

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
TPS, Inc.) ASBCA No. 52421
)
Under Contract No. N62467-95-C-2739)

APPEARANCE FOR THE APPELLANT: Charo Bolanos Ruiz, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

TPS, Inc. (TPS) appeals the denial of its claim for alleged total costs of performance, Eicheley damages and “settlement expenses” on a roof repair contract. The total claimed amount at hearing, net of contract payments, was \$600,207.88. Both entitlement and quantum are before us. We deny the appeal.

FINDINGS OF FACT

A. Award and Performance to 2 February 1996

1. TPS was awarded the contract on 28 September 1995. The contract required replacement of roofs, structural repairs and abatement of designated areas of asbestos and lead based paint (LBP) on nine buildings at the Key West Naval Air Station, Florida. The firm fixed price at award was \$274,257. The contract required work to begin on 13 October 1995 and to be completed by 11 May 1996. (R4, tab 1 at 77, tab 2 at 292)

2. The contract included among other provisions, the FAR 52.212-12 SUSPENSION OF WORK (APR 1984) clause, the FAR 52.243-4 CHANGES (AUG 1987) clause, and the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) – ALTERNATE I (APR 1984) clause (R4, tab 1 at 41, 56-57).

3. Before starting work, TPS was required to obtain contracting officer approval of a quality control plan, a health and safety plan, and a demolition plan (R4, tab 1 at 153-54,

166, 172). TPS did not submit these plans until 27 November 1995. All three plans were returned on 29 November 1995 for correction of multiple deficiencies on each. (R4, tab 20 at 737-41)

4. On 6 December 1995, the contracting officer issued a cure notice. The cure notice stated that 33 percent of the contract performance time had elapsed with no submittals approved and no work in place. The notice directed TPS to submit a written completion plan and a statement of any excusable delays it had incurred. (R4, tab 22 at 744) TPS replied on 11 December 1995 with a completion plan. It did not allege any excusable delays. (R4, tab 25)

5. TPS began work on site on 18 January 1996 at Building A-4060 (R4, tab 3 at 313).¹ On 18 and 22 January 1996, TPS requested government direction on various aspects of the work. Those requests were answered on 19 and 23 January 1996. (R4, tabs 37-39; ex. A-4)

6. On 29 January 1996, TPS began work on Building A-634 (R4, tab 3 at 341). When the abatement sub-subcontractor did not show up for work, the government project manager told TPS that it could continue other work on the building if its workers kept three feet away from the contaminated areas. TPS alleged that this advice constituted government interference with the work. (R4, tab 3 at 341, 345; tr. 646-47)

7. Specification section 02050, paragraph 3.1.1, required TPS to make provision for worker safety during demolition and to sequence the work to “minimize hazard to workers” (R4, tab 1 at 174). Any delay of the work on Building A-634 on 29-30 January 1996 was due to TPS failing to sequence the work properly, and not to government interference with the work.

8. On 30 January 1996, TPS reported that work on the drip edge of Building A-4060 was stopped due to a photocell still in place (R4, tab 3 at 346). On 31 January 1996, TPS requested the government to remove cable, phone and power lines attached to Building A-634 (R4, tab 3 at 350, 354). Pursuant to paragraph 1.3 of specification section 01500, TPS and not the government was responsible for removal and reinstallation of attached equipment that was in way of the work (R4, tab 1 at 160).

¹ TPS had a superintendent on-site on days when work was performed through the end of June 1996, but all of the on-site work was subcontracted to D&J Industries, Inc. (D&J) for \$249,325 (R4, tab 3; ex. G-24 at 146). D&J subcontracted the asbestos and LBP abatement work to Decon Environmental and Engineering, Inc. for \$22,000 (ex. G-24 at 150).

9. On 2 February 1996, the government suspended all contract work on seven and one-half of the nine buildings under contract. The suspension order stated that: “We anticipate that this suspension will continue through the end of March 1996.” The suspension order did not direct, nor did the government otherwise require, TPS to remain on standby ready to resume full work immediately when the suspension was lifted. (R4, tab 45)

10. The only work performed on the suspended portion of the contract before the order was issued was 24 man-hours on Building A-718 (R4, tab 3 at 341). The only added work caused by the suspension order was six man-hours on 11 March 1996 removing roofing equipment from Building A-718 (R4, tab 3 at 489). Since the suspended work was ultimately terminated for convenience without ever being resumed, the 2 February 1996 order did not cause any remobilization cost, loss of efficiency in performing the suspended work when resumed, or cost of performing the suspended work in a later higher cost period. *See* finding 29.

