BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

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| Appeal of WILLIAMS CONSTRUCTION COMPANY, INC. | ) | |
| | ) | Docket No. MSBCA 1860 |
| Under SHA Contract No. AW-890-501-070 | ) | |

October 8, 1996

Equitable Adjustment - Absence of Pay Item - Where there is no pay item that specifically covers the work in question in a bid constructed with a schedule of prices (rather than a single lump sum) and the contract calls for such work to be performed (i.e. it is not extra work) the Board will base an equitable adjustment on actual cost.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim by the State Highway Administration (SHA) for an equitable adjustment relating to the proper measure of payment for 264,470 cubic yards of Type I Borrow. Appellant claims it should be paid $3.50 per cubic yard and SHA claims Appellant should be paid one penny per cubic yard.

## Findings of Fact

1. The parties entered into contract, No. AW-890-501-070, for the construction of Route 100 between I-95 and I-295 upon acceptance of Appellant's low bid in the amount of $29,848,657. The contract documents included pay items for various categories of work including earthwork. This appeal arises from a dispute over the proper method of payment for a quantity of Type I Borrow brought from off-site for which there was no pay item and which the Summary of Earthwork included in the contract documents marked as zero.

2. In construction of a highway, preparation of the ground requires changing the existing grade (which is often undulating) to the relatively flat grade of the roadway's design. If the existing grade is above the design grade, the contractor must cut, or excavate, the area. If the existing grade is lower than the design grade, the contractor must fill that area up to the design grade. Generally, when a project contains more cuts than fills, material must be hauled off-site to complete the job, and such jobs are generally referred to within the industry as waste jobs. On the other hand, when the fill areas are greater than the cuts, the project needs off-site material to complete the fills so that the roadway can be brought up to the proper elevations. These types of jobs are generally referred to within the industry as borrow jobs since material must be borrowed from off-site. If the cuts and fill areas are equal and no material either needs to be hauled off the site or onto the site, the job is referred to as a balanced job.

3. In order to assure that the ground under the roadway is stable and can support the paving sections, the contract documents direct the contractor to use certain types of dirt or soil in certain areas. The most commonly used fill material or dirt is generally referred to as Type I material or common fill. In areas where extra drainage and support is needed, specifications require the use of Type II material or select fill. Type II material is a higher quality material than common fill. Type II material meets Type I needs, but Type I material does not meet Type II needs.

4. Under the SHA STANDARD SPECIFICATIONS FOR CONSTRUCTION AND MATERIALS, January 1982, the Red Book, (hereinafter Standard Specifications), incorporated into the present contract, excavation, grading, cutting and filling are classified either as Class 1, Class 1A or Class 2 Excavation. Class I excavation is the earth removed from within the lines and grades of the plans.

5. In the contract at issue in this appeal, Class 1 Excavation showed an approximate quantity of 1,265,000 cubic yards and was listed under Pay Item No. 2002. The earthwork summary reflected a design whereby excavation would be used for embankment below capping and approximately 260,000 cubic yards of Type II borrow would be used for a top layer of capping and for shallow fills in low-lying wetland areas.

6. As discussed in more detail below, Appellant's use of Type II material from the Class I Excavation required the placement of an additional 264,470 cubic yards of fill material to build the project fills, i.e., to build the embankment below the capping to the proper levels.

7. To accommodate this need Appellant secured an off-site dirt pit on a property adjacent to the project referred to as the Coca-Cola property (or Coca Cola Pit). The State tested the material at the Coca-Cola property and approved its use as Type I material. Payment for this 264,470 cubic yards of off-site Type I fill material brought from the Cola-Cola Pit forms the basis of the Appellant's claim.

8. The parties agree that the total cost to Appellant for Coca-Cola Pit operations was $969,652 inclusive of certain extra work orders.[1]

9. The Board finds that use of this Type I borrow material to build up the embankment rather than Type II borrow material was not prohibited by the contract. The real dispute is over how much should be paid for it.

