

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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PK Contractors, Inc.) ASBCA No. 53576
)
Under Contract No. N68711-97-C-8338)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The government moves for summary judgment on appellant's Type I differing site conditions claim relating to controlled fill in ASBCA No. 53576, asserting that the contract did not affirmatively represent that there were "significant quantities" of controlled fill material available at the project site as appellant alleges in paragraph four of its complaint. Appellant opposes the motion, asserting that there are genuine issues of material fact regarding each of the elements of its Type I differing site condition. The government has replied. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

Contract No. N68711-97-C-8338 for the replacement of the Basilone Road Bridge (Project A) and Santa Margarita River flood control work (Project B) at the Marine Corps Base, Camp Pendleton, CA was awarded to appellant PK Contractors, Inc. (PK) on 19 February 1998. The Santa Margarita River flood control project included construction of a soil-cement flood protection levee, a floodwall and a storm water management system. The specifications provided in part that: "Specific portions of the levee may be optionally constructed of reinforced earth with soil-cement revetment" and further that "[a]n existing earth levee shall be demolished and will provide some of the materials for fill and rock slope protection for the new levee." (R4, tab 1, § 01110, ¶ 1.1.3)

The contract incorporated the following relevant standard FAR clauses: 52.233-1, DISPUTES (OCT 1995) – ALTERNATE I (OCT 1995); 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and 52.243-4, CHANGES (AUG 1987). (R4, tab 1, § 00721 at 14)

In addition to the general specifications common to both projects, the contract included separate sets of specifications for Projects A and B. Many of these specifications were identical. Thus, for both Projects A and B, identical paragraphs 1.5, CRITERIA FOR BIDDING, of SECTION[S] 02242, SOIL-CEMENT, provided: “Suitable material in the quantities required is available at the project site from subexcavations along the levee and floodwall alignment, demolition of the existing levee, and excavations for pump station.” (R4, tab 1, §§ 02242, ¶¶ 1.5.b.)

For both Projects A and B, SECTION[S] 02301 were entitled EARTHWORK FOR STRUCTURES AND PAVEMENTS. The definitions of backfill, fill, controlled backfill and controlled fill contained in these specifications were likewise identical, as was the manner in which controlled backfill and controlled fill were to be used. Backfill was defined as: “[a] specified material used in refilling a cut, trench, or other excavation, placed at a specified degree of compaction” (R4, tab 1, §§ 02301, ¶¶ 1.2.1). Fill was defined as: “[s]pecified material placed at a specified degree of compaction to obtain an indicated grade or elevation” (R4, tab 1, §§ 02301, ¶¶ 1.2.8). Controlled fill and controlled backfill were defined as: “A specified soil mix or gradation of materials constructed to attain maximum bearing strength and minimize consolidation or differential settlement under a load. Controlled fill is sometimes called ‘structural fill.’” (R4, tab 1, §§ 02301, ¶¶ 1.2.5)

Paragraphs 1.6, CRITERIA FOR BIDDING, were also identical for both projects and provided at subparagraphs e: “Borrow material, suitable backfill and fill material, and suitable controlled fill and controlled backfill in the quantities required are available at the project site and the borrow site.” (R4, tab 1, §§ 02301, ¶¶ 1.6.e.) Additional identical provisions of the contract regarding borrow material provided: “Provide materials meeting requirements for controlled fill and controlled backfill and topsoil as required. Obtain borrow materials in excess of those furnished from excavations described herein from borrow areas indicated.” (R4, tab 1, §§ 02301, ¶ 2.1.2.6 (Project A) and ¶ 2.1.3.6 (Project B)) The borrow site was shown on the contract drawings as the “22 AREA BORROW SITE” (R4, tab 64, Drawings T0.1, C6.1).

Different criteria were specified for the controlled fill and controlled backfill for Projects A and B. For Project A, the bridge, the criteria specified were as follows:

Provide materials free of organics and classified as SM, SC, CL, or ML by ASTM D 2487 with no rocks larger than 75

mm in largest dimension where indicated. The liquid limit of such material shall not exceed 40 percent when tested in accordance with ASTM D 4318. The plasticity index shall not be greater than 12 percent when tested in accordance with ASTM D 4318.

