BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HARBOR CONSTRUCTION, INCORPORATED	)	
	)	Docket No. MSBCA 2015
Under MTA Contract No. MTA-90-51-09	)	

June 12, 1998

Patent Ambiguity - Duty to Inquire - The bidder is only required to make pre-bid inquiry regarding patent ambiguities in the bid documents. If the ambiguity is latent (as the Board found in the instant appeal), the ambiguity will be construed against the drafters of the contract, as long as the non-drafter's interpretation is reasonable.

Patent Ambiguity - Duty to Inquire - The bidder (i.e. the general contractor) is responsible to review all the bid documents and has a duty to make pre-bid inquiry concerning patent ambiguities. However, where the ambiguity is latent a failure to review all the documents may not preclude entitlement to an equitable adjustment where a review of all the documents would not have revealed the ambiguity.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim (on behalf of a subcontractor) for an equitable adjustment for the cost to furnish and install an HVAC system in connection with a construction contract. The parties have stipulated that the cost was $79,525.40 including Appellant's 5% mark-up.

Findings of Fact

1. In April 1995, the Mass Transit Administration (MTA) issued an invitation for bids for the

interior demolition, asbestos abatement and complete renovation of Bush Division Building Nos. 1 and 3 at the MTA's Washington Boulevard Complex. This appeal concerns Building No. 1. Bid opening occurred on June 6, 1998.

2. Included in the Contract's scope of work is the requirement to design and build a mechanical HVAC system for Building No. 1.

3. The set of 80 drawings issued to bidders includes 33 sheets of architectural drawings(A), 14 sheets of electrical drawings(E), and 4 sheets of mechanical drawings(M).

4. On Drawings M-1 and M-2, which are marked "Concept Design - Not for Construction," Building No. 1 is delineated into eight zones.

5. Zone 8 on the second floor of Building No. 1 was to contain a finished office space constructed under this Contract. Finished office space in Zone 8 is shown on the Drawings in a number of places, including the following:

   a. On Drawing M-2 (mechanical), Zone 8 contains, clearly marked, partitioned space and seven enclosed rooms with doors.

   b. On Drawing A-4 (architectural), the partitions and rooms shown in Zone 8 are shown in greater detail. Partitioned space in the center of Zone 8 is labeled "Info Service" and open area systems furniture is shown. On that same drawing, the seven enclosed rooms shown on Drawing M-2 and three additional rooms and doors are shown, and all delineated areas in Zone 8 are given a room number or otherwise clearly labeled.

   c. On Drawing A-12, more details are shown of the area in Zone 8. As more fully described on Drawing A-22, the Zone 8 area consists of rooms with carpet tile, painted walls and suspended acoustic panel ceilings.

   d. As shown on Drawing A-18 and Drawing E-9 (electrical), a reflected ceiling with recessed fluorescent lighting is to be installed in the Zone 8 area.

6. An air handling unit (AHU) is a major component of an HVAC system, with a combined weight of approximately one ton.

7. On Drawing E-12 of the electrical drawings all air handling units (AHUs) shown, including Air Handling Unit No. 8 (AHU-8) which services Zone 8, are drawn with a solid line, and there is no notation on that drawing that AHU-8 is not to be provided under the Contract or that AHU-8 is to be installed in the future. On Drawing E-14 of the electrical drawings details and parts for all air handling units, including AHU-8, are shown, and there is no notation that any air handling unit, including AHU-8, is not to be provided under the Contract or that AHU-8 or another air handling unit is to be installed in the future. On Drawing M-3, equipment requirements for AHU-8 are shown.

8. Zone 7 on the second floor of Building No. 1 primarily consisted of unfinished, unassigned space, as reflected by the following:

   a. On Drawing M-2, Zone 7 on the second floor of Building No. 1 is shown as a large open space, a hall corridor and a bathroom area.

   b. On Drawing A-4, the area in Zone 7 is shown in greater detail. The large open area is labeled "Unassigned;" and is a bare concrete floor, with unpainted walls and no suspended ceiling.

   c. On Drawing A-18 and E-9, there is no ceiling and no recessed lighting shown for the large open area in Zone 7.

9. Chasney & Company (Chasney) was hired by Appellant to design and install the mechanical HVAC systems under the Contract. Mr. Peter Chasney, President of Chasney, prepared Chasney's price quote to Harbor for the subcontracted HVAC design and installation work.

10. Chasney's quote to Harbor for the HVAC work on the Contract did not include any costs or markup for HVAC equipment or duct work in Zone 8 because of Mr. Chasney's belief based on his review of the notes on the mechanical drawings that no HVAC equipment or duct work in Zone 8 was required. Such belief is further discussed below.

11. Under the contract between Harbor and Chasney, Chasney was to furnish and install all mechanical work in compliance with and in accordance with the contract plans and specifications, including all architectural, electrical and mechanical bid drawings.

