

STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Docket No. 2568	Date of Decision: 03/19/08
Appeal Type: [] Bid Protest	[X] Contract Claim
Procurement Identification: Under University of Maryland College Park Contract No. K-103454-K University of Maryland Biotechnology Institute Project No. D-990009 BMC Project No. 001158	
Appellant/Respondent: Barton Malow Company University of Maryland College Park	

Decision Summary:

Interpretation of Contract - Ambiguity - Patent vs. Latent - Latent ambiguity in a contract provision is one for which reasonable alternative interpretations exist which are not obvious prior to their discovery.

Interpretation of Contract - Contra Proferentum - Ordinarily contract provisions are construed against the party who drafted them, but a design and build contract may shift the responsibility of contract precision from the State to the party charged to develop construction specifications.

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In the Appeal of Barton Malow)
Company)

Under University of Maryland)
College Park)
Contract No.K-103454-K)
University of Maryland)
Biotechnology Institute)
Project No. D-990009)
BMC Project No. 001158)

Docket No. MSBCA 2568

APPEARANCE FOR APPELLANT:

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OPINION BY BOARD MEMBER DEMBROW

This contract dispute arises from a claim made by the installers of air ventilation ductwork at the University of Maryland Biotechnology Institute's (UMBI) Center for Advanced Research in Biotechnology (CARB) II Building, located in Shady Grove, Montgomery County, Maryland. The central issue to be resolved is whether the contract documents required that all ductwork be tested for leakage, or in the alternative, that only representative portions of each ductwork system was required to be leak tested. For the reasons that follow, this appeal is denied.

Findings of Fact

1. On or about February 15, 2001, appellant Barton Malow was awarded a two-part contract for pre-construction services and construction management services, for which the University of Maryland (UM) promised and agreed to remit to Barton Malow the sum of \$270,000.00 for its pre-construction services and \$936,710.00 for its construction management services associated with the construction of UMBI's CARB II Building, a four-story, 140,000 square foot multi-functional facility, with specialized academic, research, laboratory, clinic, office and administrative spaces for which Barton Malow agreed to a guaranteed maximum total construction price of \$39,314,580.00. (Trial Exhibit No. 40.)
2. The aforesaid contract, known as Proposal No. 80635-K in UM Contract No. K-103454-K for Project No. D-990009, established certain specifications for Barton Malow's construction management services, which stated:
 - "I. SECTION I - INSTRUCTIONS TO PROPOSERS
 - A. SUMMARY...
 2. The construction Manager will be an integral member of the Project Team consisting of representatives from the University, the Architect, and other consultants, as required. Generally, it will be the responsibility of the construction Manager to integrate the design and construction phases, utilizing his skills and knowledge of the general contracting, to develop schedules; prepare project construction estimates; study labor conditions; and, in any other way deemed necessary, to contribute to the development of the project during the pre-construction / design phase. During the construction phase, the CM will be responsible for constructing the project under the Guaranteed Maximum Price (GMP) inclusive of all construction services therein...
 7. Coordination of Contract Documents

7.1 The Construction Manager shall review the drawings and specifications as they are being prepared, recommending alternative solutions whenever design details affect costs, construction feasibility or schedules. The Construction Manager shall notify the Architect and the University in writing upon observing any features in the plans or specifications which appear to be ambiguous, confusing, conflicting or erroneous.

7.2 The Construction Manager shall provide a thorough interdisciplinary coordination review of Contract Drawings and Specifications (to be performed by a qualified firm or qualified personnel) before Trade Contract Bidding. Review shall be performed utilizing a structured and industry accepted process. The CM shall review the final documents to see that all comments have been incorporated.

7.3 Therefore, such ambiguous, confusing, conflicting and/or erroneous features discovered in the plans or specifications by the CM during the review process shall be understood to be corrected, and any associated costs shall be included in the CM's Guaranteed Maximum Price (GMP)." (Trial Exhibit No. 40, pgs. 1, 38 and 39.)

