BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DEWEY JORDAN, INC.	)	
	)	Docket No. MSBCA 1304
Under SHA Contract No.	)	
B-698-509-472	)	

May 7, 1987

Burden of Proof - The State generally has the burden of proof in an appeal, both as to the issues of entitlement and quantum, when a credit is taken against Appellant's contract price pursuant to a contract provision allowing for a credit when the State accepts nonconforming construction materials. However, the Appellant has the burden of proof where it disputes the method utilized by the procurement officer to calculate the credit and there is no dispute to the State's entitlement or the amount of the credit based on the State's method of calculation. This is a challenge of the procurement officer's exercise of discretion which will not be disturbed unless shown to be fraudulent or so arbitrary as to constitute a breach of trust.

Burden of Proof - Procurement Officer's Discretion - Where the contract grants authority to the procurement officer to "provide for an appropriate adjustment" and Appellant suggests that its averaging method of calculating the adjustment is more equitable to the Appellant than the straight line method used by the procurement officer, which is more favorable to the State, the Appellant's burden of proof to establish that the procurement officer's exercise of discretion was fraudulent or so arbitrary as to constitute a breach of trust has not been met.

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APPEARANCES FOR RESPONDENT:	Brian L. Oliner Edward S. Harris Assistant Attorneys General Baltimore, MD

OPINION BY MR. LEVY

This is an appeal of a Maryland State Highway Administration (SHA) procurement officer's determination denying Appellant's claim on behalf of its subcontractor, Ratrie, Robbins & Schweizer (RR&S), regarding a penalty assessed for nonconforming asphalt content. Appellant claims that the method utilized by SHA to calculate the assessed penalty was not "appropriate" while SHA contends that it was.

Findings of Fact

1. Dewey Jordan, Inc., the general contractor, entered into SHA Contract No. B-698-509-472 for the construction of the interchange located at the intersection of the Northwest Expressway (I-795) and the Baltimore Beltway (I-695). Ratrie, Robbins & Schweizer (RR&S) was a subcontractor to Dewey Jordan on this project.

2. The contract requires, in relevant part, the furnishing of bituminous concrete in accordance with the contract specifications which included certain tolerances. The subcontract provided for RR&S to perform this portion of the contract work.

3. The contract incorporates the Maryland Department of Transportation 1981 edition of the General Provisions for Construction Contracts which provides, at p. 359, SGP-5.02:

GP-5.02 Conformity with Contract Requirements

All work performed and all materials furnished shall be in conformity with the contract requirements.

In the event the procurement officer finds the materials or the finished product in which the materials are used or the work performed are not in reasonably close conformity with the contract requirements and have resulted in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor.

In the event the procurement officer finds the materials or the finished product in which the materials are used are not in conformity with the contract requirements but that acceptable work has been produced, he shall then make a determination if the work shall be accepted. In this event, the procurement officer will document the basis of acceptance by a change order which will provide for an appropriate adjustment in the contract price. Any action taken pursuant to this paragraph may not result in an increase of the Contract price. (Underscoring added).

4. The contract incorporates the SHA specifications entitled "Specifications for Materials, Highways, Bridges and Incidental Structures" dated March 1968, the supplemental specification dated August 1980 all as supplemented by the interim specifications, specification revisions and special provisions contained in the contract proposal book. It also includes the State Highway book of standards as supplemented by the contract proposal.

5. Article 20.13 of the SHA "Specifications for Materials, Highways, Bridges and Incidental Structures" deals with bituminous concrete mixtures and §20.13-7 of the 1980 supplement specifically deals with plant control as follows:

Section 20.13-7 Plant Control

Will be maintained by the Contractor using at least two (2) hot bins for mixes of bands ST or SN and at least three (3) bins for mixes BF, BI and BC. The following tolerances will be allowed by the Engineer in comparing the material produced with the approved job-mix formula:

Property	Tolerance
Passing #4 Sieve and Larger	± 7%
Passing #8 to #100 Incl.	± 4%
Passing #200	± 2%
Asphalt Content	± 0.4%
Specific Gravity of Marshall Specimen	± 3% of Design Value
Temperature	± 25° F

(Underscoring added)

6. The SHA approved formula for bituminous concrete for this contract provided for an asphalt content of 4.5%. Based on the ± 0.4% tolerance above, the asphalt content of the bituminous concrete could vary between 4.1% and 4.9%. (4.5 + 0.4 = 4.9; 4.5 - 0.4 = 4.1).

7. During the performance of the contract work, SHA took samples of the bituminous concrete placed by RR&S and in July 1984 the tolerance test results were as follows:

Date	Tons	Deviation from 4.5%
July 1	1,679	.5
July 2	400	.16
July 3	1,206	.03
July 5	116	1.18
July 6	577	.5
July 12	1,679	.1
July 13	933	1.22
July 15	1,445	.18

These results reflect that 4,730 tons, poured on four separate days, were within the asphalt content tolerance and 3,305 tons, poured on four different days, were not within the tolerance.

8. Based on these SHA laboratory tests, the SHA project engineer made a determination that the material which was used for the base course was not in conformity with the contract specifications, but that reasonably acceptable work had been performed. SHA decided to allow the materials to remain in place and take an appropriate price adjustment in accordance with SGP-5.02, supra.

