

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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W. B. Meredith II, Inc.) ASBCA No. 53611
)
Under Contract No. N62470-96-C-6175)

APPEARANCE FOR THE APPELLANT: Ms. Margaret Davis
Vice President

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.
Acting Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Naval Facilities Engineering Command
Litigation Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN

W. B. Meredith II, Inc. (Meredith or appellant) seeks an equitable adjustment on behalf of its subcontractor, Zanahary Group, Inc. (Zanahary), for delays and disruptions to Zanahary's work under the subject contract. A hearing was held on entitlement only. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. On 13 May 1998, the Navy awarded a firm fixed-price construction contract to Meredith in the amount of \$4,790,411.00. The work consisted of converting an open barracks to a Bachelor Enlisted Quarters at the Navy Fleet Combat Training Center, Atlantic, Dam Neck, Virginia Beach, VA. Meredith awarded a subcontract to Zanahary to install, among other things, metal track framing, drywall, and acoustical ceilings. (R4, tabs 1, 212)

2. Appellant mobilized on the site between 15 June 1998 and 5 July 1998 (R4, vol. 8, Contractor Production Report No. 24-44). A preconstruction meeting, known as a "partnering workshop," was held on 7 July 1998 at which Zanahary's president and project manager, Mr. Kunle Okusaga, attended. Insofar as pertinent to this appeal, the notes from this meeting stated as follows:

8. Staging Stored Materials (Drywall)

- Subcontractor coordinate with Prime PM
- Lots of exterior laydown area – Prime prefers just-in-time material delivery
- Storage inside building available after interior demolition
- Two personnel elevators (3,000 lb) – questionable dependability
- Boom truck, exterior access preferred

(R4, tab 4)

3. The minutes of a Quality Control meeting, dated 28 September 1998, indicated that Zanahary “WILL BEGIN STOCKING MATERIAL ON 9/28/98, HOLDING PREPARATORY MEETING WITH FOREMAN TODAY” (R4, vol. 8, minutes 9/28/98 at 2). Contractor Production Report No. 130 (9/29/98) and No. 133 (10/2/98) show that Zanahary received deliveries of metal framing and gypsum wall board (GWB) on these dates, deliveries were made into the building by crane, and Zanahary began its framing at or about this time (R4, vol. 8; tr. 1/206).

4. At trial, Zanahary’s project manager contended that early in the project, an unidentified Navy representative directed Meredith—who then directed the Zanahary site representative—to the effect that Zanahary could not bring its materials into the building any earlier than the above dates, which delayed Zanahary’s work (tr. 1/131). This testimony was uncorroborated. Zanahary provided no contemporaneous writing in support of this claimed government direction. On 14 October 1998, Zanahary gave Meredith written notice of delay regarding the project, and made no mention of any government direction on this subject, or of any government interference with its material deliveries (R4, tab 51).

5. By Request for Information (RFI) No. 8, dated 13 October 1998, Meredith advised the government that certain floor plank support was needed where a return duct crossed above the elevator lobby corridor doors and load-bearing CMU was to be removed. On 16 October 1998, the government replied to Meredith, directing certain design changes. (R4, tab 10)

6. By letter dated 18 November 1998, the government requested a cost proposal from Meredith for this additional work (R4, tab 59). The OICC/ROICC Contract Modification Recommendation, dated 5 March 1999, stated that appellant’s proposal, in the amount of \$13,477.00, was fair and reasonable. It is unclear whether Meredith solicited a quote from Zanahary for this work. (R4, vol. 7, tab P-3 at 3rd page)

7. Contract Modification No. P00003 was executed by appellant on 12 March 1999, and by the government on 16 March 1999, in the amount of \$13,477.00, with no change in the contract completion date. On page 2 of the modification at paragraph 3, the parties agreed to the following language:

3. The foregoing is agreed to as constituting full and complete equitable adjustment and compensation attributable to the facts or circumstances giving rise to the change directed hereby, including, but not limited to, any changes, differing site conditions, suspensions, delays, rescheduling, accelerations, impact, or other causes as may be associated therewith.

(R4, vol. 7, tab P-3 at 2 of 2)

8. By RFI No. 10 dated 28 October 1998, Meredith advised the government of sloping floors in the existing toilet rooms that needed to be level. The government replied on 17 December 1998, seeking cost input from appellant for this additional work. (R4, tab 12)

9. By letter to the government dated 22 January 1999, appellant requested a contract modification in the amount of \$21,509.00 to perform this work, reserving the right to request a time extension if necessary. The proposed price included a quote from Meredith's subcontractor, Sound Structures, Inc. Meredith did not include a quote from Zanahary. The government reviewed the proposal and found it to be fair and reasonable, and by OICC/ROICC Contract Modification Recommendation to the contracting officer (CO) dated 19 March 1999, the government recommended a bilateral modification in the amount of \$21,509.00 with no time extension, as agreed to by the parties. (R4, vol. 7, tab P-4)

10. Contract Modification No. P00004 was executed by appellant on 30 March 1999 and by the government on 2 April 1999. Page 2, paragraph 3 of the modification included the same release language as contained in No. P00003 above. (*Id.* at 1, 2 of 2; finding 7)

11. By RFI No. 3 dated 12 August 1998, Meredith advised the government of differing conditions regarding floor removal in a first floor toilet room. The government replied on 23 November 1998, directing saw-cutting of the floor and other design changes. (R4, tab 5)

12. By letter to the government dated 22 January 1999, Meredith sought \$38,741.00 for this additional work, reserving the right to request a time extension if

necessary. On 17 March 1999, appellant reduced its proposal to \$17,202.00. Appellant's proposals included quotes from a number of subcontractors. Meredith did not include a quote from Zanahary. (R4, vol. 7, tab P-5)

13. Contract Modification No. P00005 was executed by appellant on 30 March 1999 and by the government on 2 April 1999, in the amount of \$17,202.00, with no change in the contract completion date. Page 2, paragraph 3 of the modification provided the same release language found under No. P00003. (R4, vol. 7, tab P-5; finding 7)

14. During performance appellant also notified the government that newly installed sound channels in certain wall partitions failed to provide the required fire-rating for fire stopping and fire blocking between the spaces. As a result, the government relayed to appellant the architect's recommendation to install a continuous layer of GWB at the transition between these walls. (R4, tab 28, attach. 7 at 14th page)

15. Appellant solicited a proposal from Zanahary for this additional work. By memorandum to appellant dated 9 March 1999, Zanahary sought \$1,438.00 for the additional work, with no change in contract completion date. (R4, tab 82 at 4th page) Appellant reduced the profit rate requested by Zanahary, added its own markups, and forwarded the proposal, known as "PC-18," to the government on 10 March 1999, in the amount of \$1,592.00. (R4, vol. 7, tab P-8 at 14th page)

16. By OICC/ROICC Contract Modification Recommendation dated 21 May 1999, the government accepted appellant's proposal for PC-18, and also agreed to a three-day time extension with no extended overhead. The government prepared an O/A funding document in the amount of \$1,592.00. (R4, vol. 7, tab P-8) This additional work became part of Modification No. P00008, along with additional work required under PC-17, discussed below.

17. At shear wall locations A and B, appellant was to install a new beam as part of the contract work. The government intended to design this new beam to be located above the acoustic ceiling tile but as it turned out, the beam and the tile were designed for installation at the same height. Appellant advised the government of this discrepancy under RFI No. 15, dated 9 December 1998. The government directed appellant on 28 December 1998 to provide a GWB header under the beam and to rework the layout of the ceiling tile. (R4, tab 28, attach. 7 at 11th, 12th page)

18. Meredith solicited a quote from Zanahary regarding this additional work. By memorandum dated 9 March 1999, Zanahary proposed to do the work for \$3,445.00 with no change in contract completion date (R4, tab 82 at 6). Appellant reduced Zanahary's claimed profit rate, added its own markups, and forwarded to the government a request

for additional compensation, known as “PC-17,” in the amount of \$3,813.00 (R4, vol. 7, tab P-8 at 10th page).

19. The OICC/ROICC Contract Modification Recommendation, dated 21 May 1999, stated that appellant’s proposed price of \$3,813.00 was fair and reasonable (¶¶ 5, 7); that the government would accept appellant’s proposed price (¶ 6); that the appellant was informed that its proposal would be accepted (¶ 7); that an O/A funding document, in the amount of \$3,813.00 was enclosed (¶ 9); and that the parties agreed to a six-day time extension for this work (¶ 8). The government recommended payment to appellant in the amount of \$5,405.00, which included \$3,813.00 for PC-17 and \$1,592.00 for PC-18. The CO executed this recommendation. (R4, vol. 7, tab P-8 at 5th to 7th page)

20. Contract Modification No. P00008 was executed by appellant on 11 June 1999, and by the government on 23 June 1999. The modification at page 2, paragraph 3 contained the same release language found in No. P00003. The modification included payment for the PC-17 work and the PC-18 work. With respect to the latter, the modification provided for a three-day time extension and a payment of \$1,592.00. With respect to the former, the modification provided for a six-day time extension and a payment of \$3,318.00.¹ (R4, vol. 7, tab P-8 at 1, 2 of 2)

21. Under RFI No. 21, appellant questioned whether the government’s design allowed sufficient room to run a supply air duct and a return air duct above a new eight-inch bond beam lintel for a doorway in certain rooms adjacent to the elevator lobby on each floor. The government, through the project’s structural engineer, agreed that the government design was insufficient, and directed appellant to install a five-inch steel tube beam in lieu of the eight-inch bond beam lintel. (Tr. 2/201-07)

22. Appellant prepared a proposal for this additional work, dated 4 June 1999, known as “PC-23”, seeking \$4,960.00. Appellant included a quote from subcontractor F&C Fireproofing. It did not include a quote from Zanahary. (R4, vol. 7, tab P-10 at 11th page; tr. 2/ 201-07)

23. By OICC/ROICC Contract Modification Recommendation, executed by the CO, dated 12 July 1999, the government accepted appellant’s price for PC-23 as fair and reasonable, and the parties agreed to a 21-day time extension without additional field overhead (R4, vol. 7, tab P-10 at 5th page). This additional work and time, plus some

¹ It appears that the figure of \$3,318.00 did not reflect the amount agreed upon by the parties for PC-17 prior to the execution of Modification No. P00008, that is, **\$3,813.00** (finding 19). This may have been attributable to a typographical error. Under Modification No. P00011, the government agreed to pay appellant \$495.00 to correct this error (R4, vol. 7, tab P-11 at 2nd page).

additional work under PC-24 (not relevant here), became the subject matter of Modification No. P00010. Appellant executed this modification on 23 July 1999, and the government executed the modification on 5 August 1999. The modification included at page 2, paragraph 3 the same release language contained in the other modifications referenced above. (*Id.* at 1, 2 of 2)

24. The above bilateral contract modifications were negotiated by Mr. Phil Shepard, Meredith's project manager and LT Bryan Heller, the government's assistant resident officer in charge of construction. In negotiating the modifications, Mr. Shepard considered any and all impacts to Meredith's subcontractors (tr. 2/107-08). LT Heller intended to resolve all costs and time related to the modifications (tr. 2/183).

25. During the course of performance, Meredith wrote a number of letters to Zanahary, advising that Zanahary was behind schedule and/or was understaffing the job (R4, tabs 63, 64, 67, 139). Zanahary replied, contending that its delays were due to, *inter alia*, the unavailability of work space and the delays of other subcontractors (R4, tabs 18, 20, 22, 51). 6. Zanahary walked off the job and discontinued work on 9 September 1999 (tr. 1/127). Soon thereafter, Meredith terminated Zanahary for default for abandonment of the project (tr. 2/101). Meredith obtained a replacement contractor. The overall contract work proceeded into the summer of 2000. *See, e.g.*, Contractor Production Report No. 775 dated 7/5/00 (R4, vol. 11).

27. By letter dated 24 January 2000, appellant forwarded to the government a request for equitable adjustment (REA) upon behalf of Zanahary. In brief, Zanahary sought to recover additional costs due to impacts and delays attributable to defects in the government's design and related contract changes, in the amount of \$319,617.29. (R4, tab 26)

28. The government denied the REA by letter dated 2 February 2000. Insofar as pertinent, the government stated as follows:

3. All impacts caused by the government have already been resolved with signed, bilateral modifications. In signing these, you have agreed to the paragraph included in each modification, which states, "The foregoing is agreed to as constituting full and complete equitable adjustment and compensation to the facts or circumstances giving rise to the change directed hereby, including, but not limited to, any changes, differing site conditions, suspensions, delays, rescheduling, accelerations, impact, or other causes as may be associated therewith." Plainly stated, the government

has already compensated you for all costs and time associated with any previous changes.

4. The government did not cause any inefficiencies in the drywall work. There was at any given time, more drywall work at the job site than could be performed by the number of crews present. The areas you say were impacted were to be performed separately anyway, per the approved schedule, because of the required concrete work in the shear walls. Because this was always the scheduled method (according to the schedule you provided), there could not have been any inefficiencies caused by the government in separating the work.

(R4, tab 27)

29. By letter to the government dated 17 October 2000, Meredith requested a CO decision on the REA (R4, tab 197). The CO returned the proposed claim to appellant on 15 November 2000 because it was not certified by Meredith (R4, tab 199). By letter dated 29 March 2001, Meredith submitted to the government a certified claim on behalf of Zanahary in the amount of \$396,421.00. Generally, Zanahary contended that its work was delayed, disrupted and accelerated due to various government design errors and contract modifications, the core drilling of certain floors and related strand repairs, and because the government unreasonably restricted Zanahary's ability to store materials in the building. (R4, tab 28)

30. The CO denied the claim by letter dated 24 August 2001. The CO determined that appellant failed to substantiate its claims; that appellant released and/or waived additional compensation arising from design errors through its execution of contract modifications and the release language contained therein; and that appellant failed to show that the government unreasonably interfered with Zanahary's storage of material, or otherwise violated the contract. (R4, tab 30) Appellant timely appealed the CO's decision to the Board.

DECISION

Accord and Satisfaction/Design Changes

Zanahary contends that its work was impacted by various government design changes on the project. The government did make a number of design changes, as we have found herein. However Meredith, in its own capacity and as representative of all subcontractors on the project, including Zanahary, entered into binding, written contract modifications with the government that adjusted the contract price—and the contract time

in certain instances—for the additional costs resulting from these design changes. Indeed, with respect to Modification No. P00008, the record reflects that Zannahary’s proposed additional costs were expressly included in Meredith’s proposal to the government.

Pursuant to page 2, paragraph 3 in each of these contract modifications, the parties agreed that the equitable adjustment granted by the government was “full” and “complete” compensation, and included any and all project costs for rescheduling, acceleration and/or impacts. On behalf of itself and its subcontractors, Meredith executed these contract modifications without qualification, condition or reservation.

Meredith, on behalf of Zannahary, may not now reopen these contract modifications to assert claimed impacts that should have been included, or reserved by the prime contractor on the subcontractor’s behalf. We conclude that these bilateral contract modifications bar appellant’s claims on behalf of Zannahary with respect to the subject government design changes. *See Gregory Constructors, Inc.*, ASBCA No. 35934, 90-3 BCA ¶ 23,223.

Material Storage

Appellant contends that the government was responsible for unreasonably restricting Zannahary’s storage of material in the building, that is, the government did not permit Zannahary to deliver certain materials into the building in the manner, in the amounts and at the times desired by Zannahary. However appellant failed to identify any specific direction from any authorized government representative regarding this matter, nor did appellant offer into evidence any contemporaneous written notice from Zannahary to Meredith or to the CO complaining of any such government action. The project manager’s testimony in this area was uncorroborated hearsay, and was not persuasive.

Assuming, *arguendo*, that the government prescribed certain limitations for material delivery into the building, appellant has not shown that any such limitations violated the contract, or were otherwise wrongful in view of the existing nature of the facility in which the renovation work was to be performed.

For reasons stated, we must deny appellant’s material storage claim.

Alleged Core Drilling Impacts

Appellant contends that Zannahary’s work was stopped and/or disrupted due to the core drilling of certain floors by the mechanical contractor and related strand repairs on these floors. No evidence was provided of any government order that had the effect of suspending or delaying Zannahary’s planned sequence of work for these reasons. Also, no

contemporaneous project records were provided, advising Meredith or the government of any impact to Zanahary due to this work. We must deny this claim for lack of proof.

CONCLUSION

We have duly considered appellant's remaining contentions, but believe they do not support entitlement. For reasons stated, the appeal is denied.²

Dated: 22 November 2006

JACK DELMAN
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. 53611, Appeal of W. B. Meredith II, Inc., rendered in conformance with the Board's Charter.

Dated:

² In view of our decision, we need not address the government's other contentions supporting the denial of this appeal.

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