BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	)	
MPG CONSTRUCTION, INC.	)	
	)	MSBCA Docket No. 1985
Under MARYLAND STATE HIGHWAY	)	
ADMINISTRATION Contract No.	)	
F-208-709-780	)	

July 15, 1998

Constructive Change – A contractor may be entitled to an equitable adjustment as a result of additional costs arising out of direction by the State to perform in a certain manner where the evidence reflects that the contractor planned a different method of performance which was feasible and was not prohibited by the bid documents.

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Opinion by Board Member Steel

This timely appeal comes before the Board regarding two claims filed by Appellant MPG Construction, Inc., (MPG) under the Changes clause of the above-captioned Contract with the Maryland State Highway Administration (SHA).

Findings of Fact

1. MPG Construction, Inc. and the State Highway Administration entered into a reprocurement contract[1] for the painting and cleaning of the Point of Rocks bridge. The bridge consists of five small approach spans on the Maryland side, and eight large truss spans over the Potomac River, terminating in the State of Virginia.
2. The bridge was selected for cleaning and painting because the paint (including a lead primer) was

[1]The contract consists of the Green Book, the special provisions (including technical provisions) and the plans. The Board has taken judicial notice of the Green Book, and will refer to the portion of the Green Book containing Standard Specifications as "S.S." and the portion containing General Provisions as "G.P.".

highly compromised. The paint system on the bridge had in some places begun to deteriorate into a chalky powder.

3. In 1992, prior to the issuance of this reprocuremment solicitation, Respondent awarded a contract to G&O Contractors to abrasive blast clean the Point of Rocks Bridge in order to remove the lead paint and repaint the structure. After G&O completed the work on one span of the bridge, it was default terminated from all of its Maryland contracts purportedly due to health and safety violations on a different bridge cleaning and painting project in Cumberland, Maryland.
4. In 1995 this reprocurement solicitation was issued, and a nonmandatory prebid conference was held on May 11, 1995. Appellant MPG visually inspected the bridge, but did not attend the prebid conference. The minutes of the pre-bid meeting were taken down stenographically. At that meeting the State's representatives did not indicate that use of tarp-to-ground method of containment would be prohibited on any approach span of the bridge, or that platforms had to be used. Additionally, the State's representatives did not indicate that they expected that water generated in power washing would contain concentrations of lead in excess of applicable action levels such that the water would have to be contained. The only containment issue discussed at the meeting was that tarp-to-ground would be required at the railroad spans, Spans 2 and 3, because, as reflected in the specifications, there was not enough vertical clearance to use a platform type containment. Notes were provided to bidders from the conference, but no amendment was made to the contract as a result of the conference. The record does not reflect whether or not MPG received the notes from the prebid conference.
5. MPG, a Texas contractor experienced in the business of cleaning and painting bridges, was the low bidder on the contract, bidding $2,865,000; $700,000 less than the next lowest bidder. MPG's lump sum bid for the blasting & cleaning (including power washing), bid item No. 4003, was $1,629,075. Prior to awarding the contract, the State requested a meeting with MPG to review its bid to ensure that there had been no bid mistakes. During this meeting Mr. Skandalaris, MPG's project manager, reported hat MPG had not specifically included any monies in its bid for containment of water in power washing.
6. Of the approach spans over ground, Spans 2 and 3 cross property controlled by the CSX Railroad; Spans 1, 4 and 5 cross the C&O Canal and Towpath on National Park Service land.
7. There are two methods of creating access to the bridge spans and containment of materials removed at issue in this case. The first is the hanging from the spans by use of cables, scaffolding platforms from which work can be performed. The other is the draping of tarpaulin cloth from the side of the bridge to the ground. It was clear from the Special Provisions at p. 134[2] that a platform hanging from the bridge could not be used at spans 2 and 3 crossing the CSX railroad tracks, because such a platform scaffolding would interfere with railroad traffic. The need for a tarp-to-ground method of containment for Spans 2 and 3, the railroad spans, was acknowledged by the State.
8. Other than the obvious necessity for a tarp-to-ground method of containment for the railroad spans, the Contract made provision for the type of containment system required only in terms of the level of containment required, leaving the method of achieving that containment level up to the Contractor.

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[2] Special Provisions, Section 881 - Railroad, p,. 134, states that approved "minimum temporary construction clearances from railroad tracks are 23.00 ft vertical from top of rail and 18.00 ft horizontal from track centerline."

