

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Steelhead Constructors, Inc.) ASBCA No. 55283
)
Under Contract No. W9127N-04-C-0019)

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's denial in November 2005 of the \$262,359.04 claim of Steelhead Constructors, Inc. (Steelhead) for providing 7,520 cubic yards of imported sand fill under the captioned construction contract. The government moved for summary judgment on 9 March 2006. Steelhead opposed the motion on 12 April 2006. Movant replied to the opposition on 18 May 2006. Steelhead responded to such reply on 25 May 2006.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

The following facts, which appellant does not genuinely dispute, are taken from respondent's motion, appellant's opposition and the Rule 4 file, as supplemented by the parties' 3 and 9 August 2006 letters and enclosed contract documents, and which the Board deems included in Rule 4, tab 20.

1. On 22 June 2004, before contract award, the U.S. Army Corps of Engineers, Portland District (COE), and Tillamook County applied to the Oregon Parks and Recreation Department (OPRD) for permission to perform work regarding the North

Jetty Revetment at Tillamook Bay, Oregon (app. opp'n, Ramstrom decl., ¶¶ 3, 8). The application listed the potential impacts on the site and steps that would be taken to minimize the impacts, as set forth below:

Potential Impact	Steps that will be Taken to Minimize Impacts
Shoreline dune material will be prevented from eroding and contributing to littoral system	Exavated [sic] sand will be re-placed at the toe of the completed revetment. Additional sandfill will be placed at the completed tow [sic] to address material prevented from eroding.
Potential for increased erosional stress on fronting and adjacent beach land	Sand to be placed at revetment toe specified at a coarser D50 (0.50 mm) to resist erosional stress. Cobble stone feature added a [sic] north end to absorb wave energy and reduce potential for flanking.
Narrowing of beach width fronting revetment	Excavated and additional sand to be placed at completed revetment toe.

(App. opp'n, Ramstrom decl., ex. 2 at 6)

2. OPRD approved the application and issued a permit for the revetment on 25 August 2004 (app. opp'n, Ramstrom decl., ex. 2 at 1). Condition 4 of the permit stated:

As proposed in the USACE Tillamook North Jetty Revetment Coastal Engineering Report, May 2004 [USACE Engineering Report], The Permittees shall place sand brought in from off-site in front of the revetment, in addition to sand excavated from the toe trench. The off-site sand will be coarser than existing beach sand as specified (D50, 0.50mm).

Condition 4 required that for the minimum revetment length of 210 feet, 3,120 cubic yards of off-site sand and 4,000 cubic yards of toe trench sand would be placed, and for each additional foot of revetment length, an additional 27.5 cubic yards of off-site sand and an additional 13.8 cubic yards of toe trench sand would be placed. (App. opp'n, Ramstrom decl., ex. 2 at 2)

3. On 2 September 2004 the COE awarded to Steelhead Contract No. W9127N-04-C-0019 (the contract) in the amount of \$526,680 for “quarry stone shoreline erosion protection at the root of the Tillamook North jetty” near Tillamook, Oregon. The contract included the FAR 52.243-5 CHANGES AND CHANGED CONDITIONS (APR 1984) clause. (R4, tab 20 at 00010-1, 00700-ii)

4. The contract required Steelhead to excavate for, and to construct, a 210-foot revetment along the north shoreline to prevent failure of the “weakening north jetty root” (R4, tab 20 at 02200-1, -2, 00800-3, drawing TM-347-1).

5. Contract line item number (CLIN) 0003 was for excavation. The respective estimated quantities for sub-CLINs 0003A and 0003B were 2,960 and 1,040 cubic yards (CY), totaling 4,000 CY, priced at \$8.00/CY. (R4, tab 20 at 00010-3) The measurement for payment of CLIN 0003 was “the number of [CY] excavated between original ground lines established by the Contractor survey, and lines and grades as shown or as determined in the field by the project engineer” and CLIN 0003’s price included backfilling “the excavated material along the toe upon completion of the revetment” (R4, tab 20 at 01270-2, ¶ 3.3).

6. Specification § 02200, EXCAVATION, provided in relevant part:

1.1 GENERAL INFORMATION

This section covers excavation for the base of the revetment, backfill of suitable excavated material along the toe upon completion of the revetment and disposal of unsuitable excavated material.

....

3.1 EXCAVATION

Excavation shall be performed along the lines and grades and to the dimensions shown. . . . Suitable excavated material shall be placed along the toe upon completion of the revetment and unsuitable excavated material shall be disposal [sic] of in accordance with Federal, State and Local regulations. Suitable material is naturally occurring beach sand.

....

3.3 DISPOSAL OF EXCAVATED MATERIAL

Sand and rock material excavated from the site shall be used to backfill adjacent to the completed revetment. . . .

(R4, tab 20 at 02200-1, -2)

7. CLIN 0008 was for sand fill. The respective estimated quantities for sub-CLINs 0008A and 0008B were 1,680 and 1,440 cubic yards, totaling 3,120 CY, priced at \$6.00/CY. (R4, tab 20 at 00010-3) The measurement for payment of CLIN 0008 was “the number of [CY] of imported sand placed between the original ground lines, established by the Contractor survey, and lines and grades as shown or as determined in the field by the project engineer.” (R4, tab 20 at 01270-3, ¶ 3.8)

8. Specification § 02723, SAND FILL, provided in pertinent part:

2.1 SAND

Sand shall consist of soils from sources approved by the Contracting Officer. Sand may be either naturally or artificially proportioned and blended, shall be uniform and homogenous throughout, free from deleterious materials, vegetation, roots, trash, and organic matter. Recommended sand shall be reasonably well graded and shall meet the gradation of 0.20 mm to 0.70 mm with the D50 equal to 0.50. Minimum requirements for sand shall be poorly graded, shall have a D50 of no less than 0.25 mm, and have no more than 5 percent (by weight) of the material passing the #70 U.S. Standard sieve. Sand shall not be borrowed from the beach at the project site.

....

3.2.1 . . . Sand shall be placed as shown on the drawings. . . . Perform additional shaping necessary to produce a smooth sand surface.

(R4, tab 20 at 02723-1, -2)

9. The contract included the following options clause:

3. OPTIONS TO INCREASE QUANTITIES

The Government may exercise options to increase the quantities in line items 0003 through 0008 by written notice to the contractor up to the maximum additional quantities indicated below. The unit prices for optional additional quantities shall be the same as the line prices for the

mandatory line items. These optional additional quantities act to insert additional lengths of revetment at the middle portion of the project between the tie to the jetty and the 100-foot cobble fill transition. Exercise of the maximum additional quantities would result in construction of a revetment that would extend from station 0+00 to station 3+60 and a transition revetment from the existing jetty to Station 0+00 and a cobble fill transition beyond station 3+60. . . .

a. Line Item No. 0003, Excavation. The Government may unilaterally exercise the right to increase the Excavation quantity up to an additional 2200 cubic yards (yd³).

. . . .

f. Line Item No. 0008, Sand Fill. The Government may unilaterally exercise the right to increase the sand fill quantity up to an additional 4400 yd³[.]

(R4, tab 20 at 00010-4)

10. The contract included five typical cross-sections and one drawing.

(a) The first three cross-sections depicted the revetment and noted: “Excavated sand will be temporarily stockpiled and then placed at constructed toe of revetment.” The “toe” is a structural element at the lowest, seaward edge of the revetment. (R4, tab 20 at Attach. A-5; Shongood decl. at ¶¶ 4-5) The fourth cross-section, “Sand Fill Section,” depicted the revetment and “sandfill” from lower elevations of 8 feet sloping to 6 feet (194 feet from the revetment’s shore side), to an upper elevation of 14 feet with a width of 135 feet to 145 feet. Its note 1 stated: “Existing beach slope and elevation will determine necessary top width to apply full sand Fill volume.” Its note 3 stated: “Place imported sand first. Place excavated sand on top of imported sand.” The fifth cross-section is immaterial. (R4, tab 20, attach. A-5 at 4, 5)

(b) Drawing No. TM-347-1, Note 3, stated: “REVETMENT WILL BE CONSTRUCTED TO A MINIMUM LENGTH OF 210', WITH AN OPTION TO INCREASE THE LENGTH UP TO A MAXIMUM OF 360'.” The drawing showed two plan views, each depicting the revetment with station 00+0 adjoining the existing jetty and transition to the south. One plan view showed the revetment extending to station 2+10 adjoining the new cobble fill to the northeast, designated “MIN. LENGTH”, and the other showed the revetment extending to station 3+60, designated “MAX.

