

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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J&W Allen Construction Co., Inc.) ASBCA No. 49561
)
Under Contract No. N62467-94-C-9691)

APPEARANCES FOR THE APPELLANT: Paul T. Kalinich, Esq.
Momkus Ozog & McCluskey LLC
Downers Grove, IL

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Richard J. Huber, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MOED
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Allen contends that this fixed-price construction contract required shoring only on the west side of the excavation. Allen seeks a price increase for all other shoring installed and also for special shoring and underpinning of an adjoining building resulting from (a) a concrete slab encountered in the subsurface; (b) a dimensional error in a contract drawing; and (c) removal of contaminated material which enlarged the excavation bringing it very close to that building. The basis of Government's motion for summary judgment is that the work for which the claims are asserted was required by the contract. Allen has cross-moved for summary judgment sustaining the appeal.

FINDINGS OF FACT FOR THE PURPOSES OF THE MOTION

1. On 26 September 1994, pursuant to § 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a), this contract was awarded to the U.S. Small Business Administration (SBA) and the work was then subcontracted in its entirety to Allen. The contracting agency was the Engineering Field Activity Midwest, a component of the Naval Facilities Engineering Command. The contract was assigned for administration to the Resident Officer in Charge of Construction, Great Lakes, IL (hereinafter the "ROICC").

2. The negotiated contract, awarded at a price of \$479,000, was for the excavation, removal and replacement of three underground petroleum storage tanks (USTs) and associated piping, pumps and dispensers located immediately west of Building 2710 at the Naval Training Center, Great Lakes, IL. The contract contained the standard clauses prescribed by the Federal Acquisition Regulation (FAR) for use in fixed-price construction contracts, including: "Changes (AUG 1987)," FAR 52.243-4; "Differing Site Conditions (APR 1984)," FAR 52.236-2; and, "Disputes (DEC 1991)," FAR 52.233-1.

Shoring Requirements

3. In a letter dated 17 March 1995, the ROICC issued the following order to Allen:

You are directed to install the sheet piling to protect the building on the East face and the water main on the West face of the excavation. As referenced on the construction contract drawings, [Drawing No.] 2, note 4, this is required by the contract.

You are not to excavate any further on either the East or West faces of this excavation until sheet piling has been installed.

(R4, tab 27)

4. Allen believed that the work ordered by the ROICC with respect to the east side of the excavation went beyond the contract requirements. Allen contended that "[t]he only shoring costs included in the contract are to protect the utilities on the west side" (R4, tab 31). According to Allen, the work directed by the ROICC had been included "in the plans/specs that was originally developed" but had been "eliminated in final contract negotiations" and, thus, had not been included in the final cost breakdown submitted to the Government during contract negotiations. Allen conceded, however, that the contract did not contain provisions "that reflected the actual negotiated work pursuant to the final revised proposal breakdown." (R4, tab 31) Allen agreed to comply with the direction with the *caveat* that compliance "does not in any way imply that we agree that this is a requirement of the basic contract." (R4, tab 31)

5. As evidence that the foregoing constituted its interpretation of the contract at the time of award, Allen points to the terms of a subcontract issued to R.L. DeSpain, Inc. on 1 October 1994 for various tasks, including "shoring" in connection with "tank removal." In that regard, the subcontract states that:

24. Shoring shall include only support of the existing water main on the west side of the UST site. Any and all other shoring is specifically excluded.

(App. supp. R4, tab 39a)

6. In support of its motion for summary judgment, the Government has submitted the affidavit of David L. Smith, a contracts official employed by the Engineering Field Activity Midwest, who participated in the negotiations leading to the award of the contract to Allen. Mr. Smith stated that during negotiations, Allen had asked “whether shoring of the excavation was mandatory” and was told that “it was required for technical reasons.” Disputing Allen’s above-noted assertion that certain shoring requirements had been eliminated during negotiations and, thus, had been excluded from Allen’s final price proposal, Mr. Smith stated that the negotiations “were conducted with a view towards the total contract price and we did not engage in a line-by-line negotiation of the costs included.” He states that during a final meeting with Allen on 14 September 1994, at which agreement was reached on the contract price, there were no discussions “specifically relating to the required shoring under the contract.” (R4, tab 127)

7. Note 4 on Drawing No. 2, cited by the ROICC as the contractual basis for the order issued on 17 March 1995 (finding 3), provides as follows:

Use sheet piling along entire west boundary of excavation to avoid damaging the existing 12” watermain and storm sewer. Also use sheet piling on all sides where tanks will be removed.

8. There is no issue as to the first sentence of Note 4. Allen agreed that shoring was required on the west side of the excavation and, on its own initiative, performed that work. The disagreement between the parties relates only to the second sentence of Note 4. The drawing does not designate the “sides where tanks will be removed.” No evidence of an intention for shoring particular sides has been produced.

9. The record indicates that the ROICC was unsure as to exactly what was required by the second sentence of Note 4. This was manifested by variations in the terms of the instructions issued to Allen for shoring the east side of the excavation. The direction issued on 17 March 1995 ordered Allen to “install the sheet piling *to protect the building on the East face*” (finding 3). However, in another instruction, also issued on 17 March 1995, the ROICC asked Allen to “[c]onfirm that the sheet piling will be installed *on the East and West faces of the excavation*” (R4, tab 26). Finally, in a third communication, dated 16 March 1995, the ROICC told Allen to “[s]hore the east and

west banks of the excavation to protect all existing facilities and to provide personnel protection for the installation work forces” (R4, tab 24). (Emphases inserted)

10. On the present motion, the position of the Government is that shoring was required for the entire perimeter of the excavation site. As part of its papers on the motion, the Government has submitted an affidavit from Mr. William J. Mayew, who served as the ROICC’s project manager for the final phase of contract performance (R4, tab 126). Mr. Mayew states that he measured the length of piling in place on the perimeter of the excavation site and found that a total of 115 feet of piling had actually been installed by Allen. Without any elaboration or explanation, Mr. Mayew states that, “in my opinion,” Allen was obligated, under Note 4 of Drawing No. 2, to install piling around the entire perimeter of the excavation site, which was a total of 228 feet of piling. (*Id*)

11. The position enunciated by Mr. Mayew is inconsistent with instructions issued during the contract by his predecessor, Mr. John Andrus. The long axis of one of the three tanks to be removed was located next to the north side of the excavation. Shoring of that side was not required even though it would seem to be a “side” where a tank would be removed. Instead of requiring shoring of that side, Mr. Andrus instructed Allen to “[c]ut the north and the south banks of the excavation, to an appropriate angle of repose.” (R4, tab 24)

12. Drawing No. 2 shows two existing pump islands, located inside the excavation site, which were also to be removed. These were located on the opposite side (south) of the excavation, separate and remote from the tanks. Under Mr. Mayew’s interpretation, the sides of the excavation next to the pump islands would have to be shored. This is contrary to the second sentence of Note 4 which requires shoring only for “sides where tanks will be removed.”

Claims for Special Shoring and Building Underpinning

13. During April 1995, Allen entered into a subcontract, at a total price of \$79,920.00, with Dave Pate & Sons Construction, Ltd. of Roselle, IL (“Pate”), for installation of shoring/sheeting along the east and west sides of the excavation, as directed by the ROICC (finding 3; R4, tab 39a). At Pate’s direction, Frank Gusinde, a structural engineer, prepared a revised shoring/sheeting design for that work which was subsequently approved by the ROICC.

14. In examining the site, Pate found that the east side of the excavation was much closer to the west wall of adjoining Building 2710 than shown on Drawing No. 2. According to an affidavit from Mr. Brian Pate, the president of Pate, submitted by Allen on the motions, this made it necessary to install the shoring on the east side directly against the wall of Building 2710 and to underpin that wall in order to prevent the building from caving in. (App. supp. R4, tab 131). This required a “customized” shoring job on the east side of the excavation.

15. Mr. Pate stated that there were two causes for the unforeseen proximity of the excavation to the wall. First, there was an error on Drawing No. 2 as to the dimensions of the excavation opening. Drawing No. 2 contains a scaled excavation plan which showed the east boundary of the UST excavation site as being approximately 12 feet distant from the west wall of Building 2710. By letter of 16 March 1995, Allen notified the ROICC that “[t]he drawings are in error approx. [sic] eight feet in relation to the distance between the excavation and [Building 2710].” (R4, tab 25) The existence of that error is conceded by the Government. In a memorandum dated 17 March 1995 (app. supp. R4, tab 27a), Mr. Andrus stated that “the dimensions reflected on the contract documents are not totally accurate” in that “[t]he position of the existing tanks and the installation of the new tanks will be approximately 10 [feet] to 12 [feet] closer to [Building 2710] than shown on the contract drawings.” Building 2710 was occupied by the Navy Exchange on the base.

16. The second cause cited by Mr. Pate for the closer proximity of the excavation to Building 2710 was the removal of additional contaminated material pursuant to the change orders issued in Modifications Nos. P00003 and P00004 which increased the area of the excavation bringing the edge even closer to the building wall. Note 9 on Drawing No. 2 notified Allen that during excavation of the tanks, it “should expect to remove about 500 cubic yards of contaminated (special waste) soil” (R4, tab 129). In the course of the work, however, Allen encountered a much greater quantity of contaminated soil. On 10 March 1995, the contracting officer issued a change order, designated as contract Modification No. P00003, directing Allen to “[r]emove an additional 1500 cubic yards of contaminated soil” and “[p]ump and remove 30,000 gallons of contaminated water” from the UST excavation site.

17. On 7 June 1995, in contract Modification No. P00008, the parties agreed to a price increase of \$94,001.00 and a time extension of 20 days as the compensation due for the work ordered under Modification No. P00003. The modification contains the “Contractor’s Statement of Release” clause as follows:

In consideration of the modification agreed to herein as complete equitable adjustment of the Contractor’s 4 May 1995 “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 circumstance giving rise to the “Proposal for Adjustment.”

18. On 21 April 1995, the contracting officer issued another change order, designated as contract Modification No. P00004, directing Allen to remove an additional 40,000 gallons of contaminated ground water. Modification No. P00009, effective 7 June 1995, in which the compensation for that change order was agreed to, also contained the “Contractor’s Statement of Release” clause set forth above with a reference to a proposal for adjustment dated 31 May 1995. Neither of the proposals for adjustment cited in these modifications are in the record.

19. Mr. Pate further stated in his affidavit that concrete slabs encountered in the subsurface during excavation “prevented pile driving before excavation” as was intended in pricing the work. This is supported by a memorandum of Mr. Andrus, the ROICC’s project manager, dated 17 March 1995 stating that:

The size of this slab could not be determined without further excavation of the site. Sheet piling could not be placed initially, because of the undefined dimension of the slab [which] could restrict the installation.

Installation of the sheet piling could not occur until the slab was identified and the Environmental Department determined the extent of contamination.

(App. supp. R4, tab 27a)

20. The Government admits that the objects encountered by Allen, described as concrete tank slabs, constituted differing site conditions. (R4, tabs 18a, 27a; answer, ¶ c.1). In a letter to Allen, dated 9 March 1995, Mr. Andrus informed Allen that its “concerns related to . . . removal of the concrete slabs will be addressed by the issuance of a modification to incorporate this work into the contract” (R4, tab 20).

21. According to the Government’s answer to the complaint, the action taken was the issuance of bilateral contract Modification Nos. P00006 and P00007, both effective 22 June 1995. These provided, respectively, for removal of concrete tank cradles from the slab and installation of “dead-men” for anchoring the new tanks in consideration of price increases totaling \$9,715.00. Contract Modification Nos. P00006 and P00007

contained the “Contractor’s Statement of Release” clause set forth above with references to proposals dated 15 April 1995 for contract Modification No. P00006 and 31 March 1995 for contract Modification No. P00007. Neither of the proposals is in the record.

22. Mr. Pate asserts that the foregoing conditions, taken together, necessitated a “method of installation [which] constituted a major change in quantity and character of shoring contemplated by the original drawings and spec[ifications].” Pate finished its work on or about 15 May 1995. (App. supp. R4, tab 131)

23. On 12 April 1995, Allen submitted a request for equitable adjustment increasing the contract price by the amount of \$86,889.00 for additional costs of shoring the excavation site as the result of the dimensional error in the drawings (finding 15) and Modification No. P00003 which “required the additional removal of contaminated soil which stretched the hole considerably” (finding 16; R4, tab 38). Allen made a revised submittal on 13 June 1995, seeking a price increase of \$69,781.00 on the foregoing grounds and also on the basis that its cost proposal had envisioned shoring of only the west side of the excavation (R4, tab 58). The claim also included the additional shoring costs attributed by Pate to the concrete slabs in the subsurface (finding 19). The claim was certified pursuant to the CDA for the first time on 7 August 1995 (R4, tab 68). On 7 December 1995, the ROICC issued a written decision pursuant to the CDA denying Allen’s claim in its entirety (R4, tab 99). This timely appeal followed.

DECISION

The Government’s motion for summary judgment is focused entirely on the portion of Allen’s claim seeking added compensation for all costs of shoring beyond those incurred for the west side of the excavation which Allen agrees was required by Note 4 of Drawing No. 2 (finding 8). On this motion, based on Note 4, the Government asserts that the contract was “clear and unequivocal in requiring shoring around the excavation” (Gov’t mot. at 1). This is not what the terms of Note 4 expressly require and it is not how the Government interpreted this provision during the contract (findings 3, 9).

Drawing No. 2, on its face, shows that the Government’s current interpretation is unreasonable. Under that interpretation, shoring would be required on the sides of the excavation next to facilities to be removed, such as the pump islands (finding 12), which are separate and remote from the tanks. Such a requirement is inconsistent with Note 4 which calls for shoring only on “sides where tanks will be removed.”

During the contract negotiations, Allen installed shoring on the west side of the excavation on its own initiative and as required by the plain words of Note 4. The ROICC required additional shoring only on the east side. The record does not show that even that amount of additional shoring was required by the contract. Drawing No. 2 does not designate the east side as one of the “sides where tanks will be removed” and no extrinsic evidence to that effect has been produced (finding 8). Indeed, the ROICC appeared to be unsure of the contract requirements even to that limited extent. The record contains three demands that Allen provide shoring on the east side, each with a different description of the work (finding 9). To be granted summary judgment on its motion, the Government was obliged to show, through undisputed facts, that as a matter of law, the contract required Allen to install shoring beyond the west side of the excavation. That showing has not been made and, accordingly, the motion is denied.

The same disposition is required for Allen’s cross-motion for summary judgment. During the contract negotiations, Allen apparently conceded that a requirement for installation of shoring on the east side of the excavation was contained in the contract documents. Allen asserts, however, that the work was actually eliminated during negotiations and, thus, was not part of the contract actually entered into by the parties. The Government has submitted an affidavit from a participant in the negotiations denying Allen’s assertions. (Findings 4, 6) The result of these conflicting contentions is a material fact issue, requiring trial on the merits of this aspect of Allen’s claim.

Allen also seeks to recover added costs of special shoring and underpinning of Building 2710. In support of the cross-motion, Allen has submitted the affidavit of Mr. Brian Pate, the president of the subcontractor firm which accomplished the special shoring and underpinning work. Mr. Pate attributes the added costs to the following conditions: (a) a dimensional error on Drawing No. 2; (b) additional quantities of contaminated material, the removal of which brought the edge of the excavation much closer to the side of Building 2710 than had been shown on that drawing (findings 15, 16, 18); and (c) the presence of concrete slabs in the subsurface of the excavation which are stated to have prevented pile driving before excavation as would have been intended in initially pricing the work (finding 19).

Allen has already been compensated for some of the effects of two of these conditions, namely the contaminated material and the subsurface concrete slabs. These are the subjects of bilateral contract modifications (Nos. P00006 - P00009) which allowed equitable adjustments in contract price and performance time and contained releases given by Allen. (Findings 16 through 18, 21) Missing from the record, however, are the adjustment proposals cited in the modifications which presumably enumerated the costs for which price adjustment was granted. By the terms of the modifications, the proposals define the scopes of the releases. Without those proposals, there is no assurance that Allen has not already been compensated for the matters now claimed. On Allen’s motion

for summary judgment, we are required to view the record in the light most favorable to the Government, the non-moving party. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). In view of the gaps in the record as to the scope of prior relief, it would be improper to grant summary judgment as requested by Allen. The motion as to these claims is, therefore, denied.

CONCLUSION

The motion and cross-motion for summary judgment are both denied.

Dated: 11 February 2000

PENIEL MOED
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

CAROL N. PARK-CONROY
Administrative Judge
Acting 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. 49561, Appeal of J&W Allen Construction Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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