

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Concrete Placing Company, Inc.) ASBCA No. 52614
)
Under Contract No. F10603-98-C-3008)

APPEARANCE FOR THE APPELLANT: Mr. Kevin J. Cunha
Vice President

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Thomas S. Marcey, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KETCHEN

Concrete Placing Company (CPC or appellant) has timely appealed the contracting officer's (CO) 21 December 1999 final decision denying appellant's claim for an equitable adjustment in the amount of \$22,187.83 for a Government ordered suspension of work for an alleged unreasonable period of time. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

1. On 30 June 1998, the U.S. Air Force (Air Force or the Government) awarded the captioned contract to CPC. The contract required CPC to provide all plant, labor, equipment, and supervision necessary for the demolition and replacement of Portland cement concrete airfield pavement and other work related to repair of the "A" aircraft parking ramp ("A" ramp) at Mountain Home Air Force Base (MHAFB), Idaho, in accordance with the specifications, drawings, and contract documents. The total amount of the basic contract (Phase I), scheduled for completion in 1998, was \$1,741,500. The contract contained six option items (Phase II) in the total amount of \$2,046,271. Upon exercise by the Air Force, each option item required CPC to demolish and replace additional concrete runway pavement. (R4, tab 25)

2. The captioned contract incorporated by reference the required standard Federal Acquisition Regulation (FAR) clauses, including FAR 52.233-1 DISPUTES (OCT 1995); FAR 52.211-10 COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984); FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991); FAR 52.236-15 SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1994); and FAR 52.242-14 SUSPENSION OF WORK (APR 1984) (R4, tab 25).

3. FAR 52.242-14 provides, in pertinent part, as follows:

SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, . . . an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

4. Part I - The Schedule, Section F, Deliveries or Performance, in pertinent part, provides:

F-803. PROGRESS SCHEDULE, AF Form 3064

Progress Schedules shall be submitted to the Contracting Officer and approved prior to start of work at the job site. Approved schedules will not be changed without prior Contracting Officer approval. . . .

(R4, tab 25)

5. The contract provided for completion of Phase I within 120 days after receipt of the notice to proceed. On 24 September 1998, the Air Force exercised the six Phase II options by bilateral Modification No. P00003, establishing a revised contract completion date of 1 October 1999. (R4, tabs 22, 25)

6. The contract required CPC to crush the demolished concrete runway pavement removed from the “A” ramp and to place in the Air Force stockpile any crushed pavement material not used by CPC as concrete aggregate or as base course material placed beneath the new concrete runway pavement. The contract did not require CPC to reuse the crushed runway pavement material. However, contract specification, Section 02050, Demolition, 3.5 Crushing Demolished Concrete, and contract specification, Section 02241, Base Course, permitted and encouraged CPC, at its election, to use the crushed material as aggregate for its concrete batch plant or as base course material. (R4, tab 25)

7. CPC entered into a subcontract with Western Construction, Inc. (Western) for use of Western’s portable rock crusher during Phase I in 1998. Western used its portable rock crusher to crush the pavement excavated and demolished by CPC for CPC’s use as base course material beneath the new concrete runway pavement. CPC stockpiled excess crushed material not used as base course material during Phase I construction in 1998 for later use as concrete aggregate and as base course material during performance of the contract Phase II options in 1999. (R4, tab 1)

8. Western operated its portable rock crusher in the State of Idaho in accordance with applicable Idaho air quality statutes and regulations pursuant to a permit issued by the Idaho Division of Environmental Quality (IDEQ). The Air Force holds an IDEQ air quality permit for its operations and activities at MHAFB as a permanent air pollution source or facility. (Tr. 86-87, 92)

9. CPC and Western estimated that the excess crushed material stockpiled during Western’s Phase I crushing operation in 1998 would provide CPC with sufficient base course material to complete the six Phase II runway pavement construction options exercised by the Air Force. Based on their estimate of a sufficient quantity of available crushed material in the stockpile, CPC and Western did not anticipate that Western would have to return to crush demolished pavement to produce material for CPC’s use as base course material during CPC’s construction of the new concrete runway pavement in 1999. (Tr. 17) Western would only need to move its rock crusher back to MHAFB to crush the remaining demolished runway pavement and place it in the Air Force’s stockpile (tr. 16-19).

10. The original Phase II contract schedule dated 28 January 1999 that CPC provided to the Air Force and which was approved by it contained an approximate start date of 1 March 1999 and a completion date of 28 August 1999. The original schedule indicated that Western would begin crushing the demolished pavement for the Air Force stockpile during the first week of April 1999, and continue for weeks 4-8 through June 1999, concurrently with CPC’s performance of the runway demolition and excavation work. (R4, tabs 2, 10; tr. 52-53)

11. In April 1999, during an inspection tour of MHAFB, IDEQ representatives observed Western’s portable rock crusher and raised the issue of whether the Air Force

itself would need to obtain a separate IDEQ permit for Western's rock crusher. The Air Force's Chief of Environmental Compliance at MHAFB, William Spoerer, pointedly objected to IDEQ concerning the need for the Air Force to obtain an IDEQ permit, since Western already had an IDEQ permit for its portable rock crusher. (R4, tabs 2, 4; tr. 94-96, 112-21) According to Mr. Spoerer, the IDEQ regulations did not require the Air Force to obtain an IDEQ permit to construct (PTC) for Western's portable rock crusher separate from the MHAFB facility permit. Western's rock crusher would not become a permanent air pollution source at MHAFB, and IDEQ had never before applied its requirements to portable rock crushers at the site. (R4, tab 6; tr. 86-87, 93-95)

12. Responding to the Air Force resistance to applying for an IDEQ permit, in April 1999, the IDEQ advised the Air Force that the Air Force should submit a request to IDEQ for a determination (permit applicability determination) concerning whether the Air Force itself had to have a separate IDEQ permit for operation of Western's portable rock crusher at MHAFB. (R4, tabs 2, 4; tr. 94-96, 112-20, 125) The CO informed CPC by letter of 7 April 1999 of IDEQ's potential determination that IDEQ's new environmental air quality laws applied to operation of Western's portable rock crusher at MHAFB requiring the Air Force itself to obtain a permit for operation of Western's rock crusher. (R4, tab 6; tr. 58, 75)

13. On 29 April 1999, IDEQ received the Air Force's letter "requesting a Permit to Construct (PTC) applicability determination be made for a portable rock crusher . . . to be located at the Mountain Home AFB facility" (ex. G-1).

14. On 30 April 1999, the CO requested CPC to furnish to the Air Force a copy of Western's IDEQ rock crusher permit. The Air Force anticipated using the information contained in Western's permit to prepare the Air Force application for a permit for Western's portable rock crusher, if IDEQ determined the Air Force needed one. (R4, tab 12) The CO received a copy of Western's IDEQ permit on 4 May 1999 (R4, tabs 2, 4). However, Western's permit did not provide sufficient information for the Air Force to prepare an application for an IDEQ permit for Western's portable rock crusher. The Air Force obtained additional information from CPC, including the rock crusher's size, the size of its motor, and its throughput. (R4, tabs 6, 7, 8; tr. 57-59, 96-99)

15. At some time during this period, the Air Force and CPC discussed a revised schedule containing a later start date for the Phase II work than contained in the original schedule agreed to in January 1999 because of CPC's other business commitments in the Northwest. CPC submitted a revised schedule for Air Force approval on 27 May 1999. The revised schedule indicated that CPC would mobilize during May 1999 and begin the Phase II work during the first week of June 1999. It indicated that CPC would construct base course for the new runway pavement from 19 July - 6 August (weeks 8-10) and construct the concrete pavement from 2 August - 3 September (weeks 10-14) before Western would begin crushing the excavated and demolished old runway pavement for the Air Force

stockpile from 3 October - 6 November (weeks 19-23). The revised schedule established a new contract completion date of 19 November 1999. The CO approved the revised schedule on 3 June 1999. (R4, tabs 2, 4, 9; tr. 48-49, 53-55)

16. CPC anticipated that it would complete construction of the runway pavement requiring use of its concrete batch plant in August 1999. CPC wanted to complete this aspect of the work in August 1999 because it wanted to move its concrete batch plant elsewhere for use on another project before the onset of adverse weather ended the 1999 construction season. (Tr. 16-20, 55-56)

17. On 10 June 1999, IDEQ issued a determination requiring the Air Force to obtain an IDEQ permit for operation of Western's portable rock crusher (ex. G-1; tr. 98).

18. The IDEQ regulations indicated a period of approximately 90 days as the normal period for the IDEQ to process and issue an IDEQ permit. The Air Force did not submit its application for an IDEQ permit until 2 July 1999 because of the time required for data collection and the analysis of airborne emissions required to complete the application and because of its reliance on the revised schedule which reflected that Western would not begin crushing demolished runway pavement until October 1999, in plenty of time for the Air Force to obtain the IDEQ permit for Western's crusher. (R4, tabs 2, 4, 7; ex. G-2; tr. 59-62, 88-94, 99-105)

19. In mid-July 1999, CPC determined that it had underestimated the amount of crushed concrete material needed for use as base course material for completion of the Phase II runway pavement construction work. CPC informed the Air Force that due to the shortfall of crushed base course material in the stockpile it needed Western to begin crushing demolished concrete runway pavement for use as base course material during approximately 15-20 August 1999. (Tr. 17, 56, 75-76) Prior to mid-July 1999, CPC had not made the CO aware that CPC had underestimated the amount of stockpiled, crushed material needed to meet its base course material requirements for Phase II (tr. 55-57, 61-65). There is no indication that the Air Force contributed to CPC's mistake.

20. Once CPC informed the Air Force that it needed to have Western return to the site with its rock crusher in August 1999, earlier than the revised schedule reflected, the Air Force immediately undertook efforts to expedite IDEQ's issuance of the Air Force permit for Western's rock crusher. (R4, tabs 2, 4; tr. 61-63)

21. The Air Force continued its efforts to expedite receipt of the IDEQ permit during the latter part of July 1999 and into August 1999. On 23 July 1999, the Air Force passed along to CPC the verbal statement the Air Force had received from IDEQ that IDEQ intended to issue the Air Force permit for Western's rock crusher by 12 August 1999. (Ex. A-2; tr. 63) The Air Force also indicated to CPC that it was attempting to get IDEQ to issue the permit earlier than this date. The Air Force did not expressly promise or otherwise

represent to CPC a specific date when IDEQ would issue to the Air Force an IDEQ permit for Western's rock crusher (tr. 105). The Air Force met with the IDEQ on 5 August 1999 in an attempt to expedite processing of the IDEQ permit for Western's crusher. The Air Force also made numerous telephone calls, "almost on a daily basis," to IDEQ concerning the permit. (Tr. 61, 103-05) IDEQ personnel informed the Air Force on 6 August 1999 that IDEQ had written the permit for Western's rock crusher but that the proposed permit was still going through the IDEQ review process (R4, tab 11).

22. Based on the verbal IDEQ communication to the Air Force passed on to CPC that IDEQ intended to issue the permit by 12 August, at CPC's request, Western mobilized its portable rock crusher to MHAFB and began operating it on 12 August 1999 (tr. 18, 20). That same day, the CO directed Western to stop operation of its rock crusher since the Air Force had not yet received the IDEQ permit (R4, tabs 1, 13). Western's rock crusher was idle from 12 August 1999 to 25 August 1999 as a result of the Air Force's suspension action. In the interim, in order not to delay the Phase II runway construction, CPC purchased base course material for use beneath the new concrete runway pavement.

23. The Air Force received notice from IDEQ of issuance of the permit for Western's crusher on 25 August 1999. The Air Force immediately informed CPC that it could begin crushing and Western began crushing demolished concrete pavement on 25 August 1999 (tr. 69; R4, tabs 2, 4, 15-17). This was 54 days after the Air Force submitted the permit application to IDEQ on 2 July 1999 (R4, tabs 1, 2, 4, 15-17).

24. CPC filed a claim with the Air Force on 9 November 1999 in the amount of \$22,187.83, including markups, for the additional costs incurred by CPC to purchase and haul base course material to MHAFB and for Western's costs incurred as a result of the Air Force's suspension of operation of Western's rock crusher from 12 August 1999 to 25 August 1999. The CO issued a final CO decision on 21 December 1999 denying CPC's claim, and CPC timely appealed (R4, tab 1).

DECISION

CPC seeks an equitable adjustment under the Suspension of Work clause for the increase in performance costs due to the CO's action in issuing the order suspending operation of Western's portable rock crusher for 13 days. The Government argues that the delay was not unreasonable and that appellant's own actions, not the Government's caused the delay (Gov't br. at 14).

To recover for a suspension of work, the contractor must prove:

- (1) the Government ordered, in writing, or by its act or failure to act timely, a suspension, delay, or interruption of performance;
- (2) the suspension, delay or interruption was for

an unreasonable period of time; and (3) such performance would not have been suspended, delayed or interrupted by any other cause, including the fault or negligence of the contractor

Monterey Mechanical Co., ASBCA No. 51450, 01-1 BCA ¶ 31,380 at 154,957. See *Gloe Constr., Inc.*, ASBCA Nos. 26434, 26814, 84-2 BCA ¶ 17,289 at 86,091-92 (suspension of work period reasonable where required by a temporary restraining order). The Government may suspend work for its convenience for reasonable periods based on the particular circumstances surrounding contract performance. See *Hobbs Constr. and Development, Inc.*, ASBCA Nos. 30437 *et al.*, 91-2 BCA ¶ 24,014 at 120,239-40. “Whether a particular delay is reasonable or not depends upon the circumstances of the particular case.” *Commercial Contractors, Inc. v. United States*, 29 Fed. Cl. 654, 662 (1993), citing *Tri-Cor, Inc. v. United States*, 198 Ct. Cl. 187, 458 F.2d 112 (Ct. Cl. 1972).

There is no dispute that the Government suspended rock crushing work from 12 August 1999 to 25 August 1999. We also determine that performance would not have been suspended, delayed, or interrupted by any other cause. However, CPC has not established by credible proof that the Air Force’s suspension of work was for an unreasonable period of time under the circumstances present here. CPC offered no credible proof in this regard other than the general assertion that the very fact of the 13-day suspension period was unreasonable. We are not prepared to say that the 13-day suspension of work was *per se* unreasonable. See *Elter S.A.*, ASBCA No. 52451, 01-1 BCA ¶ 31,373 at 154,913-914 (28-day delay until notice to proceed issued not *per se* unreasonable).

In April 1999, in accordance with IDEQ’s suggestion, the Air Force sought a determination that the IDEQ regulations did not require it to obtain an IDEQ permit for Western’s rock crusher. At the same time, the Air Force and CPC were negotiating and subsequently agreed to a later start of the Phase II work because of CPC’s desire to work elsewhere in the spring of 1999. The revised schedule indicated that Western would not return to the site with its portable rock crusher to crush the remaining demolished runway pavement for the Air Force stockpile until October 1999. The revised schedule thus incorporated CPC’s judgment based on its erroneous estimate of the quantity of available base course material in the stockpile that it would not need Western to crush demolished runway pavement for use as base course beneath the new runway pavement.

When IDEQ issued its determination on 10 June 1999 requiring the Air Force to obtain an IDEQ permit for Western’s rock crusher, the Air Force completed preparation of its application for the permit and submitted it to IDEQ on 2 July 1999. In doing so, the Air Force acted reasonably in reliance on appellant’s approved schedule. The Air Force had plenty of time under IDEQ’s normal 90-day review cycle to obtain the IDEQ permit for Western’s rock crusher by the time it returned to the site in October 1999.

Once CPC advised the Air Force of its shortage of base course material in mid-July 1999 and the need to have Western return with its rock crusher earlier than scheduled, the Air Force acted diligently to expedite IDEQ's issuance of the permit. Its actions resulted in receipt of the Air Force's IDEQ permit 54 days from the time it applied rather than the 90 days normally required. The elapsed time from 2 July 1999 until 25 August 1999 includes several weeks that passed after 2 July 1999 before CPC notified the Air Force of the impending shortage of base course material needed for runway construction. We determine based on the Air Force's due diligence in expediting issuance of the IDEQ permit once it became aware of CPC's need to have Western's rock crusher return to the site in August that the Air Force would have applied for the IDEQ permit earlier than 2 July 1999 and begun expediting its issuance by IDEQ had it known before then that CPC would require use of Western's rock crusher earlier than reflected by its approved schedule.

Based on the circumstances considered as a whole, the suspension of work for 13 days was not for an unreasonable period of time where the parties agreed to the revised schedule, the Air Force applied for the IDEQ permit in reliance on the schedule, and the Air Force acted diligently to expedite IDEQ's issuance of the Air Force permit for Western's rock crusher once CPC notified the Air Force of the need to have Western return to the site earlier than scheduled after it concluded that its estimate of the amount of available stockpiled base course material was incorrect.

CONCLUSION

For the foregoing reasons, we deny the appeal.

Dated: 18 October 2001

EDWARD G. KETCHEN
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. 52614, Appeal of Concrete Placing Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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