12. In preparing Chasney's quote to Harbor for HVAC work and prior to submitting it's quote in June 1995 to Harbor, Mr. Chasney did not review any architectural or electrical drawings, confining Chasney's review to mechanical and plumbing drawings which Mr. Chasney believed were the only drawings necessary for him to review in order to submit a quote. Drawing P-6 of the plumbing drawings shows Zone 8 as an open area, with no partitions or enclosed rooms, while Drawing M-2 of the mechanical drawings shows Zone 8 as partitioned space with seven enclosed rooms. Drawing P-6 also shows Zone 7 containing four enclosed rooms, while Drawing M-2 shows no such rooms in Zone 7.

13. Ralph C. Dettor, Jr., Harbor's President, prepared and, in June 1995, submitted Harbor's bid for the Contract.

14. In preparing and submitting Harbor's bid for the Contract, Mr. Dettor simply incorporated Chasney's bid into Harbor's bid and did not review the mechanical Drawings M-1 through M-4.

15. Note 4 on Drawing M-2, which reads "All equipment and ductwork serving Zone 8 is future and for coordination only," was originally written in or shortly before November, 1994 by staff of a mechanical design firm acting as a subconsultant to MTA's project architect. At the time it was first drafted, that note was to apply to Zone 8 when that zone was a completely unfinished space and no HVAC system was contemplated for the space.

16. An instruction on Drawing M-2 which reads "Provide cabinet unit heaters for unfinished area

for temporary heat," was also originally written in or shortly before November, 1994 by the mechanical subconsultant to the project architect and was to apply to Zone 8 when that zone was a completely unfinished space and no HVAC system was contemplated for that space.

17. Note 7 on Drawing M-3, which applies to AHU-8, states "Estimated for future office space," originally was written in or shortly before November, 1994 by the subconsultant to the project architect and was to apply to AHU-8 when Zone 8 was a completely unfinished space and no HVAC system was contemplated for that space.[1]

18. At the time Note 7 on Drawing M-3 originally was written, the note reflected that the equipment requirements for AHU-8 were estimated for a time when Zone 8, then an unfinished space, would contain office space.

19. At the time Note 4 on Drawing M-2 and Note 7 on Drawing M-3 originally were drafted, MTA planned that Zone 7 would contain, in large part, finished office space and that the MTA's Division Information Services would be located in that zone. At that time, a complete HVAC system was to be installed in Zone 7, and, as noted above, no HVAC system was to be installed in Zone 8 at that time.

20. In February 1995, the MTA's Division of Information Services requested that Information Services be switched from Zone 7 to Zone 8.

21. At the 100% Contract Drawing (C.D.) stage the documents called for HVAC equipment in only seven zones. At that stage, Zone 8 was unfinished office space with no HVAC system. Zone 7 of the building contained finished office space.

22. In February of 1995, at the 100% C.D. stage, the drawings were sent by the project architect to the MTA for review. At that time, in response to the MTA's Division of Information Services request, the MTA decided to "flip" Zone 7 and Zone 8. Under the revised plan by the MTA, the office space in Zone 7 became unfinished and Zone 8 became finished office space. MTA intended that, as a finished and occupied office space, Zone 8 would have a complete HVAC system. The MTA intended to move Note 4 on Drawing M-2 to Zone 7. When the bid documents were released to bidders, Note 4 on Drawing M-2 inadvertently remained on Zone 8 rather than being moved to Zone 7.

23. In a letter dated July 24, 1996, an architect with the project architect explained that the MTA requested Zones 7 and 8 to be "flipped" and that Zone 7 would be unfinished space. The fact that the MTA believed Zone 7 would be completely unfinished was thus recognized by the project architect and also by the Procurement Officer in the agency's final decision issued on April 3, 1997. Footnote 2 in the Procurement Officer's decision states "[p]rior to letting the contract out for bids, a decision was made to switch those zones [7 and 8], with the result

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1 The subconsultant also prepared a schedule indicating the efficiencies for the type of equipment to be used in the system. Because this was a design/build project, the schedule did not indicate to the mechanical subcontractor the number or quantity of the equipment that must be included in the design. Instead, the schedule indicated to the contractor the efficiencies of equipment which must be utilized. The efficiency rating of the system was essential because the MTA had applied to BGE for a rebate under a particular program operated by BGE. Specifically, if MTA designed and installed a system with a specific efficiency rating, BGE provided rebates to the MTA for the HVAC system.

Because BGE was phasing out the program, the MTA needed to apply for approval for the entire building despite the fact that it was not placing HVAC equipment in Zone 8. Specifically, the subconsultant ran efficiency models assuming HVAC equipment was installed in the entire building and the subconsultant made various assumptions regarding the future use of Zone 8. The subconsultant based its assumption of the efficiency ratings on an assumed office space for that Zone. Thus, in order to indicate this on the schedule prepared as Drawing M-3, the subconsultant placed Note 7 next to air handling unit 8 which read "estimated for future office space."

that in the Contract drawings as bid Zone 7 became unfinished and Zone 8 contained developed office space." At the hearing, Mr. Kirk, an MTA employee, who reviewed the architectural drawings prior to bid, agreed that in his deposition on January 15, 1998, he testified as follows:

> Q: Now, Mr. Kirk, just so we're clear, when you released these drawings to the bidders, zone seven was still going to be unfinished at this time zone seven was going to be a shell; is that correct?
>
> A: That's correct.
>
> Q: And is that the way it was presented to or was intended to be presented to the bidders when these documents were released in April of 1995?
>
> A: That it would be a shell, yes.

