

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CHERRY HILL  
CONSTRUCTION, INC.

Under SHA Contact No.  
P-732-506-372

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Docket No. MSBCA 1313

February 4, 1988

Patent Ambiguity - Duty to Inquire - A contractor must make or at least attempt to make prebid inquiry when faced with a patent ambiguity in the IFB specifications. If prebid inquiry may prove futile, it should nevertheless be attempted and a protest filed if the inquiry falls on deaf ears.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for the cost of gravel base for a gabion wall under a State Highway Administration (SHA) contract for interchange improvements. SHA asserts that the appeal must be denied because of the failure of Appellant to make prebid inquiry concerning the proper interpretation of the allegedly ambiguous specification involved in the determination of the cost of the gravel base.

Findings of Fact

1. On or about January 21, 1986, four bids were opened on the captioned contract for work involving Interstate 95 and Maryland Route 222 Interchange improvements. Appellant submitted the low bid of \$3,652,887.25. The other three bids submitted were \$3,985,621.60, \$4,309,740.60 and \$4,360,434.90.

2. Included among the lump sum bid items in the bid package was Item 4013 for a gabion retaining wall along Ramp J.<sup>1</sup> Appellant's lump sum bid for Item 4013 was \$282,000. Bids of the three other bidders for Item 4013 were \$627,000, \$552,000 and \$350,000.

3. Appellant had prepared its bid on Item 4013 based on its determination that the gravel base underneath the gabion retaining wall along Ramp J to the six foot depth shown on the plans was to be paid for separately as a contingent bid item; payment to be based on the contract unit price per cubic yard for select backfill pursuant to subsections 601.04 and 601.05 of the SHA Standard Specifications for Construction and Materials.

4. After the contract was awarded and upon a request for payment, Appellant was advised by SHA that the cost of the gravel base underneath the gabion wall was considered to be included in Appellant's lump sum bid price for Item 4013. (Tr. 23-24). Appellant filed a claim contesting this interpretation. However, SHA affirmed its determination by final decision of the procurement officer dated October 30, 1986 and Appellant appealed to this Board.<sup>2</sup>

5. According to its complaint, Appellant based its prebid determination that the gravel base was to be paid as a contingent item on language in Addendum No. 1 to the specifications. Addendum No. 1 was issued on December 6, 1985.<sup>3</sup> Specifically, Appellant's complaint alleges that it relied

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<sup>1</sup>Bidders could submit bids on alternate construction methods using either a gabion retaining wall or a concrete crib retaining wall. The dispute herein involves a gabion retaining wall.

<sup>2</sup>The parties have stipulated to the amount of Appellant's damages if the gravel base is treated as a contingent item. Thus, only entitlement is at issue.

<sup>3</sup>The original and amended specifications regarding payment for the gabion retaining wall are set forth as Attachment A.

on language at page 2 of Addendum No. 1 (the synopsis referring to changes on pages 98 through 100 of the Addendum, which refers to Item 4013)

providing:

"Pages 98 thru 100 - Has been revised to include the six foot (6') of gravel base in the Lump Sum Retaining Wall items and the Select Backfill items were made contingent."

Appellant also, according to its complaint, relied on language at page 99 of Addendum No. 1, providing:

"A contingent item for select backfill is included in this contract to provide for the removal of unsuitable material beyond the depths shown on the plans. The method of measurement and basis of payment for the selected backfill gravel wall base shall be in accordance with subsections 601.04 and 601.05 of the Standard Specification."

6. Appellant's President, Mr. James A. Openshaw, Jr., who was ultimately responsible for the compilation of Appellant's bid (Tr. 7-9), testified that the specifications regarding payment for the gravel base as amended by Addendum No. 1 were ambiguous as to whether gravel base was a contingent item or to be included in the lump sum bid under bid Item 4013. (Tr. 38). He perceived this ambiguity the night before bid opening while reviewing the Appellant's proposed bid. He elaborated on his understanding of the proper method of bidding of the gravel base as follows:

Well briefly, the front page of Exhibit 1 shows the breakout of the items that we needed in order to build this wall. And very specifically, Item No. 2 is no. 57 stone, which is the material which went under the gabion wall, which is what the hearing is all about. And this exhibit shows that when the bid was put together by my estimators, it was their understanding that the stone was possibly a part of the lump sum bid, and they included it in that.

Now that evening, in reviewing the bid, and reviewing the revision, I had made a note — I made many notes, one of them was, "Do we get paid separately for the 57 stone?" And the next morning, in reviewing the bid, I asked this question of my estimators and asked them — not only the estimator that put this bid together, who's name was Julian Bacot, but also other estimators who are not familiar with the project, to read the special provisions and give me their interpretation. Now, of course, I then told them that I did not believe that the stone was

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a part of the wall. And they could not give me an argument that it was and it was their opinion that it was ambiguous and they really didn't know.

At that time, I put together Exhibit 2, which took excerpts from Exhibit 1, to come up with a lump sum price, which we used in the bid. And, I deleted the stone and revised the labor and equipment. . . .

(Tr. 12-14).

7. For assistance in making his determination of how to price the gabion wall gravel base, Mr. Openshaw also looked at the original and amended specification regarding payment for the gravel base for the permissible alternate bid on a concrete crib retaining wall. Use of the words "furnishing and placement" in connection with the gravel base in the concrete crib retaining wall specifications as set forth in Addendum No. 1 suggested to him that the price of the gravel base was to be included in the lump sum bid for the concrete crib retaining wall. The absence of the word "furnishing" in the gabion retaining wall specifications as set forth in Addendum No. 1 added to the confusion in his mind as to whether the gravel was to be included in the lump sum bid for the gabion wall or treated as a contingent item particularly since, in his experience, the SHA specifications normally say "furnish and place" if gravel is to be included in a lump sum bid. (Tr. 20-22).

Faced with the need to timely submit the bid, Mr. Openshaw determined to delete the cost of providing the gravel for the gabion wall base from the lump sum bid.

8. Mr. Openshaw, while acknowledging that he believed the specifications regarding payment for gravel base to be ambiguous, did not make inquiry of SHA concerning the pricing of the gravel base. His testimony concerning why he did not make inquiry of SHA prior to bid opening was, in material part, as follows:

A. Well it meant to me that I had an ambiguity. And as a competitive bidder I had no way of knowing what my competitors were going to do with it. And that I had to interpret it the best way I could. And at that time of the day, and that time prior to the bid, there was no time to make a phone call. It's like an airplane going down a runway, there comes a point — you're at a point of no return and you have to fly with what you've got.

Q. So what did you do as a result?

A. I reduced the bid in the amount of the stone.

(Tr. 21-22).

Q. Why is it that there was no inquiry made of the State, prior to the time that the bid was submitted on this particular item?

A. Well, for two main instances. Number one, the shortness of time. And number two, ten years ago we would have handled this differently. But in the last three or four years, many times the answers we get are: "We know it's a problem, you'll have to settle it later. The bid will go ahead. All the bids get scheduled and rescheduled and this one was too." And we get this answer many times. And for that reason, sometimes we have to ignore the fact that the contingent item would not cover the stone. It wasn't big enough there wasn't enough there. And — I mean, this happens on every bid now, and there's some big difficulties with some of the bids. And that's the answers we get. So, we knew we were going to get that answer, if we could find anybody at that late hour, to even give us an answer. Odds are we wouldn't.

And second, we don't know what our competitors are doing, nor what type of an answer they may be getting. And, after all, we have to be low bidder if we're going to be in business. So, we have to make a decision with the thought in mind, we can't lose the bid over this item.

(Tr. 48-49).

9. Randolph P. Brown, a project engineer for the SHA Bureau of Bridge Design, was called as an adverse witness by Appellant. Mr. Brown was responsible for review and approval of the project specifications.

Mr. Brown had requested the private sector consultant who prepared the specifications for the project to change the specifications regarding bid Item 4013 for the gabion retaining wall and the concrete crib retaining wall at

Ramp J. Mr. Brown thought the language of the changes accurately reflected his intent that the gravel wall base be included in the lump sum bid for Item 4013 and that the select backfill be made contingent. (Tr. pp. 60-64). Mr. Brown denied that SHA would not clarify questions pertaining to the bidding of items like the one in the instant appeal prior to bid opening. (Tr. pp. 97-99).

#### Decision

Appellant and SHA agree that the specifications raise an obvious or patent ambiguity as to whether the cost of the gabion wall gravel base is or is not to be included in the lump sum bid for Item 4013. The parties also agree that Appellant made no prebid inquiry concerning this obvious or patent ambiguity to ascertain the correct measure of payment or method of bidding the gravel base. This Board has stated on several occasions that a bidder has an affirmative obligation to seek prebid clarification of such patent ambiguities. See Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 at pp. 10-11, 22-24 (1984); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 (1984); American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985); Hanks Contracting Inc., MSBCA 1212, 1 MSBCA ¶110 (1985). The rule is one of common sense.

"The doctrine of patent ambiguity is an exception to the general rule of contra proferentem which requires that a contract be construed against the party who wrote it. If a patent ambiguity is found in the contract, the contractor has a duty to inquire of the contracting [procurement] officer the true meaning of the contract before submitting a bid. This prevents contractors from taking advantage of the Government; it protects other bidders by insuring that all bidders bid on the same 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."

George E. Newsom v. United States, 230 Ct.Cl. 302, 303, 676 F.2d 647 (1982).

The practical application of the doctrine of patent ambiguity 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, 1 MSBCA ¶69 at pp. 13, 22-23 (1984).

