

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Billington Contracting, Inc.) ASBCA Nos. 54147, 54149
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Under Contract No. DACW35-00-C-0015)

APPEARANCE FOR THE APPELLANT: Leonard G. Birnbaum, Esq.
Birnbaum & Umeda, LLP
Redwood City, CA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Christine Dowhan-Bailey, Esq.
District Counsel
Arvis V. Freimuts, Esq.
Assistant District Counsel
U.S. Army Engineer District,
Detroit

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

These appeals were taken from a contracting officer's decision denying appellant's claim alleging a differing site condition (DSC), and seeking \$831,205 and the release of \$46,904 withheld as liquidated damages for the contractor's inability timely to finish as a result of the purported DSC. The underlying contract was for maintenance dredging of Duluth-Superior Harbor located in Minnesota and Wisconsin. The government filed a summary judgment motion asserting that appellant cannot establish the existence of a DSC, or in the alternative, signed a release of claims and therefore its claim is barred.¹ We grant the government's motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 17 April 2000, the U.S. Army Engineer District, Detroit (Detroit district), awarded fixed-price Contract No. DACW35-00-C-0015 in the amount of \$879,641 to Billington Contracting, Inc. (Billington or appellant). The contract was for maintenance

¹ Appellant submitted a motion in opposition to the government's motion for summary judgment (app. opp'n) and a Statement on Genuine Issues and Proposed Findings of Uncontroverted Facts (app. stmt.).

dredging of approximately 89,000 cubic yards (cy) from Duluth-Superior Harbor located in Minnesota and Wisconsin. The period of performance was 90 calendar days after the notice to proceed. The harbor was divided into four working areas, numbered three through six. (R4, tab D)

Appellant has more than 20 years experience in dredging, but had not worked directly for the Corps of Engineers or any other federal agency before the subject contract (app. stmt. at 5). Billington's ability to perform the contract with its equipment was reviewed and accepted by the government in a pre-award survey of prospective contractors (R4, tabs F-D, -E).

The contract incorporated FAR 52.236-27, SITE VISIT (CONSTRUCTION) (FEB 1995), and the underlying solicitation "urged and expected" bidders to make a site visit (R4, tab D). It is not clear from the record whether Billington conducted a preaward site visit.

Among the clauses incorporated by reference into the contract was FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) which requires the contractor to promptly notify the government of subsurface or latent physical conditions at the site which differ materially from those indicated in the contract (R4, tab D).

The contract specification described the project site conditions at § 02482, DREDGING as follows:

1.4 PROJECT/SITE CONDITIONS

1.4.1 Character of Materials

The materials within the required dredging limits are those composing of [sic] the shoaling that has occurred since the areas were last dredged consist [sic] of varying proportions of sand and silt with some organic material. Some hard packed sand may be encountered in some areas. The records of previous dredging and sampling are available for inspection at the Office of the Construction-Operations Division . . . Detroit, Michigan.

(R4, tab D)

Appellant, asserting that the prior dredging records were available at an inconvenient and unreasonable location 14 hours by car from its office in Duluth, did not inspect the records of dredging and samplings of previous contractors prior to responding

to the solicitation (app. stmt. at 8). Those records disclosed that a previous contractor, Luedtke Engineering Co. (Luedtke), repeatedly encountered hard, and very fine granular, sand while dredging in Area Six of the harbor. That area had been most recently dredged in 1997. (R4, tabs B-8, E-K)

That portion of the government's motion pertaining to the DSC is supported by the declaration of Mr. Neal Gehring, Chief of the Engineering and Construction Division, Detroit district. Mr. Gehring declares that if a bidder could not examine the dredging records in Detroit, the government would find a way to get the information to the bidder, such as sending copies to the government's area office nearest the bidder. Government procedures do not require that an area office maintain dredging records after contract completion. (Gov't mot., decl. of Neal Gehring, ¶ 5)

