BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DAVID A. BRAMBLE, INC.	)	
	)	
	)	MSBCA Docket No. 1853
	)	
Under Maryland State Highway Contract No. Q-627-501-270	)	
	)	

February 23, 1996

Contract Interpretation -- Patent ambiguity
Appellant's interpretation of bid documents was found to be unreasonable when it posited that bid item containing estimated quantity of 50 tons of bituminous concrete was the appropriate item under which approximately 3,000 tons of bituminous concrete for temporary and detour roads should be paid. In order for Government's interpretation not to prevail, where patent ambiguity results from interpretation posited by bidder, bidder has an obligation to bring the ambiguity to the attention of the procurement officer for clarification pre-bid.

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OPINION BY BOARD MEMBER STEEL

This matter comes before the Board on the sole issue of entitlement for payment. The parties are agreed that the Board is to determine whether Appellant David A. Bramble, Inc. (Bramble) is entitled to be paid by Respondent State Highway Administration (SHA) for certain work involving temporary pavement under items 1004 and 1005 or items 5003 and 5004 of the contract. While they have agreed that they will resolve the issue of quantum between themselves, at issue is payment for approximately 3,000 tons of bituminous concrete.

Findings of Fact

1. Bids were solicited for State Highway Administration (SHA) Contract No. Q-627-501-270, a project involving the construction of a new interchange at the intersection of US Route 301 and Maryland Route 213, including construction of certain temporary and detour roads to be utilized during construction of the primary intersection.

2. A "Pre-bidding Information Session" "for the purpose of answering or obtaining answers to questions of parties interested in constructing the work relative to utilities, design and construction details . . ." was scheduled for November 2, 1992 at the SHA office in Chestertown, Maryland. Appellant Bramble was aware of the pre-bid meeting, but did not attend. Bid opening was scheduled for November 24, 1992.

3. The Invitation for Bids called for unit prices for approximately 221 items of work whose nature and method of payment were described in the contract documents.

4. The testimony indicated that Mr. Bramble and his associates reviewed the bid items for the purpose of establishing their prices on the morning of Monday, November 23, 1992. When they came to item 1005, bituminous concrete for maintenance of traffic, they noticed that the State projected only 50 tons of material to be used. Although his employee and estimator Mr. David Sharretts had not done a takeoff directly from the plans with regard to temporary roads, Mr. Bramble was aware that 50 tons was a very low figure for the anticipated work for item 1005, especially if that item was to include paving for temporary roads and detour ramps.

5. Mr. Bramble and Mr. Sharretts reviewed the Invitation for Bid specifications and noted that Special Provision 814 at page 228 referred to bituminous concrete for maintenance of traffic, i.e., that material covered under the contract's bid item 1005.

6. Special Provision 814, appearing at page 228 of the Invitation for Bids, in part states,

> SECTION 814 - BITUMINOUS CONCRETE FOR MAINTENANCE OF TRAFFIC, GRADED AGGREGATE FOR SUBBASE FOR MAINTENANCE OF TRAFFIC
>
> Description:
>
> The work covered under this Special Provision shall consist of furnishing and placement of bituminous concrete pavements and graded aggregate for subbase in temporary locations for maintenance of traffic as directed by the Engineer.

7. The applicable "Red Book" Standard Specification **Section 814-Maintenance of Traffic,** in part states:

> **814.01.01.** All work shall be in accordance with the latest issue of the Manual on Uniform Traffic Control Devices (MUTCD), Specifications, Plans, Special Provisions and as directed by the Engineer. Unless specifically set up in the Proposal as a Contract pay item, it shall include furnishing traffic managers and flaggers, relocating, maintaining and removing existing traffic signs and other traffic devices, and implementation of a Traffic Control Plan (TCP).
>
> * * *
>
> **814.01.05. Basis of Payment** All work incident to maintenance of traffic, inclusive of traffic managers and flaggers; the relocating, maintaining and removal of existing traffic signs and other traffic devices; implementation of a Traffic Control Plan will be paid for at the Contract lump sum price for Maintenance of Traffic. This price shall include all materials, tools, labor and work of any kind incident to this item, except when otherwise specifically set up in the Proposal as a Contract Pay item.
>
> If additional items for Maintenance of Traffic are included in the Contract, the basis of payment will be in accordance with the pertinent specification.
>
> If an item for Maintenance of Traffic does not appear in the Plans and Special Provisions, refer to the section on Maintenance of Work During Construction as outlined in the General Provisions for basis of payment.
>
> **The material necessary in the construction of temporary or detour roads, the surfacing of temporary roadways, turnouts, etc. will not be included in the item Maintenance of Traffic but will be paid for at the respective unit price for excavation and the furnishing and placing of such materials as may be necessary for the construction of such temporary roads.** Surfacing and removal of detour roads as shown on the Plans or called for in the Special Provisions will be measured and paid for at the unit price for Class I Excavation. (emphasis supplied)
>
> * * *

