

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Larson Construction Services, Inc.) ASBCA No. 53443
)
Under Contract No. DACA01-00-C-0005)

APPEARANCE FOR THE APPELLANT: Mr. Leo H. Gilsdorf
Vice President

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Dan A. Payne, Esq.
Engineer Trial Attorney
U.S. Army Engineer District
Mobile, AL

OPINION BY ADMINISTRATIVE JUDGE ELMORE
PURSUANT TO BOARD RULE 12.3

Larson Construction Services, Inc. (LCS or appellant) has appealed the contracting officer's (CO) failure to issue a decision addressing LCS's 26 April 2001 claim for an equitable adjustment (REA) in the amount of \$94,691.92 due to inefficiencies experienced for having to perform contract work in bad weather conditions because of the Army Corps of Engineers' (Corps) delay in issuing a change order to route an under-drain pipe not shown on the drawings. LCS, appearing *pro-se*, has elected to proceed pursuant to Board Rule 12.3, the Accelerated Procedure. Only entitlement will be decided.¹ (Bd. corr. file)²

SUMMARY FINDINGS OF FACT

1. On 18 February 2000 LCS was awarded Contract No. DACA01-00-C-0005 (C-0005) to make Repairs To Lake Tholocco Dam - Phase III, Ft. Rucker, Alabama at a contract price of \$1,435,250.00. The contract was for the construction of a down stream discharge channel for auxiliary spillway including placement of rip-rap (R4, tab 37). The contract incorporated the following Federal Acquisition Regulation (FAR) clauses: 52.233-1 DISPUTES (DEC 1998); 52.243-4 CHANGES (AUG 1987); 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). The specification provided bidders with the following information (R4, tab 37):

SC-3 FAR 52.2364 PHYSICAL DATA (APR 1984)

....

b. Weather Conditions. The location is subject to atmospheric temperature ranging from plus 8 degrees F., to plus 109 degrees F. as determined from the U. S. Weather Bureau Station at Ozark, Alabama. The mean annual precipitation at Ozark, Alabama, is 53.81 inches and the mean monthly precipitation varies from a low of 2.77 inches in October to a high of 6.14 inches in July.

....

SC-4 TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER

1. This provision specifies the procedure for determination of time extensions for unusually severe weather in accordance with the contract clause entitled “Default: (Fixed Price Construction)”. In order for the Contracting Officer to award a time extension under this clause, the following conditions must be satisfied:

a. The weather experienced at the project site during the contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the project location during any given month.

b. The unusually severe weather must actually cause a delay to the completion of the project. The delay must be beyond the control and without the fault or negligence of the Contractor.

2. The following schedule of monthly anticipated adverse weather delays is based on National Oceanic and Atmospheric Administration (NOAA) or similar data for the project location and will constitute the base line for monthly weather time evaluations. The Contractor’s progress schedule must reflect these anticipated adverse weather delays in all weather dependent activities.

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY WORK DAYS BASED ON (5) DAY WORK WEEK

JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC

5 5 5 4 4 5 7 5 5 3 4 5

3. Upon acknowledgment of the Notice to Proceed (NTP) and continuing throughout the contract, the Contractor will record on the daily CQC report, the occurrence of adverse weather and resultant impact to normally scheduled work. Actual adverse weather delay days must prevent work on critical activities for 50 percent or more of the Contractor's scheduled work day.

The number of actual adverse weather delay days shall include days impacted by actual adverse weather (even if adverse weather occurred in previous month), be calculated chronologically from the first to the last day of each month, and be recorded as full days. If the number of actual adverse weather delay days exceeds the number of days anticipated in paragraph 2, above, the Contracting Officer will convert any qualifying delays to calendar days, giving full consideration for equivalent fair weather work days, and issue a modification in accordance with the Contract Clause entitled "Default (Fixed Price Construction)".

2. Contract work was to be completed by 25 September 2001, 540 calendar days after the contractor received the NTP. On 4 April 2000 LCS received the NTP. LCS's approved critical path schedule (CPM) stated in pertinent part (tr. 2/256; R4, tab 37; Dkt. 53416 *et al.*, tab 21; claim ex.; comp. ex.):

ACTIVITY DESCRIPTION	EARLY START	EARLY FINISH	LATE START	LATE FINISH
DRIVE SHEET PILE 0-30%	30 NOV 00	29 DEC 00	30 NOV 00	29 DEC 00
DRIVE SHEET PILE 30-70%	30 DEC 00	12 FEB 01	30 DEC 00	12 FEB 01
DRIVE SHEET PILE 70-100%	13 FEB 01	24 MAR 01	13 FEB 01	24 MAR 01

3. On 28 April and 23 May 2000³ LCS informed the Government a drain pipe, not shown on the original solicitation drawing, installed by the Phase II contractor beneath the invert of the emergency spillway being constructed by LCS, would discharge water in the area where LCS would be installing coffer cells. LCS requested the CO advise on how the drain pipe should be dealt with. (Dkt. 53425, tabs 3, 4; R4, tab 4)

4. On 1 June 2000 LCS told the Government it was ready to commence work at Fort Rucker and, in pertinent part, noted that a written reply to its 28 April 2000 letter regarding the under-drain had not yet been received (R4, tab 40).

