

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Strand Hunt Construction, Inc.) ASBCA No. 55904
)
Under Contract No. DACA85-03-C-0007)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this appeal for the recovery of additional costs allegedly incurred because of a requirement to work in conditions that were in excess of the maximum working temperatures called out in the contract, appellant Strand Hunt Construction, Inc. (Strand Hunt) has moved for summary judgment. Strand Hunt contends that there is no genuine issue of material fact regarding its allegations of loss of productivity, acceleration, and delay resulting from the excessively hot working conditions because the specifications stated that temperatures within the facility would range between 50 and 90 degrees, whereas they actually ranged between 120 and 140 degrees on the upper two levels. For its part, the Corps of Engineers (Corps) has opposed Strand Hunt's motion and cross-moved, chiefly contending that Strand Hunt failed to conduct an adequate site investigation and tender notice of a differing site condition. We deny both motions.

BACKGROUND

By date of 30 April 2003, the Corps awarded Contract No. DACA85-03-C-0007 to Strand Hunt for the design and construction of an emission reduction baghouse for the coal-fired boilers that operated in the Central Heating and Power Plant (CHPP) at Eielson Air Force Base, Alaska (R4, tab 1 at 6, tab 40 at 133-34).

The contract included various standard provisions, including FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) and FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) (R4, tab 33 at 121-22).

The contract also included technical specifications. Among those relevant here are: (a) section 11215, INDUCED DRAFT FANS, which contained paragraph 1.5, DESIGN CRITERIA, that provided in subparagraph d: “Current CHPP Building Indoor Temperatures: 1) Minimum: 50 degrees F[;] 2) Maximum: 90 degrees F;” (b) section 11500, BAGHOUSE COLLECTOR SYSTEM 08/02, contained paragraph 1.4, DESIGN CRITERIA, that set forth the identical temperature range in subparagraph d; and (c) section 11700, ASH CONVEYING SYSTEM 08/02, that also contained the identical temperature range in paragraph 1.5, DESIGN CRITERIA, subparagraph d (R4, tab 42 at 158, tab 43 at 194-95, tab 44 at 226).

Other relevant technical specifications included section 07900 regarding sealants, which contained paragraph 2.4.3, PREFORMED, providing requirements for such sealant “[a]t temperatures from minus 30 to plus 160 degrees F” (U.S. Corps of Engineers’ Memo. of Law in Support of its Response to Strand Hunt’s Motion for Summary Judgment and Cross-Motion for Summary Judgment (cross-mot.), ex. K). In addition, section 13405 contained paragraph 2.4, BASE DESIGN SYSTEM. It included the requirements for a programmable logic controller (PLC) and, in subparagraph 2.4.1.1 provided that such devices “shall function properly at temperatures between 32 and 122 degrees F...and shall tolerate storage temperatures between minus 40 and plus 140 degrees F.” (Cross-mot., ex. L) Section 15951, DIRECT DIGITAL CONTROL FOR HVAC, identified in subparagraph 1.2.8.1, SPACE TEMPERATURE, temperature ranges “of minus 30 to 130 degrees F plus or minus 1 degree F.” Paragraph 2.7, INSTRUMENTATION, repeated this space temperature range for transmitters to be employed. (Cross-mot., ex. M at 7, 22)

Contract performance gave rise to a dispute regarding the impact of the heat in the baghouse. By date of 30 June 2006, Strand Hunt submitted a claim to the contracting officer for \$2,477,453 for “inefficiencies and related costs and delays due to working in temperatures in excess of 90 [degrees].” (R4, tab 8 at 1; *see also* R4, tab 6 at 1) The contracting officer thereafter denied the claim (R4, tab 1) and this timely appeal followed.

DECISION

A. Strand Hunt Motion

The premise of Strand Hunt’s motion is that the actual temperatures in the upper levels of the power plant, which are said to have ranged between 120 and 140 degrees,

“were a differing site condition and caused the expenditure of extra costs on the project.” (Motion for Summary Judgment (mot.) at 1) In its motion, Strand Hunt relies chiefly upon the deposition of William Havard, an Air Force employee involved in the design and operation of the project, as well as numerous exchanges between the parties and the affidavit of Rollie Hunt, Strand Hunt’s president.

On summary judgment, “[o]ur task is not to resolve factual disputes but to ascertain whether material disputes of fact—triable issues—are present.” *Conner Bros. Construction Co.*, ASBCA No. 54109, 04-2 BCA ¶ 32,784 at 162,143, *aff’d*, No. 08-1188 (Fed. Cir. Dec. 31, 2008), *quoting John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. The outcome of this inquiry is not affected by the fact that we have cross-motions before us. “The fact that both parties have moved for summary judgment does not mean that [we] must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not appropriate if disputes remain as to material facts.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). In evaluating each motion separately, we resolve all inferences from the underlying facts “in the light most favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Considering Strand Hunt’s motion in light of these principles, we conclude that summary judgment is unwarranted. Regardless of whether Strand Hunt is arguing that the conditions that it encountered constituted a type I or a type II differing site condition, the premise of the motion is that “the specifications of the [request for proposals], clearly, unequivocally, and repeatedly stated that the temperature in the baghouse would be between 50 [degrees] and 90 [degrees] F.” (Mot. at 2) That premise cannot be sustained on the record now before us.

Technical specification sections 07900, 13405 and 15951 all indicated higher temperatures than those that Strand Hunt tells us it anticipated and the better course is to deny summary judgment in this \$2.4 million case without further testimonial and documentary illumination. In addition, Strand Hunt’s argument that it did not experience such temperatures on another baghouse contract at Clear Air Force Station near Anderson, Alaska, if probative at all, involves factual issues that we cannot say are foreclosed from an airing at trial. Similarly, Strand Hunt’s disputed contention that it conducted an adequate site investigation, like any such argument, “is dependent upon the facts and circumstances of the particular case,” *S.T.G. Construction Co., v. United States*, 157 Ct. Cl. 409, 415 (1962) and hence presents a triable issue not susceptible to summary disposition on this record.

B. *Cross-Motion*

The Corps’ cross motion rests upon two principal propositions. The first is that “first time visitors [to] CHPP’s upper levels would experience ‘boiling hot’ conditions”

that were “easily discoverable upon a reasonable site investigation” (cross-mot. at 20-21 of 22). The second premise is that that Strand Hunt failed to tender the requisite notice of the alleged differing site condition to the contracting officer (cross-mot. at 21 of 22).

Neither of these grounds warrants summary judgment in favor of the Corps. The argument regarding the adequacy of Strand Hunt’s site investigation presents a triable issue, *S.T.G. Construction*, 157 Ct. Cl. at 415, that cannot be resolved through a “trial by affidavit,” *DCX-CHOL Enterprises, Inc.*, ASBCA No. 54707, 05-1 BCA ¶ 32,933 at 163,118, as the Corps invites us to do. With respect to the notice argument, “[t]he burden is on the Corps to prove a lack of timely notice and resultant prejudice,” *Bay West, Inc.*, ASBCA No. 54166, 07-1 BCA ¶ 33,569 at 166,300, and assertions that Strand Hunt has not pointed to evidence of notice (cross-mot. at 21) do not satisfy that burden.

CONCLUSION

Appellant’s motion for summary judgment and the government’s cross-motion for summary judgment are each denied.

Dated: 23 January 2009

ALEXANDER YOUNGER
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. 55904, Appeal of Strand Hunt Construction, rendered in conformance with the Board's Charter.

Dated:

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