Appellant acknowledges the general proposition that an obvious ambiguity requires prebid inquiry of the owner before the contractor may invoke the rule of contra proferentum, i.e. that an ambiguous contract provision be construed against the drafting party. However, Appellant asserts in the instant case that SHA would not answer the question concerning how to bid the gravel base even if prebid inquiry had been made; hence it argues that prebid inquiry would have been futile and should not be required. See Finding of Fact No. 8.

We reject any notion that we should depart from or carve exception to the requirement for prebid inquiry. If prebid inquiry may prove futile, it should nevertheless be attempted and a protest filed if the inquiry falls on deaf ears. See William F. Wilke, Inc., MSBCA 1162, 1 MSBCA ¶61 (1983); American Building Contractors, Inc., supra.

We also observe that Mr. Openshaw's testimony as set forth in Finding of Fact No. 8 above is the only evidence presented by Appellant to support its contention that inquiry was not made because it would have been futile to do so.<sup>4</sup> However, Mr. Openshaw candidly admitted that both competitive considerations as well as a question of futility influenced his decision not to inquire. Mr. Openshaw testified that not only was he concerned that SHA might not answer or clarify the question of how to bid the gravel base, a point disputed by SHA's Mr. Brown, but that he was also concerned about maintaining a competitive edge that might be lost if successful inquiry were made. Concern for potential loss of competitive edge apparently stemmed from the shortness of time before the bid<sup>5</sup> and ignorance of what answer his

<sup>4</sup>On cross examination, however, Mr. Openshaw testified:

- Q. Now, you are aware, are you not, that your estimators have, on State Highway Administration projects called the State Highway Administration project engineer, when they have a question about an invitation for bids?
- A. All the time.
- Q. So, it's hardly unusual for them to make an inquiry if they have some kind of a question about a specification, is that true?
- A. It's usual for them to, yes.
- Q. Now, it is also the case, is it not, that you know that your estimators did not make any inquiry with respect to the matter that we're hear about?
- A. That's correct.

(Tr. 30-31).

<sup>5</sup>We find scant support in the record for Appellant's predicate for its futility argument that failure to recognize the ambiguity until the night before the day on which the bids were due should be excused. The fact that in the construction industry bids are prepared and refined right up to the time of bid opening does not legitimize Appellant's assertion that an 11th hour inquiry would be futile since no one could probably be found at that late hour to even possibly answer the question. Addendum No. 1, whose language created the ambiguity on how to bid the gravel base, was issued on December 6, 1985. Bids were not opened until on or about January 21, 1986, some six weeks later. Failure to recognize the ambiguity that had existed publicly for six weeks cannot be excused on the basis of Appellant's business practice.



competitors might be getting to the same question. Such testimony does not demonstrate to a reasonable degree of certainty that inquiry would in fact have been futile.

In any event, in accord with the previous decisions of this Board, Appellant's appeal must be denied due to Appellant's failure to make prebid inquiry in the face of a patent ambiguity.

Attachment A

The specification regarding payment for the gabion retaining wall as set forth in Addendum No. 1 provided:

Method of Measurement and Basis of Payment:

The gabion retaining wall, including the transition sections, will not be measured for payment. The excavation, placement of the gravel base to the depth shown on the plans, filter fabric, placing and filling of the wire baskets, backfilling, disposal of surplus material, as well as labor, materials, equipment, tools and incidentals necessary to complete the job shall be included in the contract lump sum price bid for the item Gabion Retaining Walls along Ramp "J", complete and in place.

To provide for unforeseen changes in planned dimensions of the retaining wall and the end transitions, an item of Contingent Wall is also included. This item shall be used only upon written direction of the Engineer. If additional wall is required, it shall be paid for, complete in place as described above, at the contract unit price bid, per square yard of exposed front face of wall, on the Contingent Wall item.

A contingent item for select backfill is included in this contract to provide for the removal of unsuitable material beyond the depths shown on the plans. The method of measurement and basis of payment for the selected backfill gravel wall base shall be in accordance with subsections 601.04 and 601.05 of the Standard Specification.

The original specification regarding payment for the gabion retaining wall provided:

Method of Measurement and Basis of Payment:

The gabion retaining wall, including the transition sections, will not be measured for payment. The excavation, filter fabric, placing and filling of the wire baskets, backfilling, disposal of surplus material, as well as labor, materials, equipment, tools and incidentals necessary to complete the job shall be included in the contract lump sum price bid for the item Gabion Retaining Walls along Ramp "J", complete and in place.

To provide for unforeseen changes in planned dimensions of the retaining wall and the end transitions, an item of Contingent Wall is also included. This item shall be used only upon written direction of the Engineer. If additional wall is required, it shall be paid for, complete in place as described above, at the contract unit price bid, per square yard of exposed front face of wall, on the Contingent Wall item.

The method of measurement and basis of payment for the selected backfill gravel wall base shall be in accordance with subsections 601.04 and 601.05 of the Standard Specification.