LENGTH". Both plan views designated the seaward area adjoining the north and west sides of the revetment as "SANDFILL." (R4, tab 20)

11. On 19 September 2004 the government notified Steelhead that it was not in compliance with contract specifications, and verbally directed it to place imported sand at the toe of the revetment structure. The next day Steelhead responded that "there maybe [sic] enough suitable excavation to complete the sand fill section, therefore import sand may not be required." (R4, tab 17)

12. On 22 September 2004, unilateral contract Modification R00001 exercised the government's option to increase the revetment length from 210 to 360 feet, the quantities of excavated sand (CLIN 0003) from 4,000 CY to 6,200 CY and of imported sand (CLIN 0008) from 3,120 CY to 7,520 CY (R4, tab 20).

13. The government's 28 September 2004 letter to Steelhead stated that the "sand fill section shown in typical cross-section 4 is required to be constructed using imported sand first" and "the Government would be directing the placement of 7,520 [CY] of imported sand fill" (R4, tab 16).

14. Steelhead's 29 September 2004 letter to the COE recited note 3 on Typical Cross-Section 4, and stated that this note "indicates that both excavated sand and import [sic] sand are to be incorporated in the typical section for Sand Fill, and that the import sand shall be covered with excavated sand." Steelhead concluded that the project engineer needed to determine "where in the sand fill section the import sand is to be placed." (R4, tab 15 at 1-2)

15. The COE accepted Steelhead's performance of the contract as complete on 17 November 2004 (R4, tab 11).

16. On 5 January 2005, appellant submitted a certified claim for \$262,359.04 to the contracting officer. Steelhead asserted that the government implemented the OPRD shore alteration permit by changing the lines and grades of the sand fill which increased the amount of sand fill required, and directed appellant to import 7,520 cubic yards of sand fill due to such change. (R4, tab 4 at 2, app. G)

17. The contracting officer denied Steelhead's foregoing claim in its entirety on 23 November 2005 (R4, tab 2).

POSITIONS OF THE PARTIES

Movant states that the question is whether the contract "required importing sand from offsite for use as 'sandfill'" (mot. at 1). It asserts that there is no genuine dispute of

the material fact that it accepted appellant's \$18,720 bid on CLIN 0008, at \$6.00 per cubic yard for 3,120 cubic yards of imported sand, and argues that its 19 September 2004 oral direction for appellant to use CLIN 0008 imported sand was not a change to the contract (gov't mot. at 2-3, 6-7).

Steelhead argues that (1) the government's proposed interpretation of the contract requirements ignores or renders meaningless key contract provisions, namely that § 02200 defined "suitable material" as "naturally occurring beach sand" and required Steelhead to backfill and place all suitable, excavated material adjacent to and along the revetment toe, without limiting the quantity of such material (§§ 3.1, 3.3), for payment under CLIN 0003, whereas Steelhead's interpretation of the CLIN 0003 and 0008 requirements harmonizes all contract provisions (app. opp'n at 6, 8, 10, 12); (2) genuine issues of material fact are in dispute concerning what Steelhead offered (allegedly that imported sand was required only if there was an insufficient amount of excavated material for placement) and whether Steelhead stockpiled a sufficient amount of suitable excavated material such that the government's direction to provide 3,120 CY of imported fill constituted a contract change (app. opp'n at 9-12; Ramstrom decl., §§ 6, 7); and (3) additional discovery is warranted to fully defend against the motion to determine the nature and extent of the government's pre-bid dialogue with OPRD regarding the permit that the government received for the project but failed to disclose to bidders, which permit mandated use of specific quantities of imported and excavated sand, and the motion does not permit summary judgment on Steelhead's count of superior knowledge (app. opp'n at 13-14).

Movant replies that Steelhead's interpretation allowing it to place exclusively excavated beach sand is unsound because it would make surplus the requirements of CLIN 0008 for imported sand of specified grade and weight, and would be senseless in view of the government's perceived need to replace beach sand with coarser, heavier imported sand in order to stabilize the jetty (gov't reply br. at 6-9).

Steelhead responds that there are no solicitation or contract provisions that support movant's contention that an essential element of its jetty design was the underlying layer of coarser, heavier, stabilizing sand (app. reply br. at 2), and movant's contentions that the contract requirements to place excavated sand over the coarser, imported sand, and also to place excavated sand along the toe of the revetment are inconsistent, because "the 'toe' of the revetment is at the bottom of the structure and not the top" (app. reply br. at 3; Shongood decl., §§ 4-5 and exs. 1, 2 thereto).

DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *U. S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001).

I.

The analytic framework of rules to resolve disputed contract terms is well established. First, we must determine whether the disputed provision is clear and unambiguous, *i.e.*, there is only one reasonable interpretation thereof. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). In such case, the trial court may not resort to extrinsic evidence to interpret it, *see Coast Federal Bank FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003). We must interpret the contract terms as a whole, give reasonable meaning to all of its parts and avoid conflict or an interpretation that renders meaningless or surplusage any of its provisions. *See Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996).

If there is more than one reasonable interpretation of the disputed terms, such terms are ambiguous. *Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996). One then must determine whether such ambiguity is patent or latent, *see Froeschle Sons, Inc. v. United States*, 891 F.2d 270, 272 (Fed. Cir. 1989).

We believe that movant's is the only reasonable interpretation of the contract provisions with respect to the placement of imported and excavated sand at the constructed revetment. The contract required Steelhead to place sand fill, *i.e.*, imported sand, "as shown on the drawings" (SOF, ¶ 8). The fourth cross-sectional drawing depicted sand fill from base elevations sloping from 8 to 6 feet to an upper elevation of 14 feet and stated: "Place imported sand first" and "[p]lace excavated sand on top of imported sand" (SOF, ¶ 10(a)). The contract required Steelhead to back-fill suitable excavated sand "along the toe" "adjacent to the completed revetment" "at constructed toe of revetment" (SOF, ¶¶ 5, 6, 10(a)).

Steelhead's 29 September 2004 letter to the COE interpreted Note 3 on Typical Cross-Section 4 to indicate "that both excavated sand and import sand are to be incorporated in the typical section for Sand Fill, and that the import sand shall be covered with excavated sand" (SOF, ¶ 14). Steelhead thereby confirmed that it interpreted the contract to require placement of both imported and excavated sand, not merely excavated sand if it were sufficient to fill the designated area and elevation.

Steelhead's interpretation of the contract provisions set forth in opposition to the motion -- to require it to place imported sand only on the condition that there is an insufficient quantity of suitable excavated material for placement -- is unreasonable because the contract did not expressly and unequivocally provide for the "conditional" use of imported sand under CLIN 0008, and would permit Steelhead to avoid altogether the mandatory ("shall be placed") -- not permissive or conditional -- requirement to place imported sand (SOF, ¶ 8).

II.

To recover for undisclosed superior knowledge, the contractor must prove that: (1) it undertook to perform without vital knowledge of a fact which affected performance costs or duration, (2) the government was aware that the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied by the government misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information. *See Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir.1994), *aff'd on other grounds*, 516 U.S. 417 (1996).

Steelhead has not shown that any "vital knowledge" in the COE's pre-award application to OPRD or in "Condition 4" of OPRD's permit issued to the COE (SOF, ¶¶ 1-2) was not disclosed to bidders and prescribed in the contract. The contract plainly required Steelhead to place a minimum of 4,000 CY of excavated sand (CLIN 0003) and to place a minimum of 3,120 CY of imported sand (CLIN 0008) (SOF, ¶¶ 5-8).

We conclude that the COE's pre-bid knowledge of the OPRD application and permit terms that mandated use of specific quantities of imported and excavated sand, undisclosed to bidders, was essentially equivalent to the information stated in the contract and its specifications. Accordingly, we need not defer decision on this motion for summary judgment to allow Steelhead to discover additional facts regarding the USACE Engineering Report, or the OPRD application and permit.

We grant respondent's motion for summary judgment. The appeal is denied.

Dated: 22 August 2006

DAVID W. JAMES, JR.
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. 55283, Appeal of Steelhead Constructors, Inc., rendered in conformance with the Board's Charter.

Dated:

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