3. Barton Malow hired Poole & Kent as the mechanical contractor on the job, and Poole & Kent hired United Sheet Metal (USM) as its subcontractor responsible for fabricating, installing and testing all ductwork, which included approximately thirty (30) medium pressure duct systems. (Tr. at 80-81.)
4. Section 15800 of the bid package governing "Air Distribution" defined "medium pressure duct work" as "over 2" and up to 6" water gauge" and provided further as follows:

"2.7.C.1

All supply ductwork from Air Handling Units No. (1-8) to air terminal units and all laboratory exhaust, **unless other wise** [sic] **noted**, shall be "medium pressure" ductwork. Medium pressure duct

construction shall be used for all BL-3 [biosafety level 3], glasswash, autoclave and cage wash ductwork... [Emphasis in original.]

2.7.C.5

All medium pressure duct systems shall be leak tested in strict conformance with Chapter 10 of the SMACNA High Pressure Duct Construction Standards, Third Edition - 1975 Duct Manual...
[Emphasis supplied.]

2.7.C.6

Rectangular Medium Pressure Ductwork, unless otherwise specified herein, shall conform with the requirements and details contained in HVAC Ductwork Construction Standards, First Edition - **1985**, hereinafter referred to as "Duct Manual"...
[Emphasis supplied.]

3.5.I.2

Medium and high pressure ductwork shall be tested in accordance with paragraph 2.7.C.5 of this section." (Trial Exhibit No. 1 at 15800-25 and 15800-39.)

5. The 1975 and 1985 Duct Manuals referenced above are national standards recognized in the industry as adopted and published by SMACNA (Sheet Metal and Air Conditioning Contractors' National Association, Inc.).
6. The 1975 SMACNA "High Pressure Duct Construction Standards" Manual provides as follows:

"CHAPTER 10
TESTING FOR LEAKAGE

High velocity ducts must be sufficiently air tight to insure economical and quiet performance of the system. It must be recognized that air tightness in ducts as a practical matter cannot, and need not, be absolute (as it must be in a water piping system). Adequate air tightness can normally be assured by: a) selection of construction detail known to comply with the functional standards

number 3 and 4 in Chapter 11, b) proper assembly and c) elimination of leaks that are audible and those that can be felt by hand...

Furthermore, leakage tests are an added expense in system installation. **The designer should determine the actual need for leakage tests.** In some cases representative tests (of selected portions of a system) may be desired; in others the complete system may be tested. When project requirements are such that the three elements of leakage control mentioned above will not serve to insure satisfactory installation, the project documents should clearly indicate the extent of testing required. Test procedures are described hereinafter...[Emphasis supplied.]

Test Procedures...

2(c) Total allowable leakage should not exceed one (1) percent of the total system design air flow rate. When partial sections of the duct system are tested, the summation of the leakage for all sections shall not exceed the total allowable leakage." (Trial Exhibit No. 4 at 65.)

7. The Foreward to SMACNA's 1985 "HVAC Air Duct Leakage Test Manual" states as follows:

"New research in the leakage rates of sealed and unsealed ductwork has disclosed a need for a better method of evaluating duct leakage. European countries introduced an evaluation approach using the surface area of the duct and the pressure in the duct as the basic parameters. SMACNA has concluded that this approach is far superior to the arbitrary assignment of a percentage of fan flow rate as a leakage criteria. The surface area basis highlights the effect of system size and is now the keynote of new SMACNA duct leakage classifications. It is expected that in the future industry will have correlated leakage classes with performance of particular sealant methods used on individual joint systems.

Leakage testing on job sites disrupts productivity, is costly and is generally not as beneficial as one might expect. Relatedly, industry fails to recognize the extent that equipment that is inserted in-line in duct leaks.

Few ratings for this are published. Designers must account for equipment leakage separately from duct leakage allowances as they evaluate system leakage. SMACNA encourages designers to specify equipment leakage control and to rely on prescriptive sealing of ductwork as measures what will normally lead to effective control of leakage without the need for extensive leakage testing." (Trial Exhibit No. 3 at iii.)