Standard Specifications for Construction & Materials, Maryland Department of Transportation State Highway Administration, January 1982 (the "Red Book").

8. Upon his initial review of the plans and specifications, Mr. Sharretts, Bramble's estimator, believed that item 1005 did not include concrete for the detour and temporary roads. He believed

that the 50 tons set aside under item 1005 was for "paving to fix a rough spot, a hole, a dip, entrances and patches . . . a localized problem" that may occur in the course of construction.

9. Mr. Sharretts initially recommended that they charge $50 per unit (ton) of bituminous concrete under item 1005. However, Mr. Bramble directed that the company charge $100 per unit (ton) of bituminous concrete under item 1005, assuming that if the State believed the price was too high, the parties could renegotiate pursuant to the variation in estimated quantities clause.

10. Bramble bid $37.25 per ton for item 5003, bituminous concrete SC, and $27.70 per ton for item 5004, bituminous concrete base. Mr. Sharretts did a take off for items 5003 and 5004, and believed that the quantities listed for those items were appropriate within +/- ten percent.

11. Next, Mr. Bramble discussed the unit price of item 1005 with his employee Mr. Jim Wright (a former District Engineer for SHA District 2) who agreed that he believed the quantity was wrong, but that temporary ramps and detour roads should be paid for under item 1005, rather than under items 5003, bituminous concrete SC, and 5004, bituminous concrete base.

12. Bramble submitted a pre-bid memorandum to SHA on November 16 listing a number of questions Bramble had about the contract specifications and plans, but did not submit a question about bid item 1005 or "maintenance of traffic" concrete.

DECISION

As noted above, the parties are in disagreement as to the pay item under which Appellant should be paid for the placing of several thousand tons of bituminous concrete used to construct detour roads and temporary ramps at the intersection of Routes 213 and 301. They have asked this Board to interpret the language of the contract and decide which pay item is appropriate for payment for this disputed tonnage. Thus, at issue in this appeal is whether a reasonable bidder preparing its bid would have interpreted the contract documents to provide for payment of bituminous concrete for temporary roadways and detours under the 5000 series, regular paving for permanent roads, or under the 1000 series, maintenance of traffic. Also at issue is whether, upon deciding that payment should be made under the 1000 series, that reasonable bidder would have found the contract documents to be ambiguous in light of the quantity established by SHA for item 1005.

Appellant argues that the bid item 1005, maintenance of traffic, includes detour and temporary roads despite the 50 ton quantity ascribed thereto. Appellant advances the argument that

detours and temporary ramps qualify as "maintenance of traffic" pavement because, as part of the contract, such work is by definition "as directed by the Engineer" pursuant to Section 814 at page 228 of the special provisions.

Respondent argues that "as directed by the Engineer" indicates, of necessity, that maintenance of traffic items are those requirements encountered in the course of a job, such as patching, tie-ins, and other repairs of the temporary or permanent roadways while work is on-going, not the entire contract. Further, Respondent points out that the fourth paragraph of the Standard Specification **814.01.05 Basis of Payment** makes clear that "the material necessary in the construction of temporary or detour roads, the surfacing of temporary roadways, turnouts, etc. will **not** be included in the item Maintenance of Traffic but will be paid for at the respective unit price for . . . the furnishing . . . of such materials." (emphasis supplied)

Appellant counters that the fourth paragraph of Standard Specification **814.01.05 Basis of Payment** should not be reached because of the second paragraph of that section, "[i]f additional items for Maintenance of Traffic are included in the Contract [as Appellant argues occurred here], the basis of payment will be in accordance with the pertinent specification". Appellant argues that the pertinent specification is Special Provision 814 (page 228 of the contract documents), and that the language "as directed by the engineer" includes the universe of plans and contract documents.

For the reasons set forth below, this Board finds that the underlying contract specification language in dispute, "furnishing and placement of bituminous concrete pavements and graded aggregate for subbase in temporary locations for maintenance of traffic as directed by the Engineer", means that temporary bituminous concrete necessary for patching, pothole repair and miscellaneous tie-ins, as directed in the field by the engineer during the course of the project as problems arise, NOT the bituminous concrete needed to create the detour and temporary roads. That material is to be paid for pursuant to the bid price provided for items 5003 and 5004.

Maryland follows the objective law of contracts. General Motors Acceptance Corp. v. Daniels, 303 Md. 254 (1985). The Court in Daniels observed:

> A court construing an agreement under this test must first determine from the language from the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these

> circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Id. at pp. 261-262. The same rule of construction applies to analysis of bid documents by bidders or prospective bidders. "The primary rule of contract interpretation requires that contract language be given the plain meaning attributable to it by a reasonably intelligent bidder." Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 (1984) at p.7 (citing Kasten Construction Co. v Rod Enterprises, Inc., 268 Md. 318 (1973)).

In evaluating what a reasonable person in the position of the appellant bidder would have thought the language to mean, we look at Hensel Phelps Construction Co., MSBCA 1016, 1 MICPEL ¶44 (1983) at p. 9, where this Board stated that:

> the standard for interpreting a written contract is an objective one. Our task, therefore, is to determine the meaning attributable to the contract language by a reasonably intelligent bidder acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. Fruin-Colnon Corporation and Horn Construction Co., Inc., MDOT 1001, Dec. 6, 1979; Granite Construction Co., MDOT 1011, July 29, 1981.

The threshold question to be answered is, therefore, what meaning a reasonable bidder acquainted with all operative usages and knowledgeable of the circumstances would give the bid documents in this case relative to whether the bid item 1005 included pavement for temporary roads and detours.

Appellant Bramble clearly is an experienced bidder acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. In fact, Bramble is a prime contractor on the Eastern Shore, and entered into at least two prior contracts dealing with temporary and detour roads. In these two contracts involving work on US 50/301 in Queen Anne's County between Cox Creek and Piney Creek and between Piney Creek and Jackson Creek Lane respectively, a separate bid item was included for bituminous concrete for detour roads under the 5000 series of bid items for permanent pavement, not the 1000 series, maintenance of traffic, and the bid price for materials for the temporary/detour roads was bid at essentially the same price as those for permanent pavement. Mr. Sharretts, Bramble's estimator, believed that the work for temporary/detour roads should not be included in bid item 1005 until

persuaded otherwise by Mr. Bramble. He also believed that bid item 1005 related to covered repair items such as patching.

The Board finds that a reasonable bidder "knowing all the circumstances prior to and contemporaneous with the making of the contract" would not have drawn the conclusion reached by Bramble that materials for detour and temporary roads should be paid under item 1005.

The Board also finds that there is no conflict between Special Provision 814 at page 228 of the contract documents and Standard Specification 814 in the Red Book, page 514. The fourth paragraph language of **814.01.05 Basis of Payment** that "the material necessary in the construction of temporary or detour roads . . . will not be included in the item Maintenance of Traffic but will be paid for at the respective unit price for . . . the furnishing and placing of such materials. . ." is controlling and is not modified by the preceding second paragraph of that section as advanced by Appellant. Therefore, the Board finds that the disputed material used to construct the temporary roads and detours should be paid at prices bid under items 5004 and 5005.

However, we are left with the fact that Bramble did draw the conclusion that item 1005 was the proper pay item and now seeks to be paid according to that interpretation. Looking at the "ambiguity" caused by Bramble's view, if there is a notable discrepancy it is that bid item 1005 calls for only 50 tons of bituminous concrete, clearly not enough to cover the several thousand tons of bituminous concrete needed for the paving of temporary roads and detours. Although Appellant had opportunity to do so before pricing this item, it failed to inquire of SHA whether concrete for temporary roads and detours was to be included in this bid item or under items in the 5000 series. A reasonable contractor who was in the business of reviewing and implementing such plans would or should have known that the estimate of 50 tons was not an appropriate quantity if Appellant's assumption that the item included the temporary roads and detours was correct.[1] Given this discrepancy, Appellant should have raised the issue with the State prior to establishing its bidding price.

Assuming arguendo that Appellant's interpretation, while incorrect, was reasonable, we note that if two reasonable meanings appear from a reading of the bid documents a patent

[1] In fact, the State apparently underestimated the amount of concrete that would be needed for potholes, repairs, etc., and has already paid Bramble for approximately 900 tons of concrete under this item.

ambiguity may be said to exist requiring attempt at pre-bid clarification for a bidder to prevail regarding its interpretation. Intercounty Construction Corp., MSBCA 1036, 2 MSBCA ¶164 at p. 9 (1987).

A patent ambiguity is an obvious contradiction. In Concrete General, Inc. v. SHA, MSBCA 1062, 1 MICPEL 69 (1984) this Board found that a contractor presented with an obvious discrepancy is required to inquire about the discrepancy prior to bid or risk being awarded the contract and held to the State's interpretation. As the Board stated in Concrete General, supra, what constitutes an obvious or glaring discrepancy cannot be defined generally but is made as a case-by-case determination based upon an objective standard of what a reasonable contractor would determine to be patent and glaring.

If the contractor either knew or should have known of an patent ambiguity, a failure to seek clarification prior to bidding bars recovery. Concrete General, Inc., MSBCA 1836, ___ MSBCA ___ (1995), aff'd, Civ. No. 135442 (Cir. Ct. Mont. Co. November 3,1995) John C. Grimberg Co., Inc., MSBCA 1761, 4 MSBCA ¶371 (1994); Hanks Contracting, Inc., MSBCA 1212, 1 MSBCA ¶110 at pp. 4-5 (1985); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 at pp. 10-13 (1984), aff'd, Civ. No. 3296 (Cir. Ct. Mont. Co. August 23, 1985); Avedon Corp. v. United States, 15 Cl. Ct. 771 at pp. 776-777 (1988); Dominion Contractors, MSBCA 1041, 1 MSBCA ¶69 at pp. 10-11 (1984).

A contractor is obligated to bring to the State's attention major discrepancies or errors which it detects in the specifications or plans, unless it innocently construes in its favor a hidden ambiguity equally susceptible to another construction. Martin G. Imbach, Inc., MSBCA 1020, 1 MICPEL ¶53 (1983). Quoting from Blount Brothers Construction Co. v. United States, 171 Ct. Cl. 478, 496-97, 346 F.2d 962 (1965) the Board noted,

> . . . contractors are businessmen, and in the business of bidding on government contracts they are usually pressed for time . . . They are obligated to bring to the Government's attention major discrepancies or errors which they detect in the specifications or drawings, or else fail to do so at their peril.

The contractor must bring the conflict to the attention of the State prior to bid opening and must not take advantage of the conflict to bid low and then seek additional compensation when the work is completed. S.J. Groves & Sons, Inc., 1 MSBCA ¶97 at p. 12 (1985). While we do not suggest that

Appellant is attempting to take advantage of the "conflict", a finding that Appellant's interpretation of the documents should prevail would have that effect, since the State would be paying for several thousand tons of concrete at $100 per ton instead of $27-37 per ton.

In any event, this Board finds that Appellant's interpretation was not reasonable, particularly in light of Appellant's extensive experience with similar contracts. Based on the foregoing the appeal is denied.

Wherefore, it is ORDERED this 23rd day of February, 1996, that the appeal is denied.

Dated: 2/23/96

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

Randolph B. Rosencrantz
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1853, appeal of David A. Bramble, Inc. under SHA Contract No. Q-627-501-270.

Dated: February 23, 1996

Mary F. Priscilla
Recorder