(R4, tab 1, § 02301, ¶ 2.1.2.1) For Project B, the Santa Margarita River flood control, the criteria specified were as follows:

Provide materials classified as SM, SC, CL or ML by ASTM D 2487 where indicated. Material shall contain no rocks or lumps greater than 100 mm in size and no more than 15 percent by weight shall be larger than 65 mm. The liquid limit of such material shall not exceed 45 percent when tested in accordance with A[S]TM D 4318. The plasticity index shall not be greater than 18 percent when tested in accordance with ASTM D 4318, and 20 to 70 percent by weight shall be finer than 75 micrometers sieve when tested in accordance with ASTM D 1140. Coefficient of permeability shall be a maximum of 1×10^{-5} mm per second when tested in accordance with ASTM D 2434. The soil, when remolded to 95 percent relative [compaction] shall have minimum strength parameters of $\Phi' = 25$ degrees and $C' = 24$ kPa when measured in a consolidated undrained triaxel test.

(R4, tab 1, § 02301, ¶ 2.1.3.1; gov't mot., attach. A, Cox Decl. at ¶ 3)

Logs of borings taken from specified locations were provided for Project A (Logs B-1 to B-9) and Project B (Logs L-1, L-2, L-4 to L-17, B-2 to B-17, and 22A-1 to 22A-2) (R4, tab 1, § 00102; gov't. mot., attach. B). The government did not “guarantee that borings indicate[d] actual conditions, except for the exact locations and the time that they were made” (R4, tab 1, § 00102, ¶ 1.3). “Unified Soil Classification System” charts for the boring logs were provided which defined SM soils as “silty sands, poorly graded sand-silt mixtures.” Many of the logs contain SM designations and/or silty sand soil descriptions. (Gov't mot., attach. B)

It appears that these logs were part of the geotechnical investigation of the Santa Margarita levee undertaken by Kleinfelder, Inc. for the government, following which a report was issued on 19 August 1997 (R4, tab 2). Selected samples were tested in the laboratory to evaluate the physical characteristics and engineering properties of the soils. With respect to controlled fill, the Kleinfelder report states:

It is expected that most of the soils in the 22 Area and East Oscar borrow areas and from demolition of the existing levee should meet the criteria for controlled fill. The native material along the levee alignment is not expected to meet the criteria for controlled fill but is expected to be suitable for use within the soil-cement revetment and as general fill.

(App. resp., ex. A-1) The government did not make copies of the Klienfelder report available to bidders (app. resp., ex. A-3).

Appellant notified the government of an alleged differing site condition by letter dated 3 September 1998 (app. resp., exs. A-4, -8 at 88). According to the deposition testimony of Mark Pederson, who prepared appellant's bid for the controlled fill, and the supporting materials provided to the government with appellant's differing site condition notice, appellant interpreted the boring logs and paragraphs 1.6.e., 2.1.3.1, and 2.1.3.6 of section 02301 of the specifications as indicating that suitable controlled fill was available along the levee alignment at the project site for both controlled fill and soil cement and that it did not expect to use much material, if any, from the 22 Area Borrow Site. (App. resp., exs. A-4, -7 at 13, 15, 30-32, 35, 50-52, -8 at 55, 93)

A certified claim asserting differing site conditions and that the government withheld information necessary to make an accurate and complete bid was submitted to the contracting officer on 2 February 2001 (R4, tab 32). An appeal from a deemed denial of the claim was docketed as ASBCA No. 53576 on 18 October 2001. Paragraph four of the complaint asserts:

4. The contract specified that significant quantities of suitable controlled fill to be used on the Project were available at the Project site. PK based its bid for the Project on this information provided by the Navy. During performance, the Navy refused to accept material from the Project site for use as controlled fill. This required PK to import all of the controlled fill for the Project from the borrow area at a substantially increased cost.

DISCUSSION

Summary judgment is appropriate only where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmovant must set out in an affidavit, or otherwise, what specific evidence could be offered at trial. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*,

739 F.2d 624, 627 (Fed. Cir. 1984). Its evidence is to be believed and all reasonable factual inferences must be drawn in its favor. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993). In deciding the government's motion, we are not to resolve factual disputes, but rather to ascertain whether there are material facts in dispute. *General Dynamics Corporation*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

In order to prevail upon its Type I differing site conditions claim, appellant must prove that the contract documents represented subsurface or latent conditions, that it reasonably relied upon the contract representations and that the conditions actually encountered were materially different from those represented and not foreseeable. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987).

The government's motion for summary judgment asserts that, under *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984), whether the contract indicated or affirmatively represented that there were "significant quantities" of suitable controlled fill available at the project site is a question of law. According to the government, the contract made only one affirmative representation about suitable controlled fill: namely, that paragraphs 1.6.e. of sections 02301 "unambiguously informed appellant that 'borrow material, suitable backfill and fill materials, suitable controlled fill and controlled backfill in the quantities required' were available at the project site and the borrow site to perform contract projects A and B, and that appellant should base its bid on this assertion." (Gov't mot. at 20) In the government's view, the only reasonable way to read this provision is that appellant would find sufficient quantities of the listed materials at the project site and the borrow area if it performed the work within the contractual construction options, including constructing the levee of either reinforced earth or soil cement (*id.*). It has performed a detailed technical analysis of the boring logs which it asserts demonstrates that the logs do not meet the requirement for an affirmative representation or indication that there were "significant quantities" of controlled fill at the project site (gov't mot. at 23).

In its opposition to the government's motion, appellant asserts that the boring logs, which show soil descriptions and classifications, gradation and depth, represented the subsurface conditions. Relying upon Mr. Pederson's deposition testimony and its 3 September 1998 differing site condition notice, appellant further asserts that it reasonably interpreted the contract specifications and boring logs as indicating that the material designated as SM in the logs was likely to meet the requirements for the controlled fill specifications (app. resp. at 5). It argues that it was not required to perform permeability and plasticity tests on the soil prior to bid or to use specialized geotechnical resources, charts or other expert information to determine soil characteristics (*id.* at 8). It further argues that the government withheld information which indicated that the material along the levee alignment was not expected to meet the criteria for controlled fill (*id.* at 8-9).

We are not satisfied by the present record that the contract documents, including the boring logs, made no affirmative representations, as the government initially argued in its motion, as to whether there were “significant quantities” of controlled fill available at the project site. Rather, we understand appellant’s use of the words “significant quantities” of controlled fill in paragraph four of the complaint to mean sufficient quantities to perform the better part of the contract work. Therefore, as the government seems to acknowledge in its reply brief, the issue we are asked to decide on summary judgment is whether appellant reasonably interpreted the contract documents, specifically including the boring logs, as affirmatively indicating or representing that there would be enough suitable controlled fill along the levee alignment to perform the contract work so that it would not have to use the borrow site extensively.

In deciding the government’s motion for summary judgment, we are to give the contract language the “meaning that would be attributed to it by a reasonably intelligent person acquainted with the circumstances surrounding the contract.” *Alliance Properties, Inc.*, ASBCA No. 42451, 94-1 BCA ¶ 26,462 at 131,675. We simply cannot make such a determination on the record presently before us. In short, we cannot say that the contract documents are clear and unambiguous because we lack the factual framework and predicate necessary to determine the true meaning of the contract documents and the reasonableness of the parties’ respective interpretations. *See The Ryan Company*, ASBCA No. 50466, 99-2 BCA ¶ 30,445 at 150,434. The appeal, therefore, is not amenable to summary judgment. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

Ultimately, we must reach an interpretation of the contract documents which accurately reflects their intended meaning. We cannot do that now as a matter of law. *See International Source and Supply, Inc.*, ASBCA Nos. 52318, 52446, 00-1 BCA ¶ 30,875.

CONCLUSION

The government’s motion for summary judgment on appellant’s Type I differing site conditions claim is denied.

Dated: 14 July 2004

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 53576, Appeal of PK Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals