

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF)	
WILLIAMS CONSTRUCTION CO., INC.)	
)	
)	DOCKET NO. MSBCA 2179
UNDER SHA CONTRACT NO.)	
AA-132-504-572)	
)	
APPEARANCE FOR APPELLANT)	George Harper, Esq.
)	Upper Marlboro, MD
)	
APPEARANCE FOR RESPONDENT)	Dana A. Reed
)	Assistant Attorney General
)	Baltimore, MD
)	

October 17, 2001

Equitable Adjustment - Timeliness of Claim - The Board lacks jurisdiction to award an equitable adjustment where the notice of claim or claim is not timely filed.

OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its claim that it was entitled to a time extension and rescission of liquidated damages.

Findings of Fact

1. The Contract at issue in this appeal was for the construction of a portion of Interstate 97 in Anne Arundel County. The project consisted of the construction of a six-lane divided freeway with associated auxiliary lanes and shoulders, including necessary grading, paving, drainage, lighting and signing, reconstruction of portions of ramps at existing interchanges, sound walls for the length of the project, retaining walls along portions of the project, and associated maintenance of traffic and sediment and erosion control activities necessary to complete the project.
2. Appellant was awarded the Contract for a price of \$11,149,787.89 in February of 1994.
3. The Invitation for Bids provides that the Contract is governed by the SHA Standard Specifications for Construction and Materials dated January, 1982, the 1988 Supplement to these Standard Specifications and subsequent revisions to this Supplement, and the special provisions in the Invitation for Bids. The Contract's General Provisions, as contained in the applicable February 1990 revision to the 1988 Supplement to the Standard Specifications, state as follows, at GP-8-09:

Time is an essential element of the contract and it is important that the work be vigorously prosecuted until completion.

For each day that any work shall remain uncompleted beyond the time specified elsewhere in the contract, the Contractor and/or his surety shall be liable for liquidated damages in the amount provided for in the solicitation, provided, however, that due account shall be taken of any adjustment of specified completion time for completion of work as granted by approved change orders.

4. The Contract's Invitation for Bids requires the contractor to complete the project by October 31, 1995, and further states that "[t]he Contractor is hereby advised that liquidated damages in the amount of Two Thousand Six Hundred Thirty Dollars (\$2,630.00) per Calendar Day will be assessed for unauthorized extensions beyond the contract time of completion."
5. When it signed the Contract for this project, Appellant agreed that SHA had the right to recover \$2,630.00 per day for each day the project was late "not as a penalty, but as liquidated damages." No pre-bid protest concerning the liquidated damages provision was filed by Appellant.
6. The Contract completion date was extended by SHA to December 6, 1995 to conform to the actual notice to proceed date. The Contract required Appellant to prepare and submit a Critical Path Method Project Schedule, which had to be updated on a monthly basis by the contractor. The Contract also provides that any request for an extension of the time to complete the Contract is to be determined by an analysis of the CPM schedule. During the course of the project it became apparent from the CPM updates being issued by Appellant that the project was running late, and would likely not finish by the date required by the Contract.
7. Adam Drescher, Appellant's executive vice president, testified that Appellant told SHA at the project progress meetings that Appellant would submit a request for a time extension to SHA. The only specific instance of such a discussion that Mr. Drescher could recall was at the project semi-final inspection, held January 14, 1998. At that time, Mr. Drescher testified, Appellant told SHA it would put all of the issues in a letter and submit the letter to SHA for a time extension. Both Mr. Drescher and Mark Coblentz, SHA's area engineer who attended the progress meetings, agree that no one from SHA ever told Appellant it did not have to comply with the 30-day time requirements for filing a claim set forth in COMAR and in the Contract. No such statement or agreement is reflected in any correspondence or project record, including the minutes that were kept of the progress meetings. However, there was a "partnering agreement" between Appellant and SHA pursuant to which a five step dispute resolution process was in place. Only after completion of four of the resolution stages at increasingly higher levels of authority were the thirty day notice of claim provisions of the General Procurement Law, COMAR and the Contract to be followed.
8. In July of 1995, SHA warned Appellant by letter that if it did not recover the time lost on its schedule it faced the assessment of "quite substantial" liquidated damages. After receiving this letter Appellant did not make any assertion that the liquidated damages amount was excessive, or that it was not responsible for the delays to the project. In

