

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Philip Environmental Services Corporation) ASBCA Nos. 53445, 53573
)
Under Contract Nos. DAPC49-98-D-0014)
DAPC49-99-C-0014)

APPEARANCES FOR THE APPELLANT: Michael E. Kreger, Esq.
W. Brendan Murphy, Esq.
Perkins Coie LLP
Anchorage, AK

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

These appeals arise from the Government’s unilateral deletion of appellant’s right to salvage concrete under a demolition contract. The Government alleges that there are no genuine issues of material fact and that it is entitled to summary judgment on the following issues: (1) appellant is not entitled to an equitable adjustment because it did not include a specific amount for concrete salvage in its bid; and (2) appellant did not incur any damages as a result of the change. Appellant opposes the Government’s motion and cross moves for summary judgment on the grounds that there are no disputed issues of material fact as to the following: (1) the Government’s deletion of the right to salvage concrete is a change under the Changes clause; and (2) appellant incurred damages as a result of the change. Only entitlement is at issue.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

The following stipulations of fact as numbered by the parties are hereby adopted as our findings of fact:

1. This appeal concerns two contracts for demolition of buildings and site reconstruction work at Fort Richardson. Fort Richardson is an Army base near Anchorage, Alaska.
2. The contracts are identified as DAPC49-98-D-0014 (hereinafter the “98 contract”) and DAPC49-99-C-0014 (hereinafter the “99 contract”). The 98 contract was

awarded on September 28, 1998, and the 99 contract was awarded on September 30, 1999. Philip Services received a Notice to Proceed on the 99 contract on April 10, 2000.

3. The parties to both contracts are Philip Environmental Services Corp. (“Philip” or “Philip Services”) and the United States Army Alaska (by and through the Directorate of Contracting, United States Army, Alaska).

4. The contracts contain the following specific provisions addressing salvage by the contractor:

a) Section 3.4 of the demolition specification in the 98 contract, entitled “DISPOSITION OF MATERIALS,” states:

A. The Contractor is responsible for the disposal of all materials not identified to be Government salvage items. Disposal shall be made in accordance with all local and federal disposal regulations.

B. Material Salvaged by the Contractor: Material salvaged by the Contractor under each delivery order shall be stored as approved by the Contracting Officer and shall be removed from Government property before completion of the delivery order. Material salvaged for the Contractor shall not be sold on the site.

C. Items Salvaged for the Government: Fire alarm panels. [S]ee Appendix B for specific buildings.

D. Disposal Ft Richardson: Demolished material shall be disposed of in an approved landfill located off the site. The Contractor may dispose of concrete and CMU from this project in the area shown on the Site map. The Contractor may dispose of non hazardous material from this project in the Anchorage Municipal landfill at no charge.* This must be arranged in advance with the Contracting Officer.

See Gov. R4, tab 2, § 02050, ¶ 3.4 (emphasis in original).

* This sentence was later amended to read “non hazardous and asbestos containing materials from this project.” See Gov. R4, tab 1 (8/24/98 Amendment of Solicitation/Modification of Contract) (amendment underscored).

b) Section 3.4 of the demolition specification in the 99 contract, entitled “DISPOSITION OF MATERIALS,” states:

A. The Contractor is responsible for the disposal of all materials not identified to be Government salvage items. Disposal shall be made in accordance with all local and federal disposal regulations.

B. Material Salvaged by the Contractor: Material salvaged by the Contractor under each Bid Item shall be stored as approved by the Contracting Officer and shall be removed from Government property before completion of the Bid Item. Material salvaged for the Contractor shall not be sold on the site.

C. Items Salvaged for the Government: All fire alarm panels will be salvaged.

D. Demolished material shall be disposed of in an approved landfill located off the site. The Contractor shall arrange for the use of the municipal landfill with the Contracting Officer. The Contractor shall initiate this coordination two weeks in advance of the commencement of the demolition.

See Gov. R4, tab 7, § 02050, ¶ 3.4.

5. Fire alarm panels were the only item that the contracts stated were reserved for salvage by the government. See Gov. R4, tabs 2 & 7, § 02050, ¶ 3.4.C.

6. The contracts do not reserve concrete for salvage by the government.

7. Both contracts authorized the contractor to salvage concrete.

8. The contracts required the contractor to backfill all below-grade demolition. The section on backfill described satisfactory materials as “earth, sand, gravel, rock, or combination thereof.” They specified “man-made fills” as an “unsatisfactory material.” See Gov. R4, tabs 2 & 7, § 02222 ¶¶ 1.1, 2.1.

9. Philip completed some of the demolition work under both the 98 and 99 contracts itself and subcontracted the rest. Philip did not salvage concrete from demolition work that it performed. Nor did it factor a specific salvage value for concrete into its bids.

10. Philip solicited proposals for the subcontract work in the spring of 2000.

11. Central Environmental, Inc. (“CEI”), submitted a subcontracting proposal to Philip dated April 13, 2000, offering, among other things, to complete work on building 808 from the 1998 contract for \$84,614, and to perform all work on the 1999 contract for “the amount bid by Philip Services, less 2 percent.” CEI’s proposal further stated that “CEI will have all salvage rights except for those items stated in the contract [that] are to be turned over to the Army.” See Gov. R4, tab 19.