9. SHA issued Extra Work Order No. 3, which had final approval by the Chief Engineer on May 7, 1985, covering many different items relating to the contract work. One item was "Lump Sum Credit Penalty" in the amount of $12,443.62 which represents the price adjustment for using asphalt beyond the acceptable tolerances. The amount of the credit penalty was arrived at using a straight average method which was detailed in SHA Construction Directive 72.1-05-04 dated July 1, 1981. Under this method equal weight is given the tolerance deviation for each day, even though the quantities of deviant material could differ significantly from day to day.

10. On March 26, 1985, after reviewing a copy of proposed Extra Work Order No. 3, RR&S wrote to the general contractor, Dewey Jordan, Inc., and complained about the method used by SHA to assess the credit penalty. RR&S argued that a weighted average method should have been used since it is more equitable. Under such a method no credit penalty would be assessed. Additionally, the SHA had under consideration the change from the straight line average to the weighted average method but had not adopted the new method yet.[1] Appellant forwarded RR&S' letter to SHA on March 28, 1985.

11. On April 12, 1985 the metropolitan District Engineer responded to Appellant and upheld the assessment of the credit by the District Engineer.

12. Appellant submitted its formal claim on behalf of RR&S on January 27, 1986 to the SHA District Engineer who denied the claim on February 26, 1986.

13. Appellant appealed to the procurement officer on March 31, 1986. A hearing was held and the procurement officer issued his final decision on August 4, 1986 denying Appellant's claim.

14. Appellant took a timely appeal to this Board on August 27, 1986. At Appellant's request this appeal has been handled pursuant to the Board's accelerated procedures. COMAR 21.10.06.12.

Decision

I

Appellant's attorney raised as a preliminary matter, at the outset of the hearing of this appeal, the issue of who has the burden of proof where there has been a delivery of nonconforming materials and the governmental agency takes a credit. (Tr. pp. 6-14). Under these circumstances, Appellant contends that the government has the burden. SHA, on the other hand, contends that this appeal represents an attack on the procurement officer's exercise of discretion and the burden of proof, therefore, lies with Appellant.

We agree with Appellant that the government generally has the burden of proof, both as to the issues of entitlement and quantum, when money is being deducted from the contract price. Rice Cleaning Service, GSBCA 3136, 7-1 BCA ¶8787. But there is no dispute here that bituminous concrete with an asphalt content in excess of approved tolerance was delivered and placed on the job site on certain days in July 1984 and that SHA made the determination to accept the nonconforming materials. There is also no dispute that under the terms of the contract general provisions, SGP-5.02, the procurement officer can provide for an appropriate adjustment in the contract price. The parties agree that the procurement officer exercised his right to take an adjustment in the contract price under

[1] SHA adopted the use of the weighted average method to determine the adjustment for failing asphalt content on August 8, 1985. There was no evidence presented that SHA intended this to be retroactive in its application.

Work Order No. 3, and they agree that the amount he assessed is correct if you utilize the straight line average method. All of these facts were alleged by Appellant in its complaint and amended complaint.

What really is in dispute and what the Appellant is attacking is the method utilized by the procurement officer to assess the penalty. This we interpret to be a challenge to the procurement officer's exercise of discretion under §GP-5.02. Under these circumstances the Appellant has the burden of proof since the procurement officer's judgment may not be disturbed unless shown to be fraudulent or so arbitrary as to constitute a breach of trust. Wolfe Brothers, Inc., MSBCA 1141, 1 MICPEL ¶53 at 5 (June 13, 1983). It likewise can be argued that Appellant is asserting that its interpretation of contract provision GP-5.02 is correct and that a weighted average method should be used rather than the straight line method used by the procurement officer under his interpretation. As we stated in Intercounty Construction Corporation, MSBCA 1056, 2 MICPEL ¶130 at 7 (June 12, 1986), "[a]ppellant placed this issue before the Board and therefore, it assumes the burden of proof since it is the party which asserted the affirmative on the issue."

II

Having determined that the Appellant has the burden of proof in this appeal, we must now hold that that burden has not been met. Where the procurement officer determines that certain materials in a finished product are not in conformity with contract requirements but acceptable work has been produced, the language of §GP-5.02 is clear:

> "In this event, the procurement officer will document the basis of acceptance by a change order which will provide for an appropriate adjustment in the contract price." (Underscoring added).

Appellant's burden was to prove that the method used by the procurement officer to calculate the credit for the nonconforming material was not an "appropriate" one. This Appellant did not do.

The straight line method used by SHA for determining the appropriate adjustment had been used since at least 1981. Thus it was a method long in use by SHA. Whether it was the only method used by SHA or whether Appellant had knowledge of the use of this method at time of entering into this contract are not significant. What is significant is that SHA had formerly used this method at least four years prior to its application in this contract. Its use over this period raises at least a presumption that it is a reasonable method of calculating the appropriate adjustment called for in §GP-5.02 which is a form of liquidated damages provision.

In essence, what the Appellant is seeking is to have a different method used, one which would provide for a $0 adjustment. This obviously is more equitable for Appellant but certainly not equitable for SHA. Appellant has not demonstrated that SHA's formula is unreasonable but has only shown that Appellant's formula is more reasonable for Appellant. This does not meet the burden of proof required to show that SHA's method was not appropriate or that the procurement officer's exercise of discretion was fraudulent or so arbitrary as to constitute a breach of trust.

For the above reasons, the appeal is denied.