

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
American Renovation & Construction Co. and)
St. Paul Fire & Marine Insurance Co.) ASBCA Nos. 53946, 54526
)
Under Contract No. DACA67-00-C-0220)

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
Keith C. Phillips, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
M. Susan Fink, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Seattle

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

The government moves for partial summary judgment alleging that there are no genuine issues of material fact relating to the interpretation of the rock excavation provisions in the contract and that it is entitled to judgment as a matter of law. ASBCA No. 53946 (53946) is an appeal from a contracting officer's final decision denying American Renovation & Construction Co.'s (ARC's) claim for rock excavation costs. The work at issue was performed prior to ARC's voluntary default. ASBCA No. 54526 (54526) is the appeal of ARC's surety, St. Paul Fire & Marine Insurance Co. (St. Paul), from the deemed denial of its claim for rock excavation costs incurred in connection with the takeover contract. The appeals have been consolidated because they involve identical issues. ARC and St. Paul (the appellant herein) oppose the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 22 November 1999, the government issued Request for Proposals (RFP) No. DACA67-00-R-0006 to design and construct 60 units of new military family housing (Phase 2) at Mountain Home Air Force Base, Idaho. The work included "all necessary site and utility improvements, and structures." (Gov't mot., tab 7 at 00860-1)

2. The technical criteria in the RFP contained the following provisions:

5.1 SITE CONDITIONS AND SITE PLANNING

Government provided topographical site survey, utility plans and geotechnical information, (Attachments B and D) are provided as information to assist the Contractor in preparing his proposal. . . .

5.1.1 SITE PLANNING

The information provided in Attachments B and D indicate existing conditions, project limits and locations of existing utilities. The enclosed geotechnical-technical survey logs of exploration are provided for proposal submittal requirements only. The Contractor will be responsible for verification of actual soil conditions

. . . .

5.2.1 ROCK EXCAVATION

Depth to rock is quite variable and in previous explorations at other sites on the base has varied from just below the surface to more than 8 meters. For purposes of rock excavation for this project the Contractor is to assume that rock will be found at an average depth of 600 mm [24 inches] for all foundation and utility work. Contractor is to quantify actual rock encountered during construction. Claims for rock excavation in excess of this base line will be handled in accordance with the Changes Clause of the Contract. Rock shall be removed by rippers or other mechanical methods. The Contractor may use blasting to fracture rock to facilitate removal. . . .

(54526, R4, tab D, disk 2)

3. The geotechnical report included in the RFP indicated that nine test pits had been excavated using a Case 580 SK backhoe (gov't mot., tab 8 at B1-2). The results were as follows:

<u>Test Pit No.</u>	<u>Depth at Refusal</u>
1	3.5 feet
2	2.5 feet
3	6.0 feet
4	4.5 feet
5	No refusal
6	6.0 feet
7	7.0 feet
8	No refusal
9	4.0 feet

(Gov't mot., tab 8, appendix A at B1-A1 – A9)

4. The geotechnical report concluded as follows:

Since refusal . . . occurred as shallow as 2.5 to 3.5 feet below the existing ground surface, ripper teeth, large trackhoes or drill-and-blast techniques may be required to excavate utility trenches in the cemented soil/rock. . . . The variation in soil/rock conditions will not be known until construction, and may cause changes to construction plans and/or costs.

(Gov't mot., tab 8 at B1-4)

5. The RFP also included a supplemental geotechnical report. The supplemental report indicated that the government had drilled 32 test holes using a split spoon sampler. No rock was encountered in twenty-two holes. Rock was encountered as follows in the remaining ten holes:

HOLE NUMBER	DEPTH AT REFUSAL
99-PA-302	2,340 mm
99-PA-303	2,400 mm
99-PA-304	457 mm
99-PA-305	457 mm
99-PA-306	1,200 mm
99-PA-311	2,104 mm
99-PA-312	2,400 mm
99-PA-313	762 mm
99-PA-314	2,252 mm
99-PA-318	1,952 mm

(Gov't mot., tab 8 at B2-A6 – A10, B2-A15 – A18, B2-A22)

6. The supplemental report included the following additional information:

The soils data . . . from . . . other projects in the general area indicate that the foundation materials are silts, sandy silts, and silty sands overlying basalt. Cemented zones and caliche nodules are commonly found in the foundation soils. The surficial materials tend to be soft near the surface, . . . but the soil becomes firm to very firm with depth. Depth to rock is quite variable and in previous explorations . . . on the base has varied from 600 mm to more than 8 meters. Average depth to rock is around 2.4 meters to 3.0 meters in the general area of the base.

(Gov't mot., tab 8 at B2-1 – B2-2)

7. Utilities were to be underground unless otherwise specified (54526, R4, tab D, disk 2 at ¶ 6.1). New water mains and branches and new service connections to individual units were to have a minimum of 1,219 mm of cover (*id.* at ¶¶ 6.2.1, 6.2.2.3). Connections to the existing sewer system were to have a minimum of 36 inches of cover (*id.* at ¶ 6.3.1). Connections to the existing underground gas distribution system were to be provided. The existing gas lines were typically buried 30 inches below the surface. (*Id.* at ¶¶ 6.4.1, 6.4.4) A new underground electrical system was to be provided, and each building was to have an underground secondary electrical service (*id.* at ¶¶ 6.5, 6.5.5). Telephone and cable television distribution systems were to be installed underground (*id.* at ¶¶ 6.6.1, 6.7.1). The exterior foundation footings were to be installed at least 30 inches below final grade with structural fill below the footings (gov't mot., tab 7 at ¶ 10.4.1, tab 8 at 2, 5).