12. On April 26, 2000, Philip subcontracted with CEI to perform certain demolition work specified in the 98 and 99 contracts. See Gov. R4, tab 19.

13. CEI wrote a letter to Philip dated May 31, 2000. CEI’s letter stated: “Central Environmental, Inc. (CEI) is prepared to initiate salvage efforts on the above-referenced contracts and appears to be encountering resistance from the Army regarding salvage of the steel and concrete.” It also stated: “Declination of CEI’s salvage/recycle options will have a financial impact. The salvage/recycled concrete aggregate and steel reinforcing will be removed from Ft. Richardson for use or sale.”

By letter dated June 1, 2000, Philip notified the Contracting Officer that it supported CEI’s right to salvage concrete. In its letter, Philip acknowledged CEI’s statement regarding the financial impact from denial of salvage rights to concrete. It wrote: “CEI has stated ... declination of salvage/recycle options will have a financial impact since the salvaged/recycled concrete aggregate and steel reinforcing will be removed from Ft. Richardson for use or sale.” See Gov. R4, tab 9.

14. By letter dated 8 June 2000, the contracting officer directed that “concrete is not considered a salvageable material and will not be used for any purpose. All demolished buildings will be transported to the Municipality of Anchorage landfill.” See Gov. R4, tab 10. The June 8 letter confirmed an oral directive to dispose of concrete, issued on June 2.

14.5. The government’s June 2 oral directive was issued at a meeting attended by Philip, CEI, and the Contracting Officer’s representative. At that meeting, the Contracting Officer’s representative provided a reason for the government’s directive to dispose of concrete in the municipal landfill. CEI stated its understanding of that reason in a letter to Philip, dated June 20, 2000, which is located in the Rule 4 file at tab 11. CEI’s letter stated in relevant part: “In the June 2 meeting with the Contracting Officer’s Representative and in prior meetings with other Army officials, the rationale which was put forth to justify declining concrete salvage is that while concrete is not currently considered hazardous, future rulings by governing agencies could classify concrete or its components as hazardous and the Army considered this sufficient risk to restrict salvage and re-use both on and off post.”

15. Upon receiving the government's directive above, the contractor promptly notified the government that it considered the government's position on the salvageability of concrete a change in the terms and conditions of the 98 and 99 contracts.

16. The contractor thereafter complied with the government's directive and disposed of the demolished concrete at the Anchorage municipal landfill. Disposal was as a non-hazardous material.

17. Concrete was not then designated a hazardous material by any federal, state, or local agency having jurisdiction over the site or the project.

18. On December 7, 2000, the contractor filed two claims, one each for the 98 and 99 contracts. The claim on the 98 contract was for \$218,231.30, and was certified as required by 41 U.S.C. § 605(c)(1). The claim on the 99 contract was for \$18,878.14, and was not required to be certified. The total amount of the contractor's claims was \$237,109.44.

19. CEI's claims for direct costs – the costs of loading and transporting concrete – amounted to \$135,435.25, or approximately 74% of its claims [the stipulations do not explain these calculations]. Its claims for lost salvage value amounted to approximately 26% of its claims. According to the claims, the total cost of recycling the concrete was \$11,977.22, for a unit cost of \$1.30 per ton.

20. By letter dated January 12, 2001, the Contracting Officer requested supplemental information regarding the claims. The Contracting Officer requested, among other things: "Information concerning CEI's marketing plan and or disposition of crushed concrete products." See Gov. R4, tab 17.

21. The contractor provided information in response to the Contracting Officer's request on February 14, 2001. In response to the request for "[I]nformation concerning CEI's marketing plan and or disposition of crushed concrete products," CEI prepared and submitted a three page narrative description of the history of its search for and purchase of a portable concrete processing facility, the Eagle 1000, and a competitive plan for its use. In that narrative, CEI wrote:

"No other vendor in the area has the capacity at this time of rapidly setting up the processing facility on-site to process materials. This ability results in substantial cost savings since the concrete does not have to be trucked to an off site location. The recycled concrete is sold to a customer that is responsible for picking up the aggregate material where is. In this manner, CEI eliminates all trucking and disposal costs for the concrete material." See Gov. R4, tab 18, item 4. This was the first time the Contracting Officer had seen this narrative description.

22. By letter dated March 13, 2001, the Contracting Officer requested additional documentation. In that letter, the Contracting Officer also wrote:

“Although the marketing plan submitted [in response to the contracting officer’s January 12, 2001 request] stated that materials would be sold on site, that does not comply with contract specification number 02050-3.4B, which states that ‘material salvaged for the contractor shall not be sold on site.’” See Gov. R4, tab 20.

23. This was the first time that any representative of the Army had referred to or interpreted contract specification number 02050.3.4B in any meetings or correspondence to Philip Services or CEI.

23.5. By letter dated March 27, 2001, CEI responded to the Contracting Officer’s March 13 request for additional information. That letter is located at tab 21 of the Rule 4 file, and states in relevant part:

In regards to the Government’s statement that a portion of CEI’s marketing plan ‘does not comply with contract specification number 02050-3, 3.4B’. It appears that the Government intends to misinterpret Specification Section 02050-3, 3.4B to say that the Contractor was prohibited from selling salvaged materials prior to removing them physically from the jobsite and that by having the purchaser responsible to pay for freight from the jobsite, this somehow constitutes a sale on site, this is incorrect.

CEI’s marketing plan submitted on February 9, 2001, did not state that the material is ‘sold on site’. We did state that the customer ‘is responsible for picking up the aggregate material where is.’ Which simply means that the customer is responsible to pay for the cost of transportation of the crushed concrete aggregate from the site to their destination.

Specification Section 02050-3, 3.4B, indicates that the contractor cannot conduct a sale of the salvaged materials on site. The intent of this clause is to prohibit a contractor from establishing a sale yard for salvaged materials at the site where customers come to the site to shop and purchase salvage materials.

In regards to the sale of crushed concrete aggregate and steel, the physical sale transaction occurs off the site, the customer doesn’t even go to the site to review the material, there is no

way that the Government can stretch the interpretation of 02050 to prohibit this activity.

24. The Contracting Officer denied both of the contractor's claims in a written decision dated April 12, 2001. See Gov. R4, tab 23.

28. On July 5, 2001, Philip filed a timely appeal to the Armed Services Board of Contract Appeals. Only entitlement is currently before the Board.

DECISION

Summary judgment is appropriate only where there are no material facts at issue and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The fact that both parties have moved for summary judgment does not mean that we must grant judgment as a matter of law to one side or the other. Summary judgment in favor of either party is not proper if disputes remain as to material facts. *Mingus Constructors*, 812 F.2d at 1390.

Appellant is not required to prove that it included a specific amount in its bid for salvage income in order to establish entitlement to an equitable adjustment under the Changes clause. Proof of reliance is required only in cases of ambiguity where the contractor is seeking to invoke the rule of *contra proferentem*. *Clauss Construction*, ASBCA No. 51707, 02-1 BCA ¶ 31,678 at 156,546 (where salvage provisions are plain and unambiguous, proof of reliance not required); *Shah Construction Company, Inc.*, ASBCA No. 50411, 01-1 BCA ¶ 50411 at 154,757 (where order of precedence clause resolves conflict and *contra proferentem* not invoked, reliance need not be proven); *Southwest Marine, Inc.*, ASBCA No. 46155, 96-2 BCA ¶ 28,292 at 141,235 (where contractor's interpretation only reasonable interpretation, proof of reliance not required); *Fossitt Groundwork, Inc.*, ASBCA No. 45356, 96-1 BCA ¶ 28,096 at 140,244 (proof of reliance only required in cases of ambiguity where contractor invokes *contra proferentem*); *Meredith Construction Co., Inc.*, ASBCA No. 41736, 93-2 BCA ¶ 25,864 at 128,685 (proof of reliance is required only if there is an ambiguity in the contract and *contra proferentem* invoked); *Roberts Construction Co.*, ASBCA No. 32171, 86-2 BCA ¶ 18,981 at 95,859 (salvage contractor allowed to keep scales; no proof of reliance required) and cases cited therein. Thus, we conclude that appellant's claim does not fail for lack of proof of reliance.

The cases cited by the Government do not persuade us that the rule set forth in *Roberts* is incorrect. In *Superior Abatement Services, Inc.*, ASBCA Nos. 47116, 47117, 96-1 BCA ¶ 28,228, we touched on the subject of reliance, but denied the appeals on the grounds that the contract did not permit salvage. In *Kinetic Engineering & Construction, Inc.*, ASBCA No. 30726, 89-1 BCA ¶ 21,397 at 107,872, *aff'd on reconsid.*, 89-3 BCA

¶ 21,976, we apparently denied a contractor's claim for lost salvage income exceeding that allowed by the contracting officer both because it did not establish that it factored into its bid a specific amount of income from salvage and because it did not establish that there was an increase in its overall cost of performance. We do not consider this decision controlling on the former point. Accordingly, we deny the Government's motion for summary judgment on this issue and affirm our ruling in *Roberts*.

The Government next argues that the claim fails because appellant did not incur any damages as a result of the change. According to the Government, the contract required it to transport concrete debris off the site regardless of whether or not appellant could sell it for salvage, canceling out any damages. The Government's argument overlooks the fact that by deleting appellant's right to salvage concrete, it took away a potentially valuable property right given to appellant as part of the consideration for performing the contract. In effect, the deletion was a deductive change on which the Government bears the burden of proof. *Metric Constructors, Inc.*, ASBCA No. 49343, 97-2 BCA ¶ 29,076 at 144,707. Accordingly, we conclude that appellant has established entitlement to an equitable adjustment under the Changes clause.

Appellant's motion for summary judgment is granted. The Government's motion for summary judgment is denied. Quantum is remanded to the contracting officer for negotiation.

Dated: 15 April 2002

ELIZABETH A. TUNKS
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 Nos. 53445, 53573, Appeals of Philip Environmental Services Corporation, rendered in conformance with the Board's Charter.

Dated:

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