BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF THE R.R. GREGORY CORPORATION	)	
	)	Docket No. MSBCA 2192
Under SHA Contract No. AW 683-501-329	)	

August 14, 2002

Timeliness - Notices of Claim and Claims - Notices of a claim and claims in construction contracts are required to be filed in accordance with the provisions of Section 15-219 of the State Finance and Procurement Article and COMAR 21.10.04.02.

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OPINION ON REMAND BY BOARD MEMBER HARRISON

By Order dated May 9, 2002 as explained in a Memorandum Opinion dated May 9, 2002, the Circuit Court for Baltimore City upon its review of the Board's decision of September 5, 2001 vacated the decision and remanded the captioned appeal to the Board for entry of a statement of the facts and reasons supporting the Board's decision that the Appellant's claim was timely filed. Such findings of fact and rationale follow.

Findings of Fact

1. The Board incorporates herein by reference all Findings of Fact contained in its decision dated September 5, 2001. A copy of the Board's decision dated September 5, 2001 is attached as Exhibit A.
2. The Board further specifically finds that the "Project Engineer established quantities per truck measurement and count merely to make progress payments until the item quantity was exhausted."
3. Such determination by the Project Engineer, Mr. James Daffin, an employee of the State Highway Administration (SHA), was conveyed to Appellant by letter dated August 27, 1997 from Mr. James R. Keseling, Chief, Facilities Management Division.
4. The August 27, 1997 letter from Mr. Keseling reads as follows:

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> Reference is made to your correspondence dated June 11, 1997 and AccuBid's Letter dated June 4, 1997 concerning pay quantities for Class 1 Excavation (Contract Item # 2001).
>
> A meeting was held at the construction site on July 16, 1997 where AccuBid stated they believed the quantity for the class 1 excavation has overrun by 13,011 cubic yards.
>
> Our design team re-surveyed the site, using the spot elevations obtained from the field a computer generated plot was developed then overlaid on the contract document grading plan, Drawing No. C-4. The findings were that both the existing and proposed elevations were accurate compared to the original contract plan.
>
> As stated in section 201.04.02 of the Standard Specifications for Construction and Materials dated October 1993 "Unless otherwise specified, excavation will be computed using the template from preliminary cross sections of the original ground surface combined with the template of the typical cross sections". The project Engineer established quantities per truck measure and count merely to make progress payments until the item quantity was exhausted.
>
> Based on this information, we are denying AccuBid's request to revise the contract quantity contained in pay item 2001.

5. The Board finds that this letter establishes the agency position that SHA will base final payment on the template method and not the truck measurement or liquid measure load count method, *i.e.* truck count method.
6. Notices of claim and claims are required to be filed in accordance with the provisions of Section 15-219 of the State Finance and Procurement Article and COMAR 21.10.04.02. See Cherry Hill Construction, Inc., MSBCA 2056, 5 MSBCA ¶459 (1999). For purposes of this construction contract's effective date, a notice of claim was required within thirty (30) days after the basis of the claim was known or should have been known. The Memorandum Opinion of the Circuit Court observes that "SHA contends that Gregory [Appellant] knew, or should have known, of the faulty estimate more than thirty (30) days before Gregory sent its June 11, 1997 letter to SHA and cite Gregory's certified claim as proof that Gregory [had] such knowledge on or before April 16, 1997." The Board finds that Appellant knew [and if Gregory did not personally know, its subcontractor, AccuBid, knew, and AccuBid's knowledge is attributable to Appellant] that there was a quantity error more than thirty (30) days before it sent its June 11, 1997 letter to SHA.
7. The Board also finds, however, that Appellant would not have known more than thirty (30) days prior to June 11, 1997 that SHA would base final payment on the template method, notwithstanding that the template method did not accurately reflect the quantity of excavation required.
8. SHA's position that it would base final payment on the template method would have been

conveyed by Mr. Keseling's letter of August 27, 1997. The record reflects, notwithstanding Mr. Keseling's assertion in his letter that after the re-survey of the site the findings were "that both the existing and proposed elevations were accurate compared to the original contract plan," that, in fact, original and final quantities could not be established by the template method or resurvey.

9. The Board agrees, as asserted by Respondent, that Appellant's job superintendent testified that he lacked authority to change the Contract to provide for a measured liquid volume and truck count method to replace the template method of measurement. The Board also agrees that, as testified to by the SHA Project Engineer, Mr. Daffin, the agreement in the field was only to use the truck count method for the purpose of monthly pay estimates to pay the contractor as the work was done and was not an agreement to make final payment by use of the truck count method. The Board further finds that this agreement in the field did not, and legally could not, change the Contract between the parties that called for use of the template method of measurement to determine final quantities. See ARA Health v. Dept. of Public Safety, 344 Md. 85 (1996). This template method assumes that the quantity shown on the plans is the appropriate final quantity. The templates (cross sections) could not be found when the grade bust was encountered early in the job, prior to the start of excavation, and were only located after the excavation was substantially complete pursuant to the agreement in the field to use the truck count method for purposes of monthly pay estimates.

10. As noted above, Appellant sent a letter to SHA dated June 11, 1997. Enclosed with Appellant's letter was a letter from AccuBid dated June 4, 1997, reflecting that the cross sections had been located after completion of the excavation. The AccuBid letter stated in this regard: "The current cross sections were made available after completion of our excavation thus making it impossible to check the original site conditions, since we have no means to verify the cross sections it is our contention that we are to be paid by the original agreed upon method of load counts." Thus Appellant, AccuBid and SHA all seem to agree that the truck count method was for payment for monthly estimates and that final payment would be governed by the cross sections or template method. However, the templates were flawed. As suggested by the testimony of Mr. Gupta (Finding of Fact No. 21 in the Board's Opinion of September 5, 2001) it is an unusual (if not unique) situation where "you're unable to get the volumes based on the drawings" which "have shown existing and the proposed." Nevertheless, such deficiency is what the record reflects, and accurate original and final quantities could not be established by the template method or re-survey.

Decision

Based on the above Findings of Fact on the issue of whether Appellant's claim is time barred, we determine that Appellant's letter of June 11, 1997, enclosing AccuBid's letter of June 4, 1997, constitutes a notice of claim that was filed within thirty (30) days of the time that Appellant knew or should have known that the State might insist on using the flawed preliminary cross sections of the original ground under the template method, which cross sections had then been found[1] but which were missing prior to substantial completion of the excavation on or about April 16, 1997.

[1]The preliminary cross sections were made available April 24, 1997.

The preliminary cross sections were made available April 24, 1997. The State's response to the Appellant's June 11, 1997 letter was to engage in a meeting on July 16, 1997 concerning the apparent overrun at the construction site and to conduct a subsequent re-survey of the site which determined (erroneously) that both the existing and proposed elevations were accurate compared to the original Contract plan. Such a response, combined with the State's allowance of the truck count measurement for progress payments, is not consistent with Respondent's assertion that Appellant should have known that Respondent would insist on the use of the flawed template method once the preliminary cross sections were discovered. We thus find that the June 11, 1997 notice of claim is timely even though it was given more than thirty (30) days after the lost preliminary cross sections were found and made available.

While the Board recognizes that the Circuit Court may have rejected the Board's determination in the Board's September 5, 2001 opinion that the timeliness issue is to be resolved by resort to the provisions of GP9-04, we believe that the Board's assessment that GP9-04 should govern may have merit. The State presumedly paid Gregory progress payments that included monies reflecting at least some of AccuBid's excavation as measured by the quantities established per truck measure and count. The parties seem to agree that if the templates had been accurate the dispute would not exist. As noted by Appellant in its Memorandum in Regard to Remand with respect to the template method: "the volume of dirt for which payment is to be made is the arithmetic calculation of the difference between the pre-existing surface of the dirt as reflected in the preliminary cross sections and the surface of the dirt at planned finish grade. Such calculation is made without the need to take quantity measurements during the course of the work and, in fact, contemplates that the estimated quantities will be the pay quantities." Presumedly then if more excavation had not been encountered SHA would simply have paid Gregory its bid amount for Item 2001, Class 1 Excavation, derived by multiplying Gregory's $5.21 per cubic yard price times the estimated number of cubic yards appearing in the bid line item (29,740 cubic yards), and no quantity measurement of excavation would have been taken during the course of the job. GP9-04 deals with determination of, and payment for, actual quantities of contract items that are stated as estimated quantities. It would not ordinarily apply to the facts herein because it is unusual for the template method to be flawed, and the contractor usually receives his bid price times the quantity shown by the template which appears on the bid line item, i.e. the pay quantities equal the estimated quantities. Here, however, the flaw meant that, whatever timeline is used, another method of measurement had to be used because more excavation was, in fact, necessary than that which was shown by the template method. Such other method was the liquid volume truck count method, approved by SHA for progress payments. Such a method would be covered by GP9-04 which focuses on final actual quantities.

In any event, the Board finds, for the reasons stated above, that the notice of claim filed by letter dated June 11, 1997 was filed within thirty (30) days after the basis for the claim was known or should have been known. Accordingly, the Board awards an equitable adjustment and pre-decision and post-decision interest as set forth in the Board's opinion of September 5, 2001, which is hereto attached as Exhibit A.

So Ordered this 14th day of August, 2002.

Dated: August 14, 2002

Robert B. Harrison III
Board Member

I Concur:

Michael J. Collins
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 on remand in MSBCA 2192, appeal of The R.R. Gregory Corporation under SHA Contract No. AW 683-501-329.

Dated: August 14, 2002

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Loni Howe
Recorder