8. With respect to the industry standard regarding duct testing, the 1985 SMACNA Duct Manual states:

"1.5.1 Leakage Tests...

There is no need to verify leakage control by field testing when adequate methods of assembly and sealing are used. Leakage tests are an added expense in system installation. It is not recommended that duct systems constructed to 3" (750 Pa) wg [water gauge] or lower be tested because this is generally not cost effective. For duct systems constructed to 4" (1000 Pa) wg class and higher, the designer must determine if any justification for testing exists. If it does, **the contract documents must clearly designate the portions of the system(s) to be tested** and the appropriate test methods... [Emphasis supplied.]

6.2

When the designer has adequately analyzed the systems and clearly specified the test parameters the reporting procedure is relative simple. As discussed in previous sections **the following requirement should be clearly specified:...**
Amount of system to be tested (10%, 20%, 50%, all)... [Emphasis supplied.]

Appendix D.1 SAMPLE PROJECT SPECIFICATION

NOTICE TO DESIGNERS:

WHEN TESTS ARE DEEMED NECESSARY, A TEST OF A REPRESENTATIVE SAMPLE OF THE DUCT IS RECOMMENDED. IF SAMPLE IS DEFECTIVE, THE CONTRACTOR SHOULD REPAIR OR MODIFY THE CONSTRUCTION. IF RESULTS OF SAMPLE TEST ARE GOOD, CONTRACTOR CAN BE PERMITTED TO PROCEED WITHOUT FURTHER TESTING. VISUAL

INSPECTION AND EXAMINATION OF OPERATING CONDITIONS
SHOULD SUFFICE TO JUSTIFY FAITH IN METHODS USED."
(Trial Exhibit No. 3 at 1.4, 6.1 AND D.1.)

9. In addition to converting to the use of total duct surface area instead of air flow rate as the principal factor determining the amount of leakage allowable in satisfactory duct systems, of principal relevance to the instant dispute, the primary change between the 1975 and 1985 editions of the industry recognized SMACNA standard was the apparent inclusion in the updated standard of additional discretion for designers to determine the extent of duct testing needed for any given job, and the encouragement of duct system designers not to require at unnecessary cost the excessive testing of every component of a duct system when the testing of representative samples will suffice.
10. The CARB II building was not designed for ordinary commercial or academic activity, but was replete with design elements to accommodate specialized biotechnology research needs such as elevated bio-safety levels and the consequent necessity of special atmospheric handling systems, including insulation of various laboratory areas from potential outside atmospheric contaminants as well as protecting the outside atmosphere both within and surrounding the building from the potential of uncontrolled release into the air of infectious agents with the potential of extreme hazard to human health and public safety.
11. A reasonable contractor evaluating the specialized nature of the construction elements of the CARB II building design, and particularly its various air handling duct systems including pressurized clean rooms, would readily expect construction of the duct systems to require much more leak testing than that required for the construction of an ordinary commercial or academic building.

12. Section 1090 of the bid and contract documents stated as follows:

"1.4 INDUSTRY STANDARDS...

.2 Publication Dates: Where compliance with a standard is required, comply with standard in effect as of date of Contract Documents.

.3 Conflicting Requirements: Where compliance with two or more standards is specified, and they establish different or conflicting requirements for minimum quantities or quality levels, the most stringent requirement will be enforced and shall be included in the Trade Contractor's bid. Refer requirements that are different, but apparently equal, and uncertainties as to which quality level is more stringent to the Construction Manager for a decision before proceeding." (Trial Exhibit No. 2 at 01090-3.)

13. Burt Hill was retained by the University to perform the architectural and engineering services (A&E) needed to design the CARB II building, and Burt Hill retained RMF Engineering, Inc. (RMF) to serve as its subcontractor for mechanical engineering.