24. In fact, Zone 7 contained both finished and unfinished space. Specifically, the office space in Zone 7 was unfinished space on the architectural drawings.[2] However, in addition to the unfinished office space, there is a separate corridor described on the architectural drawings that runs along Zone 7 that is finished space. While claiming that Chasney should have recognized that Zone 8 contained finished space for which an HVAC system was required, the MTA, the project architect and the project architect's subconsultant, despite a careful review of the documents, failed to recognize that Zone 7 contained both finished and unfinished space and failed to notice that Note 4 on Drawing M-2 and Note 7 on Drawing M-3 were inappropriate.

25. Thus prior to issuing the drawings for bid, Note 4 on Drawing M-2, and references to Note 4 on that drawing, inadvertently were not corrected or otherwise modified to reflect MTA's intention that the finished office space in Zone 8 was to have a full operating HVAC system. The failure to correct or modify Note 4 and those references was an error in the Drawings that neither a reasonable HVAC subcontractor nor a reasonable general contractor should have noticed. The error was latent, not patent as claimed by the State. In this regard the Board finds that Note 4 on Drawing M-2 is clear and unambiguous. The bid documents clearly instruct the mechanical subcontractor not to supply HVAC equipment or duct work in Zone 8.

26. At the same time that the subconsultant to the project architect prepared Note 4 on Drawing M-2, the subconsultant ran a construction cost estimate for the MTA. That construction cost estimate was consistent with the subconsultant's understanding that no HVAC system would be placed in Zone 8. Next to AHU-8 in the construction cost estimate, the subconsultant noted "cost not included future equipment."

27. In November, 1994, the subconsultant received clear instructions from the MTA, through the project architect, that the MTA did not want an HVAC system installed in Zone 8. As a result of the MTA's instructions, the subconsultant crafted notes intended to clearly convey to a mechanical subcontractor reviewing the drawings that the HVAC system in Zone 8 was

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2 In reality, the MTA simply flipped the office space in Zone 7 and Zone 8. Because Zone 7 is larger than Zone 8 as a result of the separate corridor running along Zone 7, the square footage for Zone 7 office space is essentially the same as Zone 8 office space.

not to be installed.

28. In order to accurately convey the absence of HVAC equipment and duct work in Zone 8, the subconsultant had to take a number of factors into account. Because this was a design build project, the mechanical designer and contractor needed to install basic plant equipment that would be sufficient to absorb the supply of heating and air conditioning for Zone 8 in the event that MTA ultimately decided to install HVAC equipment in that zone. For example, the size of the chiller and boiler for the building needed to be sufficient to provide increased capacity in the event that MTA subsequently put HVAC equipment in Zone 8.

29. In order to exclude the HVAC system in Zone 8, but to provide some information for the designer of the system in the remaining Zones 1 through 7, The subconsultant provided a rough outline of the system consistent with the design build project, and as noted above placed the following note on mechanical drawing M-2:

> **4. All duct work and equipment serving Zone 8 is future and for coordination only.**

30. The subconsultant placed the notation "Note 4" under the designation for Zone 8 and next to the major equipment in Zone 8, including the air handling unit for Zone 8. The absence of an HVAC system in Zone 8 required temporary heating in the area. Consequently, the project architect placed a note on Zone 8 which stated "provide cabinet unit heater for temporary heat for unfinished area".

31. Before submitting it's bid to the MTA in June 1995, Appellant (Harbor) did not ask any questions or seek any clarification regarding HVAC equipment or ductwork in Zone 8.

32. Before submitting its quote to Harbor for the mechanical portion of the Contract, Chasney did not ask any questions or seek any clarification regarding HVAC equipment or ductwork in Zone 8.

33. In the summer of 1995, prior to the date on which bidders submitted a bid for the Contract, Steven Lauer, a mechanical sales engineer at York International (York), received from Manufacturers Survey Associates (MSA) Drawings M-1 through M-4, a number of the electrical, plumbing and demolition drawings, and the mechanical portion of the Contract specifications. York is a manufacturer of HVAC equipment, and Chasney is one of Mr. Lauer's regular clients. MSA provides its subscribers, such as York, with reproductions of bidding documents. York typically relies upon bid drawings provided by MSA to prepare quotes for HVAC equipment for advertised projects.

34. Based upon his review of those bid drawings provided by MSA, Mr. Lauer prepared a price quote in the summer of 1995 for the HVAC equipment called for in those drawings for the subject Washington Boulevard project. The price quote formed the basis for the December 13, 1995 quote Mr. Lauer gave Chasney for HVAC equipment on this project.

