

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Mass Construction Group, Inc.) ASBCA No. 55440
)
Under Contract No. W912KC-04-C-0020)

APPEARANCE FOR THE APPELLANT: Raymond L. DeLuca, Esq.
Pepper Hamilton LLP
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
LTC Brian J. Godard, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL
PURSUANT TO BOARD RULES 12.3 AND 11

This is a timely appeal of a contracting officer's (CO) decision denying appellant Mass Construction Group, Inc.'s (Mass) claim for a differing site condition in an amount of \$81,372.77. Mass opted to use the accelerated procedures provided by Board Rule 12.3; and the parties agreed to submit the appeal on the record pursuant to Board Rule 11. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601–613, is applicable; and only issues of entitlement are before us for decision.

JURISDICTIONAL ISSUE

After the parties filed two sets of briefs on the merits, the Army submitted a partial motion to dismiss for lack of jurisdiction. It contended that the Army's assessment of liquidated damages against Mass was not properly before the Board because it was not the subject of a claim and a CO's final decision. Mass opposed the motion, arguing that the matter of liquidated damages was inextricably connected to its requested extension of the contractual completion date.

In the differing site condition claim which it filed on 4 October 2005, Mass did not even mention the issue of liquidated damages (R4, tab 76, attach. R). Moreover, in the final decision which she issued on 16 February 2006, the CO, SMSgt. Linda M. Corcoran did not even allude to the question of liquidated damages (R4, tab 76, attach. S). Indeed, Mass's first reference to this issue appeared in the initial brief which it filed on 1 September 2006 (app. br. at 18). Because the Army's purported assessment of

liquidated damages has not been the subject of a CO's final decision, we lack jurisdiction to review this issue. Accordingly, the Army's partial motion to dismiss is granted.

SUMMARY FINDINGS OF FACT

1. The Pennsylvania Air National Guard issued Solicitation No. W912KC-04-R-0012-0004 on 30 April 2004 for construction of a "Special Mission Equipment Maintenance Facility at 193rd Special Operations Wing, Middletown, Pennsylvania" (R4, tab 1 at 1). As stated in the sworn declaration of Mr. Richard M. Ketner:

The 193rd Special Operations Wing ... is located on the eastern end of the Harrisburg International Airport in Middletown[,] Pennsylvania, approximately 5 miles southeast of Harrisburg. The Airport is bounded by the Susquehanna River to the south and the Swatara Creek to the east. A smaller creek, Post Run, is located on the Airport property and runs along the Base's eastern property line. The Airport's runways and facilities are parallel to the River. Due to the close proximity to the [R]iver, the [A]irport is surrounded by a levee extending to a height of approximately 15 feet.

(Resp. br., attach. 1 at 1).¹

2. On 18 April 2003, in preparation for commencement of work on the underlying project, respondent had employed Gannett Fleming Engineers and Planners to conduct soil boring tests to determine subsurface conditions, including the water table. The tests demonstrated that the water table was located between three and one-half and six feet below the surface (R4, tab 11). After these tests were conducted but prior to the offerors' site visit, the area was completely graded. This resulted in the removal of several inches of soil and a concomitant rise in the level of the water table (Resp. br., attach. 4 at 1).

3. The solicitation provided that the offerors were "urged and expected to inspect the site where the work will be performed." Accordingly, "an organized site visit" was scheduled for "10:00 a.m., Local time, 12 May 2004" (R4, tab 1 at 31). In conjunction

¹ Mass disputes that Post Run is a creek and, instead, argues that it is a "drainage ditch" (app. br., affidavit of Mr. Sola at 2). The Board finds that a "body of water" ran along the Base's eastern property line approximately 15 feet from the edge of the work site (R4, tab 8).

with the site visit, subsection 02220.1.06.H.1 of the solicitation advised offerors of the following: “Subsurface conditions data: available at the Contracting Officer’s office” (R4, tab 4 at 02220–4). This data included results of the boring tests conducted by Gannett Fleming Engineers (resp. br., attach. 2). Also available to potential offerors during the site visit were “maps, site surveys, site historical data, environmental reports, and design information” (resp. br., attach. 1 at 1).²

4. The site visit was conducted as scheduled (R4, tab 12). But the offerors did not tour the project site; nor did they examine at the CO’s office the information made available to them by respondent (resp. br., attach. 1 at 1-2; attach. 4 at 1).

5. Contract No. W912KC-04-C-0020 was awarded to Mass on 30 September 2004 in a fixed-price amount of \$2,919,323 (R4, tab 1 at 2). Significantly, the contract incorporated by reference the FAR clauses “at 52.236-2, DIFFERING SITE CONDITIONS, and 52.236-6, SITE INVESTIGATIONS AND CONDITIONS AFFECTING THE WORK.” Pursuant to subsection (a) of the latter clause, Mass acknowledged “that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost” Also pursuant to that subsection, Mass acknowledged “that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract” (emphasis added) (R4, tab 1 at 31).

6. The notes contained in the drawings are also pertinent. For example, General Note 2 of Drawing C1 provided:

It is the contractor’s responsibility to field verify actual site conditions prior to the start of any work. There is no warranty or guarantee on the completeness or correctness of the existing condition information. Any discrepancies found shall be brought to the immediate attention of the contracting officer prior to the start of work.

(R4, tab 10)

² Mass contends at p. 12 of its complaint that respondent expressly disclaimed the accuracy of its boring tests; however, Mass does not identify the source of this disclaimer. Therefore, the Board declines to give credence to this allegation.

7. Also included in the contract were several pertinent specifications. Subsection 01560.1.06 “Water Control” required Mass to “A. Grade site to drain. Maintain excavations free of water. Provide, operate, and maintain pumping equipment.” (R4, tab 2 at 01560-2)

Further, subsection 02210.1.05.A stated:

Classification of Excavated materials: No consideration will be given to the nature of materials encountered in site grading operations. Therefore, as unclassified excavation, no additional payment will be made for difficulties occurring in excavating and handling of materials.

(R4, tab 3 at 02210-3)³

In addition, subsection 02220.1.06.G. provided:

- G. Dewatering: Keep excavations free from water during the performance of the work. Provide and operate dewatering equipment of sufficient capacity for dewatering the excavations.
 - 1. Provide for the disposal of the water removed from excavations in such manner as not to cause injury to the public health, to public or private property, to the work of others, to the portion of the work completed or in progress, nor to cause an impediment to the use of streets, roads and highways.
 - 2. Control groundwater and surface water during construction in order to maintain soil stability.
 - 3. Maintain the water table elevation sufficiently below the levels of excavation so that slopes will remain stable and bottoms of excavations will not become loosened by flow of water.
 - 4. If the foundation material loses its strength due to improper dewatering techniques, over-excavate the material and replace it with Structural Foundation Backfill at no increase in Contract Price.

³ Identical provisions may be found at 02220.1.06.A (R4, tab 4 at 02220-3), and 02221.1.06.A. (R4, tab 5 at 02221-2).

5. Dewatering efforts are to be maintained until excavations are closed or when determined by the contracting officer or contracting officer's [representatives] no longer necessary.

(R4, tab 4 at 02220-4)⁴

Finally, subsection 02270.2.01.E. required Mass to provide a "silt collection device for pumped dewater application" (R4, tab 6 at 02270-3).

8. The CO gave Mass notice to proceed on 1 November 2004 (R4, tab 13). Mass commenced site clearing and began excavation in December. By 7 December 2004, Mass had already fallen behind schedule (R4, tab 13 at 2). On 14 December 2004, Mass forwarded to respondent Request for Information (RFI) No. 7. It stated:

We have encountered significant areas of unsuitable bearing and unsuitable materials during the excavation. We have ceased excavation operations. Please advise the course of action we are to follow. This condition is causing a significant delay to the project. We required [sic] direction to proceed.

On 15 December 2004, Mr. Ketner, the Contracting Officer's Representative (COR) replied, in part, as follows:

Dewatering efforts need to be maintained until water levels are below working elevations and soil stability can be maintained. Dewatering needs to be performed from a sump which is separate from the footing excavation so that water movement caused by the dewatering activity doesn't deteriorate the footing excavation.

"Working" of soil subgrade (below the 2 feet of 2a aggregate base) shall be kept to a minimum. It was observed that the contractor was using a smooth drum roller to compact the subgrade in an effort to achieve the 2000# bearing. Overworking of the clay/silt/sand soil such as found at this site causes moisture to rise and soil to become more plastic.

⁴ Similar provisions are found at 02221.1.06.G. (R4, tab 5 at 02221-4).

Mr. Ketner concluded by stating, “Repair of overexcavation shall be at no additional cost to the Government” (R4, tab 15).

9. In a further response to Mass’s RFI No. 7, Mr. Ketner stated:

We are looking at the RFI now. In the meantime, I need to point out for the record that this RFI is very misleading for the following reasons -

There are not “significant areas of unsuitable bearing and unsuitable materials”. We were shown only two isolated spots in 132’ of excavation and when questioned about the one (northernmost) a test was performed and it was determined that 2000# bearing could be achieved.

The second area has subgrade ground water which was anticipated for this project yet the excavator has not installed any dewatering pit near the excavation, they were only dewatering from within the trench which further aggravates soil problems at the base of excavation. They also were not following the required erosion and sedimentation program with their discharge; this must be addressed immediately.

We will review the southernmost corner with our geotechnical engineer and let you know the results, but in the meantime the current dewatering operation should be corrected since it is only making the situation worse.

(R4, tab 16)

10. On 30 December 2004, Mr. Ketner forwarded an e-mail to the CO in which he wrote, in part:

Wed 29 Dec – we noticed that MASS was dumping stone into the south footer excavation which had close to 2 feet of standing water. The required soil bearing tests were not performed in this area. Dewatering efforts have been intermittent and minimal at best. This was discussed previously in RFI 007, copy attached.

Site was known to have a water table and marginal soil conditions, that is why the AE designed heavy footers. Site

dewatering must precede excavation and be maintained until footer or subbase work is well above the water table (as you may recall from the Interim Warehouse project).

This observation took place in early afternoon. I told MASS' superintendent that excavation required bearing tests and tha[t] putting stone in standing water is not acceptable. We did not instruct them to discontinue work.

(R4, tab 17) Also, on 30 December 2004, Mr. Ketner forwarded a letter to the CO in which he recounted a site visit of that date. He stated, in part:

An update I visited the site around 1130 today (Thursday). There were no dewatering pumps in place (or running). Water level in the excavation was at about 18" below proposed footer. We also measured the depth of the southeast dewatering sump. It was not any deeper than the footer excavation. The sump must be deeper than the work area, so that water goes to the sump rather than the work area (intent of the spec which was referenced in RFI 007).

(R4, tab 18)

11. On 12 January 2005, Mass forwarded RFI No. 13 to Mr. Ketner, in which it stated:

We have reviewed the site conditions and boring log information provided to us, with our testing lab, as well as a registered engineer and offer the following: We are presently in an area of the foundation excavation that according to the boring records gets significantly worse as depth increases. Over excavation and deeper dewatering pose the risk of making this area even more unstable than it is. Our dewatering actions to date have been deemed suitable for the foundations completed to date, but given the material encountered, based on the boring log, it is very doubtful that the minimum required bearing will be achieved. If we attempt to dewater deeper, and the bearing fails, the areas we have disturbed will then be unsuitable to attempt foundation widening[] There is great concern that over excavation as well as deeper dewatering could have a destabilizing effect on subsurface conditions, as well as adjacent completed

foundations. In accordance with spec. section 02220, Part 3.02, E Item 2, indicates that if over excavation is required below the planned subgrade that the additional work would be paid to the contractor. At the locations in question the engineer and testing lab feel that about 10 feet additional excavation will be required to meet the bearing requirement, based upon the information contained in the boring reports. This would be a very significant cost. I have enclosed a copy of their report, as well as a proposed solution, and request an onsite meeting with your structural engineer to discuss the possible solutions to these conditions. Please advise at your earliest possible convenience.

Mass attached to RFI No. 13 boring log information, which had been compiled by Testing Services, Inc., its testing lab. In a report dated 5 January 2005, the lab concluded, *inter alia*, that “the groundwater table is situated about three feet below the footing level” (R4, tab 76, ex. B).

12. In a progress meeting held in January 2005, the CO noted that “several items are behind on the revised (second) schedule.” In addition, Mr. Ketner offered his opinion that Mass’s dewatering efforts were inadequate. (R4, tab 19 at 2)

13. On 19 January 2005, Mr. Ketner responded to Mass’s RFI No. 13. He stated that the “engineer has determined that they [sic] are comfortable with the soil analysis and foundation design as presented by the Contract Documents.” He also wrote that Mass’s dewatering efforts were inadequate, that the contractor was excessively working the subgrade causing the soil structure to deteriorate, and that Mass had allowed water to accumulate in the excavation (R4, tab 24; tab 76, ex. C).

14. On 20 January 2005, Mr. Ketner forwarded the following e-mail to the CO:

Please note that there is no one on site today. The last site progress was on 4 January. We also have not received major component submittals such as structural steel and HVAC systems, and have not received follow-up resubmittals. These topics have now been the subject of discussion at several progress meetings over a period of 6 to 8 weeks.

According to the project schedule, we are now about 4 weeks behind schedule (6 weeks if you look at submittals).

I would like to request that Contracting request a recovery plan from MASS or issue a Cure Notice if appropriate. The project performance period is realistic and MASS had indicated earlier that they saw no problem with the timeframe, but if submittals and progress continue to fall at this rate, we will not achieve the anticipated completion date.

(R4, tab 25)

15. On 21 January 2005, Mass forwarded RFI No. 18 to the COR which it described as a "Response to Subsurface RFI 13 Response and Engineers comments." It stated, in part, that the subsurface conditions were not consistent with the contract documents and that the standard dewatering methods were "unworkable." (R4, tab 26) Mr. Ketner replied on 21 January 2005, stating, in part, that "we are comfortable with the Contract as presented and feel that all elements have been addressed." He referred, once again, to Mass's inadequate dewatering plan. (R4, tab 27)

16. On 8 February 2005, the parties held another progress meeting. Mr. Ketner complained that "to date, two dewatering sumps have been operated only intermittently and that they only extend to the depth of the footing excavation which is not deep enough." Mass replied that they did not "feel that full dewatering is achievable." (R4, tab 28)

17. On 10 February 2005, Mr. Kenter forwarded an e-mail to the CO's office in which he stated, in part: "Just a note for record that no one is working on site today. Site conditions are muddy but workable for this current stage of construction (and given the tight schedule)" (R4, tab 29).

18. On 14 February 2005, Mass sent a letter to the CO in which it stated that it had tested a ground water sample and that it had encountered hazardous substances (R4, tab 30). On 15 February 2005, Mr. Ketner advised Mass that the government was reviewing the test results (R4, tab 31). On 22 February 2005, the CO informed Mass to suspend work at the job site pending review of the ground water test results (R4, tab 36).

19. On 4 March 2005, Mr. Ketner advised the CO that he had conducted additional testing of the ground water at the site and had concluded that "the levels of the compounds found at the site are within allowable" environmental limits. He advised that work should resume immediately (R4, tab 38). Also on 4 March 2005, the CO directed Mass to resume work on Monday, 7 March 2005. In addition, she revised the contractual completion date from 24 September 2005 to 4 October 2005 (R4, tab 39).

20. On 15 March 2005, the CO sent the following letter to Mass:

This is to notify you that your company has failed to progress on this project in a timely manner. Work for this project started November 2004 with a completion date of September 24, 2005. Submittals were due in January 2005, as the progress meeting minutes reflect we have received excuses for several months and we are still waiting on outstanding submittals. Also, I have made several requests for a progress recovery schedule to see how your company plans to finish this project by the October 4, 2005 completion date, however we have not received that to date. Our daily records indicate there were several months of mild winter weather and little or no work has been completed on the site. I am very concerned that you will not be able to meet the revised October 4, 2005 completion date.

CURE NOTICE

You are notified that the government considers your lack of performance a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default under the terms and conditions of the FAR Clause 52.249-10 Default (Fixed-Price Construction) (APR 1984) of this contract.

END OF NOTICE

Your written reply to this notice must be received within 5 calendar days of receipt. Your written reply shall include your anticipated progress schedule that shows how you intend to complete the project by October 4, 2005. You shall also include all outstanding material submittals in the proper format.

(R4, tab 42)

21. On 21 March 2005, Mass replied to the CO's cure notice. It stated that "the timing of Mass's submittals is in accordance with the contract documents." It also enclosed a revised progress schedule. Finally, Mass stated that it intended "to seek reimbursement for all costs and time impacts associated with . . . differing site conditions" (R4, tab 44).

22. On 22 March 2005, the parties held another progress meeting. The CO noted, in part, that: “Mass had planned on 6 dewatering wells. They are now planning on using 4 (2 are operational at this time; 2 will be connected this afternoon)” (R4, tab 45). On 30 March 2005, Mr. Ketner e-mailed the CO that Mass had only two workers on the job site that day although the weather was excellent (R4, tab 46).

23. On 31 March 2005, the CO replied to Mass’s response to her cure notice. She stated that Mass had not forwarded required submittals in a timely manner. In addition, the CO concluded that there were no differing site conditions at the job site, as it was evident that there was a high water table (R4, tab 47).

24. On 1 April 2005, Mr. Ketner forwarded an e-mail to Mass in which he noted that the job site was deserted on that date as early as 3:20 p.m. He also stated that he was “amazed by the lack of performance being demonstrated by Mass Construction on this project” (R4, tab 48). Similarly, on 10 May 2005, Mr. Ketner informed Mass that there was only one laborer at the job site at 3:55 p.m. on that date (R4, tab 52). In addition, on 13 May 2005, Mr. Ketner informed Mass that all of its workers had left the job site early on that date (R4, tab 53). Also, in a progress meeting of 24 May 2005 the COR stated that, “at Mass’[s] request, extended hours were agreed to several times but were seldom utilized” (R4, tab 54). On 7 June 2005, Mr. Ketner informed Mass that “even after several inquiries on our part, the site is continuing to shut down well before 3:30.” He also noted that “the project is currently about 11% complete (physical, not monetary), while 65% of the Contract Time has expired (R4, tab 55). Despite these problems, Mass informed the CO in a progress meeting on 19 July 2005 that it would meet the revised completion date of 4 October 2005 (R4, tab 57 at 3). Mass repeated this assurance in a progress meeting held on 30 August 2005 (R4, tab 58 at 4). At the next progress meeting, held on 13 September 2005, Mass stated that it was still on schedule (R4, tab 59 at 4). However, Mass did not complete the job as planned, and the CO cancelled a progress meeting scheduled to be held on 11 October 2005 because “the project [was] not close enough to completion” (R4, tab 60 at 6).

25. As of 20 November 2005, an inspection for beneficial occupancy could not be scheduled because too many work items had not been addressed by Mass (R4, tab 63 at 7). In a progress meeting held on 6 December 2005, Mr. Ketner stated that Mass had not addressed numerous items on the preliminary punch list (R4, tab 66 at 2). On 13 December 2005, Mr. Ketner stated that Mass had not addressed numerous items on the preliminary punch list (R4, tab 66 at 2). On 13 December 2005, Mr. Ketner presented Mass with a six-page list of items which needed to be corrected as a result of an inspection for beneficial occupancy conducted on 1 December 2005 (R4, tab 67). Many of these items had not been corrected as of 16 December 2005 (R4, tab 68).

26. On 4 October 2005 Mass forwarded a claim to the CO in which it alleged that it had encountered differing site conditions at the job site pursuant to FAR 52.236-2(a)(2). Specifically, Mass argued that there were “[u]nknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” It concluded that it was entitled to recover \$81,372.77 in additional costs “incurred in dewatering its excavations” and “a corresponding extension of its contract time, if necessary” (R4, tab 76, ex. R at 2).

27. In a final decision dated 16 February 2006, the CO “partially approved” Mass’s claim to the extent that she agreed to meet with Mass’s representatives “to possibly work out a settlement of their actual costs.” The CO also stated that she believed that Mass “was aware of the site conditions.” (R4, tab 76, ex. S) The parties were unable to achieve a settlement and Mass obtained no financial relief. On 1 May 2006, it lodged a complaint with the Board. The Board’s Recorder docketed the appeal as ASBCA No. 55440.

DECISION

As a preliminary matter, we reject Mass’s contention that respondent, through the CO’s “partial approval” of its claim, conceded entitlement (app. br. at 1-2). Clearly, the CO was simply acting in good faith to achieve a settlement. This proved unavailing, and Mass has subsequently achieved no financial relief. Hence, the reason for this appeal.⁵

The Board also rejects Mass’s claim that it encountered a differing site condition pursuant to FAR 52.236-2(a)(2). To recover under this subsection, Mass must prove, *inter alia*, that there were “unknown physical conditions at the site of an unusual nature” Here, the water table at the job site was accurately portrayed by the subsurface drilling logs developed by Gannet Fleming Engineers in 2003 in anticipation of the award of this contract. These logs indicated that water was present as high as three and one-half feet below the surface (finding 2). Prior to the organized site visit the area was graded so that the water table would have been even higher when Mass began to excavate (finding 2). Once it began excavation, Mass actually encountered the water table as high as three feet below the footing level, and its own testing lab portrayed the water table as existing at this level (finding 11). Therefore, what Mass encountered were site conditions which were anticipated long before the contract was awarded.

Mass was alerted by subsection 02220.1.06.H.1. of the contract specifications that subsurface conditions data were available at the CO's office (finding 3). In addition,

⁵ The Board’s review is, of course, *de novo*. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*).

many other types of topographical data were available for its review at the scheduled site visit. However, Mass's representatives did not review any of this data, and, therefore, put Mass at risk of any unexpected subsurface conditions which it encountered (finding 4).

CONCLUSION

The appeal is denied; respondent's partial motion to dismiss for lack of jurisdiction is granted.

Dated: 30 October 2006

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 55440, Appeal of Mass Construction Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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