BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Odyssey Contracting Company	)	
	)	Docket No. MSBCA 1617 and 1618
Under Maryland Transportation Authority Contract No. TFA2-1260-20	)	

December 18, 1992

Bids - Addendum to IFS - Affect - Amendments to Invitation for Bids may only be accomplished by addenda not by pre-bid conference minutes. Compare COMAR 21.05.02.07 with COMAR 21.05.02.08.

Contract Interpretation -
Specifications and Drawings - Words Given Ordinary Meaning - The Board will apply the ordinary everyday meaning of words used in a specification to ascertain the meaning of the specification.

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OPINION BY CHAIRMAN HARRISON

Appellant has taken two appeals from the absence of a procurement officer's decision on two claims and the withholding of liquidated damages involving the subject contract to blast clean, prime and paint the superstructure of the Thomas J. Hatem Memorial Bridge over the Susquehanna River on Route 40 in Cecil and Harford Counties, Maryland. The appeals have been consolidated by the Board for hearing and decision. At the request of the parties the appeal has been limited to issues of entitlement only.

Findings of Fact

A. Additional Quantities Claim

1. In February 1989, the Maryland Transportation Authority (MdTA) entered into the subject contract with Appellant for the cleaning and painting of the Thomas J. Hatem Bridge over the Susquehanna River.

2. Special Provision 1-2 "Specifications" incorporated by

reference into the contract the State of Maryland, State Highway Administration, "Standard Specifications for Construction and Materials" dated January 1982 including the General Provisions for Construction Contracts and all supplements to these specifications issued up to bid day.

3. The project required the contractor to blast clean, prime and paint the superstructure of the bridge. Containment procedures were required in order to minimize the escape of blast and paint materials from the surface preparation cleaning operation. The contractor was required to collect, store and remove blast debris and there were bid items for the cost of storage and disposal of industrial and hazardous waste generated which are discussed in more detail below.

4. A pre-bid meeting (conference) was held on July 26, 1988.[1] At this meeting representatives from MdTA answered questions regarding the project. Mr. Theodore Kartofilis, Appellant's project manager, attended the meeting. Prior to bid opening, summary minutes of the pre-bid conference were

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[1] COMAR 21.05.02.07 provides as follows concerning pre-bid conferences:

> Pre-bid conferences may be conducted by the procurement officer or his designee to explain the procurement requirements. They shall be announced to all prospective bidders who were sent an invitation for bids or who are known by the procurement officer to have obtained the bidding documents. The pre-bid conference should be held long enough after the invitation for bids has been issued to allow prospective bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the pre-bid conference results in the preparation of bids. Attendance at a pre-bid conference may be encouraged, but may not be made mandatory. Nothing stated at the pre-bid conference may change the invitation for bids unless a change is made by the procurement officer by written amendment. If a summary of the conference is made, it shall be supplied to all prospective bidders who were sent an invitation for bids or who are known by the procurement officer to have obtained the bidding documents. If a transcript is made, it shall be a public record.

supplied as required by COMAR 21.05.02.07 to prospective bidders including Appellant.

5. The summary minutes of the pre-bid conference contained the following question and response:

"Are the scuppers and forms[2] beneath the bridge deck to be painted?"

"This will be addressed in Addendum No. 2."

Addendum No. 2 [3]addressed this matter of the " scuppers and forms beneath the bridge deck" as follows:

"SP 2-6 PAINTING STRUCTURAL STEEL

SP 2-6.01 Description

This work consists of the surface preparation and subsequent painting of all existing superstructure steel and existing steel bents; including truss members and bracing, girders, stringers, floor beams, diaphragms, bearings, catwalks, deck pans, expansion dams[4], scuppers, ladders, and all other steel appurtenances for the bridge.

Many of the structural steel members on the existing structure were strengthened by adding steel plates and new structural members in 1987 and 1988 under

Contract No. TFA-2-1250-20
Rehabilitation of Susquehanna River Bridge at
Havre de Grace, Maryland
Thomas J. Hatem Memorial Bridge.