11. As measured by the approved Schedule of Prices, the suspended work was 85 percent of the total contract work at award (ex. G-30). The only contract work that was not suspended by the order was the work on Building A-4060 and one-half of the work on Building A-634.

B. Delay in Completion of Building A-4060

12. As of 3 February 1996, the work on Building A-4060 was completed except for installation of the soffit and ridge vent. Installation of the soffit was awaiting correction of a contract drawing error.² Installation of the ridge vent was awaiting an acceptable submittal by TPS. On 22 February 1996, TPS was directed orally to install the soffit “up the rake as existing and not as shown on the drawings.” This direction was confirmed in writing on 28 March 1996. (R4, tab 56 at 843) There is no credible evidence that this change caused TPS any increased cost, and the delay in receiving direction was concurrent with the first two months of the ridge vent delay. *See* findings 13 and 14.

13. TPS’ initial submittal on the ridge vent was disapproved on 24 January 1996. The submittal failed to indicate which of several options shown would be installed. (R4, tab 43) A resubmittal was not made until sometime between 20 February 1996 and

² The contract drawing showed the new soffit installed horizontally on the underside of existing roof joists extending beyond the wall of the building. The existing roof joists did not in fact extend beyond the wall of the building. (R4, tab 143, Sheet 18, Detail 32; tr. 242)

11 March 1996.³ The resubmittal was approved on or about 26 March 1996 (ex. A-29). Although installation of the ridge vent was only “four hours work for two guys,” and “not much work,” TPS did not begin installation until 7 June 1996. When rain stopped work on that day, TPS did not return to complete the installation until 27 June 1996 (tr. 249; R4, tab 3 at 583-649).

14. TPS alleges that a conflict between two contract drawings delayed installation of the ridge vent (tr. 245-49). The intent of the drawings, however, was clear. Sheet 9, in a plan view of the roof, expressly required an opening in the existing roof sheathing for the new ridge vent. The roof truss elevation detail on Sheet 18 specified the truss structure, and only incidentally showed the existing sheathing without the opening specified on Sheet 9. (R4, tab 143) Moreover, while TPS submitted a number of written inquiries to the government on other alleged problems,⁴ it did not submit a written inquiry on the ridge vent opening, and it completed the ridge vent with the opening and without further direction from the government (tr. 249).

C. Suspension of Work on Building A-634

15. The contract drawing for Building A-634 showed LBP only on some of the fascia boards and on the wall paneling of the attached storage shed (R4, tab 143, Sheet 6). On 2 February 1996, the government notified TPS that LBP was also present on the rafters of Building A-634 (R4, tab 48). On receipt of this notice and on the advice of its certified industrial hygienist (CIH)⁵, TPS stopped work on that building and requested government direction as to how to proceed (R4, tab 47).

16. Specification section 01560, paragraph 1.6.1 stated:

All known hazardous materials are indicated on the drawings.
If additional material that is not indicated on the drawings is

³ The resubmittal form is dated 7 February 1996 and marked “via hand delivery.” The attached technical data on the ridge vent, however, has a fax transmission date from the supplier of 20 February 1996 (ex. G-8 at 3143). On 7 March 1996 the government notified TPS that it had not yet received a resubmittal (R4, tab 59). On 11 March 1996, the government project manager sent the resubmittal for review by the using activity (ex. G-8).

⁴ See, e.g., R4, tabs 37, 39, 46, 47, 55, 56.

⁵ Specification section 02090, paragraphs 1.2.4 and 1.3.2 required TPS to provide a CIH for the job and made the CIH responsible for, among other things, ensuring that “hazardous exposure to personnel and to the environment are adequately controlled at all times” (R4, tab 1 at 195, 197).

encountered that may be dangerous to human health upon disturbance during construction operations, stop that portion of work and notify the Contracting Officer immediately. Intent is to identify materials such as PCB, lead paint, and friable and non-friable asbestos. Within 14 calendar days the Government will determine if the material is hazardous. If the material is not hazardous or poses no danger, the Government will direct the Contractor to proceed without change. If the material is hazardous and handling of the material is necessary to accomplish the work, the Government will issue a modification pursuant to "FAR 52.243-4, Changes" and "FAR 52.236-2, Differing Site Conditions."

(R4, tab 1 at 166)

17. On 5 February 1996, test results at Building A-634 showed LBP at levels requiring abatement on the storage shed rafters and walls, and on the main building soffit, rafters and drip edge (exs. A-16, -17). On 22 February 1996, TPS again requested government direction as to how it should proceed with the additional contaminated areas (R4, tab 56 at 840-42).

