

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of JOHN C. GRIMBERG)
COMPANY, INC.)
) Docket No. MSBCA 1761
Under DGS Contract)
No. J-000-891-003)
)

December 2, 1994

Contract Interpretation - Ambiguity - A contract is ambiguous if it sustains the interpretations advanced by both parties. Pre-bid inquiry concerning the State's interpretation of the contract is necessary for a contractor to be entitled to an equitable adjustment where the specific ambiguity in question is significant in terms of the scope or cost of the work to be performed.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final decision of the Department of General Services (DGS) Procurement Officer denying its claim for the cost of producing duct insulation for make-up air ductwork.

Findings of Fact

1. On November 27, 1991, Appellant entered into a contract with DGS for construction of the New Academic Building for St. Mary's College, sometimes referred to herein as "Project" *pr or ✓* "building."
2. Appellant subcontracted mechanical insulation work for the building to Performance Contracting, Inc. (PCI).

3. Prior to the award of the instant Contract to Appellant, PCI submitted a bid to Appellant to perform the insulation work on the Project in the amount of One Hundred Seventy-Five Thousand Dollars (\$175,000.00). Appellant's bid to DGS was based on such amount.
4. PCI's bid to Appellant was prepared by an experienced estimator employed by PCI as branch manager.
5. This individual prepared take-off sheets for the duct insulation. He interpreted the bid documents as requiring the insulation of make-up air ducts and therefore included make-up air ducts among the ducts to be insulated and included the cost of make-up air duct insulation within PCI's bid amount to Appellant. The amount attributed to the cost of the make-up air duct insulation was \$60,582. As noted above, the total amount of PCI's bid to Appellant was \$175,000. Sometime after the preparation of the bid the branch manager was replaced by a new branch manager who was also an experienced estimator.
6. After Contract award, Appellant offered the new branch manager the opportunity to review the PCI bid to Appellant to make sure that PCI was comfortable with its pricing prior to executing a subcontract.
7. The new branch manager reviewed the PCI bid prior to executing a subcontract with Appellant and concluded that, due to mistakes in interpretation, PCI's bid incorrectly included the cost of make-up air duct insulation and incorrectly omitted the cost of certain canvas jacketing on duct in the attic spaces. The new branch manager further concluded that the cost of the omitted canvas jacketing was higher than the cost of the make-up air duct insulation and that the two items could be offset. According to the branch manager's best recollection, the cost of the canvas jacketing "was in the realm of \$5,000.00 to \$7,000.00 more than the cost of the make-up air duct work that was included in the bid," and the cost of the canvas jacketing was "in the realm of \$42,000.00 or \$43,000.00.
8. Prior to PCI's entering into a subcontract with Appellant, PCI did not advise Appellant of its findings concerning its bid and did not advise Appellant of the offset of the cost of the canvas jacketing against the cost of the make-up air duct insulation. PCI did however, offer to reduce its bid and PCI and Appellant entered into a subcontract for \$170,000.
9. At no time prior to award of the contract to Appellant by the State or prior to entering into the subcontract did Appellant or PCI seek clarification from the State concerning the interpretation of the insulation requirements of the Contract. The State was not made aware of Appellant's proffered

interpretation of the Contract until the shop drawing submittal process when PCI indicated an intent not to insulate make-up ductwork.

10. In connection with the shop drawing submittal process, DGS directed Appellant, and Appellant in turn directed PCI, to insulate the make-up air ductwork. This ductwork provided air to the laboratory fume hoods through the terminal units to replace exhaust air.
11. During the shop drawing submittal process PCI and Appellant interpreted the Contract Documents to not require insulation of the make-up air ducts. Appellant on behalf of itself and PCI submitted Cost Proposal Request No. 161 in the amount of \$69,542.00 in response to the direction to perform the makeup air ductwork insulation.
12. The Insulation Specifications at 15400-12, ¶2.20 M.2 provide for the contractor to "[i]nsulate outside air ducts, outside air plenums, all supply air ducts, all return air ducts in unconditioned spaces". The Specifications for the Project do not contain language which specifically provides for insulation of make-up air ducts nor do the Specifications expressly set forth definitions of the terms supply air or make-up air.
13. The mechanical legend on Drawing M8.2 provides abbreviations for the various ductwork, including a specific designation of MA for make-up/auxiliary air. The mechanical legend on Drawing M8.2 lists other abbreviations including OA for outdoor air, SA for supply air, RA for return air and EA for

exhaust air. Other drawings for the building show labelling for the various ductwork in accordance with these separate designations.

