BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Dick Enterprises, Inc.	)	
	)	
Under Maryland Transportation Authority Contract No. HB 367-000-007	)	Docket No. MSBCA 1683
	)	

September 10, 1993

Board of Contract Appeals - Untimely Appeal - Constructive Denial of Claim.

Where the contractor agrees to extend the time for a final decision in a construction contract claim dispute, the period to appeal to this Board is enlarged under COMAR 21.10.04.04. E(1).

Delay - CPM Delay Claim

Where a claim of delay damages under a CPM schedule is made, the contractor must show that the work affected the critical path as an essential element of its case and if not, would fail to meet the burden of proof.

Interpretation of Contracts - Objective Standard

Where the ordinary and plain language of the contract requires windows to match the prior existing windows and the shop drawings describing the windows were approved the requirements of the contract under the objective test has been fulfilled.

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OPINION BY MR. MALONE

Appellant on September 2, 1992 timely appealed the constructive denial of its May 23, 1991 claim against Respondent arising out of a construction contract requiring the re-installation of windows on the Thomas J. Hatem Memorial Bridge. Respondent filed a Motion to Dismiss the appeal as untimely since more than 180 days[1] had passed from the May 23, 1991 claim together with 30 days without a written Procurement Officer's decision. The Board dismissed the Motion finding Appellant had by agreement enlarged the date which commenced the running of the 30 day appeal period to August 17, 1992. From the dismissal of its

[1]This would constitute a "constructive" denial of the claim, unless the contractor had agreed to an enlarged time period to appeal.

Motion Respondent took an interlocutory appeal to the Circuit Court for Baltimore City. The Baltimore City Circuit Court dismissed Respondent's appeal and the Board then heard the merits.

Findings of Fact

A. Motion to Dismiss

A reasonable expectation under the General Procurement Law is that when a claim is filed in a construction contract dispute the Procurement Officer will investigate and act by issuing a final written decision. The decision could take the form of payment; or denial of the claim. The requirements for the Procurement Officer to act by investigation and to issue a written final decision including all required notices is expressed in clear language in COMAR. In this appeal however, the Board is asked to consider a set of facts where the reasonable expectation does not in fact occur and no written final decision of the Procurement Officer is ever issued. The actual date of a final decision[2] is important since it is 30 days from that date within which the aggrieved party can take further appeal to this Board. The requirement that the final decision be in writing with an appeal notice is important since the writing offers the best opportunity for the Procurement Officer to articulate his reasoning and basis for his decision. The contractor can then decide if the reasons underlying the final decision require any further review. COMAR anticipated circumstances where no final written decision would be issued and provided that where no final written decision had been issued within 180 days of the claim, and no longer period to enlarge the 180 day period was agreed upon by the contractor, the passage of 180 days would constitute a constructive final denial of the claim from which appeal to this Board could be made.[3]

The State relies upon Warwick Supply & Equipment Co., Inc., MSBCA 1580, 3 MICPEL 277 (1991) in its Motion to Dismiss Appellant's appeal as late. The State's position is clear. The claim herein was filed

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[2]A final decision is required to be in a certain written form with notice to the contractor, but can be constructively denied without a writing. (See Maryland State Police et al. v. Warwick Supply & Equipment Company, Inc. In the Court of Appeals of Maryland No. 117 September term, 1992, Opinion by Karwacki, J. filed May 10, 1993, 330 Md. 474, 624 A.2d 1238.

[3]The language of the Statute SF 15-219 which controls this dispute was changed by the Legislature in 1992. See SF 15-219(d) effective October 1, 1992.

