BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MACRO MANAGEMENT, INC.	)	
	)	Docket No. MSBCA 1429
Under DNR Project No. P-020-864-004	)	

December 29, 1989

Reformation - A material mutual mistake of fact existed at the time the parties entered into the contract. To rectify such mutual mistake, reformation was available for consideration as a remedy at the agency level. The agency declined to reform the contract and Appellant appealed to this Board. Reformation, however, is an equitable remedy and the Board having no equitable powers may not grant the equitable relief of reformation. Nevertheless, in the instant appeal the Board found that a constructive change had occurred under the changes clause of the contract when, despite the mutual mistake, the agency ordered the contractor to perform in a particular manner. The Board then concluded that Appellant was entitled to an equitable adjustment as a result of the change.

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APPEARANCE FOR RESPONDENT: Michael P. Kenney
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DECISION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for an equitable adjustment concerning use of a patented system in the construction of a playground at Sandy Point State Park.

Findings of Fact

1. On or about November 2, 1987, Appellant was awarded a contract with the Department of Natural Resources (DNR) to install playground equipment and a fiber system play area at Sandy Point State Park. The contract in the amount of $49,750.00 was administered by the Department of General Services (DGS).

2. The dispute centers around installation of the fiber system play area which was specified in the bid documents as the "Fiber system as produced by Robert Godfrey Ltd. or approved equal". The Robert Godfrey Ltd. system (hereinafter FIBAR System) consisted of a systematic arrangement of specified materials (wood chips, filter cloth, stone) and a drainage system for the playground surface.

3. Prior to submitting its bid, Appellant did not request approval for any system or materials that were purported to be equal to the FIBAR System. After the contract was executed, Appellant submitted a request to DNR to substitute certain specified materials and a systematic arrangement of such materials that were purported to be equal to the FIBAR System.

4. Subsequent to the award of the contract, DGS[1] was made aware by an attorney representing Robert Godfrey, Ltd. (Godfrey) that the FIBAR System was patented and that Godfrey was the exclusive licensee under the patent. DGS was threatened with a patent infringement action if it approved a system for use that infringed the FIBAR System patent. Accordingly, DGS declined to approve Appellant's proposed substitution on grounds that the proposed substitution would have infringed the FIBAR System patent.

5. Appellant was thereafter afforded the opportunity to propose a different system that would not be considered by DGS to infringe the FIBAR System patent. Appellant was unable to immediately propose such a satisfactory substitute system, and because of concern about delay in project completion DGS directed Appellant to furnish and install the FIBAR System. Appellant then obtained a license from Godfrey and installed the FIBAR System.

6. Appellant filed a claim with DGS for the alleged difference in cost between the substitute system it proposed to use and the FIBAR System. From the denial of such claim, Appellant took the instant appeal.

7. Based on the record, the Board finds that Appellant has demonstrated that it would reasonably have been able to comply with contract requirements respecting warranty, insurance and testing for an as equal system. The Board further finds that the system proposed by Appellant as a substitute was solely rejected because of DGS concern over patent infringement. The record also reflects, and the Board so finds, that neither DGS, DNR nor Appellant was aware when the solicitation was issued or at the time of award that the FIBAR System was patented.

8. After the patent issue surfaced, DGS in good faith gave Appellant the opportunity to propose a different non-infringing system. However, following the hearing of the appeal, the Board concludes that the FIBAR System patent was

[1] The ultimate authority in matters of contract administration to include approval of a substitute fiber system play area resided with DGS.

so all-encompassing that it was not possible to propose an as equal. Thus the specifications in effect mandated use of the FIBAR System in construction of the playground.

Decision

When the instant procurement was advertised for bid neither Appellant nor the State were aware that the FIBAR System was patented. Because of the "or approved equal" language of the specification, bidders and the State were mutually of the understanding that another "equal" system might be proposed for approval. In fact this understanding was incorrect because the all-encompassing nature of the FIBAR System patent made substitution of an equal for all practical purposes impossible. To this degree therefore a mutual mistake existed at the time of bidding concerning the effect of the as equal specification. At the time the contract was entered into, both Appellant and the State assumed incorrectly, i.e. mistakenly, that an equal system could in fact be submitted and approved.

Because of the mutual nature of the mistake[2] herein rescission or reformation was available at the agency level for consideration as a remedy. See Md. Port Adm. v. Brawner Contracting Co., 303 Md. 44 (1985) and cases cited therein at pp. 55-59. Compare American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (1985) at pp. 12-15. Appellant elected not to seek rescission, but instead to perform and thereafter seek an equitable adjustment pursuant to the remedy granting provisions of the General Procurement Law. In so doing, Appellant in effect asked the State to reform the contract due to a mutual mistake of fact, i.e., that it was not possible, contrary to the belief of the parties at the time the contract was entered into, to provide a substitute system for the patented FIBAR System, and compensate it for the difference in price between its bid as calculated on the cost of a cheaper substitute and the actual cost of the FIBAR System. The State by denying Appellant's claim declined to reform the contract and Appellant appealed to this Board seeking the same relief. This Board, however, has no equitable power and such powers as it has to resolve disputes in the context of a contract claim are narrowly defined by statute and regulation. Md. Port Adm. v. Brawner Contracting Co., supra. Reformation is

[2] In another context involving mistake, it has been established that a contractor may not prevail if its claim is for additional compensation based upon a unilateral mistake in the compilation of its bid. COMAR 21.05.02.12D; Md. Port Adm. v. Brawner Contracting Co., 303 Md. 44 (1985).

an equitable remedy and is not otherwise a power that has been conferred upon this Board. Therefore, the Board may not grant the equitable relief of reformation, and the appeal must be denied on such grounds.

However, as noted in the Findings of Fact, DGS instructed Appellant to proceed with the FIBAR System when it became apparent that the practical reality was that the FIBAR System had to be used since it was not possible to provide in any reasonable timeframe an equal that would not infringe the FIBAR System patent. We find this action to constitute a constructive change to the contract under the changes clause of the contract. This Board does have authority to award an equitable adjustment for additional cost of performance that stems from a change under the changes clause of a contract, and the Board finds Appellant to be entitled to an equitable adjustment for any additional costs involved in use of the FIBAR System. We emphasize that our determination that Appellant is entitled to an equitable adjustment as a result of the mutual mistake of the parties should not be viewed as relaxing the prohibition set forth in COMAR 21.05.02.12D that there may be no relief relative to a change in price for a unilateral mistake or error of judgment in compilation of a bid not discovered until after award.

At the hearing, the parties agreed that the State would review cost information to be supplied by the Appellant following the hearing concerning the actual costs it asserted that its proposed use of a substitute system would have entailed compared to the cost of the FIBAR System. Therefore, the Board sustains the appeal as to entitlement and remands the matter to the parties for consideration of quantum.