14. The Contract General Conditions provide at paragraph 5.01 H as follows:

When no specification is cited and the quality, processing, composition or method of installation of a thing is only generally referred to, then:

(3) For items generally considered as heating, refrigeration, air conditioning or ventilating, the applicable portions of the latest edition of the A.S.H.R.A.E. Handbook published by the American Society of Heating, Refrigerating and Air Conditioning Engineers, Inc. are the applicable specification.

15. The ASHRAE Handbook in effect as of the date of the Contract General Conditions refers to and is supplemented by the "ASHRAE Terminology of Heating, Ventilation, Air Conditioning & Refrigeration."
16. The ASHRAE Terminology of Heating, Ventilation, Air Conditioning & Refrigeration defines "supply air" as "air entering a space from an air conditioning, heating, or ventilation apparatus." PCI's new branch manager testified at the hearing that this was "a definition of supply air".
17. The ASHRAE Terminology of Heating, Ventilation, Air Conditioning & Refrigeration defines "makeup air," as, among other things, "air brought into a building from the outside to replace that exhausted." PCI's new branch manager also testified at the hearing that the foregoing definition of make-up air is consistent with the use of make-up air on the St. Mary's College Project.
18. The ASHRAE standard pertaining to insulation, ASHRAE standard 90.1, provides that insulation of a duct is indicated when the temperature difference between the air inside the duct and the air outside the duct will be greater than 15°. The drawings

indicate that such temperature differentials may occur with respect to the make-up air duct on the St. Mary's project.

19. The definition of "supply air duct" as contained in the National Commercial Industrial Insulation Standards published by the Midwest Insulation Contractor's Association (MICA) is ". . . a duct which carries conditioned air from air supply units to room diffusers or grills." The MICA publication does not contain a definition of "make-up air or make-up air duct."
20. The Architect denied Cost Proposal Request No. 161 and required Appellant, who, in turn, required PCI to perform the insulation of the make-up ductwork. By letter dated April 27, 1993, Appellant filed a timely claim for the cost of the work.
21. Assuming entitlement the amount in dispute is stipulated to be \$42,939.56. Appellant also seeks predecision interest on such amount from the date of receipt of its claim by the Procurement Officer.
22. The Procurement Officer issued a final decision dated August 17, 1993 denying Appellant's claim for a constructive change as embodied in Cost Proposal Request No. 161 for duct insulation. The final decision was received by Appellant on September 17, 1993. This appeal followed.

Decision

Appellant contends that while the specifications¹ required insulation on all outside air ducts, outside air plenums, all supply ducts, and all return air ducts, "make-up air ducts" are not included. Further, Appellant asserts that the drawings have a specific designation for make-up/auxiliary air which is different from the designation for outdoor air, supply air, return air and exhaust air.

DGS, on the other hand, contends that the specifications, particularly 15400-12, ¶2.20 M.2, required the insulation of all supply air ducts and that as shown in the drawings, the make-up air ducts supply air to the fume hoods through the terminal units.

¹15400-12, ¶2.20 M.2

Thus, DGS asserts that the drawings show that the make-up air ducts are supply ducts. DGS notes that the mechanical legend illustrates the standard symbol for supply air ductwork which is denoted by an "x" bound by a rectangle in section and that the drawings graphically use the supply duct designation for make-up air ductwork. Therefore, according to DGS the ductwork supplying make-up air is part of the supply air ductwork and had to be insulated. At the least DGS asserts an issue of ambiguity concerning inclusion of the insulation work is thus raised.

Maryland follows the objective law of contracts. General Motors Acceptance Corp. v. Daniels, 303 Md. 254 (1985). The Court in Daniels observed:

A court construing an agreement under this test must first determine from the language from the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Id. at pp. 261-262. The same rule of construction applies to analysis of bid documents by bidders or prospective bidders. "The primary rule of contract interpretation requires that contract language be given the plain meaning attributable to it by a reasonably intelligent bidder." Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶69 (1984) at p.7 (citing Kasten Construction Co. v Rod Enterprises, Inc., 268 Md. 318 (1973)). The threshold question to be answered is, therefore, what meaning a reasonable bidder would give the bid documents in this case relative to whether the make-up air ductwork was to be insulated. If two reasonable meanings appear from a reading of the bid documents a patent ambiguity may be said to exist requiring attempt at pre-bid clarification for a bidder to prevail regarding its interpretation.

Intercounty Construction, Corp., MSBCA 1036, 2 MSBCA ¶164 at p. 9 (1987).

If the contractor either knew or should have known of the ambiguity, a failure to seek clarification prior to bidding bars recovery. Hanks Contracting, Inc., MSBCA 1212, 1 MSBCA ¶110 at pp. 4-5 (1985); Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 at pp. 10-13 (1984), aff'd., Civ. No. 3296 (Cir. Ct. Mont. Co. August 23, 1985); Avedon Corp. v. United States, 15 Cl. Ct. 771 at pp. 776-777 (1988); Dominion Contractors, MSBCA 1041, 1 MSBCA ¶69 at pp. 10-11 (1984).

The portion of the specifications relevant to this appeal is §15400-12, ¶2.20M which reads in pertinent part as follows:

Extent of insulation

2. Duct work: Insulate outside air ducts, outside air plenums, all supply air ducts, all return air ducts in unconditioned spaces.

Also relevant to this threshold question is the mechanical legend on Drawing M8.2.

The Project plans (i.e. drawings) and specifications indicate that there were the following five ductwork systems on the Project.

- Outside air ducts depicted on the drawings by the abbreviation "OA" as set forth on the mechanical legend on Drawing M8.2.
- Supply air ducts depicted on the drawings by the abbreviation "SA" as set forth on the mechanical legend on Drawing M8.2.
- Make-up/auxiliary air ducts depicted on the drawings by the abbreviation "MA" as set forth on the mechanical legend on Drawing M8.2.
- Return air ducts depicted on the drawings by the abbreviation "RA" as set forth on the mechanical legend on Drawing M8.2.

- Exhaust air ducts depicted on the drawings by the abbreviation "Exh".²

The terms "outside air ducts", "supply air ducts, " and "return air ducts" are not defined in the specifications. Those terms are, however, defined in the mechanical legend on Drawing M8.2. Therefore, one way for the contractor to determine which system a given duct belongs to, and thus whether Specification 15400-12, ¶2.20 M.2 requires it to be insulated, is to use the abbreviations depicted on the drawings and defined in the mechanical legend on Drawings M8.2.

The parties agree that insulation of exhaust air ducts is not required consistent with the express language of ¶2.20 M.2 which does not contain the words "exhaust air ducts" and thus doesn't require them to be insulated. Similarly the words "make-up air/auxiliary air ducts" do not appear anywhere in the listing in ¶2.20 M.2 of duct work required to be insulated.

In summary Appellant contends that the language of ¶2.20 M.2 read in conjunction with the mechanical legend on Drawing M8.2 advises the contractor that it was required to insulate all of the duct systems depicted by the "OA"³ and "SA" abbreviations, a portion of the system depicted by the "RA" abbreviation if the ducts were in unconditioned spaces, and none of the remaining two systems depicted by the abbreviations "MA" and "Exh" or "EA".

However, the Board finds that Appellant's contention is not the only reasonable one arising out of a reading of the bid

²The mechanical legend actually indicates that the abbreviation for exhaust air is "EA", but the abbreviation actually used by the drafter was "EXH." Not all conflicts or discrepancies give rise to ambiguities, however, and this is one such example.

³The terms "outside air ducts" and "outside air plenums" are used in the specifications while the mechanical legend indicates that the abbreviation "OA" refers to "outdoor air." As with the case of the use of the abbreviation "Exh" on the plans instead of the abbreviation "EA" listed in the mechanical legend as the abbreviation for "exhaust air," this discrepancy does not give rise to a contract ambiguity.

documents herein to resolve the question of whether a make-up air duct is a supply air duct required to be insulated.

DGS argues that the bid documents are clear that make-up air ducts are a form of supply air duct required to be insulated. The Specifications direct the contractor to insulate "all supply air ducts". The terms supply air and make-up air are not expressly defined in the Specifications. As noted previously, however, the terms are defined in the ASHRAE Terminology of Heating, Ventilation, Air Conditioning & Refrigeration, a publication that supplements the ASHRAE Handbook, which is incorporated into the Specifications. Supply air is "air entering a space from an air conditioning, heating, or ventilation apparatus." Make-up air is "air brought into a building from the outside to replace that being exhausted." The ASHRAE definitions are, DGS argues, consistent with a typical use of these terms within the construction industry. DGS contends that as used in the bid documents for this project, supply air encompasses make-up air because the make-up air is being supplied through air handling units.

At the hearing, Appellant introduced into evidence a definition of supply air from a publication entitled "National Commercial Insulation Standards" published by the Midwest Insulation Contractors Association (MICA). The MICA standards define supply air duct as "duct which carries conditioned air from air supply units to room diffusers or grilles." The make-up air ducts end in or near the fume hoods, not at room diffusers or grills. However, the Specifications neither incorporate nor refer to the MICA standards.

The Drawings clearly depict the make-up/auxiliary air system supply air from the outside through air handling units to their destination points in or near the fume hoods. Therefore, DGS argues that consistent with the ASHRAE definition of make-up air, the obvious function of the make-up air ducts is to supply air to replace the room air being exhausted. Moreover, the argument continues, throughout the Drawings make-up air ducts are graphically depicted as supply ducts through the use of the supply

duct symbol, an x enclosed in a rectangle. Although the Drawings also differentiate between supply air ducts and make-up air ducts through the use of SA and MA abbreviations, that differentiation, DGS contends, is for the purpose of facilitating a contractor's determination of which ducts are coming from which mains.

Finally, DGS argues that the use of the word "all" to modify "supply air ducts" in the Specification (15400-12, ¶2.20M.2) together with the use of the supply duct symbol to depict make-up air ducts throughout the Drawings, resolves any uncertainty caused by the SA and MA abbreviations. That make-up air is a component of supply air is further reinforced by the use of the symbol "SA Fan" on the detail for Air Handling Units 5 and 6, the air handling units for the make-up/auxiliary air system. See Drawings M 7.1. That detail the State argues communicates to the contractor that make-up air ducts are a form of supply air duct within the meaning of the bid documents.

Recalling that "[a] primary rule of contract interpretation requires that all written provisions be read together and interpreted as a whole giving effect to each clause if reasonably possible," Cam Construction Company, Inc., MSBCA 1088, 1 MSBCA ¶62 (1983) at p. 8, the State contends that not to interpret the Specifications and Drawings as requiring the insulation of make-up air ducts renders superfluous the reference to "all supply air ducts" in 15400-12, ¶2.20M.2 and requires the contractor to ignore the depiction of make-up air ducts as supply ducts throughout the drawings and the supply air fan designation in Drawing M7.1

The Board finds based on its review of the record that there are two reasonable readings of the bid documents apparent on the face of the bid documents concerning make-up air duct insulation. According to one reading the make-up air ducts are supply ducts required to be insulated; according to another reading they are not. The ambiguity is patent since the Board has been persuaded by its review of the written record, the opposing points of view expressed in testimony of several persons knowledgeable in matters

of mechanical contracting,⁴ argument and briefs of counsel that both interpretations would be apparent to a reasonably intelligent bidder from the face of the bid documents.

By Appellant's own admission, the scope of the disputed work was significant in relation to the overall Subcontract price of \$170,000.00. PCI's new branch manager's original cost estimate for performing the disputed work was \$60,582.00, exclusive of Appellant's mark-up. This represents more than one-third of the Subcontract amount. The amount of money required to insulate the make-up air ducts is significant. As a percentage of the total subcontract price the cost of insulation is high, clearly high enough to classify the ambiguity as significant from a cost stand point. Such significance this Board finds imposes a duty to seek clarification. See Transco Contracting Co., ASBCA No. 25315, 82-1 BCA ¶15,516 (1981) (omission of clause which "had a significant cost and control impact on project performance" triggered duty to inquire) and Gelco Builders & Burjay Construction Corp. v. United States, 369 F.2d 992, 177 Ct. Cl. 1025 (1966) (total contract price of \$2,200,000 versus claim of \$385,000). See also L.B. Samford, Inc., ASBCA No. 19138, 76-1 BCA ¶11,684 (1975) (small size of disputed bid item in comparison to the total contract price made it more likely that error would escape notice). Compare Cherry Hill Construction, Inc., MSBCA 1550, 3 MSBCA ¶272 (1991) at p. 7 (bidder not to be penalized for failing to determine if there were pay items covering all items of work under specific facts of that appeal).

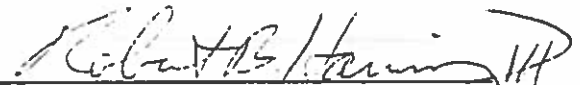
Here, the high ratio of the amount originally calculated for the disputed work to the total Subcontract price is illustrative of the overall importance of any ambiguity regarding the extent of insulation, and supports a determination herein based on the record

⁴Compare the testimony of Mr. Donald Steiner, Mr. Richard Lippy and Mr. Michael Sherwin for the Respondent with the testimony of Mr. David Trumble and Mr. Robert McCormick for the Appellant. All of these individuals are experienced in insulation of mechanical systems. All were credible.

that the ambiguity was patent. Accordingly, Appellant was required to seek prebid clarification from the State "or risk being awarded the contract and held to the State's interpretation." Concrete General, Inc., supra, 1 MSBCA ¶87 (1984) at p. 12.

The Board does not mean to suggest that all disagreements between the parties as to the meaning of the bid documents rise to the level of ambiguities. See Centex Construction Co., MSBCA 1419, MSBCA ¶243 (1990) at p. 15. However, the obvious or glaring nature of the ambiguity in these bid documents is stark and is further reinforced by the diametrically opposed interpretations developed by Appellant's own estimators, the two office managers, in November and December of 1991. Although the patent ambiguity test is objective, the original branch manager's actions clearly support the proposition that a reasonably intelligent bidder should have been aware of the interpretation proffered by the State. The cost of insulation for the make-up air ducts was originally included by PCI. Thus an interpretation other than the one proffered by Appellant during contract performance was acted upon by PCI prior to bid opening. Such action runs counter to Appellant's assertion that the State's interpretation was not apparent from the face of the bid documents. If Appellant is correct that the documents also support its interpretation of the requirements of the bid documents, it follows that a reasonable bidder should have been aware of any ambiguity prior to bidding. Where the bid documents admit of two reasonable interpretations of the requirements pertaining to a material or consequential item of work, pre-bid inquiry is required; otherwise the State's interpretation will prevail.

Based on the foregoing the appeal is denied. Wherefore, it is ORDERED this 2nd day of December, 1994, that the appeal is denied.


Robert B. Harrison III
Chairman

Dated: December 2, 1994

I concur:

Candida Steel

Candida S. Steel
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 1761, appeal of John C. Grimberg Company, Inc. under DGS Contract No. J-000-891-003.

Dated: December 2, 1994

Mary F. Priscilla
Mary F. Priscilla
Recorder

