

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Fuel Tank Maintenance Co., LLC) ASBCA Nos. 54402, 54516
)
Under Contract No. N44255-00-C-3008)

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OPINION BY ADMINISTRATIVE JUDGE THOMAS

Appellant Fuel Tank Maintenance Co., LLC (FTM), on behalf of its subcontractor Democon, asserts a claim for \$702,165.16 in connection with demolition of concrete floors. The claim is premised on theories of a Type 2 differing site condition as a result of unusually hard concrete, or, in the alternative, defective specifications. Delay days are not at issue (tr. 1/97-98). ASBCA No. 54402 is an appeal from a deemed denial of the claim. ASBCA No. 54516 is an appeal from a subsequent contracting officer's final decision denying the claim. The appeals were consolidated for record and hearing purposes.¹ A hearing was held in Seattle, Washington.² Only entitlement is to be decided (tr. 1/9). We sustain ASBCA No. 54402 and dismiss ASBCA No. 54516 as duplicative.

FINDINGS OF FACT

1. On 27 September 2000, the Naval Facilities Engineering Command, Engineering Field Activity NW (EFA) awarded FTM firm fixed-price Contract No. N44255-00-C-3008 in the amount of \$2,624,795 with a contract completion date of 8 October 2001. The contract required concrete repairs at Dry Dock No. 6 at Puget Sound Naval Shipyard, Bremerton, WA. Bilateral modifications increased the amount of the contract to \$4,674,879 and extended the

¹ All citations to the record are to the record in ASBCA No. 54402.

² The government trial attorney who represented the government at the hearing and in briefing has retired.

contract completion date to 21 August 2002. The Resident Officer in Charge of Construction (ROICC) administered the contract for the government. (R4, tab 1 at 1-2, 4 of 56, tab 3, Modification No. P00009 at 2 of 2; tr. 2/45)

2. The contract included FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) (the DSC clause) and FAR 52.243-4, CHANGES (AUG 1987). The DSC clause provides in part:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of... (2) unknown 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.

(R4, tab 1 at 6 of 56)

3. Bid item (d) required “surface preparation of spalled and delaminated concrete in the electrical and mechanical tunnel floors and the pumpwell...” The drawings directed the contractor to remove deteriorated material “to a level of sound concrete.” Where rebar was exposed, the contractor was to remove material, including sound concrete, to a depth of at least 1 ½-inch beyond the rebar. The specifications required the depth of the cavity to be at least 1-inch and limited jackhammers to a 15-pound size. An appendix to the specifications mapped 17,835 square feet of spalls and delaminations in the pump well and various tunnels. Spalled and delaminated concrete is deteriorated concrete that is rotting and falling off. The parties have not pointed to anything in the contract documents alerting prospective contractors that the concrete might be unusually hard. (R4, tab 1 at 3 of 56, §§ 02220, ¶ 3.1.2, 03731, ¶ 3.1.1, Appendix at A-3 and *passim*, tab 2, drawings S-1, general note 7, S-9, note 1; tr. 1/36, 124-25, 127, 2/125, 151-52, 166)

4. FTM initially subcontracted the concrete demolition work to TLH Abatement (TLH), an experienced demolition contractor. Before entering into the subcontract, Mr. Timothy Peter Ozog, TLH’s president, visited the site. He saw “what we believed was... a very straightforward money-making opportunity.” The job was “to remove spalled and delaminated concrete. Spalled and delaminated concrete is real easy to remove.... [I]t’s loose.” (Tr. 1/119-21, 123-26)

5. On 13 February 2001, at a meeting attended by the government inspector, Mr. Shannon O’Dell,³ TLH requested permission to use 60-pound jackhammers instead of 15-pound jackhammers. TLH felt that the use of 15-pound jackhammers would not be feasible for the scope of work. It was agreed that “the next appropriate sized hammer will be used with the understanding that TLH take responsibility for any additional damage caused by

³ Mr. O’Dell was present at the hearing but was not called as a witness.

