BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF WILLIAMS CONSTRUCTION COMPANY, INC.	)	
	)	Docket No. MSBCA 2187
Under State Highway Administration	)	
Contract No. AW-890-501-070	)	

December 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.

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APPEARANCE FOR RESPONDENT: Dana A. Reed
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OPINION BY BOARD MEMBER HARRISON

Appellant timely appeals the denial of its claim for the actual cost of replacement Type II Borrow on the project covered by the subject Contract.

Findings of Fact

1. In this Contract, which was to construct a portion of Md. Route 100, there were several pay items for earth work:

Item number	Item description	Estimated quantity	Contract price
2002	Class 1 Excavation	1,265,000 cubic yards	$2.35/cy
2003	Class 1A Excavation	5,000 cubic yards	$5.00/cy
2007	Borrow Excavation Type II	260,000 cubic yards	$ .01/cy
2008	Contingent Borrow Excavation Type II	1,000 cubic yards	$ .01/cy

2. Class 1 Excavation is the removal of existing ground down to the subgrade of the road. The Contract requires the con-tractor to use excavated Class 1 material on the project to construct embankments. Payment for Class 1 Excavation includes both the cost of excavating the dirt and re-using it elsewhere on site; the Contractor is not paid any additional amount for using the Class 1 Excavation as on-site fill.
3. Class 1A Excavation is the removal of unsuitable material below the subgrade of the road. Class 1A Excavation must be backfilled to bring the grade back up to the subgrade of the road. The backfill used must meet the requirements of Type II material, which is dirt of a particular sandy quality.
4. Type II Borrow is dirt of a particular sandy quality which is brought in from off-site. The Contract provides that Type II Borrow, Bid Item Number 2007, is to be used as shown on the plans and to construct embankments of three feet or less. Contingent Type II Borrow, Item 2008, is to be used to backfill Class 1A Excavation and for use as directed by the project engineer.
5. Because Class 1A Excavation is by definition below the existing ground, it is difficult to know in advance the exact amount of Class 1A that will have to be done on a particular project. The decision about how much Class 1A to remove is made by SHA's project engineer on the job site. For this reason, the Contract informs the Appellant that the actual quantity of Class 1A Excavation is subject to wide variation from the estimated quantity.
6. The Contract specifies that Item 2008, Contingent Type II Borrow, is for backfill of Class 1A Excavation. The Contract provides that the Contract's Variations in Estimated Quantities clause will not apply to work items identified as being contingent, and that therefore no adjustment in the Contract price will be made for variations in the estimated quantities of these items.
7. Appellant did not include all of its costs in its bid price for either Type II Borrow item. It bid both Item 2007 and Item 2008 at $ .01 per cubic yard. However, its actual costs to do the work were over $8.00 per cubic yard. Bid prices were based on an estimated quantity of 261,000 cubic yards of Type II Borrow. Appellant bid $.01 because, rather than bringing Type II material from off-site, Appellant planned to obtain Type II material from the Class 1 Excavation. Pre-bid, Appellant projected that it could obtain between 210,000 and 265,000 cubic yards of Type II material from on-site. In actuality about 320,000 cubic yards of Type II material was obtained from the on-site Class 1 Excavation.
8. In this appeal Appellant is seeking payment of its full costs for 11,613 cubic yards of Type II Borrow which was brought on site between July and September, 1996. All of this borrow was used for work provided for in the Contract, capping of embankments and primarily backfill of Class 1A Excavation. SHA paid Appellant its Contract bid price of $.01 per cubic yard for Type II Borrow and Appellant seeks the difference between $.01 and either an $8.50 per cubic yard price as established for the Type II material furnished in the MARC station interchanged footprint discussed below or an $8.12 per cubic yard price offered on a force account basis.
9. In the first half of 1993, after the Contract was awarded (in 1992), SHA added an interchange to provide access from Route 100 to a new MARC train station being built in the area. This interchange was added to the Contract documents by means of Redline Revisions 3 and 4. Plan sheet 38A shows the addition of the MARC station interchange to the project. Plan sheet 38 shows the same area as it originally was to be constructed. Prior to

the change the work in that area was to consist of construction of the mainline road and embankment that sloped gradually to the edge of the fill area. The change added an intersection with ramps and a bridge. This new configuration had to be constructed in substantially the same space as the original work. One of the reasons the interchange had to be constructed in substantially the same area as the original work was because there was a large wetlands area in this location which could not be disturbed. This wetlands area was shown on the plans, and pointed out to the Contractor in the Contract special provisions.

