BEFORE THE
MARYLAND DEPARTMENT OF TRANSPORTATION
BOARD OF CONTRACT APPEALS

Appeal of FRUIN-COLNON CORPORATION and HORN CONSTRUCTION CO., INC.	)	Docket No. MDOT 1002
Under MTA Contract No. NW-03-02	)	

April 24, 1981

Motion For Reconsideration - General — A motion for reconsideration generally will be granted on a showing that the Board (1) failed correctly to evaluate the evidence of record, or (2) failed properly to rule on a question of law. Here Appellant was unable to demonstrate that the Board's decision was incorrect under such a standard.

Motion For Reconsideration - New Evidence — Only newly discovered evidence may be received by the Board on motion for reconsideration.

Motion For Reconsideration - New Issues — Where a party seeks to raise a new issue on motion for reconsideration which is dependent upon new evidence or evidence which has not been fully subjected to the adversary process, the Boar I will refuse to consider this issue.

OPINION ON MOTION FOR RECONSIDERATION

In our December 5, 1980 decision in this appeal, we considered the sufficiency of Appellant's support of excavation design for two tunnel access shafts. Our conclusion was that the evidence as a whole supported Respondent's rejection of this plan and thus, we denied Appellant's claim for an equitable adjustment for the work involved in revising and strengthening its access shaft support system.

Appellant has timely moved for reconsideration of the Board's decision pursuant to Board Rule 30. The points raised in this Motion will now be addressed seriatim.

I. The Board's Reliance Upon the MTA Calculations

During the hearing of this appeal, Respondent introduced a number of exhibits containing calculations, prepared by its engineering staff and consultants, relating to the inadequacy of Appellant's original design submittal. These calculations were prepared prior to Respondent's decision to reject Appellant's design and formed the basis for Respondent's directive that Appellant strengthen the packing connections between the wales and the soldier piles. Although Respondent communicated its engineering conclusions to Appellant prior to finally rejecting the original access shaft design, the calculations supporting these conclusions were not contemporaneously presented to Appellant for review. In fact the record indicates that these calculations were not seen by Appellant until the hearing in this appeal.

Appellant first contends that Respondent's failure to disclose its calculations prior to rejecting the original access shaft design should have precluded the Board from relying on them in arriving at its decision. Notwithstanding the fact that Appellant waived its objection to the introduction of these calculations as exhibits during the hearing, the Board will consider the three arguments relied upon by Appellant in this regard.

Initially, Appellant contends that the Board established, in its decision, a criterion "...for its consideration of and reliance upon a piece of information relating to the stability of the excavation support system...." This criterion was said to be "...whether or not that information was available at the time respondent rejected appellant's proposed design and before any construction was done pursuant to respondent's directives...." (App. Motion, p. 6) Accordingly, since the MTA calculations were not made available to Appellant prior to the rejection of its access shaft design, the Board's reliance on these calculations would therefore be inconsistent with its stated criterion.

Appellant's characterization of the Board's decision is deemed erroneous. The dispositive issue was determined by the Board to be whether Respondent properly rejected Appellant's design on the basis that it failed to conform to minimum standards of good engineering practice. In weighing the evidence of record, the Board analyzed those factors which either were or should have been considered by Respondent at the time it rejected Appellant's design and directed it to strengthen the packing connections. This included all calculations prepared by the MTA staff analyzing Appellant's design and the engineering assumptions contained therein. The Board does not find an inconsistency or error in this approach.

Appellant next contends that the disputed calculations constituted superior knowledge which Respondent had a duty to disclose. When Respondent omitted to disclose these calculations in a timely manner, it allegedly breached this duty, thereby precluding both itself and the Board from relying upon the calculations to Appellant's detriment.

Assuming, arguendo, that Respondent had a duty under the superior knowledge doctrine to reveal its calculations prior to rejecting Appellant's original design, Appellant has failed to show that it was damaged by the alleged breach of this purported duty. As stated by the General Services Board of Contract Appeals in Piracci Construction Company, Inc., GSBCA No. 3715, 74-2 BCA ¶10,719 at page 50,985:

> "Under the superior knowledge doctrine where the contractor has no reason to know of information not disclosed, such information is peculiarly within the knowledge of the Government, and the non-disclosure results in the complained of injury to the contractor, the Government is held liable for the injuries resulting from non-disclosure of all relevant factors material to the prudent contractor's assessment of his scope of work." (Underscoring added.)

Here the withholding of Respondent's calculations during the initial phase of this dispute did not affect Appellant's contractual liability for the costs of redesigning and strengthening its access shaft designs. Under the contract "Disputes" clause and the administrative remedy provided therein, Appellant's liability was determinable by this Board, only after Appellant had the opportunity to seek and review the calculations, cross-examine those responsible for them, and offer rebuttal testimony. See COMAR

11.06.01. Since Appellant's response to the calculations was raised during the hearing and constituted a part of the record upon which the Board formulated its decision on liability, Appellant has not been prejudiced or damaged.

Appellant's final contention with regard to Respondent's calculations relates to the alleged prejudicial effect of receiving these calculations at the outset of the hearing. Appellant maintains that as a result of Respondent's actions, it was unable to have its primary expert witness, Mr. James Wilton, analyze these calculations and present rebuttal evidence therein during the hearing. The Board was therefore wrong in considering Respondent's calculations without permitting an adequate opportunity for study and response by Appellant.

During the hearing Respondent submitted seven exhibits (B, C, D, E, G, V and K) containing calculations relating to the adequacy of Appellant's original thrust pile design. Because Appellant did not have the opportunity to review these calculations prior to hearing, the Board in each instance permitted Appellant to reserve cross-examination until its experts had sufficient opportunity to analyze the calculations and discuss them with Appellant's counsel. (Tr 293-297, 299, 304, 360, 377, 575, 601) On the final day of the hearing in this appeal, the following exchange took place between the Board and respective counsel pertaining to six of the seven calculation exhibits:

> "MR. BAKER: Mr. Blasky, with regard to a number of exhibits, Appellant has reserved its right to additional cross examination. Those exhibits being computations contained in Exhibits B, C, D, E and G, I believe. There was also an additional reservation just made with regard to Exhibit V. I would take it, based upon the cross examination which Mr. Whitt conducted yesterday that you no longer are reserving your right to cross examine the computational exhibit, is that correct?
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> MR. BLASKY: That is correct. What we are reserving for the record is the option of requesting permission from this Board for a continuance at the close of this hearing for an opportunity to furnish rebuttal testimony with regard to these calculations. We have not made a decision whether we will do that until the close of the hearing. Insofar as further cross examination of Mr. Desai, I would not want it, do not desire it.
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> MR. ELLISON: I'm going to object to the procedure. I think it would be pertinent to inquire as to when they first looked into volume V, they've had it several days. If necessary, over the weekend and reconvene Monday afternoon for a finalization, it certainly would be adequate in my opinion. That would be my position.
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> MR. BAKER: Before we rule on this, we will continue to take testimony. If the hearing does not end today, then I would expect you to be prepared to offer rebuttal testimony to Exhibit V by Monday.
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> MR. BLASKY: No, we would not be. I would have to have these calculations reviewed by someone who could furnish testimony to them and voluminous and lengthy, and it cannot be done by anyone here [sic]. I would have to send them out to be reviewed either by one of our other consultants, either by Mr. Werner, Mr. Hymie [sic] or a third consultant. I have not made a decision whether to do that.

Most of it would depend on the sum total of the testimony. My understanding is that you have a further witness to present, and at that time I think we can be in the position to tell the Board before the hearing is closed what our decision will be.

MR. BAKER: That would be acceptable. As long as we know before the hearing is over, then we will rule accordingly at that time." (Tr 585-86)

Thereafter Respondent called its final witness, Mr. Edward Ziegler and during his testimony exhibit X was introduced containing additional calculations. Following this testimony and the admission of exhibit X into evidence, Respondent rested its case. The following discussion then took place:

"MR. BLASKY: May it please the Board. I have assumed that the Respondent has rested its case also at this stage. We have noted throughout the record that, in particular with reference to Exhibit V and X that they are very voluminous and furnished to the contractor, and his attorney on Tuesday of this week. We have reserved our objection to Exhibit V until the conclusion of examination. I now withdraw our objection to that, and as far as we're concerned it can be received into evidence without further objection.

With regard to Exhibit X, however, this also was furnished. We have had cross examination on Exhibit X, but I would like to reserve the right to present rebuttal testimony with regard to this. I would have to consult with my clients and my co-counsel on this over a period of the next several days to determine what decision to make on this. I promised to advise the Board no later than Wednesday of next week.

MR. BAKER: Mr. Ellison?

MR. ELLISON: Our position is that the document has had ample time to be studied, and that is apparent by the intensive amount of three hours of cross examination on every detail contained in the submittal, and that if rebuttal is to be concerned with calling another expert back, these experts were here and were dismissed for other reasons, including our own, and so recontinuing a trial is not a matter of continuance which is normally before this Board. This Board normally opens a hearing and then continues to its conclusion and then closes the evidence. The fact that expert witnesses were dismissed by one side or the other, I don't see where that is grounds for a continuance.

MR. BLASKY: If I may respond, my request does not necessarily indicate that I plan to use any expert witnesses previously at this hearing.

MR. BAKER: Is there anything further? I'm going to grant your request. I'm going to ask that you inform the Board by next Wednesday, at the latest, as to whether or not you will have a rebuttal case. I'm going to grant your request for a continuance. In the event that you desire to present a rebuttal case, I'm going to

require that any computations that you seek to submit to the Board as evidence in this proceeding be given to the Respondent five days before the hearing, and further, if there is an expert witness to be called, that a statement setting forth his opinion and the underlying facts for that opinion also be furnished to the Respondent five days before the hearing.

If Mr. Blasky elects to present a rebuttal case, that will be set for hearing for the 19th of February, and I'm going to require that the information that I set forth earlier be provided to the Respondent no later than Wednesday morning, February 13, 1980." (Tr 700-702)

On February 4, 1981, Appellant's counsel advised the Board:

> "After further review of respondent's Exhibit X, Appellant has concluded that rebuttal testimony with regard to the aforementioned Exhibit is not necessary."

The Board accordingly closed the record in this appeal.

Appellant was given every opportunity to review Respondent's calculations, cross-examine, and present rebuttal evidence. Under these circumstances the Board finds no prejudice or error in its consideration of Respondent's calculations.

II. Appellant's Design Responsibility Under the Contract and Its Reliance on Trade Practice

Appellant first alleges that the Board erred in failing to consider contract language which placed design responsibility and risk of loss on Appellant. Given this language, Appellant concludes that it was reasonable for it to have expected a less stringent review of its design than is usually experienced where the design is furnished by the owner.

The Board determined at page 3 of its decision that Appellant's design was required to be submitted to the MTA Engineer for review and approval prior to the performance of any work and was to include "...complete computations, work sequence and working drawings." In considering Respondent's review and approval authority under this performance requirement, the Board specifically determined that Respondent could only require a submitted design to conform to minimum standards of good engineering practice. This finding implicitly recognized that Respondent was entitled only to a basic, safe design. The Board's decision was in conformity with this standard.

Appellant also contends that the design assumptions contained in its thrust pile design were so well recognized in the fields of structural and soil mechanics design as to have warranted its expectation that Respondent would approve them. However, the evidence of record establishes that the characteristics and design features of Appellant's thrust pile system were not based on published technical data or professional articles. Instead the basic design assumptions made by Appellant, principally the load distribution factors, were based upon the experience of Messrs. Wilton and Werner, Appellant's expert witnesses. Their experience, no matter how extensive and successful, standing alone, is insufficient to establish a uniform practice in the engineering profession.

III. Appellant's Allegations of Error in Respondent's Calculations

Appellant also contends that it identified, both at the hearing and in its reply brief, a number of "gross errors" in Respondent's calculations which the Board ignored. These errors were said to pertain to Respondent's calculation of maximum passive resistance, its subsequent use of this calculation to compute load distribution, and Respondent's use of a 34 ton per cubic foot horizontal subgrade reaction to compute the thrust pile movement necessary to achieve passive resistance of the earth. (App. Reply Brief, pp. 6-9)

Appellant's design assumption was that an unbalanced load of 8120 kips would develop when the north shaft was unloaded and that the maximum passive resistance of the earth behind the thrust piles would provide 7853 kips of support. (Exh X) Respondent's engineers calculated an unbalanced load of 8436 kips at the north shaft with a maximum passive resistance of 4381 kips. The Board did not make a finding with regard to the alleged error in these computations because it was immaterial to the disposition of this appeal. Respondent used these calculations to determine the percentage of the unbalanced load which would move into the thrust piles. This was done by the following equation:

$$1/3 \times \frac{\text{4381 kips (max passive resistance)}}{\text{8436 (unbalanced load)}} = 17\%$$

Assuming that Appellant's calculations of unbalanced load and maximum passive resistance were accurate, Respondent's corrected computation of unbalanced load distribution to the thrust piles would have been:

$$1/3 \times \frac{7853 \text{ kips}}{8120 \text{ kips}} = 32\%$$

Using Appellant's numbers, 68% of the unbalanced load would have been transmitted to the soldier piles under this equation. Since the Board found that Respondent rejected Appellant's design because of its valid concern over the adequacy of the packing connections when more than 39% of the unbalanced load is resisted by the soldier piles, it is irrelevant whether the actual load distribution to the soldier piles is 83% (100-17) or 68% under the corrected computation.

Finally with regard to Respondent's use of a 34 ton per cubic foot coefficient of subgrade reaction, this was fully evaluated by the Board in its findings of fact and decision (Board decision, p. 18). While Appellant contends that a 300 ton per cubic foot factor was more appropriate, it presented no evidence in support of this contention during the hearing. Respondent, on the other hand, presented the testimony of Mr. Edward Ziegler who testified that the 34 tons per cubic foot factor was appropriate. The Board found Mr. Ziegler, a professional engineer with 35 years of experience, to be a credible witness and accepted his opinion in this regard.

For these reasons the Board again finds no error in its reliance upon Respondent's calculations.

IV. Appellant's Contention that the Board Decision Reflects Incorrect Engineering and Design Assumptions Regarding Load Distributions and Thrust Pile Movement

Appellant next contends that the Board erred in accepting Respondent's assumption that the path through the soldier piles was the "stiffer path." The basis for this error is purportedly found in the Board's consideration of the thrust pile movement necessary to generate the passive resistance of the earth. Appellant submits that the evidence showed that the thrust piles would move less than 1/2" before developing passive earth resistance, thus making the thrust piles and internal bracing of the shaft, the "stiffer path" of resistance for the unbalanced load.

At pages 14-19 of our decision, we considered Appellant's arguments in this regard. Since Appellant has failed to invite the Board's attention to any evidence of record which it might have overlooked, the Board finds no basis to reconsider its previous findings relative to distribution of the unbalanced load.

V. The Board's Consideration of the Monitoring Results

Appellant ultimately contends that the Board erred in not accepting its monitoring data as evidence of the correctness and safety of the access shaft design, and in not granting an equitable adjustment for the corrective work performed at the south access shaft. With regard to the first point, the Board determined at page 19 of its decision that the propriety of Respondent's rejection of the north and south access shaft designs must be judged as of the time of Respondent's action on this matter. On May 4, 1978 when Respondent's directive to redesign and strengthen the access shafts was issued, no definitive monitoring data was then available. Accordingly, the Board determined the propriety of Respondent's actions on the basis of the information which was before Respondent or was reasonably available to it when the decision was made to reject Appellant's design. We find no error on this score.

With regard to the south shaft support, Appellant argues that prior to its performing the directed work to augment the support structure in this area, Respondent received monitoring data indicative of the stability of the south shaft. Appellant contends, on this basis, that Respondent was under a duty to rescind its directive upon receipt of the monitoring data and that its failure to do so entitles Appellant to an equitable adjustment for extra work. It is further contended that the Board erred by not ruling on this issue and we are requested, on reconsideration, to clarify our decision.

At no time during these proceedings, prior to this Motion, did Appellant either raise, or contend that it was entitled to an equitable adjustment for work performed solely at the south shaft. The only reference to this contention is found in Appellant's letter dated June 21, 1978 wherein an objection was registered with Respondent's Resident Engineer concerning the performance of directed work at the south shaft. (Appeal File, Tab 00) The basis for this objection, in fact, was the monitoring data which showed the south shaft to be stable while allegedly supporting the full unbalanced load. The record further reflects that Respondent considered the south shaft as stable only while the south bulkhead soldier piles remained in place. (Appeal File, Tabs PP, QQ) Since these piles were scheduled to be removed by another contractor, Appellant was required to continue with the augmented support directed. The structural support provided by the south bulkhead piles was not addressed by the parties during the hearing and it would have been speculative for the Board to determine whether the shaft would have remained stable when the bulkhead piles were removed.

have been but were not made before the closing of the record, an adequate ground for reconsideration does not exist. Gil-Brown Constructors, Inc., DOTCAB No. 67-21, 69-2 BCA ¶7986; Itek Corp. (Itek Laboratories Division), NASA BCA No. 27, 65-1 BCA ¶4592. We find this rule to be sound. The raising of new issues on reconsideration unduly protracts the adjudicative process and undermines the achieving of an expeditious and inexpensive resolution of a controversy. Further, certain evidence may be found in the record which is material to a new issue raised but was not probative as to the other issues argued in the appeal. It would be grossly unjust to consider this type of evidence without fully subjecting it to the adversary process. Accordingly, where an issue could have been raised and argued prior to the closing of the case, this Board finds no basis to consider it on reconsideration.

VI. Appellant's Request that the Board Receive Additional Evidence

Appellant requests that the Board reopen the record "...so that Appellant can place before the Board testimony addressed specifically to the gross errors contained in the calculations so tardily furnished to it upon which Respondent improperly based its decision to reject Appellant's support of excavation design." Respondent contends that the Board only may receive, Newly discovered evidence" as that term has been applied by the courts. See Mack Trucks, Inc. v. Webber, 347 A.2d 865 (Md. 1975).

The standard for revision of a Board decision is somewhat different than that provided for judgments rendered by the courts of this State. With regard to judgments, the Maryland Rules of Procedure, Rule 625b, provides that:

> "The Court may, pursuant to a motion filed within the time set forth in section a of this Rule, grant a new trial or other appropriate relief on the ground of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under section a of Rule 567." (Underscoring added.)

Revision of a Board decision however is governed by the Maryland Administrative Procedure Act which provides that:

> "If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken in open court or before the agency upon such conditions as the court deems proper..." Art. 41, Md. Ann. Code, § 255(e). (Underscoring added.)

While the instant appeal is not before a court on judicial review, the Board finds that the correct standard for receiving additional evidence on motion for reconsideration should be the same as would be applied by the courts.

Notwithstanding the fact that the Maryland Administrative Procedure Act permits the exercise of broad discretion in deciding whether to receive additional evidence, the Board concludes that it would be inappropriate to grant Appellant's motion. Appellant was given every opportunity to submit the evidence in question during

the hearing. The fact that hindsight suggests that this additional evidence might be helpful to Appellant's case is not a sufficient reason to receive it on reconsideration.

For the preceding reasons, Appellant's Motion For Reconsideration is, in all respects, denied.