18. Although the contract required the government to direct by change order the appropriate action on the additional contaminated areas within 14 days of notice by TPS (see finding 16), the government took no substantial action until 25 April 1996 when it requested TPS to provide a cost proposal for a proposed change order (R4, tab 68).

19. The proposed change order called for LBP abatement in the areas designated in TPS' notices of 2 and 22 February 1996, additional asbestos abatement, and replacement of rotted sheathing and joists in Building A-634. The request further stated that it was not a notice to proceed with the proposed change. (R4, tab 68) TPS responded with a request for an extension of time to 20 May 1996 to submit its cost proposal (R4, tab 69 at 876).

20. On 24 May 1996, the contracting officer issued unilateral Modification P00001 directing TPS to proceed with the proposed change, and to complete it within 14 days. At page 2, the modification specified a not-to-exceed price of \$12,000. At page 3, however, it stated: "The change work set forth in the modification shall be completed notwithstanding the not-to-exceed amount set forth in the modification. The final increase in the contract amount will be determined pursuant to negotiations." (R4, tab 2 at 296-97)

21. TPS received Modification P00001 on Friday, 24 May 1996, the day it was issued (ex. A-32 at 142). By letter dated 1 June 1996, TPS requested various technical clarifications on the Modification P00001 work, and stated that the work could not be performed within the NTE amount (R4, tab 77). The government provided the requested

clarifications on 4 June 1996 (R4, tab 79). On or about 3 June 1996, TPS sent the government a detailed estimate in the total amount of \$44,016.44 for the direct costs, overhead and profit for performing Modification P00001 (R4, tab 78).

22. TPS did not resume work on site until 6 June 1996, 13 days after receiving the modification (R4, tab 3 at 579). The one-week delay in requesting technical clarifications, and the two-week delay in resuming work show that TPS was not standing by ready to resume full work immediately on Building A-634 when Modification P00001 was issued.

23. The only additional cost incurred as a result of the suspension of work on Building A-634 was 57.5 man-hours by D&J protecting materials and maintaining the building in a weather tight condition⁶ (R4, tab 3 at 382-575). There is no evidence that TPS incurred any cost of remobilization on site, loss of efficiency in performing the original work, or cost of performing the original contract work in a higher cost period as a result of this suspension.

D. Completion of Building A-634

24. The daily reports show work performed on 16 days between 6 and 28 June 1996. The average daily manning on those 16 workdays was six persons in addition to the TPS superintendent. (R4, tab 3 at 579-651) Although the added cost for Modification P00001 was in dispute at the time (see finding 21), TPS made no attempt in its daily reports or otherwise to identify what parts of the work being performed on and after 6 June 1996 were specified by the original contract and what parts were added work required by the modification (R4, tab 3 at 579-651; ex. G-17). At hearing, TPS' claim consultant testified that TPS could have tracked separately the costs of performing Modification P00001, but did not do so (tr. 520-21).

25. The TPS daily reports show work performed on only five days between 29 June and 18 July 1996. The daily manning on those five days was one D&J laborer. (R4, tab 3 at 653; ex. G-17 at 1537-42) No TPS superintendent was present on site on those days, or at anytime thereafter through contract completion on 5 December 1996 (ex. G-17).

26. By letter dated 18 July 1996, the government project engineer told TPS that there had been no progress on Building A-634 since 15 July 1996 and requested a written explanation and a completion schedule for that building (R4, tab 98). By letter dated 19 July 1996, TPS stated that it was waiting for direction from the government on various

⁶ The 416 man-hours charged by the TPS on-site superintendent during the period 3 February-5 June 1996 are not compensable costs of the suspension of work on Building A-634. The delay in completion of Building A-4060 during this entire period was a concurrent cause of delay in contract completion for which TPS and not the government was responsible. See findings 12-14.

technical and contract administration issues (R4, tab 99). Those issues were not resolved to TPS' satisfaction until 3 August 1996 (ex. A-41). Nevertheless, TPS resumed work on 26 July 1996, and the daily reports for the period 29 June-26 July 1996 do not report any government-caused delays of the work (R4, tab 3; ex. G-17; tr. 1068-69). On the evidence of TPS' own daily reports, we find unproven the allegation of government-caused delay in the TPS letter of 19 July 1996.⁷

27. Between 26 July and 9 August 1996, work was performed on site on 11 days. The daily manning on each of those days was one D&J laborer. From 12 August through 26 September 1996, no work was performed on site. Neither the daily reports nor the parties' contemporaneous correspondence indicate the reasons for this work stoppage. (Ex. G-17 at 1555; tr. 1068-69) On 2 October 1996, the government issued a cure notice to TPS citing its failure to make progress, and requesting, among other things, a "detailed explanation of any excusable delays" (ex. G-16). There is no evidence of a TPS reply to the cure notice.