35. Both the summer 1995 and the December 13, 1995 price quotes prepared by Mr. Lauer called for eight air handling units and 16 variable speed drivers.

36. Chasney first began seeking price quotes from York for HVAC equipment for the Washington Boulevard project on December 11, 1995. In that first request, Chasney sought prices for eight air handling units as well as other HVAC equipment.

37. As of December 11, 1995, when Chasney first began seeking price quotes from York, the only mechanical drawings that were available, and the only mechanical drawings that had been reviewed up to that time by Mr. Chasney, were Drawings M-1 through M-4.

38. From December 11, 1995 through mid-July 1996, Chasney consistently sought prices for and/or ordered HVAC equipment for all eight zones in Building No. 1. In June of 1996, however, Mr. Chasney became aware that his costs for the project were excessive based on an internal cost estimate of the job prepared at that time. While Mr. Chasney became aware in June, 1996 that his costs were too high, he could not determine at that time what was causing the costs to be too high.

39. Chasney became aware that it was ordering equipment for one zone too many in July of 1996 and installed the Zone 8 equipment under protest. At the time of bid,[3] however, Chasney only intended to bid and only did bid equipment for seven zones. The Board finds that Chasney's post bid pricing for equipment for 8 zones was due to clerical error or oversight.

40. Appellant filed a timely claim on Chasney's behalf. The claim was denied by final agency decision dated April 3, 1997. From such decision Appellant appealed to this Board.

41. At the time Appellant filed the claim on Chasney's behalf for the Zone 8 HVAC costs, the State knew or should have known that the claim had merit. Indeed, at the time Chasney began to perform the Zone 8 HVAC work under protest of MTA's direction to perform such work Respondent knew or should have known of the merits of the claim subsequently filed by Appellant on Chasney's behalf. By letter dated July 31, 1996 to MTA[4] Chasney stated that:

> Gentlemen:
>
> We are proceeding with your directive to install the equipment, control, and duct work for Zone 8 under protest. We will, after securing all of the cost entailed for the above installation, file a claim for this work.

42. Concerning the cost of performing such work, the Appellant sent the Procurement Officer a letter dated December 3, 1996 which provided as follows:

> In reply to MTA letter #169 dated November 5, 1996, [from which letter it is apparent that MTA understood the Zone 8 issue that is the subject of this appeal], we wish to resubmit Chasney & Company, Inc.'s claim for Zone #8 mechanical equipment. We are attaching all backup including MTA letters, Chasney's letter, specification #15850-1 and mechanical drawing #M-2.
>
> The total amount of this claim is as follows:
>
> | | | |
> |---|---|---|
> | Mechanical Claim | | $75,821.00 |
> | G.C. 5% | | 3,791.00 |
> | | Total Claim | $79,612.00 |
>
> We are submitting this information as a formal claim in

3 Chasney's June 1995 quote to Appellant and Appellant's June 1995 bid as submitted to MTA.

4 The letter was addressed to the Maryland Department of Transportation at MTA's address.

compliance with GP 5.14 and GP 5.15.

> Your cooperation and expedience in processing this claim will be greatly appreciated.

The Board finds that the Procurement Officer received this December 3, 1996 letter on December 27, 1996.

43. In the above referenced letter of December 3, 1996 which was received by the Procurement Officer on December 27, 1996 a total claim in the amount of $79,612 is set forth. At a meeting of the parties held on January 16, 1997 to discuss this claim, Mr. Chasney confirmed that he would have all claim related paperwork available for MTA's inspection within a two week period. As noted, the parties stipulated that the actual quantum is $79,525.40.

44. The Board finds that Respondent had all necessary material to assess the validity of Appellant's claim on Chasney's behalf as to both entitlement and quantum not later than January 31, 1997 and could have made such assessment within a 30 day period from January 31, 1997 or by March 3, 1997.

Decision

This case involves an ambiguity in the Contract drawings, and the absence of inquiry about the Contract drawings by the General Contractor and the HVAC Subcontractor before the General Contractor submitted its bid to the MTA. Under the patent ambiguity rule, if, when it bid, a contractor knew or should have known of an ambiguity in the contract documents, the contractor (the general contractor who submitted the bid) has a duty to make inquiry of the government before submitting its bid as to the true meaning of the contract. A failure to inquire precludes the contractor from recovering on its interpretation. Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 at pp. 10-11(1984).

The rule was recognized in government contract cases at least as early as 1943, in Consolidated Engineering Co. v. United States, 98 Ct. Cl. 256(1943). There, the inconsistency

> was so patent that it might well have invoked an inquiry from prospective bidders, including plaintiff, as to what the specifications really meant. . . . We think plaintiff, aware of an ambiguity, perhaps even inadvertent, in the defendant's invitation to a contract, could not accept the contract and then claim that the ambiguity should be resolved favorably to itself.

