

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DICK CORPORATION)
AND SOFIS COMPANY, INC.)
Under MDTA Contract No. TFA-2-) Docket No. MSBCA 1472
9700-50)

January 26, 1994

Equitable Adjustment - Equipment Costs - When records are available from which actual equipment costs may be ascertained such records shall be used rather than a rate schedule approach. However, when a sophisticated accounting system is absent and detailed fixed asset records and asset utilization records are unavailable job costs are likely to be understated. In such cases use of Blue Book is appropriate to calculate equipment costs.

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OPINION BY CHAIRMAN HARRISON

The Board issues the following decision on quantum and pre-decision interest pursuant to remand from the decision of the Court of Special Appeals affirming the decision of the Circuit Court for Baltimore County.

Findings of Fact

1. On February 20, 1991, the Board of Contract Appeals issued an opinion, Dick Corporation and Sofis Company, Inc., MSBCA 1472, 3 MICPEL ¶267(1991) (incorporated herein by reference), sustaining in part Appellant's claim for an equitable adjustment based on finding Appellant entitled under the State's variation in estimated quantities clause to be paid its contract price (for its Bid Item 425) up to 125% of the estimated quantity set forth in an estimated quantity bid item. The Board thus awarded Appellant an equitable adjustment of \$53,196.15 (plus any outstanding retainage). Pre-decision interest was awarded from April 26, 1989, the date the Board found that the MTA Procurement Officer had received Appellant's claim. However, Appellant's claim related to the cost of the overrun quantity as such was

denied because the Board found that Appellant's claim was not timely filed.

2. Appellant appealed to the Circuit Court for Baltimore County arguing that its claim was timely filed. The Transportation Authority filed a cross appeal arguing that the changes clause rather than the variation in estimated quantities clause controlled and that even if the estimated quantities clause did apply this Board had incorrectly applied the estimated quantities clause.
3. The Circuit Court reversed this Board on the timeliness issue, finding that the Appellant had timely filed its claim and remanded to this Board for a determination of damages (quantum) and pre-decision interest.
4. Appeal and cross appeal to the Court of Special Appeals followed. The Court of Special Appeals affirmed the Circuit Court. No. 1563, per curiam, unreported (July 15, 1993).
5. During the hearing of the appeal before this Board from which this Board's decision of February 20, 1991 issued, the issues of entitlement and quantum were thoroughly explored. Additionally, pursuant to procedures of this Board applicable to this appeal, see COMAR 21.10.06.21, Appellant filed a post hearing brief with the Board which contained detailed and accurate analysis of the record as it relates to quantum. Respondent, Transportation Authority, did not file a post hearing brief. On November 3, 1993, after remand from the Court of Special Appeals, Respondent filed a brief addressing quantum.
6. At the hearing on remand on November 24, 1993, the Board considered argument of counsel on quantum. The Board also considered and denied Respondent, Transportation Authority's Motion to Dismiss which was based on Maryland State Police v. Warwick Supply & Equipment Co., 330 Md. 474(1993). This Board denied the Motion because on September 7, 1993 the Court of Special Appeals had denied the Transportation Authority's Motion for Reconsideration based on identical grounds.

Decision

Based on the record¹ and having entertained written and oral argument of counsel this Board determines that Appellant is entitled under the variation in estimated quantities clause to damages in accord with the purpose of an equitable adjustment to make it whole. See Genstar Stone Paving Products Co., Inc. v. State Highway Administration, 94 Md. App. 594, 602 (1993).

In footnote 6 to its Opinion of February 20, 1991 the Board adopted with minor exception the Appellant's position on the quantum issues, specifically referencing pages 23-28 of the Post Hearing Brief filed by the Appellant. The format of the Appellant's Brief followed the format of Board Exhibit 3 at 3, which was a portion of the report received into evidence from the Appellants' expert accountant, Mr. McMurtry. In turn, that report largely followed the format utilized by the Authority's expert accountant as contained in Board Exhibits 1 and 2. These cost components were developed in order to calculate an actual cost per cubic foot of Item 425 work from which a damage computation could ultimately be made.

The Board has again reviewed the portion of the record that relates to damages related to the overrun quantities as such² and determines that Appellant is entitled to an equitable adjustment for the following individual components that comprise the overrun item, Item 425, as follows.

Labor. The Board finds that Sofis incurred labor costs of \$143,625.00 with respect to Item 425. This amount is supported by the record. The Appellants' expert accountant testified that the

¹The Board transmitted the record to the Circuit Court when the parties appealed thereto from the Board's decision in 1991. After the proceedings in the Court of Special Appeals, the parties were unable to locate Appellant's Exhibit 8. Otherwise the record developed during proceedings before this Board is in material respect intact.

²The Board had found that Appellant was entitled to its contract price for the quantity up to 125% of the estimate. See Finding of Fact No. 1.

labor costs amounted to \$145,507.00 (Tr. 339, 343-344; Bd. Ex. 3 at 3, Note A, at 4). The Board rejects the Transportation Authority's lower figure of \$133,022.00 (Bd. Ex. 2, Sch. C).

Appellants' Mr. McMurtry developed a total labor cost of \$145,507.00 for Sofis Co. on Item 425. The difference between this amount, and the lesser figure advanced by the Transportation Authority, is explained by realizing that when the Sofis Co. timesheets upon which the cost coding had been contemporaneously corrected are utilized, the McMurtry figure results (Tr. 339, 343-344). Mr. McMurtry accounted for \$11,630.00 of the \$12,485.00 difference, and believed that had he had all of the workpapers used by the Authority's expert, he could have accounted for the entire difference (Tr. 341, 343-344; Bd. Ex. 3, Note A, at 4).

James Henderson, project superintendent for Sofis Co., testified that he kept and reviewed daily time sheets, which he adjusted, when necessary, to correct misphasing by foremen and to reflect proper cost coding among the various work Items being performed by Sofis Co. (Tr. 471-474, 477). These changes were based upon his actual observations (Tr. 552-553). Because Mr. Henderson's alterations were internal, and had no effect upon the payment of employees, he regularly sent the uncorrected time sheets and summaries to the home office in Pittsburgh, and only brought the corrected copies back at the end of the job (Tr. 472-473, 476-477, 1239-1240). See also Bd. Ex. 3, Note A, at 4. Although these corrected time records (App. Ex. 8) [which are now missing from the record herein] more accurately reflected the Sofis Co. cost associated with Item 425, the Authority's expert witness used the uncorrected records for his computations (Tr. 692) even though the more accurate records were available for his use and had been explained to his personnel at the outset of their work by Mr. Henderson, who, although available in the office, was not asked anything further about them over a two week period (Tr. 70-71, 477-481, 518, 546, 693, 908, 1265-1266; see also Bd. Ex. 1, at p. 1).

Labor Burden. With respect to labor burden, the Board finds costs amounting to \$37,642.00, which figure coincide with that

offered by Appellants' expert accountant (Tr. 345-346; Bd. Ex. 3, Note B, at 4).

Labor burden essentially includes union benefits and taxes (Tr. 345). Mr. McMurtry applied the rates determined by the Transportation Authority's expert, Mr. McGeehin, to the Sofis Co. labor figures in arriving at a total labor burden of \$37,642.00 (Bd. Ex. 3, Note B, at 4; Tr. 345-346). Mr. McMurtry added the 13.9% union benefits rate and 9.85% tax rate used by Mr. McGeehin (Bd. Ex. 1, Sch. 4), to derive a total labor burden of 23.75%, which he applied to his labor figures, yielding a total labor burden of \$37,642.00. See Bd. Ex. 3, Note B, at 4.

Out of Town Living Expenses. The Board finds out of town living expenses incurred to be \$7,812.00. This was the amount developed by the Transportation Authority's own expert witness (Bd. Ex. 1, at 3; Tr. 315, 346; Bd. Ex. 3, Note C, at 4).

Materials. The Board accepts the testimony of the Appellant's expert accountant to the effect that material costs on the job amounted to \$70,990.00 (Tr. 349; Bd. Ex. 3, Note D at 4).

Mr. McMurtry calculated the actual cost of materials attributable to Item 425, and borne by Sofis Co., to be \$70,990.00, as opposed to the \$62,789.00 figure developed by Mr. McGeehin (Tr. 349). The higher figure is due to Mr. McMurtry's inclusion of an invoice for \$1,444.53 from Form Services, Inc. (Bd. Ex. 3, Note D, at 4, and Exhibit I thereto; Tr. 157-158, 346-347); the inclusion of a credit and expenditure for Sika products totaling \$19,999.65 (Tr. 85-87, 346-349, 397; App. Ex. 10; Bd. Ex. 3, Note D, at 4, and Exhibits II and II-A thereto); and the corrected phasing of incidental materials, inasmuch as Sofis Co. had already included in its claim only incidental materials which directly pertained to Item 425 (Tr. 400-401, 1284; Bd. Ex. 3, Note D, at 5).

Equipment. The Board accepts the testimony of Mr. McMurtry that equipment costs amounted to \$116,973.00 (Bd. Ex. 3, at 3; Tab 23).

This Board has held it is preferable to ascertain actual equipment costs as part of an equitable adjustment analysis.

Fruin-Colnon Corp., MDOT 1025, 2 MSBCA ¶165 at p. 83 (1987). When records are available from which actual costs may be ascertained they should be used rather than a rate schedule approach. However, Sofis Co. is a small company that does not have a sophisticated accounting system, such that it is difficult to capture certain indirect equipment costs that would be necessary to determine actual cost (Tr. 17, 318). This is a common situation for entities the size of Sofis Co. (Tr. 327, 720-721, 876-877), and where, as here, a sophisticated accounting system is absent, and detailed fixed asset records and asset utilization records are unavailable, job costs are likely to be understated (Tr. 325-326, 411). In these circumstances, in order to reliably ascertain equipment costs, it is acceptable to use a rate schedule approach, like Sofis Co. did when it used the Blue Book (Bd. Ex. 5) to compute its claim for equitable adjustment (Tr. 316-318).

Use of the Blue Book to calculate equipment costs is appropriate in this instance for several reasons. It is a comprehensive approach that gives effect to the primary components of equipment cost, as well as some indirect components (Tr. 318). Use of the Blue Book gives effect to such components of ownership costs as depreciation, major overhauls, and cost of money (Tr. 323, 326).

"The basic objective of an equitable adjustment is to make the contractor whole," a proposition with which both expert accountants agree in this case (Tr. 369, 958-959). See Fruin-Colnon Corp., supra, at p. 81 (1987); Maryland Port Admin. v. C.J. Langenfelder & Son, Inc., 50 Md. App. 525, 540 (1982). The "starting point for determining an equitable adjustment for equipment costs should be based on the rule of best evidence under the circumstances." Fruin-Colnon Corp., supra, at 86. Both experts agreed that Sofis Co. did not have the sort of detailed records from which actual costs could be accurately determined. We conclude, therefore, that it is appropriate to utilize secondary evidence such as a rate book to determine equipment costs (Tr. 317-318, 411, 772-773, 789-791); Fruin-Colnon Corp., supra, at 83. Both Mr. McMurtry and Mr. McGeehin used the Blue Book in this appeal.

It is not uncommon to see use of rate manuals to value equipment when performing an actual cost analysis (Tr. 963), and 49 of 50 State Departments of Transportation refer to rate manuals in their specifications (Tr. 693-694). Thus the Blue Book approach we find to be an acceptable way to measure the equipment costs incurred by Sofis Co..

In accordance with the foregoing, Mr. McMurtry endorsed the Sofis Co. approach to determining equipment costs totaling \$116,973.00 (Bd. Ex. 3, at 3; Rule 4 File, Tab 23), having observed clear indicators that the Transportation Authority's IDRs missed equipment components or hours (Tr. 331-332). Although the Transportation Authority had been initially close to Sofis Co. in its calculation of equipment cost on the demolition portion of Item 425 work, there were much more substantial differences with respect to placement due to the Authority's omission of equipment (Tr. 598, 1311-1312; compare Rule 4 Tab 13 with Tab 22 and Tab 23). The record reflects that Sofis Co. had much more equipment in use with respect to Item 425 than the Transportation Authority recognized (Tr. 483-510; Tr. 598-599, 1311-1312). A Transportation Authority inspector testified that, following instructions, he did not include all pieces of equipment in his IDRs (Tr. 259-263), and, in any event, did not continually observe the work of Sofis Co. (Tr. 514).

Because the Transportation Authority's analysis of equipment costs was based upon incomplete IDRs, which understated equipment (Tr. 416), the resultant cost figures were low and would increase if all of the equipment usage were reflected (Tr. 318-322, 331, 767-768, 791). If equipment used by Sofis Co. did not find its way onto the IDRs, it was ultimately not included in Mr. McGeehin's analysis (Tr. 888).

Insurance. With respect to insurance costs, the Board finds that \$32,595.00 of expense was incurred, which coincides with the figure developed by the Appellant's expert accountant (Tr. 351; Bd. Ex. 3 at 3). We find Appellant's expert used base labor costs that are attributable to Item 425 and that use of the insurance

rate information provided by the Sofis Co. insurance agent was appropriate. (Tr. 351-352).

Sofis Overhead Rate. The Board finds a Sofis Co. overhead rate of 13.09% to be reasonable and supported by the record. Appellant's expert accountant calculated the rate based upon an examination of a five year period, as opposed to the Transportation Authority's expert who utilized only two years (1987, 1988) which resulted in a lower figure (Tr. 361). See Bd. Ex. 3, Note G, at 6.

The average taken over a longer five year time period in this appeal more accurately reflects reality and minimizes distorting effects, including the activity involved in this appeal concerning Item 425 (Tr. 360-362). The 1987 fiscal year was out of the ordinary for Sofis Co. Sofis, percentage overhead was the lowest that year since at least 1979 because volume was so much larger than a typical year, thereby distorting an "average" developed by using only two years (Tr. 1264-1265).

Multipliers for Profit. The Board finds that use of 10% for profit is reasonable. This was the profit rate advanced by the Appellants' expert accountant during the hearing. Direct testimony supporting the Sofis profit rate at 10% is found at Tr. 69 and 156. Furthermore, the Transportation Authority's own expert used the 10% profit rate for Sofis (Tr. 952).

Dick Corporation Profit and Overhead. The Board adopts a 10% multiplier for profit, and a 15% multiplier for Dick Corporation overhead based on the testimony at the hearing (Tr. 667). See Tr. 858-860.

Utilizing these cost components and the quantities that were admitted by the Transportation Authority in its Answer to the Appellants' Complaint generates the following result:

Labor	\$143,652
Labor Burden	37,642
Out-of-Town-Living	7,812
Materials	70,990
Equipment	116,973
Insurance	<u>32,595</u>

Subtotal \$409,664

Sofis Overhead at 13.09%	<u>53,625</u>
Subtotal	\$463,289
Sofis Profit at 10%	<u>46,329</u>
Sofis Total	\$509,618
Dick Overhead at 15%	<u>76,443</u>
Subtotal	\$586,061
Dick Profit at 10%	<u>58,606</u>
TOTAL	\$644,667
(Price per cubic foot:	\$219.45) ²
Agreed Quantity for Item 425	7,501.5 cubic feet
Estimated Quantity for Item 425	1,425 cubic feet
125% of Estimated Quantity for Item 425	1,781.25 cubic feet
Calculated Unit Price for Item 425 Quantity in Excess of 125% (per Board's findings charted above)	\$219.45 per cubic feet
Quantity in Excess of 125% (7,501.5 - 1,781.25 = 5,720.25)	5,720.25 cubic feet
Price for first 125% of Estimated Quantity at Contract Unit Price (1,781.25 x \$250.00)	\$ 445,313.00
Price for Excess Over 125% of Estimated Quantity at Calculated Unit Price (5,720.25 x \$219.45)	<u>\$1,255,308.00</u>
<u>TOTAL PRICE</u>	<u>\$1,700,621.00</u>
LESS: Amount Paid	<u>-1,221,553.00</u>
NET DUE APPELLANTS as of January 6, 1988	<u>\$ 479,068.00</u>

We turn now to the issue of pre-decision interest. The Board

² This is the amount that application of the cost components set forth in footnote 6 of the Board's February, 1991 opinion would have yielded.

in its February, 1991 decision determined that Appellants were entitled to pre-decision interest and citing Section 15-222(b) (2) of the State Finance & Procurement Article commenced the running of interest on April 26, 1989, the date the Board determined that the claim was first received by the Procurement Officer. However, on appeal, the Court of Special Appeals expressly held that, in fact, the claim was made on January 6, 1988 (CSA Opinion at 8-9), which we find is thus the earliest date from which to begin the accrual of pre-decision interest. We further find as we found in our initial decision in February 1991 that it is fair and reasonable to commence the accrual of pre-decision interest from the date the claim was received by the Procurement Officer. See Maryland Code, State Finance & Procurement Art., §§11-201, 15-222; Maryland Port Admin. v. C.J. Langenfelder & Son, Inc., supra, at pp. 543-545.

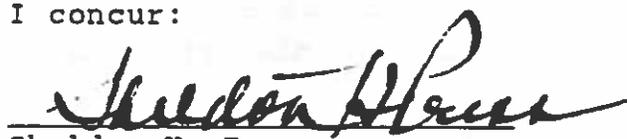
The Court of Special Appeals found (as also found by the Circuit Court) that the Appellant's claim was filed on January 6, 1988. We believe this finding is intended to encompass receipt by the Procurement Officer on January 6, 1988. Therefore, it is appropriate to commence the running of pre-decision interest from January 6, 1988 to the date of this decision.

Therefore, it is this 26th day of January, 1994 ORDERED that Appellant is awarded an equitable adjustment of \$479,068.00 with pre-decision interest thereon from January 6, 1988 until today. Hereafter, post-decision interest shall run at the rate of interest on judgments.

Dated: January 26, 1994


Robert B. Harrison III
Chairman

I concur:


Sheldon H. Press
Board Member


Neal E. Malone
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 MSECA 1472, appeal of DICK CORPORATION AND SOFIS COMPANY, INC. under MDTA Contract No. TFA-2-9700-50.

Dated: *January 26, 1994*

Mary A. Priscilla

Mary A. Priscilla
Recorder