14. On or about October 28, 2003, USM provided to Poole & Kent Company and RMF a certain "Duct Construction Details Submittal Data for Approval" which stated as its fifth (5th) of eight (8) "Special Notes to the Reviewer": "All required Duct Leakage Testing will be performed per the S.M.A.C.N.A. HVAC AIR DUCT LEAKAGE TEST MANUAL, FIRST EDITION 1985, in lieu of the Chapter 10 SMACNA High Pressure Duct Construction Standards specified in Division 15800-25, Paragraph 2.7 DUCTWORK, subparagraph C-5," thereby placing others on notice that USM intended to use the 1985 SMACNA Duct Testing Manual instead of the 1975 edition as specified in contract documents. (Trial Exhibit No. 5 at page 2.)

15. The foregoing notice of USM's intention to test ductwork in accordance with the 1985 standards for testing duct leakage

instead of the 1975 Manual was reviewed by Poole & Kent and deemed on or about November 12, 2003 to be "in compliance with Section 15800-2.6/2.7 of the contract documents." (Trial Exhibit No. 5 at page 1.)

16. Similarly, the same notice of USM's intention to test ductwork in accordance with the 1985 standards for testing duct leakage instead of using the 1975 Manual was reviewed by Mr. Don Smith (Smith), Field Engineer for RMF, who responded on or about November 20, 2003 that "no exceptions [were] taken" regarding USM's intended method of duct testing. (Trial Exhibit No. 5 at Page 1.)

17. With respect to contract ambiguities, the bid package advised bidders as follows:

"00100 Sec. 8.1
Bidder shall promptly notify the Construction Manager of any ambiguity, inconsistency or error, which they may discover upon examination of the Bid Documents or of the site and local conditions...

00700 Sec. 2.06(A)(2)
Clarification - Whenever he has questions, the Contractor should obtain clarification of all questions which may have arisen as to intent of the contract documents or any actual conflict between two or more items in the Contract documents. Should the Contractor have failed to obtain such clarification, then the Construction Manager may direct that the work proceed by any method indicated, specified, or required by the contract documents in the interest of maintaining the best construction practice. Such direction by the construction Manager shall not constitute the basis for a claim for extra costs by the Contractor. The Contractor acknowledges that he had the opportunity to request clarification prior to submitting his bid to the Construction Manager and therefore agrees that he is not entitled to claim extra costs as a result of such clarification." (Trial Exhibit No. 41 at 00100-6 and 00700-9.)

18. There is no evidence to suggest that prior to contract award, anyone questioned or pointed out any potential ambiguity with respect to ductwork leak testing requirements.
19. There is no evidence to suggest that Barton Malow relied upon USM's bid when it determined and submitted its guaranteed maximum price to the University.
20. Smith analyzed contract requirements and concluded as reflected by correspondence dated August 25, 2004 that "all medium pressure ductwork is required to be tested" and reported that interpretation to Burt Hill. (Trial Exhibit No. 6.)
21. On or about October 13, 2004 Poole & Kent sent to Burt Hill drawings indicating the status of ductwork leak testing. (Trial Exhibit No. 44.)
22. On or about October 25, 2004 Smith marked up drawings of duct work indicating what areas still needed to be tested at that time. (Trial Exhibit No. 42.)
23. On or about June 30, 2005 Barton Malow reported incomplete duct testing to Poole & Kent, informing them that the remainder of the ductwork in certain areas needed to be tested because they were classified as having medium pressure ductwork. (Trial Exhibit No. 8.)
24. On or about July 5, 2005, USM directed written correspondence to Poole & Kent, disagreeing with Barton Malow with respect to its allegations of incomplete duct leakage testing as well as its interpretation of contractual specifications as requiring further duct testing. (Trial Exhibit No. 9.)
25. On or about August 25, 2005, Barton Malow threatened Poole & Kent with contract default, sending a written Notice of Intent to Declare Incomplete Work as a result of the failure

- of USM at that time to have performed leak testing on all of its ductwork. (Trial Exhibit No. 17.)
26. On or about July 12, 2006, UM's Frank Leonhart added markings to the duct-work diagram earlier marked by Smith, distinguishing supply from exhaust vents and indicating those portions of the ductwork which had already been tested. (Trial Exhibit No. 42.)
 27. It is reasonable to expect that more duct leak testing costs more than less duct leak testing, and that leak testing all duct work is more costly than leak testing each duct system.
 28. The cost of duct leak testing is considerably enlarged when installed systems must be retroactively invaded with air flow measuring devices or dismantled in order to facilitate post-construction leak testing verification before duct may re-installed and re-sealed after leak testing, as compared to leak testing ductwork during the course of initial system installation.
 29. On or about July 28, 2006, USM noted its intent to file a claim for additional payment pursuant to change order.
 30. Prior to August 26, 2006, Barton Malow did not recognize or contemplate any potential contract ambiguity by way of interpreting the extent of required duct leak testing. (Tr. 158-159.)
 31. USM ultimately tested all ductwork as demanded by UM and verified that all of the ductwork in the CARB II Building passed leak testing standards.
 32. USM originally sought payment for an additional charge of \$49,780.00 for duct leak testing under change order no. 411.
 33. On or about October 18, 2006, UM's Procurement Officer notified Barton Malow of its final decision rejecting USM's claim for compensation for additional duct leak testing stating, "[t]he University's position is that the specification is clear in its instruction in stating that

'all' medium pressure duct systems shall be tested, not portions of the systems." (Trial Exhibit No. 28 at pg. 2.)

34. The instant appeal was noted in timely fashion on November 15, 2006 and heard on the record by the Board at a hearing commencing October 22, 2007, such record being closed with the submission of final Rebuttal Briefs on January 3, 2008.
35. With respect to quantum, the parties have now stipulated that judgment should be entered in the amount of \$39,141.00 in liability by the State if the Board finds in favor of appellant Barton Malow, appellant and its subcontractors waiving any claim to pre-judgment or post-judgment interest.

Decision

The parties agree that resolution of this dispute hinges on interpretation of the following key element of the bid and contract documents:

"2.7.C.5

All medium pressure duct systems shall be leak tested in strict conformance with Chapter 10 of the SMACNA High Pressure Duct Construction Standards, Third Edition - 1975 Duct Manual..."

The foregoing language specifically refers to the necessity of leak testing all medium pressure "duct systems," not all "ductwork," as the State contends is the implication of the use of the word, "all," in this contract provision. The State also relies heavily on the elaboration of the contractor's obligation by reference to the 1975 SMACNA standards instead of the 1985 standards, even though the contract was awarded long after SMACNA's adoption of the less stringent 1985 standards for leak testing ductwork. In this context, the State asserts that the use of the word, "all," predicate to the description of what duct testing is required reasonably conveys the requirement of testing all ductwork, but this argument ignores the logic of the

contrasting view that as used in the pertinent contract provision, "all" modifies "systems," not "ductwork." Requiring the testing of some unspecified portion of **all** duct systems is quite different from requiring the testing of **all** portions of **all** duct systems.

The State's witness, Buck, the RMF engineer who drafted the foregoing contract specification, testified that he deliberately selected the 1975 SMACNA standard rather than the more lenient 1985 standard, and that his use of the word, "all," was intended by him to disclose the necessity of testing 100% of all ductwork. (Tr. at 216-218.) This Board differs from Buck's contention and the State's concurring interpretation that the initial section of the contested contract provision required leak testing of 100% of all ductwork. The word, "all," as used in the opening portion of Sec. 2.7.C.5 of the contract, prescribes the testing of all systems, not all ductwork. This is to conclude merely that the words in question must be given their ordinary meaning, as the Board is obliged to do. See Adolph Baer, Ph.D. and Apothecaries, Inc., MSBCA 1285, 2 MSBCA ¶146 (April 21, 1987).

The more problematic and complex question of contract interpretation is the determination of the balance of the contractor's obligations as set forth in Sec. 2.7.C.5. Is the leak-testing standard applicable to this job defined by the 1975 or the 1985 SMACNA Manual? The pertinent contract provision specifies the 1975 standard, but the contract also states in Sec. 1090 that "where compliance with a standard is required, comply with standard in effect as of the date of Contract Documents," arguably establishing that the more recent and more lenient 1985 standard controls, especially if the reference to the 1975 rather than the 1985 edition was inadvertent. On the other hand, Sec. 1090 further states, "where compliance with two more standards is specified [and the contract in different places does specify both the 1975 and the 1985 SMACNA Manual], and they establish

different or conflicting requirements for minimum quantities or quality levels, the most stringent requirement will be enforced," thereby implying the applicability of the more stringent 1975 SMACNA standard.

It may be unnecessary for this Board to answer the question set forth in the preceding paragraph because, as appellant contends, neither the 1975 nor the 1985 SMACNA establishes a certain amount of duct leakage testing required for the underlying job. Furthermore, USM made timely disclosure of its intent to conduct leak testing in accordance with the 1985 Manual rather than the 1975 Manual as expressly referenced in the contract documents, and at least initially, both Poole & Kent as well as RMF affirmatively noted no objection. Moreover, the determination of how much ductwork should be leak tested is firmly established by both editions of the SMACNA Manual to be within the sole province of the designer's decision making. It is only the rationale and recommended basis of that decision that varies depending on whether the designer uses the 1975 or the 1985 SMACNA standard. And unfortunately, the testing of "all...systems" is all that is contractually mandated here. The actual amount of total ductwork leak testing that is required of each system is nowhere specified as a numerical percentage, as expressly recommended to be done by the 1985 Manual. Instead, the design merely uses the words, "all medium pressure duct systems," leaving to pure speculation whether the applicable percentage of required ductwork leak testing was contemplated to be 100% or some lesser figure, providing only that a portion of each system be tested. Viewed in hindsight it is easy to observe that the designer should have used a numerical percentage for testing the ductwork, rather than just "all" of the duct "systems." In other words, the contract should have simply stated, "test 100% of all ductwork." But that is not what this contract stated, and so an ambiguity resulted, which is the

reason that the instant appeal is filed.

Given the ambiguity which existed here, a seminal related issue is whether that ambiguity was latent or patent. If patent, the obligation falls to the contractor to point out the ambiguity prior to bid award. See David A. Bramble, Inc., MSBCA 1853, 5 MSBCA ¶389 (Feb. 23, 1996). The omission of a percentage requirement for ductwork leak testing might appear at first blush to be a patent error, but in this matter, both parties argue strenuously that there was no ambiguity at all, appellant contending that it only had to leak test some portion of each duct system, and respondent arguing just as vigorously that its intent was clearly stated, that "all means all," and that therefore all ductwork had to be leak tested. The very existence of a good faith argument in this regard on the part of both parties is evidence to the Board that there was an ambiguity and that it was latent.

Appellant is correct in its assertion that Maryland authority holds that the mere averment of a dispute over contract meaning is not proof of the existence of a genuine contract ambiguity, but here, it is an indication of an ambiguity. Intercounty Construction Corp., MSBCA 1036, 2 MSBCA ¶164 (Nov. 6, 1987). Each party read the same contract language and reasonably interpreted it not to be confusing or unclear, each in good faith and for sound reasons reaching entirely different conclusions about what that language obliged the contractor to do. Put simply, there is more than one reasonable interpretation of the language here in dispute. Consequently, an ambiguity existed. This Board concludes further that that ambiguity was not patent, but latent, because, while ultimately causing reasonable persons to differ as to its meaning, the ambiguity is not of such a character as to be clear or glaring or obvious in the instance of initial review. P.G. Construction Company, MSBCA 1642, 4 MSBCA ¶312 (Sept. 17, 1992). As such, under the doctrine of *contra*

proferentem, this latent ambiguity is ordinarily construed against the drafter. Martin G. Imbach, Inc., MSBCA 1020, 1 MSBCA ¶52 (May 31, 1983), Colt Insulation, Inc., MSBCA 1426 and 1446, 3 MSBCA ¶231 (Dec. 5, 1989). If this dispute involved an ordinary building construction contract, this would conclude the Board's analysis and judgment would be entered in the stipulated *ad damnum*. But this matter arises not from an ordinary building construction contract any more than the CARB II building could be fairly regarded as an ordinary building.

The rule of *contra proferentem*, that contract ambiguities are construed against the party who drafted them, is not an absolute directive applied in all cases. See Concrete General, Inc., MSBCA 1062, 1 MSBCA ¶87 (Nov. 7, 1984), American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 (June 24, 1985), The Driggs Corporation, MSBCA 1235, 2 MSBCA ¶141 (Jan. 16, 1987). The principle of strict construction against the party preparing the contract is based upon the rationale that the drafting party is best positioned to avoid the possibility of an ambiguity by insisting upon precise contract expression, and also that the party who is primarily responsible for bringing a certain contract provision into existence should be held primarily responsible for any subsequent determination of its inadequacy. In the case of a contract for pre-construction services and construction management services, however, the Board is not persuaded that either of the reasons for the invocation of *contra proferentem* is present. Instead, the same rationale operates against the party with the duty to provide pre-construction and construction management services. Barton Malow was much more than an ordinary construction subcontractor because its contract included responsibilities during the design phase as well as ongoing construction management services, rendering appellant to be not just a subcontractor but an agent as well.

Barton Malow served, along with the University, the

architect and others, as a part of the project team throughout virtually all phases of building design and construction. Unlike a typical general contractor, in this project the parties entered into an at-risk construction management contract with a guaranteed maximum price. Under such an arrangement, the construction manager becomes involved in the project at a much earlier stage than usual, performing project related duties beginning at the pre-construction design phase and continuing through the duration of construction. Indeed, the construction manager is selected before the design phase to permit the State to obtain numerous pre-construction planning support functions, including the assumption of at least some responsibility to identify and resolve potential contract ambiguities. The construction manager thereafter drafts the various bid packages that direct the activity of the skilled trade professionals who perform the actual construction work. The construction manager then evaluates subcontractors' bids to insure that the scope of necessary work at the job site is fully understood and the general contractor ultimately acts as a supervisor to assure the completion and adequacy of all of the work that is done, while promising and committing to deliver the project within the guaranteed maximum price and not \$39,141.00 more, as sought by this appeal.

Specifically, as set forth in Finding of Fact No. 2 above, Barton Malow is expressly designated as "an integral member of the Project Team" bearing the "responsibility...to integrate the design and construction phases, utilizing his skills and knowledge of the general contracting, to...prepare project construction estimates...and, in any other way deemed necessary, to contribute to the development of the project during the pre-construction / design phase." In addition, the construction management contract provided that "[d]uring the construction phase, the CM [construction manager] will be responsible for

constructing the project under the Guaranteed Maximum Price (GMP) inclusive of all construction services therein..." Furthermore, consistently employing the mandatory "shall" in defining appellant's contract obligations, the contract provided that for good and valuable consideration Barton Malow undertook the duty to "review the drawings and specifications as they are being prepared, recommending alternative solutions whenever design details affect costs, construction feasibility or schedules...[and] notify the Architect and the University in writing upon observing any features in the plans or specifications which appear to be ambiguous, confusing, conflicting or erroneous." Finally, Barton Malow was contractually obligated to "provide a thorough interdisciplinary coordination review of Contract Drawings and Specifications (to be performed by a qualified firm or qualified personnel) before Trade Contract Bidding." Indeed, appellant's broad pre-construction and construction management contract expressly concludes, "[t]herefore, such ambiguous, confusing, conflicting and/or erroneous features discovered in the plans or specifications by the CM during the review process shall be understood to be corrected, and any associated costs shall be included in the CM's Guaranteed Maximum Price (GMP)."

Under these circumstances it would not be fair or justified for this Board to conclude that appellant bears no responsibility for latent ambiguities included in the contract provisions. Indeed, Barton Malow bore direct contractual responsibility for assisting the University in identifying and avoiding contract ambiguities. Appellant cannot on the one hand accept a \$270,000.00 payment for pre-construction contract services and on the other hand validly assert that it is entitled to additional sums because of defects in the contract provisions avoidance of which appellant bore express responsibility. To hold otherwise would be to encourage contract managers to ignore ambiguous provisions by creating a financial incentive for the pre-

construction advisor to render deficient advice resulting in contract ambiguity causing change orders resulting in project cost inflation in excess of the guaranteed maximum price. It would be folly to suggest that an agent could fail in its contract obligation to its principal and thereafter assert a valid claim against the principal for damages accruing to the agent by virtue of its breach of duty owed to the principal.

The University hired appellant to assist it in the drafting of contract specifications in part because the construction experience of a firm like Barton Malow was desired by the University to identify and address the need for exactness in drafting contract specifications. Presumably, as compared to the University, appellant Barton Malow, a company experienced and engaged on an ongoing basis in building construction, including mechanical engineering, held superior knowledge about building construction in general and mechanical engineering in particular. That is why the University hired Barton Malow. Appellant could and should have informed its principal of the costs and benefits of varying degrees of ductwork leak testing and the divergent standards and recommendations between the 1975 and 1985 editions of SMACNA standards. As a part of its design support obligation, appellant could and should have insisted that a certain numerical percentage of ductwork leak testing be set forth in the design and contract documents. Surely one of the reasons that respondent engaged the early construction design and management expertise of Barton Malow was to make sure that such specialized construction design decisions were deliberately identified, addressed and resolved without ambiguity. To sum, the Board determines that appellant should not be permitted to benefit from the failures or defects of the contract it was hired to help create. This is not to suggest that the principle of *contra proferentem* universally does not apply when a construction management services contract is present, but simply that under

the particular facts and circumstances here extant, the rule is inapplicable. As a result, despite the presence of a latent ambiguity, this appeal must be denied.

It is important to note further that Barton Malow concedes that it did not rely upon USM's initial anticipation of duct testing needs when it offered its guaranteed maximum price to the University. This Board has long established that a contractor's failure to establish such pre-bid reliance on proposed contract interpretation prevents recovery under that interpretation. Cherry Hill Construction, Inc., MSBCA 2025 and 2048, 5 MSBCA ¶468 (Feb. 23, 1999). Therefore, even though this Board concurs with appellant's contentions that a latent ambiguity existed and that appellant's interpretation of the meaning of the ambiguous provision is correct, appellant is nonetheless also barred from recovering any sum in excess of its guaranteed maximum price in the absence of any evidence or allegation that appellant relied upon its interpretation of the subject contract ambiguity in pricing the job. Thus, due to this additional shortfall the Board must deny the instant appeal.

Finally, the Board addresses the State's new contention in its post hearing Brief that appellant's claim was not timely filed for review by the procurement officer. The Board notes that the University's March 2, 2007 Answer to Barton Malow's Appeal makes no mention of untimeliness of appellant's presentation of the underlying claim to the procurement officer within thirty (30) days after basis of the claim was known, in accordance with General Condition 6.13(I) of the contract and consistent with COMAR 21.10.04.02, and there was no Motion for Summary Decision filed, nor was any such contention made during the extensive hearing on the record in this proceeding commencing October 22, 2007, nor was any evidence offered on this point at that hearing. For these reasons, the Board concludes that the State is equitably estopped from raising in untimely fashion the

procedural objection of untimeliness. Therefore the State's prayer for dismissal on this ground is denied, but the Board nonetheless dismisses this appeal on the substantive bases more fully set forth above.

Wherefore, it is Ordered this ^{19th} day of March, 2008 that the above-captioned appeal is denied.

Dated: 3/19/08

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Dana Dembrow
Board Member

I Concur:

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Michael Burns
Board Chairman

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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 in MSBCA 2568, appeal of Barton Malow Company under University of Maryland College Park Contract No.K-103454-K University of Maryland Biotechnology Institute Project No. D-990009 BMC Project No. 001158.

Dated:

March 19, 2008

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Michael L. Carnahan
Deputy Clerk