These plans consist of Title Sheet and Sheets 1 thru 18. All of the new steel installed under Contract No. TFA-2-1250-

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[2] Scuppers are holes in the bridge deck which serve as outlets for water runoff. The forms referred to are commonly known as deck pans (or deck forms) which are steel forms used to support the concrete of the roadway while the concrete is being poured.

[3] Addenda are written amendments to the invitation for bids. See COMAR 21.05.02.08.

[4] Expansion dams are openings between the spans of a bridge covered by steel plates allowing for contraction or expansion of the bridge.

20 was given a shop or field coat of zinc-rich primer. This prime coat has deteriorated causing rust to form on the surfaces of a majority of the new steel members. All of the steel installed under Contract No. TFA-2-1250-20 shall be blasted clean to conform to SSPC-SP 6, Commercial Blast Cleaning; and painted in accordance with this specification.

All structural steel in the bridge including underside of steel grid bridge deck and deck pans shall be cleaned and shall receive a primer coat and two finish coats.

See SP 2-7 and SP 2-8 for requirements for removing lead paint.

The Contractor shall schedule his work sequence in such a way that all work prior to January 1, 1990 shall be performed from below the bridge structure. No lane closures will be permitted prior to January 1, 1990."

6. SP 2-6.01 originally provided prior to issuance of Addendum No. 2 as follows:

"SP 2-6 PAINTING STRUCTURAL STEEL

SP 2-6.01 Description

This work consists of the surface preparation and subsequent painting of all existing superstructure steel and existing steel bents; including truss members and bracing, girders, stringers, floor beams, diaphragms, bearings, catwalks, ladders, and all other steel appurtenances for the bridge.

Many of the structural steel members on the existing structure were strengthened by adding steel plates and new structural members in 1987 and 1988 under

Contract No. TFA-2-1250-20
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These plans consist of Title Sheet and Sheets 1 thru 18. All of the new steel installed under Contract No. TFA-2-1250-

20 was given a shop or field coat of zinc-rich primer. This prime coat has deteriorated causing rust to form on the surfaces of a majority of the new steel members. All of the steel installed under Contract No. TFA-2-1250-20 shall be blasted clean to conform to SSPC-SP 6, Commercial Blast Cleaning; and painted in accordance with this specification. All painting (3 coats) of steel installed under Contract No. TFA-2-1250-20 must be completed prior to November 1, 1988.

All structural steel in the bridge shall be cleaned and shall receive a primer coat and two finish coats.

See SP 2-7 and SP 2-8 for requirements for removing lead paint."

7. Appellant testified that it based its bid for this contract on the assumption that the surface preparation and painting work to be performed involved a total of 1.7 million square feet of bridge[5]. The summary minutes referenced above provided in this regard the following question and response: "What is the total area of steel to be painted? Approximately 1.7 million square footage of structural steel."

8. In early 1991, during winter shut down, Appellant engaged in a quantity take off to estimate the amount of work required to be performed. At that time Appellant had cleaned and painted approximately 1.5 million square feet of bridge and estimated as a result of the take off that an additional .6 million square feet of bridge remained to be cleaned and painted.

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[5] Appellant did not do a quantity take off of the work to be performed prior to submitting its bid, choosing instead to rely on the 1.7 million square foot figure. The schedule of prices in the bid proposal form provided as lump sum bid items: mobilization, engineer's office, maintenance of traffic, painting structural steel and blast waste containment system. Arrow panel, temporary traffic signs, respirators, protective clothing, storage of hazardous waste and hauling and disposal of industrial waste were estimated quantity bid items.

9. By letter dated February 15, 1991, Appellant advised MdTA that it had "sandblasted approximately 1.5 million S.F. of structural steel and... painted a slightly lesser quantity" and that a change order would have to be issued for Appellant to proceed beyond cleaning and painting 1.7 million square feet.

10. MdTA denied Appellant's request for a change order by letter dated March 12, 1991 and directed Appellant to clean and paint the remainder of the bridge.

11. Following issuance of the March 12, 1991 letter by MdTA, discussions over the issue ensued between the parties which failed to resolve their differences; and by letter dated May 21, 1991, Appellant reiterated its position that it was entitled to compensation for the additional costs and time associated with cleaning and painting the area of bridge beyond 1.7 million square feet and requested that MdTA implement the force account procedures of the contract to verify the additional costs being incurred. This letter concluded with a request for a final decision of the Procurement Officer.

12. MdTA did not respond to Appellant's letter of May 21, 1991 and did not implement force account procedures.

13. The actual area of bridge required by the specifications to be cleaned and painted was approximately 2,089,000 square feet (sometimes referred to herein as 2.1 million square feet).

14. Bid Item Nos. 405 and 406 relating to waste storage and disposal originally appeared as follows:

ITEM NOS.	APPROXIMATE QUANTITIES	DESCRIPTION OF ITEM AND PRICES BID (IN WRITTEN WORDS)	UNIT PRICE DOLLARS	UNIT PRICE CTS.	AMOUNTS DOLLARS	AMOUNTS CTS.
405	3,500	TONS OF BLAST WASTE STORAGE AT _____ PER SHIFT USE	_____	____	_____	____

406	3,500	TONS OF HAULING AND DISPOSAL OF INDUSTRIAL WASTE AT _____ PER TON	_____	_____

These Bid Item Nos. were amended in Addendum No. 2 to provide as follows:

ITEM NOS.	APPROXIMATE QUANTITIES	DESCRIPTION OF ITEM AND PRICES BID (IN WRITTEN WORDS)	UNIT PRICE DOLLARS CTS.	AMOUNTS DOLLARS CTS.
405	3,500	TONS OF STORAGE OF HAZARDOUS WASTE AT _____ PER TON	_____	_____
406	3,500	TONS OF STORAGE HAULING & DISPOSAL OF INDUSTRIAL WASTE AT _____ PER TON	_____	_____

15. The record reflects that approximately 7,686.98 tons of hazardous and industrial waste were generated in performance of the work.[6]

16. On December 6, 1991, Appellant filed an appeal with this Board from the absence of a decision on its May 21, 1991 letter.

B. Paint Substitution Claim

17. After the subject contract was entered into and work had progressed, Appellant's paint supplier (manufacturer) significantly raised its prices in March of 1990 and again in the spring of 1991. Despite the increase in prices Appellant painted the entire bridge as required using the original manufacturer's paint. Appellant does not argue or contend

[6] Hazardous waste contributed approximately 6,721.09 tons and industrial waste contributed approximately 965.89 tons of the waste generated.

that the increased cost to it of the original manufacturer's paint made completion of the work with such paint a contractual impossibility and, as noted, Appellant completed the work. Appellant did request permission to substitute another manufacturer's paint by letters dated May 11, 1990 and May 24, 1991. Appellant's May 11, 1990 letter was simply a request to change paint manufacturers due to the 1990 price increase. Appellant's May 24, 1991 letter provided specific commitments relative to accomplishing the work with a different manufacturer's paint and requested a procurement officer's final decision pursuant to the Disputes Clause, GP-5.15.

18. SP 2-6.02 Materials provided (both before and after issuance of Addendum No.2):

SP 2-6.02 Materials

The three coat paint system for all structural steel shall conform to the following:

1. The primer coat shall be an organic zinc rich primer as specified in Section 910.01.03 of the Standard Specifications.

2. The intermediate coat or tie coat shall be vinyl, and shall be a green color as approved by the Engineer.

3. The finish coat shall be vinyl and shall be a light grey or blue grey color as approved by the Engineer.

4. All of the paint for this paint system (zinc and vinyl) shall be supplied by the same manufacturer.

19. Appellant's initial May 11, 1990 request to use a paint supplied by another manufacturer was denied by MdTA in a letter dated June 7, 1990 which provided in relevant part as follows:

> Your request to change paint manufacturers is denied. The Maryland Transportation Authority has encountered numerous problems in the past when the use of more than one paint manufacturer was allowed on a project. This

contract included specific language that would not allow more than one manufacturer.[7]

20. MdTA did not respond to Appellant's May 24, 1991 letter and Appellant appealed to this Board from an absence of a procurement officer's decision on December 6, 1991.

21. Structural steel includes truss members and bracing, girders, stingers, floor beams, diaphragms and bearings. Structural steel does not include catwalks, ladders, expansion dams, deck pans and scuppers. Steel bents are part of the substructure rather than the superstructure of a bridge. Structural steel is found in the superstructure area which is the area above the substructure demarcated by the bearing pads on the piers.

22. Expert witnesses[8] in the field of industrial protective coatings testified that it was technically feasible to use the paints of different manufacturers at proximate locations on the bridge without creating a significant risk of paint failure at those areas where the two different manufacturer's paints overlap or tie in provided a feathering or step down technique[9] was used to interface the area of overlap. Dr. Smith, however indicated that finish coat paints of different manufacturers may or may not weather the same over time, and

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[7] In this same letter MdTA did approve a separate request by Appellant to change the color of the zinc primer to green (using the same manufacturer's paint).

[8] Mr. Kenneth A. Trimber for Appellant; Dr. Lloyd Smith for Respondent.

[9] A feathering or step down technique in an area of overlap is to first apply primer, then to apply the first coat (intermediate) a few inches back from the primer, and then to apply the next coat (finish) a few inches back from the first coat to achieve a step off so that the next system would knit together primer over primer, intermediate over intermediate, finish over finish to avoid an abrupt butt joint where the two systems meet.

thus there is a chance of color variation after weathering.

Decision

A. Timeliness

MdTA asserts that Appellant's claims (additional quantities claim, paint substitution claim) are untimely pursuant to the changes clause and GP-5.14 and GP-5.15 of the contract and thus the Board lacks jurisdiction over the appeals. The contract provisions read literally make the Chief Engineer of the State Highway Administration (SHA) the procurement officer for purposes of dispute resolution. This apparently unintended result comes about by virtue of use by MdTA of standard interim SHA contract provisions. We conclude that filing with MdTA officials satisfies the contract, regulatory and statutory requirements for filing claims with the procurement officer. We also find that Appellant timely filed its claims pursuant to the thirty day claim filing provisions of Sections 15-217 and 15-219 of the State Finance and Procurement Article, COMAR 21.10.04.02 and the contract when it made its request for a procurement officer's final decision on the additional quantities claim by letter dated May 21, 1991 and made its request for a procurement officer's final decision on its paint substitution request by letter dated May 24, 1991. We also find that Appellant timely appealed to this Board from the lack of a procurement officer's decision on its May 1991 requests on December 6, 1991 pursuant to the 180 and 30 day requirements related to appeals in contract disputes set forth in the State Finance and Procurement Article and COMAR. MdTA reliance on Dick Corporation and Sofis Company, Inc., MSBCA 1472, 3 MICPEL ¶ 267 (1991) is misplaced. The facts found by the Board were different from the facts found herein and the Board was reversed by the Circuit Court for Baltimore County concerning its determination that the claim was untimely (the case is presently pending appeal in the Court of Special Appeals).

B. Additional Quantities Claim

Appellant notes that under Maryland's General Procurement Law the State may be liable to its contractors for inaccurate representations in the bid documents regarding work to be performed where detrimental reliance has occurred. See Raymond International, Inc. v Baltimore County, Maryland, 45 Md. App. 247 (1980); Martin G. Imbach, Inc., MDOT 1020, 1 MICPEL ¶ 52 (1983); Structural Preservation Systems, Inc., MSBCA 1440, 3 MICPEL ¶ 234 (1989).

Appellant argues that MdTA represented that the total area of bridge to be cleaned and painted was approximately 1.7 million square feet. The actual area required to be cleaned and painted was approximately 2.1 million square feet and Appellant asserts that this difference between the 1.7 million square foot alleged representation and the actual 2.1 million square feet of work represents either a constructive change, differing site condition or misrepresentation. It bases its argument on the question and answer given at the pre-bid meeting of July 26, 1988. What was actually said at the pre-bid meeting is in dispute. Appellant asserts that there was an unequivocal representation that the total area of steel to be painted was 1.7 million square feet. MdTA argues that the representation at the pre-bid meeting was 1.7 million square feet of structural steel. The Board will not attempt to weigh conflicting testimony concerning what was said. The Board will only consider the wording of the pre-bid meeting minutes. While pre-bid conference minutes may not amend the bid documents, such minutes[10] are required by COMAR 21.05.02.07 to be provided to prospective bidders. The minutes of the pre-bid meeting, herein, were provided to prospective bidders including Appellant prior to bid opening.

The minutes provide in response to the question "[w]hat is the

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[10] The pre-bid meeting was not transcribed. Bidders were provided summary minutes prepared from notes taken by a MdTA employee at the meeting.

total area of steel to be painted?" "[A]pproximately 1.7 million square footage of structural steel." We find no evidence of an attempt by MdTA to deceive or to mislead bidders by the wording of the summary minutes. The words "structural steel" in the minutes were interpreted by Appellant to encompass all of the superstructure steel. In this regard Appellant observes that the description of the work under SP 2-6 PAINTING STRUCTURAL STEEL both before and after issuance of Addendum No. 2 similarly provided that: "This work consists of the surface preparation and subsequent painting of all existing superstructure steel and existing steel bents; including, truss members and bracing, girders, stringers, floor beams, diaphragms, bearings [and] catwalks [and] ladders, and all other steel appurtenances for the bridge." Thus the work, as described in the special provisions, at all times included both structural steel items (i.e. truss members and bracing, girders, stringers, floor beams, diaphragms and bearings) and non structural steel items (i.e. catwalks and ladders)[11]. SP 2-601 both before and after Addendum No. 2 calls for "surface preparation and subsequent painting of all existing superstructure steel and existing steel bents...." Addendum No. 2 also states that "[a]ll structural steel in the bridge including... deck pans shall be cleaned and shall [be painted]". The words "structural steel" have a specific meaning commonly understood in the construction industry that includes certain items and excludes others.[12] Clearly a question is raised by SP 2-601 as originally issued as to whether the deck pans, expansion dams and scuppers which are non structural steel items in the bridge

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[11] The work involved in the non-structural steel items originally included (catwalks and ladders) was de minimus in relation to the structural steel work.

[12] See AISC Code of Standard Practice for Steel Buildings and Bridges, 1976 and 1986 editions (Respondent's Exs. 15 and 16).

superstructure were also to be considered part of the work (i.e. whether the deck pans, expansion dams and scuppers were to be prepared and painted) under either the "existing superstructure steel" language or the "all other steel appurtenances for the bridge" language of the provision.

The summary minutes of the pre-bid conference reflect that a question was asked at the pre-bid meeting concerning whether the scuppers and forms (i.e. deck pans) beneath the bridge deck were to be painted. The answer in the minutes to the question was "This will be addressed in Addendum No. 2". Such a response indicates that the special provision that prospective bidders were then considering should not be read as encompassing the deck pans and scuppers which were non structural steel items in the work, and that whether such were to be added or included would be addressed in Addendum No. 2. This response is consistent with the response to the question about the total area of steel to be painted that 1.7 million square feet of structural steel was to be painted. Pursuant to the language of Addendum No. 2[13] the deck pans[14] and scuppers were added to the work as well as the expansion dams.

Upon its review of the language of the special provision as originally issued, the plans,[15] Addendum No. 2 and the language of the pre-bid meeting minutes the Board concludes that the only reasonable interpretation of the scope of the

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[13] Amendments to Invitations for Bids may only be accomplished by amendments (i.e. addenda) not by pre-bid conference minutes. See COMAR 21.05.02.07 and 08.

[14] The addition of deck pans to the work by Addendum No. 2 substantially increased the square footage of work to be performed and accounts for most of the additional approximately 400,000 square feet of work added by the addendum.

[15] The plans comprised a selection of drawings from the original bridge and a subsequent repair of the bridge. This compilation of drawings provided information necessary for bidders to take off the square footage of the structural steel. Deck pans were not shown on the drawings.

reference to the 1.7 million square feet of structural steel in the pre-bid minutes was that it only covered structural steel and not the non structural steel items specifically mentioned in the original special provision and those non structural steel items mentioned for the first time in Addendum No. 2. In other words, Appellant's argument that the specific mention of deck pans, scuppers and expansion dams in Addendum No. 2 was superfluous since such work was already included in the special provision as originally issued is rejected. This work was not included in the original special provision but was added by Addendum No. 2. Addenda (amendments) are issued to amend or clarify portions of the invitations for bids or bid documents; not to merely repeat matter. See COMAR 21.05.02.07 and .08.

The Board's conclusion is not altered by Appellant's argument that it interpreted Bid Item Nos. 405 and 406 to both refer to the same thing such that 3500 tons was the total estimated quantity of waste (hazardous and industrial) expected to be generated. Appellant's argument continues that the quantity for these bid items was not changed with the issuance of Addendum No. 2 because the language of Addendum No. 2 only clarified work already included in the original specification and therefore there was no need to increase the amount of blast waste that completion of the work would generate. We have already rejected the assertion by Appellant that Addendum No. 2 was only intended to clarify that the expansion dams, scuppers and deck pans were included in the work and found that the Addendum actually added such work. We also find that Appellant's reading or interpretation of Bid Item Nos. 405 and 406 is not reasonable. Bid Item Nos. 405 and 406 do not refer in both the original bid documents and as amended by addendum to the same approximate quantities; i.e. the same estimated 3500 tons is not referred to by each bid item. The bid items are for separate estimated tonnages of

3500 each for a total of 7000 tons[16]. The project actually generated approximately 7,687 tons of waste of which approximately 6,721 tons were hazardous and approximately 966 tons were industrial. The State did not revise the estimated quantities of Bid Item Nos. 405 and 406 to account for the additional square footage of blast material that would be generated by the surface preparation of the scuppers, deck pans and expansion dams added by Addendum No. 2. However, the actual waste generated, 7,687 tons, does not significantly exceed the 7000 tons originally estimated[17]. In similar manner as with Bid Item Nos. 405 and 406 Appellant argues that the fact that there was no change in Bid Item Nos. 403 and 404 (estimated quantities per shift use of Respirators and Full Body Protective Clothing) shows that Addendum No. 2 merely clarified that the expansion dams, scuppers and deck pans were included in the specification as originally issued. We reject such argument. The record does not reflect what the relationship may be between estimated quantities of respirators and protective clothing and the quantity of square footage required to be prepared and painted. Appellant also argues that in view of the environmental aspects of the project it made no sense for MdTA not to have included the deck pans in the original special provision since the deck pans were rusting and had been previously painted with lead paint. The record does not reflect why MdTA originally chose not to include the deck pans. However, deck pans are not structural steel and were simply not included in the work encompassed by the original specifications.

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[16] Bid Item No. 405 was for storage of hazardous waste while such waste was being classified as such. Disposal of hazardous waste was to be paid for pursuant to force account. Bid Item No. 406 was for hauling and disposal of industrial waste.

[17] The State originally over estimated waste by 30%. When Addendum No. 2 was issued there was thus flexibility in the original estimate to provide for the new work.

Accordingly, we find that MdTA did not represent that the total scope of the work was to prepare and paint only 1.7 million square feet of bridge rather than the 2.1 million square feet actually involved. We further note that the bid documents refer to painting as a lump sum bid item where quantities are not to be considered. Appellant's appeal on grounds that it encountered a differing site condition or that misrepresentation or constructive change occurred is therefore denied. Appellant made a mistake. Mistakes discovered after award do not permit a change in price. COMAR 21.05.02.12 D; Md. Port Adm. v. Brawner Contracting Co., 303 Md. 44 (1985).

C. Paint Substitution Claim

Appellant argues that it is entitled to an equitable adjustment for the costs that it incurred in continuing to use the original manufacturer's paint to complete the work after MdTA refused to allow the paint of a different manufacturer to be substituted.

Special provision SP 2-602 Materials provided that: "The three coat paint system for all structural steel shall conform to the following:

1. The primer coat shall be an organic zinc rich primer as specified in Section 910.01.03 of the Standard Specifications.

2. The intermediate coat or tie coat shall be vinyl, and shall be a green color as approved by the Engineer.

3. The finish coat shall be vinyl and shall be a light grey or blue grey color as approved by the Engineer.

4. All of the paint for this paint system (zinc and vinyl) shall be supplied by the same manufacturer."

Appellant argues that the above language only prohibits a change of system and not manufacturer (i.e. only prohibits the use of one manufacturer's primer with a different manufacturer's intermediate or finish coat rather than prohibiting painting parts of the bridge with the three coat system using the products of manufacturer A and painting parts of the

bridge with the three coat system using the products of manufacturer B). Appellant also argues that in any event there was no reason not to allow a change in manufacturer and thus the decision was arbitrary. We disagree with Appellant's first argument, that the language of the specification only prohibits a change in "system". The language of the specification clearly and unequivocally states that all of the paint shall be supplied by the same manufacturer[18]. This is one of the conditions of the three coat system. Appellant sought to change manufacturer, not to change the system.

Maryland courts apply the objective law of contracts whereby the clear and unambiguous language of a contract provision will be literally enforced at least in the absence of a finding that literal enforcement of the provision would be unconscionable. General Motors Acceptance Corp. v. Daniels, 303 Md. 254 (1985); State Highway Adm. v. Greiner, 83 Md. App. 621 (1990), Cert. Den. 321 Md. 163 (1990). Words used in a contract should be given their ordinary everyday meaning. See Dr. Adolph Baer, P.D. and Apothecaries, Inc., MSBCA 1285, 2 MSBCA ¶ 146 (1987). The ordinary everyday language of the specification requires the paint to be supplied by one manufacturer. Thus it prohibits substitution of another manufacturer's paint. Appellant does not argue nor does the record reflect that the refusal to permit a change of manufacturer by MdTA in literal application of the specification was

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[18] No objection was made to the language of the specification requiring that all paint for the paint system be supplied by the same manufacturer. Absent latent ambiguity (and the Board finds none in this clearly written special provision) a bidder is bound by the requirements of the specifications when no objection is made to such requirements prior to bid opening. See Centex Construction Company, Inc., MSBCA 1419, 3 MSBCA ¶ 243 (1990), Affd. Case No. 9011704/CL112710 (Cir. Ct. Balto. City Nov. 7 1990). Where a bidder does not understand the meaning of a specification, pre-bid opening inquiry is likewise required as a condition for post award relief. See Dominion Contractors, Inc., MSBCA 1041, 1 MSBCA ¶ 69 (1984) at p. 13.

unconscionable. Appellant finished the work using the same manufacturer's product. Accordingly, Appellant's appeal on grounds that the language of the specification should be read as permitting substitution of a different manufacturer's paint is rejected.

Appellant also contends that notwithstanding the language of the specification prohibiting substitution, MdTA's action in not allowing the paint substitution was arbitrary. The reason advanced by MdTA for the contract requirement that all paint be supplied by the same manufacturer is set forth in the testimony of MdTA's Chief of Construction, Mr. Timothy Reilly.

"Q Can you say, Mr. Reilly, whether you had any concerns regarding the use of more than one manufacturer for this job?

[Counsel for Appellant] At what time?

[Counsel for MdTA]

Q At the time construction began or before construction began?

A Yes, I had concerns prior to the job being put out for bid even.

Q What were those concerns?

A Well, my major concern was with the warranty, because the project requires a five-year manufacturer's warranty, and I have personally been involved in many other jobs that did that.

Q Many other jobs that did what?

A That required an extended warranty on a paint project.

What happens is, you know, three, four years down the road -- in fact, some of our warranties, I think, are for ten years -- we have a failure of some type of the paint and the first thing that maintenance would do would be to call me and request that I have the warranty honored.

So I'm the one that has to go through, look through all of the records, find this warranty, and deal with the people to get the work done.

Now, in the past, we had allowed contractors to change paint manufacturers. Now, I'm talking seven, eight years ago, we just allowed them to do it on a normal basis.

When that happened, we had several problems. Number one, the paint colors didn't match. Number two, even though the paint colors matched when they were put on, they weathered differently and the colors changed, like one would bronze, and you would have two different colors, which there was nothing I could do about that as far as a warranty.

So that was just another problem that I was concerned with with only having one paint manufacturer, but then we also had a failure in the areas where there was two different paint manufacturers and the one manufacturer said, "well, I don't believe that's my paint. You show me it's my paint and I'll honor it."

Q Are you referring to a particular incident or giving an example?

A I'm giving you an example of --

Q Are you giving me an example of something that happened or just a theoretical example?

A No, I'm giving you an example of something that happened. They pretty much said, "I'll cover the warranty if you guys can show us that it was our paint."

Well, that took a long time to figure out whose paint was whose and then it was even a harder time proving it, but this happened more than once. I mean, this happened on several occasions.

Again, this is seven, eight years ago and a long time passed, but it is a problem that occurred a couple of times and I didn't want to be involved in it. I didn't think the Transportation Authority needed to spend a lot of time on the same thing.

If we only had one paint manufacturer, I felt that that would eliminate that problem totally.

Q With regards to the problems that you say the State had in the past when more than one manufacturer was used, on those particular projects, was there a provision similar to the one you identified, which you say means that only one manufacturer can be used on the job?

A Well, I know we had a problem with warranties on one of the tunnel projects when we were painting the bridges and

I know we had a problem on one of the Bay Bridge projects.

I cannot remember which projects they were, but I do know that this statement was not in there because we have just recently began using this statement in our proposals."

While the record reflects that the risk of paint failure could have been overcome by careful feathering or step down technique at areas where the different manufacturer's paint overlapped, the problem of weathering producing different colors and the problem of warranty enforcement in the event of failure could not be ruled out. The existence of these potential problems provides a reasonable basis for the requirement in the specification that all of the paint be supplied by the same manufacturer. The fact that MdTA had previously permitted a change in paint manufacturer does not make the determination in the instant contract not to do so arbitrary. The specification clearly warned bidders that substitutions would no longer be permitted. There was no complaint made to such policy change (i.e. to the express prohibition set forth for the first time in the specification) prior to bid opening and the expert testimony provided at the hearing supports MdTA's concern about manufacturers' warranty and effects of weathering. Accordingly, Appellant's claim related to denial of its request to substitute paint of a different manufacturer is denied.

Appellant also seeks in its complaint in MSBCA 1617 filed with the Board on January 8, 1992 a time extension of 168 calendar days and payment of $168,000 in funds withheld by MdTA as liquidated damages.[19] MdTA has presented no evidence that Appellant breached the contract or is otherwise entitled to withhold funds as liquidated damages. The contract

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[19] Liquidated damages were provided for in the contract at $1,000.00 per calendar day for "unauthorized extensions beyond the contract time of completion." MdTA in its Answer to Appellant's Complaint in MSBCA 1617 filed on March 24, 1992, states it was withholding an amount of $267,000 as liquidated damages.

provides that Appellant is to complete the work within 480 calendar days from the date set forth in the notice to proceed. The record does not reflect either the actual start date provided in the notice to proceed or the date the work was substantially completed. The parties have advised the Board that the issue of entitlement to liquidated damages should not be considered in the instant consolidated appeals, and the Board specifically finds that the issuance of this opinion does not preclude consideration by the Board of Appellant's requests for time extensions and the appropriateness of liquidated damages at a later time since those issues have been reserved.

Accordingly, the appeals are denied.

Dated: December 18, 1992

Robert E. Harrison III
Chairman

I concur:

Sheldon H. Press
Board Member

Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1617 and 1618, appeals of Odyssey Contracting Company under Maryland Transportation Authority Contract No. TFA2-1260-20.

Dated: December 18, 1992

Mary G. Priscilla
Recorder

[illegible] that Appellant [illegible] [illegible] that [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] have been [illegible].

[illegible] the appeal[s] [illegible] denied.

Robert B. Harrison III
Chairman

I concur:

Sheldon H. Press
Board Member

Neal E. Malone
Board Member

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA [illegible] and [illegible] appeals of Odyssey Contracting Corporation under Maryland Transportation Authority Contract No. [illegible]

Dated: [illegible]

Mary F. Priscilla
Recorder