

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CHERRY HILL
CONSTRUCTION, INC.

Under SHA Contract No.
P-410-505-372

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Docket No.
MSBCA 1550

May 1, 1991

Equitable Adjustment - Omission of Pay Items for Work Specified in the Contract Documents - A contractor was entitled to an equitable adjustment to its contract price for the cost of construction of eight standard junction boxes where the SHA inadvertently omitted pay items for the junction boxes in the Schedule of Prices in the bid documents. SHA contended that the junction boxes should be paid for under a bid or pay item for a quantity of component material for miscellaneous structures. However, the Board found that the pay item for miscellaneous structures did not apply to the standard junction boxes in dispute and concluded that SHA should have issued an extra work order or change order for the boxes as it already had for several more expensive special or non-standard junction boxes for which no pay items appeared in the Schedule of Prices.

APPEARANCE FOR APPELLANT:

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Smith, Somerville & Case
Baltimore, MD

APPEARANCE FOR RESPONDENT:

Dana A. Reed
Assistant Attorney General
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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for the cost of construction of eight (8) junction boxes which the State Highway Administration (SHA) contends should be paid for pursuant to the unit price for cubic yard of Mix No. 2 Concrete for miscellaneous

structures as set forth in Appellant's bid for Bid Item No. 3006 in the Schedule of Prices, and Appellant contends should be paid for pursuant to an equitable adjustment of the contract price.

Findings of Fact

1. Appellant was one of four bidders for the subject contract. The bid documents included 388 plan sheets reflecting work to be performed, and a Schedule of Prices for several hundred lump sum and estimated quantity items of work. At bid opening on November 29, 1988 Appellant's bid of \$35,746,344.60 was the low bid, and Appellant was awarded the contract on January 25, 1989. The work included the construction, improvement and replacement of a portion of proposed Interstate 68 in the Route 50 corridor in Prince George's County. Notice to proceed was issued on February 15, 1989, and Appellant commenced work.

2. On April 27, 1989, the SHA project engineer for the subject work, at the direction of Mr. Rick O'Neal, his superior

at SHA and the coordinator for construction in the Route 50 corridor, requested Appellant to submit prices for construction of eleven (11) pre-cast and cast-in-place special (or non-standard) and standard junction boxes ¹ identified as: S-42, S-44, S-52, S-53, S-54, S-55, S-60, S-14, S-15, S-36, and S-37. The request was made because although these junction boxes were set forth on sheets 79 and 80 of the plans, and referenced in a schedule of structures, no pay item was provided in the Schedule of Prices in the Bid Documents for them. ² The Schedule of Prices in the Bid Documents included only a bid or pay item at Bid Item No. 3081 (added by Addendum No. 5 issued on November 9, 1988) which referenced one special junction box (S-38 - Special Junction Box No. 1) and appeared as follows: ³

Item Nos.	Approximate Quantities	Description of Items	Unit Price Dollars .Cts	Amounts Dollars .Cts
3081 300000	1	Each of Special Junction Box No. 1	88,000.00	88,000.00

3. Pursuant to the request of April 27, 1989 from the project engineer, Appellant on June 21, 1989 and July 10, 1989 submitted Requested Change Order (R.C.O.) Nos. 35 and 22 seeking compensation of \$177,480.33 for the eleven (11) junction boxes referenced. SHA acknowledged receipt of the two R.C.O.'s on July 27, 1989, and on July 12, 1990, the SHA District Engineer

¹ A standard junction box is one of a uniform type as set forth in SHA's Book of Standards at paragraph 386.11. A special or non-standard junction box requires reference to a particular plan detail sheet for specifics of size and shape.

² Twelve junction boxes were listed on the plans at sheets 79 and 80, specifically: four special S-38, S-42, S-44 and S-52 and eight standard S-53, S-54, S-55, S-60, S-14, S-15, S-36 and S-37.

³ The wording of Addendum No. 5 indicated that there was only one special junction box shown on the plans.

responded with a payment procedure.