- April, 1996 SHA warned Appellant that the amount of liquidated damages owed would soon exceed the amount of Contract retainage being withheld. There was no response, reaction or claim forthcoming from Appellant to this warning.
9. In June, 1996, SHA began withholding from Appellant's progress payments additional retainage for liquidated damages for late completion of the project. Even after SHA started withholding money from its progress payments Appellant did not file a claim challenging the amount of the liquidated damages or request a time extension. At no time during the course of the project did Appellant object to the amount of the liquidated damages contained in the Contract.
 10. The project was accepted for traffic on August 27, 1996, and the time charges were stopped. SHA agreed that Appellant was entitled to a 131day time extension to the contract completion date on account of bad weather.
 11. Semi-final inspection of the project was held on January 14, 1998. Semi-final inspection is held at the point in the job when work is substantially complete. At the semi-final inspection meeting Appellant said it would submit documentation requesting an extension of time to avoid liquidated damages.
 12. In accordance with discussions at the semi-final inspection meeting, Appellant submitted its written notice of claim and claim on March 26, 1998 to the District Engineer.¹ All of the events which Appellant claimed justified a time extension had occurred between 1994 and 1996. No written notice of claim for any of these events had been submitted to SHA prior to March 26, 1998. The March 26, 1998 claim did not contain any assertion that the amount of liquidated damages in the Contract was unreasonable or excessive. Appellant provided further justification for a time extension and rescission of liquidated damages in a letter to the District Engineer dated March 8, 1999. By letter dated April 27, 1999 the District Engineer denied Appellant's request for a 134 day time extension and rescission of liquidated damages and Appellant timely appealed this denial to the SHA procurement officer.
 13. SHA's procurement officer denied Appellant's claim by letter dated April 12, 2000, and found that Appellant was responsible for 134 days of delay to the project. The claim was addressed on its merits and not dismissed on timeliness grounds.
 14. Appellant's appeal to this Board followed. In its Complaint in this proceeding Appellant claimed for the first time that the liquidated damages figure in the Contract constituted an illegal penalty.
 15. During the course of this appeal Appellant withdrew its request for a time extension, conceding responsibility for the delay in project completion. The only remaining issue before the Board is whether the Contract's liquidated damages provision constitutes an illegal penalty.

Decision

We find that notwithstanding the "partnering agreement" the Appellant failed to file its notice of claim within 30 days of when it knew or should of known of its claim. At the semi-final

¹ According to SHA practice claims are initiated by a filing with the District Engineer.

inspection meeting on January 14, 1998 Appellant indicated it would “submit documentation warranting an extension of time to avoid liquidated damages;” i.e., Appellant knew it was required to submit a notice of claim (and claim) pursuant to the Contract (and Statute and Regulations). However, the Notice of Claim (and claim) were not filed until March 26, 1998 over two months after the January 14, 1998 expression of knowledge. Notwithstanding that the notice of claim was not filed within thirty days of January 14, 1998 and that therefore the claim was late and could not be considered such that the appeal must be dismissed on jurisdictional grounds,² the Board believes that comment, although dicta, on the merits is warranted.³

St. Fin. & Proc. Code Ann. §13-218 requires every procurement contract to include a clause covering liquidated damages as appropriate. COMAR 21.07.02.08 sets forth a liquidated damages clause that is a mandatory provision for all construction contracts unless the agency head determines that the exclusion of the clause is in the best interest of the State.⁴ It is clearly the public policy of Maryland that State construction contracts may provide for liquidated damages.