10. As noted, a total of 264,470 cubic yards of Type I material was brought to the site, and used by Appellant in the construction of the project. For performance of this work Appellant claims an amount of $925,645, plus interest, based on Pay Item 2006. This Pay Item sets forth an approximate quantity of 25,000 cubic yards of Contingent Borrow Excavation Type I for which Appellant bid $3.50 per cubic yard (264,470 x $3.50 = $925,645). As noted above, there was no pay item for Borrow Excavation Type I, only Contingent Borrow Excavation Type I.

11. Because Pay Item 2006 was set forth in the bid documents as an approximate or estimated quantity of 25,000 cubic yards, Appellant alternatively claimed pursuant to the Estimated Quantities Clause of the contract, costs in the amount of $879,001, plus interest, based on payment

[1] This total cost is generated in the Rubino and McGeehin Proof of Cost letter report dated November 29, 1995, and is adopted by the Board.

under the Estimated Quantities Clause of $3.50 for 31,250 cubic yards (125% of 25,000) and alleged actual costs of $3.30 due solely to the overrun for the remaining 233,220 cubic yards (264,470 - 31,250 = 233,220). At the close of the hearing the parties were invited to discuss the possible applicability of the Variation in Estimated Quantities Clause to payment for the Type I material at issue herein. The parties did so; the Appellant arguing its application, the State that it was not applicable. The Board finds that the Estimated Quantities Clause does not apply because there is no approximate quantity pay item for the Type I material at issue herein.

12. The Type I material was brought on-site starting April 6, 1993, and SHA paid $3.50 per cubic yard for 155,000 cubic yards of the material under Pay Item No. 2006 through progress payments made through August 25, 1993 for a total payment of over $540,000. After August 25, 1993, SHA took the position that such previous payments at $3.50 per cubic yard were inappropriate and that the material should be paid for at one penny ($.01) per cubic yard under Appellant's bid for Bid Item No. 2007 for an approximate quantity of 260,000 cubic yards of Borrow Excavation Type II.

13. Under the contract documents, all excavation and grading, including cuts and fills of existing materials, is considered Class 1 Excavation and paid under Item No. 2002. The bid price for Class 1 Excavation under Bid Item No. 2002 submitted by Appellant was $2.35 per cubic yard. According to the contract documents, if the Class 1 Excavation contained suitable Type I material or suitable Type II material which the contractor placed in the embankment on the project site the contractor is only paid the Bid Item No. unit price of Class 1 Excavation and not the additional Bid Item No. unit price for the suitable Type I or Type II material from the Class 1 Excavation that is placed on the site. Type I Borrow Excavation and Type II Borrow Excavation are only to be paid for at their respective unit prices in the event those items were actually obtained from off-site sources; i.e., the contractor must go off-site to find sufficient quantity of such materials. Stated another way, the contractor only gets paid his bid price for Class 1 Excavation (i.e. his bid price for excavating) where such material excavated is also used to meet Type II Borrow requirements to assure a good support system for the roadway. The contractor does not get paid twice for both digging the dirt within the project limits and then placing it elsewhere on the project.

14. As noted above, the project's earthwork required 264,470 cubic yards of suitable material over and above that existing within the Class 1 Excavation to build the project's fills, principally

because the Appellant removed approximately 260,000 cubic yards of Type II material from the Class 1 Excavation for use in areas on the project requiring Type II material; i.e., in low-lying wetland areas and capping above the embankment for extra drainage support. The removal of Class I excavation for use as Type II borrow thus resulted in a shortage of an equal amount of Class I Excavation necessary to build the embankment below the capping. Additionally, a small amount of Type I and Type II material was also needed to be brought in from off-site in order to complete the project in accordance with certain extra work orders.

15. The State prepared soil borings and cross-sections that were made part of the contract documents that reasonably conveyed to prospective bidders that the on-site excavation contained at least 260,000 cubic yards of Type II material. This was a sufficient quantity to satisfy the requirements of the contract (exclusive of extra work) for Type II Borrow. When the Appellant used approximately 260,000 cubic yards of Type II Borrow material from the on-site excavation in order to complete all the work (wetlands and capping) requiring Type II material, an approximately equal number of cubic yards of suitable borrow material would still have to be brought in from off-site to complete the project in large part to make up the shortage for embankment construction left by the approximately 260,000 cubic yards of Type II material involved in the Class 1 Excavation that had been excavated and used on the project as capping and in low-lying wetland areas where Type II material was required. However, if no Type II Borrow material had been found on the Project site, approximately 260,000 cubic yards of Type II Borrow material would have been required to be brought in from an off-site source to complete the Project's earthwork requirements regarding capping and wetland areas for proper drainage.

16. Based upon its belief that the soil borings and cross-sections that were part of the contract documents demonstrated that Type II Borrow would be found in the Class 1 Excavation in sufficient quantity to satisfy the Type II Borrow requirements of the project, Appellant bid one penny ($.01) for Item No. 2007 - Borrow Excavation Type II.

17. The penny bid by Appellant for the Borrow Excavation Type II, Bid Item No. 2007, was bid to take advantage of Appellant's belief in the existence of sufficient on-site Type II material to meet the projects Type II material requirements. Appellant bid one penny ($.01) for this item, in

the belief that, when Type II material found within the site is used for Type II Borrow purposes[2], payment would not be made for placing the material but rather would only be paid for excavating it under the Class 1 Excavation pay category which was Bid Item No. 2002 for which Appellant bid $2.35. In Appellant's opinion the replacement dirt for the excavated Type II material would then be paid for under its $3.50 bid for Bid Item No. 2006 Contingent Borrow Excavation Type I. To summarize: Appellant did not intend to use borrow as a source of Type II material. Appellant intended to satisfy the project's Type II material needs from Type II material in the excavation. Appreciating that this would create a deficiency in the source of suitable material for the embankment below the capping, Appellant planned to supply Type I material from off-site from the Coca- Cola Pit and be paid for this replacement material at its bid price for Type I Contingent Borrow.

18. Several other bidders, including the four lowest bidders, also submitted one penny bids. Of the fourteen bidders that bid, seven submitted penny bids, including five who submitted penny bids on Bid Item No. 2007.

19. It is uncontested that a quantity of approximately 260,000 cubic yards of material meeting the requirements of Type II Borrow was found in the Project's excavation.

20. Standard Specification §202.03.01 states that "all excavated material shall be used as far as practicable" and that no excavated material "shall be wasted." This specification allows Type II material found in the excavation to be utilized for Type II material purposes. Standard Specification §202. 01.01, under "Cut and Fill Quantities," provides that the contractor has an obligation to utilize all suitable material from the excavation in the construction of the fills. The Board finds that Appellant's use of the Type II material found in the excavation to meet on-site requirements for Type II material to be consistent with the contract documents.

21. SHA structured the Invitation for Bids with a bid item for Type II Borrow (i.e. off-site) even though the soil borings and other indicia in the contract documents showed Type II [Borrow] material to be available in the on-site excavation because SHA did not want to take the risk that the

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[2] §103.01.01 (see below) of the Standard Specifications provides that where excavation materials are used as Select Borrow or Type II Borrow, payment is only made at the unit price for the class of excavation from which the materials are obtained.

Type II material might not actually turn out to be in the excavation in sufficient quantity and thus would have to be obtained (borrowed) from off-site. SHA left the risk of finding material which satisfied the requirements of Type II Borrow in the excavation on the contractors and Appellant assumed the risk of finding material which satisfied the requirements of Type II Borrow in the excavation.

22. Section 103.01.01 of the Standard Specifications governs the utilization of excavation as Type II Borrow. The specification provides:

> 103.01.01 **Rights in and Use of Materials Found on the Work.** The Contractor, with the approval of the Engineer, may use in the proposed construction such stone, gravel, sand or other materials determined suitable by the Engineer, as may be found in the excavation.
>
> In the event these materials are used for Borrow, Select Borrow or Special Borrow and meet the pertinent material specifications, payment for these work items will only be made at the unit price for the class of excavation from which the materials are obtained.
>
> In the event these materials are processed through a crushing, screening, washing or sorting plant for use as another pay item, the Contractor will be paid both for the excavation of such materials at the Contract unit price and at the Contract unit price for which the material is used. He shall replace at his own expense with other acceptable material all of that portion of the excavation materials so removed and used which was needed for use in the embankments, backfills or approaches or otherwise. No charge for materials so used will be made against the Contractor.
>
> The Contractor shall not excavate or remove any materials from within the highway location which is not within the excavation, as indicated by the slope and grade lines, without written authorization from the Engineer.

23. Appellant found in the Class 1 Excavation, material that met the requirements or was suitable as Type II material (set forth in the bid documents under Pay Item 2007 as Borrow Excavation Type II).

24. Standard Specification §202.03.01 required the SHA to approve the use of suitable excavated material for Type II Borrow purposes. The soil reports dated for date sampled on 9/21/92 and 9/30/92 indicate SHA's approval of Appellant's use of the excavation as Type II Borrow as does SHA's approval of the C.P.M. schedule showing such work. Appellant placed approximately 260,000 cubic yards of excavated on-site material as Type II Borrow (for filing in

wetlands and capping). The Board finds the record demonstrates the SHA's approval of Appellant's use of the suitable excavated material for Type II Borrow purposes.

25. 264,470 cubic yards of Type I Borrow involved in this appeal was brought on site from the Coca-Cola property, approved by the SHA in writing by letter dated April, 1993 as a Type I Borrow Pit.

26. This material was brought in so as to have the elevation of the dirt and embankments at the proper levels as required by the contract.

27. Appellant claims it is entitled to be compensated for each cubic yard of this material brought on site from the Coca-Cola Pit at its bid price of $3.50 for Bid Item No. 2006 Contingent Borrow Excavation Type I.

28. Appellant's position (and the State's contrary position that such material is to be paid for at the one penny bid for Bid Item No. 2007) led to Appellant's filing a claim which was denied by final decision dated December 2, 1994.

29. After the hearing of the Appeal it was determined by the parties based on final cross sections that a grand total of 309,865 cubic yards of soil to include 45,395 cubic yards involved in extra work was brought on site from the Coca-Cola Pit of which a total of 264,470 cubic yards represents the total cubic yardage of Type I Borrow actually involved in Appellant's claim.

Decision

The Board finds that use of Type I borrow material to build up the embankment rather than Type II borrow material was not prohibited by the contract. The real dispute is over how much should be paid for it. SHA argues that the appropriate measure of payment for the Type I Borrow brought to the project site from the Coca-Cola Pit to build the project fills is one penny per cubic yard derived from Appellant's one penny bid for Bid Item No. 2007 for an estimated quantity of 260,000 cubic yards of Borrow Excavation Type II. Appellant on the other hand argues that the appropriate Bid Item upon which payment should be based is Bid Item No. 2006 where Appellant bid $3.50 per cubic yard for an estimated quantity of 25,000 cubic yards of Contingent Borrow Excavation Type I. Neither bid item specifically covers the 264,470 cubic yards of Type I material brought to the project from the Coca-Cola Pit. Bid Item No. 2007 is for Borrow Excavation Type II, not Type I material and Bid Item No. 2006 is for Contingent Borrow Excavation Type I,

intended to cover need for a relatively small amount of additional Type I material not available on site to cover a shortfall due to shrinkage in the excavation soil used.[3]

The State, in the agency Final Decision dated December 2, 1994, set forth its position in denying Appellant's claim as follows:

> As the project progressed, Williams Construction Company, Inc. secured an off-site borrow pit, the "Coca-Cola Property". This location had available material that passed for the requirements of Type I and Type II Borrow. The Williams Construction Company, Inc. elected to provide embankment for fill from the "Coca-Cola Property" borrow pit and requested payment for same as Borrow Excavation Type I. Williams was paid under item 2006 for 25,000 cubic yards as Borrow Excavation Type I, but not paid under this item for the additional 260,000 cubic yards of Type II Borrow needed for the project. The District Engineer consistently stated that SHA would not pay Class 1 Excavation as Type II Borrow unless Williams replaced the Class 1 Excavation with item 2007, Type II Borrow.
>
> In your claim, you stated: "To review, the project had an item for Type II Borrow of 260,000 cubic yards. Because we expected to secure the material from the Class 1 Excavation on the project, we bid one cent per cubic yard for this item. Since the grading quantities were basically balanced other than the Type II Borrow required, this necessitated the need for 260,000 cubic yards of Type I Borrow."
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> Under Subsection **202.03.01 Use of Excavated Material.** of the Standard Specifications, **Section 202 - ROADWAY EXCAVATION**, states:
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> > "All suitable material removed from the excavation shall be used as far as practicable in the formation of embankment, subgrade shoulders, slopes, backfill for structures, and at such other places as directed. No excavated material shall be wasted without permission of the Engineer. Borrow shall not be used until provisions have been made for utilizing in embankments all available suitable excavated material."
>
> Williams did not receive permission from the Engineer as stated in the specifications. In fact, in his February 2, 1994, [sic] the District Engineer allowed the use of Class 1 Excavation as Type II Borrow only under the condition that the shortage of Class 1 Excavation be replaced with Type II as provided for in the contract.
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> Based on the above, your claim is denied.

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[3] Section 205.05 of the Standard Specifications dealing with the basis of payment for Borrow Excavation provides that "when, as a supplement to a specified excavation item, a proposal quantity is provided for an item of Contingent Borrow, then the Basis of Payment for the contingent item will be that quantity which is in excess of 125 percent of the applicable Proposal Items for Borrow Excavation." This provision however, is inapplicable because there is no specified excavation item for Borrow Excavation Type I for which the Contingent Borrow Excavation Type I may be viewed as a supplement. The Contract Documents only provide a bid item for Contingent Borrow Excavation Type I. The Board finds that this bid item (Bid Item No. 2007) is for a relatively small quantity of additional Type I material to make up any shortfall in the excavation due to shrinkage or the removal of excess root matt.

The District Engineer's letter to Appellant of February 2, 1994 referred to above stated the District Engineer's position in the following terms:

> This is in response to your letter dated November 16, 1993, concerning payment of borrow excavation
>
> In accordance with the Specifications Section 103, you have the right, with the approval of the Engineer, to use in the construction that material which is determined suitable which may be found on site.
>
> In the event these materials are used for Borrow and meet the pertinent materials specifications, payment for this work will only be made at the unit price for the class of excavation from which the materials were obtained.
>
> The situation here is; you have removed Class 1 Excavation and used as Type II Borrow. This results in a shortage of an equal amount of Class 1 Excavation. The question then becomes, what material to use to replace this shortage of Class 1?
>
> We have the right to use the items provided in the contract. Accordingly, we choose to use Item 2007, Type II Borrow to replace this shortage of Class 1.
>
> Therefore, we do not approve of your using Class 1 Excavation as Type II Borrow unless you replace the Class 1 with Item 2007, Type II Borrow as provided for in the contract.

An appropriate translation of the above is that the State did not object to use of the Type I material but wanted to pay for it as if it were Type II material under Bid Item No. 2007 at one penny per cubic yard since in large part the Type I material from off-site was to replace the excavated Type II material that was placed elsewhere on the site as capping and in wetland fill, and not wasted. It should be emphasized that SHA is not demanding that the Appellant demolish the embankment and replace the Type I material below the capping with Type II material. The Type I material from off-site meets the requirements of the specifications dealing with suitability of soil for the embankment and the embankment was brought to the proper level with the off-site Type I material. The dispute is over the proper measure of payment for the work.

As noted above, however, no bid item specifically covers the 264,470 cubic yards of Type I Borrow brought to the site from the Coca-Cola Pit to provide for dirt and embankments at the proper levels. To the extent that the absence of a pay item for Type I Borrow may be said to raise an ambiguity in the bid document concerning payment for same, we find such ambiguity to be latent, thereby excusing the duty of a contractor to seek pre-bid clarification in order for its interpre-

tation to prevail.[4] Compare Macke Building Services, Inc., MSBCA 1128, 1 MSBCA ¶95(1985) at pp. 8-9 with Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87(1984) at p. 12. See George E. Newsom v. United States, 230 Ct.Cl. 301 (1982) at pp. 303-304. While latent ambiguity excuses absence of pre-bid inquiry, the contractor's interpretation of the contract must be reasonable for its position to prevail.

We find the Appellant's interpretation is supported by the testimony of a former Secretary of the Maryland Department of Transportation of which Respondent, SHA, is a constituent unit. This witness has extensive familiarity with State (and Federal aid) highway projects. In his opinion Appellant's position has merit and there was justification for a claim. We likewise find Appellant's interpretation of any such latent ambiguity to be reasonable. The testimony of Appellant's witnesses involved in the bidding process demonstrates Appellant's consistent belief in the reasonableness of its interpretation of the bid documents both before and after bid opening. See Macke Building Services, Inc. supra at pp. 8-9.

Application of the doctrine of contra proferentem might thus seem to be appropriate, and, construing the ambiguity against SHA as the drafter, lead to payment under Bid Item No. 2006 at $3.50 per cubic yard as requested by Appellant. However, notwithstanding that Appellant's interpretation may be reasonable, to utilize Bid Item No. 2006 to pay for the 264,470 cubic yards of Type I material at issue at $3.50 per cubic yard will result in payment of $925,645 pursuant to a bid item that is not applicable and would result in payment greatly exceeding the actual cost for performing the work involved in bringing the material from the Coca-Cola Pit and placing it on the project to provide for embankment at the proper levels. The record reflects that SHA has already paid the Appellant $276,028 for Type I material removed from the Coca-Cola Pit in response to two extra work orders.[5] Conversely, Appellant's actual cost for the 264,470 cubic yards in dispute

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[4] Neither party asserts that the contract is ambiguous. "The test of ambiguity is whether . . . the language used in the contract, when read by a reasonable prudent person is susceptible of more than one meaning." S.J. Groves & Sons Co., 4 MSBCA ¶327(1993) at p. 4. If there is any ambiguity attaching to the absence of a pay item for the Type I material at issue, its obscurity or latent nature is underscored by the fact that SHA did not recognize the existence of any problem with payment for the Type I material until after it had paid over half a million dollars for the material over a period of four and one-half months.

[5] The extra work orders provided for 5,000 cubic yards at $3.50 ($17,500) and 40,395 cubic yards at $6.40 ($258,528).

is considerably more then the $2,600 that results from payment at one penny per cubic yard under Bid Item No. 2007 as insisted on by SHA.

Implicit in the Court of Special Appeals decision in Genstar Stone Paving Products Co., Inc. v. State Highway Administration, 94 Md. App. 594(1993), which only dealt with application of the Estimated Quantities Clause in State construction contracts, is that a windfall is to be avoided in any situation where particular circumstances exist that would create a windfall to either party through award of a particular sum by the Board.

The Board concludes that in the absence of a bid item that specifically covers payment for the work in question, the legislative direction in §11-201(a)(2) of the State Finance and Procurement Article to ensure the "fair and equitable treatment of all persons who deal with the State procurement system," is best met by compensating Appellant for its actual cost incurred in the transportation and placement of the 264,470 cubic yards of Type I material from the Coca-Cola Pit, provided that such cost is fair and reasonable. The Board emphasizes here, however, that ordinarily a contractor under a competitive bidding system only receives its bid price for the item in question. The unusual circumstance presented in this appeal is that there is no applicable bid item price.

Based on final cross sections it has been determined that 309,865 total cubic yards of Type I material, including 45,395 cubic yards of Type I material used in extra work referenced above, was removed from the Coca-Cola Pit. The record does not permit the Board to separate Appellant's costs for the Type I material involved in the extra work orders referenced above from the 264,470 cubic yards of Type I material at issue. The Appellant's total cost for the 309,865 total cubic yards of Type I material taken out of the Coca-Cola Pit was $969,652. Here the record reflects that the total payment by SHA to the Appellant for the two extra work orders referenced above was $276,028.

Allowing full credit to the SHA for the payments already made to the Appellant, Appellant's appeal is sustained in the amount of $693,624, summarized as follows:

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| Total cost of Coca-Cola Pit operations<br>Rubino and McGeehin Proof of Cost letter report dated Nov. 29, 1995 | $969,652 |
| Total paid to Appellant through Extra Work orders, Coke Pit<br>5,000 cubic yards @ $3.50 $ 17,500<br>40,395 cubic yards @ $6.40 $258,528 | 276,028 |

Source: Letter from Respondent's counsel to
Appellant's counsel Dated September 3, 1996
included in Appellant's Post Hearing Brief
exhibits as Attachment A

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| Total due to Appellant | $693,624 |

Total materials taken from the Coca-Cola Pit was 309,865 cubic yards

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| Average cost per cubic yard all materials | $969,652 ÷ 309,865 = $3.13 |
| Amount paid per cubic yard/Extra Work | $276,028 ÷ 45,395 = $6.08 |
| Average amount per cubic yard | $693,624 ÷ 264,470 = $2.63 |

Appellant also seeks pre-decision interest. Pursuant to §15-222, Division II, State Finance and Procurement Article, the Board may award pre-decision interest on money that the Board determines to be due to the contractor under a contract claim. The Board has interpreted this provision over the years as consistent with the goal of an equitable adjustment to make a contractor whole and the express statutory purpose as set forth in §11-201(a)(2) to ensure fair and equitable treatment of all persons who deal with the State procurement system. Section 15-222 also provides that interest may accrue from a day that the Board determines to be fair and reasonable, after hearing all the facts, until the day of the decision of the Board; provided that interest may not accrue before the Procurement Officer receives the contract claim from the contractor. Generally the Board attempts to determine when the State knew or should have known that the claim had merit and awards interest from such time adjusted to allow a reasonable period for processing the claim for payment. The dispute herein raises a legal question concerning payment for required work for which there is no pay item.

The specific facts herein make the issue a novel one. The record reflects that there existed a legitimate dispute over whether to pay for the Type I Borrow at one penny, $3.50 or at some other amount. While the Board has found that any ambiguity arising out of the absence of a pay item for Type I Borrow was latent and the contractors analysis of the bid documents was reasonable, we do not find that the State's position was arbitrary or unreasonable. We simply have found that the State's position was not the correct one. Indeed, the Board has rejected the respective positions of both parties and determined it is most appropriate to base payment upon actual cost rather than a

specific bid item. It clearly does not appear that the dispute arises from an arbitrary position taken by the State wherein money was being wrongly withheld from the Appellant. Under such circumstances as applied to the particular facts of this appeal the Board in its discretion declines to award pre-decision interest. See Department of General Services v. Harmans Associates Limited Partnership, 98 Md. App. 535(1993) at pp. 555-558.

Post-decision interest shall run from the date of this decision.

Wherefore it is Ordered this 8th day of October, 1996 that Appellant's appeal is sustained in the amount of $693,624.

Dated: October 8, 1996

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel[6]
Board Member

Randolph B. Rosencrantz
Board Member

[6] Mrs. Steel did not sit for the hearing of this matter; however, she has fully reviewed the transcript and the record herein prior to concurring in this opinion.

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 1860, appeal of Williams Construction Company, Inc. under SHA Contract No. AW-890- 501-070.

Dated: October 8, 1996

Mary F. Priscilla
Recorder