BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GUARDIAN MANAGEMENT COMPANY	)	
	)	Docket No.
Under MDOT Contract No. MVA-CO-90-003	)	MSBCA 1619

September 3, 1992

Contract Interpretation - Differing Site Condition Clause - The mandatory Differing Site Condition clause in construction contracts supersedes other exculpatory language in the contract which may be in conflict with it.

APPEARANCES FOR APPELLANT: Donald L. Logan, Esq.
Berg, Tighe & Cottrell, P.A.
Wilmington, Delaware

APPEARANCES FOR RESPONDENTS: John R. Hargrove, Jr.
Assistant Attorney General
Motor Vehicle Administration
Glen Burnie, MD

OPINION BY MR. MALONE

Appellant timely appeals the denial of its claim for an equitable adjustment by the Maryland Department of Transportation (MDOT) Procurement Officer's final decision. The parties requested the Board rule on the record without a hearing.

Findings of Fact

1. On or about October 24, 1990 Appellant and Respondent entered into an agreement where Appellant would construct a Truck Test Course and modify another at the Motor Vehicle Administration, Chesapeake City Branch Office, for $77,365.00. The contract required soil compaction to 95% at the site.

2. Appellant attended a pre-bid conference and site inspection on July 18, 1990. No addendum to the bid documents were issued as a result of the conference.

3. The bid documents do not make any representation as to the soil conditions to be encountered. No boring samples of the site were obtained by Appellant or Respondent. The parties walked the perimeter of the site for a general visual inspection. The record contains no indication of any potential differing site conditions being observed as a result of the site inspection.

4. On or about November 21, 1990 Appellant received the Notice to Proceed and began work. During the initial stages of evacuation of the site Appellant encountered subgrade conditions at the site differing materially from those ordinarily encountered in the geographic area in which the work was being preformed. These conditions were clayey silt soils with varying amounts of gravel. This condition would make compaction to 95% unobtainable without additional work. The soil was also 4-8% above optimum moisture content.

5. Appellant timely notified Respondent of this condition and a meeting was held on January 3, 1991 to discuss possible solutions. Appellant prior to the meeting had retained Hardin Kight Associates, Inc. (Hardin Kight) to evaluate the soil condition and make recommendations.

6. Hardin Kight suggested two alternative methods of correction. One method was undercutting and another required mixing the soil with lime.

7. Respondent made no change to the contract and directed work proceed using whatever procedures Appellant would normally follow.

8. The Appellant requested that Respondent waive the 95% soil compaction requirement. Respondent refused.

9. Appellant fulfilled the contract requirement by under cutting the entire site by 24 inches and back filled with bank run sand and gravel placed over ground stabilization cloth. This method was the most reasonable since the weather conditions were bad and Appellant's experience with mixing lime and soil was limited.

10. Appellant filled a timely claim for an equitable adjustment of $37,187.86 plus interest and attorney fees.

11. Respondent denied the claim based upon the contract provision Earthworks which provides:

EARTHWORKS

1. General

Furnish all labor, materials, equipment and services necessary for all excavating, filling, backfilling, topsoiling; rough, fine and finish grading for the site; excavating, filling,

¶311

backfilling; compacting; and removing unsatisfactory and excess excavated materials from the site and providing all borrow material that may be required to complete the work. Excavating is unclassified and includes all soil, paving materials, fill and every kind of subsurface conditions encountered in the contract area.

The contract also contained the mandatory Differing Site Condition Clause which provides:

GP-4.05 Differing Site Conditions

A. The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of:

1. Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or

2. Unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract. The procurement officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

B. No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in A. above; provided however, the time prescribed therefor may be extended by the State.

C. No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

12. There was no requirement in the contract documents for bidders to conduct soil testing prior to submission of bids.

Decision

The subgrade soil condition encountered by Appellant constitutes a Type II Differing Site Condition. No representation was made in the contract documents as to the subsurface condition nor were any boring samples offered or taken by either party. No one

knew or reasonably could have known from the information available and the site inspection of the soil problem encountered on this project.

GP-2.04 of the Maryland Department of Transportation General Provisions for Construction Contracts (1989) defines a contractors duty to conduct a reasonable investigation as to the site conditions insofar as the information is reasonably ascertainable from the site and contract documents and specifications.

The Appellant has complied with the requirements under the Differing Site Condition Clause. The Respondent denied the claim and sought protection under the Earthworks clause.

The Respondent's denial of the claim rest upon its interpretation of the legal effect of the "Earthworks" section of the contract. The Earthworks section is not a mandatory construction clause and as used by Respondent is in conflict with the Differing Site Condition Clause. The Differing Site Condition Clause COMAR 21.07.02.05 is mandatory and it's enforcement supersedes the Earthworks clause. A procurement contract for construction shall include a clause providing for contract modification if the condition of a site differs from the condition described in the specifications. State Finance and Procurement (SF) Article 13-218 (b). Also see SF 11-206.

The Board has previously ruled on exculpatory specifications which attempt to override the mandatory Differing Site Condition clause. Clauses such as the Earthworks clause herein may not limit the intent of the Differing Site Condition Clause, Hardaway Constructors, Inc. MSBCA 1249, 3 MICPEL 227 (1989), but should, if possible, be read in harmony with it. The wording of the Earthworks clause may not be construed to override the Maryland Statute and supporting COMAR sections which require the Differing Site Condition Clause and Respondent's defense based on the Earthworks clause must be rejected.

We shall now address quantum.

Appellant originally claimed $37,187.76 exclusive of attorneys fees[1] as follows;

Labor	$ 8,480.00
Equipment	15,777.50
Material	11,243.70
15% Markup on Materials	1,686.56

The parties have stipulated that the actual cost of the work, resulting from the differing site condition, was $30,464.10. The Board finds that this figure is reasonable in light of the record and adopts the stipulation of the parties. The Board further awards 15% of the stipulated amount for overhead and profit in the amount of $4,569.61.[2] Wherefore, the Board finds entitlement to be a total amount of $35,033.71. No predecision interest is awarded. See Section 15-222 State Finance and Procurement Article.

Dated: 9/3/92

Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Chairman

Sheldon H. Press
Board Member

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[1] Attorneys fees are not allowable under the General Procurement Law and Appellant's claim therefore is denied.

[2] GP -4.07 states up to 20% markup for overhead and profit on an equitable adjustment is permitted.

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1619 appeals of Guardian Management Company under MDOT Contract MVA CO-90-003.

Dated: September 3, 1992

Mary F. Priscilla

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Recorder