By letter to appellant dated 19 June 2000, the government advised Billington that it considered its performance to date as "unsatisfactory." The government continued to express concern over appellant's progress. (R4, tabs E-B, -D, -H) By letter dated 22 July 2000 to the Duluth Area Engineer, Billington explained that progress was slow as a result of the type of material it was encountering in Area Six of the harbor. According to Billington, the material differed from that described in the solicitation and contract. Billington added, "there may be a need to renegotiate the contract for more time and/or moneys [sic] as a result of the characteristics of the materials that we are dredging." (R4, tab E-G) The 90-day performance period ended on 1 August 2000. Dredging was incomplete, but Billington continued with performance of the contract. (R4, tabs E-B, -H, -I)

On 20 October 2000, appellant sent a letter to the government stating, in part, that it was reserving its rights with respect to its increased costs due to the differing site condition encountered in Area Six (R4, tab E-J).

Billington continued to dredge until 2 November 2000, when its barge and backhoe sank. Afterward, Billington tried unsuccessfully to subcontract its remaining work to another contractor. On 28 December 2000, pursuant to the contract's DEFAULT clause, FAR 52.249-10 (APR 1984), the contract was terminated based on "material breach and repudiation of the terms and conditions of the contract." (R4, tabs E-R, F-O)

On 26 February 2001, Mr. Billington went to the Detroit district's Duluth area office to arrange for final payment. At that time, he also executed a "Contractor Release of Claims," and certification prepared by the government. Referencing contract ¶ 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997), the release stated that the contractor released the government from any and all claims except those listed. The space for listing any claims was left blank. (R4, tab B-3)

Appellant submitted the affidavit of Mr. Billington in opposition to the government's motion. Mr. Billington states that the government's representative advised that he was required to sign the release in order to be paid, and that the release pertained only to the subject pay estimate and would not affect Billington's pending claim. (App. opp'n, tab A, aff. of Robert Billington, ¶¶ 2-3) The government did not submit an affidavit in response to Mr. Billington's affidavit, and prior declarations in the record dispute Mr. Billington's account only in part. (R4, tabs B-4, B-5)

The government made final payment on the contract on 3 March 2001 (R4, tab B). Billington ultimately was paid \$659,082.05. The amount reflects the cubic yardage actually dredged at the unit price of \$8.35 per cy, and \$46,904 withheld as liquidated damages. (Gov't mot. at 2)

By letter dated 28 August 2001, Billington submitted a certified request² for equitable adjustment for \$831,205 and release of the \$46,904 withheld as liquidated damages. Appellant based its claim on the alleged DSC, particularly in Area Six. (R4, tab C) The REA contended that the character of the materials encountered was "substantially different" than indicated by the contract. *Id.* at 7. The contractor stated that it had notified the government of the unexpectedly hard sand and the need for an increase of time and money in its 22 July 2000 letter, and that Billington's letter of 20 October 2000 reiterated the contractor's "right to pursue a claim for differing site conditions." *Id.* at 9.

After reconsideration, the CO agreed to convert the default termination, which was the subject of an appeal to this Board, to a no-cost termination on 5 March 2002 (bilateral Modification No. P00007). The modification stated in part "[t]his settlement of the ASBCA Termination for Default case has no effect on the contractor's claimed entitlement to an equitable adjustment for an alleged differing site condition." (R4, tab F-K)

By final decision dated 16 January 2003, the CO denied Billington's claim in its entirety. The CO based his denial, in part, on the fact that appellant had signed a release of claims. (R4, tab B at 5-7) The CO also denied the claim on the basis that Billington could not prove that conditions encountered differed from those depicted in the contract, an essential element of a Type I differing site condition, because it failed to investigate that information which disclosed the presence of hard packed sand. *Id.* at 3-5.

² Appellant's certification was incomplete. Appellant submitted a corrected certification to the CO by letter dated 24 March 2003 (supp. R4, tab L).

Billington filed a timely appeal. We docketed the portion relating to the amount of \$831,205 as ASBCA No. 54147 and the portion relating to the liquidated damages as ASBCA No. 54149.

DECISION

Summary Judgment

The government moves for summary judgment, contending that there are no genuine issues of material fact and that it is entitled to favorable judgment as a matter of law. Two bases for summary judgment are alleged: that the contractor cannot prove essential elements of its differing site condition claim and that it signed a release of all claims; we address the former first. The government contends that appellant did not review before bidding the referenced records of the prior contractor, which accurately depicted the character of the now-questioned substrate, and cannot now recover for encountering that very condition. (Gov't br. at 1, 11-23)

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to favorable judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987); *Voices R Us, Inc.*, ASBCA No. 51565, 99-1 BCA ¶ 30,213 at 149,478; Fed. R. Civ. P. 56. We look to substantive law to determine which facts are material, that is, “which facts are critical and which facts are irrelevant.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We consider whether the nonmovant has presented “sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard, could decide the issue in favor of the nonmovant.” *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,507.

Even if some factual issues remain unresolved, summary judgment may be granted where “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Caddell Construction Co., Inc.*, ASBCA No. 53144, 02-1 BCA ¶ 31,850 at 157,399 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for the [trier of fact] to return a verdict for that party.” *Tacoma Boatbuilding Co.*, ASBCA No. 50238, 00-1 BCA ¶ 30,590 at 151,070 (quoting *Anderson* at 249). Faced with potential summary judgment, Billington was “on notice that it had to come forward with all of its evidence.” *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). The failure to set forth specific evidence that could be offered at trial may result in the motion being granted. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984);

Dillingham Construction Pacific Basin, Ltd., ASBCA Nos. 53284, 53414, 03-1 BCA ¶ 32,098 at 158,663.

Billington's Claim for an Alleged Differing Site Condition

Billington seeks an equitable adjustment for additional costs it attributes to subsurface conditions which allegedly differed substantially from those indicated in the specifications and delayed its performance. (R4, tab C at 2, 15). The claim focuses upon Area Six of the Duluth-Superior Harbor, which appellant describes as containing finely packed hard sand that required considerably more effort to dredge than contemplated (compl., ¶¶ 19-21). This type of claim is categorized as a Type I differing site condition, in which “subsurface or latent physical conditions at the site . . . differ materially from those indicated in th[e] contract.” *Control, Inc. v. United States*, 294 F.3d 1357, 1362 (quoting FAR § 52.236-(2)(a)(1) APR 1994)); *Kilgallon Construction Co., Inc.*, ASBCA Nos. 52582, 52583, 03-2 BCA ¶ 32,380. To prevail, Billington must prove that:

- (1) the contract documents affirmatively indicated or represented the subsurface conditions which form the basis for the claim;
- (2) it acted as a reasonably prudent contractor in interpreting the contract documents;
- (3) it reasonably relied on the indications of the subsurface conditions in the contract;
- (4) the subsurface conditions actually encountered differed materially from the subsurface conditions indicated in the contract;
- (5) the actual subsurface conditions were reasonably unforeseeable; and
- (6) its claimed excess costs were solely attributable to the materially different subsurface conditions.

Pitt-Des Moines, Inc., ASBCA Nos. 42838 *et al.*, 96-1 BCA ¶ 27,941 at 139,574, citing *Weeks Dredging & Contracting, Inc. v. United States*, 13 Cl. Ct. 193, 218 (1987), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988) (table) (the “Weeks test”).

Billington does not dispute that Luedtke’s records disclose the presence of “mostly hard packed sand in Area 6” (app. stmt. at 6). Rather, appellant argues that it had a right to rely upon the government’s portrayal in specification ¶ 1.4.1 of materials to be dredged as “[s]ome hard packed sand . . . in some areas” without resorting to the referenced documents. It contends this characterization lulled bidders “into a false sense of low risk” regarding material to be excavated (app. opp’n at 4), and “was misleading with respect to the importance of the prior contractor’s dredging records” (*id.* at 3). Billington asserts that the solicitation further “undercut the importance of [a prospective contractor] actually reviewing” prior records by advising these were available in Detroit, “750 miles away” from the project site in Duluth (*id.* at 4).

Discussion

The “purpose of the Differing Site Conditions clause is to allow contractors to submit more accurate bids by eliminating the need for contractors to inflate their bids to account for contingencies that may not occur.” *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1343 (Fed. Cir. 1998). Where the government discloses site information, the contractor must consider it at bid or forfeit recovery. *Id.* at 1345.

The government’s arguments that Billington cannot recover because it failed to consider the contract in its entirety are well placed. Appellant’s contentions that “the description as to the character of material in the Solicitation was inaccurate” and that the government “chose not to reveal in the Solicitation” the mostly hard packed sand in Area Six (app. opp’n at 5) are unavailing. As admitted by Billington (app. stmt. at 6), the referenced records of the prior contractor show clearly that Luedtke repeatedly encountered very hard packed sand in Area Six (R4, tab B-8 *passim*). There is no genuine issue of material fact with respect to the contract’s accurate representation of the subsurface conditions Billington actually encountered.

“Contract documents” include those referenced by the specifications and a contractor has the duty to review information that explicitly is made available for inspection. *See Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1270-71 (Fed. Cir. 2001). Contrary to Billington’s assertion that it was justified in not investigating prior records, a contractor is required to review all relevant, referenced information; it cannot consider only select material. In *Flippin Materials Co. v. United States*, 312 F.2d 408, 413 (Ct. Cl. 1963), another contractor advanced a similar argument, contending it was “entitled to rely on definitive representations in the contract papers themselves . . . and [was] not required to search further for the true facts.” The court rejected that position, and instead ruled that a contractor must look to all information provided and referenced in assessing the full story. *Id.* at 414. Like the contractor in *Flippin*, Billington cannot “rest content with the materials physically furnished to him; he must also refer to other materials which are available and about which he is told by the contract documents.” *Id.* at 414 (footnote omitted); *see also Hunt & Willett, Inc. v. United States*, 351 F.2d 980, 985 (Ct. Cl. 1964). Although Billington faults the general advisement of ¶ 1.4.1 that the contractor may encounter “[s]ome hard packed sand . . . in some areas” as insufficient notice of the degree of difficulty it actually encountered (app. opp’n at 2-3), that description is not untruthful. Specifications that may be incomplete, but are not false so far as they go, do not constitute misrepresentation where referenced information provides the necessary prescription. *Flippin* at 414.

While appellant also charges the government allegedly undercut the importance of the prior dredging records by advising these were available in Detroit, far away from Duluth, this criticism is of no avail. The government did proffer these essential

documents, and Billington did not inquire or ascertain whether Luedtke’s records could be obtained elsewhere. “[W]here a contractor ‘has opportunity to learn the facts, he is unable to prove . . . that he was misled by the contract.’” *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987) (citation omitted). If the government provides a more comprehensive description in referenced documents, a contractor is “bound to seek that information or to be treated as if it had.” *Flippin*, 312 F.2d at 411.

CONCLUSION

Billington cannot prevail on its Type I differing site condition claim, as it is unable to meet essential elements of its burden of proof because it failed to give regard to all relevant contract documents. Appellant has failed to show triable issues of material fact, nor has it shown that a reasonable finder of fact could decide the appeal in its favor. The government is entitled to summary judgment as a matter of law. Because we grant summary judgment on this point, it is unnecessary to consider further arguments advanced by the government or rejoinder by Billington. The motion for summary judgment is granted, and these appeals are denied.

Dated: 28 February 2005

REBA PAGE
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. 54147 and 54149, Appeals of Billington Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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