10. SHA determined that the best way to stay within the original limits of work was through use of a "mechanically stabilized embankment," referred to as a geogrid system. SHA determined that the work to construct these slopes would require additional Type II material. SHA asked Appellant to provide a new price for the additional Type II material required by the change.

11. In August, 1993 SHA directed Appellant to perform Class 1A Excavation in the area where the new interchange was to be built. Appellant's records indicate that it performed most of this work between August and October, 1993. At Appellant's suggestion, all of the Type II material to backfill the Class 1A Excavation in this area was taken from the on-site Class 1 Excavation. This Type II material, replacement of which is the subject of this appeal, was not included in Redline Revisions 3 and 4 nor did Appellant contemporaneously advise SHA in writing that it expected SHA to pay to replace the backfill material taken from the Class 1 Excavation.

12. Because of the nature of the soil conditions and the fact that the changed work was being done in substantially the same physical location as the original work, the record reflects the probability that Class 1A Excavation would have had to be done in this area even if no change had been made to the project, to provide a firm foundation for the embankment. The record also reflects that Class 1A Excavation was needed all over the job, including at other locations in the wetlands area.

13. SHA paid Appellant its Contract prices for both the Class 1A Excavation in the area of the interchange and the Class 1 Excavation from which the backfill came. Appellant did not dispute this method of payment, or ask to be paid more at the time this work was done.

14. SHA and Appellant agreed on two Extra Work Orders – 11 and 12 – to compensate Appellant for the 12,000 cubic yards of Type II material required to construct the MARC station interchange taken from the on-site Class I Excavation. The record reflects that Appellant believed that the Class 1A Excavation backfill done in the vicinity of the new interchange should have been included in the work called for by Redline Revision 4 and that such item was omitted by oversight. This work was substantially complete by October, 1993.

15. Appellant executed Extra Work Order 11 on January 14, 1994 and Extra Work Order 12 on March 21, 1994 without requesting that the quantity of Type II material for which payment would be made at the $8.50 rate be increased to cover Appellant's costs for backfilling the Class 1A Excavation in the interchange area. When it executed these extra work orders Appellant acknowledged that they were full accord and satisfaction for all of the items included.

16. Appellant wrote to SHA on September 22, 1995 asking to be paid the $8.50 per cubic yard for the 12,000 cubic yards of Type II Borrow authorized by Extra Work Orders 11

and 12. At this time Appellant knew that the actual quantity of Class 1A Excavation was going to be much greater than the estimated quantity, and that this additional quantity of Class 1A Excavation would have to be filled with an additional quantity of Type II material. However, Appellant still did not request SHA to increase the quantity of Type II material to be paid for at $8.50 on account of the Redline Revision 3 and 4 changes.

17. In 1996 the supply of Type II material from on site Class 1 Excavation was exhausted, so Appellant began bringing in Type II Borrow to complete the project. SHA paid Appellant for 12,028 cubic yards of this borrow at $8.50 per cubic yard pursuant to Extra Work Orders 11 and 12. Approximately 13,839 cubic yards were used in other changed work and were paid for on a force account basis. The remaining Type II Borrow was used for original Contract work, either capping of embankment or Class 1A backfill. None of this material was used to backfill Class 1A Excavation at the MARC station interchange, which had been done over a year and half earlier.

18. SHA paid Appellant its Contract bid rate of $.01 per cubic yard for this Type II Borrow used for original Contract work. Twelve thousand (12,000) cubic yards of this material was at issue in Appellant's appeal to this Board in Williams Construction Company, Inc., MSBCA 2111, 5 MSBCA ¶480 (2000), which opinion is presently pending decision in the Court of Special Appeals, the Board having been reversed by the Circuit Court for Baltimore City. At issue in this appeal is the price to be paid for 11,613 cubic yards.

19. By a letter dated March 14, 2000 Appellant notified SHA, for the first time, that it wanted SHA to pay Appellant its full costs to replace the Type II material from the Class 1 Excavation used to backfill Class 1A Excavation in the area of the MARC station interchange. Appellant alleged that the Class 1A Excavation was caused by the addition of the MARC station interchange. By letter dated May 16, 2000, SHA denied Appellant's claim and Appellant appealed to this Board.

20. In its Complaint filed in this appeal Appellant added a claim for payment of its full costs for the Type II Borrow under the Contract's Variations in Estimated Quantities clause; this claim had never previously been raised with SHA (a condition precedent to this Board's jurisdiction) and was otherwise untimely filed which also divests the Board of jurisdiction. Thus we shall not discuss the matter further, to include the issue of whether a contract provision that states that the Variations Clause does not apply to a contingent bid item is lawful.

Decision

In 1993, when Redline Revision 4 was issued, Appellant told SHA that it might have to go off site to get any more than the estimated 260,000 cubic yards of Type II material called for in the Contract documents. Accordingly, SHA solicited prices from Appellant for the additional 12,000 cubic yards of Type II material needed for the MARC station interchange, and ultimately issued Extra Work Orders 11 and 12. By the end of October, 1993, Appellant knew from its own records that over 11,000 cubic yards of Type II material from on-site excavation had been used to backfill Class 1A Excavation in the area of the MARC station interchange. Thus, at that point, Appellant had full knowledge of the basis of its claim for replacement of the on-site Type II material used on this part of the project. Subsequent to 1993 Appellant sent SHA several letters dealing with the Type II borrow issue. During that time the quantity of Class 1A and resultant need for Type II backfill continued to grow. In MSBCA 2111, the Board found that Appellant

timely notified SHA that it wanted to be paid for replacement material by letter dated February 18, 1998. At the hearing of MSBCA 2111, the dirt in question in this appeal (11,613 cubic yards) representing dirt used to cap embankments or backfill Class 1A Excavation was removed from consideration for purposes of that appeal by agreement of the parties and left to be dealt with later.

In its letter of March 14, 2000 Appellant notified SHA it wanted to be paid to replace all the material used in 1993 pursuant to Redline Revisions 3 and 4. However, Appellant never notified SHA prior to its appeal to this Board that it had a claim under the Variations in Estimated Quantities Clause; the first time it raised this issue was in its Complaint in this appeal, and, as noted, the Variations Clause issue will not be discussed.

As an alternate basis for its claim Appellant asserts that it is entitled to an adjustment under the Contract's Changes Clause, GP- 4.06. The change that it is relying on is the addition of the MARC station interchange in 1993. Appellant asserts that it is entitled to be paid to replace Type II material that was taken from Class 1 Excavation to backfill Class 1A Excavation in the area encompassed by Redline Revisions 3 and 4.

In its March 14, 2000 notice of claim, Appellant argues that:

> The overall need for Type 2 material was exacerbated when the MARC station was added to the project. Extra work orders 11 and 12 added approximately 12,000 cy of type 2 material for special fills to the project and a new unit price of $8.50/cy was established. Not only was 12,000 cy of type 2 material needed for the special geogrid fills, but 11,185.61 cy of type 2 material was also needed to replace the 1A Excavation directed under the fills at the MARC station to provide an extra firm support for the geogrid fill.
>
> From our review of documentation, specifically the 1A Excavation item, 9,987.15 cy of 1A Excavation was traced directly to this work in the foot print of the MARC station. Using the densification factor of 12% specified in the grading table on sheet 469 of the Contract, this translates to a need for 11,185.61 cy of replacement material. We have enclosed both a "Memorandum of Meeting" from KCI Technologies which shows this undercutting to be extra work beyond Redline Revisions 3 & 4's scope associated with the MARC station. Absent the MARC station work, however, there would have [been] no need for undercut in this area. Also enclosed, is a copy of our Class 1A ledger sheets which indicate the quantities in the footprint of Redlines 3 and 4 work.
>
> Williams Construction Co., Inc. supplements its earlier request for payment of its cost to furnish the 11,613.64 cubic yards of type 2 material for the project by pointing out that either of two Contract provisions justify payment.
>
> The Contract Changes clause would necessitate either a mutually agreed upon price for the additional type 2 replacement material or payment on a force account basis. A price of $8.50/cy has already been established for the additional type 2

borrow furnished in the MARC station foot print. Alternatively, Williams has offered a price of $8.12/cy which was prepared on a force account basis and was verified separately by the auditors.

The second basis for payment is the existence of a differing site condition. The need to replace wet material to support the geogrid fill was not anticipated by SHA prior to the time the MARC station was added and the need for a more solid base led to this undercut and subsequent installation of type 2 material fill. [1]

We are requesting your final decision regarding our right to payment for 11,613.94 cy at the E.W.O. rate of $8.50 which amounts to $98,718.19 or alternatively at the force account rate of $8.12 which amounts to $94,305.19.

We find that the Changes Clause applies in these circumstances. However, Appellant still must show that it is entitled to an equitable adjustment under the Clause; it must demonstrate that the Class 1A Excavation and backfill done in 1993 was caused by a change to the Contract. A determination was not made at the time the MARC station work was being performed whether additional Class 1A Excavation was actually caused by the addition of the MARC station interchange. It is true, as Appellant points out, that there was Class 1A Excavation required in the area of the MARC station interchange. However, this work occurred in substantially the same physical space as the original work that was included in the plans as bid.

Respondent argues that Class 1A Excavation would have been required in that area because the Contract documents indicated that the project was in a low, saturated wetlands area. In fact, Class 1A Excavation was required all over the project. To show entitlement to an adjustment for replacement material under the Changes Clause Appellant bears the burden of proving that the Class 1A Excavation in the vicinity of the MARC station interchange was caused by the change and would not have been needed if the work had been done as originally planned.

Mr. Dan Sajedi, an SHA geotechnical engineer with ten years of experience in assessing soil conditions on highway projects and determining if undercut is necessary, testified he was familiar with the project site and the ground conditions present in the area encompassed by the MARC station interchange and that he participated in determining the areas of the interchange work where Class 1A Excavation was to be done.[2] Mr. Sajedi testified that, based on his knowledge of the project and subsequent slope stability checks, it would have been necessary to do Class 1A Excavation at that location (the location of the mechanically stabilized embankment) even if the MARC station interchange work had not been added, in order to obtain the required factor of safety.

Appellant argues that it was an outcome of building the embankment pursuant to Red Line Revisions 3 and 4, using the geogrid design, that led to SHA's request for extra support which constitutes a change to the work requiring Class 1A Excavation and Type II fill.

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[1] The Board does not find that a differing site condition is involved and will not further discuss this basis for Appellant's claim.

[2] Class 1A Excavation is determined at the job site by the project engineer.

We find based on the testimony of Mr. Sajedi that the Class 1A Excavation work requiring backfill primarily from the 11,613 cubic yards of Type II Borrow at issue in this appeal would have been necessary even if there had been no MARC station interchange. Since the Class 1A Excavation work would have been necessary in any event no change is involved and Appellant is only entitled to its bid price of $.01 for Type II Borrow under Bid Item Number 2007 or 2008 for the quantity of borrow used to backfill the Class IA Excavation.

While we have entertained a discussion of the appeal on the merits, our determination that the claim based on the changes clause lacked merit because it involved work that otherwise would have been required to be performed also leads us to the conclusion that the claim noticed in the letter of March 14, 2000 was late.

St. Fin. & Proc. Code Ann. §15-217 provides that a Contract claim "shall be submitted" within the time required by regulation. COMAR 21.10.04.02 requires a Contractor to file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier. If a notice of claim is not timely filed, COMAR 21.10.04.02C provides that the claim "shall be dismissed."[3] This Board has held that absent the timely written notice required by this regulation, the Board does not have jurisdiction to consider a claim, and the Court of Special Appeals has recently agreed with the Board's conclusion that timely filing of a notice of claim is a condition precedent to the State's waiver of sovereign immunity from contract claims. Cherry Hill Construction, Inc., MSBCA 2056, 5 MSBCA ¶459 (1999); Arundel Engineering Corp., MSBCA 1940, et.al., 5 MSBCA ¶453 (1998), aff'd, Arundel Engineering Corp. v. Maryland Mass Transit Administration, No. 554, Sept. Term 1999, (July 30, 2001), Cert. den. No. 387 (Nov. 9, 2001).

Appellant knew in 1993 the basis for its claim for replacement of the Type II material used in the Class 1A backfill in the area of the MARC station interchange. To the extent that such claim directly related to dirt connected with MARC station interchange work we could find it to be timely. However, we have found no such connection. Appellant did not give SHA written notice of this claim under the changes clause until its letter of March 14, 2000. Appellant knew in 1996 that the estimated quantity of Contingent Type II Borrow had overrun, yet it did not notify SHA it had a claim under the Variations Clause until it filed its Complaint in July of 2000. Because these claims under the Changes and Variations Clauses were not timely filed, these claims are barred by sovereign immunity; this Board does not, as a matter of law, have jurisdiction to consider them, and they must be dismissed.

Accordingly, the Board must dismiss Appellant's appeal for lack of jurisdiction and would dismiss Appellant's appeal on the merits if the Board had jurisdiction.

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[3] GP-5.14 of the instant Contract contains provisions similar to COMAR 21.10.04.02 requiring filing of a notice of claim after the basis for the claim is known or should have been known and providing for dismissal if the notice of claim is not filed within the prescribed time.

Wherefore, it is Ordered this 17th day of December, 2001 that the appeal is dismissed.

Dated: December 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), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2187, appeal of Williams Construction Co., Inc. under State Highway Administration Contract No. AW-890-501-070.

Dated: December 17, 2001

Mary F. Priscilla
Recorder