the use of a hammer not specified in the contract agreement.” (R4, vol. 6, tab 4B, 5th page⁴; tr. 1/126-28)

6. On 15 February 2001, TLH began concrete demolition in the pump well. At the end of March it moved from the pump well to the first tunnel, the East Tunnel Electrical (ETE). The ETE proved to be more difficult than the pump well because the concrete was harder. On 2 April 2001, FTM informed the ROICC in a Request for Information (RFI) on the required profile for spall removal that progress in the ETE was “difficult” because of the amount of sound concrete being removed. On 23 April 2001, Mr. Ozog visited the site to assess progress. According to the QCM, TLH’s “crew is still not making the progress they need in order to fit the time frame. They will have to go back over the spalls and expose the area under rebar that has not been removed.” On 26 April 2001, TLH abandoned the job. (R4, vol. 2, tab 4A, reports 2/14/01, 2/15/01, 3/27/01, 4/23/01 at 2 of 2, vol. 6, tab 4B, report 4/26/01; app. supp. R4, tab 43; tr. 1/129, 131)

7. Mr. Ozog testified credibly as follows about the difficulties TLH encountered:

The 60-pound hammers took care of the spalled, delaminated concrete, but the specification called for any time we found a corroded rebar that we were to dig underneath the rebar by an inch or two....

Well, as soon as you got to the rebar the world changed. It was the hardest concrete we’d ever encountered. And to get underneath that rebar it was just an awesome task. It – I mean I watched guys get a square foot an hour.

(Tr. 1/127-28) TLH attempted to use 90-pound jack hammers, but they were not suited to digging under rebar. TLH did not have the finances to continue the job because of the lack of productivity (tr. 1/132).

8. On 9 May 2001, FTM began concrete demolition with its own forces. It started reworking areas which TLH had failed to complete in the ETE. On 14 May 2001, FTM began removing spalls on the floor of the Mechanical Tunnel East (MTE). There was a considerable problem with spalls “running” (expanding) in the MTE. In mid-July 2001, as FTM attempted to finish the south end of the MTE in preparation for a concrete pour, the spalls were “running faster than [FTM] can keep up with. It seems they will be taking out the whole floor.” As of 24 July 2001, the spalls were “still walking” and FTM was “going to have to go over many of

⁴ During the course of the work, FTM’s superintendent and its Quality Control Manager (QCM) filed daily reports. These reports are included in the record at R4, tabs 4A and 4B. Ex. G-8 tabulates the daily reports. We rely upon the reports for the sequence of events.

the areas.” On 3 August 2001, FTM completed demolition of the floor at the south end of the MTE. (R4, vol. 6, tab 4B, reports 5/9/01, 5/14/01, 7/14/01, 7/24/01, 8/2/01, 8/3/01, 8/4/01)

9. Effective 4 August 2001, FTM subcontracted with Democon to complete the MTE and remove not to exceed 15,000 square feet of concrete in up to three tunnels. Democon was a full service demolition contractor, experienced with concrete demolition. Democon representative Mr. Larry Wilson visited the site before Democon signed the subcontract. FTM told Mr. Wilson that it wanted to get experts in there to do the work. They stated that 60-pound hammers were the best tool based on the previous work that was performed in the tunnel. The plan was for Democon to complete the MTE in two weeks and the Mechanical Tunnel West (MTW) in four weeks. FTM directed Democon to take 4 ½” of concrete out across the board in the MTW because, based on the experience in the MTE, they would end up taking out the bulk of the concrete anyway. Mr. Guy Hampton, Democon’s owner, described the proposed job as follows:

[B]reaking concrete is breaking concrete. I mean, you look at a slab, and we break a lot of concrete, and there’s...nothing that would show us any different that it was going to be a difficult project.

