BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AMERICAN BUILDING CONTRACTORS, INC.	)	
	)	Docket No. MSBCA 1125
Under DGS Contract No. UB-592-791-020	)	

June 24, 1985

Contract Interpretation - Payment of Prevailing Wages - The contra proferentem rule providing that an ambiguity in a contract is construed against the drafting party was not applicable to a contractor's construction of a specification requiring payment of prevailing wages for contracts in the base bid amount of $500,000 or more where the solicitation called for a base bid and add alternate prices and the contractor's base bid was less than $500,000 but its base bid and add alternates as accepted by the State exceeded $500,000.

Patent Ambiguity - Duty to Inquire - A contractor presented with an obvious ambiguity concerning whether prevailing wages applied where its base bid was less than $500,000, but its base bid and certain add alternates, if accepted by the State, would exceed $500,000 had a duty to inquire about the discrepancy prior to bid or risk being awarded the contract and absorbing the difference between its ordinary wage rates as reflected in its bid and the higher prevailing wage rates which it was required to pay to workers on the project.

Ambiguous Specification - Execution of Contract - A contractor who accepts award with full knowledge of the Government's contrary interpretation of an ambiguous contract specification, term or condition impliedly agrees to absorb the damages flowing from its construction of the ambiguity unless there is evidence of coercion or duress, an appeal, or some other reservation of rights.

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OPINION BY CHAIRMAN HARRISON

This is an appeal from a Department of General Services (DGS) procurement officer's final decision denying Appellant's claim for an equitable adjustment to the captioned contract and, in the alternative, its request to terminate the contract. Appellant maintains that it should not have been required to pay prevailing wages on this construction project pursuant to its interpretation of Section 9.06 of the contract general conditions. On the other hand, DGS argues that not only is Appellant's interpretation incorrect but that it was aware of the specification's ambiguity when it prepared its bid and failed to seek timely clarification thereby precluding relief. DGS further argues that Appellant waived its right to relief when it executed the contract, without duress or coercion, and without a proper reservation of its rights. The parties have entered into a stipulation of the facts eliminating the need for a hearing.

Findings of Fact

The following pertinent facts gleaned from the stipulation and the record as a whole are adopted by the Board.

1. On or about July 23, 1982, DGS solicited sealed bids for DGS Project No. UB-592-791-020 involving renovation and conversion of the University of Maryland School of Law Library, located in Baltimore, Maryland. The solicitation required contractors to make a bid based on specifications prepared by Browne, Worrall and Johnson dated July 23, 1982. Bids were due on August 26, 1982.

2. The solicitation sought a base bid and four add alternate prices from the bidders. Any alternates accepted at the discretion of DGS were to be accepted in the order in which they appeared in the bidding documents. Low price was to be determined on the basis of the lowest combined price of the base bid and the accepted alternate(s).

3. Appellant, acting through its President, Mr. Albert Schweizer, perceived a problem in the preparation of its bid as to whether the payment of "prevailing wage rates" as set forth in the bid documents were necessary in the calculation of its bid because while the base bid was going to be in an amount less than $500,000 acceptance by DGS of the first three alternate prices would increase the contract amount to more than $500,000. Mr. Schweizer's perception of a problem was triggered by his reading of Section 9.06 of the contract general conditions which provides, in pertinent part, as follows:

> A. All contracts in the base-bid amount of $500,000 or more shall be subject to the provisions of Art. 21, Section 8-501, et. seq., Annotated Code of Maryland.[1] Where an original contract is in an

[1]Article 21, §8-501, et seq., Annotated Code of Maryland (prevailing wage statute), generally provides for contractors on State public works projects to pay wages at the prevailing wage rate where the amount of the contract is $500,000 or more. Prevailing wage rates are determined by the Commissioner of the Maryland Department of Labor and Industry for all classes and types of workmen and apprentices required for a project. The schedule of prevailing wage rates which is established for a particular project is

amount less than $500,000 the terms of Article 21, Section 8-501 shall not apply, even where subsequent change orders shall increase the total Contract in excess of $500,000. Wage rates applicable to projects of $500,000 or more are attached to the specification. (Underscoring added).

4. In order to understand what Section 9.06 of the general conditions meant, Mr. Schweizer on the morning of August 26, 1982, called the office of Browne, Worrall and Johnson and spoke to one of the architects, Phillip Worrall. Mr. Worrall told Mr. Schweizer that he did not prepare the general conditions to the contract about which he had questions. Mr. Schweizer asked Mr. Worrall for an opinion as to whether his bid prices must include wages paid at the prevailing rate set forth in the general conditions. Mr. Worrall told Mr. Schweizer that he "was not a lawyer" but that based on the facts as represented by Mr. Schweizer, it was his opinion that the bid did not have to be made with prevailing wages included in the bid price.

Mr. Worrall qualified his opinion by indicating he had no expertise in the area of wage rates and told Mr. Schweizer to talk to DGS about the meaning of Section 9.06.

5. After speaking to Mr. Worrall and prior to bid opening, Mr. Schweizer called a person at DGS whose name he does not remember who told him to call the Assistant Secretary of DGS. Mr. Schweizer left a message for the Assistant Secretary who did not return his call until after the bids were opened.

6. The bid prepared by Appellant offered to do the work entailed in the base bid portion of the contract for $437,734 and offered to do the first add alternate for $33,000, the second add alternate for $29,000, the third add alternate for $3,300 and the fourth add alternate for $83,000. Appellant's total bid including add alternates was thus $586,034. Appellant prepared its bid on the belief that it and its subcontractors were allowed to pay their normal wage rates and not prevailing wages to workers on the project. Appellant's subcontractor, J. W. Russell & Company, also used normal wage rates in computing its price. These normal wage rates were lower than the prevailing wage rates required to be paid workers under the applicable prevailing wage laws.

7. Appellant submitted its bid to DGS shortly before bid opening. The bids were opened by DGS at 11:00 a.m. on August 26, 1982. Nine contractors submitted bids ranging (base bid and all four add alternates) from a high of $793,800 to Appellant's low bid of $586,034.

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incorporated into the specification as was done for the subject project.

8. DGS accepted the base bid and all four add alternates and on September 21, 1982, the Board of Public Works approved an award of the contract to Appellant in the amount of $586,034. A contract was forwarded to Appellant for execution on September 22, 1982.

9. In early October of 1982 prior to executing the contract, Appellant obtained counsel who called DGS and asserted that, based on his reading of Section 9.06 of the general conditions, DGS could, or should, allow Appellant to perform the contract work with the payment of Appellant's and its subcontractor's regular wage rates to employees.

10. In an inter-office memorandum to the Secretary of DGS dated October 20, 1982, Mr. Marshal McCord, the procurement officer and Director of DGS's Office of Engineering and Construction, stated that counsel for the Maryland Department of Labor and Industry had advised that the prevailing wage rates applied to the contract and that counsel for DGS was undertaking a rewrite of Section 9.06A. Mr. McCord recommended that Appellant be compensated by change order for the $16,000 that it then claimed should have been reflected in its bid for prevailing wages provided such amount could be substantiated. Mr. McCord's recommendation was not accepted by the Secretary of DGS.

11. By letter dated October 27, 1982, DGS wrote Appellant and advised that:

> "The Prevailing Wage Rates . . . are, by law, applicable to the contract . . .
> . . . Please execute [the Contract] . . . within 10 days of your receipt of this letter, otherwise it will be necessary for the State to invoke your bid bond and [make] an award to the second bidder."

12. On October 29, 1982, counsel for Appellant spoke to counsel for DGS and made three alternate requests on behalf of his client:

a. Payment of a change order,

b. Division of the work into two contracts so that neither the first contract (for the base bid work) or the second contract (for all of the alternate work) would be in an amount exceeding $500,000, thusly avoiding the statutory requirement to pay prevailing wages.

c. Rescission of Appellant's bid.

13. On November 1, 1982, counsel for Appellant wrote to counsel for DGS to repeat Appellant's request for relief, including withdrawal of its bid. DGS's counsel replied by telephone on November 8, 1982 and reported that DGS would not allow Appellant to rescind its bid.

14. Counsel for Appellant called counsel for DGS on November 9, 1982 to advise that Appellant would execute the contract and seek legal redress for its damages. Appellant signed the agreement on November 10, 1982 and

transmitted it to DGS on that date with a cover letter. In correspondence dated November 12, 1982, DGS returned Appellant's bid bond and issued notice to proceed.

15. On November 12, 1982, Appellant through counsel asserted a claim against DGS. On December 6, 1982, Mr. McCord issued a procurement officer's final decision denying the claim in the requested amount of $16,000 from which decision Appellant took a timely appeal.

16. Appellant initially sought $16,000 in damages before this Board, but amended its Complaint increasing this amount to $21,662.86 as reflecting actual additional wages paid for its own workers and the workers of sub-contractors using the prescribed prevailing wage rates. Adding the $21,662.86 sought by Appellant to its bid would not have resulted in its being displaced as low bidder.

Decision

Appellant contends that Section 9.06 of the general conditions (Finding of Fact No. 3) is ambiguous. It maintains that its interpretation that prevailing wages do not apply is reasonable, and that DGS as the drafter of Section 9.06 under the rule of contra proferentem should have the ambiguity construed against it and be required to compensate Appellant for the cost of paying prevailing wages. DGS denies that the specification is ambiguous and asserts that even if it is, such ambiguity is clarified by reference to the wage rates attached to the specification and references in the specification and attachment to the prevailing wage statute. Since the prevailing wage statute does apply to wages under the instant contract, Appellant cannot prevail unless the specification is ambiguous and its construction thereof was reasonable.

We find that the specification is ambiguous as applied to a solicitation calling for a base bid and add alternate prices. The specification makes no reference to add alternates. The language of the first sentence of Section 9.06 clearly and unequivocably states that contracts in the base-bid amount of $500,000 or more shall be subject to the provisions of Art. 21, Section 8-501, et seq., Annotated Code of Maryland. The second sentence states clearly that where the original contract is less than $500,000 the prevailing wage statute does not apply even if subsequently increased by change orders to over $500,000. The final sentence merely directs the contractor to the wage rates applicable to contracts of $500,000 or more which are attached to the specification. Read as a whole it seems to us that a contractor could reasonably interpret the specification as not requiring payment of prevailing wage rates if its base-bid amount was less than $500,000 as was the case with Appellant's bid regardless of whether acceptance of add alternates would increase the total contract price beyond $500,000. We acknowledge, as DGS argues, that contract Specification Section 01100, Paragraph 1.7 advises bidders that alternates will be accepted in the order in which they appear in the bidding documents[2] so that a bidder will know when its base bid and

[2]Specification Section 01100, Paragraph 1.7 states:

> ACCEPTANCE OF ALTERNATES BY OWNER: As the basis of determining the lowest bonafide bidder, the Owner will accept the Alternates in order given above. The lowest combined price of the

alternates will exceed $500,000. However, the bid documents do not apprise bidders of how many add alternates will be accepted, if any, and one could still reasonably find that the prevailing wage rates are only triggered by the base-bid amount exclusive of alternates as specifically provided by Section 9.06.

Nor do we believe as DGS also argues that reference in the Specification to the provisions of the prevailing wage law, Article 21, §8-501, et seq., clarifies the ambiguity. While it is true that subsisting laws enter into and form part of a contract as if expressly referred to or incorporated in its terms, Downing Development Corporation v. Brazelton, 253 Md. 390, 398, 252 A.2d 849 (1969); Kasmer Electrical Contracting, Inc., MSBCA 1065 (January 12, 1983) at pp. 10-11, a contractor who read the statute could still reasonably be in doubt as to the effect of add alternates on the determination of what constitutes a contract for $500,000 or more since the prevailing wage statute does not define what constitutes a contract but merely defines public work and excludes contracts of less than $500,000 from such definition. Article 21, §8-501(c).

We also note that DGS personnel perceived some difficulty with the proper interpretation of the language of Section 9.06. DGS's Director of the Office of Engineering and Construction (and the procurement officer herein) authored an inter-office memorandum to the Secretary of General Services on October 20, 1982 in which he recommends that Appellant be compensated for prevailing wage differential and states that: "Counsel is undertaking a rewrite of 9.06A." It thus appears that DGS perceived ambiguity in the language of Section 9.06 and directed its counsel to rewrite it to remove the ambiguity.

This same memorandum states that: "Counsel for Labor and Industry has advised that wage rates do apply." This statement further suggests confusion concerning the proper interpretation under Section 9.06 as to when prevailing wage rates were to be applied since advice of Labor and Industry's counsel was sought on the matter.

Since we conclude that Section 9.06 is ambiguous, we next consider whether the ambiguity was obvious, thus, as the parties agree, raising the doctrine of patent ambiguity making it encumbent upon Appellant to seek clarification of the ambiguous specification prior to bid opening or be held responsible for the adverse impact of its interpretation that prevailing wages did not apply.

The importance of the doctrine of patent ambiguity has been summarized by the U.S. Court of Claims as follows:

> . . . If a patent ambiguity is found in a contract, the contractor has a duty to inquire of the contracting [procurement] officer the true meaning of the contract before submitting a bid. [citations omitted]. This prevents contractors from taking advantage of the Government; it protects other bidders by ensuring that all bidders bid on the same

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base bid and the accepted alternate(s) will be the basis of determination.

specifications; and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact. [citations omitted].

George E. Newsom v. United States, 230 Ct.Cl. 301, 303, 676 F.2d 647 (1982).

The practical application of this doctrine may be summarized as follows:

> . . . First, the court [Board] must ask whether the ambiguity was patent. This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum: Is it so glaring as to raise a duty to inquire? [citation omitted]. Only if the court [Board] decides that the ambiguity was not patent does it reach the question whether a plaintiff's interpretation was reasonable. [citation omitted]. The existence of a patent ambiguity in itself raises the duty of inquiry, regardless of the reasonableness vel non of the contractor's interpretation. [citations omitted]. . . . The court [Board] may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist.

George E. Newsom v. United States, supra at 230 Ct.Cl. 304 citing Mountain Home Contractors v. United States, 192 Ct.Cl. 16, 425 F.2d 1260 (1970). See: Dominion Contractors, Inc., MSBCA 1041 (February 9, 1984) at pp. 13-15, 31-33. The initial question to be answered, therefore, is whether the conflict identified above was so glaring as to constitute a patent ambiguity.

"What constitutes a patent and glaring omission cannot . . . be defined generally, but only on an ad hoc basis by looking to what a reasonable man would find to be patent and glaring." Rosenman Corp. v. United States, 182 Ct.Cl. 586, 590, 390 F.2d 711, 713 (1968). Generally, it is helpful to ask initially whether the contractor's interpretation does away with the contract's ambiguity or internal contradiction. George E. Newsom v. United States, supra; The Brezina Construction Co., Inc. v. United States, 196 Ct.Cl. 29, 34, 449 F.2d 372 (1971). Here Appellant's interpretation that prevailing wages did not apply, while reasonable, was not correct, nor does it do away with the specification's ambiguity or internal contradiction between base bid amount and total contract price resulting from acceptance of add alternates. We think the ambiguity is obvious on its face since there is no way to determine that prevailing wages apply to a proposed contract award exceeding $500,000 as a result of acceptance of add alternates without recognizing that the specification also indicates otherwise when the base bid is less than $500,000.

Since Appellant perceived the ambiguity prior to bid opening and since we are of the opinion that the ambiguity is patent, we may not consider the reasonableness of Appellant's interpretation nor construe the ambiguity against DGS under the rule of contra proferentem unless satisfied that Appellant met its duty to inquire of the true meaning of the specification before submitting its bid.

Here Appellant made inquiry on the morning of bid opening. Mr. Schweizer called the project architect and spoke to Phillip Worrall asking for an opinion on the applicability of prevailing wages. Mr. Worrall opined that the bid did not have to be made with prevailing wages included in the bid price. He qualified his opinion, however, by indicating that he had no expertise in the area of wage rates and did not prepare the general conditions about which inquiry was made. He advised Mr. Schweizer to talk to DGS regarding prevailing wate rates. Mr. Schweizer was unsuccessful in his attempt to contact DGS prior to bid opening at 11:00 a.m.

DGS argues that the Instructions to Bidder required Appellant to make written inquiry concerning desired explanation regarding applicability of prevailing wages not later than ten days prior to bid opening.[3] Since

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[3] DISCREPANCIES

A. Should a bidder find discrepancies in the plans and/or specifications or should he be in doubt as to the meaning or intent of any part thereof, he must, not later than seven (7) days (Saturdays and Sundays excluded) prior to bid opening, request clarification from the Architect, who will issue a written addendum. Failure to request such clarification is a waiver to any claim by the bidder for expense made necessary by reason of later interpretation of the contract documents by the architect.

B. Explanations desired by a prospective bidder regarding the Contract Drawings, Specifications, and other bid Documents shall be requested in writing from the Department no later than ten days prior to the bid opening. Requests shall include the contract number and name and shall be directed to the address indicated in the Notice to Contractors.

C. Oral explanations or instructions will not be binding, only written addenda are binding. Any addenda resulting from these requests will be mailed to all listed holders of the Bid Documents no later than seven days prior to the bid opening. The bidder shall acknowledge the receipt of all addenda in the space provided on the Proposal Form. (Underscoring added).

Instructions to Bidder at page 2-3.

Appellant did not make timely written inquiry pursuant to the Instructions to Bidder, DGS asserts that Appellant has not met its duty to inquire. Appellant, on the other hand, contends that it discovered the ambiguity within ten days of bid opening and to prevent it from seeking clarification from the architect violates the spirit and the meaning of the Instructions to Bidder.

The record does not precisely disclose when Appellant discovered the ambiguity as to applicable wage rates; only that it was discovered at least by the morning of bid opening when inquiry was first actually made. The contract clarification and interpretation provisions contained in the Instructions to Bidder are those typically found in government contracts and are designed to give DGS sufficient opportunity to consider alleged discrepancies, and, if necessary, clarify or modify bidding requirements by publishing an addendum in sufficient time to be considered by all bidders. This ensures that all bidders are apprised of the actual requirements of the bid and preserves the integrity of the competitive bidding process. See: William F. Klingensmith, Inc. v. United States, 205 Ct.Cl. 651, 664, 505 F.2d 1257 (1974); George E. Newsom v. United States, supra.

We believe that to rigidly and inflexibly hold bidders to the specific requirements of the Instructions to Bidder regardless of the circumstances of their inquiry would violate the spirit and intent of the Instructions to Bidder to foster informed competitive bidding and avoid unnecessary litigation. Compare William F. Wilke, MSBCA 1162 (October 3, 1983) at pp. 7-9. Here we find, however, that Appellant's inquiry does not meet the criteria of reasonable diligence required to obtain clarification of a patent ambiguity. DGS solicited bids for the project on or about July 23, 1982, some four to five weeks prior to bid opening on August 26, 1982.[4] Thus Appellant had some 30 days to familiarize itself with the specifics of the solicitation including applicable wage rates before submitting its bid. We believe Appellant failed to exercise requisite diligence in making inquiry, at the earliest, some three hours before the 11:00 a.m. bid opening. See: William F. Klingensmith, Inc. v. United States, supra, 205 Ct.Cl. at 662-665. As stated by Appellant in its Post Hearing Brief:

> "Maryland has a "prevailing wage" payment law which requires persons contracting with the State for construction work in excess of $500,000 to pay "prevailing wages" to employees. Code, Art. 21 Sec. 8-501 et seq. ABC was aware of the amounts required to be paid as "prevailing wages" and ABC knew that these amounts were considerably in excess of the actual wages it was paying to its employees. Furthermore, ABC, during the bid preparation stage, became aware of the fact that one of its potential subcontractors, J. W. Russell & Company, also made wage payments to its employees at rates lower than the wages required in the "prevailing wages" applicable to work at this project. (At that time, ABC believed that the total differential between the "prevailing wages" and its wage package was $16,000, but, in fact, learned that the differential was $21,662.86)."

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[4]COMAR 21.05.02.02 requires 30 days between the date of publication of the invitation for bids and the time set for receipt of bids for procurements in excess of $25,000. See also COMAR 21.05.02.04B(1).

Despite such awareness and given the several weeks that the general conditions including Section 9.06 thereof were available to it, no inquiry was made until the morning of bid opening. Even had Appellant's eleventh hour attempt to obtain clarification on applicability of prevailing wage rates succeeded,[5] DGS would not have had time to ensure that all bidders received like clarification by issuance of an addendum or otherwise. Had DGS been alerted to the problem on the morning of bid opening (which it was not) its only option would have been to delay bid opening pending clarification of the matter for all potential bidders or face the potential for a protest pursuant to COMAR 21.10.02.

While we re-emphasize that there may well be circumstances where the duty to inquire as to a patent ambiguity will be satisfied absent strict compliance with the requirements set forth in the Instruction to Bidders, the facts presented to us here simply cannot justify relaxation of the bidding requirements. In failing to respond adequately to its obligation to seek prebid clarification, Appellant is held to have voluntarily assumed all risks of its incorrect interpretation of Section 9.06. Accordingly, in the face of this patent ambiguity, combined with its failure to timely consult with DGS, Appellant may not rely on the principle that ambiguities in government-drawn contracts are construed against the drafter. See: Beacon Construction Company of Massachusetts v. United States, 161 Ct.Cl. 1, 314 F.2d 501 (1963); Jamsar, Inc. v. United States, 194 Ct.Cl. 819, 442 F.2d 930 (1971); James A. Mann, Inc. v. United States, 210 Ct.Cl. 104, 535 F.2d 51 (1976). See also: Johnson Controls, Inc. v. United States, 229 Ct.Cl. 445, 671 F.2d 1312 (1982); Jefferson Construction Co., 176 Ct.Cl. 1363, 364 F.2d 420 (1966), cert. denied, 386 U.S. 914 (1967). Therefore, Appellant's appeal seeking an equitable adjustment to its contract based on contract interpretation grounds is denied.

Appellant also argues as an alternate ground for relief that DGS's rejection of the request for rescission of its bid made after bid opening and before contract execution was a violation of law causing the same quantum of damages ($21,662.86) to be sustained by it.[6] However, for reasons that

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[5]Appellant argues in its Post Hearing Brief that it was required in the absence of clarification by DGS to make its own determination of whether prevailing wages applied based on its reading of Section 9.06. Apparently, Appellant does not contend DGS is bound by the "qualified" opinion of the architect. DGS, in our opinion, is not bound by the opinion of its architect since DGS and not the architect prepared the general conditions and one would not assume in the overall scheme of things that architects would be responsible for preparation of material involving applicability of the State's prevailing wage law. The bid documents instruct bidders to contact DGS concerning questions about general conditions and not the architect, and Appellant never made contact with DGS prior to bid opening.

[6]Denial of Appellant's requests for relief at the agency level involving division of the work into two contracts and issuance of a change order (see Finding of Fact No. 12) have not been pursued in this appeal. The change order request is the functional equivalent of its claim for an equitable adjustment and the request for division of the work into two contracts was properly rejected since it would have been an improper circumvention of both the statutory competitive bid requirements and prevailing wage requirements set forth in Article 21.

follow, we determine that DGS's rejection of Appellant's request for rescission was appropriate and that, in any event, in accepting award of the contract without a proper reservation of rights, Appellant is precluded from relief in this forum.

In P. Flanigan and Sons, Inc., MSBCA 1068 (July 17, 1983) at p. 4 we said:

> In the absence of evidence of coercion or duress, a protest, or some other reservation of rights, a contractor who accepts a contract award with full knowledge of a mistake in its bid[7] impliedly agrees to absorb the error. [citations omitted].

In the instant case Appellant, after unsuccessfully seeking rescission of its bid, executed the contract and performed the work. In so doing we find that it failed to properly reserve its rights to thereafter seek relief. Appellant could have challenged DGS's refusal to permit it to withdraw its bid by initiating the dispute resolution procedures set forth in §7-201 of Article 21 of the Annotated Code and its implementing regulations, COMAR 21.10.04, prior to executing the contract. We held in Flanigan, supra, that the appeal to this Board of the agency's unfavorable decision on Flanigan's request for relief prior to executing the contract operated as a reservation of rights permitting Flanigan to execute the contract at the price bid and seek review of the agency's determination not to permit the requested correction of its bid to the intended amount. Appellant also could have declined to execute the contract upon DGS's refusal to grant the requested relief and tested the appropriateness of such refusal in the courts in an action seeking rescission and return of its bid bond. Appellant elected not to follow either of these avenues but instead executed the contract and thereafter filed a claim with DGS.

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[7] Flanigan involved a clerical error in unit price where both the mistake and the intended correction were evident on the face of the bid document. The parties are in agreement that ABC's determination that prevailing wages did not apply to its bid was not a mistake in bid in the sense of a clerical error which it seeks to correct. The "mistake" involved an erroneous interpretation of the applicability of prevailing wages. What we said in Flanigan concerning reservation of rights applies, however, with equal force to a "mistake" such as the one before us.

Appellant argues, however, that its rights were nevertheless reserved, because it signed the contract under coercion or duress and advised DGS that it was reserving its rights at the time it executed the contract. Appellant contends that it signed the contract fearful of the economic consequences[8] should DGS invoke its bid bond and award the contract to the second low bidder. DGS argues that no coercion or duress exists because no inadvertent yet ascertainable (i.e., clerical error) mistake in bid[9] is involved which would make it unconscionable not to grant rescission but only a judgmental mistake or error in interpretation of prevailing wage rate applicability by Appellant for which no relief is available. DGS further asserts that Appellant's negligence in failing to seek prebid clarification also made rescission inappropriate. In DGS' view it would have been improper for it not to have proceeded against Appellant's bid bond upon its refusal to execute the contract.

Similar arguments to those advanced by DGS were addressed by Chief Judge Thomsen in President and Council of Mount Saint Mary's College v. Aetna Casualty and Surety Company, 233 F. Supp. 787 (D. Md. 1964), a case involving rescission where the contractor erred in its interpretation of confusing though not ambiguous specifications and relied upon by Appellant for authority that it was unlawful for DGS not to grant rescission. Judge Thomsen stated:

> The McGraw case, [Connecticut v. F.H. McGraw & Co., 41 F. Supp. 369 (1941)] cited with approval by the Maryland Court in Deluca-Davis, [Baltimore v. DeLuca-Davis Construction Co., 210 Md. 518, 124 A.2d 557 (1956)] answers the College's argument that rescission should be denied in the instant case because the mistake was not a clerical, mechanical mistake, but a mistake in the interpretation of the specification. The College contends that the mistake was a "mistake

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[8]Appellant calculates those consequences in its Post Hearing Brief as an assessment of damages equal to the difference between Appellant's bid and the bid of the second lowest bidder ($23,800) as compared to Appellant's loss of the then perceived damages of $16,000 resulting from application of prevailing wage rates.

[9]Appellant and DGS assert and the Board agrees that Appellant's error was not a mistake in bid in the mathematical, clerical or mechanical sense presented in the appeal of John W. Brawner Contracting Co., Inc., MSBCA 1085 (July 25, 1983), reversed on other grounds in Maryland Port Administration v. John W. Brawner Contracting Company, Inc., ___ Md. ___, ___ A.2d ___ (May 13, 1985) and that the mistake in bid provisions of Maryland's procurement regulations COMAR 21.05.02.12 do not apply. See: Article 21, §3-202(h). Assuming, arguendo, that COMAR 21.05.02.12 applies, Appellant would not be permitted to recover since COMAR 21.05.02.12D prohibits changes in price for mistakes after a contract is awarded, Maryland Port Administration v. John W. Brawner Contracting Company, Inc., supra, and withdrawal of bids after bid opening is only permitted as a matter of discretion pursuant to COMAR 21.05.02.12(C) and upon written approval by the Office of the Attorney General.

of judgment", and therefore not such a mistake as would justify relief, citing M. F. Kemper Constr. Co. v. Los Angeles, 37 Cal.2d 696, 235 P.2d 7 (1951). The Kemper case, which was cited in DeLuca-Davis on another point, said that there is a difference between a mistake in tabulating and transcribing figures and "errors of judgment, as, for example, underestimating the cost of labor or materials." 37 Cal.2d at 703, 235 P.2d at 11. The mistake in the instant case was not such an "error of judgment".

The College argues that Kappelman, [Kappelman v. Bowie, 201 Md. 86, 93 A.2d 266 (1952)] DeLuca-Davis and McGraw are distinguishable from the instant case because in each of those cases the mistake was palpable, and because in the instant case Miller, Inc. was negligent in failing to clarify its confusion or uncertainty with respect to the specifications by asking the Architects for an authoriative interpretation.

Taking the latter point first, the Court finds that Miller, Inc. was negligent in failing to take the matter up with the Architects, and in relying on Miller's construction of the confusing though not ambiguous specifications; but the Court finds that Miller, Inc. was not guilty of gross or culpable negligence. Relief should not be denied because there was "more or less negligence", Kappelman, supra, nor because Miller was "to a degree negligent", McGraw, supra, since the mistake was not the result of "culpable negligence", DeLuca-Davis, supra.

233 F. Supp. at 797.

The case before us involves interpretation of an ambiguous specification and does not represent the type of "error of judgment" such as underestimating the cost of labor or materials that precludes relief.

Relief would likewise not be precluded merely because Appellant, faced with interpretation of an ambiguous specification, failed to secure prebid clarification from DGS. Therefore, rescission of its bid was not precluded as a matter of law, although, as we have noted above, its ability to accept award of the contract and thereafter seek an equitable adjustment was critically affected by its lack of diligence in meeting its positive legal duty to seek timely clarification, and, as we shall discuss below, the circumstances surrounding its prebid inquiry may well amount to culpable negligence.

Mount Saint Mary's premises its decision on the principles set forth in Baltimore v. DeLuca-Davis Construction Co., 210 Md. 518, 124 A.2d 557 (1956). Both cases are cited with approval in Baltimore County v. John K. Ruff, Inc., 281 Md. 62, 375 A.2d 237 (1977), as enunciating the law of Maryland regarding withdrawal or rescission of bids on government contracts.[10] All three involve a refusal by the contractor to accept award and execute the contract and determination of whether such refusal was legally justified.

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[10]Both DeLuca-Davis and Ruff are cited as reflecting Maryland law on rescission in Maryland Port Administration v. John W. Brawner Contracting Company, Inc., supra.

Here, Appellant executed the contract but contends that it did so under coercion or duress and that it would be, therefore, unconscionable not to compensate it for payment of prevailing wages.

We shall therefore examine the propriety of DGS's action by assuming that Appellant had refused to execute the contract and had defended the challenge to its bid bond; an option that was open to it. As gleaned from Mount Saint Mary's, DeLuca-Davis, and Ruff, supra, the Maryland courts would have applied the following test to determine whether DGS wrongfully refused to allow Appellant to withdraw its bid before award:

> "The general rule as to the conditions precedent to rescission for unilateral mistakes may be summarized thus: (1) the mistake must be of such grave consequences that to enforce the contract as made or offered would be unconscionable; (2) the mistake must relate to a material feature of the contract; (3) the mistake must not have come about because of the violation of a positive legal duty or from culpable negligence; (4) the other party must be put in statu quo to the extent that he suffers no serious prejudice except the loss of his bargain."

Baltimore v. DeLuca-Davis Construction Co., supra, 210 Md. at 527. Applying this test to the record before us, we do not find that DGS's action in advising Appellant that it would "invoke" its bid bond if it refused to execute the contract constitutes coercion or duress such as to require rescission.

Since price and the requirement for payment of prevailing wages are material features of the contract and since DGS could have awarded to the second low bidder without prejudice except loss of the low bid, we find that elements two and four would have been met. As indicated above, we have grave doubts that Appellant's prebid conduct in attempting to clarify the ambiguity as to applicability of prevailing wages satisfies the third element that the mistake not arise out of violation of a positive legal duty or from culpable negligence. Recalling: (1) that the ambiguity was patent or glaring; (2) that Appellant had some 30 days to familiarize itself with the specifics of the solicitation including applicable wage rates; (3) that Appellant had knowledge of the higher amount of such rates compared to the normal wages it and its subcontractor J. W. Russell and Company proposed to pay; (4) that Appellant made no inquiry until the morning of bid opening (and then to the architect who did not prepare the specification); and (5) that the Instructions to Bidder required prebid clarification of discrepancies strongly suggests to us that Appellant's lack of diligence in its response to its imputed and actual knowledge of the problem regarding prevailing wages amounts to culpable negligence.

However, we find that Appellant could not demonstrate the existence of the first element that the mistake be of such grave consequences that to enforce the contract as made or offered would be unconscionable. At the time of its request for bid recission, Appellant valued its mistake at $16,000 or approximately 2.8% of its bid of $586,034. Requiring Appellant to absorb such an alleged loss through performance of the contract clearly does not appear to be unconscionable. Nor would we view performance to be unconscionable applying the actual additional wages paid by Appellant as stipulated to by the parties of $21,662.86, or approximately 3.9% of its bid. The order of magnitude of these numbers bears no compelling comparison to the figures involved in cases where rescission was deemed appropriate such as

DeLuca-Davis where the contractor submitted a bid of $589,880 less than was intended or some 33% of the bid and where the facts also showed that if the contractor had been held to its bid it would have incurred a loss of over $400,000 while its net worth was only $82,000; and Ruff where the mistake amounted to $253,371 or some 8.3% of the bid; and Mount Saint Mary's where the mistake amounted anywhere from $140,000 to $169,000 out of a total bid of $1,389,450 or some 10% to 12% of the bid.[11] Nor do we find it to be unconscionable for DGS to seek through invocation of the bid bond an assessment of damages equal to the difference between Appellant's bid and the bid of the second lowest bidder ($23,800). Assuming validity to Appellant's characterization of this as a "threat . . . compared to ABC's mere loss of the damages (then perceived as $16,000) resulting from the payment of higher wages" which caused Appellant to execute the contract we do not view the "threat" or any underlying economic coercion it may present to represent an unconscionable act nor to rise to the level of coercion or duress we alluded to in Flanigan, supra. See also: Massman Construction Co. v. United States, 102 Ct.Cl. 699, 60 F. Supp. 635 (1945), cert. den. 325 U.S. 866 (1946).

Having concluded that there existed no coercion or duress such as to amount to a legal reservation of rights to seek an equitable adjustment for DGS's refusal to grant rescission, we examine whether, as claimed by Appellant, it nevertheless properly reserved its rights to seek compensation through the actions it did take when it executed the contract.

On October 27, 1982, DGS wrote Appellant and advised it to execute the contract within ten days of receipt of the letter or DGS would invoke Appellant's bid bond and award to the second low bidder.

On October 29, 1982, counsel for Appellant orally requested that DGS either rescind Appellant's bid, issue a change order for $16,000 to cover the cost of payment of prevailing wages or divide the work into two contracts, one in the base bid amount of $437,734 and the second in the sum of the four alternates, $148,300 neither of which would exceed $500,000 and trigger the prevailing wage statute. On November 1, 1982, Appellant's counsel repeated this request to counsel for DGS in writing. On November 8, 1982, counsel for DGS called Appellant's counsel and advised that DGS would not allow Appellant to rescind its bid. Counsel for Appellant called counsel for DGS the next day and advised that Appellant would execute the contract and seek legal redress for its damages.

Appellant executed the agreement on November 10, 1982 and transmitted it to DGS on that date with a cover letter signed by its President that made absolutely no reference to the prevailing wage dispute. It merely stated:

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[11]Neither the contractor in Mount Saint Mary's nor Ruff would have been rendered insolvent had their bids been enforced. We acknowledge as stated in Mount Saint Mary's and quoted with approval in Ruff that whether enforcement of a bid would render the contractor insolvent is a factor to be considered in determining unconscionability, but that it is not controlling, and unconscionability depends upon the various circumstances surrounding each particular case.

In accordance with your instructions, we have enclosed the following completely executed documents:

5 Constructions Agreements [sic]
2 Performance Bonds
2 Payment Bonds
2 Certificate of Insurnace [sic]
2 Insurance Binder

We understand that you in turn will forward the written authorization to proceed with the project.
Should you have any questions, please do not hesitate to call.

Two days later on November 12, 1982, Appellant through counsel asserted a written claim against DGS requesting a procurement officer's decision on the dispute and thereby for the first time initiating the dispute resolution procedure prescribed by law. Article 21, §7-201; COMAR 21.10.04.01. After reciting the nature of the problem and the efforts Appellant had made to secure relief, the letter stated:

> American was, thusly, greatly abused. Even though three viable and legal options were presented to the Department of General Services, it insisted upon an illegal threat, invoking the bid bond. This threat entails the expenditure of substantial legal fees on the part of American and creates the possibility for discord and trouble between American and it's bid bond surety. Accordingly, American agreed to execute the contract "under protest". Mr. Schweizer advised me that he was going to hand deliver the contract to Bill Lee on November 10, 1982. This claim letter is the explication of that "protest" that is made commensurate with the execution of the contract.

We do not find that a letter authored two days after the contractor accepted the contract and returned it without written complaint to DGS suffices as a proper reservation of rights. In our view, absent the filing of a timely appeal to this Board prior to acceptance of contract award as in Flanigan, or clear and convincing evidence of coercion or duress, a reservation of rights can only be said to exist, if at all, where the contractor executes the contract with a contemporaneous written statement that it does so under protest and the specific reasons therefore. Otherwise, the contractor, as here, will be held upon execution of the contract to have waived any right it had to seek relief and be deemed to have knowingly agreed to absorb the damages flowing from its construction of an ambiguous contract specification, term or condition.

For the foregoing reasons, therefore, Appellant's appeal is denied.