9. The contract specifications required the Contractor to achieve Class 3 containment, Level 1 emissions. Generally, a Class 3 containment will have impermeable walls, a dust collector, and ventilation as set forth in the SSPC Guide at 8. For a Class 3 containment, negative pressure is required; this means that the sides of the containment will look like they are being sucked in. The second part of the requirement, for level 1 emissions, is determined generally by visual observation. Level 1 means no more than one l percent of emissions in the workday, or about five minutes in an 8 hour workday. The emissions are from the containment structure itself. In a Class 3 containment with level 1 emissions, there will be a small amount of allowable visible emissions during the workday.
10. Other than the requirement for Class 3 containment, Level 1 emissions, there was nothing in the Contract which specified the manner in which the contractor must achieve those requirements. The Contract did not require the hanging of scaffolding platforms to achieve Class 3 containment, Level 1 emissions, nor did it prohibit the use of a tarp-to-ground system of containment over the approach spans of the bridge and, in fact, required the use of a tarp-to-ground system over Spans 2 and 3, the railroad spans. MPG had often achieved Class 3 containment, Level 1 emissions using tarp-to-ground.
11. SHA and MPG both understood that MPG would be using a tarp-to-ground method of containment on all five approach spans, not just Spans 2 and 3 which run over the railroad tracks.
12. Spans 1, 4 and 5, as noted, run over National Park Service Land. They each are 29 feet wide and are 35 feet, 84 feet and 66 feet long respectively. By contrast, the truss spans are 165 feet long.
13. The Contract, at Special Provisions (hereinafter "S.P."), p. 47, unequivocally alerted bidders to the fact that the paint on the bridge contained lead:

> The Contractor is alerted to the fact that paint on the existing bridge contains "LEAD".

14. Likewise, S.S. 413.01 states at paragraphs 3 and 4,

> A prime concern is the protection of the environment. Existing paint systems may include toxic substances such as red lead oxide which may be considered hazardous waste when removed and tested as specified in the Toxicity Characteristic Leaching Procedure (TCLP)and Extraction Procedure Toxicity Test (EP Tox).
>
> Prior to bidding the Contractor should be familiar with the current environmental regulations and safety procedures. The Administration is considered the "Generator" of all waste associated with the work, however the Contractor shall be responsible for preventing waste from entering into the environment by containing, collecting, storing, testing and disposing of all waste in conformance with federal, state and local regulations.

15. The Contract also provided that lead was not to be released in to the environment. S.S. 413.03.08 ("Paint removed during washing operations shall be contained and collected in conformance with 413.03.03 through 413.03.05."); S.S. 413.03.03 (requiring among other things that "[t]he Contractor shall provide for total containment of all spent materials allowing no blast dust or

debris to escape into the environment."); SSPC Guide 6I 5.1.2 (notice that water may cause hazardous substances to be carried with the water); Contract, S.P. at 47 (noting prime consideration of protecting waterway against pollution and prohibiting paint from being disposed into waterway). Pursuant to S.S. 413.03.04, hauling and disposing of hazardous waste is covered by lump sum bid.

16. Prior to blast cleaning, the Contractor was required to power wash all surfaces. Special Provisions 413.03.06(g) :

> Power washing shall be used to remove dust, dirt, debris, and salt contaminants within 48 hours prior to blast cleaning or power tool cleaning. The pressure washer shall be capable of 2,000 psi pressure at the nozzle using potable water.

