BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HARMANS ASSOCIATES LIMITED PARTNERSHIP	)	Docket Nos. MSBCA 1517, 1518 and 1519
Under DGS Contract No. LA-65-87	)	

May 7, 1992

Decision Summary

Differing Site Condition - Where a construction contract fails to include the mandatory differing site condition clause required by statute (State Finance and Procurement Article, 13-218), the Board of Contract Appeals will incorporate into the contract the differing site condition clause.

APPEARANCE FOR APPELLANT: David G. Lane, Esq.
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APPEARANCE FOR RESPONDENT: John H. Thornton
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OPINION BY MR. MALONE

Harmans Associates Limited Partnership (Harmans) seeks equitable adjustments in consolidated appeals. Each appeal is comprised of several separately described claims. Prior to the hearing on jurisdiction the parties dismissed as settled Appeal 1517 and some of the sub-claims of 1518 and 1519. The remaining claims under 1518 of: Service Road Undercut, Excess Top Soil, Borrow Pit, Retaking of Site and 1519 Sign/Signal Warehouse Smoke Vents and Ceiling Heights came before this Board consolidated for

hearing on jurisdiction. The Board dismissed all appeals as outside Board jurisdiction since the contract between Harmans and the State was approved by the Board of Public Works as a lease where the State was landlord.[1] This was appealed to the Circuit Court of Baltimore County which found the claims did not arise out of a lease and remanded to MSBCA for further action. The Order of the Circuit Court was not appealed and is the law of this case. The MSBCA accepted jurisdiction as directed and after a hearing on the merits issues this Decision.

Findings of Fact

1. On July 6, 1987, the DGS Department of General Services

[1]The Board has no jurisdiction over contract disputes arising out of a lease. *See* § 15-220(a), State Finance and Procurement Article.

issued RFP LA 65-87 for the design, financing, construction and leasing[2] of office space and of manufacturing and warehouse space and of service maintenance and storage space at Harmans, Maryland.

2. The land was owned by the State and occupancy of the buildings was to be on or before January 1, 1989.

3. In effect the State wanted to issue a ground rent lease to the successful offeror. The offeror would obtain financing and build to suit the State the described buildings with the right to purchase the buildings at any time. Innovative proposals to accomplish this goal were envisaged. Following a preliminary evaluation process negotiations would be conducted with each responsible offeror; then best and final offers would be entertained. Mistakes in bids were to be resolved by COMAR 21.05.02. Section 21 of the RFP subjected the Claims and/or Protests to the procedures of COMAR 21.10. The approved offeror was required to execute a lease containing the mandatory State of Maryland Lease Clauses. The RFP envisioned several agreements including construction agreements.

4. The offeror was to construct the facilities substantially in accordance with the conceptual Plans and Specifications developed by Greiner Engineering Sciences, Inc. (Greiner) under a separate contract with the State of Maryland.

5. The contract contained a clause requiring the offeror to investigate the site and another clause for the offeror to bear the risk of any unknown condition.[3]

6. Harmans' proposal provided that it would finance the

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[2] MSBCA 1517, a consolidated case, was settled by the parties. We note that the RFP therein (RFP 35-85) invited options for sale or lease but required the State shall elect sale or lease at time of award.

[3] When the dispute arose as to differing site conditions several State officials wanted to resolve the matter under the standard differing site condition clause. However, a new Procurement Officer following several meetings decided ultimately to deny the claims.

construction by issuance of securities to the public. The State would convey by ground lease the land to Harmans for a period equivalent to the term for the securities.[4] Harmans was to transfer title of the buildings to the State subject to the lien of the securities holders[5] and Harmans was to sub-lease the land back to the State for the remaining portion of the ground lease. The State would then make the periodic payments on the securities. The intent of the RFP and resulting contracts between the State and Harmans, and Harmans and others was for construction of buildings on State land.

7. The MSBCA, following a hearing on jurisdiction, found that the Board of Public Works approved this contract as a lease and therefore had no jurisdiction. The Circuit Court for Baltimore County found that the claims made by Harmans on behalf of its sub-contractor Mullan Contracting Company (Mullan) for an equitable adjustment were not contract claims relating to a lease of real property within the exception to MSBCA jurisdiction and remanded it to MSBCA. The MSBCA finds the unappealed decision of the Circuit Court for Baltimore County to be the law of the case and that the claims of Appellant arise out of a construction contract. The MSBCA further finds that all of the agreements arising out of the RFP constitute the construction contract between the parties.

