

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Perini Corp.) ASBCA No. 51573
)
Under Contract No. S-54-FA-237)

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 1 March 2004 appellant timely moved for reconsideration of our 30 January 2004 decision in this appeal, 04-1 BCA ¶ 32,530, arguing that it has errors of fact and law. Respondent replied to the motion, arguing that movant "is simply rearguing the facts and law that were considered by the Board in reaching its prior decision" (gov't resp. at 2). Appellant replied to the government's response. Familiarity with our 30 January 2004 decision is assumed. We evaluate movant's arguments *seriatim*.

1. Movant contends that the Board's calculation of 204 days after 31 December 1993 to complete contract work and derivation of 340 days of excusable delay in 1994-95 by the formula "(579-204-30-5)" (finding 112) were "skewed in the Government's favor" because we included 342 days in 1991, when Perini performed only \$5,538,231 of contract work due to government delays arising from differing site conditions and design changes. The Board should have calculated 160 days to complete the contract work considering the 82% progress rate achieved in 1992-93, and found 384 days of excusable delay in 1994-95 by the formula "(579-160-30-5=384)." (Mot. at 2-5)

Respondent responds that Perini's July 2003 brief, based upon its rate of progress from 31 December 1992 to 30 November 1993, derived 4.7 months to complete the remaining contract work by "late May 1994" (app. br. at 83, proposed finding 119); the Board considered and rejected that proposed finding; its present argument to use a 1992-93 progress rate is based on "self-serving advantage"; and the Board did not find

that all Perini's alleged loss of productivity in 1991 was the government's fault (gov't resp. at 2-3).

Though its post-hearing brief and motion do not use that terminology, movant's formula is an application of the "measured mile methodology," which this Board accepted in *W.G. Yates & Sons Construction Co.*, ASBCA Nos. 49398, 49399, 01-2 BCA ¶ 31,428 at 155,210-11 and *DANAC, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184 at 145,152 (for labor inefficiency claims, a "good period vs. bad period" analysis, comparing the cost of performing work during periods both affected and unaffected by disruptive events "is a well established method of proving damages"). *DANAC*, 97-2 BCA at 145,152, does not require that "bad period" delays be entirely the fault of the government.

We conclude that appellant is correct that we should have used 1992-93 as the baseline. This baseline is consistent with our findings that Perini's 342 days of performance in 1991 were impacted by the rock fill changes, for which Modification Nos. 10 and 11 extended the contract completion date by 153 days (findings 23-28), and by the rock mass reinforcement change, causing 56 days of delay (though bilateral Modification No. 51 did not extend the contract completion date) (findings 93-99), compared to its 731 days of performance in 1992-1993 that were impacted by far fewer changes and delays (findings 29-31, 40-41).

To determine when Perini should have completed contract performance at its 1992-93 rate of progress, we need to correct movant's formula that mistakenly calculated "82%" progress in 1992-93. By 31 December 1991, Perini performed \$5,538,232 (16%) of the contract work (R4, tab I7 at 3). By 31 December 1993, Perini performed \$31,253,019 (83.78%) of the contract work (R4, tab I31 at 6), including \$25,714,787 in 1992-1993 (\$31,253,019-\$5,538,232), or 67.78% (83.78%-16%). The contract price as last amended was \$37,226,737 (R4, tab F53). On 31 December 1993, the unperformed contract balance was \$5,973,718 (\$37,226,737- \$31,253,019). The \$25,714,787 performed in 1992-93, divided by 731 calendar days, yields a daily rate of \$35,177.55. The \$5,973,718 unperformed balance, divided by the \$35,177.55 daily rate, yields 169.8 or 170 days to complete the contract. Therefore, the corrected formula for 1994-95 excusable delay days is $(579-170-30-5 = 374)$, rather than the 340 days in finding 112.

2. According to movant, the Board's denial of excusable delays for Christmas holiday suspensions in 1993-94 (17 December 1993 through 2 January 1994) and 1994-95 (17 December 1994 through 8 January 1995) was fallacious because Perini's approved as-planned schedule provided for Christmas holiday suspensions for 1991-92 and 1992-93 and contract completion in August 1993, but did not provide for later Christmas holiday suspensions, and finding 35 was unsupported by record evidence and is contradicted by R4, tab Y10 (mot. at 5-8).

