UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1018

September Term, 2014

BRAWNER BUILDERS, INC.

v.

STATE HIGHWAY ADMINISTRATION, MARYLAND DEPARTMENT OF TRANSPORTATION

Woodward,
Graeff,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: June 16, 2015

The instant appeal arises from a contractual dispute between Brawner Builders, Inc. ("Brawner"), appellant, and the Maryland Department of Transportation State Highway Administration ("SHA"), appellee. In 2011, the parties entered into a contract whereby Brawner would replace four bridge decks on two bridges in Anne Arundel County. Upon removal of the road surface from the bridge decks, the parties discovered lead paint on the top flanges of the bridges' horizontal steel beams. Brawner removed the lead paint and then submitted a claim to SHA for the additional cost. SHA denied the claim, finding that the presence of lead paint was not a change to the contract, nor a differing site condition. Brawner appealed SHA's decision to the Maryland State Board of Contract Appeals ("the Board"), which granted a summary decision in favor of SHA. Brawner filed a petition for judicial review in the Circuit Court for Baltimore County, which affirmed the Board's decision.

Brawner presents three questions for our review, which we have rephrased and condensed into a single question:[1]

[1] Brawner's questions, as originally presented, are:

I. Did the Circuit Court err by ignoring a change order which was issued?

II. Did the Circuit Court err by ignoring the differing site condition which existed?

III. Did the Circuit Court err by adding an impermissible element to a contractor's claim for change order or differing site condition?

> Was there substantial evidence to support the summary decision of the Board that the removal of lead paint from the top flanges of the horizontal steel beams was not a change to the contract or a differing site condition?

Because we answer this question in the affirmative, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

In 2010, SHA issued an "invitation for bids" ("IFB") for a contract to upgrade the road surfaces on two bridges in Anne Arundel County that carry vehicular traffic over MD 295. The two bridges, known as Hammonds Ferry Road Bridge and West Nursery Road Bridge, were originally constructed in the 1940s.

The IFB included a set of the construction plans, including the as-built plans that showed how the bridges were originally constructed. The as-built plans were silent as to the specific location of any lead paint, but the plans for each bridge included a "General Notes" section that stated: "Specifications: For materials and construction, S.R.C. Specifications March 1942. For design, A.A.S.H.O. Standard Specifications for Highway Bridges, 1944."[2] The 1942 S.R.C. Specifications for Materials, Highways, Bridges and Incidental Structures required three coats of lead-based paint to be applied to structural steel. The 1944

[2] "S.R.C." is the Maryland State Roads Commission, the predecessor entity to SHA. "A.A.S.H.O." is the American Association of State Highway Officals, the predecessor entity to the American Association of State Highway Transportation Officials, which promulgated the welding standards at issue in the instant appeal.

A.A.S.H.O. Standard Specifications for Highway Bridges required two levels of lead-based paint coats for metal materials.

The IFB also contained a Special Provision notifying a contract bidder of "the fact that paint on the existing bridges contains 'TOXIC METALS'. The Certification of Insurance or endorsement shall affirmatively state that claims arising from cleaning, including toxic metals based paint removal, and painting operations are covered."

On January 12, 2011, Brawner was notified that it had won the contract. Among other tasks, the project entailed removing and replacing the existing shear studs at each location on the top flanges of the horizontal steel beams ("I-beams"). The top flanges were not visible without removing the overlaying road surface, and the contract did not specify whether the top flanges had lead paint on them. When the old bridge deck was removed, the parties discovered that the top flanges of the I-beams had been painted with red lead paint at the time that the bridges were originally constructed. SHA directed Brawner to remove all of the lead paint. Brawner hired a subcontractor, Blastech Enterprises, Inc., to perform the work at a cost of more than $100,000.

On October 11, 2011, Brawner submitted claim documents for the lead paint removal to SHA, requesting additional compensation in the amount of $125,764.08, plus interest on the claim amount, as well as a seventeen-day extension of time. Brawner alleged two legal justifications: (1) there was a "Change" to the contract under Section 4.06 of the General Provisions ("GP"), because "paint removal from the top flanges of the existing beams [was

added] to the items already designated for paint removal in Section 436 of the Special Provisions" ("SP"); and (2) there was a "Differing Site Condition" under GP 4.05, because "the presence of lead paint on the top of the top flanges was not disclosed in the SHA contract plans, was not identified in the Contract Special Provisions, and was not visible prior to removal of the existing concrete bridge decks."

On April 9, 2012, SHA issued a decision denying Brawner's claim. On May 1, 2012, Brawner noted an appeal to the Board. The parties filed cross motions for summary decision, and the Board held a hearing on July 19, 2013. On July 24, 2013, the Board issued a written decision granting SHA's motion and denying Brawner's motion. The Board made the following relevant findings of fact, which are not disputed by Brawner:

> [ ] Both parties recognized at all pertinent times that lead paint was commonplace in 1948 and they fully anticipated the presence of lead paint on at least some portions of the structural steel components of the bridge decks being replaced. The more precise question presented by the contest here is whether the contractor should reasonably have known or foreseen the presence of lead paint on the top flange of the structural support beams.
>
> [ ] Lead paint was visible on the exposed portions of the steel beams supporting the bridge deck, but the top flange of the beams, known as I-beams or H-beams, were covered by concrete as a result of which it was unknown to the parties prior to the commencement of work on this job whether the top flanges of the beams had been painted when the bridges were initially constructed in 1948.
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> [ ] Part of the work to be done to replace the subject bridge decks required the contractor to weld spiral shaped reinforcing rods, also known as steel stud shear developers, onto the tops of the load-bearing steel beams spanning the bridges. That work was required to be performed after the contractor removed the old spiral reinforcing

> rods initially installed in the bridges by welding onto the tops of the beams.
>
> [ ] The custom in the bridge-building industry in 1948 when the bridges were initially constructed did not mandate painting of the concealed areas of reinforcing rods welded onto the top flange of the bridge beams later covered by concrete. During that time, the practice of painting or not painting the top flanges of bridge beams varied from bridge to bridge. Some were painted, others were not.
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> [ ] The American Association of State Highway and Transportation Officials (AASHTO) promulgates accepted industry standards which require structural steel to be clean and free of paint prior to welding.
>
> [ ] In the course of removing the deteriorated concrete constituting the old bridge deck in order to expose the beams, it became apparent that the top flanges of the beams in the bridges here at issue had been painted with red lead paint at the time of the original construction.

(Citations omitted).

The Board rejected Brawner's argument that the contract required Brawner to remove lead paint only from the vertical parts of the structural beams and not from the top flanges of the I-beams. Rather, the Board concluded that, because Brawner

> well understood at the time of its bid and throughout the performance of its work on this job that the exposed horizontal bottom flanges of the bridge I-beams also needed to be painted in addition to the vertical beam surfaces[,] . . . it stands to reason that Brawner also anticipated and understood its contractual duty to paint the top flanges as well.

Moreover, pointing to the deposition testimony of Brawner's subcontractor, the Board determined that Brawner should have anticipated the possibility of lead paint on the top flanges, because the subcontractor testified that "most of the times there's no paint [on the] top flange," indicating that there were times at which paint was on the top flanges.

Consequently, the Board determined that (1) no change order occurred when SHA directed Brawner to remove the lead paint, and (2) no differing site condition existed. Additionally, the Board concluded that "SHA did not express or create the false impression that no lead paint would be encountered on the top flanges of the I-beams because the State made no assurance one way or the other as to whether the top surfaces of the I-beams had been painted."

On August 21, 2013, Brawner filed a motion for reconsideration, which was opposed by SHA. Brawner argued, among other things, that the as-built plans for the bridges failed to show paint on the hidden top flanges of the I-beams. In its written opinion denying the motion, the Board wrote that the as-built plans

> are neither deficient nor incomplete. Simply put, the "as built" depictions and descriptions of the subject bridges did not disclose whether the top flange of the I-beams in the bridge deck structure had been painted, nor did they need to make any disclosure of that nature. Typical of most "as built" drawings, the contract depictions of the bridges in question showed structural characteristics, not paint coverings. The presence or absence of paint on the top flanges of the bridge deck I-beams is not misrepresented by the "as built" drawings. If the "as built" plans had actually represented that the top flange was not painted, Brawner's claim of a differing site condition would indeed be meritorious. But they did not.

On August 22, 2013, Brawner filed a petition for judicial review in the circuit court. On June 2, 2014, the parties appeared in court for oral argument. On June 17, 2014, the court affirmed the Board's decision. Brawner filed a timely appeal to this Court.

DISCUSSION

Standard of Review

In reviewing an administrative decision, "[t]his Court looks through the circuit court's decision and evaluates the decision of the agency." *Wilson v. Md. Dep't of the Env't*, 217 Md. App. 271, 283 (2014) (citation and internal quotation marks omitted). A reviewing court is "*not* to substitute its judgment for the expertise of those persons who constitute the administrative agency." *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69 (1999) (italics in original) (citations and internal quotation marks omitted). Rather, our review is limited to deciding "if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and . . . if the administrative decision is premised upon an erroneous conclusion of law." *John A. v. Bd. of Educ. of Howard Cnty.*, 400 Md. 363, 381 (2007) (citations and internal quotation marks omitted). "The substantial evidence test evaluates whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Motor Vehicle Admin. v. Lipella*, 427 Md. 455, 467 (2012) (citations and internal quotation marks omitted). Moreover, the agency "may use its experience, technical competence, and specialized knowledge in the evaluation of evidence." *Oltman v. Md. State Bd. of Physicians*, 162 Md. App. 457, 482 (citations and internal quotation marks omitted), *cert. denied*, 389 Md. 125 (2005).

We note at the outset that a motion for summary decision is similar to a motion for summary judgment in that it may be granted only when there is no genuine issue of fact and

a party is entitled to prevail as a matter of law. COMAR 21.10.05.06D(2). Whether summary judgment was properly granted is a question of law that we review to determine whether it was "legally correct." *Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 229 (2003).

Change Order

GP 4.06(a) of the contract governs "Changes" and provides:

> The procurement officer may unilaterally, at any time . . . by written order designated or indicated to be a change order, make any change in the work within the general scope of the Contract, including but not limited to changes:
>
> (1) In the Specifications (including drawings and designs);
>
> (2) In the method or manner of performance of the work;
>
> (3) In the State-furnished facilities, equipment, materials, services, or site; or
>
> (4) Directing acceleration in the performance of the work.

Brawner argues that a constructive change to the contract occurred when SHA instructed it to clean the lead paint off of the top flanges of the I-beams. According to Brawner, because SP 436, entitled "Areas to be Cleaned and Painted," includes only "Fascia of Beam Nos. 2 and 9" on the bridges, anything else is "extra work," including cleaning the paint on the top flanges.

SHA counters that the Board correctly determined that Brawner was not entitled to a change order because the work performed by Brawner was already required by the contract. According to SHA, (1) removing lead paint before installing the steel stud shear developers "was always an integral part of the deck replacement because proper welding requires a clean, unpainted surface"; (2) SHA never altered the method for removing lead paint as set forth in the Standard Specifications; (3) no change to the job site was made; and (4) there are no allegations that SHA ordered Brawner to accelerate the time allotted for lead paint removal. SHA responds to Brawner's argument that SP 436.01.01 provides only for the cleaning and painting of the fascia of steel beams, and not the hidden top flanges, by asserting that SP 436 deals only with painting the *exposed* beams. Moreover, SHA argues, SP 431 and AASHTO Welding Code § 7.4.3 required Brawner to remove the lead paint. We agree with SHA, and shall explain.

SP 431 of the contract provides:

> **431.01 DESCRIPTION. This work shall consist of furnishing, fabricating and installing, complete in place, stud shear developers** as specified in the Contract Documents or as directed by the Engineer. The existing plans indicate that a spiral alternative has been used.
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> ***
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> **431.03 CONSTRUCTION.** Erect all structural steel and install all applicable forming and decking in a particular span of a bridge before shear developers are attached to the structural steel. **Install shear developers per AASHTO/AWS Bridge Welding Code D1.5.** After welding is completed and prior to concrete placement, the Engineer will inspect all studs. Correct all defects as directed.

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> **431.04 MEASUREMENT AND PAYMENT.** Steel Stud Shear Developers will not be measured but will be paid for at the Contract lump sum price. **The payment will be full compensation for complete removal of existing steel stud shear developers, and for all material, labor, equipment, tools, and incidentals necessary to complete the work.**

(Emphasis added).

Section 7.4 of the AASHTO/AWS Bridge Welding Code D1.5 provides:

> **7.4.1.** At the time of welding, the studs shall be free from rust, rust pit, scale, oil, moisture, and other deleterious matter that would adversely affect the welding operation.
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> **7.4.2. The stud base shall not be painted**, galvanized, nor cadmium–plated **prior to welding.**
>
> **7.4.3.** The areas to which the studs are to be welded shall be free of scale, rust, moisture, and other injurious material to the extent necessary to obtain satisfactory welds. These areas may be cleaned by wire brushing, scaling, prick-punching, or grinding. Extreme care should be exercised when welding through metal decking.

(Emphasis added).

SP 431 thus required the contractor to install new stud shear developers in accordance with the Welding Code. The Welding Code then required the contractor to remove the paint from the stud base before replacing the shear developers. Therefore, Brawner had to remove the lead paint from the top flanges in order to complete the welding work that it had agreed to perform.

Brawner argues that only the exposed beams, and not the hidden I-beams, were covered by the cleaning and painting requirements set forth in SP 436. Even assuming Brawner is correct, the lack of reference to the top flanges in SP 436 does not negate Brawner's obligations under SP 431 and the Welding Code. Under those provisions, Brawner was expressly required to remove all paint from the top flanges before welding. Therefore, the Board did not err in concluding that no change order occurred when SHA directed Brawner to remove the lead paint from the top flanges of the I-beams.[3]

Differing Site Condition

Brawner next argues that the circuit court erred by ignoring a differing site condition, because the as-built plans did not show lead paint on the top flanges of the I-beams. Because its bid was based on the as-built plans, Brawner argues that it is entitled to the cost associated with a differing site condition discovered during construction. SHA responds that Brawner has not established a differing site condition because (1) the contract here alerted Brawner that the bridges contained lead paint in the special provisions' "Toxic Metals" warning; and (2) the as-built plans provided to Brawner showed that the bridges were constructed in 1948 in accordance with specifications calling for lead paint on structural steel.

[3] Brawner also argues that the Board and the circuit court erred by adding an impermissible element to a change order claim when it determined that the contractor "knew or should have known that the extra work would be needed." Our determination that there was no change order does not rest on any allegedly impermissible element added to Brawner's change order claim.

GP 4.05 of the contract provides for two types of differing site conditions: (1) "Subsurface or latent physical conditions at the site differing materially from those indicated in this Contract," and (2) "Unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract." Appellant makes no argument as to Type 2. We hold that there was substantial evidence to support the Board's determination that Type 1 did not exist either.

As the Board noted in its denial of Brawner's motion for reconsideration, the as-built plans did not show the location of any paint, lead-based or otherwise. "Typical of most 'as built' drawings, the contract depictions of the bridges in question showed structural characteristics, not paint coverings." As a result, neither party could have known simply from looking at the as-built plans whether there was lead paint on the top flanges. We agree with the Board, however, that Brawner was alerted to the possibility of lead paint on the top flanges.

First, the contract's Special Provisions warned prospective bidders of the presence of lead paint, stating: "The Contractor is alerted to the fact that paint on the existing bridges contains 'TOXIC METALS.'" Second, the as-built plans alerted Brawner to the presence of lead paint through the notification that the bridges were built in compliance with 1940s standards, which required the application of three coats of lead paint to structural steel.

Moreover, the plans did not specify *where* the lead paint was or was not located; such plans typically do not show paint coverings.

Finally, Brawner's own subcontractor was asked during his deposition: "What about existing beams where you have seen the deck where the beams have been exposed? Have you ever seen where there's been no paint on a beam?" The subcontractor replied, "Yes." In response to the question, "How many times?", the subcontractor replied, "Well, I don't remember how many times, but most of the times there's no paint [on the] top flange." From the subcontractor's answer, we conclude, as did the Board, that, if "most of the times" there was no paint on the top flange, then it follows that some of the time, even if occasional, there was paint on the top flange. Therefore, Brawner should have been alerted to the possibility that there was lead paint on the top flanges.[4]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; APPELLANT TO PAY COSTS.

[4] We see no merit to Brawner's argument that the Board added an impermissible element to the differing site condition claim by determining that Brawner "knew or should have known that the extra work would be needed." The Board's determination is relevant to whether there were latent physical conditions at the site differing materially from those indicated in the contract.