

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Roy McGinnis & Co., Inc.) ASBCA No. 49867
)
Under Contract No. DACA63-94-C-0111)

APPEARANCE FOR THE APPELLANT: Theodore M. Bailey, Esq.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
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Engineer Trial Attorney
U.S. Army Engineer District, Fort Worth

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON GOVERNMENT'S MOTION FOR RECONSIDERTATION

On 31 October 2001, the Government timely moved for reconsideration of our decision dated 28 September 2001, 01-2 BCA ¶ 31,622. The motion was amended on 1 November 2001.

Our opinion found appellant entitled to damages for unabsorbed home office overhead for a 110-day Government-caused delay computed in accordance with the Eichleay formula. We awarded damages of \$109,011. Said damages included a mark-up for profit of \$9,812. In its amended motion the Government asks that we reconsider the award of profit based upon its contention that the Suspension of Work clause in the contract excludes profit from any adjustment thereunder.

Although we found that the 110-day delay was caused by several differing site conditions encountered by appellant, the Government focuses on finding 7 in our decision wherein we stated in part that "none of the delaying events [differing site conditions] caused a complete suspension of work, the delays merely stretched out the performance period," and argues that such finding recognized that the damages are for a partial suspension of work. Since suspension of work awards are to be made without the addition of profit, the Government argues we should reduce the award to appellant by \$9,812.

We disagree with the Government contention that our finding 7 logically leads to the conclusion that we granted the appeal under the Suspension of Work clause. Despite our finding that the work was partially suspended, this claim has always been based on differing

site conditions (*see* findings 19-20) rather than on suspensions of work. Indeed, in resolving the direct costs of the 110-day delay the parties included profit in their agreement (*see* finding 23).

While adjustments made under the Suspension of Work clause in this contract (FAR 52.212-12, APR 1984) (R4, tab 3C at 00700-18 to -19) are to exclude profit, the clause further provides that no adjustment is to be made under the Suspension of Work clause if an equitable adjustment is provided for under another term of the contract. Here an equitable adjustment is provided by the Differing Site Conditions clause (FAR 52.236-2, APR 1984) (*id.* at 00700-72) where profit is not excluded. Case law fully supports this conclusion. *BEI Defense Systems Co.*, ASBCA No. 46399, 95-1 BCA ¶ 27,328 (profit is not excluded on equitable adjustments for unabsorbed overhead where adjustment is for late delivery of Government property which is made under the Changes clause); *Lea County Construction Co.*, ASBCA No. 13964, 72-1 BCA ¶ 9298 (while profit is excluded on suspensions of work, it is allowable on changes and changed conditions).

The Government has presented no valid basis for reconsideration of our decision. The motion is denied.

Dated: 31 December 2001

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEPLER
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. 49867, Appeal of Roy McGinnis & Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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