(Tr. 1/32-33, 37-38, 41-42, 44, 49, 152; ex. A-1 at 1, 10, 11)

10. Democon started work on the MTE floor on 13 August 2001. It began with a small crew the first week and ramped up the second week. Instead of the contemplated two weeks, it took approximately seven weeks to complete the work on the MTE exclusive of two weeks lost because of the terrorist attack on 9/11 and shipyard delays. On 11 October 2001, Democon completed the MTE. (R4, vols. 2-3, tab 4A, reports 8/13/01 to 10/11/01 *passim*, vols. 6-7, tab 4B, reports 8/13/01 to 10/11/01 *passim*; ex. G-8 at 10-11)

11. Democon’s superintendent was Mr. Robert Strunk. He had worked for Democon for five years at the time. He testified that Democon could not achieve production rates at the MTE because they could not break the concrete. Normally demolishing concrete with a 60-pound jackhammer is not a problem. Here there were too many equipment failures. The chisel points for the jackhammers broke. Normally, the points don’t break. He reiterated several times that he had “never” seen concrete like this before. If the concrete’s “all fractured and spalled, you ought to be able to break the top part of it off and get it all exposed to a point that they were requesting.... And that wasn’t possible.” (Tr. 1/162, 168-70) We find this testimony credible.

12. Mr. Hampton also testified about the work at the MTE. Mr. Strunk called him at the beginning of the job and said that “we were going to have some major problems on this project, financially” because “it’s the hardest concrete he’s ever seen.” Democon could not achieve production rates. The crew was breaking steels bits in breaking the concrete, which

“isn’t something that you normally encounter; hardened steel bits breaking.” Mr. Hampton visited the site, after allowing a week or so to go by to see if there was some learning, and “[o]bserved that my guys were struggling and the production rates weren’t increasing.” Democon had planned on production of 100 square feet per man; instead they got 50 square feet per crew. In Mr. Hampton’s opinion:

[The reason] had to be the hardness of the concrete. There is no other explanation. I mean we break concrete every day in what we do. And I would have never anticipated this job being this difficult, ever.

(Tr. 1/57-58, 60, 117-18; ex. A-2) We find this testimony credible.

13. On 13 September 2001, FTM wrote EFA reporting *inter alia* a problem with obtaining scheduled outages so that FTM and Democon could mobilize to the westside of the Dry Dock. FTM set forth difficulties associated with the concrete demolition:

Please keep in mind that the signing of Democon as a subcontractor to assist FTM with demolition was a turning point for this project. While Democon is under contract and available to complete work at this time, lengthy delays may result in them taking other jobs in the interim. In this event, they can legally request to be released from their contract due to delays.

Additionally, Democon has begun to voice concerns about financial difficulties and apprehension about timely completion of this job. Also know that FTM and the previous subcontractor have encountered difficulties with the demolition portion of this project and there are no other alternatives for performing this contract. The “word is out” concerning these difficulties and no one wants a part of this job. With this in mind, I believe Democon is looking for a way out of this contract and as mentioned before, may have a legal out if things continue in this direction.

(App. supp. R4, tab 40 at 1)

14. After observing the problems at the MTE, Mr. Hampton began looking for ways to increase production and came up with the idea of high pressure water blasting (“hydroblasting”), something a contractor would not normally do because it is more expensive. On 21 September 2001 FTM submitted RFI 67 to the ROICC proposing hydroblasting. The plan, if the RFI was approved, was to complete the MTE using jackhammers and use hydroblasting for the MTW. The government’s architect and engineer approved hydroblasting as technically acceptable. On 2 October 2001, however, the ROICC

turned down the RFI because of safety and environmental concerns. (R4, tab 14; tr. 1/60-61, 132)

15. Because of unrelated delays, Democon was not able to start work on the MTW until March 2002. During the shut-down period after completion of the MTE, Mr. Hampton persuaded FTM to resubmit the hydroblast method. As Mr. Hampton testified, “I was at kind of my last...straw here, knowing [the] financial impact to finish the West Mechanical Tunnel.” (Tr. 1/73, 76; *see* R4, vols. 3, 4, tab 4A *passim*)