The second sentence in finding 35 may have been unclear. We revise it to state:

FBO's office engineer (tr. 353-54) Scott Hastings' 19 March 1992 memorandum reviewed Perini's proposed time extension for Modification No. 6 and stated: "It should also be noted that Ref (2) ["Perini Letter Serial No. 126-005-WFB-193," not in evidence] assumes the contractor will be working through the 1993/1994 Christmas holiday season. The approved schedule and actual work conditions during 1991/1992 holiday season indicates [sic] that all construction work will be shut down for two weeks during the Christmas holiday season. This issue is not currently addressed, however I am sure it will be on subsequent time extensions requests which will increase the contract completion date impact an additional 14 calendar days." (R4, tab Y10 at 4) The FBOPD's 4 November 1994 telegram stated that: "The reduction in labor force and the loss of the skilled workers has [sic] resulted in schedule slippage into the [1994/1995] holiday season which in Caracas amounts to a realistic loss of one month of production" (R4, tab Z43 at 1).

Scott Hastings' above-quoted 19 March 1992 statement that suspension of work for the Christmas holidays in 1993-94 was "not currently addressed" by FBO's review of Perini's equitable adjustment proposal for Modification No. 6 shows that in the 153-day time extension provided in Modification Nos. 10 and 11 the parties did not consider the 1993-1994 holiday suspension of work. Therefore, we revise the second sentence in finding 109 to state: "We find that such stoppage complied with Venezuelan custom (see finding 35), the first 15 days of such suspension (17 through 31 December 1993) were not released by bilateral Modification Nos. 10 and 11 or concurrent with the Venezuelan instability delay (*infra*), and hence those 15 days constituted excusable delay."

Perini's 1-2 January 1994 holiday season suspension, and its 23 calendar day suspension for the 1994-95 holiday season were concurrent with the 374 days of excusable delay due to Venezuelan economic instability in 1994-95, as recalculated above.

3. According to movant, the Board's denial of 56 calendar days of excusable delay for the 1991 rock mass reinforcement change, based on Perini's release in Modification No. 51, erred by misinterpreting the unilateral Modification No. 3 change order, and the bilateral Modification No. 51 release, to address the government claim for liquidated damages and penalties (mot. at 8-10).

Absence of any government release of its liquidated damages and penalties rights in Modification No. 51 is irrelevant and immaterial. The Board did not err in interpreting Modification No. 51 to release FBO of liability for all delay arising from the rock mass reinforcement change in Modification No. 3, and hence to release the government from Perini's excusable delay defense to liability for liquidated damages and penalties.

4. According to movant, the Board erred in finding 84 stating that the delay in obtaining the building permit resulted only in a 6-day extension from 24 to 30 April 1991, since the Board found that Perini planned to start site construction on 11 March 1991 (finding 7). Thus, Perini is entitled to the 42 calendar days from 11 March to 22 April 1991. (Mot. at 11-13; appellant does not explain the discrepancy between 22 and 24 April)

Perini's 15 April 1991 letter to FBO stated Perini's "intent to commence construction of the temporary facilities on Wednesday, 17 April 1991 . . . [to begin] with the excavation . . . to contract subgrade," urged FBO to issue the building permit if needed for such work, and stated that "any additional delays in commencing the construction of the temporary facilities will have an impact on the overall construction schedule" (R4, tab U25). The record does not establish that Perini was ready to start such work before 17 April 1991. Therefore, we increase the six days excusable delay in finding 84 by seven days, and revise that finding as follows: "We find that FBO delayed contract completion by 13 calendar days (from 17 through 29 April 1991) in obtaining building permits."

5. According to movant, the Board erred legally in declining to recognize the first 45 days of compensable and excusable delay due to the rock fill differing site condition from 1 July to 15 August 1991 (mot. at 13-15).

That Perini and FBO disagreed on a time extension starting 1 July 1991 as Perini proposed (findings 24, 27), constitutes no new evidence or contractual or legal basis to disregard Perini's release of further liability for compensation and time extension for the rock fill differing site condition in Modification Nos. 10 and 11 (finding 28).

6. According to movant, the Board erred legally by declining to recognize the undisputed 17-day delay in receipt of updated drawings, which Perini received 17 days after notice to proceed on 19 February 1991, by holding that Modification No. 1 released such delay on the basis of ¶ 13.3.2(e) in FBO Form DS-1231, since that modification gave Perini no "price and time adjustment" as prescribed in ¶ 13.3.2(e) as a requirement for a contractor release (mot. at 16-17).

We do not agree with appellant's interpretation of the "price and time adjustment" phrase in ¶ 13.3.2(e). Our review of the solicitation amendments indicates that the 203 drawing changes that respondent incorporated in the updated drawings issued with

Modification No. 1 (R4, tab F1; ex. G-10), and all specification revisions (which were *not* re-issued in Modification No. 1), had been issued to Perini in October-December 1990 before contract award by solicitation amendments 3, 5, 7 and 8 (R4, tabs A4, A6, A8-A9; finding 75). Perini lacked no specification and drawing information not already on hand that it needed to obtain the materials and to plan the technical work required to start contract performance. Moreover, Perini's claim of 17 days excusable delay due to delayed issuance of updated specifications and drawings is inconsistent with the fact that as far as the record reflects it never received updated specifications throughout the entire performance of the contract. Accordingly, we are not persuaded to revise our finding that "FBO's delay in providing updated drawings to Perini did not delay the start or the overall completion of contract 237" (finding 77).

7. According to movant, the Board erred in stating that GSTR approval was not on the critical path on 20 December 1991 and therefore the government's delay in approving Perini's GSTR submittal from 26 September to 20 December 1991 (findings 102, 107) did not delay contract completion. Movant argues that the 1 November 1991, 1 December 1991, and 1 January 1992 schedule updates showed that Perini's schedule slipped 124 days, 136 days and 157 days due to delay in approving the GSTR submittal and revisions to the earthwork design (R4, tabs J9, -10, -11).

We rely on the actual monthly critical path updates, rather than the FBO office engineer's comments about schedule slippages, in those monthly progress reports. GSTR submittal approval, activity No. P012, was on Perini's critical path on 1 September, 1 October and 1 November 1991, but not on 1 December 1991 or on 1 January 1992 (R4, tabs J7-11). FBO's 1 December 1991 and 1 January 1992 progress reports stated that the "project is currently 136 calendar days [157 in January] behind schedule . . . due to late approval of GSTR submittals and revised specifications/drawings for earthwork on site." (R4, tabs J10-11). From these facts it is apparent that FBO's late approval of Perini's GSTR submittals delayed contract performance from 26 September to 30 November 1991 (but not in December 1991 or thereafter). That September-November 1991 delay, however, is wholly included in the 153 calendar days of delay extensions for the rock fill changes (from 15 August 1991 to 15 January 1992), which were equitably adjusted and released in Modification Nos. 10 and 11 (findings 27-28). Therefore, FBO's delay in approving Perini's GSTR submittal cannot increase the total number of days of excusable delay.

8. According to movant, the Board erred legally in ignoring the work respondent added after 15 May 1994 which excusably delayed Perini, because there is no evidence that in the releases in Modification Nos. 44, 47 and 48 Perini accepted liability for liquidated damages and penalties (mot. at 21-23).

The Board properly interpreted Modification Nos. 41-42, 44, and 46-48 to release FBO from liability for all delays arising from the unidentified 21 of the 30 "RFPs" issued

after 15 May 1994, and therefore to release the government from Perini's excusable delay defenses to liability for liquidated damages and penalties arising from such RFPs (finding 64). In any event, the Board has recognized 374 days of excusable delay during the period from 31 December 1993 to 2 August 1995, in addition to the 35 days recognized by the government in 1994 (findings 42-43, 111). These days encompass any delays relating to added work after 15 May 1994.

In conclusion, we grant appellant's motion for reconsideration to the extent set forth above under Issues 1, 2 and 4, revise our finding of total excusable delay from 366 days to 422 days, and deny the balance of the motion for reconsideration. Accordingly, we revise our CONCLUSION, 04-1 BCA at 160,899, to state:

We sustain ASBCA No. 51573 to the extent of reducing the number of days of enforceable liquidated damages by 422 days, from 444 as assessed, to 22 days as validly assessable, which amounts to a reduction of \$2,321,000 ($\$5,500 \times 422$), and we deny the balance of this appeal. In lieu of the \$2,892,000 LDs and penalties that FBO assessed (finding 115), Perini is liable to pay FBO \$286,000 in LDs and penalties ($\$5,500 \times 22 + \$7,500 \times 22$).

Dated: 12 May 2004

DAVID W. JAMES, JR.
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. 51573, Appeal of Perini Corp., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals