BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of CAM CONSTRUCTION COMPANY OF MARYLAND, INC.	)	
	)	Docket No. MSBCA 1926
Under DGS Project No. MS- 531-861-001	)	

April 22, 1996

Equitable Adjustment - Interest - In exercising its responsibility to determine the date from which pre-decision interest, if any, is to run, the Board will attempt to ascertain when the State was in an adequate position to know the details of the claim and the extent of the equitable adjustment being requested. Once this is determined from the record, the Board will allow a reasonable period for assessment of the merits of the claim and payment thereof by the State.

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APPEARANCE FOR RESPONDENT: Michael P. Kenney
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for the additional cost involved in furnishing and installing tapered insulation rather than flat insulation on the gymnasium roof at the Clifton T. Perkins Hospital Center at Jessup, Maryland.

Appellant has elected to proceed under the accelerated procedures set forth under Board Rule 12. COMAR 21.10.06.12.

Findings of Fact

1. On or about June 16, 1993, Appellant entered into a construction agreement with the Department of General Services (DGS) to complete Phase I of the captioned project involving certain renovation and new construction work at the Clifton T. Perkins Hospital Center in Jessup, Maryland.

2. Appellant's work included installation of new roofs as well as replacement of roofs on existing buildings.

3. Generally, the roofing work consisted of first placing several inches of rigid insulation on the roof deck and then placing the build-up roof membrane on top of this rigid insulation.

Two types of rigid insulation were specified, flat and tapered.

Tapered insulation consists of insulation placed in layers to create a sloping effect normally required on flat roof decks so that precipitation will run off the roof. Flat insulation of uniform thickness is required on sloped roof decks. Tapered insulation is not normally required on sloped roof decks because the sloped decks already permit precipitation to run off the roof. Tapered insulation, which involves the layering of strips of insulation, is more expensive to furnish and install.

4. The dispute leading to this appeal arose out of the work involved in the removal and replacement of the existing roof on the gymnasium building. Detail 2 on drawing A-17 is a large scale (3/4" = 1'0") section through the gymnasium roof. This detail indicates that the existing roof deck is to remain. This detail does not indicate that the tapered insulation is required. A note in detail 2 on drawing A-17 points to the roof and states:

BUILD UP ROOF ON 3" MIN. FIBERGLASS INSUL. ON SLOPED DECK, thus indicating that the deck is sloped. By contrast detail 2 on drawing A-17 may be compared with similar roof sections such as details 1 and 2 on drawing A-18, both of which require tapered insulation as follows: BUILT UP ROOF ON TAPERED INSUL. ON 3" F.G. INSUL.

5. Drawing A-12 shows part of the roof plan (labeled area "A") and drawing A-13 shows the continuation of the roof plan (labeled area "B"). The roof plan shown on drawings A-12 and A-13 contains three different categories of roof areas, i.e., dotted areas, blank areas and areas enclosed within dashed lines. According to the roof plan:

(1) the dotted areas are explained as

DOTTED ROOF AREAS INDICATE LOCATIONS OF TAPERED INSUL. OVER SLOPED ROOF STRUCTURE;

(2) the blank areas are explained as

SLOPED ROOF STRUCTURES (TYP); and

(3) the dashed line areas are explained as

ROOF AREA INDICATED BY DASHED LINES TO BE TAPERED INSUL. OVER FLAT STRUCTURE.

6. The gymnasium roof plan, which is shown on drawing A-12, shows the gymnasium roof blank, except for diamond shaped crickets[1] appearing thereon which are dotted. The gymnasium roof contained no dashed line areas. A note appeared in the blank area of the gymnasium roof plan which stated "BUILT UP ROOF ON TAPERED RIGID INSUL." with arrows pointing to the blank area. DGS argues that the note should have alerted bidders that tapered insulation was required. However, we find that a contractor bidding the work would reasonably have concluded that the blank and undashed gymnasium roof area indicated that the roof structure or roof deck was sloped. This indication is consistent with the roof section shown on detail 2 of drawing A-17. Therefore, a bidder would reasonably assume the gymnasium roof would require flat insulation excepting the dotted cricket areas which would require tapered insulation and would have compiled its bid accordingly. As discussed below any discrepancy raised by the note would be resolved by the order of precedence clause set forth in general note 13 on drawing TS-2.