16. On 10 January 2002, FTM submitted to the EFA a presentation on hydroblast prepared by Democon. The presentation addressed the government’s safety and environmental concerns. FTM also submitted proposed revisions to its environmental plan and waste information sheets. The government approved the revised environmental plan. (R4, tabs 16, 17, 18; app. supp. R4, tab 36; tr. 2/48)

17. In early February 2002, at Democon’s request, a potential hydroblasting subcontractor tried to demolish a test patch of concrete. The test was unsuccessful. Their method “pretty much just scratched the surface of the concrete.” (Tr. 1/82, 2/15)

18. On 18 March 2002, a second hydroblasting company, A&B Concrete Coring Company (“A&B”), successfully demonstrated its method. On 19 March 2002, Democon and A&B started work on the MTW. A&B did the initial work in each area. Democon followed along as necessary to do jackhammering in areas which the machine could not reach. The hydroblasting increased productivity. As FTM’s CQC noted on 20 March 2002:

Democon and A&B are working on the Water demolition in the MTW at the North end of the tunnel. This is going well. The high Pressure water does a really good job at removing the spalled concrete and cleaning the rebar. You can see were [sic] the old concrete is still good and it was spalled around it, so the water removed the bad concrete and left little pillars of the sound concrete.

(R4, vol. 8, tab 4B, reports 3/18/02, 3/19/02, 3/20/02 at 2 of 2, *see also* tab 24C after second divider; tr. 1/93-95)

19. On 11 April 2002, Democon informed FTM that “[a]s you know, this project has continuously been beset with problems, changes and delays.” It asserted:

...Democon’s work has been severely impacted by loss of productivity.... In addition, we had to completely change our method of operation for the concrete demolition procedures in an attempt to overcome the defective specifications.

None of this is new to either FTM or the Navy. I am writing to advise you that we will be submitting detailed backup and analysis which explain and support a request for additional compensation related to these problems. In the meantime, we will keep putting forth our best effort to get the work done as soon as possible.

(App. supp. R4, tab 38) On 25 April 2002, FTM forwarded the letter to EFA, stating:

It is the intent of this letter to show FTM's support for Democon's request for monetary compensation due to prior delays and specification problems.

As you are well aware, there have been numerous instances where the specifications and/or the shipyard have caused delays affecting the completion of the contracted work, in accordance with our original plans.... As well, Democon feels the defective specifications are to blame for having to change their concrete removal procedures and their greatly exceeded contract quantities. And we agree with them.

Further more [sic], their 4-week demolition project has turned into 35 weeks, and they are not looking at being completed soon.

(*Id.*, tab 39) The record does not reflect what investigation if any the government may have made in response to this letter.

20. On 12 June 2002, Democon completed the MTW. It did not repair the entire floor of the WMT; the government directed FTM to stop the work at station 578. FTM completed the contract on 6 August 2002. (Ex. G-8 at 16; R4, vol. 5, tab 4A, report 6/11/02, vol. 9, tab 4B, report 6/14/02; tr. 2/53)

21. On 16 October 2002, FTM wrote the ROICC that it was Democon's position that it had encountered unknown site conditions upon commencing work. FTM attached Democon documents arguing that the actual production rates achieved using 60-pound jackhammers were much more laborious than could have been expected. (R4, tab 20) We find the concrete encountered on the job was unusually hard.

22. The government called one of the contract specialists from the ROICC office as a witness. She became involved with the contract in roughly the mid-summer of 2002. She testified that the areas which Democon had worked on would not have been accessible for visual inspection at any time after 16 October 2002. (Tr. 2/45, 53, 58)

23. On 3 March 2003, FTM submitted its final invoice on the contract with “a verbal caveat that there might be a claim still out there pending” (R4, tab 22; tr. 2/54-55). In response, the contracting officer notified FTM on 11 March 2003 that she was withholding final payment on the contract pending confirmation of whether FTM intended to pursue a Request for Equitable Adjustment (REA) on behalf of Democon. The contracting officer stated that “[i]n order to resolve any outstanding issues as expeditiously as possible, you are requested to provide your REA and all supporting documentation as soon as possible.” (R4, tab 23)

24. On 7 April 2003, FTM submitted a REA in the amount of \$702,165.16 on behalf of Democon. FTM included a Contract Disputes Act (CDA), 41 U.S.C. § 601-613, certification. (R4, tabs 24, 24A at 1, 8) We find, based on the context of the submission, which was made after completion of the work, presentation of a final invoice, verbal notification of a claim, and a contracting officer request to resolve all outstanding issues as expeditiously as possible, and based on the CDA certification, that the REA requested a contracting officer’s final decision. The REA contended that the specifications and drawings were defective in that the specified 15-pound hammer was inadequate and that the concrete was much harder than reasonably could have been expected:

Democon has experience removing structural concrete to depths of over four inches. There was nothing apparently unique about the concrete demolition and preparation on this Project nor was there anything visually obvious that indicated that the concrete on this Project was different from other concrete demolition projects involving spalled and deteriorating concrete. However, the concrete hardness on the Project was much different than could have been expected or derived from the site visit and contract specifications. Because the concrete was extraordinarily hard, conventional air powered hammers were not capable of achieving normal production efficiencies.

(R4, tab 24A at 4-5)

25. A contracting officer at the ROICC denied the REA, and advised FTM that it could request a final decision pursuant to the Disputes clause. The contracting officer did not include any notice of appeal rights. On 21 August 2003, FTM requested an accelerated final decision and recertified the claim. On 2 October 2003, a contracting officer at EFA informed FTM that a final decision would be rendered on or before 30 January 2004. (R4, tabs 25, 26; ex. G-7)

26. On 24 October 2003, appellant appealed from the deemed denial of its claim. The appeal was docketed as ASBCA No. 54402. The government moved to dismiss the appeal upon the ground it was premature.

27. On 26 January 2004, the contracting officer issued a final decision denying the claim (R4, tab 29). On 23 February 2004, appellant appealed from the final decision, and the appeal was docketed as ASBCA No. 54516. In view of the second appeal, the parties and the Board agreed to defer a decision on the motion to dismiss until a decision on the merits.

DECISION

Appellant argues that the hard concrete in the floors at Dry Dock No. 6 constituted a Type 2 differing site condition or, in the alternative, that the specifications were defective. The government responds that appellant's subcontractor Democon, upon whose behalf the appeal is brought, failed to follow the contract specifications and that appellant's claim is barred by its failure to give prompt notice of the alleged differing site condition (gov't br. at 14). Also for decision is the government's motion to dismiss as it relates to the running of interest (finding 27). We first address the government's motion to dismiss and then turn to the merits.

Motion to Dismiss

The government initially moved to dismiss ASBCA No. 54402 upon the ground that it was premature since, according to the government, the contracting officer had specified a reasonable time within which a decision would be issued on appellant's request for a decision dated 21 August 2003. The government explained that it did not treat "the original claim of April 7, 2003" as a claim because it did not request a final decision (ltr. 18 Dec. 2003). Appellant responded *inter alia* that its REA dated 7 April 2003 qualified as a claim under the CDA because it implicitly requested a final decision, citing *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572 (Fed. Cir. 1992). After appellant appealed from the 26 January 2004 final decision, the government withdrew its motion on the grounds of prematurity, leaving for decision whether the REA qualified as a claim for purposes of CDA interest (ltr. 29 Mar. 2005; tr. 1/5).

In these circumstances, where FTM submitted its REA after completion of the work, presentation of a final invoice, verbal notification of a claim, and a contracting officer request, in light of the verbal notification of a claim, to resolve all outstanding issues as expeditiously as possible, and where FTM included a CDA certification, the REA requested a final decision (finding 24). The government has not argued that the REA was deficient as a claim in any other respect. Accordingly, it qualified as a claim under *Transamerica, supra*. The motion to dismiss ASBCA No. 54402 for lack of jurisdiction is denied. CDA interest shall run from the date of receipt of the REA.