28. Between 27 September and 31 October 1996, work was performed on site on 22 days. The average daily manning on those days was two persons consisting of various mixes of carpenters, laborers and roofers. No work was performed from 1 through 28 November 1996. Again, there is no explanation for this break in the work in either the TPS daily reports or in the parties' contemporaneous correspondence. (Ex. G-17 at 1556-79; tr. 1068-69)

29. On 21 November 1996, the government terminated for convenience the contract work it had suspended on 2 February 1996 (R4, tab 2 at 298-302). *See* finding 9 above. Work resumed on Building A-634 on 29 November 1996. The last day of work on that building and on the contract was 5 December 1996. Between 6 June and 5 December 1996, work was performed on the contract on 60 days with an average daily manning of less than four persons on each workday. (R4, tab 3; ex. G-17)

E. The Claim

30. On 28 March 1997, TPS submitted a document entitled "Termination Settlement Proposal." The proposed settlement amount was \$994,040. (R4, tabs 119, 123) The contract price at that time was the NTE amount of \$286,257 established by Modification P00001 (R4, tab 2 at 296). The contracting officer had provided with the termination notice the required form (SF 1436) for a total cost termination settlement proposal (R4, tab 2 at 298). TPS' 28 March 1997 submission, however, did not provide

⁷ Paragraph 1.12.1 of specification section 01400 required the daily report to include "problems encountered during construction, work progress and delays" (R4, tab 1 at 157-58)

that form, and it was in substance a total cost price adjustment claim for alleged differing site conditions and government suspensions of work (R4, tab 119).

31. The 28 March 1997 claim document was prepared in part by D&J employees and in part by an outside consultant (ex. G-24 at 545-55). It is readily apparent from the references to litigation in the consultant's contract that the underlying purpose of the document was not to further a negotiation process with the contracting agency, but to prosecute a claim against the government (ex. G-24 at 556-57). In August 1997, the contracting officer sent the claim to the Defense Contract Audit Agency (DCAA) for audit (R4, tab 119 at 1043-44, tab 123 at 1061).

32. By unilateral Modification P00004, dated 31 October 1997, the contracting officer increased the contract price by \$49,268.32 for the changes ordered in unilateral Modification P00001. This amount included the \$12,000 allowed in Modification P00001. (R4, tab 2 at 306-07)⁸ The allowed amount was supported by a detailed government estimate of the material, labor, equipment and other costs required to perform the changed work (ex. G-18). The government estimate exceeded the estimate submitted by TPS on 3 June 1996. *See* finding 21 above.

33. On 6 January 1998, TPS requested the government to consider its 28 March 1997 claim as a "Request for Equitable Adjustment based upon the Total Cost Method" (R4, tab 128). On 15 July 1998, TPS revised the claim to a net amount of \$1,068,063 (ex. G-24 at 155). The DCAA audited the revised claim and questioned all but \$229,255 of the claimed amount (ex. G-19).

34. After settlement negotiations failed to reach agreement, the government on 30 October 1998 issued unilateral Modification P00005 in the amount of \$98,218 for "full and final settlement for all work on this contract, including but not limited to: 1. All costs associated with the Termination for Convenience. 2. All costs associated with Government caused changes and delays. 3. All costs caused by the Suspension of Work." The allowed amount included \$56,757 for Eichleay damages and \$41,094 for "proposal preparation" costs. (R4, tab 2 at 308-10)

35. By letter dated 10 August 1999, TPS certified its claim in the form required by the Contract Disputes Act of 1978. The contracting officer received the certified claim on 11 August 1999. (R4, tab 140) On 12 October 1999, TPS appealed a deemed denial of the claim (R4, tab 141). On 22 November 1999, the contracting officer denied the claim entirely (R4, tab 142).

⁸ Although Modification P00004 allowed TPS to invoice the balance due on a price increase of \$49,268.32, it expressly left the total contract price established in Modification P00001 at \$286,257 "pending deletion of [the terminated] buildings" (R4, tab 2 at 307).

36. At hearing, TPS claimed a net compensation of \$600,207.88. That amount is its alleged total costs of performance with profit (\$721,593.88) less government payments (\$121,386.00). The claim does not identify the direct costs incurred as a result of the suspensions of work, the direct costs of the change order in Modification P00001, the costs of performing the terminated work prior to the termination, or the cost impact of the partial termination on the continued portion of the contract. (Ex. A-51)

37. The alleged total costs at hearing included, among other items, \$95,072.31 for 200 days of D&J Eichleay unabsorbed overhead between 3 February and 21 November 1996, and \$43,368 for “settlement expenses” (ex. A-51; tr. 439-40). The claimed settlement expenses consisted of the costs incurred in preparing the 28 March 1997 claim document (exs. A-51, G-24 at 545-55). The government payments credited in the claim (\$121,386) were the amounts of the original bid price allocated on the Schedule of Prices to bonding and to the continued portion of the contract (Buildings A-634 and A-4060), plus the price adjustment in unilateral Modification P00004 (exs. A-51, G-24 at 565).

DECISION

Although initially submitted on 28 March 1997 as a total cost termination settlement proposal, TPS’ submission was in substance a total cost equitable price adjustment claim, and on 6 January 1998, TPS requested the government to consider it as such. *See* findings 30 and 33. TPS is entitled to equitable price adjustments under the Suspension of Work clause for the 2 February 1996 suspension order and for the government delay in issuing Modification P00001 for Building A-634. TPS is also entitled to an equitable price adjustment under the Changes clause for the cost of the additional work ordered by that modification. However, to recover a total cost price adjustment for those areas of entitlement, TPS must show, among other things, the impracticability of proving directly the actual costs caused by the suspensions and change order. *See Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372 (Fed. Cir. 2004); *Propellex Corp. v. Brownlee*, 342 F.3d 1335, 1339 (Fed. Cir. 2003); *Southwest Marine, Inc.*, ASBCA No. 36854, 95-1 BCA ¶ 27,601 at 137,518.

The direct costs of the two suspensions are identified in TPS’ own daily reports. *See* findings 10, 23. TPS made a detailed estimate of the added cost of Modification P00001, and its own consultant testified that it could have tracked and recorded those costs during performance as they were incurred. *See* findings 21, 24. The work performed on this contract was not complicated. *See* finding 1. The workers employed were few. *See* findings 24-25, 27-29. On this record, TPS has failed to show that it was impracticable to prove directly the actual costs incurred for the two suspensions or for the change order in Modification P00001.

As part of its total cost price adjustment claim, TPS seeks Eichleay damages for 200 days of alleged “standby” by D&J between 3 February and 21 November 1996. To recover Eichleay damages, TPS must show, among other things, that “much, if not all” of the work on the contract was suspended, and that it was required to hold itself ready during the suspension period “to resume work on the contract at full speed as well as immediately,” when the suspension was lifted. *See P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1371 (Fed. Cir. 2003). Assuming *arguendo* that the two suspensions amounted to a suspension of “much, if not all,” of the contract work, there is no evidence that TPS was required to be ready to resume full work immediately when the suspensions were ended. There was no such express requirement in the 2 February 1996 suspension order, and TPS did not in fact, resume full work immediately when the suspension on Building A-634 was ended by Modification P00001 on 24 May 1996. *See findings 9, 21-22.*

TPS’ total cost price adjustment claim also includes “settlement expense.” This is substantially the same item that was allowed in unilateral Modification P00005 for “proposal preparation.” The claimed expense is in fact the cost of prosecuting a price adjustment claim against the government. *See findings 31, 37.* It is barred by FAR 31.205-47(f)(1). *See Bill Strong Enterprises v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*).

We have considered the other claims and arguments raised by TPS. We find them without merit. Moreover, the record is insufficient for us to construct a proper total cost termination settlement for TPS.⁹ Since we hear appeals *de novo*, the government is not bound by its award in unilateral Modification P00005. The government requests that we adopt the final pricing of the contract in that modification with the exception of the amounts allowed for Eichleay damages and proposal preparation (gov’t br. (argument) at 37). Since we deny in this decision TPS’ claims for a total cost price adjustment, for Eichleay damages, and for its claim preparation costs, the total amount of \$97,851 for those items in unilateral Modification P00005 may be deleted in a final settlement consistent with this decision.

⁹ Among other things, it is apparent that, using TPS’ claimed total cost amounts and without the price adjustment which it has failed to prove in this appeal, TPS was in a loss position even before considering an estimate to complete the terminated work. The record does not include an estimate to complete, and therefore no basis on which we could compute the proper loss adjustment required by the convenience termination clause of the contract.

The appeal is denied.

Dated: 26 March 2004

MONROE E. FREEMAN, 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. 52421, Appeal of TPS, Inc., rendered in conformance with the Board's Charter.

Dated:

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