

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Marenco, Inc.) ASBCA No. 51310
)
Under Contract No. F65501-96-C-0005)

APPEARANCES FOR THE APPELLANT: Traeger Machetanz, Esq.
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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

This is an appeal from a final decision denying a construction claim for \$95,211.49. A hearing was held in Anchorage, Alaska, and both parties have filed post trial and reply briefs. Both entitlement and quantum are before us.

FINDINGS OF FACT

1. On 24 August 1995, the 3RD Contracting Squadron at Elmendorf AFB, Alaska issued Solicitation No. F65501-95-B0024, inviting sealed bids for a firm fixed-price construction contract “to perform demolition and relocation work for removal and reconstruction of existing partitions and finishes inside a building” as well as “demolition of two existing buildings and construction of two pre-manufactured buildings.” This project was commonly referred to as Golf Course Maintenance Facilities. (R4, tab 1C)

2. In connection with constructing the project, certain sitework was called for as set forth in Section 02200 of the specifications. Paragraph 3.02 thereof, Excavation, provided in part as follows:

1. Excavation consists of the removal and reuse or disposal of all materials encountered to obtain the required subgrade elevations and to remove organics.
2. Classified and unclassified excavated materials shall not be removed from the site unless they are surplus to the

requirements of the work and then only with the written approval of the Contracting Officer. Excess material not incorporated in the work and unsuitable material shall be transported to the Contractor's off-site disposal area. The drawings indicate the extent of the excavation required.

(R4, tab 1E at 02200-6; *see also* § 02220, ¶ 3.02, *id.* at 02220-2)

3. Paragraph 3.05(A)(1) of specification section 02220, Grading Outside Building Lines, provided as follows:

Areas outside the building lines shall be graded to provide drainage away from the structure and to prevent ponding of water. Slope shall be a minimum of 2% for ten (10) feet from the building unless shown otherwise on the plans.

(*Id.* at 02220-4)

4. Contract drawing C1.1, Site Plan, included the following General Notes:

1G. EXISTING GROUND CONTOURS AND TOPOGRAPHY ARE BASED ON THE 1986 BASE COMPREHENSIVE PLAN. NO TOPOGRAPHIC SURVEY WAS PERFORMED FOR THIS PROJECT. THE CONTRACTOR SHALL VISIT THE SITE TO OBSERVE EXISTING CONDITIONS PRIOR TO BID.

2G. SITE SOILS CONDITIONS ARE REPORTED IN THE SUBSURFACE INVESTIGATION REPORT DATED MARCH 1995, PREPARED BY DOWL ENGINEERS. TEST PIT LOGS REFLECT THE MATERIAL AT THE TEST PIT HOLE LOCATION ONLY. ANY INTERPRETATION OF MATERIAL BETWEEN THE TEST PITS IS AT THE CONTRACTOR'S RISK. TEST PIT LOCATIONS ARE SHOWN ON THIS SITE PLAN.

3G. ALL EXCAVATION SHALL CONFORM TO APPLICABLE FEDERAL, STATE, AND LOCAL SAFETY REGULATIONS.

4G. DIMENSIONS ARE TO BUILDING GRID LINE, EDGE OF CONCRETE PAD, HORIZONTAL CONTROL LINE OR EDGE OF GRAVEL DRIVEWAY, OR CENTER OF PIPE UNLESS INDICATED OTHERWISE.

5G. DUE TO THE LACK OF CURRENT TOPOGRAPHIC SURVEY, THE FINISH FLOOR ELEVATIONS FOR THE NEW MAINTENANCE BUILDING AND NEW STORAGE BUILDING SHALL BE ESTABLISHED AT THE TIME OF CONSTRUCTION BY THE CONTRACTOR AND APPROVED BY THE CONTRACTING OFFICER. THE FINISH FLOOR ELEVATIONS SHALL BE ESTABLISHED TO PROVIDE FOR POSITIVE DRAINAGE AWAY FROM THE BUILDINGS AS SHOWN ON THE SITE PLAN. GRADING OF THE CONCRETE PAD IS SHOWN RELATIVE TO THE BUILDING FINISH FLOOR. THE FINISH FLOOR OF THE NEW MAINTENANCE BUILDING AND THE NEW STORAGE BUILDING SHALL BE AT THE SAME ELEVATION.

6G. DEWATERING MAY BE REQUIRED FOR CONSTRUCTION OF THE FOOTINGS AND UTILITIES. GROUND WATER ELEVATIONS RANGED FROM 4.5 FEET TO 5 FEET BELOW GROUND SURFACE ON MARCH 7, 1995.

(R4, tab 1I)

5. The site soils report referred to above in Note 2G included the following relevant provisions:

2.2 Surface

The surface around the existing buildings is relatively flat. Although it was snow-covered at the time of the explorations, we believe most of the area is gravel surfaced parking area. The site extends out into a treed area where the ground surface becomes more uneven.

....

3.3 Dewatering

Depending on the final grading plan, the Contractor's approach to the work, and the weather at the time of construction, it will be necessary to dewater any of the excavations that penetrate below a depth of about five feet. It is essentially impossible to adequately place and compact structural fill if there is standing

water in an excavation. Therefore, it is important that water be removed from excavations until they are properly backfilled. For the soil conditions at this site, construction dewatering may require more than sumps and pumps.

(AR4, tab 2)

6. Drawing C1.2 (AR4, tab 30) includes a site earthwork section which shows the existing ground as a relatively flat surface (tr. 2/202, 3/13-14, 96), but the section drawing is not to scale (tr. 2/202) and makes no representation as to the slope of the site (tr. 3/14).

7. On 14 November 1995, the Government awarded Contract No. F65501-96-C-0005 to Marengo, Inc. to perform the Golf Course Maintenance Facilities project for the lump sum bid price of \$605,000 (R4, tab 1C). In addition to the specifications referred to above, the contract incorporated by reference the DIFFERING SITE CONDITIONS clause (APR 1984) (FAR 52.236-2) which provided in part as follows:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; *provided*, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

8. The SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clause (APR 1984) (FAR 52.236-3) was also incorporated by reference into the contract. It provided in part as follows:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

9. Marenco's bid was prepared by Joe Marks. Marks was assisted on bid submission day by Scott Siebert, but Siebert's assistance was limited to making sure the documents were in order and delivering the bid. Siebert did not read the contract prior to bid submission. (Tr. 2/73) Marks did not testify at the hearing (tr. 1/4, 2/4, 3/4), so we are unable to determine what assumptions, if any, were made by Marks about the nature of the work. There is no indication that Marks visited the site prior to bid.

10. Marenco awarded a subcontract to Alpha Construction & Engineering (Alpha) to perform "all work necessary or incidental to complete the work for the Project which includes Demolition, Sitework, Paving, Site Concrete, Bollards, Metal Buildings, as specified in Divisions 6, 7, 8, 9, 10, 12 and 13 of the Contract Specifications." The lump sum subcontract price awarded was \$405,270. (AR4, tab 4; tr. 2/58)

11. Marenco's bid was based upon Alpha's subcontract price (tr. 2/58). Alpha's estimate for its subcontract work was prepared by George Magby, Alpha's owner and operator (tr. 3/6, 8-9). Prior to preparing and submitting Alpha's estimate to Marenco, Magby did not visit the site as required by Note 1G to observe existing conditions. Nor did Magby review or seek to review the subsurface investigation report referred to in Note 2G.

12. Magby, who prepared Alpha's bid, concluded, based upon his review of the plans and specifications and his prior experience at Elmendorf Air Force Base, as follows:

On my estimate, I believed that we were going to probably find a flat place there that was gravely, would probably meet the requirements of the classified material. A lot of Elmendorf does. Most of it does. But I would have to, as I look at that, I would have to import the – in fact, I think I showed that I would have to import the sand bedding. There is a six inch minimum sand bedding required beneath the slab. Then I would have to import the leveling course there. But basically, I was anticipating finding the classified material there.

(Tr. 3/15)

13. In its brief, appellant proposes finding of fact 7, as follows:

Snow obscured the existing ground conditions and limited access to the site during the pre-bid phase of construction. In addition, the construction area for the new buildings was heavily forested, preventing bidders from determining the topographical and geological conditions until construction commenced and the site was cleared. (Tr. 1-49, line 25 to 1-50, line 5; Tr. 1-110, line 10 to 1-111, line 11; Tr. 2-163, lines 2-7).

We find no credible evidence to support this proposed finding.

14. Based upon the foregoing, we find as a fact that appellant had no valid basis for concluding prior to bid that it would not be required to import classified material (fill) to achieve the required 2% grade.

15. Alpha mobilized at the site in May 1996 (AR4, tab 29 at 5/6/96). On 7 June 1996 Alpha advised Marenco as follows:

After observing the existing site conditions, we believe the ground water elevation is approximately 3 to 3.5 feet below

existing ground surface. We recommend that the finish floor elevation be established between 18” and 24” above the top of slab elevation of the existing utility pad on the west corner of Building 23-700. This will keep the new footings more out of the ground water and provide for better positive drainage around the new buildings.

...

Please expedite responses to these issues. We are rescheduled to do our survey work on Monday, June 10, 1996, and our excavation starts the next day.

(R4, tab 2F)

16. On 10 June 1996, an Alpha subcontractor “shot grade to verify recommendation of finish elevation” and Alpha’s supervisor noted that:

All measurements taken show the existing grade to be lower by .3’ to 2.1’, than existing utility pad at Bldg 23-700. This confirms the wisdom of raising the finish floor level as previously recommended to provide positive drainage away from buildings

(AR4, tab 29 at sheets 10-13)

17. In fact two of the nine measurements taken on 10 June 1996 were higher than said existing grade (*id.* at sheet 13; AR4, tab 30 at drawing C1.1). The problem with the lower existing grade as perceived by appellant was that the water would tend to flow into the area of construction rather than out (tr. 1/30-31) and Alpha recommended to Marengo that they keep the footings out of the water (tr. 1/29).

18. Sgt. Geoffrey Herrick was the Government inspector for the contract (tr. 2/180) and on 11 June 1996, Herrick met at the site with David Kuiper, project manager for Alpha (tr. 1/100) and Robert Pulido, Marengo’s project manager (tr. 1/26). According to Kuiper, they discussed the finish floor elevation and Herrick requested that the contractor proceed to excavate the footings before a decision was made on the final elevation and Pulido and Kuiper agreed (R4, tab 29 at 6/11/96). According to Pulido, it was agreed that the excavation would continue and any additional raising of the floor elevation would be determined after some site work was completed (AR4, tab 13). Herrick’s notes of the meeting reflect that they discussed the water table, and Marengo/Alpha conveyed to him that they thought the water table was three feet down, while the test pit showed the water to be five feet down. Herrick notes that he told them to continue per the design and they

agreed to do so and would stop if conditions worsened (R4, tab 27, report 15). In an internal memorandum dated 13 June 1996, Herrick stated that the agreement on site was that they would continue excavation per the design “until a differing site condition is actually encountered” (AR4, tab 15).

19. On 14 June 1996, Alpha wrote at least three letters to Marengo. In the first letter (Serial 012) Kuiper advised Pulido as follows:

Please use the attached copies of the existing elevation shots we took at the site, along with the drawings and calculations to demonstrate to the Owner the necessity to raise the finish floor slab elevation a minimum of 18” from the existing grade. This will **only** serve to provide the positive drainage required. It does not address the ground water condition that continues to be a concern to us. It would be far better, and continues to be our recommendation, to keep the footing completely above the area that is expected to saturate.

We are scheduled to start our footing excavation today. We must have a determination to proceed. (emphasis in original)

(R4, tab 2J)

20. The second 14 June letter from Kuiper to Pulido (Serial 013) provided as follows:

At your request, this morning we re-excavated and shot grade on the previously excavated test hole area to determine what concern was necessary regarding the existing ground water as it relates to the bottom of the new footing elevation. Starting with the 100.6’ elevation, . . . and adding 1.53’ for drainage slope to establish top of foundation/slab, puts the top of slab elevation at 102.13’. The overall height of our foundation wall with footing is 4.83’. That would establish bottom of footing elevation at 97.3’. Our elevation shots of the existing water were; saturation level at 95.26’, and standing water at 93.26’. This is below the bottom of new footings and removes our previously expressed structural concerns.

Summary

Location

Elevation

Grid A + 34.5	100.6'
Top of Foundation/Slab	102.13'
Bottom of New Footing	97.3'
Top of Water Saturated Soil	95.26'
Top of Standing Water	93.26'

Please provide us with approval to proceed.

(*Id.*, tab2K)

21. The third 14 June letter from Kuiper to Pulido (Serial 014) provided as follows:

At your request we have calculated the additional volume and cost of gravel to raise the elevation of the building slabs to allow for the drainage described in our correspondence [serial 013]. Please accept the following as request for compensation for such additional gravel:

Summary

Description

Top of Foundation/Slab	102.13'
Thickness of Slab and Sand (4" + 6")	.83'
Average Existing Grade Elevation	99.6'
Average Additional Gravel Required	1.7'
Total Square Footage Inside Buildings	5600 sf
Total Cubic Yards Compacted Gravel	352.6 cy
Total Tonnage @ 1.8 Ton per Cubic Yard	634.7 tons
Total Cost Payable to DLW Contractors	
@ 13.00 per ton Compacted	\$8,250.00
Alpha O.H. and Markup @ 26.5%	\$2,186.00

Total Request for Additional Compensation \$10,436.00

(R4, tab 2L)

22. Marengo, in turn, added overhead, profit and bond to the amount claimed by Alpha and on 17 June 1996, submitted a request to the Government for total compensation of \$13,502 (R4, tab 3).

