracts entered into before the effective date of the legislation, July 1, 1986, which nullifies such contractual prohibitions. The Contract herein was entered into in May 1986. Accordingly, the contractual obligation of the contractor as set forth in GP-10.01 in the Red Book to waive pre-decision interest in the event of an equitable adjustment was in effect on July 1, 1986. To allow the July 1, 1986 legislation to apply to this Contract would be to impair this obligation, and be inappropriate, given that the legislation is substantive and not merely remedial.

Accordingly, the appeal is denied.

Therefore, it is Ordered this 10th day of November, 1997 that the appeal is denied.

Dated: November 10, 1997

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 1884, appeal of Allied Contractors, Inc. under SHA Contract No. AA 400-501-580.

Dated: November 10, 1997

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Mary F. Priscilla
Recorder