8. On 7 December 1999, the government conducted a pre-proposal conference and site visit. Mr. Shane Peterson attended on behalf of ARC. Attendees were advised that they were not to rely on oral responses from government personnel because only a written amendment could change the RFP (54526, R4, tab F at 000005, 000008).¹ Neither Mr. Peterson nor the other contractor representatives asked any questions regarding rock excavation. (54526, R4, tab F)

9. ARC's bid was prepared by its president, Mr. Anthony Dethloff. His affidavit states, in part, as follows:

¹ The RFP did not include FAR 52.214-6 EXPLANATION TO PROSPECTIVE BIDDERS, which provides that “[o]ral explanations . . . given before the award of a contract will not be binding.”

2. I was responsible personally, as Vice President of ARC, for preparing ARC's proposals and estimating the proposal amount in response to the [RFP].

3. I reviewed and relied on the geotechnical report . . . in preparing ARC's proposal pricing. Pursuant to the geotechnical report, I determined that only minimal quantities of rock would be encountered during the foundation work and utility trenching

4. In addition, Mr. Shane Peterson, a representative of ARC, attended the pre-proposal conference at the Project site, and reported to me that Government representatives stated that rock excavation would be an extra to the Contract

5. As a result of my determination that only minimal quantities of rock would be encountered, and that the quantities excavated would be paid for by the Government, ARC did not include rock excavation costs in its proposal prices

(App. opp'n, tab A, Anthony Dethloff Affidavit (Dethloff aff.) at 1-2)

10. According to a note in Mr. Dethloff's bid papers, government representatives advised Mr. Peterson as follows during the pre-proposal site visit:

Shane [Peterson] visited site. . . . Told at meeting that there was a possibility of rock being encounter[ed] on site. See Rock Clause. Was told that no rock should be found in the first 600 mm. After that it was any bodies [sic] guess . . . where rock would be hit. For purpose[s] of bidding all rock which needed to be excavated below 600 mm would have to be quantified at excavation and the contractor would be paid for that type of excavation. . . . Any rock excavation would be handled as extra.

(App. opp'n, tab A at 4-5)

11. ARC has not been able to identify the government representatives who advised Mr. Peterson that rock excavation would be handled as an extra.

12. The government received three offers on 25 January 2000 (app. opp'n, tab B, ex. 2). After completion of the initial evaluations, ARC's proposal was found to be in the competitive range. Discussions were held with ARC and another offeror on or about 6 March 2000. Rock excavation was not discussed and was not used to determine the

competitive range or for source selection. The government did not question ARC's proposal with respect to rock excavation. (Gov't mot., tab 1, Cheryl A. Anderson Affidavit)

13. The government awarded Contract No. DACA67-00-C-0220 in the amount of \$10,112,000 to ARC on 31 March 2000 (R4, tabs 15 at 00046; 16 at 00049). The contract contained FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984).

14. Appellant encountered rock in November 2000 and advised the government on or about 27 November 2000 (Dethloff aff. ¶ 9 at 2). The rock elevations encountered at the project were allegedly higher than set forth in the geotechnical report. The rock excavated at the project was far in excess of the amounts depicted in that report. (Dethloff aff. at 1-2)

15. On 30 January 2001, representatives of appellant and the government met and agreed that ARC's quality control representative would keep daily records of the details of the rock excavation (R4, tab 13(a)).

16. On 7 February 2001, the Administrative Contracting Officer wrote ARC as follows:

In my read of the contract, I find that clause 00860, 5.2.1 is exculpatory and contradicts the terms of the Differing Site Conditions Clause. This clause seems to disregard the subsurface investigation information presented in the contract. I believe that a fair method to handle the occurrence of rock is to compare the conditions encountered with those indicated in the geotechnical report. If the conditions vary significantly, the Corps will consider requests for adjustment pursuant to the Differing Site Conditions Clause.

(53946, R4, tab D-4)

17. On 11 April 2001, ARC submitted a certified claim in the amount of \$2,014,541.98, alleging that paragraph 5.2.1 of specification section 00860 required the government to pay appellant "if rock was found and excavated" (53946, R4, tab D-10).

18. ARC voluntarily defaulted on the contract on or about 11 December 2001.

19. On 20 February 2002, the government terminated the contract for default (53946, R4, tab D-15).

20. Pursuant to its performance bond, St. Paul entered into a takeover agreement with the government on 21 February 2002 and completed the work (53946, R4, tab D-16).

21. On 28 June 2002, the contracting officer denied ARC's claim (54526, R4, tab B; R4 53946, tabs D-10, -15). ARC appealed the contracting officer's denial of its claim to this Board on 20 September 2002, where it was docketed as ASBCA No. 53946.

22. On 15 April 2003, ARC and St. Paul submitted a properly certified "amended claim" to the contracting officer, requesting \$4,315,640 and a 189-day extension of the contract completion date due to unanticipated rock excavation. The amended claim alleges that appellant excavated 16,834 cubic yards of rock. (54526, R4, tab C-2, at 4, 13; Dethloff aff. ¶¶ 3, 5)

23. The contracting officer did not issue a final decision on the amended claim. On 9 March 2004, appellant appealed the deemed denial of their claim to this Board. We docketed the appeal as ASBCA No. 54526 on 9 March 2004.

24. On 12 March 2004, the Board struck ARC's name from the caption of ASBCA No. 54526 to reflect the fact that ARC's status as a contractor under the Contract Disputes Act of 1978 (CDA) ended with its voluntary default and the fact that St. Paul did not become a contractor for purposes of the CDA until it entered into the takeover agreement with the government (54526, R4, tab A-1). The appeals were then consolidated for hearing.

DECISION

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Mingus Constructors, Inc.*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc.*, 812 F.2d at 1390-91.

The parties agree that paragraph 5.2.1 provides that ARC would be paid under the Changes clause for rock excavated above an average depth of 600 mm (gov't mot. at 2; app. opp'n at 14).² However, they disagree as to what, if any, compensation the paragraph provides for rock excavated below that depth. The government argues as the basis for its motion that there are no material facts in dispute and that the only reasonable

² The Board does not reach the issue of whether this interpretation is reasonable.

interpretation of paragraph 5.2.1 is that rock excavated below an average depth of 600 mm was the contractor's responsibility. Assuming *arguendo*, that paragraph 5.2.1 is ambiguous, the government argues that the ambiguity was patent. Since ARC did not request pre-bid clarification, the government argues that appellant may not recover on a theory of ambiguity. Thus, the government concludes that it is entitled to summary judgment as a matter of law with respect to rock excavated below an average depth of 600 mm.

Appellant argues that there are material facts in dispute that preclude summary judgment. According to appellant, the government's interpretation of paragraph 5.2.1 abrogates the mandatory Differing Site Conditions clause. Reading the contract as a whole, appellant argues that it is entitled to compensation under the Differing Site Conditions clause for rock excavation below an average depth of 600 mm. Appellant also argues that government representatives told ARC during the pre-proposal site visit that "[f]or purpose[s] of bidding[,] all rock . . . excavated below 600 mm . . . would be handled as extra." Based on this representation and the review of the geotechnical data in the RFP performed by Mr. Anthony Dethloff, ARC's president, Mr. Dethloff asserts in his affidavit that he concluded only minimal rock excavation would be required and did not include anything for rock excavation in ARC's bid. Appellant also argues that further discovery is required regarding the government's knowledge of ARC's and the other bidders' interpretation of the paragraph and that the government's motion is procedurally defective in that it merely seeks an advisory opinion.

At common law, the contractor bore the risk of increased costs resulting from unknown subsurface or latent physical conditions in connection with a fixed-price contract. The Differing Site Conditions clause shifts the risk of such conditions from the contractor to the government, thereby removing the necessity for contractors to inflate their bids to provide for such contingencies. *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). Under FAR 1.4, contracting officers are prohibited from including a provision in a solicitation or contract which is inconsistent with a mandatory FAR clause without obtaining a deviation. The record does not reflect whether the government obtained a deviation in connection with paragraph 5.2.1 or include any information regarding the development, intended scope or prior usage, if any, of the clause. On this record, we cannot determine whether paragraph 5.2.1 impermissibly abrogates the Differing Site Conditions clause. *E.g., Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988) (summary judgment granted by lower court reversed and remanded to determine whether a Bureau of Labor Statistics index violated the Defense Acquisition Regulations).

In addition, there are other significant disputed issues of material fact. The Dethloff affidavit asserts that government representatives told ARC's representative at the pre-proposal site visit that rock excavation would be handled as an extra under the Changes clause. The government disputes this assertion. In preparing ARC's bid,

Mr. Dethloff interpreted the geotechnical data in the RFP to mean there would be minimal rock excavation. Based on the government's alleged representations during the pre-proposal site visit and his interpretation of the RFP, Mr. Dethloff determined that ARC did not have to include anything for rock excavation in its bid. Accordingly, we conclude that there are disputed issues of material fact which preclude summary judgment. *See Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 515 (1993) (although pure contract interpretation is a question of law, the meaning that should be given to the words of a contract, *e.g.*, the interpretation of language, the conduct, and the intent of the parties, may raise questions of material fact which preclude summary judgment).

In conclusion, the record does not provide sufficient information for us to determine whether paragraph 5.2.1 abrogates the Differing Site Conditions clause. In addition, there are material facts in dispute regarding the reasonableness of the parties' interpretations of the contract. The government's motion for partial summary judgment is denied.

Dated: 19 December 2005

ELIZABETH A. TUNKS
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. 53946, 54526, Appeals of American Renovation & Construction Co., and St. Paul Fire & Marine Insurance Co., rendered in conformance with the Board's Charter.

Dated:

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