4. Pursuant to this procedure junction boxes S-53, S-54, S-55, S-60, S-14, S-15, S-36 and S-37 (i.e. those in dispute ⁴) would be paid for under Bid Item No. 3006 covering Mix No. 2 Concrete for Miscellaneous Structures through reference to a provision dealing with Mix No. 2 Concrete for Miscellaneous Structures at page 114 of the Contract Special Provisions, which states:

MIX NO. 2 CONCRETE FOR MISCELLANEOUS STRUCTURES

An item [3006] of "Mix No. 2 Concrete for Miscellaneous Structures" has been allowed for the construction of any miscellaneous structures directed by the Engineer or unforeseen changes in planned dimensions affecting concrete for pipe headwalls.

The item shall be in accordance with Section 608 and 918 of the Specifications.

The Contract unit price bid per Cubic Yard for "Mix No. 2 Concrete for Miscellaneous Structures" shall be full compensation for all labor, equipment, materials and incidentals required to satisfactorily complete the work specified.

⁴ At Issue are the following standard junction boxes broken down into the following unit prices as set forth in the R.C.O.'s:

S-53	\$ 6,997.16
S-54	7,065.52
S-55	7,697.14
S-60	7,030.33
S-14	6,951.12
S-15	7,262.48
S-36	4,874.59
S-37	<u>4,946.89</u>
	\$52,825.23

The remaining three non-standard or special junction boxes, S-42, S-44 and S-52, payment for which is not in dispute, were paid on a "per each" (i.e. extra work order) basis with SHA accepting the reasonableness of the payment requested in the R.C.O.'s by reference to the amount Appellant bid for the work involved in Bid Item No. 3081, the single junction box actually appearing as a pay item in the Schedule of Prices in the Bid Documents. See Finding of Fact No, 2; Tr. pp 111-113.

5. SHA also relied on Section 603 of the Standard Specifications for its determination of the payment procedure for the eight (8) junction boxes in dispute. Under Section 603.04, the second paragraph states that "Standard Endwalls and special structures will be measured on the basis of the count or number of each type and size of standard units built," and paragraph 3 states, "Non-standard endwalls and other miscellaneous structures such as barricades, steps, spring boxes, junction boxes, pipe encasements, etc. will be measured on the basis of the volume in cubic yards of the masonry actually used in their construction." Under Section 603.05, the first paragraph states that "Miscellaneous structures will be paid for on the basis of the lump sum bid per each type and size of such standard structure," whereas paragraph two states "Nonstandard endwalls and other miscellaneous structures such as barricades, steps, spring boxes, junction boxes, pipe encasements, etc. will be paid for on the basis of the unit price bid per cubic yard of concrete of the mix specified."

6. Appellant's bid for Bid Item No. 3006 was Six Thousand (\$6,000.00) for an approximate quantity of "100 cubic yards of mix 2 concrete for miscellaneous structures." Approximately fifty-five (55) cubic yards of mix No. 2 concrete were used in construction of the eight standard junction boxes. Payment under Bid Item No. 3006 at \$60.00 per cubic yard would total approximately \$3,300.00. As noted, Appellant asserts that the actual cost to construct the eight standard junction boxes was \$52,825.23.

7. On July 26, 1990, Appellant submitted a request for reconsideration of the method of payment for the remaining eight standard junction boxes in dispute. This request was subsequently denied by the SHA District Engineer on August 10, 1990.

8. Appellant then submitted its claim for an equitable adjustment to SHA's Chief Engineer on August 22, 1990. On September 25, 1990, the Chief Engineer rendered the SHA final

decision denying Appellant's claim for an equitable adjustment for the junction boxes. Appellant appealed to this Board on October 22, 1990.

Decision

SHA's reliance on Bid Item No. 3006 is inappropriate for payment of the eight junction boxes in dispute. Bid Item No. 3006 is the pay item for Mix No. 2 Concrete for miscellaneous structures. It is an estimated (approximate) quantity item⁵ intended as a competitively bid item to provide a measure of payment for a relatively small quantity of Mix No. 2 Concrete to construct miscellaneous structures. There should have been pay items in the Schedule of Prices in the bid documents for all twelve junction boxes (standard and special) set forth in the plans. Through inadvertence, the Schedule of Prices included only a bid item for one of the special junction boxes and failed to include a pay item for the remaining eleven (3 special, 8 standard) junction boxes. Bid Item 3006 was never intended to be the pay item for the missing eleven junction boxes, and should not have been used as the yardstick for payment when the omission of pay items for the junction boxes from the bid documents was discovered during contract performance. Bid Item 3006 by its terms is limited to "miscellaneous structures" and is intended to provide compensation for all work involved in completing such structures. "Miscellaneous structures" are defined under Section 603 of the SHA Standard Specifications to include junction boxes. However, the contract special provisions specifically link Pay Item No. 3006 to full payment for work involved in construction of miscellaneous structures directed by the SHA Engineer or for unforeseen changes in planned dimensions affecting concrete for

