

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GENSTAR STONE PAVING)
PRODUCTS COMPANY) Docket No. MSBCA 1532
)
Under SHA Contract No. B-780)
501-477)

September 22, 1993

Equitable Adjustment - Variation in Estimated Quantities

The "ordinary application" of the estimated quantity clause will determine entitlement to an equitable adjustment except where such application will result in an "excessive profit" (or loss) for the overrun item.

APPEARANCES FOR APPELLANT: Scott A. Livingston, Esq.
Donald A. Tobin, Esq.
Bastianelli, Brown & Touhey
Washington, D.C.

APPEARANCE FOR RESPONDENT: Dana A. Reed
Asst. Attorney General
Baltimore, MD

OPINION OR REMAND BY CHAIRMAN HARRISON

The Court of Special Appeals in an opinion filed January 11, 1993 (94 Md. App. 594 (1993)) voided a decision of the Circuit Court for Baltimore City which had reversed the July 9, 1991 decision of this Board in the above captioned appeal and remanded to the Circuit Court for further remand to this Board so that this Board might reconsider the matter in light of the opinion of the Court of Special Appeals.

The remand involves the interpretation of the estimated quantities clause of the contract GP-4.03¹ as applied to

¹GP-4.03 contains the language required by COMAR 21.07.02.03 for State construction contracts containing estimated quantity items. In relevant part GP-4.03 provides:

Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than 25 percent above or below the estimated quantity stated in this contract, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 124 percent or below 75 percent of the estimated quantity.

Appellant's bid for an estimated quantity of arrow board. The Board has been directed by the Court of Special Appeals to examine whether the ordinary application of the clause may not be appropriate where the State Highway Administration (SHA) asserts that the Appellant would receive an excessive profit based on its having included costs for other items in the bid item for an estimated quantity of arrow board that was the subject of an overrun- Bid Item No. 1006.

In the words of the Court of Special Appeals, the following guidelines are to be applied.

We start with the contract unit price; that is the price to be paid, even for adjustable units, unless an equitable adjustment, to that price, is required. That basic premise, we think, is implicit from the contract language applicable to arrow boards (and other unit price items). See ante: "Method of Measure and Basis of Payment shall be at the contract unit bid price per unit day." There is nothing in that language, or in any other, suggesting that there is to be a complete repricing or that the contract unit price is to be ignored for overrun (or underrun) units.

To become entitled to an equitable adjustment, a party must establish four things. The first thing he needs to show, of course, is the existence of adjustable units - the requisite overrun or underrun. That is evident from the first sentence of the clause. The second thing he needs to establish is that the actual unit cost of the adjustable units varies, in his favor, from the contract unit price, for, unless he can show such a difference, no adjustment in the contract unit price is warranted. If the actual unit cost for the adjustable units is the same as the contract unit price, any reduction in the contract price would not make the contractor "whole," which is the purpose of an equitable adjustment, and any increase in the contract unit price would give the contractor a windfall profit, which is not the purpose of the clause.

The third thing that the proponent needs to establish is that the actual unit cost of the adjustable units is greater or lesser, as the case may be, than the actual unit cost of the base units. That second comparison, between actual units costs, is required because it serves as the basis for measuring the amount of any adjustment. And finally, the proponent must demonstrate that this difference in actual unit cost is due solely to the overrun or underrun and not to any other cause.

If the proponent establishes these four things, under the clear language of the clause - both sentences read

together - he would ordinarily be entitled to an adjustment to the contract unit price for the adjustable units in an amount equal to the difference in actual unit costs due solely to the variation. That difference would be added to, or deducted from, the contract unit price, as the case may be.

In construing the clause in this manner, we stress that this is its ordinary application. There is some flexibility, however, which also arises from the language of the clause. The clause speaks of an "equitable" adjustment that is to be "based on" an increase or decrease in "costs" due solely to the variation.

The word "costs" is not defined in the clause, and thus, when the evidence indicates that the contractor, in its bid, has shifted expenses from one item to another, it may indeed be inequitable to require the government, if it is the one seeking the adjustment, to be put to the burden of auditing the entire job to find and determine the relevance of camouflaged expenses. It may be, in that circumstance, that the government, in making its comparison of actual unit costs of the base and adjustable units, need look only at the lesser of those expenses properly allocable to the item for which an adjustment is sought or those actually included in it.

Apart from the determination of "costs" additional leeway is implicit from the "equitable" nature of the adjustment and the fact that it is merely to be "based on" and not necessarily equivalent to the cost differential. Keeping a contractor "whole" does not require that it be given an excessive profit based on its use of creative accounting in devising its item bid; nor does it allow the Board to cause injury to the contractor by refusing to compensate it for unit costs legitimately incurred by reason of a significant change in the scope of the work upon which the contractor bid.

The standard, being an equitable one, needs to be flexible in its application. It is not to be applied so rigidly as both the Board and the court, in their very different ways, applied it.

94 Md. App. 612-614.

Although upon remand the parties filed written briefs and presented oral argument, no additional evidence was offered by either party. We, therefore, incorporate by reference the Board's opinion of July 9, 1991, and make the following findings in connection with the task assigned by the Court of Special Appeals; noting that SHA initially bears the burden of proof in moving for its equitable adjustment.

Findings of Fact

1. Some costs to include material, equipment and labor costs from other maintenance of traffic bid items (Item Nos. 1002, 1007, 1008, 1009, 1015, 1016, and 1017) were included in Appellant's bid for Item No. 1006 - per unit day Arrow Board. Some equipment costs for dump trucks, paint sprayers, air compressors, line grinders, power brooms and light plants may also have been included in Item No. 1006.
2. Item No. 1006 provided an estimate of 200 unit days of arrow board. Appellant bid \$900.00 per unit. The actual number of unit days required for the work was 514. 125% of the estimated 200 unit days is 250 unit days. Therefore an overrun of 264 unit days ($514 - 250 = 264$) occurred.
3. Costs for a unit day of arrow board are not quantity sensitive. Therefore, the unit day costs of arrow board before and after the 125% threshold under the estimated quantities clause (GP-4.03), i.e. the cost of the 250 base and 264 adjustable units, remain constant.
4. SHA asserts that only \$213,767 of the total of \$462,600 attributable to Item No. 1006 ($\$900.00 \times 514 = \$462,600$) relates to arrow board costs and that the remaining \$248,833 ($\$462,600 - \$213,767 = \$248,833$) is attributable to material, labor and equipment costs for other maintenance of traffic line items such as temporary signs, application and removal of temporary tape, set up and removal of drums, maintaining lights and barrels, variable message signs and temporary barrier wall and other equipment costs for dump trucks, paint sprayers, air compressors, line grinders, power brooms and light plants. SHA further says that allowing for a 10% overhead factor would bring Appellant's direct and indirect costs for arrow board to \$235,144 ($\$213,767 \times 10\% = \$21,377$; $\$213,767 + \$21,377 = \$235,144$). Thus SHA argues that Appellant stands to make a clear profit of \$227,456 ($\$462,600 - \$235,144 = \$227,456$) on the arrow board item amounting to 106% on direct costs and 97% on total costs. Such profit SHA contends is one that is "excessive" based on creative accounting and thus proscribed by the

Court of Special Appeals.

5. This Board is unable to tell from the record before it what amount of the \$900 bid as the unit price for Bid Item No. 1006 actually relates to other bid items. We believe that a reasonable bidder would conclude that Item 1006 was meant to cover both the cost of the arrow board itself and the cost to place it on, leave it and remove it from the worksite to help direct and maintain traffic flow as required by the contract.

6. Appellant was of the belief when compiling its bid that Item 1006 would overrun and shifted some other costs in an unknown amount out of the items to which they generically belonged into Item 1006 with the result that payment for these costs would multiply along with the arrow board overrun even though they were not true arrow board costs.

7. The costs that were shifted from other bid items, as noted above, cannot be determined. However, while a large degree of speculation is required, we believe the arrow board type costs that make up Item 1006 may be roughly quantified based on the record. We start with the following from Finding of Fact No. 5 in the Board's July 9, 1991 opinion.

5. In compiling its bid for Bid Item No. 1006 pertaining to unit days of arrow board use, Appellant included costs for arrow board, labor and equipment predicated on an assumption that 555 unit days of arrow board placement or use would be necessary including employment of a maintenance of traffic crew for 327 of these days. Maintenance of traffic crew costs (foreman, laborers, flatbed, pickup) were calculated to be \$783.00 per day. The daily cost of arrow boards was calculated at \$45.00 a board. Appellant then multiplied the \$783.00 daily crew cost by the estimated 327 maintenance of traffic crew days yielding \$256,041.00 and multiplied its estimated 555 arrow board unit days times \$45.00 yielding \$24,975.00. The combined cost of labor and arrow board thus computed totaled \$281,016.00. Appellant divided the \$281,016.00 by the 555 unit days of arrow board it estimated would be necessary thus deriving a unit price for Bid Item No. 1006 of \$506.00. Appellant then marked up the \$506.00 unit price to \$600.00, and, on the assumption that one third of the 555 arrow board days would require two (2) arrow board crew shifts, increased the unit price to \$800.00. To this amount Appellant

added \$100.00 for overhead and profit to derive the \$900.00 bid price appearing in its bid.

8. We next focus on a portion of Finding of Fact No. 8 including footnote 9 thereof, from the Board's July 9, 1991 opinion where we stated:

8. At the hearing, SHA presented testimony from Mr. Dennis Allen, an expert in construction accounting. Mr. Allen reviewed Appellant's bid tabulation work sheets which showed the aforementioned cost estimate of \$800.00 per unit per day of arrow board. Notwithstanding Appellant's estimate, Mr. Allen concluded from a review of Appellant's internal equipment rate schedule, Superintendent's daily reports and cost analysis prepared by Appellant that Appellant's actual costs per unit day of arrow board were \$76.00. In Mr. Allen's opinion there would be no decrease (or increase) in the unit cost of an arrow board day resulting from the excess number of actual arrow board days over the estimated number of days set forth in the bid documents....

9 Based on his review of Appellant's records Mr. Allen calculated a labor and equipment cost of \$20,571 [sic - \$20,471] for total arrow board placements and removals and a cost for arrow board use of \$18,592. He then divided the resulting sum \$39,063 (\$20,471 + \$18,592 = \$39,063) by the total number of arrow board unit days, 514, to arrive at \$76.00 (\$39,063 divided by 514 = \$76.00).

Decision

We do not believe the Court of Special Appeals has directed that the ordinary application of the clause must be abandoned whenever shifting of costs from one bid item or items to another has occurred. The ordinary application is to be abandoned only when an excessive profit results from the shifting.² Thus, we believe some attempt at quantification of the costs that make up the \$900.00 bid price for Item 1006 is necessary to determine if an

² Appellant argues that the Board should consider whether the contractor's overall profit on the job may be considered excessive when focusing on the question of excessive profit for the overrun item. We believe, however, that the Court of Special Appeals opinion requires the Board to more narrowly focus on the question of whether an excessive profit exists relative to the specific bid item or items where the shifting has occurred.

excessive profit may be said to result from an ordinary application of the estimated quantities clause.

Using Mr. Allen's numbers, which SHA admits are only estimates, generates a daily cost for the arrow board itself for 514 days of arrow board use of approximately \$36.17 ($\$18,592 \div 514 = \36.17). This number (\$36.17) we find to be compatible with Appellant's calculation of \$45.00 per day for the daily cost of arrow board and thus we conclude the \$45.00 arrow board cost in Appellant's bid does not reflect costs from other bid items and thus would not generate an excessive profit pursuant to the Court of Special Appeals guidelines.

There is, however, a large difference between Appellant's and Mr. Allen's calculation of the cost of labor and equipment needed to place and remove the arrow board. The record reflects that some labor and equipment costs for maintenance of traffic items other than arrow board was included by Appellant in its bid on the arrow board item. To this extent Appellant's figure of \$783.00 for a daily rate for maintenance of traffic crew costs would also cover work involving maintenance of traffic items other than arrow board placement and removal. The question is how much of the \$783.00 relates to arrow board placements and removals? Mr. Allen only allocates \$20,471 for arrow board placements and removals which translates out to a daily rate of \$62.60 for such work for the 327 maintenance of traffic crew days estimated by Appellant. This figure, \$62.60, as generated by Mr. Allen, we find to be unrealistically low when one considers the factors of safety of the crew and the need for two arrow board crew shifts on certain days and the fact that the record reflects that SHA approved by extra work order a daily rate of \$480.00 for Appellant for 130 days of single shift arrow board involving night placements on a follow on related

project in June 1988³. This amount of \$480.00 daily cost for arrow board presumably reflects SHA's belief as to the reasonable cost of arrow board and crew costs plus markup to use, place and remove the arrow board in June 1988 for this single shift follow on related project where Appellant was also the contractor.⁴ Assuming that a range of \$36.00 to \$45.00 remained a reasonable cost for arrow board itself in the summer of 1988, two years after the bid in the instant appeal, and subtracting such amount from the \$480.00 approved by SHA for 130 days of arrow board yields crew costs in the range of \$435.00 to \$444.00. Thus \$435.00 to \$444.00 represents SHA's view as to appropriate crew costs for daily use of arrow board in June 1988 for this contractor on a related follow on project. While the procurement officer found that \$55.00 represents the average bid for arrow board by other contractors on other projects in the 1986 construction season and Mr. Allen estimated that Appellant's costs per unit day were \$76.00⁵, we believe it would be unfair not to adopt the \$480.00 found by SHA to be appropriate for the daily arrow board rate for this contractor on a follow on related project two years later and only seven months after SHA had moved for its equitable adjustment on the instant

³ Appellant's bid was the sole bid received for the captioned contract. Therefore, no comparison may be made to other bids for Bid Item No. 1006 on the instant project. The SHA procurement officer compared 15 to 20 other unit price bids for arrow board by other contractors on other projects for the 1986 construction season and determined an average of \$55.00 unit bid price. The parties are unable to agree whether the \$480.00 approved by extra work order in June 1988 included overhead and profit. SHA could not agree to stipulate that the \$480.00 figure included overhead and profit. The Board assumes that the \$480.00 reflects only the daily rate cost including markup without any additional amount for overhead and profit.

⁴ We note that in the project involved in this appeal SHA moved for its equitable adjustment by letter dated November 27, 1987.

⁵ SHA's counsel argues that \$76.00 (rather than \$55.00) be the "lesser of those expenses properly allocable to the item for which an adjustment is sought or those actually included in it."

project.

The \$480.00 which we adopt as representing actual daily arrow board costs for performance of the Item No. 1006 work herein does not we have found include overhead and profit. We must, therefore, remove the \$100.00 overhead and profit included in Appellant's \$900.00 bid for Item No. 1006⁶ to get an actual cost comparison to determine if there is excessive profit in Appellant's bid. Taking \$800.00 (\$900.00 - \$100.00 = \$800.00) as representing the cost including markup included in Appellant's bid for Item No. 1006 and subtracting the \$480.00 we find to reflect arrow board costs yields \$320.00 of costs we assume to be from maintenance of traffic items other than arrow board. The question according to the Court of Special Appeals guidelines then becomes whether \$900.00 versus \$480.00 generates an excessive profit for the 264 adjustable unit days assuming that \$320.00 of the \$900.00 bid represents costs for maintenance of traffic items other than arrow board. Pursuant to the above analysis the Appellant's actual costs to include markup, i.e. the "lesser" costs, for both the base and adjustable or overrun units were \$480.00. Accordingly, on its \$900.00 bid, adjusted to \$800.00 to eliminate overhead and profit and capture only cost including markup, Appellant would make \$320.00 profit on each of the 264 adjustable units attributable to non arrow board items. This represents a profit of 66 2/3% attributable to non-arrow board items. A profit of 66 2/3% we conclude is excessive under the guidelines for whether the ordinary application of the estimated quantity clause is appropriate. Accordingly, SHA is entitled to an equitable adjustment based upon the finding that the ordinary application of the estimated quantities clause is not appropriate. SHA is entitled to an equitable adjustment for the price of the adjustable units in an amount of \$84,480 (\$320.00 x 264 = \$84,480).

⁶ Finding of Fact No. 7 reflects that \$100.00 of the \$900.00 bid for Item No. 1006 represented overhead and profit.

Therefore, it is this 22nd day of September, 1993
Ordered that the matter be remanded to SHA for appropriate action
in light of the finding of this Board on remand from the Court of
Special Appeals that SHA is entitled to an equitable adjustment.

Dated: 9/22/93

Robert B. Harrison III
Robert B. Harrison III
Chairman

I concur:
Sheldon H. Press
Sheldon H. Press
Board Member

I certify that the foregoing is a true copy of the Maryland
State Board of Contract Appeals decision on remand in MSBCA 1532,
appeal of Genstar Stone Paving Products Company under SHA Contract
No. B-780-501-477.

Dated: September 22, 1993

Mary F. Priscilla
Mary F. Priscilla
Recorder

DISSENTING OPINION BY MR. MALONE

Respondent has failed to meet the burden of proof that the
profit was excessive under the facts of this case. This Board is
unable to tell from the record before it what amount of the \$900.00
bid for Bid Item No. 1006 actually relates to other bid items.

Dated: 9/22/93

Neal E. Malone
Neal E. Malone
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 B4 Time for Filing

a. Within Thirty Days

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that where the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

* * *

I certify that the foregoing is a true copy of the Dissenting Opinion of Mr. Malone on remand in MSBCA 1532, appeal of Genstar Stone Paving Products Company under SHA Contract No. B-780-501-477.

Dated: *September 22, 1993*

Mary F. Priscilla

Mary F. Priscilla
Recorder