8. The MSBCA also finds that the mandatory construction contract provision for differing site conditions constitutes a part of the contract documents.

9. MSBCA 1518 involves a claim for an equitable adjustment for

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[4] The State in fact issued Certificates of Participation having a State AA bond rating.

[5] The State argued at the hearing that in case of default the lien holder could in theory remove the building as "personal property" and sell it to fulfill the debt. Of course in reality any attempt to move the buildings would require their demolition.

differing site condition by Harmans[6] on behalf of Mullan , the construction contractor who actually performed the work arising out of the design/build contract between Harmans and Mullan. The Board finds this agreement also consitutes part of the construction contract documents. Mullan then contracted with George, Miles and Buhr, an architect firm, to review the design provided in the RFP which included drawings and 48 soil boring logs. These logs showed that there were approximately 3-6 inches of topsoil on the construction site. The topsoil was to be moved to allow the construction of the buildings as this topsoil being organic was not suitable for foundation surfaces for buildings. The topsoil after construction was to be used throughout the site for landscaping the project since the site was balanced.[7]

10. When work began it became clear that the depth of top soil[8] was 1-1/2 to 2 feet. This required the moving, piling and removal of a large amount of topsoil and also had an impact on the amount of foundation grade fill. To mitigate these problems the contractor and State agreed[9] to strip an adjacent parcel of land, use suitable borrow material and then spread excess topsoil over the parcel which was to be developed into a baseball field. The volume of excess topsoil was calculated by performing a topographical survey of a pile of top soil removed. The survey reflected the pile contained 25,000 cubic yards. This was then compared to the contract drawings estimate of 13,000 cubic yards resulting in approximately 12,000 cubic yards of excess top soil.

11. Mullans' earthwork subcontractor Meekins Construction, Inc.

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[6] Harmans Associates Limited Partnership is the named Appellant, however, Rosedale Company was the General Partner.

[7] A balanced site is one where no dirt need be brought in or taken from the site to meet contract objectives.

[8] The inspector on site during construction determined the excess material to be top soil and the State and Appellant reacted to the differing site condition as excess top soil.

[9] The agreement was oral.

(Meekins) imported 3,000 cubic yards of fill at $5.75 per ton from off site. A cubic yard equals 1.6 tons. Meekins paid for 5,770 tons at $5.75 per ton. Meekins still needed 10,000 cubic yards of fill which they obtained from lowering grade at site and the adjacent ballfield. Meekins billed Change Order #1 to Harmans for $32,780.81 for supplying off site fill. Change Order #2 was a lump sum agreement with Meekins for fill from the ball field parcel for $71,000.00.

12. MSBCA 1518 also has a claim for Service Road Undercut. In building the service road, part of it would not compact to specification. The subsurface area was pumping[10] under a load. The area had to be under-cut, then filled with suitable non-pumping material using a filter fabric. This differing site condition was not shown on the plans or documents. An equitable adjustment is sought for the costs to cure this problem.

13. The claim in consolidated appeal MSBCA 1519 was amended to a reduced amount at the time of the hearing. The remaining elements of the claim involve the incorporation of 24 smoke vents in the Signal Warehouse and the construction of the warehouse with an 18 foot ceiling height.

The contract required the buildings comply with all applicable codes. Buildings in excess of 70,000 square feet required certain fire and smoke safety equipment. The Anne Arundel County Department of Public Works was enforcing the 1981 BOCA[11] Code in regard to the Signal Warehouse. This required the building be classified an unlimited area building. The contractor could either provide a sprinkler system and smoke vents or divide the building with fire walls. The Signal Warehouse drawings showed a sprinkler system which under BOCA 1987 would qualify for the fire suppression system required

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[10] The undulating action of ground subjected to a weighted vehicle.

[11] BOCA stands for Building Officials & Code Administrators, a uniform code for safety some of which was adopted by A.A. Co.

without smoke vents.

However, on June 14, 1988 the County had stamped approved the plans for the buildings using 1981 BOCA. Those revised plans included Drawing A-31 for a roof design showing roof vents. However, the County Code in effect on June 14, 1988 was not the 1981 BOCA code used by the County. The new codes were enforced and adopted from July 1 of each year. The 1987 BOCA Code in effect on June 14, 1988 did not require roof vents for the buildings. However, the building permit was applied for on March 10, 1988 when the 1981 BOCA Code was still in effect (i.e. smoke vents required).[12] The County selected the parts of the BOCA Code it wanted to use. The County officials were internally instructed not to adopt the 1987 BOCA Code until applications made on or after July 1, 1988. However, the County Ordinance enacting the 1987 relevant parts of the 1987 BOCA Code which did not require smoke vents took effect 45 days after its passage on April 6, 1988. The effective date of the 1987 BOCA was May 21, 1988, not July 1, 1988. The County's internal application of the July 1, 1988 effective date did not conform to the actual effective date given in the ordinance.

14. The conflict over effective date of the relevant BOCA Code is discussed in the Preface to 1987 BOCA page iii:

> "Use of the BOCA National Building Code or any of the other BOCA National Codes within a government jurisdiction is intended to be accomplished only through adoption by reference in a proceeding of the jurisdiction's board, council, or other authoritative governing body. At the time of adoption, jurisdictions should insert the appropriate information in those passages of a code requiring specific local information, such as the date of adoption, name of adopting jurisdiction, dollar amount of fines and permit costs, etc. These passages are shown in bracketed italics in the codes, and are also listed in the sample adoption ordinance page of each code for which the local adoption information is required. In addition, jurisdictions may amend or modify National

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[12] The State argued this date as the operative date for Code enforcement.

Code provisions to accomplish desired local requirements, although use of the codes in substantially original and standardized form is encouraged by the BOCA organization. A sample draft of an adopting ordinance for the BOCA National Building Code is provided on page vi."

Users of the BOCA format must know that the blank on the form is to be completed using the local governing bodies effective date and not another arbitrary date such as July 1 of each year. If Anne Arundel County wanted July 1 to be the effective date they would have put that in their ordinance.

15. The claim also seeks an equitable adjustment related to the interior height of the Signal Warehouse. The warehouse was to be used for the construction of signs. The open floor plan and height were desired to allow large signs and materials to be moved inside the building by fork lifts.

The drawings showed an 18 foot interior height. However, in certain parts of the building work suspended from the ceiling reduced the clearance to less than 18 feet. The plans were substantially drawn by Greiner [13] under a separate contract with the State. The State Highway Administration had participated in review and approval of these drawings. Any changes to these plans would have required State approval. Greiner was and remained the titled drafter of the plans and was to provide a sealed[14] set of prints. Prior to construction the State advised George, Miles & Buhr of the change which was acknowledged by their architect. However, during actual construction the contractor erroneously built to original plans. The State directed the contractor Mullan to remove the suspended work and relocate it to provide for an unimpeded 18 foot clearance in the

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[13] Harmans proposal in the Narrative Statement relies upon the Plans of Greiner.

[14] Sealed drawings indicate the drafter takes responsibility for the accuracy of the drawings.

building. This occurred by oral directives changes[15] during the course of work at various Progress Meetings and reflected in correspondence between the parties.

Decision

The Board of Contract Appeals has jurisdiction over disputes arising under a contract with a State agency. COMAR 21.02.02.02. The word contract is defined as "an agreement entered into by a procurement agency for the lease as lessee of real or personal property or the acquisition of supplies, services, construction, construction-related services, architectural services or engineering services." COMAR 21.01.02.01 (25)(a). The definition of contract is also given in State Finance and Procurement Article § 11-101(m) "Procurement contract means an agreement in any form entered into by a unit for procurement." (emphasis added)

Nowhere in either of these definitions is there the requirement for a writing specifically. The Appeals Board has previously decided jurisdictional questions arising in appeals concerning the form of a procurement contract. In Boland Trane Associates, Inc., MSBCA 1084, 1 MSBCA ¶ 101 (1985) the Appeals Board discussed the definition of the word contract as then appearing in the General Procurement Law[16]; "we find that the Legislature intended this definition to be satisfied only upon the execution of a written document by an authorized representative of the State evidencing its intention to be bound". However, in Boland Trane, supra, there was no writing whatsoever. Here we have a written, executed and approved RFP along with various contracts arising out of the RFP. Since a procurement contract can be in "any form" the question remains to what degree must "any form" reach to become a viable procurement contract. Legal mandates for writings have historically been

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[15] While changes are normally written the practice in many instances were oral based on trust.

[16] Former Md. Ann. Code Article 21, § 7-201(d).

used to demonstrate (with clarity) the intention to be bound to specific terms. Prior to 1984, Md. Ann. Code, Art. 21 § 7-101 provided specifically that the State has waived the defense of sovereign immunity only with respect to those contract claims which were "based upon a written contract executed on behalf of the State, ... by an official or employee acting within the scope of his authority." This language was strictly construed by the Court of Special Appeals of Maryland in determining that a claim based on an implied contract was barred. Mass Transit Administration v. Granite Construction, 57 Md. App. 766 (1984). However, effective October 1, 1984 Md. Ann. Code Article 21 § 7-101 was repealed and transferred without substantive change to § 12-202, State Government Article, Md. Annotated Code.[17] On first glance this would appear to be a change in position by the Maryland Legislature. However, it must be noted that § 12-201 Md. Ann. Code, State Government Article states:

> (a) In general. - Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or one of its units while the official or employee was acting within the scope of the authority of the official or employee.
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> (b) Exclusions. - In an action under this subtitle, the State and its officers and units shall have immunity from liability described under § 5-399.2(d) of the Courts and Judicial Proceedings Article. (Ann. Code 1957, Art. 21, §§ 7-101, 7-102; 1984, ch. 284 § 1; 1986 ch, 265; 1990, ch. 546 § 3.)

This statute and its predecessor were in effect before, during and after enactment of Md. Ann.Code Art. 21 § 7-101.

In light of this legislative history it is clear a

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[17] While the word repealed is used, the substance of this code section was transferred without substantive change to Ann. Code of Md. State Government Article § 12-202 which was renumbered in 1986 to 12-201.

procurement contract (the existence of which is essential for purposes of conferring jurisdiction upon the Appeals Board) must be a sufficient writing to show the intent of the State to be bound. The intent to be bound is best shown by a writing signed by a State official acting within the scope of authority. However, while a writing may be of sufficient form for one to conclude that it is a procurement contract for purposes of conferring jurisdiction upon this Appeals Board, it would not survive the defense of sovereign immunity unless it be (1) a writing, (2) executed (3) by an official acting within the scope of his authority. The analysis of a writing for jurisdictional purposes before the Appeals Board must be made in harmony with meeting the test of sovereign immunity even if the statutory language for each differ. This distinction was discussed by the Appeals Board previously in Boland Trane, supra, at page 6 as follows:

> The total absence of any written instrument in this instance also precludes the Board from considering Appellant's appeal under an implied in fact contract based on the theory that a contract can be constructed through circumstantial evidence rather than in an explicit set of words. Mass Transit Administration v. Granite Construction Company, supra, at 773-776. For this Board to have jurisdiction over an appeal arising from a dispute concerning a contract, the parties must have memorialized their conduct at least in some gross fashion in writing.

The Appeals Board thus left room to consider "gross writings" which may contain sufficient evidence of an intent to be bound to create jurisdiction for the Appeals Board to hear the dispute.

There are numerous contracts and contract modifications ongoing under State procurement. Contractors routinely perform work and have the proper "paper work" executed after the fact. Examples of this are numerous, i.e. work that exceeds estimated quantities, extra work, and change orders. The definition of a procurement contract as being an agreement "in any form" thus allows for the flexibility necessary to accomplish legitimate

State goals while protecting the parties from violations of State procurement law.

The parties are protected from contracts which may be sufficient for Board of Contract Appeals jurisdiction but not sufficient to survive the defense of sovereign immunity since if a contractor acts without a sufficient writing he cannot enforce the contract in a court. His only remedy would be to plead "good faith" and ask the Board of Public Works for relief under COMAR 21.03.01.02.(B). A contractor proceeding without sufficient writings acts at his own peril. COMAR 21.03.01.01.

The RFP in this case sought the construction of buildings and invited proposals with creative financing to pay for such construction. The various agreements constituting Appellant's responses to the RFP fulfill the requirements of a sufficient writing.

The enforcement of writings between a contractor and the State on behalf of the contractor's sub-contractors routinely come before the Board as an appeal filed by the general contractor. The Board following the direction of the Circuit Court has applied this same reasoning in the instant case where the contract between Harmans and Mullan is not signed by a State Official, but is dependent upon the other writings between Harmans and the State (i.e. permission to enter, approval of work, payment).

The process for State procurement of construction is well known and regulated. All procurement contracts for construction require a Differing Site Provision.[18] This requirement follows a number of disputes resulting from contracts which did not have this mandatory provision. The General Procurement Law now mandates differing site clauses to avoid the legal morass which historically resulted in its absence. Lease agreements, however, do not mandate a differing site condition clause, since the type

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[18] Section 13-218, State Finance and Procurement Article, COMAR 21.07.02.05

of construction related problems anticipated by the differing site condition clause would not be present. Nevertheless, the clear intent of the RFP in this appeal and consolidated MSBCA 1519 was for construction. The record clearly reflects that the convoluted set of agreements resulting from the RFP were structured with the intent that the debt incurred to construct the buildings for use by the State not be a General Obligation of the State and not constitute an indebtedness of the State within the meaning of any Constitutional or Statutory limitation or a charge against the general credit or taxing power of the State.[19] In effect this RFP and the agreements arising out of it were to construct the building using off balance sheet financing.

The correct form for procurement construction contracts is recited in COMAR. The contracts for actual construction are between Mullan, Harmans and various sub-contractors, to none of which the State is a signatory as required. However, all of these agreements arise out of the principal agreements between the State and Harmans where lies the control and direction of the construction and all ordinary and necessary activities related to the construction. It clearly was the intent of the State to be bound to these controlling agreements. The fact that the language of certain of the agreements is combined with lease language normally found in a lease and that the agreements were presented to the Board of Public Works for approval as a lease does not change the substantive character of the agreement.

The State's position that by drafting a construction contract in the form or with elements of a lease agreement permits the exclusion of the mandatory site condition clause for construction contract is unfounded. It is the substantive intent of the agreement which controls. The General Procurement Law requires it. Without the mandatory site condition clause in a

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[19] See Description of the Certificates of Participation issued in connection with this procurement.

procurement contract for construction, the agreement may be void.[20]

The State's position that the State was procuring a supply under SF Sec. 11-101(V) is presented under the theory of fixtures. The State cites various fixture cases for the proposition that if the parties label a procurement for the construction of a building as a "supply" item (i.e. tangible personal property) it becomes tangible personal property. Neither the General Procurement Law nor COMAR requires a differing site condition clause for supply contracts. Therefore, in theory the parties could contract for the procurement of construction without the mandated clause by calling the procurement one for a fixture. The Board does not accept this view of Maryland law. Under no reasonable reading of the facts can the buildings in this case be considered fixtures. These buildings are permanent structures with fixed foundations, and any attempt to move them would do irreparable harm to the buildings.

The State cites several fixture cases for the proposition that if the parties define real property as personal property then such an agreement is sufficient to make the real property personal property contrary to the real substantive character of the property.

In Abramson v. W.W. Penn & Co., 156 Md. 186, 143 A. 795, (1928) W.W. Penn & Co. entered into a conditional contract to sell a garage under which it furnished 10 gas stream radiators. The radiators could be removed without any material damage to the property. The conditional sales agreement recited that title to the radiators remain with W.W. Penn & Co. until fully paid, or upon default the right to reposess. This sales agreement was recorded in the land records. Subsequently Abramson without knowledge of the recorded agreement purchased the building. In interpreting the notice statute the Court said since the radiators retained their character as personal property as

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[20] Section 11-204, State Finance and Procurement Article.

described and recorded, the Appellant Abramson had notice. Unlike the radiators in W.W. Penn & Co., the buildings here are not nor ever were by "their character" personal property. In Bain v. Hammond 218 Md. 184, 146A. 2d 44 (1988) the court held if a contract is susceptible of two interpretations one of which would produce an absurd result and the other of which would carry out the intent of the parties, the latter construction should be adopted. Bain entered into an agreement with Hammond, a real estate agent, to sell land and improvements. In part Bain refused to pay Hammond since part of what was sold covered personalty and therefore was not a sale of real estate to entitle the agent to a commission under then Section 17 of Article 2 of the Annotated Code (1957). The Court held this argument to be without merit since the essence of the transaction was the sale of real estate. In effect the Courts in Maryland have routinely looked at the intent and substantive character of property to determine the applicable law. Nowhere in the cases reviewed by this Board has a Maryland Court arbitrarily allowed property to be labeled personalty without looking at its substantive character.

1518 - Differing Site Condition Excess Topsoil

A contractor can rely upon the representations in State plans.[21] The State originally contracted with Greiner to

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[21] See, Corman Construction, MSBCA 1254, 3 MICPEL ¶ 206 (1989). Cherry Hill Construction, Inc., MSBCA 1547, 3 MICPEL _____ (1991).

"...Regarding the reasonableness of a contractor's reliance on representation of subsurface conditions in a construction contract, the Maryland Court of Special Appeals in Raymond International, Inc. v. Baltimore County, 45 Md. App. 247, 412 A. 2d 1296 (1988) citing Hollerbach v. United States, 233 U.S. 165 (1914) observed:

> We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken

prepare the drawings in this construction. The plans included soil boring samples which clearly indicated topsoil a contractor would reasonably expect to encounter. Based upon these borings

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> representations...If the Government wished the matter open to independent investigation of the claimants, it might easily have omitted the specification...In its positive assertation of the nature of this much of the work it made a representation upon which claimants had a right to rely without an investigation to prove its falsity.

45 Md. App. 247, 255 (Underscoring added).

Soil borings are the most specific and usually the most reliable indications of subsurface conditions. United Contractors v. United States, 177 Ct. Cl. 151, 368 F. 2d 585, 598 (1966). In Account General, Inc. 87-2 BCA, ¶ 19,689 (1987) the Armed Services Board of Contract Appeals approached the issue of soil borings with practicality and reasonableness:

> We are not unmindful that as an absolute proposition a boring, and its attendant log, show the conditions only in the bored hole. We live, however, in a practical world and it is certainly not practical, even if it were possible, to drill every square inch of a proposed construction site to determine subsurface conditions. This fact of life has to be taken into consideration in determining what use prospective bidders can make of the boring log information furnished to them.
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> . . . .
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> There is no firm rule of which we are aware regarding the distance around a boring that may be considered as falling within the indications shown in the boring log. On prior occasions we have simply determined what was reasonable . . .

Id. at 99,680, 99,681 (emphasis added). See also Corman Construction, Inc., supra; Structural Preservation Systems, Inc., MSBCA ¶ 234 (1989)."

Cherry Hill, at pp. 8-9 (slip opinion).

bids resulted. The small percentage of work done to the plans by the contractor's architect in no way affected the representations by the State in providing the boring samples. Harmans had nothing to do with the preparation of the boring samples. The State offered this information in the RFP and bidders reasonably relied upon them in making their bids. Meekins Construction, Inc. (Meekins), the sub-contractor for Mullan, encountered excessive topsoil when an evaluation of the site based on the boring samples reflected that the site should have been a balanced site.

This unexpected condition was dramatically different from what any of the parties expected, requiring the removal of the unsuitable material and importation of borrow to complete construction. The record refects that the differing site condition of excess topsoil required removal and piling of the material. Removal of the material from the site was mitigated by Harmans by making available to non-parties this material for other use. Harmans also cleared adjacent State land for borrow and upon completion restored that parcel as a ballfield, speading some of the excess topsoil over the field. However, despite this mitigation additional work was required for moving the topsoil and obtaining borrow. The books and records support Harmans' claim of $103,780.81 actually paid to Meekins for this extra work and the Board finds this amount reflects an appropriate equitable adjustment for this part of the claim together with 8% overhead and profit of $8,302.46 and Bond/Insurance costs @ 1.2% of $1,245.37 for a total of $113,328.64.

Harmans also claims a developer's fee as part of its differing site condition claim. However, in light of the award of overhead and profit the additional claim for a developer's fee will not be considered separately and allowed since that type of fee is included under overhead and profit.

The Board also disallows that part of the claim that relates to Borrow Pit and Retaking of Site Costs arising out of a subsequent oral understanding of the parties to mitigate the

topsoil problem involving the building of a ballfield for the State. The costs of grading the ballfield was a compromise (Harmans obtained the borrow from the State at no cost). However, the cost of re-seeding the property, $6,162.46, was an unavoidable cost directly arising out of the topsoil problem and the contractor is entitled to $6,162.46 for the work. However, no related expenses for overhead, profit bond, insurance or developer's fee will be allowed due to the mutual compromise involved in the undertaking.

1518 Differing Site Condition Service Road Undercut

Part of the service road was subject to pumping and required undercutting together with fill and filter cloth to bring the road to contract specifications.[22] The condition was not known until excavation and is a differing site condition for which Harmans is entitled an equitable adjustment. Quantum was not challenged as to Harmans' claim for this work. Actual costs paid of $10,200 to the subcontractor, overhead and profit of $816.00 bond/insurance @ 1.2% of $132.00 for a total of $11,148.00 together with architect/engineer review fee of $325.00 are supported by the record. The developer fee is disallowed for the same reasons stated above.

1519 Signal Warehouse Smoke Vents

During the period this project was conceived and completed, laws, codes and regulations were changed, altered and otherwise affected. All construction contracts are subject to the vagaries of non-party governmental actions. These changes are expected and looked for by the parties. However, in all construction contracts there must be recognized a point in time where the contractor's obligations are fulfilled and the owner assumes responsibility for changes to local codes affecting building requirements. The Board finds that the date the final plans were stamped fully approved by the controlling building authority is the date Harmans' duty and responsibility for changes in the

[22] The road failed the proof rolling test.

building code affecting the work ceased. Any change in building code after the stamped date of fully approval plans is a change to the contract for which the contractor is entitled to an equitable adjustment. The reasoning herein is consistent with the rationale the Board expressed in Dewey Jordan, Inc., MSBCA 1569 (1992). In Dewey Jordan the Corps of Engineers designated wetlands after contract award requiring a change to the contract. This unknown governmental requirement constituted a compensable change to the work. In this case an analysis of the date and actions of the parties leads us to the same conclusion. Anne Arundel County passed an ordinance on April 6, 1988 with an effective date of enforcement of May 21, 1988. This ordinance adopted BOCA Code 1987 which did not require smoke vents for the Signal Warehouse. However, the County using an in house policy enforced the 1981 BOCA Code requiring smoke vents up to July 1, 1988 using July 1, 1988 as the effective date contrary to the expression in the County ordinance. Harmans applied for the building permit on March 10, 1988. The plans submitted with the application were fully approved and stamped by the County on June 14, 1988. These plans showed the smoke vents as the County would not stamp them without the vents. The contractor claims an equitable adjustment since on June 14, 1988 smoke vents were not required by the ordinance in effect on May 21, 1988 (i.e. BOCA 1987) and that the smoke vent requirement constituted a change. We agree. The County internal policy is not controlling. The effective date of the ordinance was May 21, 1988 and no smoke vents were required. Since the plans were stamped approved on June 14, 1988 the building code in effect at that time sets the standard of performance.

The State verified the books and records of Harmans as supporting their claim for steel, roof vents, blocking material, overhead, profit, bond, insurance and architect engineer fee in the amount of $31,677.00. The Board denies entitlement for a developer's fee for reasons previously stated.

1519 Signal Warehouse Building Ceiling Height Revision

The RFP provided plans drafted and sealed by Griener. After award the contractor's architect did some minor work on the plans. None of that initial work affected the ceiling height in the building. The plans called for an 18' ceiling height. This was required to allow the unobstructed movement of machines and materials inside the building. However, in several parts of the building this 18' clearance was reduced by electrical channel, duct work and plumbing which was suspended from the ceiling. The contractor had the right to rely on the plans in the RFP. The plans did not show a uniform 18' clearing in building. However, prior to construction on April 11, 1988 the contractor's architect, George, Miles and Buhr, had been informed of this new requirement which constituted a change to the drawings. The record supports the State's view that the contractor never effected the change. If the contractor had acted in accordance with the State ordered change, the cost to Harmans to later remove and re-install the suspended electric, mechanical and plumbing work clearly would not have occurred. We therefore find no entitlement for work to remove and re-install the suspended work. However, Harmans' Proof of Costs claim included $1,078.00 "Mechanical Revised Dwgs Modify Duct" costs. The cost to revise the drawing is compensable and entitlement is awarded for that part of the claim.

The matter is remanded to DGS for action consistent with this opinion.

Dated:

May 7, 1992

Neal E. Malone

Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Chairman

Sheldon H. Press
Board Member

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1518 and 1519, appeal of HARMANS ASSOCIATES LIMITED PARTNERSHIP, under DGS Contract No. LA-65-87.

Dated: May 8, 1992

Mary F. Priscilla
Recorder