Merits

The DSC clause defines Type 2 differing site conditions as “unknown 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” (finding 2). A Type 2 differing site condition “‘must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience [,] if any, as a contractor in the area.’” *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1276 (Fed. Cir. 2001), quoting *Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967).

Both of FTM’s subcontractors were experienced demolition contractors. The contract documents did not indicate anything unusual about the hardness of the concrete. The subcontractors each visited the site before beginning the work and detected nothing out of the ordinary about the concrete. Witnesses from each company credibly described the concrete as the hardest they had ever seen. The demolition crew broke steel bits in breaking the concrete, something one does not normally encounter. To achieve any kind of production, Democon was required to switch to a more expensive method of demolition (the hydroblast method). We found that the concrete encountered on the job was unusually hard. (Findings 3, 4, 9, 11, 12, 14, 18, 21) We conclude that there was a Type 2 differing site condition.

Turning to the government’s arguments, the government is correct that Democon failed to follow the contract specifications to the extent that it used 60-pound jackhammers in lieu of 15-pound jackhammers. This does not help the government. The use of larger jackhammers should have made it easier, not harder, to demolish the concrete. The government is also correct that Democon routinely demolished 4 ½” of concrete in the MTW instead of proceeding spall by spall. As we found above, it did so because of FTM’s experience in the MTE, where there was a considerable problem with spalls running (findings 8, 9). Assuming for the sake of argument that Democon may have encountered more sound concrete than it otherwise would have as a result of the 4 ½” methodology, the government has not explained how it affected, or related to, the hardness of the concrete. The basic problem here was that the sound concrete, which was required at a minimum to be removed to provide clearance for the rebar, was extraordinarily hard.

With respect to notice requirements, the DSC clause requires that the contractor promptly, and before the conditions are disturbed, give written notice to the contracting officer of the alleged conditions (finding 2). The purpose of the written notice requirements imposed by the FAR is “to allow the Government an opportunity to investigate and to exercise some control over the amount of cost and effort expended in resolving the problem.” *Central Mechanical Construction*, ASBCA No. 29431 *et al.*, 85-2 BCA ¶ 18,061 at 90,658. These requirements are not construed hypertechnically to deny legitimate contractor claims when the government is otherwise aware of the operative facts. *Grumman Aerospace Corp.*, ASBCA No. 46834 *et al.*, 03-1 BCA ¶ 32,203 at 159,185, *modified on other grounds on recon.*, 03-2 BCA ¶ 32,289. The burden is on the government to establish that it was prejudiced by absence of the required notice. *Grumman Aerospace Corp.*, *supra*.

On 2 April 2001, FTM informed the ROICC in a RFI that progress in the ETE was “difficult” because of the amount of sound concrete. In September 2001, FTM wrote EFA that FTM and the subcontractors had encountered difficulties with the demolition portion of the contract. In April 2002, FTM notified EFA that it supported a Democon request for monetary compensation. FTM referred to defective specifications rather than differing site conditions but it is clear that Democon was complaining about the difficulty in demolishing the concrete. The record does not reflect what investigation if any the government may have made at the time. (Findings 6, 13, 19) We accept the testimony of the contract specialist who became involved with the project in mid-summer 2002, after completion of the concrete demolition, that it was not possible in October 2002 to visually inspect Democon’s underlying work (finding 22). There appears to be no reason, however, why the government could not have examined adjacent concrete which had not been repaired if it so desired. On balance, we are not persuaded that the government has been prejudiced. We believe it had an opportunity to investigate the conditions at the site to the extent it was not already aware of them.

ASBCA No. 54402 is sustained on the basis of a Type 2 differing site condition and remanded to the parties for negotiation of quantum including interest pursuant to the CDA.

We do not reach the alternative defective specifications argument. ASBCA No. 54516 is dismissed as duplicative.

Dated: 12 June 2008

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
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

ROLLIN A. VAN BROEKHOVEN
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 Nos. 54402, 54516, Appeals of Fuel Tank Maintenance Co., LLC, rendered in conformance with the Board's Charter.

Dated:

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