⁵ The dispute does not involve application of the estimated quantities clause. We find that application of the estimated quantities clause to the dispute herein would lead to an unreasonable method for resolving the problem at the center of the dispute which is a mistake in preparation of the bid documents and not an overrun or underrun of an estimated quantity.

pipe headwalls; i.e. for miscellaneous structure work not included in the contract documents at the time of bid opening. Because the junction boxes at issue herein are specifically set forth in the plans included with the bid documents, they do not involve work directed by the engineer (i.e. new work) or work involving unforeseen changes in planned dimensions affecting concrete for pipe headwalls. SHA made a unilateral mistake in failing to include pay items for all the junction boxes. Nor, as asserted by SHA, should the contractor be penalized for failure to discover and bring to the attention of SHA prior to bid opening that the Schedule of Prices did not contain bid items for all junction boxes set forth in sheets 79 and 80 of the 388 plan sheets. We decline to read into this procurement any requirement that bidders were to check the Schedule of Prices to determine that there were pay items covering all of the junction boxes set forth in the plans. Such a requirement under the specifics of this procurement would be unreasonable. Compare Tuxedo Contractors Inc., ASBCA No. 22073, 78-2 BCA ¶13,485 (1978); Brady Williamson Contractors, Inc., ASBCA No. 23111, 79-2 BCA ¶13,946 (1979).

However, the contract provides for contract modifications (i.e. change orders, extra work orders) through which equitable adjustments for increases in a contractor's costs may be affected. See COMAR 21.01.02.01 (26). The parties discovered after work had commenced that SHA had failed to include bid items in the Schedule of Prices for eleven of the twelve junction boxes set forth in the plans. In order to address compensation for the cost of the eleven junction boxes, SHA determined to treat the work, at least in part, as new, extra or additional work, asked Appellant to submit prices therefor and modified the contract by issuing an extra work order for three of the boxes.

The work in question, construction of the junction boxes, does not, however, constitute new, extra or additional work since it was set forth in the plans and Appellant by submitting its bid obligated itself to perform such work. Nevertheless, SHA

requested Appellant to submit prices for the work and determined to treat the work involved in construction of the three special or non-standard junction boxes for which there was no pay item as extra work, looking to the most nearly applicable pay item, Bid Item No. 3081 (Junction Box No. 1) as a yardstick for the reasonableness of the cost thereof. See Finding of Fact No. 4, Footnote 4.

SHA then erred by treating the remaining eight (8) standard junction boxes as if the cost thereof had been included in Appellant's bid for miscellaneous structures under Bid Item No. 3006, for, as we have determined, Bid Item No. 3006 may not be said to apply to the cost of the junction boxes set forth in the plans in the bid documents. The parties having agreed that extra or additional work was involved in the construction of the three non-standard junction boxes, SHA should have continued to apply the same logic to the eight standard junction boxes and paid Appellant through issuance of a change order or extra work order the reasonable cost for their construction.

SHA alternatively argues that payment for the eight (8) junction boxes should be based on cubic yardage pursuant to Section 603 of the Standard Specifications. We agree, however, with Appellant that Sub-Section 603.05 of Section 603 indicates that standard junction boxes should be measured for payment on the basis of a lump sum bid for such structures rather than by reference to a unit price bid for component materials, i.e. concrete of the mix specified for such structures.

Accordingly, we sustain the appeal and remand the matter to SHA for negotiation of an equitable adjustment for the eight (8) standard junction boxes in dispute.

Dated: *May 1, 1991*


Robert B. Harrison III
Chairman

I concur:

Sheldon H. Press

Sheldon H. Press
Board Member

Neal E. Malone

Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1550, appeal of CHERRY HILL CONSTRUCTION, INC., under SHA Contract No.P-410-505-372.

Dated: May 1, 1991

Mary F. Priscilla
Mary F. Priscilla
Recorder

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