BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DICK CORPORATION and SOFIS COMPANY, INC.	)	
	)	Docket No. MSBCA 1472
Under Maryland Transportation Authority Contract No. TFA-2-9700-50	)	

February 20, 1991

Variation in Estimated Quantities - The language of the State's standard variations in estimated quantities clause that an "equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above...125 percent or below...75 percent of the estimated quantity" requires that the contractor be paid its contract bid price up to 125% of the estimated quantity set forth in the bid documents.

Timeliness - Where the contract specifications required that a contract claim be filed within thirty days after the conditions upon which the claim is based became known or should have become known to the contractor, failure to file the claim within such thirty day period waives the contractor's right to an equitable adjustment.

APPEARANCE FOR APPELLANT: Glenn E. Bushel, Esq.
Brocato, Price & Bushel, P.A.
Baltimore, MD

APPEARANCE FOR RESPONDENT: Steven Vanderbosch
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant* timely appeals the denial of its claim for an equitable adjustment for epoxy mortar repair work under a contract for the rehabilitation of the Baltimore Harbor Tunnel Thruway.

Findings of Fact

1. On February 18, 1987, Appellant was awarded the captioned contract with the Maryland Transportation Authority (MTA) for the rehabilitation of the Baltimore Harbor Tunnel Thruway.

2. Bid Item 425, Epoxy Mortar Repair, contained an estimated quantity of 1,425 cubic feet of epoxy mortar repair. Appellant bid $250.00 per cubic foot for this estimated quantity item.

3. Appellant subcontracted certain work to include the epoxy mortar repair work under Bid Item 425 to Sofis.

* The Appellant is the Dick Corporation who has taken the instant appeal on behalf of one of its subcontractors, the Sofis Company, Inc. (Sofis).

4. Section GP-4.03 of the Standard Specifications of the contract provided in relevant part that where the actual quantity of a pay item in the contract "is an estimated quantity and where the actual quantity of such pay item varies more than 25 percent above or below the estimated quantity ... an equitable adjustment shall be made upon demand of either party" and that the "equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity."

5. It became apparent to all parties by the early summer of 1987 that Bid Item 425 would significantly overrun. However, Appellant and MTA were unable to agree to a revised cost for the work. In late November, 1987 Appellant submitted a price of $188.00 per cubic foot for the cost of the work above 125% of the estimated quantity set forth in Bid Item 425. MTA countered in December 1987 with a proposal which treated the work as new work and repriced the entire work (not just the amount above 125% of the estimated quantity in Bid Item 425) at $138.96 per cubic foot. Such inability to agree was further complicated by MTA's position that rather than renegotiate the cost of epoxy mortar repair that exceeded 125% of the estimate under Bid Item 425, the entire cost of all epoxy mortar repair should be treated as new work and renegotiated.

6. The matter was not resolved, and at a meeting of the parties on January 6, 1988, attended by Sofis, Sofis submitted for consideration a price per cubic foot for the work above 125% of the estimated quantity in Bid Item 425 of $241.67 per cubic foot.[1] MTA rejected the Sofis proposal and by unilateral issuance to Appellant of Extra Work Authorization (EWA) Request No. 6 on January 27, 1988, MTA agreed to pay $145.00 per cubic foot for

[1] At the hearing Sofis reduced its claimed rate to $220.44 per cubic foot for work above 125% of the estimated quantity.

work remaining beyond the first 1,274.62 cubic feet to complete the epoxy mortar repairs.[2] In issuance of this EWA, MTA treated such work as new work within the general scope of the contract rather than estimated quantity work under Bid Item 425.

7. Appellant executed EWA Request No. 6 on February 3, 1988, and the EWA was formally approved or ratified by MTA on February 16, 1988. EWA Request No. 6 contained the following language:

> This Extra Work Authorization is ordered by the Procurement Officer. The scope of work under this Extra Work Authorization is within the general scope of the Contract between the Maryland Transportation Authority and the Dick Corporation. In the event that the Dick Corporation disputes the price and terms of this Extra Work Authorization, the Dick Corporation may submit a claim for equitable adjustment, if any, to the Maryland Transportation Authority for an administrative determination. Pursuant to a final agency determination of the Dick Corporation's claim for equitable adjustment, the Dick Corporation may appeal the final agency determination to the Maryland State Board of Contract Appeals in accordance with COMAR Title 21, Subtitle 10. Disputes over equitable adjustment, if any, shall be a question of fact. The Dick Corporation shall diligently proceed with the Contract as amended, regardless of its claim for equitable adjustment, if any.