on May 23, 1991, and appeal to this Board was not made until September 2, 1992 being over 180 days plus 30 days and`therefore is late under Warwick supra. and must be dismissed. We disagree. In Warwick, supra. the contractor made no agreement to enlarge the 180 day period and did not want to wait any longer. It was simply ignored by the Procurement Officer. However, the facts underlying this case clearly support an ongoing agreement by the parties to continue reviewing the claim which enlarged the 180 day period. The parties had a schedule of meetings and correspondence which supports timely and progressive attempts to resolve the claim. The claim was filed timely on May 23, 1991 and on June 26, 1991 a request for decision and a hearing to provide further evidence on the claim was made. In November of 1991 phone calls and letters requesting meetings on the claim were engaged in by both parties. In December of 1991 the parties met to discuss the claim and these discussions continued into early 1992. It was not until May of 1992 that State personnel advised Dick orally that time had expired and the claim was in effect denied. Appellant's counsel from May 1992 to August 1992 requested a written denial of the claim and on August 17, 1992 the Procurement Officer by letter advised that the time for the claim had run out. Appellant assumed this writing to be a final denial (even though the letter of August 17, 1992 did not contain the language required for a final decision of Dick's appeal rights) and filed an appeal to this Board on September 2, 1992. The State's argument fails to address the conduct of the parties from May 23, 1991 through May of 1992 and thereafter until the August 17, 1992 letter from the Procurement Officer was received by the Appellant.

The parties conducted themselves as would be expected during this period. Such conduct reflects a mutual agreement by the parties to enlarge the period under COMAR 21.10.04.04E(1). A contrary finding would necessarily mean that the State continued to meet with the contractor and hold discussions for resolving the claim all for the sole purpose of luring the Appellant not to act within 180 days. Such a finding can not reasonably be inferred since it would require the Board to find the State acted to purposefully deceive the contractor with false, meaningless meetings held for no other purpose but to gain the lapsing of the appeal period. The facts here clearly reflect both parties

intended to enlarge the filing period by ongoing and meaningful discussions. There is no express requirement that the agreement to enlarge the 180 day period be in writing and the mutual conduct of the parties is sufficient to support the existence of an agreement to enlarge the period for appeal.[4]

The Board has concluded that the 180 day period was enlarged by the conduct of the parties until the August 17, 1992 writing. While no substantive settlement talks were had after May of 1992 the parties continued correspondence anticipating a final written decision and the enlargement of the period continued. The contractor clearly agreed to enlarge the period until it received the August 17, 1992 letter since it continued to believe up to that date that the State would provide it with a final written decision and were willing to wait for it. The contractor then timely appealed to this Board.

As an alternative argument it is asserted by Appellant that the August 17, 1992 letter constitutes a final denial as required by COMAR and therefore its appeal taken within 30 days is timely. We disagree. A final written denial of a claim under COMAR must have the appeal rights and be sent to the Appellant. The August 17, 1992 letter does not contain this information and therefore, can not constitute a final written decision. This case is controlled by the COMAR section 21.10.04.04E where no final written decision is issued and appeal to this Board is perfected by the passage of 180 days from date of claim or an enlarged period; plus 30 days.

In addition, the argument by Respondent that the May, 1992 conversation constitutes a denial by the Procurement Officer such that the appeal was untimely is also incorrect since there is no writing, no appeal notice, and no certified mailing of the decision to the Appellant. COMAR 21.10.04.04 is controlling. The period was enlarged by the conduct of both parties to May 1992 and further enlarged by the agreement of the contractor to August 17, 1992. There is no writing in the record which constitutes the final

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[4] The State has argued only that the appeal is late, not that it is premature.

written decision contemplated by COMAR. The enlarged period ended on August 17, 1992 and a timely appeal to this Board on September 2, 1992 resulted in the Board's order denying the State's Motion to Dismiss.[5]

B. Merits

1. On or about May 4, 1989 Dick Enterprises, Inc. (Appellant) entered into contract No. HB-367-000-007 with the Maryland Transportation Authority (MTA) to provide, "Modifications to Administration Building/Toll Plaza and construction of truck weight facilities at the Thomas J. Hatem Memorial Bridge", Havre de Grace, Maryland.
2. The scope of the project included replacement of the windows in the existing Administration Building with new steel windows that matched the original windows in size, configuration and operation. (See Drawing A9, 30 Nov. 88).
3. The Special Provisions (SP) for steel windows contained SP-2-08510 which gave the detail for steel windows subject to this appeal. The SP required manufacture by Hopes Architectural Products Co. (Hopes) or equal, as approved by the Engineer. SP-2-08510A steel windows by Hopes (or equal) listed windows to be Hope's Jamestown series heavy intermediate steel windows with project out ventilators, or equal, as approved by the Engineer. The project out windows were for the new building as opposed to the project in windows for the existing building. No specific series of Hope's was given in the contract documents for replacing the original windows.
4. Hope's Architectural Products Co. is an old established firm which provided at the time of the instant contract two series of heavy intermediate windows, namely the Jamestown series and the Landmark series. Each series is a separate product offered by Hope's. The Hope's windows are described in various manufacturers catalogues which are routinely found in architect's offices.

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[5] As noted above the MTA took an interlocutory appeal to the Circuit Court for Baltimore City on this issue, which was dismissed.

5. Prior to contract bid the MTA investigated various window manufacturers' products and specified Hope's or equal for replacement steel windows. The windows originally installed in the existing building were provided by Hope's.

6. The contract required Dick to provide shop drawings for each type of window including details of typical composite members of the windows. Dick contracted Hope's to provide the windows and received a set of full size shop drawing of the steel windows from Hope's which were submitted for approval to the MTA's architect Peterson and Brickbauer, Inc. (Brickbauer).

7. The MTA architect Brickbauer (acting pursuant to a separate contract with MTA) received the shop drawings dated 11/15/89 for review which shop drawings comprised sheets A, B, C, 1, 2, 3. The top sheet clearly indicated hardware as H.I. Steel Jamestown Series Windows Project Out Vents and Project-In Vents. The set of drawings clearly referred to the windows on both the new and existing building to be offered as the Jamestown series. Page B of this set of shop drawings clearly shows the details of actual size for the Jamestown window mullion[6] flange as 2 3/16". The shop drawings also clearly showed 1" insulated glass requiring a 1 15/16" space. The drawings clearly state all elevations are to be viewed from the exterior of the building so anyone looking at the plans could visualize the mullion width as 2 3/16". The original windows had non-insulated windows only 3/16" in thickness being held on the frame by a mullion of much less width and having the thin part of the mullion facing outward as opposed to the shop drawings showing the thick (2 3/16") width showing outward. These dimensions are all shown on the shop drawings. The Board notes some of the original drawings were used in the bid package showing 3/16" thick glass for various other original windows. The Board reasonably infers the MTA had in its possession the original drawings for the windows which would reflect the 3/16" thick window glass. The record reflects that the composite member size of windows is directly related

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[6] Mullion, vertical dividing bar between window panels.

to the thickness of glass. The thicker the glass is the larger the composite members are required to hold the glass against positive and negative air pressure per square inch as required for the safe and long lasting quality of the entire window.[7] The shop drawings show many of the details for actual composite member size as well as window size, configuration and operation. The Hope's shop drawings offered by Dick clearly reflect the Jamestown series windows as being the product which Dick and Hope's concluded fulfilled the contract specifications for the new buildings where this series was specifically called for as well as being offered by Dick for the replacement windows in the existing building. Hope's only manufactured heavy metal windows in two series, Jamestown or Landmark. Once a decision is made as to the thickness of the glass, the product specifications for composite members are then pre-set by the manufacturer. In effect, if you know the product series and glass thickness you would also be able to determine, standard rebate size, bite, mullion width etc. Brickbauer had the Hope's cut outs and catalogue in its office so this information was available when Brickbauer reviewed the window shop drawings. They noted on the drawings that all dimensions were to be verified by the contractor and supplier/fabricator and indicated that this note applied to the typical opening dimensions for the windows. There is no notation for verification of composite member size in the field. The shop drawings were approved and/or were approved as noted by MTA on 12/11/89. These approvals were made by MTA after they received the drawings from the architect with notations "make corrections noted" and/or "no action taken" dated 12/5/89. MTA then sent these shop drawings to Dick with transmittal no. 68 dated 12/11/89 "approved" and "approved as noted". The clear intent of this transmittal was for Dick to begin fabrication of the windows shown on the shop drawings.

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[7] Ultimately MTA accepted a customized Hope's Landmark series window with 1/2" insulated glass on a custom mullion. See Respondent's Exhibits 4, 5 and 6 and Rule IV Exhibit A-3.

8. The iterative process of shop drawing approval is set out in detail in the contract documents and the record clearly supports that every step in the approval process was complied with by Dick. The notations on the shop drawings to verify window opening dimensions is also expressed in the SP where the field measurements of the actual window openings are to be checked where possible before fabrication of the windows to ensure proper fit of window units. There is no expressed SP for field measurement of composite members for the windows. The windows were to be manufacturer's standard fabrication except to the extent more specific or more stringent requirements are indicated. MTA made no specific or stringent requirements. Hope's window was based upon its standard detail of manufacturer and offered the manufacturer's standard profile for span and spacing of mullions. The record clearly supports that the windows did in fact fit into the opening of the building, and matched configuration and operation.

9. In October 1990 all of the windows arrived on site and installation began. The replacement windows were delivered five months later than originally scheduled on the CPM due to mis-communication between Dick and Hope's. The metal frames of the windows were installed first to be followed by the glass, glazing and finish work. In November of 1990 Dick had installed approximately six of the mental window frames in the existing building. At that time a visual comparison of the replacement windows could easily be made with the original windows, and the composite parts of the windows were not identical to the original windows. The architect following a routine visit to the site wrote a letter to MTA dated November 1, 1990 informing them the windows were not acceptable, for he concluded the windows were inappropriate for the building. The architect refers to the Maryland Historical Trust concerning a requirement to replicate the original windows.

10. The contract documents contain no expressed requirement for approval of any work by the Maryland Historical Trust nor any requirement for the replacement windows to replicate the original windows. The new replacement windows were to "match"

the size, configuration and operation of the original windows. The windows provided by Dick pursuant to the approved shop drawings in October of 1990 did match in size, configuration and operation the original windows. The original windows were technologically outdated having been installed in the "art deco" administration building in the late 1930's. There was no express intent that the replacement windows be replicas of the old windows. Many upgrades in window technology were incorporated in the replacement windows such as the insulated glass which were not original characteristics of the old windows and the parties knew that the replacement windows would be different in various respects from the old windows. The problem ultimately revolves around the understanding the parties had over the word "match". The Board finds no ambiguity in the language and applies its ordinary plain meaning. The Board rejects the idea offered by MTA that some requirement of historical preservation can be read into the word "match". The windows were the correct size and fit into the openings. They operated as indicated and had the number of panes and other general characteristics to match the existing windows.

11. MTA offered Exhibits 4, 5, and 6 being sections of the window mullion from respectively the original windows, the rejected replacement windows and the window ultimately accepted by the MTA. There is an obvious difference in the appearance of this composite member of the windows. However, these differences were shown on the shop drawings approved by the authority. MTA, MTA's engineering section and MTA's architect had an opportunity to reject the first set of windows or request more information. Instead, approval was given and fabrication performed. The rejection by MTA on November 12, 1990 of the windows constituted a change to the contract. The work incurred by Dick and costs to install a second set of windows constituted new work.

12. The MTA subsequently approved a customized version of the Landmark series of windows from Hope's which were installed by Dick in May of 1992. On May 23, 1991 Dick had timely filed a

claim for cost and delay damages resulting from the window re-installation.

13. From May of 1991 through March 1992 the parties engaged in ongoing negotiations of the claim. Prior to the expiration of 180 days from the date of claim the Procurement Officer came to a determination to deny the claim. However, the Procurement Officer decided not to issue a written decision denying the claim as required by COMAR but continued settlement negotiations with the expectation that the 180 days would expire and Dick would take this failure to act as a constructive denial of the claim which Dick could then appeal to the Board.

14. The Board finds that the continuing negotiations acted as an agreement to enlarge the 180 day period to August 17, 1992 from which date Dick filed a timely appeal to this Board.

15. Dick damages are comprised of the direct actual costs of the re-installation and direct field costs resulting from alleged delays to the project due to rejection of the first set of Jamestown windows.

16. Dick claims extended overhead costs of $72,345.93 which consist of costs Dick identified from 12/23/90 through 4/14/91. Dick selected this period of time as representing a delay period since the windows were rejected in November of 1990, and the approved second Landmark series decision was made in December of 1990. The second set of windows arrived on site approximately 4/14/91 which is the factual predicate Dick relies upon for the delay period ending. Dick reasons that it was unable to continue work as a practical matter during this period since other interior work could not economically be performed without the windows in place. We reject this reasoning.