7. Pursuant to specification Section 07512, paragraph 1.04A.[2] which provides "Shop Drawings: Submit tapered insulation layout", Appellant submitted shop drawings for the roof areas to the architect for approval on October 4, 1993. As to the gymnasium roof area, these shop drawings were submitted consistent with the foregoing showing tapered insulation only at the crickets. The remainder of the gymnasium roof was shown on the shop drawings with flat insulation.

8. On November 4, 1993, these shop drawings were reviewed by the architect and marked FURNISHED AS CORRECTED. As to the gymnasium roof area, the architect noted on the shop drawings only that the cricket configuration was incorrect and Appellant was given the option either to correct the cricket configuration or to give a credit for the reduction in tapered insulation at the crickets. The architect took no exception to the flat insulation shown on the remainder of the gymnasium roof.

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[1] A cricket is a small, well-defined, often diamond-shaped, roof area which has been raised to a greater slope than the overall roof area.

[2] Section 07512 deals with the built-up asphalt roofing system.

9. Subsequently, Appellant removed the existing roof at the gymnasium and discovered that the gymnasium roof deck was flat and not sloped as the drawings indicated.

10. As a consequence, on June 21, 1994, Appellant submitted RFI No. 80-A, requesting information on how to proceed with the gymnasium roof work.

11. Appellant's RFI No. 80-A pointed out the discrepancy between the actual field condition (flat gymnasium roof) and the sloped gymnasium roof it believed was shown on the drawings. This RFI also acknowledged the note on the blank area of the gymnasium roof plan (drawing A-12) which stated "BUILT UP ROOF ON TAPERED RIGID INSUL." and appeared to be in conflict with the dotted versus blank symbology and also with the larger scale detail 2 on Drawing A-17. However, as noted in Appellant's RFI, Appellant believed this discrepancy was automatically resolved by the "order of precedence" clause set forth in general note 13 on drawing TS-2:

> In case of discrepancies between the small scale drawings and the larger scale drawings, the larger scale will take precedence over the smaller scale drawing. In case of discrepancies between the Drawings and the Specifications, the Specifications will take precedence over the Drawings. Any discrepancy within the Contract Documents shall be called to the attention of the Architect before proceeding with work affected thereby.

12. The gymnasium roof plan on drawing A-12 which contains the note "BUILT UP ROOF ON TAPERED RIGID INSUL." is drawn at a small scale of 1/16" = 1'-0". On the other hand, detail 2 on drawing A-17 is drawn at a larger scale of 3/4" = 1'-0". Thus, according to the order of precedence clause, detail 2 takes precedence over the note.

13. By letter dated June 22, 1994, the architect responded to Appellant's RFI by requiring tapered insulation on the entire gymnasium roof due to the fact that the existing gymnasium roof deck was actually flat and denied Appellant any additional compensation based on the architect's position that its drawings, properly interpreted, depicted a flat roof deck.

14. Appellant provided tapered insulation on the entire gymnasium roof as directed by the architect at an additional cost of $19,988.00.

15. Between the architect's letter dated June 22, 1994 and August of 1995 the Appellant continued to follow DGS internal review procedures in an attempt to persuade DGS to accept Appellant's position as reflected in its proposed Change Order No. 46 dated August 2, 1994 that the bid documents reflected that the gymnasium roof deck was sloped. However, by letter dated

August 11, 1995, from the Deputy Chief of the DGS Construction Division, Appellant was advised that it's proposed Change Order No. 46 was recommended for disapproval with finality within the DGS review procedure that preceded review by the Procurement Officer. By letter dated August 16, 1995,[3] Appellant timely filed its notice of claim and claim with the Procurement Officer and timely revised its claim upward to $19,988.00 by letter dated September 21, 1995 to reflect the actual cost of having furnished and installed the tapered insulation on the gymnasium roof.

16. On October 24, 1995, the Procurement Officer issued a final decision on the merits denying Appellant's claim for additional compensation.

17. Appellant timely appealed this final decision to the MSBCA on November 15, 1995 and requested the accelerated procedure on December 18, 1995.

Decision

A. Timeliness

At the conclusion of the presentation of Appellant's case, DGS made an oral motion for summary disposition on grounds that Appellant's notice of claim was not timely filed with the DGS Procurement Officer within thirty days of the architect's June 22, 1994 response to Appellant's RFI. After entertaining argument of counsel, the Board denied the motion. The DGS motion was predicated on COMAR 21.10.04.02 requiring dismissal of a claim where (1) notice of the claim is not filed with the appropriate Procurement Officer within 30 days after the basis for the claim is known or should have been known whichever is earlier or (2) the claim is thereafter not timely documented. DGS asserts that Appellant's claim arose in the summer of 1994 when the architect refused to accept Appellant's contention that the bid documents reflected that the gym roof deck was sloped and that the claim filed in the summer of 1995 was therefore late. The Board finds that the notice of claim and claim was timely filed by letter to the Procurement Officer dated August 16, 1995 in response to the final proposed administrative denial of proposed Change Order No. 46 of

[3] Previously, by letter dated May 26, 1995 addressed to "Mr. William E. Culen, Procurement Officer," Appellant filed a "Request for Hearing" as specifically directed by DGS in a facsimile dated May 24, 1995, which noted that "the matters in dispute on PCO #46 . . . remain without further comment." However, the Board finds, as noted, that the record reflects final rejection by DGS of proposed Change Order No. 46 by letter dated August 11, 1995 from which action Appellant filed its notice of claim and claim by letter dated August 16, 1995.

August 11, 1995 issued by the DGS Construction Division. See Finding of Fact No. 15.[4] In the Board's opinion the determination by the architect did not under the record presented in this appeal constitute a rejection by DGS of Appellant's position requiring the filing of a claim under COMAR 21.10.04.02 for Appellant's contract dispute rights to be preserved. The record reflects that review by the architect constituted only one level of review which was subject to further review pursuant to DGS internal review procedures.

DGS also complains that the Appellant's letter of August 16, 1995 was directed to Mr. Culen rather than Mr. Kelley because Mr. Kelley identified himself as the Procurement Officer in a letter to Appellant dated June 28, 1995 acknowledging Appellant's "claim letter of May 26, 1995".[5] However, DGS specifically directed Appellant to file a "Request for Hearing" with "Mr. William E. Culen, Procurement Officer" by facsimile dated May 24, 1995 if Appellant decided to "pursue these matters further." The Board finds that the filing with Mr. Culen rather than Mr. Kelley of the letter dated August 16, 1995 satisfied the requirements of COMAR 21.10.04.02 that the claim be filed with the appropriate Procurement Officer, resolving any confusion created by Mr. Kelley's letter of June 28, 1995 in Appellant's favor. Mr. Kelley did not raise any such issue in his October 24, 1995 Procurement Officer's decision, choosing instead to address the merits of Appellant's claim. The Board also notes that COMAR 21.01.02.01(67) defines Procurement Officer to include an authorized representative acting within the limits of authority.

B. Merits

Appellant argues that a reasonable reading of the bid documents at the time of bid preparation would lead a bidder to conclude that the existing gym roof deck was sloped. DGS argues that the bid documents create an ambiguity as to whether a flat or sloped deck is intended to be portrayed as a result of the note on drawing A-12. Without the note which states "BUILT UP ROOF ON TAPERED RIGID INSUL," there would be no question that the bid documents conveyed that the gymnasium roof deck was sloped. The note was placed on the drawings in haste

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[4] While not mentioned as a ground in DGS's oral motion for summary disposition we note that the letter of August 16, 1995 while signed by Appellant's President does not contain the certification required by COMAR 21.10.04.02B(5). We find that this requirement has been waived by DGS. All other requirements set forth in COMAR 21.10.04.02B we find were satisfied by the letter of August 16, 1995 directly or by reference.

[5] This is the letter of May 26, 1995 referred to in footnote 3 above.

at the last minute with the intention to convey to the bidders that the gymnasium roof deck was flat. The note does conflict with the other information conveyed by the bid documents, particularly the information conveyed by drawing A-12 (excepting the note) and detail 2 on drawing A-17, which indicates that the gymnasium roof deck is sloped. However, the record reflects that the Appellant reasonably resolved the matter by resort to the order of precedence clause set forth in general note 13 on drawing TS-2.

This note provides:

> In case of discrepancies between the small scale drawings and the larger scale drawings, the larger scale will take precedence over the small scale drawing. In case of discrepancies between the Drawings and Specifications, the Specifications will take precedence over the Drawings. Any discrepancy within the Contract Documents shall be called to the attention of the Architect before proceeding with work affected thereby.

The gymnasium roof plan on drawing A-12 which contains the note "BUILT UP ROOF ON TAPERED RIGID INSUL." is drawn at a small scale of 1/16" = 1'-0". On the other hand, detail 2 on drawing A-17 is drawn at a larger scale of 3/4" = 1'-0". Thus, according to the order of precedence clause, detail 2 takes precedence over the note and it was not unreasonable for the Appellant to rely on the clause to resolve the matter.

Because the potential ambiguity created by the note was internally resolved by a harmonious reading of all the information conveyed by the bid documents to include the order of precedence clause there was, in fact, no ambiguity to clarify and Appellant is entitled to reply on its own reasonable interpretation of the documents that the roof deck was sloped. At worst, we find any ambiguity created by the last minute insertion of the note by DGS's agent, the architect, during the bid document preparation phase was latent rather than patent, excusing the absence of pre-bid inquiry and enabling Appellant as the non-drafting party to rely on its own reasonable and good faith interpretation of the bid documents. See Martin G. Imbach, Inc.,MDOT 1020, 1 MSBCA ¶52 (1983) at p. 15; The Driggs Corporation, MSBCA 1235, 2 MSBCA ¶141 (1987) at pp. 14-15. Compare American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985) at pp. 6-9. In regard to the latency of the matter we note that the architect did not indicate that there was a problem upon its review of Appellant's shop drawings and that the roof insulation in question constitutes only a twenty thousand dollar item in an eight million dollars contract.

We find further that Appellant has documented its damages at the hearing in the amount of $19,988.00 for additional cost to furnish and install tapered insulation through presentation of invoices for materials and equipment totaling $11,787.00 and 5% sales tax thereon, $589.00, and labor costs of $3,318.00 for a total labor and material cost of $15,694.00. To this is added 15% allowable overhead and profit of $2,350.00, $1,493.00 for payroll burden at 45%, $250.00 for a dumpster for waste and shavings and $197.00 for a 1% Bond cost for the total amount claimed of $19,988.00. See Tabs 5 & 6, Rule 4 File; Tr. April 4, 1996 at pp. 56 - 77.

Pre-Decision Interest

Appellant seeks pre-decision interest from the date of its submission of its claim to the Procurement Officer in August 1995. Pursuant to Section 15-222, Division II, State Finance and Procurement Article, the Board may award pre-decision interest on money due a contractor on a claim from a day the Board determines to be fair and reasonable. As the Board has previously stated in determining when interest should begin to run, it will attempt to ascertain "when the State was in an adequate position to know the details of the claim and the extent of the equitable adjustment being requested," and thereafter allow a reasonable period for review and payment by the State. See Granite Construction Company, MDOT 1014, 1 MSBCA ¶66 (1983) at p. 41. The extent of the equitable adjustment being requested was known when DGS received Appellant's letter of September 21, 1995 amending its claim upward. However, the Board notes the good faith (though erroneous) belief by DGS that the note on drawing A-12 conveyed to the bidders that the gymnasium roof deck was flat and the latent nature of any ambiguity created by the existence of the note. Further, the record does not reflect the quality of the argument advanced by Appellant prior to the denial of its claim to persuade DGS of the merits of the claim. Accordingly, the Board will not start the running of pre-decision interest from the date the Procurement Officer received the Appellant's claim. However, upon the receipt by DGS of Appellant's detailed and legally persuasive Complaint in the instant appeal the DGS Procurement Officer should have been able to fully appreciate the validity of the Appellant's claim. The Board received the Complaint on December 18, 1995. The certificate of service on the Complaint is dated December 15, 1996 (hard copy first-class mail and facsimile) and the Board finds that the Complaint should have been received and reviewed by the DGS Procurement Officer by January 16, 1996. Thus by January 16,

1996 the validity of Appellant's claim could have been appreciated. Allowing thirty (30) days for payment to have been affected, the Board finds it appropriate to commence the running of pre-decision interest from February 15, 1996.

Wherefore, it is ORDERED this 22nd day of April, 1996 that Appellant is entitled to an equitable adjustment of $19,988.00 with pre-decision interest thereon to run at the rate of interest on judgments as provided by the Courts Article from February 15, 1996 and post-decision interest on such amount to run at the rate of interest on judgements as provided by the Courts Article from the date of this decision until paid.

Dated: April 22, 1996

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
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 1926, appeal of Cam Construction Company of Maryland, Inc. under DGS Project No. MS-531-861-001.

Dated: April 22, 1996

Mary F. Priscilla
Recorder