

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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G & C Enterprises, Inc. ) ASBCA No. 53830  
)  
Under Contract No. F41689-93-C-0505 )

APPEARANCE FOR THE APPELLANT: Paul T. DeVlieger, Esq.  
Harry R. Blackburn & Associates, P.C.  
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF  
Chief Trial Attorney  
CAPT Teresa G. Love, USAF  
CAPT Robert E. Luttrell III, USAF  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DICUS  
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This appeal was taken from a contracting officer's decision denying appellant's \$454,104 differing site conditions claim. The underlying contract is for construction of a commissary at the United States Naval Station, Guam. Respondent has filed a summary judgment motion asserting that there are no material facts in dispute and that appellant cannot establish the existence of a Type I differing site condition. We deny the motion.

FINDINGS OF FACT

The facts set forth below are solely for the purpose of resolving the motion.

1. Contract No. F41689-93-C-0505 was awarded to G & C Enterprises, Inc. on 24 September 1993. The contract required appellant to build a commissary at the United States Naval Air Station, Guam. As solicited and awarded, the contract contained a geological site survey ("survey") which included borings. (R4, tab 1)

2. Plates 5-9 of the survey, representing boring logs 4-8, are for the commissary site. Boring 4 contains "soft silt layers." Borings 6-8 "consist of less than a foot to 5 feet thick of medium dense to dense silty sandy limestone gravel fill overlying medium dense to hard coralline limestone. We also encountered a sandy silt layer in Boring 7 at approximately 1 to 4 feet deep but the silt is stiff at the Boring 7 location." (R4, tab 1, survey at 5-6)

3. The boring logs show the following:

Boring 4 - Light brown-white silty sandy limestone gravel-dense, moist to 2.5 feet; Dark brown sandy silt-very soft, moist to 5 feet; and Light brown-white coralline limestone moderately hard below 6 feet.

Boring 5 - Dark brown-white silty sandy limestone gravel-dense, moist, with roots on surface to a depth of less than 1 foot; Light brown-white coralline limestone below, moderately hard at 3 feet to 6 feet.

Boring 6 - Dark brown-white silty sandy limestone gravel to 2.5 feet; Light orange-brown-white coralline limestone below that level.

Boring 7 - Light brown-white silty sandy limestone gravel to less than 1 foot; Dark red-brown sandy silt-stiff, moist to 4 feet; Light yellowish brown-white coralline limestone below.

Boring 8 - Light brown-white silty sandy limestone gravel to 5 feet; Light yellowish brown-white coralline limestone below.

(R4, tab 1, survey, plates 5-9)

4. The survey informed bidders that materials larger than 6 inches must be removed and that “On-site excavated limestone rock may have over-size fragments . . . .” We find that the survey warned bidders to expect rocks over 6 inches in excavated limestone rock. (R4, tab 1, at 13-14)

5. Appellant submitted a proposal in the amount of \$122,045 on 21 December 1995 for the costs it allegedly incurred as a result of encountering a differing site condition, *e.g.*, 2,724 cubic yards of “boulders” (R4, tab 19). There is no evidence that respondent took any action on the proposal. Appellant re-filed the proposal on 7 January 2002 as a certified claim in the amount of \$454,104, the difference being attributable to a \$332,059 item for extended site overhead (R4, tab 60). The claim was denied in a 12 March 2002 contracting officer’s decision (R4, tab 62).

6. Appellant has filed an affidavit from its project manager, William Lane. Mr. Lane states that:

. . . .

10. The Report stated that boulders may be encountered only when a depth beneath the sandy gravel fill layer was reached.

11. The Government's Geotechnical Report represented that we would not encounter boulders within the sandy gravel fill layer.

12. G&C prepared its bid in reliance on the government's Geotechnical Report.

13. After G&C began excavation, it encountered boulders with diameters of 6" and greater, at depths where the Report said only sandy gravel fill would be encountered.

14. G&C came across 2724 cubic yards of boulders greater than 6" in diameter in layer that was supposed to consist of sandy gravel fill.

15. G&C could not use these boulders as fill because the contract specifications required fill to consist of rocks that were less than 6" in diameter.

16. The subsurface conditions differed materially from those represented by the government's Report, because G&C encountered boulders where we should not have found any.

17. From September 22, 1994 to November 7, 1994, G&C removed the 2724 cubic yards of boulders from the site.

18. The boulders made excavating the site far more difficult, and delayed the project nearly two months.

19. G&C's claims of excess costs were solely attributable to materially different subsurface conditions.

(App. ex. 1)

### DECISION

Summary judgment may be granted when there is no material fact in issue and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). Respondent has moved for summary judgment, arguing that under the undisputed material facts of this appeal appellant cannot meet the burden of proof for a Type I differing site conditions claim.

Type I differing site conditions consist of “subsurface or latent physical conditions at the site which differ materially from those indicated in th[e] contract.” FAR § 52.236-2(a)(1) (1994). To establish entitlement to an equitable adjustment due to a Type 1 differing site condition, a contractor must prove, by preponderant evidence, that: the conditions indicated in the contract differ materially from those actually encountered during performance; the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and the contractor was damaged as a result of the material variation between expected and encountered conditions. *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998).

*Control, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002).

Respondent argues that the survey warned bidders to expect rock fragments of greater than 6 inches. Appellant responds that it encountered those conditions at elevations where the survey predicted sandy gravel fill (finding 6). It is hardly debatable that the survey characterized the soil and predicted 6 inch rocks in limestone (finding 4). The logs show coralline limestone at elevations of less than one foot (boring 5), 2.5 feet (boring 6), 4 feet (boring 7), and 5 feet or below (borings 4, 8), and sandy gravel above those elevations (finding 3). The affidavit of appellant’s project manager states it encountered 6 inch rocks above the levels set forth in the logs “where we should not have found any” (finding 6). We hold that the existence of a differing site condition and the unforeseeability thereof is thus placed in issue. The affidavit of appellant’s project manager is also adequate to place in issue reliance and damage (*id.*). Respondent’s motion for summary judgment is denied.

Dated: 27 August 2003

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CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 53830, Appeal of G & C Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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