8. Following issuance of EWA Request No. 6, neither Appellant nor Sofis took any written action to contest the MTA unilateral determination that the work would be treated as new work and repriced (above the first 1,274.62 cubic feet) at $145.00 per cubic foot. Mr. John Stanich, Appellant's project director for the project, and the person who would have initiated a claim on

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[2]At the time EWA Request No. 6 was issued it was for 5000 cubic feet at $145.00 per cubic foot. MTA eventually agreed to pay $145.00 per cubic foot for a total of 6,226.88 cubic feet of epoxy mortar repair. Sofis ultimately performed a total of 7,501.50 cubic feet of epoxy mortar repair work on the project, completing such work on or about March 1, 1988. MTA paid Appellant at the bid price under Bid Item 425 of $250.00 per cubic foot for the first 1,274.62 cubic feet of the work (representing the amount performed when the magnitude of the overrun became known) and paid for the remaining cubic footage of work (less retainage) at $145.00 per cubic foot.

Appellant's behalf (and on Sofis's behalf[3]), testified that he did have certain oral discussions with Mr. Tim Reilly, the MTA's Chief of Construction, after EWA Request No. 6 was issued with a view toward negotiating a higher price for the work. However, Mr. Stanich could provide no details on the dates or substance of such discussions. Specifically he testified that:

> You know, we had a lot of job meetings and I had several different projects, I'm going for them, and I don't get to talk to Jack Moeller [the MTA Director of Engineering and the Procurement Officer for the instant project], but I do get to talk to Tim Reilly an awful lot, and it was my attempt at that time to try to, we were at $188 that we thought it was worth, Sofis was at $170, they were at $145, and I was just trying to get them all to get it together.

(July 18, Tr. p. 208).

9. Sofis completed the epoxy mortar repair work (a total of 7,501.50 cubic feet) on or about March 1, 1988.

10. The record reflects that Appellant did not actually or constructively file a claim with the MTA for an equitable adjustment for the cost of performing the increased epoxy mortar repair reflecting the difference between MTA's $145.00 per cubic foot price and Sofis's $241.67 per cubic foot price until April 1989 when counsel was retained by Appellant who wrote Mr. Moeller on April 25, 1989 asserting that a claim existed and requested a final decision.

11. By letter dated August 14, 1989, MTA issued a final decision on Appellant's alleged claim stating in pertinant part as follows:

> On April 26, 1989, I received a letter from [counsel] stating that he represented Dick Corporation and Sofis Company, Inc. in connection with their claim for compensation for epoxy mortar repair on the Baltimore Harbor Tunnel Rehabilitation Contract.
>
> This work is the same work for which the Authority issued an Extra Work Authorization on February 16, 1988, to compensate Dick Corporation for the epoxy mortar repairs to the invert of the tunnel. This Extra Work Authorization stated: "In the event that the Dick Corporation disputes the price and terms of this Extra

[3]Neither party disputes that claims are required to be filed by the party having a contractual relationship with the State, in this appeal, the Appellant Dick Corporation.

Work Authorization, the Dick Corporation may submit a claim for equitable adjustment, if any, to the Maryland Transportation Authority for an administrative determination. Pursuant to a final agency determination of the Dick Corporation's claim for equitable adjustment, the Dick Corporation may appeal the final agency determination to the Maryland State Board of Contract Appeals in accordance with COMAR Title 21, Subtitle 10."

The alleged claim for which [counsel] is apparently requesting a final decision has never been filed in accordance with COMAR 21.10.04.02 or Section GP 5.14 of the Standard Specifications, which require claims to be filed within 30 days after the conditions upon which the claim is based became known or should have become known to the Contractor.

Furthermore, Dick Corporation in a letter from Mr. John Stanich dated May 8, 1989 states; "...it has been so long ago that we met with Sofis concerning the subject of a potential claim being filed that I thought this epoxy mortar repair problem was a dead issue" (emphasis added). Obviously, Dick Corporation in its May 8, 1989 letter has indicated that a claim hasn't yet been filed and is only a "potential claim".

It is my decision as Procurement Officer that Dick Corporation has not filed a claim in accordance with COMAR 21.10.04.02 and GP 5.14 and if Mr. Bushel's letter dated April 25, 1989 were construed to be notice of a claim or a claim, it also was not filed in accordance with the time limits prescribed in Section GP 5.14 of the Standard Specifications or COMAR 21.10.04.02, and is therefore denied.

This decision is the final action of this agency. This decision may be appealed to the Maryland State Board of Contract Appeals in accordance with COMAR 21.10.04.06. If you decide to take such an appeal, you must mail or otherwise file a written notice of appeal with the Appeals Board within 30 days from the date you receive this decision.

12. Appellant took an appeal from the MTA final decision to this Board on September 13, 1989.

Decision

MTA asserts that Appellant's claim for an equitable adjustment must be denied for failure to file a timely claim with the agency pursuant to COMAR 21.10.04.02 and GP 5.14.

The predecessor of COMAR 21.10.04.02 as it existed at the time the contract was awarded on February 18, 1987 and through January 8, 1989 provided:

.01 **Procurement Officer's Decision.**

A. Procedures Prior to Issuing Decision. When a controversy cannot be resolved by mutual agreement, the procurement officer shall, after written request by the contractor for a final decision, promptly issue a written decision. The procurement officer shall:

(1) Review the facts pertinent to the controversy.

(2) Secure any necessary assistance from the State Law Department; and

(3) Afford the contractor an opportunity to be heard and to offer evidence in support of his claim.

B. Final Decision. Before issuance, the decision of the procurement officer shall be reviewed by the agency head and appropriate legal counsel. The agency head may approve or disapprove the procurement officer's decision. In disapproving a decision, the agency head may order the procurement officer to effect a resolution. The agency head may order the procurement officer to effect a resolution. After review by the agency head, the decision of the procurement officer is deemed the final action by the State agency, or its equivalent, as the case may be. The procurement officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt request, or by any other method that provides evidence of receipt, and include in the decision:

(1) A description of the controversy;

(2) A reference to pertinent contract provisions;

(3) A statement of the factual areas of agreement or disagreement;

(4) A statement of the procurement officer's decision, with supporting rationale; and

(5) A paragraph substantially as follows: "This is the final decision of the procurement officer. This decision may be appealed to the Marylands State Board of Contract Appeals in accordance with the provisions of the Disputes Clause of the contract. If you decide to make such an appeal, you must mail or otherwise file a written notice of appeal with the Appeals Board within 30 days from the date you receive this decision."

C. A copy of the notice of appeal shall be furnished to the procurement officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference the decision from which the appeal is being taken, and identify the contract involved.

It will be noted that no time limit for filing of a claim was set forth in the regulation. However, effective January 9, 1989, COMAR 21.10.04.01 was repealed and new regulation COMAR 21.10.04.02 was adopted providing:

.02 Filing of Claim by Contractor

A. Unless a lesser period is prescribed by law or by contract a contractor shall file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier.

B. Contemporaneously with or within 30 days of the filing of a notice of a claim, but no later than the date that final payment is made, a contractor shall submit the claim to the appropriate procurement officer. The claim shall be in writing and shall contain:

(1) An explanation of the claim, including reference to all contract provision upon which it is based;

(2) An explanation of the claim, including reference to all contract provisions upon which it is based;

(3) The facts upon which the claim is based;

(4) All pertinent data and correspondence that the contractor relies upon to substantiate the claim; and

(5) A certification by a senior officer, or general partner of the contractor or the subcontractor, as applicable, that, to the best of the person's knowledge and belief, the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

C. A notice of claim or a claim that is not filed within the time prescribed in Regulation .02 shall be dismissed.

D. Each procurement contract shall provide notice of the time requirements of this regulation.

Thus under COMAR 21.10.04.02, a claim is required to be filed within 30 days of the time the contractor knew or should have known of the basis for its claim.[4]

Accordingly, if COMAR 21.10.04.02 is applied to Appellant's claim an issue of timeliness is presented. However, the effect of COMAR 21.10.04.02 on Appellant's claim may only be considered if the regulation is applied retroactively. While as we note below, time limits for filing a claim might be said to have commenced running when Appellant received EWA No. 6, it is certain that the elements of Appellant's claim, i.e., the actual costs of epoxy mortar repair under Bid Item 425 due solely to the increase above 125% of the estimate, became known at the latest on or about May 1, 1988 when all the work was performed and Appellant would have had a reasonable additional period to calculate the approximate actual cost of the Bid Item 425 work that exceeded 125% of the estimated quantity. This date precedes the effective date (January 9, 1989) of the adoption of COMAR 21.10.04.02 which sets forth the thirty day time limit for filing claims. We do not find, however, that COMAR 21.10.04.02 was intended to be applied retroactively to contracts entered into prior to its effective date since we believe substantive rather than procedural rights of the parties to be affected thereby. See James Julian, Inc., MSBCA 1222, 1 MICPEL ¶100 (1985). Thus we reject MTA's argument that Appellant's appeal must be denied for failure to file a timely claim pursuant to COMAR 21.10.04.02.

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[4]Pursuant to § 15-217(b), Division II, State Finance and Procurement Article and its predecessor [§ 11-137(b)(1)], claims are required to be filed within the time required under regulations adopted by the primary procurement unit responsible for the procurement. COMAR 21.10.04.02 fulfills this requirement.

However, Appellant's contract did contain a provision dealing with time limits for filing a claim. MTA argues that this provision, GP-5.14 of the Standard Specifications, as set forth in Appellant's contract bars Appellant's claim. GP-5.14 provides as follows:

> **GP-5.14 Claims**
>
> Subject to and without in any way enlarging or limiting the other provisions of this contract, and unless otherwise specifically prescribed in this contract, any claim of Contractor against the Administration for extension of time, extra compensation or damages whether under this contract or otherwise, shall be conclusively deemed to have been waived by Contractor, unless said claim is set forth in writing, accompanied by itemized supporting data specifically indentifying the basic elements of cost that Contractor claims to have incurred or claims that he will incur, and filed with the procurement officer within 30 days after the conditions upon which said claim is based became known, or should have become known to contractor. (emphasis supplied)

Maryland Courts apply the objective law of contracts whereby the clear and unambiguous language of a contract provision will be literally enforced, at least in the absence of a finding that literal enforcement of the provision would be unconscionable. General Motors Acceptance Corp. v. Daniels, 303 Md. 254 (1985); State Highway Admin. v. Greiner, 83 Md. App. 621 (1990) Cert. Den._____ Md.___ (1990). See Dr. Adolph Baer, P.D. and Apothecaries, Inc., MSBCA 1285, 2 MSBCA ¶146 (1987) at p. 4. The clear and unambiguous language of GP-5.14 requires the contractor to file a written claim with the procurement officer within 30 days after which the "conditions" upon which the claim is based become known or should have become known to the contractor. The record does not support a finding that literal application of the provision would be unconscionable.

The record would support a finding that Appellant knew or should have known about its claim upon its receipt of EWA No. 6 in January of 1988 since such document constituted MTA's final position on the question of

compensation for the epoxy mortar repair. However, assuming arguendo that the elements of Appellant's claim were not known nor should have been known upon its receipt of EWA No. 6 in January of 1988, we observe that Appellant completed the epoxy mortar repairs on or about March 1, 1988. Allowing an additional reasonable period of 60 days for Appellant to calculate its approximate actual costs for the epoxy mortar repair work above 125% of the estimated quantity, due solely to the increase in quantity (and which exceeded $145.00 per cubic foot), we find Appellant should have known of the "conditions" upon which its claim was based by May 1, 1988. Appellant thereafter did not file its claim with MTA until April of 1989 (see Finding of Fact No. 10), more than ten months after it knew of the "conditions" upon which its claim was based. In so finding we have considered Appellant's argument that the material (Rule 4 File, Tab 22) submitted by Sofis at the January 6, 1988 meeting between the parties called to discuss price for the epoxy mortar repair which set forth a price $241.67 per cubic foot constituted the timely submission of Appellant's claim. We do not conclude that the Sofis submission on this date constituted a claim.

Appellant, Sofis and MTA during the summer and fall of 1987 all recognized that the unit price or measure of payment for epoxy mortar repair should be equitably adjusted downward from the bid price of $250.00 per cubic foot because of the greater economy in performance of the work that would be realized due to the greatly increased volume.[5] However, MTA rejected Sofis's price of $241.67 per cubic foot as submitted on January 6,

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[5]Sofis in May of 1987 concluded that there would be a significant overrun on Bid Item 425 and that it would be able to reduce its price to Appellant, eventually negotiating a price of $190.00 per cubic foot with Appellant. Thereafter, Sofis further reduced its price to Appellant to $170.00 per cubic foot, which figure was included in Appellant's $188.00 per cubic foot quote to MTA on November 20, 1987. By letter dated December 10, 1987, MTA countered with a price of $138.96 per cubic foot.

1988 and issued a unilateral EWA at $145.00 per cubic foot and otherwise treating the work as new work. At this juncture negotiation toward a mutually acceptable price may be said to have failed, since MTA legally took a final action through issuance of the EWA which states on its face that Appellant may submit a claim if it disputes the $145.00 price or other term set forth in the EWA. Upon receipt of the EWA the provisions of GP-5.14 came into play requiring Appellant to submit a claim for an equitable adjustment within thirty days of its receipt of the EWA on January 27, 1988 or at the latest within 30 days of February 16, 1988 when MTA formally ratified the EWA, since the EWA constituted notice of the MTA final position that $145.00 per cubic foot should be the equitably adjusted price or measure of payment due to the overrun in epoxy mortar repair work. While execution of the EWA by Appellant on February 3, 1988 did not waive Appellant's right to file a claim within thirty days of Appellant's receipt of the EWA or its formal approval by MTA, Appellant's failure to initiate a claim until April of the following year did constitute a waiver of such right pursuant to GP-5.14. Accordingly, Appellant's claim is barred by the clear and unambiguous terms of GP-5.14 which require a claim to be filed within 30 days after the conditions upon which the claim is based became known, or should have become known to the contractor.[6]

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[6]Appellant presented its case on quantum and demonstrated that the unit cost per cubic foot to perform the epoxy mortar repair work was within a few dollars of the $220.44 per cubic foot claimed at the hearing. The Board would find (assuming we had ruled in Appellant's favor on the timeliness issue) that Sofis incurred the following costs on Item 425: labor costs of $143,652, a labor burden of $37,642.00, $7,812.00 for out-of town living expenses, $70,990.00 for materials, $116,973.00 for equipment (acceptably based on Blue Book) and insurance costs of $32,595.00. We would concur with use of a five year period from 1985 through 1989 for Sofis to derive an overhead rate for the instant project of 13.09% finding the same to be reasonable and we would further find that use of 10% and 15% as multipliers for profit and overhead for Appellant would be reasonable. See Appellant's Post Hearing Brief at pp. 23-38.

Nevertheless, Appellant is entitled to compensation based upon application and proper interpretation of the variation in estimated quantities clause. We reject MTA's argument that the overrun in epoxy mortar repair work was appropriately treated as new work to be repriced. The price for the overrun was to be determined by the variation in estimated quantities clause in the contract. MTA was not free to ignore this clause which is mandatory in State construction contracts. See COMAR 21.07.02.03 and its predecessor 21.07.03.02. The clause as it appears in Appellant's contract provides in relevant part that an "equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity." Section GP-4.03 of the Standard Specifications. According to the plain language of the clause, Appellant was entitled to be paid its contract price for Bid Item 425 up to 125% of the estimated quantity. See Victory Constr. Co., Inc. v. United States, 510 F. 2d 1379 (Ct. Cl. 1975); N. Fiorito Co., Inc. v. United States, 416 F. 2d 1284 (Ct. Cl. 1969); Bean Dredging Corp., 89-3 BCA ¶22,034 (1989); G. Keating, "Variation in Estimated Quantity" Clauses, Construction Briefings No. 90-3 (Feb. 1990). Appellant's bid (unit) price for Bid Item 425 was $250.00 per cubic foot. The estimated quantity set forth for Bid Item 425 in the bid documents was 1,425 cubic feet. Appellant was only paid $250.00 per cubic foot for 1,274.62 cubic feet and thereafter at $145.00 per cubic foot. Appellant is entitled to be paid the difference between $250.00 and $145.00, i.e. $105.00, for the remaining 506.63 cubic feet of epoxy mortar repair representing the additional quantity up to 125% of the estimate (1,425

estimated quantity x 125% = 1,781.25; 1,781.25 - 1,274.62 - 506.63). Multiplying $105.00 times 506.63 cubic feet yields $53,196.15. Appellant is thus entitled to an equitable adjustment of $53,196.15 plus any contract retainage related to its claim.

Appellant, pursuant to § 15-222, Division II, State Finance and Procurement Article, is awarded interest on this sum of $53,196.15 (plus retainage, if any) at the rate of 10% from April 26,1989 when the MTA procurement officer received Appellant's contract claim from counsel.[7]

The appeal is thus sustained in part denied in part and remanded to MTA for appropriate action.

Dated: February 20, 1991

Robert B. Harrison III
Chairman

I concur:

Sheldon H. Press
Board Member

Neal E. Malone
Board Member

[7]Subsection(b)(2) of Section 15-222 provides that pre-decision interest "may not accrue before the procurement officer receives a contract claim from the contractor."

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1472, appeal of DICK CORPORATION and SOFIS COMPANY, INC., under Maryland Transportation Authority Contract No. TFA-2-9700-50.

Dated: Feb. 20, 1991

Mary F. Priscilla
Mary F. Priscilla
Recorder

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