

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Packard Construction Corporation) ASBCA No. 55241
)
Under Contract No. DACA21-02-C-0012)

APPEARANCE FOR THE APPELLANT: Mr. Richard C. Forrester, III
Vice President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Colin R. Ozanne, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Savannah

OPINION BY ADMINISTRATIVE JUDGE THOMAS
PURSUANT TO RULE 12.3

Packard Construction Corporation appeals from a contracting officer's final decision determining that the government was entitled to a credit of \$1,115 because of a change to the electrical work resulting in the deletion of one pole. Packard has elected the Board's accelerated procedure pursuant to Rule 12.3. Both entitlement and quantum are before us.

SUMMARY FINDINGS OF FACT

1. On 28 March 2002, the U.S. Army Corps of Engineers awarded appellant Contract No. DACA21-02-C-0012 for the construction of a SOF Imagery and Analysis Facility at Fort Bragg, N.C. The contract included FAR 52.243-4 CHANGES (AUG 1987). (R4, tab 3 at 1-2, 26)

2. Drawing E-1 depicted relocation of existing overhead electrical lines. On 28 June 2002, the government issued a sketch rerouting the lines to avoid removal of some pine trees. According to the transmittal letter: "The attached sketch shows the new routing and will not affect Packard Construction in any adverse way." The sketch reduced the number of poles from five to three and lengthened the distance between the poles. (App. supp. R4, attach. 2; tr. 1/67)

3. Appellant's subcontractor relocated the electrical lines in accordance with the 28 June 2002 sketch. Because of the change, the subcontractor used longer poles than anticipated. (App. ex. D; tr. 1/60).

4. On 22 May 2003, the government requested proposals for several utility and site changes including rerouting the overhead electrical lines in accordance with sketch SK-02-12-01 dated 22 May 2003. This sketch showed the revisions made in June 2002. (R4, tab 6)

5. The parties were unable to agree on adjustments for the various changes. As a result, the contracting officer issued unilateral Modification No. P00006 dated 6 August 2003, increasing the contract price by \$44,339 and extending the contract completion date by 66 days. The modification included a credit to the government of \$2,324 for rerouting the overhead electrical lines. (R4, tab 6)

6. The government estimated the credit of \$2,324 as follows. The change reduced the quantity of poles from five to three. The unit cost for a 35-foot pole was \$350 for materials, \$263 for labor, and \$56.50 for equipment, totaling \$669.50, times two equals \$1,339.00. The cost for "scaffold to relocate" was increased by \$26. Adding taxes, insurance and subcontractor and prime contractor mark-ups resulted in a total of \$2,324. The government's estimate and related Prenegotiation Objectives Memorandum, dated 11 July 2003, referenced Means as a source for the estimate. (R4, tab 6) The government admits that the estimator erred in basing the calculation on a 35-foot pole since the contract required 45-foot poles (gov't br. at 6). While that mistake may cut in appellant's favor, it undercuts the credibility of the evidence in the absence of further explanation. Further, the estimate takes no account of the costs associated with longer poles and the increased distance between poles. The author of the estimate did not testify at the hearing.

7. On 13 April 2005, appellant submitted a claim to the contracting officer challenging the credit of \$2,324 (R4, tab 11).

8. On 22 September 2005, the contracting officer issued a final decision upon this claim among others. The contracting officer found that the June 2002 rerouting only eliminated the requirement for one pole, not two poles. Accordingly, the contracting officer concluded that the credit should have been \$1,115 instead of \$2,324. (R4, tab 2 at 6)

9. On 21 October 2005, Packard appealed the denial of its claim for \$2,324. Packard stated that, in addition, its claim included a request for a contract extension of 41 days and associated overhead costs of \$60,714, for a total of \$63,038. The appeal was docketed as ASBCA No. 55241. The Board does not have jurisdiction of the additional

claim for an extension of 41 days because it was not submitted to the contracting officer in a sum certain (tr. 2/7). Accordingly, our findings are limited to the credit issue.

SUMMARY CONCLUSIONS

Notwithstanding the contracting officer's finding, the government on appeal still seeks a credit of \$2,324 for a deductive change (gov't br. at 3). The government has the burden of proving how much of a downward equitable adjustment in price should be made on account of the deletion of the two poles. *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971).

Parties may prove quantum using estimates in appropriate cases. Here, however, the estimate presented admittedly contains a mistake and does not account for the costs associated with longer poles and the increased distance between poles. The author of the estimate did not testify at the hearing. The record does not contain sufficient evidence to enable us to adjust the estimate as necessary for our decision on quantum.

Accordingly, we sustain the appeal as to the credit. It is not clear whether the government has actually withheld this amount from appellant's payments. If so, appellant is entitled to the amount of \$2,324 plus interest from the date of receipt of the 13 April 2005 claim until payment (finding 7).

Dated: 17 February 2006

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

PETER D. TING
Administrative Judge
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. 55241, Appeal of Packard Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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