98 Ct. Cl. at 280.

The patent ambiguity rule is designed to ensure that all bidders on a public contract share a common understanding of the project's scope. This objective is especially important in government contracts, where "significant post-award modifications are limited by the government's obligation to use competitive bidding procedures and by the risk of prejudice to other potential contractors." Triax Pacific, Inc. v. West, 130 F.3d 1469, 1475 (Fed. Cir. 1997), citing James F. Nagle Federal Construction Contracting, §22.3 at 305 (1992). The duty to inquire about patent ambiguities

"prevents contractors from taking advantage of ambiguities in government contracts by adopting narrow interpretations in preparing their bids and then, after the award, seeking equitable adjustments to perform the additional work the government actually wanted." Triax Pacific at 1475.

The ambiguity in the Contract drawings here arose from an inadvertent government error. The patent ambiguity doctrine exists, in large part, to protect the government from such unwitting mistakes, and is a rule of law that does not permit a bidder to take advantage of those mistakes. However, where the ambiguity is latent, the counterpart rule that the ambiguity is read against the drafter serves to protect the contractor. Thus:

> The rule that a contractor, before bidding, should attempt to have the Government resolve a patent ambiguity in the contract's terms is a major device of preventive hygiene; it is designed to avoid just such a post-award disputes as this by encouraging contractors to seek clarification before anyone is legally bound. The rule is the counterpart of the canon in government procurement that an ambiguous contract, where the ambiguity is not open or glaring, is read against the Government (if it is the author) . . . . Both rules have their place and their function. In addition to its role in obviating unnecessary disputes, the patent ambiguity principle advances the goal of informed bidding and works towards putting all the bidders on an equal plane of understanding so that the bids are more likely to be truly comparable.

S.O.G. of Arkansas v. United States, 212 Ct. Cl. 125, 131(1976).

The analytical framework for a case like this one mandates a two-step analysis. Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 at p. 11 (1984). First the Board must decide whether the record reflects that the ambiguity is patent. If it is, and the contractor did not inquire about that ambiguity before submitting its bid, the contractor cannot prevail. Only if the Board concludes that the ambiguity was not patent, i.e. that the ambiguity is latent,[5] does it reach the second step and consider whether to read the ambiguity against the Government by assessing the reasonableness of the contractor's interpretation. Id. "The existence of a patent ambiguity in itself raises the duty of

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5 A latent ambiguity exists when an ambiguity is "neither glaring nor substantial nor patently obvious." Community Heating & Plumbing Co., Inc. v. Kelso, 987 F.2d 1575, 1579(Fed. Cir. 1993); Mountain Home Contractor v. United States, 425 F.2nd 1260, 1264,(Ct. Cl. 1970). If the ambiguity would not be obvious to a reasonably intelligent bidder from the face of the bid documents, the ambiguity may be said to be latent. Fry Communications, Inc. v. United States, 22 Ct.Cl. 497, 509(1991). Moreover, the bidder is "not required to seek clarification of any and all ambiguities, doubts, or possible difference in interpretation" of the bid documents. Beta Constr. Co., Inc. v. United States, 39 Fed. Cl. 722, 730(1997); WPC Enterprises, Inc. v. United States, 323 F.2d 874, 877 (Ct. Cl. 1963). Instead, the contractor is only required to inquire about "a major patent discrepancy, or obvious omission, or a drastic conflict in provisions." WPC, supra 323 F.2d at 977. Thus, courts and boards have focused the inquiry into patent ambiguity by asking whether the ambiguity is so glaring as to raise a duty to inquire. Centex Construction Co., Inc., MSBCA 1419, 3 MSBCA ¶243(1990) at pp. 13-14; George E. Newsom v. United States, 230 Ct. Cl. 301, 303(1982).

The bidder is only required to inquire regarding patent, i.e. glaring, ambiguities in the documents. If the ambiguity is latent however, the ambiguity will be construed against the drafters of the contract, as long as the non-drafter's interpretation is reasonable. The interpretation offered by the non-drafter simply must be within the "zone of reasonableness." WPC, supra 323 F.2d at 877. It is not necessary that the non-drafter's interpretation be the only reasonable interpretation. Cherry Hill Sand & Gravel Co., Inc. v. United States, 8 Cl. Ct. 757, 767(1985).

inquiry, regardless of the reasonableness vel non of the contractor's interpretation . . . . The Court [Board] may not consider the reasonableness of the contractor's interpretation, if at all, until it has been determined that a patent ambiguity did not exist..." George E. Newsom v. United States, 230 Ct. Cl. 301, 304(1982)(emphasis in original, footnote omitted).