17. The Contract required that paint removed during washing operations be contained and collected in conformance with Sections 413.03.03 through 413.03.05 of the Special Provisions. Sections 413.03.03 through 413.03.05 contain requirements for collecting, storing, testing and disposing of hazardous waste. To the extent these provisions apply to power washing, they apply to the paint debris, whether chips or particles, captured in power washing and to the blasting operation.
18. The Special Provisions of the Contract at page 49 indicated that no permits were required for the Project. Prior to the bid date for the Contract, there was no permit between the State of Maryland and the National Park Service ("NPS") that any bidder could have investigated in the course of bidding the job. Additionally, other than a sign about 1/4 mile away from the Bridge stating that the area was a national park, there was no indication in the contract documents or at the Bridge itself in any way demonstrating that the State of Maryland did not own the right of way under the Bridge. The State's representatives believed that the State of Maryland owned the right of way under the bridge, and that no permit was required from the National Park Service to perform the contract scope of work.
19. Notice of award was issued on or about June 26, 1995. On June 30, 1995, the National Park Service contacted SHA about obtaining a permit for the work on the approach spans; SHA had assumed that it had the right of way under the bridge and that no permits from NPS were required. SHA promptly applied for a permit.
20. The State issued Notice to Proceed to MPG on July 28, 1995. MPG began mobilizing at the site in August 1995.
21. MPG had provided no indication to SHA as to how it planned to contain Spans 1, 4 and 5. In particular, MPG had failed to submit its drawings by this time even though they were due 14 days after notice of award in approximately mid-July, 1995.[3]
22. On September 8, 1995, a meeting among the National Park Service, the SHA and MPG was held on site. At the meeting, the National Park Service representative expressed concerns about the public who used the park with respect to the drop-tarp system, stating he favored a suspended platform system. The State's Contract with MPG expressly addressed concerns of public safety, the environment and convenience. Contract, G.P. 7.05 & 7.06. Under G.P. 7.06, MPG was to

[3]The CPM was to be submitted 30 days after the June 26 notice of award (Contract, Spec. Prov. at 87); however the first submission was not made until August 11.

ensure the least practicable obstruction to the public.

23. At this meeting, the NPS advised for the first time that NPS would not permit MPG to use the tarp-to-ground method of containment at the approach span. The NPS representatives were insistent that MPG would not be permitted to drop its tarps to the ground at the approach spans (Spans 1, 4 and 5), because two other contracts had gone forward in the State of Maryland without the State obtaining a permit from the National Park Service. The NPS position effectively required Appellant to utilize a platform method of containment at spans 1,4 and 5.
24. After the meeting, MPG immediately submitted a claim for a change order, contending that MPG had planned to use a drop tarp system for these spans; the claim was denied as premature.
25. Despite the prohibition of the use of a tarp-to-ground system for Spans 1, 4 and 5, MPG submitted its containment drawings prepared between August and September 1995 by Rummel, Klepper & Kahl (RK&K), MPG's structural engineer, showing the tarp-to-ground method for those approach spans. MPG's Mr. Skandalaris testified that on or around September 18 he submitted to SHA the drawings for a drop tarp system at the request of RK&K. The drawings were rejected on the grounds that they did not provide the details required by the Contract and did not show that the system met Class 3, Level 1 standards.
26. MPG's wooden platforms were dedicated to another job and were not planned to be delivered to the site until the Spring of 1996. Thus, upon receipt of the NPS/State directive to use platforms rather than tarp-to-ground, Mr. Skandalaris was forced to look into alternative methods for erecting platforms at the approach spans. Because Mr. Skandalaris had seen platforms constructed of chainlink fencing on prior jobs, he contacted Long Fence Company and learned that chainlink fencing could be delivered to the job site within a few days which would facilitate the on-site construction of platforms. Accordingly, Mr. Skandalaris requested that RK&K redesign the approach span containments using a chainlink platform method of containment suspended under the approach spans in its structural analysis.
27. RK&K charged MPG additional monies because it had not planned to design for platforms at the approach spans or calculate the structural load impact at the approach spans of utilizing platforms rather than tarp-to-ground. MPG paid RK&K for the additional, unanticipated structural analysis and redesign at the approach spans.
28. MPG submitted the revised drawings and calculations to the State on or about September 21, 1995. The State approved these drawings within a day. On September 23, 1995, MPG began erecting its cables and rigging for placing the chainlink platforms at the approach spans, spans 1, 4 and 5.
29. On September 22, 1995, the State issued a Notice to Show Cause to MPG in which it threatened to default terminate MPG's contract due to its failure to begin productive work on the project. The Notice to Show Cause indicated that the State expected that MPG would begin work the last week of September. In fact, MPG had begun installing its cabling and rigging on September 23, 1995, the last week of September. MPG completed the work at approach Span 1 using the chainlink platform.
30. On October 18, 1995, MPG submitted to the State its costs incurred erecting the chainlink fence platforms at approach Spans 1, 4 and 5.
31. On or about October 3, 1995, the State directed MPG to take a sample test of the water generated in power washing. MPG argued to the State's inspector that the Contract specifications did not require testing of the water generated in power washing. Nevertheless, after putting samples of the water through a 95% mesh tarp, MPG's planned method of filtering dirt, dust, salt

contaminants and paint particles from the power washing water, both the State and MPG provided the water samples to separate laboratories.

32. Test results from both laboratories indicated that concentrations of lead in the water generated in power washing exceeded, albeit slightly, the applicable action level.[4] Accordingly, the State directed MPG to contain the water generated in power washing. MPG complied with the directive and contained the water on all of the spans, ultimately submitting a claim for the cost thereof.
33. On October 20, 1995, MPG completed the task of lining the platforms at Spans 4 and 5 with visqueen, a form of plastic sheeting. That night, it rained an unprecedented nine inches. On the morning of October 22, 1995, the State's inspector notified MPG that water had collected in the platforms due the presence of the visqueen, and that the platforms at approach Spans 4 and 5 had collapsed. Upon examination, it was obvious that water had collected on the visqueen on the platforms, and that several of the cables had snapped.
34. After the platforms collapsed, MPG spent a substantial amount of time taking the collapsed platform down and replacing it. After MPG re-established the platforms at approach Spans 4 and 5, it demobilized from the site for the winter because the weather became unseasonably poor.
35. After MPG demobilized for the winter, on January 19, 1996, the State notified MPG that representatives of TCS had alleged that MPG's chainlink platform infringed on TCS' patent. Subsequently, MPG determined to take down the chainlink platforms at Spans 4 and 5 and to substitute wooden platforms on the cables and rigging that already had been installed. MPG made this decision because it was concerned that TCS might follow through on its threats of patent infringement litigation and might try to enjoin MPG from completing its Contract with Maryland. As part of its decision-making, MPG attempted to negotiate a fair price with TCS for a license to use the allegedly patented system, but was unable to reach agreement. MPG also sought the advice of counsel and was told it could litigate TCS' allegations of patent infringement. Rather than risk the potential delays to project completion or the costs of a lawsuit, MPG decided to remove the chainlink fencing when it remobilized in the Spring of 1996, and to replace the chain link fencing with its own wooden platforms which became available in the Spring of 1996.
36. In the Spring of 1996, due to the necessity of utilizing platforms rather than tarp-to-ground, MPG brought a third crew and a supervisor for that crew to the site which MPG had not anticipated at the time it bid the project. It took MPG approximately 8 days to install the wooden platforms. Most of the work had already been completed in that the cabling and rigging was essentially the same as that originally installed and only the chainlink fencing had to be substituted with wooden platforms. MPG submitted the cost of changing out the chainlink fencing and substituting the wooden platforms to the State in June, 1996.
37. Subsequent to the MPG contract, SHA amended its Standard Specifications at 413.03.08 to expressly require the containment of water generated in power washing. The specifications now read: "Water [generated in power washing] shall be contained unless otherwise directed by the Engineer."

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4 Until the water was tested during performance, there was no way for bidders to determine prior to bidding whether the water generated in power washing would produce concentrations of lead above the applicable action level.

Decision

A. Containment of Water During Power Washing

Appellant urges this Board to find that since it was unlikely that following use of a 95% mesh tarp (to strain the water to capture any paint chips dislodged by the power washing) there would be any actionable levels of lead remaining in the water, the Contractor should be compensated for any expense resulting from the necessity to contain that water when it did prove, by its and the State's tests, to contain actionable levels. For the following reasons, the Board declines to do so.

While the bid documents did not specifically require that all water used in power washing be contained[5], they were abundantly clear that Appellant was not to pollute the environment, and was to abide by Federal and State regulations in so doing.

At the time of bidding, MPG had performed water testing on other projects. In addition, the Contract called for water testing to be performed on this Contract, Spec. Prov. at 97, and called for the Contractor to employ an industrial hygienist that would be responsible for conducting testing and interpreting results. Contract, Tech Prov. 413.03.03 and Spec. Prov. 95-97. Lead was to be contained. MPG expected strict enforcement. MPG understood that it would have to collect water which tested at action levels.

The evidence at trial was that bidders in the Maryland bridge painting and cleaning industry have regularly viewed the cost of containing water as something for which they are financially responsible under contracts like the instant one. Thus, the view of both reasonable bidders and owners in the Maryland bridge painting and cleaning industry is that containing water which is not compatible with the environment is not a change to the contract for which an equitable adjustment is owed.

The contract was not ambiguous. The Board therefore finds that the Appellant is not entitled to an equitable adjustment for containment of the power washing water.

B. Method of Containment at Approach Spans

Appellant argues, and the Board agrees, that the undisputed trial evidence showed that the Contract contained no requirements or prohibitions on the method of containment. The Contract did not require the use of suspended platforms at the approach spans; similarly, the Contract did not prohibit the use of tarp-to-ground at the approach spans. Accordingly, the means and methods of attaining Class 3 containment, Level 1 emissions, were left up to the Contractor.

Respondent offered no evidence that MPG's as-planned method of containment at the approach spans was a method other than tarp-to-ground, or that MPG should have known that the

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5 The fact that the State later added a requirement to its Special Provisions for later contracts that all powerwashing water be contained, regardless of lead action level, is not dispositive of the issue in this case.

right of way under the Bridge was owned by the National Park Service and not the State of Maryland. Indeed, the evidence showed that the contract expressly stated that no permits were required, the State itself had no idea that the National Park Service owned the right of way under the Bridge, believing that the State owned the right of way, and Respondent presented no statute or regulation of the National Park Service prohibiting the use of impermeable tarpaulins on the ground to capture the residue of the abrasive blast operation in connection with a bridge cleaning and painting contract as planned by MPG.

Thus, the State admitted it was surprised on September 8, 1995 when the NPS asserted that it owned the right of way under the Bridge. At a meeting under the Bridge on September 8, 1995, the NPS advised Appellant and SHA for the first time that NPS would not permit MPG to use the tarp-to-ground method of containment at the approach span. However, the NPS representatives were insistent that MPG would not be permitted to drop its tarps to the ground at the approach spans (Spans 1, 4 and 5), because two other contracts had gone forward in the State of Maryland without the State ever obtaining a permit from the National Park Service.

The State rejected MPG's initial containment drawings which included plans for tarp-to-ground containment for spans 1, 4 and 5. The tarp-to-ground method of containment would have been acceptable to the State but for the insistence of the Park Service that the tarp-to-ground method of containment was not acceptable.

As a result of the NPS directive in September 1995 the State effectively directed MPG to use a platform containment system at the approach spans. Therefore, this Board finds that this directive constituted a constructive change order for which the Appellant deserves payment. Such payment is discussed further below.

The decision by the Appellant to attempt to utilize a chainlink system was the result of its evaluation and was not directed by the State. Likewise, the decision by the Appellant to later abandon portions of the system, regardless of its reasons, was based upon its assessment and judgment and was not directed by the State. The State never specified which type of containment system was to be used on any portion of this project, although it did make suggestions, and it did require that the containment system perform to certain standards enumerated in the Contract. The Appellant decided to utilize the chainlink system under Span 1 in order to comply with the State-directed change in containment method and this system performed satisfactorily at this location. The costs associated with the attempted construction of a containment system using chainlink fencing will be denied except for that portion utilized under Span 1.

Here, the State precluded Appellant's proposed use of tarp-to-ground containment for Spans 1, 4 and 5, although it was permitted at Spans 2 and 3 to accommodate railroad traffic under these spans. Appellant was thus required to come up with a different containment system involving above-ground platforms. When it could not timely utilize its own wooden platforms, Appellant initially chose to use a chainlink fencing platform. The record reflects that the chainlink fencing methodology was alleged to be patented and Appellant lacked a license or permit from the alleged patent holder to employ such a system.

The State's approval of the use of the chainlink system does not shield or protect the Appellant from applicable patent requirements. Appellant determined to abandon the chainlink system at Spans 4 and 5 rather than pay a license or permit fee when patent litigation threatened. The Appellant's decision to abandon the system rather than pay a fee was voluntary and the State is not liable for the cost of such voluntarily abandoned effort. Such effort is not made compensable by the State's approval of the chainlink fencing system. The contract (GP-7.03, the Green Book, Oct. 1993) places the risk of patent infringement on the contractor, not the State, and approval by the State of a certain methodology does not operate to shift such risk from the contractor to the State regarding an alleged patent infringement.

Appellant argues that the State knew about the alleged patent but failed to advise Appellant thereof and thus the Respondent's "superior knowledge" and failure to disclose was the proximate cause of Appellant's selection of the chainlink fencing methodology. The Board rejects such argument. Patent information is in the public domain and the superior knowledge doctrine has been held not to apply to information in the public domain. See Arnold M. Diamond, Inc., ASBCA No. 22733, 78-2 BCA 13, 447(1978). The Board will enforce the provisions of GP-7.03 regarding the Contractor's responsibility for alleged patent infringement. Appellant is thus not entitled to any costs involved in the collapse and replacement of the chainlink system at Spans 4 and 5 due to heavy rain, even assuming arguendo that the heavy rain was not foreseeable and the collapse not preventable by use of ordinary diligence by the Contractor.

On or about October 21, 1995, the chainlink system collapsed, allegedly as the result of Appellant's failure to install a system which would divert rainwater from the bridge surface off of the chainlink platforms. The State has no responsibility to compensate the Appellant for the installation, repair, reinstallation or removal of the failed chainlink system. The State does, however, have a responsibility to compensate the Appellant for that portion of the chainlink system that was successfully used under Span 1.

Quantum

We turn now to the issue of damages that Appellant is entitled to recover as a result of the Board's determination that the State's directive to use a containment method other than the planned tarp-to-ground system at approach Spans 1, 4 & 5 constitutes a change to the Contract. Numbers are rounded to the nearest dollar. The Board will focus on the actual costs that Appellant incurred to erect a platform containment system as the appropriate focus to cost out this constructive change to the contract. However, as discussed above, the costs associated with the attempted construction and dismantling of a containment system using chainlink fencing will be partially denied because of the patent infringement issue.

The Contractor is entitled to costs arising out of a change to the Contract based on the actual costs incurred to perform the changed work above what the contractor estimated it would cost in its bid had the work not been changed. However, such costs involved in the changed work must be reasonable and the methodology used to accomplish the changed work must also represent a reasonable attempt to actually complete the work involved in the change. See Granite Construction Company, MDOT 1014, 1 MSBCA ¶66 (1983) at pp. 32-34; Total cost claims have been rejected

where some of the costs are either unreasonable and/or the fault of the contractor. Star Contracting Co., ASBCA Nos. 27848, 27890, 30501, 89-2 BCA 21,587 at 108,701 (1989) (rejecting total cost claim where record showed that at least part of the cost overruns resulted from poor workmanship by the contractor); Bruce-Andersen Company, Inc., ASBCA No. 31663, 89-3 BCA 22,013 at 110,722-25 (1989) (refusing to compensate contractor based on total cost claim where inefficient method was selected by contractor).

The Board must determine the cost incurred by Appellant to erect and take down the wooden platform containment systems on Spans 4 and 5 and the cost of the chainlink system that was utilized under Span 1. Thus, the costs to which Appellant is entitled in this appeal are limited to the difference between the reasonable cost of Appellant's intended containment system as bid, assuming use of the tarp-to-ground methodology (which methodology was not precluded by the bid documents) and the actual reasonable cost of the platform system eventually employed to perform the work; i.e. the difference between the tarp-to-ground containment method as bid for approach Spans 1, 4 and 5 and the platform containment finally employed due to the change by the owner in precluding the tarp-to-ground methodology.

The amount of the change in containment claim as submitted by Appellant was divided into four time periods. After reviewing the Proof of Cost analysis developed by Rubino and McGeehin ("R&M"), the State's accounting expert, Appellant reduced its claim to $234,594. The Board has rounded costs to the nearest dollar and has used costs as further reduced by the Appellant with supporting documentation during the hearing.

Appellant Claim Period and Claim Amounts

Claim Period	Amount of Claim
(No. 1) Sept. 23 to Oct. 8, 1995	$ 61,262
(No. 2) Oct. 18 to Nov. 10, 1995	$126,908
(No. 3) Apr. 10 to June 11, 1996	$ 53,085
(No. 4) June 17 to Oct. 20, 1996	$ 5,361
Tarp-to-ground as bid	$(6,023)
Adjusted October 20, 1997 total cost change in containment method	$234,594

Testimony at the hearing indicated that during claim period No. 3 (April 10 - June 11, 1996), Appellant installed and removed wooden platforms at Spans 4 and 5. The chart below compares the cost for claim period No. 3 as filed and revised by the Appellant, and the cost for the same period as determined by the Rubino and McGeehin analysis (without regard to entitlement).

Detail of the Claim cost for Claim Period No. 3

	Appellant's Claim	R&M Report
Equipment:		
Owned:	$ 5,555	$ 1,340
Rented:	$15,675	$ 8,790
Total:	$21,230	$10,130
Labor	$18,855	$15,569
Small Tools	566	-0-
Total Direct Cost:	$40,651	$25,499
Overhead/profit, Ins. & Bond (based on 24.77% of Direct Cost):	$10,069	$ 6,317
Total:	$50,720	$31,816

The difference between Appellant's and R&M's calculations is accounted for by cost of equipment computation, allowed labor costs, and an allowance for small tools.

The cost figures provided indicated that the Appellant has calculated some of its equipment costs based on Blue Book rates. This Board has recognized that use of Blue Book rates is appropriate under certain circumstances, especially regarding small companies with unsophisticated record keeping. See Dick Corporation and Sofis Company, Inc., MSBCA 1422, 4 MSBCA ¶350(1994), aff'd Civil Action No. 940550003 CL 176478 (Cir. Ct. Balto. City 23 Aug. 94), Aff'd per curiam, No. 1839 [unpublished] (Md. Ct. Spc. App. Sept. 14, 1995) reconsid. den; ___; Jackson Bell, MSBCA 1851, 5 MSBCA ¶392 (1996). We also note that the State here approved payment of change orders with identical Blue Book rates as that sought by Appellant for the identical equipment at issue herein. The Board prefers, however, that actual costs be documented, and we will not permit use of Blue Book rates for equipment where it is possible to capture actual costs based on Appellant's record keeping.

The record in this appeal reflects that the actual costs for the equipment could be determined as well as the cost of money, depreciation, fuel, oil, repairs, and risk insurance. These costs were used to develop an hourly rate for each unit of equipment. Where appropriate, this computed rate for each piece of equipment was multiplied by the number of hours utilized (production and/or standby) as reported by the Appellant, to determine the actual cost allowable for each unit.

Certain pieces of rented equipment were rented from one of the Appellant's owners by the Appellant. While we share Respondent's concern, as voiced by Mr. McGeehin, about whether such arrangement represents an arms length transaction, we do not find that the rental arrangement was improper or precluded by law or regulation. See COMAR 21.09.01.17.

Included in the labor cost as provided by the Appellant is the cost of certain supervision. The State challenged inclusion of that cost stating that it is already included in the overhead/profit calculation. To include it here would be an improper duplication.

The Rubino and McGeehin report did not include any allowance for "Small tools". This item would include the cost of expendable small tools and various other small cost items consumed in the construction the containment system.

Costs for Overhead/Profit, Insurance and Bond were calculated based on a percentage of the direct cost amount. The Board did not find these costs to be unreasonable and utilized that same percentage (24.77%) as shown in the Appellant's claim and the Rubino Testimony indicated that wooden platforms for span 4 and 5 were installed and removed during claim period 3. In order to arrive at an equitable adjustment which accurately reflects the actual cost incurred by the Appellant, a number of adjustments must be made to the R&M Report for the cost Period No. 3 (April 10 to June 11, 1996). An additional cost must be included to compensate the Appellant for expenditures related to the installation and removal of the chainlink platform system which was utilized for Span 1. Also, the cost of redesign of the containment system for Spans 1, 4 and 5, which was actually incurred in Period No. 2 must be included.

The chart below indicates the Board's adjustments to the R&M Report which were necessary to determine the cost to the Appellant caused by the State-ordered change in the containment method.

SUMMARY OF ALLOWABLE COST

$31,816	Total allowable cost assuming full entitlement as determined by R&M
A. (6,865)	3 days not allowable
B. 1,856	Allowance for "working foreman" owner
C. 542	Small tool allowance ($10,844 X 5%)
D. 7,951	Cost of chainlink system under Span 1
E. 7,656	Cost to redesign containment system
F. (6,023)	Cost of containment system for Spans 1, 4 and 5 as included in Appellant's bid
$36,933	Total allowable cost

Adjustment A reduces the number of claim days from eleven (11) to eight (8). The erection of the wooden platforms was performed over eight working days during the period April to May, 1996. Of the eleven days, the first two days were related to removal of the chainlink fence, and a day at the end also related to removal of the chainlink. According to Mr. McGeehin, the figure of $24,951 relates only to Spans 4 and 5.

Adjustment B reflects the Board's disagreement with Rubino and McGeehin's decision to reduce field supervision costs being charged directly to this project. At issue is the $1,856 claimed for Philip Chrysakis' services as a "working foreman". This amount represents that portion of his payment related directly to the mandated change order. Mr. Chrysakis was one of the owners of the company and was paid $1,100 a week for his services on this job. Mr. Skandalaris testified that in the Spring of 1996 Mr. Chrysakis came as a working foreman and worked on the approach Spans 4 and 5. The State argues that such costs are included in the Overhead/Profit calculations and should not be included here. While the Board agrees it is normally appropriate that the cost for home office

personnel not be charged directly to a project but rather that appropriate portions of their cost be allocated to the project as home office overhead, there are certain conditions under which such charges could be charged directly to a project. Such cost is allowable if it can be demonstrated that the person did perform a service on the project for which the cost would normally be charged directly to the project as opposed to charging such cost through the overhead account. In this situation, the Board finds that the salary paid to the owner as a "working foreman" was a reasonable amount for such services and further finds that such field supervision was actually provided by that individual and that such services were reasonably necessary. The record reflects that there are not a large number of companies engaged in the dangerous and specialized work of cleaning and painting highway bridges over water. Since Appellant would have had to pay someone else an equivalent amount had it not used an owner of the company to provide the service, we allow the claimed amount of $1,856.00 for this individual.

Adjustment C reflects the amount due the Appellant as an allowance for small tools for which Appellant claims $566. Rubino and McGeehin failed to allow any amount for this item. An allowance for small tools (which may include other consumables on a construction project) is not unusual and the Board feels it appropriate to allow five (5) percent of direct labor (Wages per Schedule 3 of $8,988 plus $1,856 working foreman fee, times 5%.) for the cost of small tools.

The Board has also determined to award an equitable adjustment to Appellant for the cost of the chainlink platform at Span 1 where all the work was performed using such a containment system, as shown in Adjustment D. The record does not permit the Board to determine with precision what portion of total cost relating to the chainlink methodology only applies to the construction and subsequent taking down of the chainlink platform at Span 1. The Board has determined that it is appropriate to employ the square feet methodology suggested by Respondent's expert in claims analysis, Mr. Erick Schwartz, to capture Appellant's approximate costs related to the change in containment system for Span 1.

Mr. Schwartz derived a per square foot cost of $6.77 for work related to the chainlink platform at Span 1. Mr. Schwartz derived this square foot cost by analyzing the costs to install (one time) and remove chainlink fencing at Spans 1, 4 and 5 as such costs were developed in part by R&M and in part as claimed by Appellant. Installation occurred in the September, October 1995 time frame (Period 1 in Appellant's Proof of Costs) and removal occurred in the April, June 1996 time frame (period 3 in Appellant's Proof of Costs). The chainlink fence containment methodology costs for these two periods as set forth in Respondent's Ex. 45 were $42,144.00 Period 1 and $4,206.00 for Period 2 for a total cost of $46,350.00. The total square footage of Spans 1, 4 and 5 was 6,845 sq. ft. Therefore the cost of the work on a square foot basis was $6.77 ($46,350.00) 6,845 = $6.77). Since some costs shown are already included in the calculations provided by R&M and utilized by the Board, the total cost has been adjusted to $42,050. This produces a new square foot cost of $6.14. The total square footage of Span 1 was 1,295 sq.ft. Therefore the total costs related to erection and removal of a chainlink fence platform type containment system at Span 1 were $7,951.

Since the State mandated that change in the containment system under Spans 1, 4 and 5, it was necessary for the Appellant to redesign the containment systems for those Spans. These costs

are the responsibility of the State, and are reflected in Adjustment E. R&M indicated the cost of such services were $6,136 to which Overhead & Profit, Bond and Insurance costs in the amount of $1,520 must be added for a total of $7,656.

Adjustment F deals with a necessary correction regarding the containment system for Spans 1, 4 and 5. The contract required that some sort of containment system be provided for these three spans, and Appellant included in his bid $6,023 for such work. Since the $31,816 includes all cost for the containment system required for these spans, the Appellant is only entitled to additional cost actually incurred as a result of the mandated change in the containment system. Therefore, the amount of Appellant's bid must be subtracted to determine the additional monies resulting from the change.

The Board awards to the Appellant $36,933 as an equitable adjustment to its Contract. The Board in its discretion, declines to award pre-decision interest.

Wherefore, it is this 14th day of July, 1998, hereby ORDERED, that the appeal is denied in part and granted in part, and that the Appellant be awarded $36,933.00 as an equitable adjustment to its Contract.

Dated: July 14, 1998

Candida S. Steel
Board Member

I concur:

Robert B. Harrison III
Chairman

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 1985, appeal of MPG Construction, Inc., under SHA Contract No. F-208-709-780

Dated: July 15, 1998

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Mary F. Priscilla