Guidance from the Court of Appeals of Maryland reflects that to be enforceable, a liquidated damages provision must meet two requirements: it must constitute a reasonable forecast of fair compensation for harm that would result from a breach of the contract, and the resultant injury must be difficult to accurately estimate or actual damages could not be easily ascertained. Traylor v. Grafton, 273 Md. 649, 662. (1975).

The Court of Appeals has opined that when the parties to a contract have expressly stipulated to a sum for liquidated damages in a contract a court should not disregard this statement of the parties’ intent unless the amount is “grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract.” Baltimore Bridge Co. v. United Railways and Electric Co. of Baltimore, 125 Md. 208, 214-15 (1915); Traylor, 273 Md. at 662; Anne Arundel Co. v. Norair Engineering Corp., 275 Md. 480, 492 (1975).

Whether the specified liquidated damages constitute reasonable compensation for the expected harm, and whether the injury resulting from a breach would be difficult to estimate or ascertain, is determined from the standpoint of the parties at the time the Contract was entered into, not when it was breached. Anne Arundel Co., 275 Md. at 494; Traylor, 273 Md. at 668; Baltimore Bridge Co., 125 Md. at 214-15. What, if any, actual damages were sustained as the result of a breach of a contract with a liquidated damages provision is entirely irrelevant to the

² See Cherry Hill Construction, Inc., MSBCA 2056, 5 MSBCA ¶459 (1999); Arundel Engineering Corp., MSBCA 1940, et. al., 5 MSBCA ¶ 453 (1998), aff’d in an unreported decision in Arundel Engineering Corp. v. Maryland Mass Transit Administration, No. 554, Sept. Term 1999, slip op. at 22-23 (July 30, 2001).

³ The Board took under advisement SHA’s motion to dismiss the appeal on timeliness grounds and heard the merits of the appeal.

⁴ GP-8.09 is substantially the same as the clause mandated by COMAR.

issue of whether the liquidated damages provision is unreasonable. Traylor, 273 Md. at 670. As the Court of Appeals has noted, the whole point of a liquidated damages clause is to avoid having to calculate actual damages. Cowan v. Meyer, 125 Md. 450 (1915) (The party who failed to perform the contract will not be heard to say that the other party has not suffered any damages from the breach, or that his loss did not equal the sum named. The very object of the clause is to prevent such a controversy.)⁵ Thus, the Court of Appeals has affirmed a trial court's decision to exclude any evidence that the party collecting the liquidated damages had suffered no actual damages. Traylor, 273 Md. at 670.

Ultimately, the goal of the court is to determine the intent of the parties – whether they intended the provision to be liquidated damages, or a penalty. Baltimore Bridge Co., 125 Md. at 215.

In Anne Arundel Co. v. Norair Engineering Corp., *supra*, the Court of Appeals recognized that damage to a county from a delay in the construction of a wastewater treatment plant “obviously would be difficult of ascertainment”. 275 Md. at 494. In that case the Court upheld a liquidated damages for delay provision even though the county could not demonstrate any actual, calculable financial loss from the delay. Thus the Court recognized that delay to the completion of a public works improvement causes damage entirely apart from any measurable financial loss to the public agency. In Baltimore Bridge Co., *supra*, the Court cited with approval a case from the District of Columbia allowing liquidated damages for failure to timely complete construction of a piece of equipment for a fire department. The Court noted that the potential damage to the public if a fire occurred and the fire department did not have the equipment was “inestimable”, and properly the subject of liquidated damages. 125 Md. at 214.

In its holding in Anne Arundel Co. v. Norair, *supra*, the Maryland Court of Appeals recognized the principle that delays in construction of public works projects cause damages over and above any direct financial loss to the agency building the project.