5. The Government on 6 June 2000 responded to LCS's 1 June 2000 letter stating, in pertinent part, the under-drain, the subject of numerous conversations, would require a change order routing the outfall through or around LCS's coffer cells. The letter further stated an on-site coordination meeting was anticipated to discuss and determine the best course of action given the conditions on site and LCS was requested to suggest how the under-drain should be routed. On 27 June 2000 LCS submitted a proposal, in the amount of \$28,500, to complete the emergency spillway under-drain which the Government rejected. (Dkt. 53425, tab 6; R4, tabs 5, 41; tr. 2/153-4, 252-53, 284-85)

6. Mr. Joseph Leone, LCS's project manager, testified it was LCS's original plan to put the temporary sheet pile protection wall in as part of item "504 - MOBILIZE SHEET PILE SUB, 04 Apr 00 to 29 Nov 00" implying that the sheet pile would have been installed by 29 November 2000 (tr. 2/120-21); but that LCS re-sequenced its work and started the rip-rap installation in September/October 2000⁴ vice when sheet pile driving was scheduled as recorded in the approved CPM (R4, tab 3; tr. 2/149; finding 2 *supra*). LCS contended it had been unable to install temporary sheet pile since 15 October 2000 (finding 9 *infra*).

7. LCS in its 21 September 2000 letter summarized its position regarding the under-drain stating it was a changed site condition but to date no Government direction had been issued. Mr. Robert Bugg and Mr. William Shows, the Government's area engineer and Administrative Contracting Officer (ACO)/Contracting Officer's Representative (COR) respectively, testified the water flow from the under-drain was minor in nature and because it did not impact/interfere with LCS's ability to work it was given a low priority; and resolution would be done through issuance of a modification. (R4, tab 6; tr. 2/212, 248-49, 275-76)

8. The Government in its 5 October 2000 response to LCS's 21 September 2000 letter stated in pertinent part the contract documents show a drainage channel existed and discharged through LCS's work area; LCS was contractually responsible for stabilizing its work area, including the run-off from the concrete channel; although this under-drain was not shown in LCS's contract, the matter had been repeatedly discussed but was set aside until such time as different issues could be resolved; LCS's proposal was determined to be excessive and in need of additional breakdown or cost justification; that the issues holding up routing of the under-drain have been resolved with the approval of sheetpile material, and a modification to route the under-drain would be issued in a timely manner. It was the Government's position the primary cause of erosion in LCS's work area was surface run-off from the adjacent concrete structure. (R4, tab 8)

9. In its 4 December 2000 and 22 January 2001 letters to the Government, LCS stated since 15 October 2000 it has been unable to install the temporary sheet pile wall due to discharging water from the under-drain; the under-drain problem was considered a changed site condition; that LCS's ability to install sheet pile coffer cells and the outfall rip-rap was being impaired; and LCS reserved its right to claim for the extra costs for additional work and delay (R4, tabs 12, 14). LCS did not introduce evidence, *i.e.*, Quality Control Reports (QCR), diary entries, or an updated CPM, supporting its contention it was ready to drive sheet pile on 15 October 2000 vice 30 November 2000 (findings 2, 6 *supra*).

10. On 2 February 2001 LCS informed the Government that as of 31 January 2001 all of the work on the project that could be completed, without the sheet pile in place, had been completed; that LCS was ready to install the sheet pile; however, the sheet pile installation could not begin because the Government had failed to take action on the changed condition, *i.e.*, the under-drain's existence (R4, tab 15; tr. 2/187-88).

