# BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of J.H. BURTON		)					
AND SONS OF HYATTSVILLE, INC.		)	Docket	No.	MSBCA	1484	
Trading As: J.H. BURTON AND		)					
SONS	8	)					
Under DGS Contract No. BA-000-892-001	:	8 -					

### March 27, 1990

<u>Contract Interpretation</u> - <u>Duty to Inquire</u> - A contractor who deliberately fails to point out an alleged defect in the specifications prior to bid, is obligated to perform in accordance with the State's reasonable interpretation.

APPEARANCE FOR APPELLANT:

Richard F. Stefanelli, Esq. Heise Jorgenson & Stefannelli, P.A. Silver Spring, MD

APPEARANCE FOR RESPONDENT:

John H. Thornton Assistant Attorney General Baltimore, MD

# OPINION BY MR. PRESS

Appellant timely appeals the denial of its claim for an equitable adjustment for construction of a fountain basin or pool in connection with grounds renovation at the Governor's Mansion.

#### Findings of Fact

1. On or about May 25, 1989, Appellant submitted an acceptable bid for the grounds renovation at the Governor's Mansion. The contract in the amount of \$251,750.00 was administered by the Department of General Services (DGS).

2. The dispute involves the construction of the aforementioned fountain which was specified in the contract drawings and

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specifications<sup>1</sup> prepared by Graham Landscape Architecture, (Graham). The fountain is labeled "proposed fountain by others" on Drawing L-1 of the sediment and erosion control plan (Appellant Exhibit 5) and "Prop. Fountain by others" on Drawing L-7 of the utility plan (Appellant Exhibit 6).

3. On May 4, 1989, Appellant's representative, Robert H. Elkins, who prepared Appellant's bid, attended a pre-bid meeting at the Governor's Mansion. Among those present were Robert Sivert, Director of Facilities Management for DGS and Patricia Tyson (Graham) responsible for the day-to-day administration of the project (Rule 4, Tab 10).

4. Ms. Tyson allegedly told potential bidders at the meeting that the installation of the fountain sculpture, the fixture from which water spouts, was not within the scope of the contract, but construction of the fountain basin or pool was within the scope of the contract (Rule 4, Tab 10). Mr. Elkins did not recall whether that was said.

5. On May 5, 1989 and May 18, 1989, Addenda (including drawings) for the project were forwarded to all bidders. Appellant acknowledged receipt of the Addenda by inserting its number and date in the proposal form. The Addenda form a part of the Contract Documents, and made detailed changes to the construction of the fountain basin or pool<sup>2</sup> (Rule 4, Tab 3).

<sup>&</sup>lt;sup>1</sup>The drawings contained details of the construction of the fountain basin and two addenda were issued before bidding, which made changes to the basin construction.

<sup>&</sup>lt;sup>2</sup>The addenda increase the depth of the pool from 12" to 18" and make specific reference to materials to be used in the tile work for the pool.

#### 6. In submitting its bid Appellant acknowledged the following:

"Having carefully examined the "Instructions to Bidders", the "General Conditions", and the Specifications and Plans for the subject construction . . . and having received clarification on all items of conflict or upon which any doubt arose, the undersigned propose to furnish all labor, materials, and equipment called for by the said documents for the entire work, in strict accordance with the Contract Documents . . . (Rule 4 File, Tab 4)

7. In performance of the work, Appellant apparently took the position that the wording "proposed fountain by others" on the Drawings meant someone else was responsible for all fountain work including the basin or pool as well as the fixture or sculpture from which water spouts. When Appellant learned it was expected to construct the fountain basin or pool (as distinct from the fixture from which water spouts) it objected in writing on July 20, 1989. DGS on July 24, 1989, issued a Field Report which states as follows:

"In order not to delay job you are directed to proceed under force account [to construction the fountain basin or pool] as provided in the General Conditions. . ."

Appellant proceeded to construct the fountain basin or pool under protest and then filed a claim with the DGS procurement officer for the cost of the work. Appellant's claim was denied by the procurement officer on October 30, 1989 and Appellant appealed.

## <u>Decision</u>

Appellant contends that a reasonable construction of the language "proposed fountain by others" on Drawings L1 and L7 does not require it to construct the fountain basin or pool.<sup>3</sup> DGS

<sup>&</sup>lt;sup>5</sup>Both parties agree that the language does not include construction of the fixture from which water spouts.

asserts that the language clearly requires construction of the fountain basin or pool and that such is the only reasonable reading of the contract documents. The record supports DGS' assertion that the only reasonable construction of the contract documents taken as a whole is that the fountain basin or pool was part of the scope of work. The addenda issued in connection with the IFB specifically refer to a change in the depth of the pool and other details pertaining to pool construction. Even if there may be a question concerning whether the contractor's interpretation may also be reasonable thus raising the issue of ambiguity in the contract documents, we note that the Appellant apparently made no attempt to pre-bid inquiry. If the Appellant's assertion at the hearing of the appeal that the language "proposed fountain by others" is ambiguous is given credence by the Board we would further have to find that the Appellant subjectively determined that the language was ambiguous prior to submitting its bid.<sup>4</sup> Nevertheless, as we have noted, Appellant failed to seek clarification prior to bid and this its claim is barred. See American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985) at pp. 6-7.

Finally we note, that the Appellant's asserted position regarding ambiguity is controverted by the testimony of Robert Wilkins. Approximately two weeks into the project Mr. Elkins in a conversation on the grounds of the Governor's mansion admitted "that when he put the bid together he didn't realize that the pool

<sup>&</sup>lt;sup>4</sup>The evidence is in conflict concerning whether Appellant may have actually perceived the alleged problem prior to submitting its bid. As noted in Finding of Fact No. 4, there was apparently some discussion of the actual scope of work involving the fountain at the pre-bid conference, but Appellant denies hearing such discussion.

was part of it and he blew it" (Transcript, p. 66). We find this was an admission against interest weakening Appellant's assertion of its alleged subjective belief prior to bid opening that the contract documents were ambiguous.

In view of the foregoing reasons, the Appellant's claim for an equitable adjustment is denied.

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