17. The contract requires a critical path method (CPM) of analysis for the project schedule. The contract bid items required a CPM which was provided within one month of Notice to Proceed (NTP) on July 7, 1989 as required. The contract clearly requires in the event of a delay claim, the making of a time impact analysis and determinations as to delay contemporane-

ously with the delay. It is well known that CPM schedules work best where all parties understand the schedule, accept the method and actually use it. While the MTA paid $3,000.00 for the schedule and it was provided by Dick there is little evidence the parties worked toward effecting the CPM method of scheduling. Dick's Project Manager assumed the CPM had been abandoned and relied upon notations during progress meetings. We find that the CPM is a mandatory contract requirement and was to be relied upon to determine any delay claim of Dick. The conduct of the parties does not support a finding that the contract was modified as to the requirements for scheduling and delay claim analysis.

18. The CPM shows installation of the windows to be a non-critical activity upon which the schedule of the project did not depend[3]. CPM Line item 59 change existing windows was originally set for performance between July 24, 1990 (early start) and September 17, 1990 (late finish) with 24 days of float, with an activity duration of 15 days. The CPM does not show any other work such as dry wall, painting, carpet, tile, heating and air conditioning being dependent upon changing existing windows. The Board rejects any finding of a general delay from 12/23/90 through 4/14/91 resulting from the window problem using a CPM analysis.

19. Dick has provided the Board with direct cost information as to the costs it incurred due to the new work. Dick has annual sales of over $500 million and an enormous set of records.[4] Dick's accounting system is also computerized to provide summaries and details of summaries of actual job costs. In response to Proof of Costs Dick provided these computer generated details as to costs. MTA's cost accountants rejected many of the items due to lack of back up "hard"

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[3] While some work was shown scheduled after the window installation this work was not dependent upon the window work and therefore did not affect the critical path of the project.

[4] Dick archive methodology is similar to State of Maryland in that document summaries are prepared and the actual hard copies are boxed and placed on pallets or shelves in a warehouse.

copies of bills and other related documents. The Board accepted the computer generated documentation together with live testimony as to its accuracy from Dick over the objection of MTA. The Board finds that while minimal, these types of records may be used to support Dick's claim for direct costs together with other evidence in the record.

20. The cost of the second set of Jamestown custom steel windows of $26,770.00 is the actual cost incurred by Dick plus $2,730.00 for screens for a total actual cost of the windows from Hope's of $29,500.00. The cost of the glass from Standard Glass & Aluminum, Inc. of $1,315.00 is an actual cost of Dick related to its claim. Dick also incurred invoices for $665.73 and $760.31 for glazing materials as a direct result of the new window work.[illegible] Dick's claim for $435.90 delivery is not a direct cost incurred due to new work. The unrebutted testimony that delivery is normally included in the cost of material results in rejection of this aspect of the claim. Finally the $15,484.82 for labor is also a direct cost of Dick[illegible].

21. Dick offers a change order request of its sub-contractor T.A. Gorman, Inc. (Gorman) of April 8, 1991 for $15,085.00 for re-mobilization of forces to install the Landmark series windows. None of the computer generated records of Dick indicate any actual amount paid. No testimony was offered by Gorman as to actual costs and billings on the change order request. The Board finds this documentation speculative and uncertain as to the actual cost incurred. While the record supports some amount of re-mobilization of the sub-contractor may be outstanding, the record is not sufficient to determine those costs. Dick was in a position at the hearing to have defined precisely the result of the change order request but did not

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[illegible] The glazing detail was changed from the first approved set of shop drawings.

[illegible] MTA argued this labor claim should be denied since Dick did not provide certified payrolls with its Proof of Costs. The record supports a finding MTA received the certified payrolls during performance of the contract.

offer any evidence.[12]

22. Dick's claim for temporary weather protection necessarily resulted from the new work. The old windows were removed and the replacement windows were rejected. Some protection was required until the window replacements were installed. The wood and plastic protection claim of $1,823.12 for labor is reasonable. The hourly rates given for the foreman, carpenter, and laborers are supported in the record while the number of hours are reflected on force account forms.

23. Dick saved money on the first incomplete installation of rejected windows and computed a credit of $3,142.95. There remained work of a substantial nature to complete the first installation. MTA's cost accountant, Rubino & McGeehin (R&M) accepted the labor burden in the Dick analysis but used an actual time per window method to calculate a credit of $6,776.00. The Board agrees that the (R&M) analysis most closely captures the correct credit with an actual cost per window method.

24. The Board has found the time period analysis by Dick for delay from 12/23/90 to 4/14/91 to be an inappropriate method to capture the delay under the CPM requirements of the contact. However, this aspect of the claim also includes direct cost information which the Board has considered. The Board finds that none of the items listed on the computer generated flow chart given on the top sheet of Appellant's Exhibit #5 are supported as a delay cost item. Dick claims $27,044.49 for a Supervisor during the 12/23/90 to 4/14/91 period. The record supports the fact a Supervisor was required on site with an office trailer until all sub-contractor work was completed.[13] There were several temperature sensitive items such as landscaping which could not have been finished until the Spring of 1991 and to that extent the Supervisor, his truck,

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[12] Gorman's change order request also contains a description for work not related to the new work.

[13] See Supplement to the 1982 Standard Specifications January 1988, sections GP-5.04, 811, 811.10.

his living expenses, telephone, tools, electric, toilets, copier and computer would have to be on site, regardless of any delay claimed until the spring of 1991.

25. The Board can not find any support in the record for the presence of two supervisory personnel, or an additional trailer during the claimed delay period. The decision by Dick to keep those forces onsite was a business decision not driven by the new window work. The day logs reflect while work was slow in the claimed time period various types of work were being performed. While the absence of the second set of windows made interior work more difficult the work was still performable and was performed using the temporary weather protection. The contract documents and approved CPM do not reflect any dependency relationship on the window installation and other on going interior work. While it is possible some of the direct costs shown on Appellant's Exhibit #5 may have been related to the new window work such as small tools the record is deficient to support an award as it requires the Board to speculate how they may or may not be related to the new work.[14]

Decision

The Board finds entitlement as set forth in the Findings of Fact above for the claim of Dick for direct costs related to new work and denies all other claims for delay.

The contract required CPM methodology (See SP 1-20). The schedule was mandatory and to be applied according to the principals and definitions set forth in the manual, The Use of CPM in Construction. The method provides an express procedure for changes, delays and time extensions.

The Board has had prior cases involving this general provision

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[14] For example, the small tool cost of $115.29 could have been for tools incurred in the normal progress of work. In the absence of further details that all or part of the tools needed to be purchased was a result of the new window work, this level of proof is too speculative. While the Board accepts that small tools were purchased there is no definition that the tools were for window replacement. The day logs indicate other work on going during this period which would have required small tools.

(GP) for CPM. In Hensel Phelps Construction Company, MSBCA 1101 et al, 4 MICPEL ¶304, (1992) this Board stated, at page 183;

"*MSBCA 1101 Quantum Discussion*

> *The bulk of this case and its 147 Counts is for delay. This project was to be developed under a CPM method. The Critical Path Method is a valuable tool for construction if used properly and accepted and understood by the parties and sub-contractors.*

However, a basic understanding of CPM requires a through reading of the underlying manual. In Prince George's Construction Company, MSBCA 1622, 4 MICPEL ¶309A (1992) the Board outlined some of the principals of CPM:

> *"3. The contract documents require construction according to Critical Path Method (CPM) of scheduling. The correct method of CPM analysis is described a booklet "The Use of CPM in Construction" which is part of the contract documents. There are four main principles of CPM which must be considered to understand this method.*
>
> *(1) Everything in the diagram has meaning.*
>
> *(2) An activity has a single starting point and a single definite ending point.*
>
> *(3) The arrow diagram does not describe time relationship but rather dependency relationships.*
>
> *(4) All persons who have anything to do with the project must be consulted when creating the arrow diagram.*
>
> *The CPM method is a valuable schedule technique when accepted and understood by all parties and their subcontractors. CPM requires a detailed analysis of activities and events and an understanding of the dependent relationships between those activities and events. A critical path of work is developed from this planning which reveals a head to tail path of activities in an arrow diagram that requires the longest total amount of time for accomplishment. In this way the*

critical path contains no float.[9] *Non-critical path work is also scheduled showing the amount of time estimated for work duration and any float related to that non-critical activity."*

Prince George's Construction Company, supra. at p. 2, footnote omitted.

The Board has always recognized that changes may be constructively made. See Fruin-Colon Corporation and Horn Construction Co., Inc., MSBCA 1001, 1 MICPEL 1 (1979). COMAR still recognizes the potential effectiveness of a change order by the conduct of the parties. Compare COMAR 21.07.02.02. Change orders without the benefit of a writing remain fertile ground for disputes. There is nothing in the record which indicates that the Procurement Officer acted in a way to constitute an express or implied waiver of the CPM. The view of Dick's Project Manager that a Progress Meeting would replace the CPM is untenable since it is impossible to determine what that schedule was or could have been.

The contract provided for a process of approval of hardware for replacement windows and the contract language is clear and unambiguous. Upon receipt of approval of the shop drawings Dick reasonably relied on the approval and fabrication resulted. The action of MTA to stop work on November 12, 1990 constituted a unilateral change to the work for which Dick is entitled to an equitable adjustment. There is no express requirement for replication of the original windows in the contract documents for the windows offered did match the original windows in that they were equal or similar to the old windows in some aspects. The offered windows went together with the original windows. These windows were nearly but not exactly the same and resembled the original windows. In every plain sense of the word the windows matched. The inference by MTA's architect that the windows replicate and be historically identified with the original old windows can not reasonably be found in any standard definition of

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[9] *Float - The amount of extra time available to an activity not on the critical path determined by the difference of the earliest start date over the latest start date."*

match and no standard of historical identity is expressed in the contract documents. The MTA's approval acted, as contemplated by the contract, as an acceptance of the product offered. The manufacturer specified by MTA itself was offered. The MTA knowing its own requirements selected this source or equal and upon approval of the shop drawings accepted the product. MTA did not bid for identical replacement windows. The contract clearly expressed a bid for off the shelf manufactured heavy intermediate windows from a known source.

The Board has previously discussed the objective test of contract interpretation and in C.J. Langenfelder & Son., Inc., MSBCA 1636, ________ MICPEL ¶________ (1993) at page 12 stated;

> *"The fundamental principal that contracts should be interpreted objectively and given their plain meaning as understood by a reasonable intelligent bidder, Dominion Contractors. Inc., MSBCA 1041, 1 MICPEL 69 (1984) applies to Addendum #1. Neither the narrative of the specifications nor the plain meaning of the drawings contemplates installation of the 5 KV crane cable. The specifications and drawings are not ambiguous, the Board will not look outside the contract documents unless there is ambiguity. Intercounty Construction Corporation, MSBCA 1056, 2 MICPEL 130 (1986). Since the meaning is clear there was no duty on Appellant to inquire. See Dr. Adolph Baer, P.D. and Apothecaries, Inc., MSBCA 1285, 2 MICPEL 146 (1987). Contract provisions must be read harmoniously to give reasonable meaning to all parts of the contract. Intercounty Construction, MSBCA 1036, 2 MICPEL 164 (1987)."*

Applying these principals to the facts herein we find that Appellant reasonably interpreted the contract requirements in offering the windows it initially did and is entitled to an equitable adjustment for certain demonstrated costs it incurred as a result of the change.

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, 492 A.2d 1306 (1985); State Highway Adm. v. Greiner, 83 Md. App. 621, 572 A.2d 363 (1990), Cert. Den. 321 Md. 163 (1990). Words used in a

contract should be given their ordinary everyday meaning. See Dr. Adolph Baer , P.D. and Apothecaries, Inc., MSBCA 1285, 2 MICPEL ¶146 (1987).

The Board discussed the nature of proof required arising out of change work in general in C.J. Langenfelder & Son., Inc., MSBCA 1636, __________ MICPEL __________ (1993) on pages 13-14,

> "*The changes clause provides for actual cost together with permitted mark-up in calculating the amount of an equitable adjustment. Equitable adjustments are corrective measures to restore the contractor to an economic position he was in prior to the change. The standard has been and is what the work reasonably and actually cost. See* C.J. Langenfelder & Sons. Inc., *MDOT 1000 et al., 1 MICPEL 2 (1980). This burden of proof lies with the Appellant. See* Fruin-Colon Corporation and Horn Construction Co., Inc., *MSBCA 1025, 2 MICPEL 165 (1987). The contractor has the burden of showing the actual costs as shown by their records. If, however, those records are inadequate or incomplete or do not fairly represent the full costs other sources are permitted (i.e. standard rate manuals). See* Fruin-Colon Corp./Supra. *Estimated labor costs have been accepted by this Board where unchallenged,* Calvert General Contractors Corp., *MDOT 1004, 1 MICPEL 5, (1981), and a reasonable historic "actual" cost could be computed. Here the record, while incomplete as to labor, is sufficient to support the findings of labor installation. Appellant's method of determining historic costs in its estimate was not provided in the record.[15] However, it is uncontested the work was performed and Appellant is entitled to reasonable compensation.[16] The Board has*

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15 The Board has allowed the use of "historical" records where actual records were inadequate. "Historical" records would be evidence of what it actually costs a contractor to perform similar work, (i.e. example: it takes 1 electrician. 1 laborer and 1 truck driver, one (1) hour to pull x length of cable). No "historical" records were given during Appellant's presentation.

16 The Board concludes that to disallow all labor costs would be unconscionable and contrary to the record taken as a whole and arbitrary since it is undisputed Appellant's forces installed the 5 KV crane cable. Respondent offered no evidence to contradict the hours claimed but argued that there was no record of the actual hours spent on 5 KV work specifically identified as such in Appellant's records.

stated previously, that a contractor need not prove his increased costs with absolute certainty or mathematical exactitude but must furnish a reasonable basis for computation, even if the result is only approximate. See, Traylor Brothers and Associates, MSBCA 1028, 1 MICPEL 86 (1984)."

Dick is entitled to the direct costs incurred as a result of new work as follows;

Temporary Weather Protection	$ 1,823.12
Cost of Landmark Windows and Screens	$29,500.00
Cost of Glass	$ 1,393.90
Cost of Glazing Materials	$ 1,426.04
Labor to Install	$15,484.92
Total	$49,627.98
Less Credit	-$6,776.00
Total	$42,851.98

The Board has consistently held costs of this type compensable.

However, the extended overhead costs of $72,245.93 are denied. The contract required justification of such costs under a CPM analysis. Dick has failed to demonstrate entitlement under the CPM. Additionally, the direct costs indicated in this analysis are not delay sensitive with the documentation sufficient to link them to the new work.

Pre-decision interest was requested and is awarded.[17] MTA received the claim on May 23, 1991. The claim contained sufficient information to ascertain an amount certain of direct costs due to Dick. In light of this the Board awards Pre-Decision interest from May 23, 1991[18] to the date of this decision at the standard rate of interest on judgments in addition to the principal amount of $42,851.98 calculated as follows; $4,285.19 ÷ 365 = $11.74 per day

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[17] *In Harmons Associates Limited Partnership, MSBCA 1517, 1518 and 1519 3 MICPEL ¶301 (1992) a discussion of pre-decision interest is given at page 3 where the Board stated,*

> *"Pre-decision interest is discretionary. (See State Finance Procurement Article 15-222; 15-211, 15-210 and 11-201.)"*

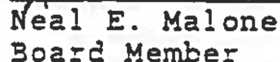
[18] Pre-decision interest can not be awarded prior to the date of claim. State Finance & Procurement Article § 15-222(b).

interest x 840 days = total interest of $9,861.60.

MTA made no affirmative claims and Dick made no claims for incentive under this appeal.

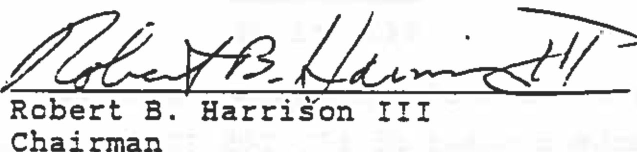
Wherefore, it is Ordered this 10th day of September, 1993 entitlement in the amount of $42,851.98, plus pre-decision interest of $9,861.60 is made to Dick to be paid by MTA together with judgment interest from the date of this decision until paid.

Dated: 9/10/93



Neal E. Malone
Board Member

I concur:



Robert B. Harrison III
Chairman

Sheldon H. Press
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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1683, appeal of

Dick Enterprises, Inc. under Maryland Transportation Authority Contract No. HB 367-000-007.

Dated: September 10, 1993

Mary F. Priscilla

Mary F. Priscilla
Recorder