23. By letter dated 17 June 1996 (serial 015), Alpha provided to Marengo a cost breakdown on Form AF 3052, corresponding to the costs outlined in serial 014 (R4, tab 2O). On 18 June 1996, Alpha confirmed to Marengo (serial 016) that Alpha was proceeding with Marengo's "verbal direction to excavate and fill in accordance and agreement with our letters [serial 012 through 015]" (*id.*, tab 2P). On 19 June 1996, Marengo wrote to Alpha stating that such letter constituted "written direction to excavate and fill in accordance with the plans and specifications of the Project" (*id.*, tab 2Q).

24. By letter dated 12 July 1996 (Serial 017), Alpha advised Marengo of additional costs for imported gravel, stating:

Upon proceeding with your direction to excavate and fill in accordance and agreement with our letters [Serials 012 through 015], it has been necessary to import more gravel than our anticipated 635 tons. The purpose of this letter is to advise you of the final quantity required to bring the building site grade up to the proper elevations.

Final quantities of imported gravel will be 3,312 tons. This additional fill was necessitated by the large depressed area that

existed from the middle of the PCC wash slab, south to the limits of the new storage building. The site also slopes away from the buildings on the south half of the project. This depression and subsequent slope after clearing was not reflected on the site plans and was not apparent at the time we made our original proposal.

The revised amount claimed for the alleged unanticipated work was \$43,056 for 3,312 tons of gravel at \$13 per ton plus overhead and markup of \$11,410, making the amount sought \$54,466. (R4, tab 2T) Marengo added overhead and profit to Alpha's request and on 22 July 1996 requested compensation from the Government in the total amount of \$70,465 (R4, tab 4).

25. After much discussion both inside the Government and between the parties with regard to the request for additional compensation, on 16 May 1997, Marengo submitted a re-priced claim totaling \$95,211.49 and requested a final decision (R4, tab 28).

26. The claim included the cost of providing and installing 635 tons of additional fill required inside the footing line to raise the floor slab one foot (\$8,547.10); the cost of providing and installing 2,677 tons of fill required to make the site ready for the drainage requirements (\$36,032.42); the cost of excavating and removing 420 cubic yards of organic material claimed not to have been shown on the contract documents (\$1,873.20); eleven days for delay due to added work (\$10,912); and eleven days of additional supervision (\$2,134). The total of the above came to \$59,498.72 to which were added Alpha overhead (15%) and profit (10%) for a total Alpha claim of \$75,266. (Tr. 3/16-24; R4, tab 28)

27. Of the amount claimed by Alpha, Marengo has paid \$10,000 to them (tr. 3/24). The addition of overhead and profit for Marengo raised the claim to \$95,211.49 (R4, tab 28).

28. On 8 January 1998, the contracting officer denied the claim (R4, tab 33) and a timely appeal was made to the Armed Services Board of Contract Appeals and docketed as ASBCA No. 51310.

29. As to the claim for removal of unsuitable organic material, Marengo proposes a finding in its brief that Marengo encountered unsuitable material on the north side of the new maintenance building perimeter beneath the area where footings for the new building were poured and that the quantity of organic material was not disclosed in the plans and specifications (app. br. at 7). Appellant does not indicate what contract provision it relies upon to conclude that the quantity was not disclosed, such that we could compare what was represented with what was encountered. Nor does appellant show any evidence that the organic material it encountered differed materially from that which is ordinarily

encountered in work of the character of that under the contract. There is no evidence of timely written notice to the contracting officer before the condition was disturbed.

30. The subsurface soil conditions were disclosed in the Subsurface Investigation Report referenced in Note 2G, drawing C1.1 and said report provided as follows:

The soils at the site are relatively consistent with a surface layer of gravel above a silt and another gravel layer below the silt. The silt layer generally contains tree roots and other traces of organics. A surface layer of peat was encountered at Test Pit 1.

(AR4, tab 2 at 2)

31. Test Pit 1 is just east of the north side of the new maintenance building (AR4, tab 2). Peat is defined in the Test Boring Log - Descriptive Guide as “Highly organic soils” (AR4, tab 2 at 4 of 6).

DECISION

In its claim, appellant sets forth the rationale for recovery of additional expenses as follows:

In order to achieve this fully consistent contract requirement, (2% slope for positive drainage *away* from the buildings) the extent of which could not have been known prior to the bid, additional fill was necessary. The extra fill became a requirement due to subsurface conditions which differed materially from what was shown in the contract/bid documents. The contract specifically anticipates that adjustments for such conditions shall be made if and when they occur, as in this case.

If elevation “shall be established” at time of construction and no topographical survey was performed for the project, this proves that these things could not have been known pre-bid. Then it follows that any excess costs will be paid under the terms of the contract when these things are done or determined after award. Ignoring the contractor’s establishment of final floor elevation and its request for adjustment cannot change the obligation of the government to adjust the contract price for this work. It was the government’s choice not to quantify this work in the contract. It is unreasonable to imply that all bidders

should have expended time and money for topographical survey(s) prior to submitting their bids.

(R4, tab 28 at 3)

In its Post-Hearing Brief, appellant seeks to recover for the additional fill on two alternative theories - defective specifications and Government's duty to cooperate. Additionally, appellant contends that the amount of organic material it encountered and had to remove was a differing site condition. We will discuss each below.

I. Defective Specifications

The focus of the defective specification theory seems to be that "it was impossible to establish the elevations for the building floors as required without performing sitework in excess of that required by the plans and specifications." Stated another way, appellant asserts that "[c]ompleting the work within the specified limits set forth in those plans and specifications, and meeting the 2% slope requirement without importing additional fill was not feasible because of the design's flawed assumption that the site would be flat." Finally, appellant says the "failure to depict the classified material necessary to complete the work is a defect in the design plans and specifications which entitles Marengo to claim for an equitable adjustment." (App. br. at 9-10)

The Government counters that the contract only specified a result (a 2% minimum grade) and allowed the contractor to determine how to achieve that result as this was a performance, not a design specification. Thus, under the Government's theory, the contractor was "free to design their own method of installation of footers, elevation and grade away from the buildings, as long as the grade met the 2% minimum requirement." (Gov't br. at 19-20). Appellant responds that, in fact, the specification was a mix of performance and design characteristics.

The Government warrants the design it furnishes to contractors and must pay damages when that design is not workable. On the other hand, there is no liability for increased costs when the design is left to the contractor unless there is a showing that the performance standards were impossible or commercially impracticable to meet. *Engineering Technology Consultants, S.A.*, ASBCA No. 43600, 92-3 BCA ¶ 25,133. Where there is a mix of the two, the particular contract provision at issue must be evaluated to determine if it is a design or a performance requirement. *Santa Fe Engineers, Inc.*, ASBCA No. 24469, 92-1 BCA ¶ 24,665.

The minimum 2% slope requirement was a performance characteristic; the contract did not tell appellant how to achieve that result. It was left to the contractor's discretion. We next examine the other portions of the contract upon which appellant relies for its conclusion that in order to meet the minimum 2% slope requirement, more sitework,

including additional fill, was required because of the flawed assumption in the plan and specifications that the site was flat. Because the factual predicate for this argument fails, the argument must also fail. As our findings indicate, the plans and specifications did not assume a flat site. The plans had no topographical information at all and bidders were directed to visit the site to ascertain the nature of the work. There is no credible evidence that the site conditions were not visible during the pre-bid period. The evidence in the record concerning what was and was not visible at other irrelevant periods of time (such as after award) is not probative on this point.

Because the contract documents did not promise a flat surface such that fill would not be required, appellant's assumptions to that effect were invalid, appellant assumed the risk of increased cost for meeting the 2% slope requirement and the specification was not defective.

II. Government's Duty to Cooperate

Appellant's contention that the Government failed to cooperate is without merit. The record is replete with evidence of conversations between Government and contractor personnel during the June 1996 time frame concerning finish floor elevations (*see* finding 17) and while there is no evidence that the Government explicitly approved or disapproved the floor elevations, it is clear that the Government was intimately involved in the resolution of appellant's perceived difficulties. The Government, however, is not responsible for those difficulties.

III. Differing Site Conditions

Appellant has not demonstrated that it encountered either a Type I or a Type II differing site condition with respect to organic material on the north side of the new maintenance building. Not only was no notice given, but appellant has not proven other elements of its case. As to a Type I differing site condition, we are not told what representation was made in the contract such that appellant could encounter something different. As for a Type II differing site condition there is no evidence that encountering the organics was unusual for that location. Moreover, the subsurface investigation report contained evidence that organics would be encountered, but appellant neglected to refer to that document in preparing its bid.

Accordingly, the appeal is denied.

Dated: 24 April 2001

RICHARD SHACKLEFORD

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51310, Appeal of Marengo, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals