

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Elter S.A.) ASBCA Nos. 52491, 52492
)
Under Contract No. N33191-96-C-0716)

APPEARANCES FOR THE APPELLANT: Mr. Dimitrios Messadakos
President & Managing Director
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APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE HARTY

The subject contract is a firm fixed-price contract, payable in Greek drachmas, for multiple construction projects at Souda Bay, Crete, Greece, in support of the United States Navy. These appeals arise under the Contract Disputes Act from contracting officer final decisions denying the claims of Elter S.A. (Elter). In ASBCA No. 52491 Elter seeks a time extension and the additional costs incurred in fixing an electrical cable which it severed during construction. We deny the appeal because Elter has admitted responsibility for cutting the electrical cable and we conclude that even if the Government were responsible for ordering the repairs, the contract required Elter to bear the responsibility for the cost of the required repairs.

In ASBCA No. 52492 Elter seeks compensation for additional demolition work allegedly ordered by the Government. We also deny this appeal because we conclude that the contract required Elter to perform the work for which it seeks compensation. Although some evidence presented at the hearing suggested the possibility of a mistake, any mistake claim must first be submitted to the contracting officer.

FINDINGS OF FACT¹

The Department of the Navy, Engineering Field Activity Mediterranean Contracts Office, Souda Bay, awarded Contract No. N33191-96-C-0716 to Elter on 28 September 1996 for multiple construction projects at the U.S. Naval Support Activity, Souda Bay (R4, tabs 1, 3; tr. 14). The contract incorporated provisions typical in overseas construction contracts, including: FAR 52.233-1 DISPUTES (OCT 1995) - ALTERNATE I (DEC 1991); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.212-12 SUSPENSION OF WORK (APR 1984); FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991); FAR 52.236-9 PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984); FAR 52.214-34 SUBMISSION OF OFFERS IN THE ENGLISH LANGUAGE (APR 1991); FAR 52.225-14 INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT (AUG 1989); and a choice of law provision choosing U.S. substantive law in the event of a dispute. (R4, tab 6)

ASBCA No. 52491

Under the FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991) clause, the contractor assumes responsibility for “all damages to persons or property that occur as a result of the Contractor’s fault or negligence.” The FAR 52.236-9 PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984) clause specifically provides that:

(b) The Contractor shall protect from damage all existing improvements and utilities

(1) at or near the work site and

(2) on adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. The Contractor shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

(R4, tab 6 at 128, 129)

¹ All citations in this opinion are to the Rule 4 file submitted in ASBCA No. 52327, unless otherwise indicated.

Bowling Center Drawing E7, Note 1, included the following additional guidance with respect to existing utilities and the contractor's liability for damaged property:

1. THE LOCATION AND NUMBER OF EXISTING ELECTRICAL LINES SHOWN ON THE PLAN ARE INDICATIVE. IT SHALL BE THE RESPONSIBILITY OF THE CONTRACTOR TO MAKE GOOD USE OF INFORMATION AVAILABLE TO THE MAINTENANCE FORCE AT THE SITE, AND TO USE AN ELECTRONIC INSTRUMENT IN ORDER THAT THE EXACT LOCATION OF ALL ELECTRICAL LINES, WATER, FUEL e.t.c. WHICH MAY INTERFERE WITH HIS WORK BE LOCATED. CONFLICTS AND CROSSINGS, SHALL BE RESOLVED WITHOUT DAMAGE AND MINIMUM DISTURBANCE TO EXISTING ACTIVE UTILITIES, AND AT NO ADDITIONAL COST TO THE GOVERNMENT. RESTORE EXISTING UTILITIES TO THEIR ORIGINAL CONDITION IF DISTURBED DURING CONSTRUCTION AT NO ADDITIONAL COST TO THE GOVERNMENT ALSO.

(52491 R4, tab 5E) In addition, Paragraph 27, Digging Permit, of specification section 01110 provided that the “[c]ontractor will be held responsible for any damages caused to existing services indicated on the digging permit and related drawings and will immediately repair such damage at his own expense” (R4, tab 7).

Project R-500 called for the construction of a bowling center. As part of the project, Elter was required to place a sewer line and new manholes in accordance with revised drawing C-2. (R4, tabs 1, 15 at bilateral Modification Nos. P00013 and P00016) On 3 October 1997, while digging the trench for the sewer line, Elter's excavation subcontractor cut an underground electrical cable (52491 R4, tab 5D). Elter has admitted liability for the accident (tr. 525).

The severed electrical cable was located on Hellenic Air Force (HAF) property and was under the control of the Greek Air Force (tr. 554). Elter proposed to correct the problem by installing a manhole at the point of the break and splicing the cable. The Greek Air Force officials involved rejected the proposal. Instead, they insisted that the cable be replaced from the substation to the nearest existing manhole, approximately 60 meters from the cut. LT Jason Fournier, who had contracting officer authority, arrived on the site shortly after the incident. He testified that much of the conversation was in the Greek language. However, he understood that the Greek Air Force officials wanted the cable replaced. LT Fournier testified that since the break occurred on a Friday and he was leaving for Naples, Italy, the next day, he was not going to be present during the duration of the

repair work. Consequently, he recalled directing Mr. Paraskakis, Elter's site superintendent and the Elter representative with authority to bind the company, to come to an understanding with the Greek officials and repair the break in the mutually agreed to manner without delay. He also testified that he told Mr. Paraskakis that he did not consider his direction a change to the contract, but that if Mr. Paraskakis did, he should submit a claim without delay. It was his understanding that no claim would be forthcoming. Elter performed the work as required by the Greek Air Force officials.
(Tr. 545-46, 549-51)

By letter dated 20 September 1999, almost two years after the event, Elter submitted a claim for 4,555,515 Greek drachmas for work performed and sought an eight-day time extension. The amount claimed is based on the difference between the cost of replacing the severed cable and what Elter alleges it would have cost to install a manhole at the site of the break and splice the cable. (52491 R4, tab 5D; tr. 536-41)

The Government received the claim on 22 September 1999. On 9 December 1999, Elter filed a notice of appeal based on a "deemed denial" (41 U.S.C. § 605(c)(5)) and we have jurisdiction on this basis. By letter dated the same day, the Government issued its final decision denying Elter's claim in its entirety. (52491 R4, tabs 5D, 6)

DISCUSSION

Under paragraph (b) of the Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements clause, quoted above, Elter was responsible for protecting utilities on adjacent property of a third party, here the HAF, from damage and it was responsible for repairing any damage resulting from failure to comply with the requirements of the contract or failure to exercise reasonable care in performing the work. Elter admits liability for severing the cable. Moreover, the evidence suggests that Elter took the action that it did based on direction from Greek officials in order to satisfy its liability to the Hellenic Air Force, which controlled the site and the cable. However, for the purposes of this appeal, we assume, but do not decide, that Elter took the action it did in response to the contracting officer's direction.

Elter maintains that the contract did not require it to replace the cable. The Government argues in reply that the contract required Elter to "restore existing utilities to their original condition," citing Note 1 of drawing E-7. It maintains that the original condition of the cable was a continuous run from the substation to the existing manhole.

The contract must be read as a whole, giving effect to all of its provisions. An interpretation which leaves a portion of the agreement "useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous" or in conflict with another portion of the agreement should be avoided unless no other reasonable interpretation is possible.

Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972, 979 (Ct. Cl. 1965). See also *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985). Elter's position does not attempt to account for Note 1 of drawing E-7. The Note clearly contemplates replacement as an option in order to "[r]estore existing utilities to their original condition if disturbed during construction at no additional cost to the government also." A splice in the cable at the point of the break, coupled with a manhole for access, would not restore the line to its "original condition."

Moreover, an understanding that a "repair" could not include replacement as an option is incorrect. We believe that in this context the generally prevailing meaning of the word, "repair," includes the notion of replacement. "Repair" may be defined as "to restore by replacing a part or putting together what is torn or broken." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1923 (1986). See also RESTATEMENT (SECOND) OF CONTRACTS (1981) § 202(3) (a) (where language has a generally prevailing meaning, it is interpreted in accordance with that meaning).

Under the circumstances it was not unreasonable for the Government to insist that the cable be replaced.

The appeal is denied.

ASBCA NO. 52492

Project RC9-93, NSA ENTRANCE IMPROVEMENTS, required Elter to furnish all labor, materials, equipment and supervision necessary to construct a one-story building to house the base pass and identification office and provide a bunk house (R4, tab 10; 52492 R4, tab 5B). On 14 January 1997 the Government suspended work in order to consider project changes. Subsequently, by letter dated 27 August 1997, the Government asked Elter to submit a detailed cost proposal for certain project changes, as well as costs incurred as a result of the suspension. Elter submitted its cost proposal to the Government on 22 September 1997. The cost proposal related in part to Drawing C-2. The parties subsequently negotiated and signed bilateral Modification No. P00015 on 30 September 1997. Contract Modification No. P00015 extended the completion date an additional 247 days to 30 April 1998 and provided an additional 30,000,000 drachmas to Elter. (52492 R4, tab 5B)

Drawing C-2, entitled "Demolition Plan," required Elter, among other things, to "REMOVE EXISTING WATER LINE," "DEMOLISH AND REMOVE EXISTING SENTRY BOX INCLUDING FOUNDATION," "DEMOLISH AND REMOVE EXISTING MASONRY GUARD HOUSE INCLUDING FOUNDATION SLAB," "DEMOLISH AND REMOVE EXISTING MASONRY BUILDING INCLUDING FOUNDATION," "DEMOLISH AND REMOVE EXISTING MASONRY SHED" and "REMOVE CURB AND DEMOLISH SHED" (52492 R4, tab 5B).

Elter's cost proposal for Modification No. P00015 included pricing for specific demolition/removal work. Of pertinence to this appeal, pricing was provided for "Removal of water line, Demolition/Removal of sentry box including foundation, Demolition and removal of masonry guard house including foundation slab . . ." Pricing was not indicated in the proposal for the demolition and removal of three other structures identified on drawing C-2—namely, the "existing masonry building including foundation," and the two sheds. (52492 R4, tab 5B)

By letter dated 1 October 1999, and received by the Government on 4 October 1999, Elter filed a claim seeking 1,330,769 Greek drachmas for:

- i) Demolition/removal of the existing building including its foundation and the existing slab on grade, and
- ii) Removal of the existing water line[.]

(52492 R4, tab 5B)

Elter's claim alleged that on 13 November 1997, Mr. Constantinos Damatis, its senior mechanical/electrical engineer – quality control, advised the contracting officer that Elter had discovered the omission of the two items, noted above, which were required in accordance with drawing C-2, and asked that Elter be authorized to recover the cost of the "missed items." Elter further alleged that on 15 January 1998, the contracting officer by oral order instructed Mr. Damatis to consider the work items a change to cost proposal PC000023 and contract Modification No. P00015. Mr. Damatis was not authorized to represent Elter in its contractual dealings with the Navy; this authorization was reserved to Mr. Paraskakis, Elter's site superintendent, and other senior company officials. (52492 R4, tab 5B; tr. 388-90) Though Mr. Damatis testified at the hearing, he did not offer any testimony as to his role in connection with this appeal.

Based on the evaluation and recommendation of Mr. Patrick Donnelly, the contracting officer who negotiated Modification No. P000015 with Mr. Paraskakis and signed it on behalf of the Navy, the contracting officer, Engineering Field Activity Mediterranean, Naples, Italy, by letter dated 3 November 1999, issued a final decision denying Elter's claim on a number of grounds. (52492 R4, tab 6; tr. 745) Elter filed a timely appeal.

Mr. Donnelly testified at the hearing that all he had before him was the terse request for compensation for "demolition/removal of the existing building including its foundation and the existing slab on grade" and "removal of the existing water line." In the absence of further clarification and based on a review of the requirements of drawing C-2 and the elements of Elter's 22 September 1997 cost proposal, he concluded that there was no basis for the claim and recommended to the contracting officer in Naples, who had the authority to issue final decisions, that it be denied. (Tr. 746-52) Item 1.6 of Elter's cost proposal

specifically included pricing for removal of the water line. With respect to demolition of the building, item 1.2, which he understood to be the building at issue, included pricing for “Demolition and removal of masonry guard house including foundation slab” However, not all of the buildings that are called out on drawing C-2 for demolition and removal are addressed in Elter’s 22 September 1997 cost proposal, although the contract required Elter to perform the demolition work called out on drawing C-2. (52492 R4, tabs 5A, 6) At the hearing, Elter’s representative presented some evidence suggesting that the building for which Elter was seeking compensation was not the guard house, but was the “existing masonry building.” The evidence prompted the contracting officer to observe that he did not have the opportunity to consider a claim based on another building and questioned whether it was properly before the Board. (Tr. 730-36, 747)

DISCUSSION

Based on our *de novo* review, we agree with the contracting officer that contract drawing C-2 required Elter to remove the existing water line and to demolish and remove all of the structures identified on the drawing. Under the circumstances Elter was required to do no more than it had agreed to do under the terms of the contract. Consequently, the appeal as presented is denied.

Some of the evidence presented at the hearing suggests the possibility of a mistake with respect to the masonry building and sheds in Elter’s offer to perform Modification No. P00015, although we express no opinion on whether Elter has, in fact, made a mistake. However, if Elter seeks to pursue a mistake claim, it must first present the matter to the contracting officer for decision before the Board can assume jurisdiction. *See* 41 U.S.C. 605(a); *e.g.*, *Bay Decking Co.*, ASBCA No. 33868, 89-2 BCA ¶ 30,019.

SUMMARY OF DECISIONS

ASBCA No. 52491 is denied. ASBCA No. 52492 is also denied. Any potential mistake claim must first be submitted to the contracting officer.

Dated: 29 May 2001

MARTIN J. HARTY
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 Nos. 52491 and 52492, Appeals of Elter S.A., rendered in conformance with the Board's Charter.

Dated:

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