Maryland law as set forth by the Court of Appeals thus requires the Board of Contract Appeals to determine whether the parties intended the liquidated damages provision in the Contract to represent reasonable compensation for the harm caused by a delay to the project. When Appellant submitted its bid for this Contract it agreed that the \$2630 figure in the Contract was for liquidated damages. When representatives of Appellant and SHA executed the Contract for this project they again agreed that this figure was liquidated damages and explicitly agreed that it did not constitute a penalty. Appellant did not object to this language before submitting its bid or before signing the Contract. While this language is not in and of itself determinative of the issue in this case, the language used in a contract is a circumstance that should be considered in determining the parties' intent. Traylor, 273 Md. at 661.

SHA incurs additional direct and indirect costs when a project is late, including extra costs for inspectors, for supervisory and administrative personnel, for support services, for SHA-owned equipment, for consultant costs required by the contract when a project is late, and for

⁵ The Court has noted that this works both ways; if actual damages are greater than the liquidated damages, the liquidated damages still apply, “because of the agreement between the parties that the amount so named should be in lieu of the damages resulting . . .” Baltimore Bridge Co., 125 Md. at 215.

additional payments that must be made to the contractor for work items that are time-related.

In addition to the financial consequences SHA suffers when a project is delayed, there are other damages that are less tangible. It is typical for SHA to get complaints from the public when a project is delayed. These complaints come from motorists, from the government, and from elected representatives, and require an appropriate response from SHA.

When a highway construction project is delayed, the citizens of Maryland are harmed, both the traveling public who use the roads and the members of the public whose property adjoins a project. This harm comes in a number of different forms: the noise of the construction, the safety concerns, the public's inability to use the improvement (such as a road widening) under construction, and the presence of temporary detours which can cause confusion and slow traffic. On some contracts, such as interstate projects that have an incentive component, SHA will add a specific dollar amount to the liquidated damages to account for the public inconvenience caused by late completion. But even on projects such as the present one, in which a specific dollar figure is not factored in to the liquidated damages, the public still suffers the same inconveniences from a late project.

For the instant Contract, the liquidated damages figure of \$2630 per day was calculated by SHA's Office of Construction for the range of highway construction contracts with a dollar value of \$11 million to \$14 million. The number is based on two components: the cost to SHA for the work of its inspectors, and the cost to SHA for its general and administrative expenses, i.e. its overhead. The costs on which the number is based are actual, historical costs to SHA for inspectors' salaries, overtime, fringe benefits, and expenses, plus actual historical general and administrative costs. Based on these actual costs SHA established a daily cost to SHA for an inspector in each personnel classification in the SHA system. The daily rates for each class of inspectors were then multiplied times the number of inspectors in each class that SHA determined to be appropriate for jobs that fall within the defined cost range.

Determining the number and class of inspectors that would be appropriate for jobs that fall within various price ranges was done by technical engineering staff at SHA headquarters who looked at the various work elements of a highway construction contract and determined what would be the inspection requirements for each of those elements. From that analysis SHA established the number and classification of inspectors that would be required for jobs of different sizes. These guidelines were initially established about 20 years ago, and have been revised periodically since then. The version of the guidelines used to establish the liquidated damages for this Contract indicate they were revised in May, 1993, just prior to the time the liquidated damages figure for this Contract was established. These guidelines indicate that nine would be the appropriate number of inspectors to use to set liquidated damages for jobs in the \$11-14 million dollar cost range, and the cost of those inspectors to SHA would be \$2630 per calendar day.

The record reflects that the actual liquidated damages number in this Contract was calculated based on anticipated additional inspection costs plus a markup for SHA's general and administrative expenses. However, it is undisputed that these are not the only costs incurred by or harm suffered by SHA and the public when there is a delay to project completion. As the

cases cited above make clear, whether or not a liquidated damages amount is fair compensation for damages in the event of a breach is evaluated by taking into account all of the harm that would result from that breach.

However, whether the assessment takes into account the full range of potential damages that would result from delay to project completion, or whether the Board looks just at the costs included in the actual number, the result would be the same. Under either assessment the evidence reflects that the number in the Contract is fair compensation for the foreseeable harm.

As described above, the number in the Contract reflects a reasonable assessment of what SHA would incur for overhead and inspection costs for a project in the \$11-14 million range. It was based on a rational process in which people with technical experience in highway construction looked at the work activities included in typical highway construction projects and made an assessment as to how many inspectors would be appropriate for these work activities. It was based on SHA's actual historical costs, and the information that went into the calculation was periodically updated, including just months before the liquidated damages for this Contract were established. The case law in Maryland holds that a liquidated damages figure should not be held invalid unless it is "grossly" excessive such as to indicate that there was no bona fide attempt to arrive at a reasonable forecast of harm, but rather the intent was to create a penalty. Baltimore Bridge Co., 125 Md. at 214-15. The record does not reflect that the figure here is grossly excessive; rather the evidence reflects a genuine attempt on SHA's part to arrive at fair compensation for a delay.

Appellant challenged the justification for the use of nine (9) inspectors, a fringe benefit percentage of 56.3% for the inspectors and a 105.4% markup for SHA's administrative overhead expenses. Appellant presented testimony that for a generic highway construction project consisting of paving, grading, drainage and soundwalls, where each work activity proceeded individually and sequentially, he believed five inspectors would be sufficient.

However, SHA's calculation was done for projects within a specific dollar range, into which this project falls and Appellant agreed that projects within the \$11-14 million range could and would differ from one another and would have different needs for inspectors.

However, assuming arguendo that five inspectors would be sufficient to staff the project does not establish that SHA's calculation for the range of projects that would be possible in the \$11-14 million range is so excessive that it constitutes an illegal penalty.

Further, simply comparing nine versus five inspectors would not resolve the issue before the Board, because to determine whether SHA's liquidated damages are reasonable it is necessary to look at all of the damages that could be expected from a delay, not just at inspection costs. The Courts have observed that in assessing the reasonableness of liquidated damages it is appropriate to consider all potential damages, not just measurable financial costs. E.g., Anne Arundel Co., 275 Md. at 494 (inconvenience to public); Baltimore Bridge, 125 MD. at 219 (inconvenience, additional care to protect railway passengers, safety concerns, loss of business). The potential damages that would be incurred by SHA and the public could be expected to exceed the inspection and overhead costs. When the full range of potential damages suffered by

SHA and the public are factored into the assessment, as they should be, there is no basis for the Board to conclude that the liquidated damages calculation is grossly excessive or out of all proportion to the actual harm that could be expected by the parties.

The liquidated damages figure in the Contract also meets the second legal requirement that the damages that would be incurred from a delay to project completion would be difficult or impossible to determine prior to entering into the Contract. Neither party could know in advance when a delay would occur, what activities would be impacted, or how long a delay would last. Some damages would be difficult to measure at all, such as the impact on other projects of a lack of inspectors and equipment, or the loss of goodwill from the public, and the public inconvenience costs would be difficult to quantify. As the courts have noted, these are reasons why parties agree on liquidated damages prior to contracting.

The parties to this Contract agreed to a liquidated damages figure of \$2630 per day, and agreed that it was in fact for liquidated damages and not an illegal penalty. This figure was arrived at using a process and guidelines that SHA has been following without objection for 20 years. We would thus have denied the appeal on the merits. However, as noted Appellant did not file a timely claim, and thus the appeal must be dismissed for lack of jurisdiction. Accordingly, it is Ordered this day of 17th October, 2001 that the appeal is dismissed with prejudice.

Dated: October 17, 2001

Robert B. Harrison III
Board Member

I concur:

Randolph B. Rosencrantz
Chairman

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), which is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2179, appeal of WILLIAMS CONSTRUCTION CO., INC., under SHA Contract No. AA-132-504-572.

Dated: October 17, 2001

Mary F. Priscilla
Recorder

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