Was the ambiguity here patent? Maryland's objective law of contracts requires that the Contract be construed as a whole and, if reasonably possible, effect be given to each of its parts. Sagner v. Glenangus Farms, Inc., 234 Md. 156, 167(1964); Bausch & Lomb, Inc. v. Utica Mutual Insurance Co., 330 Md. 758, 782(1993). One part cannot be read alone and without reference to other provisions. Kelley Construction Co., Inc. V Washington Suburban Sanitary Comm'n, 247 Md. 241, 249(1967). It is a bidder's responsibility to ensure that its bid represents a coordinated effort encompassing all of the contractual provisions and obligations. Although it may be customary in the construction industry for potential subcontractors to review only the portions of the contract documents that pertain to their specialties, that custom does not release the general contractor from its responsibility for complying with the provisions of the entire contract. Gall Landau Young Construction Co., Inc., 77-1 BCA ¶12,515 at 60,690(ASBCA No. 21549, April 22, 1977) ("[I]t is axiomatic that the prime contractor is charged with knowledge of what is required by ALL the specifications and drawings . . . .[T]he prime contractor is responsible for assuring that all the work required by the entire contract is furnished, and cannot be relieved of this responsibility by subcontracting part of the work.") (emphasis in original, citations omitted); see also Dominion Contractors Inc., supra, 1 MSBCA ¶69 (Concurring Opinion by Chairman Baker) at p. 26.

Neither Harbor nor its mechanical subcontractor, Chasney, reviewed the complete set of contract drawings prior to Harbor's bid submission. Harbor never looked at the HVAC mechanical drawings prior to bidding, but simply incorporated Chasney's HVAC price quote into its bid. Chasney's quote did not include any costs for Zone 8 HVAC work. However, we hold that mere failure by the Appellant to review all contract drawings prior to bid does not preclude recovery if such review would not have revealed the alleged patent ambiguity asserted by Respondent to exist therein.

This Board has observed that a primary rule of contract interpretation requires that contract language be given the plain meaning attributable to it by a reasonable, intelligent bidder. C.J. Langenfelder and Sons, Inc., MSBCA 1636, 4 MSBCA ¶322 (1993) at p.12 citing Dominion Contractors Inc., MSBCA 1041, 1 MSBCA ¶69(1984). When the language of the contract is plain and unambiguous, there is no room for construction and the Board must presume that the drafter (the State) meant what the bid/contract documents express. Indeed, when the contract is clear, there is no need for extrinsic evidence and the Board will look to the four corners of the contract to determine its meaning. Baltimore Washington Services, MSBCA 1539, 3 MSBCA ¶261 (1990). "The fact that the Respondent disagrees with the Appellant on the interpretation of the contract . . . does not of itself make the contract documents ambiguous." C.J. Langenfelder, supra at p. 12. Instead, the record must reflect that the bid documents are subject to two reasonable interpretations. If MTA is unable to point to a reasonable interpretation of the bid documents which would require the installation of HVAC equipment in all eight zones, no patent ambiguity may be said to exist. MTA argues that a review of all the drawings, mechanical, electrical and architectural, reveals that patent ambiguity concerning whether HVAC equipment and ductwork is to be installed in Zone 8.

The case of C.J. Langenfelder and Sons, Inc., supra is instructive concerning whether patent ambiguity exists in the bid documents in the present case. In Langenfelder the dispute focused on whether the subcontractor was required to provide in a particular area: (a) 5 KV Crane cable (5 KV Cable) which was a lengthy and expensive cable or (b) the much shorter and less expensive 4160V cable (4160 Cable). The owner issued addendum drawings. The addendum drawings "contain[ed] many structures never contemplated within the scope of work by either party," because the drawings were simply reformatted drawings from a previous stage of the project. Id. at 8. In fact, the addendum drawings showed the installation of both 5KV Cable and 1460 Cable. On the addendum drawings there appeared the triangle symbol, ▲, next to a variety of work including the 4160 Cable work. The ▲ did not appear next to the 5KV Cable work. Id. at p.8. The Board refused to go beyond the four corners of the drawings and found that there was no ambiguity because the use of the ▲ clearly designated the work required. The Board stated:

> It was Respondent's unusual use of the ▲ designation on original drawings of Add. #1 which caused confusion. Respondent offered no reasonable explanation of the inclusion or exclusion of certain work on the drawings in light of the ▲ symbol. The bidder reasonably read the Add. #1 as not requiring the 5KV cable installation, since there was no ▲ next to the structure on the drawing.

Id. at p.8.

In this case, we find that there is no patent conflict or ambiguity in the drawings issued by the MTA. Instead, a reasonable review by knowledgeable contractors of the drawings which make up the bid documents would reflect that no HVAC system is to be installed in Zone 8. The drawings in this case are even clearer than the drawings in Langenfelder. Drawing M-2 in the present case specifically and unambiguously directs Chasney not to include the HVAC equipment or duct work in Zone 8. As in Langenfelder, Chasney had the right to rely upon that clear directive. There is nothing in the other drawings that is inconsistent with that clear directive. The references to AHU-8 in the electrical drawings and the finished nature of Zone 8 reflected in the architectural drawings, as set forth in the Findings of Fact above, are not inconsistent with Note 4 on Drawing M-2 and other notes on the mechanical drawings reflecting that such work for Zone 8 is future and for coordination only, i.e. is not work required under the Contract. The references in the architectural and electrical drawings to an HVAC system in Zone 8 advise the contractor to design required work to accommodate an HVAC system in Zone 8 should MTA decide in the future to provide equipment and duct work in Zone 8.

Moreover, like the Respondent in Langenfelder, the MTA is unable to offer any contrary reasonable interpretation of the documents that explains the clear directives of Note 4 on M-2. We have noted that in order for an ambiguity to exist, the MTA must demonstrate that two reasonable interpretations of the contract documents exist. No ambiguity exists because none of the interpretations offered by the MTA are reasonable. Instead, the MTA has given a variety of interpretations of the contract, all of which, require either rewriting the express words of the mechanical drawings or ignoring the clear directive of Note 4 on Drawing M-2. Simply reviewing the numerous interpretations offered by the MTA demonstrates that the MTA cannot establish a reasonable contrary interpretation of the words of Note 4 on Drawing M-2 which state that all duct work and

equipment serving Zone 8 is future and for coordination only.

The first interpretation made by the MTA occurred in March of 1996. At that time, the MTA interpreted Note 4 on Drawing M-2 to apply to Zone 7. That interpretation, however, still leads to the conclusion that the Contract between the parties required only seven finished zones of HVAC equipment.

In July of 1996, the MTA offered its next interpretation. At that time, the MTA claimed that Note 4 on Drawing M-2 applied to VAV boxes and duct work in Zone 8. This interpretation is also contained in the MTA's Answers to Interrogatories (Interrogatory No. 6) in which the MTA alleged that Note 4 on Drawing M-2 applied to VAV boxes and duct work in Zone 8. No reasonable bidder could read Note 4 on Drawing M-2 to suggest that it applied to a more limited scope of equipment than all equipment and duct work. Further, the MTA's interpretation of the note requires that the note actually be rewritten and is thus unreasonable.

Finally, at the hearing on this matter, the MTA claimed that a reasonable mechanical subcontractor could conclude that HVAC equipment and duct work were required in Zone 8 irrespective of the existence of Note 4 on Drawing M-2 on the theory that the Government would not leave heating and air conditioning in a portion of the building for the future. We must reject that assertion. As further discussion below, a reading of the plain language of Note 4 on Drawing M-2 to mean that, in fact, the contractor must supply duct work and equipment in all eight zones is a strained reading and not a reasonable one.

MTA has not provided an interpretation that takes into account the notes on the mechanical drawing which clearly direct the mechanical subcontractor not to supply an HVAC system in Zone 8. Absent a reasonable contrary interpretation by the MTA, no ambiguity, at least a patent one, may be said to exist.

The MTA's attempt to create a conflict is also hampered by the rule of construction that require that specific provisions govern over general provisions. (See for example TC-3.01 of the MDOT (SHA) Standard Specifications for Construction and Materials, October 1993; S.G.P.-5.03D. set forth in the Contract Specification Book for the instant Contract.) In this appeal, the MTA has claimed that because the architectural drawings showed finished office space in Zone 8, a conflict exists between the architectural drawings and Note 4 on M-2. However, as we have discussed above, the general depiction of finished office space in Zone 8 does not override the specific instruction in Note 4.

While it is not always an easy task to discern what is or is not obvious or glaring, particularly in a technical area, we find it apparent from the record in the instant appeal that any ambiguity existing between the notes on the mechanical drawings and the other drawings and bid documents available to bidders is latent. The alleged ambiguity existing between Note 4 on Drawing M-2 and other drawings is not so obvious or glaring that it would be brought to the attention of a reasonably intelligent bidder directly; or constructively through the imputed knowledge of the subcontractor. Finally, we note that the MTA itself demonstrated the latent nature of the ambiguity in two ways. Firstly, at the very time the MTA was denying Chasney's claim, the MTA, the project architect and

its subconsultant failed to recognize the alleged ambiguity despite extensive reviews of the bid documents before and after their release to bidders. Secondly, the MTA failed to recognize that Zone 7 contained both finished and unfinished office space. Specifically, prior to releasing the bid documents, the MTA "flipped" the office space in Zone 7 and Zone 8. In reality, this modification created both finished and unfinished space in Zone 7. The finished space was a corridor which ran the length of Zone 7. The unfinished space became office space separated from the corridor. When denying Chasney's claim and during the course of discovery in the present appeal, the MTA mistakenly and repeatedly stated that Zone 7 contained only unfinished space. It is evident that the MTA failed to recognize the "finished space" in Zone 7 despite having months to carefully investigate the documents. De-spite this fact, the MTA argues that Appellant should have made the determination that an HVAC system was required in Zone 8 in the weeks that bid documents were available to bidders prior to bid opening.

We conclude that the MTA's own actions suggest the latent nature of the ambiguity. The general contractor who submits the bid is of course responsible for a comprehensive analysis of the meaning an intent of all the bid documents prior to submitting its bid. Accordingly, Respondent makes the same arguments as set forth above concerning when the mechanical subcontractor should have noticed ambiguity in the bid documents to apply to the Appellant because of its duty to review all the documents, not just those pertaining to mechanical work. Nothing in the record, however, suggests that a comprehensive review of all of the bid documents would have exposed the so called latent ambiguity Respondent now argues should be found to exist to defeat Appellant's claim (on Chasney's behalf). The fact that York prepared a quote for 8 AHU's based upon its review of the project documents provided by MSA does not alter our conclusion. The documents do refer to eight air handling units, and while one (Zone 8) is stated to be for future installation there would be no reason for York not to price it.

Thus, we proceed to the second step of the inquiry and assess the reasonableness of the contractor's interpretation of the meaning of the bid documents. The contractor's interpretation of the bid documents is that no HVAC system is required in Zone 8. Is such an interpretation reasonable or in the zone of reasonableness?

We note first that the manner in which a mechanical subcontractor bids a design build project reflects the latent nature of the alleged ambiguity herein. The record reflects that on a design build project a mechanical subcontractor is not concerned with the precise layout of floors, walls and ceilings. The subcontractor is also not concerned with the actual use of the space for which he is bidding. Instead, in order to properly bid a design build project, a reasonable mechanical subcontractor bases his bid on the square footage of the area requiring an HVAC system. As explained by Mr. Chasney in his testimony, because the system has not yet been designed, it is impossible for a mechanical subcontractor to base his bid on the precise amount of equipment and duct work which will be installed in the building. The mechanical subcontractor uses the square footage for the area to receive an HVAC system as the starting point for calculating the bid. In this particular case, use of the square footage simply requires a reasonable mechanical subcontractor to determine the square footage of Zones 1 through 7. Having been instructed that no equipment or duct work would be placed in Zone 8, the reasonable mechanical subcontractor would exclude the square footage of Zone 8 and would not concern himself with the precise use of Zone 8.

Second, there is no express language in the contract or bid documents which directly conflicts with Note 4 on Drawing M-2, and Note 4 on Drawing M-2 expressly directs the mechanical subcontractor that no equipment or duct work will be supplied in Zone 8.

Third, in order to create an ambiguity, the MTA contends Appellant's (and Chasney's) interpretation of the bid documents is unreasonable because the mechanical subcontractor should realize that an HVAC system must be installed in an area which contains finished office space. MTA argues that the State could not reasonably have intended that finished office space not have an HVAC system. Chasney's President admitted during his testimony at the hearing that constructing finished office space without also installing HVAC equipment and ductwork is "very unusual" and typically not done. However, we decline to hold that Mr. Chasney or Appellant or any other contractor would be required (in order to be eligible for an equitable adjustment) to second guess the owner and advise the State that despite the clear instructions by the MTA in Note 4 on Drawing M-2, the MTA was mistaken and that HVAC equipment and duct work should be supplied in Zone 8. No reasonable mechanical subcontractor would undertake such an exercise on a design build project in which the mechanical subcontractor is basing its bid on square footage. Nor would the general contractor be so required to second guess the owner.

Fourth, the reasonableness of Appellant's interpretation is actually enhanced because of the issuance of the mechanical drawings which divided the building up into eight zones. According to testimony by Mr. Chasney, in a typical design build project, the owner does not issue mechanical drawings. Instead, the mechanical subcontractor square foots the space to receive an HVAC system from the architectural drawings. However, as explained by Mr. Chasney, in those instances in which the owner issues mechanical drawings, the owner is indicating to the mechanical subcontractor that the mechanical subcontractor should follow the details in the mechanical drawings when determining the design build aspects of the system.

We find based on the record that no patent ambiguity exists and that Appellant's (and Chasney's) interpretation of the bid documents was reasonable. Accordingly, the Appellant on behalf of its subcontractor Chasney is entitled to an equitable adjustment for the cost of the Zone 8 HVAC system. That cost has been stipulated by the parties to be $79,525.40. The record reflects that such costs were encompassed in the Appellant's December 3, 1996 resubmitted claim on Chasney's behalf in the amount of $79,612, which was received by the Procurement Officer on December 27, 1996. The record further reflects that by January 31, 1997, the Procurement Officer was in possession of all material necessary to assess Respondent's liability for the Zone 8 costs. The Board finds that such assessment could have been made within 30 days thereafter. Accordingly, based on the authority of Section 15-222 of the State Finance and Procurement Article, the Board awards predecision interest at the rate of interest as provided under Section 11-107(a) of the Courts Article from March 3, 1997, the date the record reflects the Procurement Officer could have assessed and appreciated the validity of the claim as to both entitlement and quantum, until the date of this decision. Post decision interest shall run at the statutory rate from the date of this decision. The matter is thus remanded to MTA for appropriate action.

So ORDERED this 12th day of June1998.

Dated: June 12, 1998

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 MSBCA 2015, appeal of Harbor Construction, Incorporated under MTA Contract No. MTA-90- 51-09.

Dated: June 12, 1998

_____
Mary F. Priscilla
Recorder