11. The Government's 6 February 2001 response to LCS's 2 February letter stated in pertinent part that to date LCS has failed to mobilize the necessary equipment to drive sheet pile and Mr. Ramiro Fernandes, LCS's superintendent, had stated that two to three weeks of preparatory work remained before sheet pile driving could begin. Mr. Bugg testified that it was the Government's determination that until LCS was mobilized to do the sheet pile driving, *i.e.*, delivery and assembly of the crane and hammers needed to drive the sheet piles, LCS could not drive sheet pile. Mr. Leone testified the crane was rigged with the boom on 21 February 2001, pin hammer arrived 7 March and vibrator hammer, the hammer used to drive piles to rock, arrived 19 March 2001. Mr. Leone testified the sheet pile could not be driven prior to the pin hammer arriving. (Dkt. 53425, tab 12; tr. 2/180-84, 197, 248-49)

12. On 15 February 2001 the ACO issued unilateral Modification No. R00006 directing LCS to temporarily "[e]xtend the existing PVC drainage pipe from the end of the Roller Compacted Concrete channel through the new sheetpile coffercells until daylighted." The modification proposed a contract price increase of \$13,283.00 but retained the contract's original completion date. The cover letter stated the ACO considered the modification to be fair and reasonable but if LCS disagreed, it should return the original unsigned with an explanation and supporting documentation of the reasons for non-acceptance. (Dkt. 53425, tab 14; R4, tab 34)

13. On 23 February 2001 LCS returned Modification No. R00006 unsigned stating, in pertinent part, there was no profile shown for the permanent drain line; and no consideration given to an earth retention system to protect the edge of the RCC (roller compacted concrete) from collapsing while excavating for the installation for the diversion drain. LCS stated it "acknowledge[d the Government's] directive to perform the work under modification number 00006" and would do so under protest (R4, tab 20; tr. 2/292).

14. On 9 March 2001 LCS informed the Government that on 3 March 2001 “unusually severe and abnormal weather caused heavy flooding and associated erosion damage at the Lake Tholocco Dam site” and it was reserving the right to claim for the cost of the damages incurred. Mr. Bugg testified heavy rain was experienced on 3 and 13 March 2001. (R4, tab 21; tr. 2/228-29)

15. On 19 March 2001 the parties executed bilateral Modification No. R00007 providing in pertinent part (R4, tab 35):

. . . [F]or final resolution of all work and impacts associated with extension of existing underdrain pipe through the coffercell structure. This modification supplements unilateral modification number R00006 and provides for bilateral resolution of that modification including the revised scope of work and additional compensation as included herein. The scope of work of this modification shall replace that of modification R00006. Total compensation for all work and impacts associated with these modifications is \$13,283 as indicated in R00006, and \$5,749 as indicated in this modification, for a total of \$19,032. Contractor is responsible for coordination of underdrain work with installation of sheetpile coffercells.

. . . .

E. CLOSING STATEMENT

In consideration of a modification agreed to herein as complete equitable adjustment for the Contractor’s 27 Feb 2001 proposal for adjustment, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances given rise to the proposal for adjustment.

(R4, tabs 24, 35; tr. 2/268)

16. LCS by letter, also dated 19 March 2001, informed the Government (R4, tab 24):

We are in receipt of modification No. [R]00007, which is an addition to Modification No. [R]00006. We are returning

subject modification after signing same under protest. The nature of our protest is that no additional time was added to the contract for this additional work. The work added to the contract by Modification Nos. 00006 and 00007 are on the critical path and have to be completed before the sheet pile barrier wall and the majority of the sheet pile can be installed. Therefore it directly impacts our schedule and our final completion date.

We intend to proceed with the work under Modification Nos. 00006 and 00007 as soon as we receive an executed copy of Modification No. 00007. However, we reserve the right to claim for additional time under these modifications.

17. On 11 April 2001 LCS informed the Government it could not meet the scheduled timetable to install the sheet pile barrier along the river and the diversion drain in the cell area due to the “lack of timely action by the ACOE”; that since modification No. R00007 was signed to proceed with the diversion drain, flooding has caused undue delay to LCS ability to work in the cell area; that work scheduled to begin in December 2000 to protect the area from river back-up is now being done in the wet season causing LCS to incur lost time and extra work from 12 March to 6 April 2001 (R4, tab 28).⁵ Except for the April 2001 climatological summary for the Fort Rucker area (ex. G-4), no other climatological reports were offered into evidence.

18. LCS’s Contractor QCR for the period 12 March to 9 April 2001 indicate the following: 12, 13, 14, 15 March, the area experienced flooding allegedly due to sheet pile barrier not being installed; 19, 20, 21 March, the area was allegedly inaccessible due to high water in river; 22, 26, 27, 28 March, sheet pile being installed but contractor was on standby part of the time due to installation of diversion pipe; 29 March, area secured for rain; 2 April, installing sheet pile; 4, 5, 6, 7 April, site secured for flooding allegedly due to uninstalled sheet pile barrier; 9 April, installing sheet pile, hauled fill for earth dike for sheet pile barrier wall.

19. On 26 April 2001 LCS filed a claim with the CO for an equitable adjustment in the amount of \$94,691.93 for additional cost for inefficiencies experienced during the period from 12 March to 9 April 2001 when driving sheet pile stating (R4, tab 3):

We respectfully submit this claim for payment, in the amount of \$94,691.93 for being subjected to bad weather conditions because of the Army Corps of Engineers (ACOE’s) inability to administer their changes in a timely manner. In particular, they were slow in getting a solution to the changed condition to reroute the drain through the cell area.

Larson Construction Services[,] Inc. (LCSI) was to install the sheet pile coffer dam using sheet pile from cells 1, 6, and 9, along the river prior to installation of the cells. See drawing ENV-03 attached. This work was to be performed in November 2000, according to our schedule (see copy attached).

In a letter dated 28 April 2000 LCSI informed the ACOE of a changed condition and followed with at least 18 other letters pertaining to the presence of a drain pipe in the vicinity of the cell spillway which was not shown on the plans. The ACOE finally provided a solution to the drain problem with Modification No. 00007 (signed copy received in our office 9 April 2001). When we finally could begin to install the coffer dam to protect the area from river back-up, the wet season delayed us further and caused additional unnecessary cost to LCSI.

....

The calculations for this claim are attached and as follows:

Labor, Equipment and Material (See attachment)	\$76,860.33
Overhead of 12 %	\$ 9,223.24
Profit of 10%	<u>\$ 8,608.36</u>
Total amount of this claim	\$94,691.92

We respectfully request you render a decision within 60 days of this request as specified in Contract Clause 52.233-1, Disputes, paragraph (e).

20. On 29 June 2001 LCS appealed the CO's failure to issue a final decision to the Board (R4, tab 1).

DECISION

LCS contends it is entitled to an equitable adjustment as compensation for the inefficiency experienced in having to drive sheet pile during a wetter time period than

anticipated due to the Government's delay in executing a change order directing how an under-drain, installed by a prior contractor, was to be routed. In deciding this issue we first scrutinize bilateral Modification No. R00007 to determine the intent of the parties at the time the modification was issued.

Modification No. R00007 contained a general release releasing the Government "from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances given rise to the proposal for adjustment" (finding 15). The courts have consistently held that when a contractor signs a general release without noting an exception the contractor is bound by his signature. *J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801 (1963).

Modification No. R00007 was the "final resolution of all work and impacts associated with extension of existing underdrain pipe through the coffercell structure" (finding 15). LCS, except to declare it was reserving its right to claim additional time for delay, executed Modification R00007 without additional reservations or comments (*id.*). Clearly, the installation of the temporary sheet pile wall was work associated with and impacted by the extension and, accordingly, was included under Modification No. R00007. Contractors have consistently been precluded from subsequently asserting claims arising out of their contract performance which were not excepted from the provisions of the release. *J. G. Watts Construction Co., supra* at 805.

We note that there are exceptions to the general rule that a contractor is bound by his signature to the general release if an exception is not noted. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1395 (Fed. Cir. 1987). However, in the instant matter none of the exceptions apply.

The appeal, based on the discussion above, is denied.

Dated: 18 January 2002

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

NOTES

- ¹ This decision will not address delay since LCS has filed a delay claim, ASBCA No. 53425, which will be decided separately.
- ² References to the record will be as follows: appeal (R4) file; appellant (ex. A-) and Government (ex. G-) exhibits; transcript (tr.); Board correspondence file (Bd. corr. file); claim exhibits (claim ex.); complaint exhibits (comp. ex.); answer (ans.). LCS filed nine appeals and the parties consolidated the R4 files to reduce duplication and to mitigate reproduction cost. The R4 file for ASBCA No. 53443 is consolidated with docket Nos. 53442 and 53484 which have been settled. References to the R4 file will be to those which address ASBCA No. 53443 (and the settled appeals) unless prefixed with a different ASBCA number.
- ³ The two letters were identical except for the dates (Dkt. 53425, tabs 3, 4).
- ⁴ Mr. Leone's testimony LCS commenced installation of the rip-rap in "September and October" (tr. 2/149) was not supported by any evidence, *i.e.*, daily diary entries or quality control reports.
- ⁵ Attached to LCS's 11 April letter was a summary, taken from Mr. Leone's field notes, of conditions experienced during the period 12 March to 6 April 2001 (R4, tab 28).

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. 53443, Appeal of Larson Construction Services, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals