

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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The Davis Group, Inc.) ASBCA No. 57523
)
Under Contract No. W912HN-08-D-0037)

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OPINION BY ADMINISTRATIVE JUDGE JAMES

On 29 November 2010 The Davis Group, Inc. (Davis) submitted a claim under a task order issued under the captioned contract for \$78,777.07 and an 80-day extension, alleging government delay in approving an application for an erosion and storm water permit. On 9 February 2011 Davis appealed to the Board from the contracting officer's (CO) failure to issue a decision on that claim. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. Davis elected the accelerated procedure under Board Rule 12.3. The parties elected a decision on the record under Board Rule 11. We decide entitlement only (Bd. order dtd. 17 February 2011).

SUMMARY FINDINGS OF FACT

The Solicitation and Proposal

1. On 8 July 2008 the U.S. Army Corps of Engineers (COE), Savannah District, awarded indefinite delivery, multiple award task order Contract No. W912HN-08-D-0037 (MATOC) to Davis to construct Company Operations Facilities (COF) in the Eastern U.S. (R4, tab 2).

2. The MATOC, *inter alia*, included the FAR 52.216-18, ORDERING (OCT 1995) clause, which provided that all task orders issued under the MATOC are subject to the MATOC's terms and conditions, and the FAR 52.242-14, SUSPENSION OF WORK (APR 1984) clause (R4, tab 2 at 24-25, 97 of 155).

3. On 23 April 2009 the COE issued Solicitation No. W912HN-07-X-9308 (RFP) under the MATOC for design/build of COF, Ft. Stewart, Georgia (R4, tab 4 at 1 of 14).

4. In response to the RFP, on 18 June 2009 Davis proposed to design and build administration, readiness and covered hardstand COF modules (R4, tab 3 at 2, plates A101A, A101B).

5. Davis' proposal stated that the "existing site is relatively flat with a pond and stream intersecting the site," the COF buildings would be six inches minimum above existing grade to provide drainage; Davis planned to slope away from the buildings and parking lots to convey storm water to treatment areas; and Davis' Conceptual Site Plan (Plate C-00) located five, unnumbered, storm water management areas (SWMAs) around the COF site (R4, tab 3 at 33-34).

Task Order 0002

6. The COE awarded Davis Task Order No. W912HN-08-D-0037-0002 (TO 2) on 28 August 2009 for the COF, Ft. Stewart, Georgia (R4, tab 4 at 1, 3 of 10).

7. TO 2's Statement of Work (SOW) required all site design, including storm drainage, to be within the COF limits of construction (R4, tab 4 at 4 of 380).

8. SOW, ¶ 4.1, listed "State/Local Regulations" for environmental control and "Storm Water Management Requirements," but did not identify any such regulation by document number (R4, tab 4 at 33 of 380).

9. SOW, ¶ 6.3.3.1, specified: “A Storm Water Pollution Prevention Plan...shall be...included in the design submittals.... No wet ponds are allowed.” (R4, tab 4 at 51 of 380)

10. TO 2, Appendix H, required Davis to adequately control post-development storm water runoff in accordance with the requirements of Georgia’s Environmental Protection Division (GA EPD) and stated: “Where stormwater retention/detention is required, designers should limit their designs to include dry detention basins only. A dry detention basin is a surface storage basin...designed to provide water quantity control through detention...of stormwater runoff.” (R4, tab 4 at 248-49, 251 of 380) Appendix EE specified that “[t]he final grade of the [dry detention basin] floor shall be a minimum of 1 foot above seasonal high water table” (SHWT) (R4, tab 4 at 345 of 380).

11. TO 2, Appendix A, the COE’s January 2009 Preliminary Subsurface Exploration Report at Ft. Stewart, included soil boring logs and sounding graphs, and required Davis’ licensed geotechnical engineer to submit a final geotechnical evaluation report with Davis’ first design submittal (R4, tab 4 at 52, 98, 101, 114-61 of 380).

12. The Preliminary Subsurface Exploration Report stated that groundwater elevations varied during “prolonged drought and excessive rainfall as well as seasonally,” fluctuations should be anticipated with changing climatic and rainfall conditions, and “groundwater will be encountered as high as 1 foot below the existing grade at the proposed sites” (R4, tab 4 at 106).

13. In January-February 2008 the COE made soil borings B-1 through B-11, outside TO 2’s construction limits shown on the COE’s Plate CS-102, Site Plan, and identifying the surface elevation at each boring (R4, tab 4 at 114-24, 384). Boring B-4, about 31’ from Davis’ proposed northern SWMA, indicated groundwater at 8.7’ below the 69’ surface grade, *i.e.*, at 60.3’ elevation. It also had a notation that there was “wet” on the rod at 3’ from rain the previous day. (R4, tab 4 at 117, 383)

14. In July 2008 the COE made nine soundings at the COF, CPT-131 through CPT-134 and CPT-166 through CPT-170, identifying no ground level elevations. It installed a piezometer to monitor groundwater depth in sounding CPT-134, about 148’ from the east SWMA, that indicated groundwater at 4.13’ below the ground level. (R4, tab 4 at 103-06, 147 of 380) From the COE’s 2008 borings and soundings, we find that Davis was on notice that groundwater conditions were uncertain in the area of the COF.

Davis' Design

15. The 11 June 2009 site plan of AECOM, Davis' design firm, showed four, unnumbered SWMAs, described as two- or three-foot "dry ponds or infiltration basins" to collect storm water, but did not identify their existing surface elevations (ex. G-3).

16. To AECOM's John Funk the terms SHWT and groundwater depth were not different (ex. G-16 at 12-13, 20-21). Mr. Funk used the Georgia stormwater management manual criteria in his design (ex. G-16 at 6).

17. In October 2009 Whitaker Laboratory, Inc., Davis' subcontractor, made six soil test borings within the COF sites and six auger borings within the parking lot sites, identifying no ground surface elevations at those borings, and reported its findings to Davis on 1 November 2009. None of Whitaker's borings were at the sites of Davis' contemplated "dry ponds or infiltration basins" (finding 15). Borings A-1, A-2, A-3, B-2 and B-3, nearest to such basins, showed groundwater two to three feet below the ground surface elevations. Whitaker reported buried wood debris in borings A-1, A-2, A-3 and A-5. (Exs. G-5 at 3, 12-18; G-16 at 40-41, 59) The record does not indicate when Davis first sent the Whitaker report to the COE. We find that the Whitaker report showed that groundwater conditions were uncertain in the areas of the COF and of Davis' proposed infiltration basins.

18. The record contains no expert opinion of how far from each COE and Whitaker boring site the groundwater measurement is reliable.

Davis' 11 December 2009 Design Submission

19. On 11 December 2009 Davis submitted, and on 14 December 2009 the COE received, Davis' design, with a Notice of Intent (NOI) to obtain a GA EPD permit to discharge storm water during construction activities, and eleven design drawings dated 4 December 2009 setting forth infiltration basin details (R4, tab 6).

20. Davis' 4 December 2009 drawings CG102 and CG103 changed the number of proposed infiltration basins to three: basin #1 to the north, basin #2 to the east and basin #3 to the south, of the COF. Drawing CG104 set forth a 66.0' basin floor elevation and existing surface elevations of 66', 67' and 68' (averaging 67') crossing infiltration basin #1's footprint. Drawing CG105 set forth a 66.5' basin floor elevation and an existing surface elevation of 66' crossing infiltration basin #2's footprint. Drawing CG106 set forth a 66' basin floor elevation and existing surface elevations of 66' and 67' (averaging 66.5') crossing infiltration basin #3's footprint. (R4, tab 6)

Government Design Review

21. On 23 December 2009 COE's Project Engineer, Don Grover, sent Davis comments on its design and directed it to incorporate them into the design/build processes (R4, tab 7). Comments generated by Victoria Post, a support contractor with Ft. Stewart's Department of Public Works' Environmental Division on 22 December 2009, included: "Utilization of the 'Coastal Stormwater Supplement' [CSS] in the 'Georgia Stormwater Manual'...is required in order to meet the [National Pollutant Discharge Elimination System] permit...requirements for pre-construction and post-construction, the Energy & Independence Security Act of 2007...requirements." (R4, tab 7 at 2-3)

22. The CSS allowed the use of dry detention basins "on a limited basis, and only when [wet ponds, extended detention ponds, infiltration basins, etc.] cannot be used to completely satisfy [various protective requirements]" (R4, tab 5 at 347).

23. AECOM's 8 January 2010 e-mail to Davis stated that the RFP did not reference the GA EPD's CSS (ex. G-10). AECOM reviewed the meaning and availability of CSS requirements, but made no effort to meet any CSS requirements because Davis told AECOM to hold off until Davis worked out contractual issues with COE (exs. G-8, G-9, G-16 at 53). AECOM did not believe the CSS would require it to resubmit its storm water management design plans (drawings) (ex. G-16 at 35).

24. Davis' 11 January 2010 letter to COE stated that it had indicated that Davis' permits would not be approved until it complied with the CSS; Davis considered Ms. Post's 22 December 2009 direction to comply with CSS to be a change to TO 2 that would result in additional design and construction costs since the CSS was not a requirement of the State of Georgia for issuance of the subject permits; and Davis' site design efforts were at a standstill since 22 December 2009 and Davis needed a change order to proceed (R4, tab 8, tab 14 at 29).

25. Davis' 18 January 2010 letter to COE stated that Whitaker's geotechnical report dated 1 November 2009 indicated buried wood debris in the east and west parking lots, which were changed site conditions (ex. G-12). We find that Davis was responsible for delay in reporting to the COE the possible changed site conditions.

Supplemental COE Geotechnical Investigation

26. On 28-29 January 2010 the COE investigated Davis' subsurface wood debris allegation. We find that such investigation was reasonably prompt. The COE made ten borings one to four feet from Whitaker's borings and did not identify the boring surface

elevations. None of the COE's borings were at the sites of Davis' contemplated "dry ponds or infiltration basins." The COE determined that wood debris would not significantly affect the structural integrity of the soils. The COE modified its procedure at 7 of those 10 borings to make a first groundwater observation followed by a second 1 to 20 hours later. (Ex. G-13 at 1-8) Boring B-3, 45' from basin #2, indicated groundwater at 0.3' (about 3.6") on its second 29 January 2010 observation (ex. G-13 at 5). We find that the COE had reason to suspect on 29 January 2010 that groundwater could be encountered less than one foot below the existing surface grade at Davis' proposed basins.

Storm Water Design Review Meeting

27. The parties met on 4 February 2010. COE said that its recent borings south of the proposed building showed a groundwater depth of several inches. COE's Jim Freeman recommended, given the shallow depth to ground water, that, instead of dry detention basins, Davis use vegetative swales to divert storm water to the existing pond. AECOM's Mr. Funk thought the recommendation "was a great idea." He stated that using swales would reduce the cost of construction and expedite permit processing, and the swale redesign would not be significant. He understood that he could continue to use the dry detention basin design, although the contractor might have to bring in fill to raise the basin floor elevations. Davis stated that it would send revised documentation to the COE. (R4, tab 9; ex. G-16 at 39, 45, 61-64)

28. On 2 March 2010 Davis resubmitted its Erosion and Sedimentation Drawings and NOI using the vegetative swale approach (ex. A-3 at 7). COE received that resubmittal on 3 March 2010, which it approved and forwarded to the base Department of Public Works on 10 March 2010. The Department of Public Works signed the NOI on 8 April 2010 and forwarded to Georgia. Thus, land disturbance could begin 14 days later, on 22 April 2010, unless Georgia rejected the application or requested further action. (R4, tabs 11, 12)

REA and Claim

29. Davis' 14 April 2010 letter to COE requested an equitable adjustment (REA) of an 80-day extension of TO 2's completion date (but no added compensation), alleging that it planned to start silt fence erection and soil disturbing activities on 3 February 2010, and was delayed to 23 April 2010 due to late approval of its NOI. Davis' appended critical path schedules of 12 and 14 April 2010 set forth activity "080 Silt Fence & Sediment Controls," with a late start on 3 February and late finish on 8 February 2010, and activity "042 Delay in permit approval," with an early/late start on 9 February and early/late finish on 22 April 2010. (R4, tab 13 at 6, 10)

30. On 8 July 2010 Davis converted its REA to a claim, asserting that compliance with the CSS was not part of the original RFP, the initial design submission should have been approved as submitted and all delay in the approval of the storm water design was attributable to the government. Davis sought an 80-day extension and \$141,413.21 in added compensation for direct, extended field overhead and Eichleay costs. (R4, tab 14 at 1-2)

31. On 29 November 2010 Davis revised its claim to \$78,777.07 (R4, tab 17). Davis appealed to the Board on 9 February 2011 based on a deemed denial of its claim.

DECISION

The contractor has the burden of proof that its submittal met contract requirements, *see The Davis Group, Inc.*, ASBCA No. 51832, 00-2 BCA ¶ 30,985 at 152,925, and that the work was delayed because of the government delayed approval of the submittal. *See Law v. United States*, 195 Ct. Cl. 370, 385 (1971). A compensable constructive suspension of work occurs if government approval of a contractor's submittal is not given in a reasonable time. *See FAR 52.242-14(b)*, SUSPENSION OF WORK clause (price adjustment only if work is suspended for an unreasonable period); *R.J. Crowley, Inc.*, ASBCA No. 35769, 88-3 BCA ¶ 21,151 at 106,788 (contractor entitled to an adjustment for delayed shop drawing approval only if "the delay is unreasonable").

On 11 December 2009 Davis submitted its design and Notice of Intent to obtain a GA EPD permit (finding 19). On 23 December 2009 the COE directed Davis to incorporate into its design the utilization of the Coastal Stormwater Supplement in the Georgia Stormwater Manual to meet designated federal requirements (finding 21). AECOM made no such storm water design effort due to CSS requirements, however, because AECOM did not believe the CSS would require stormwater redesign and Davis told AECOM to hold off until contractual issues were worked out with COE (finding 23). We need not determine whether compliance with the CSS was required by the contract, since we conclude for the reasons set forth below that the CSS compliance issue ultimately did not delay Davis' NOI submission to the GA EPD, as Davis claimed, and there is no evidence that the GA EPD questioned Davis' compliance with CSS (findings 28, 30).

On 18 January 2010 Davis first alleged to the COE a possible differing site condition of wood debris in Whitaker's October 2009 borings underlying the parking lots (findings 17, 25). We found that the COE was reasonably prompt in investigating that allegation (finding 26).

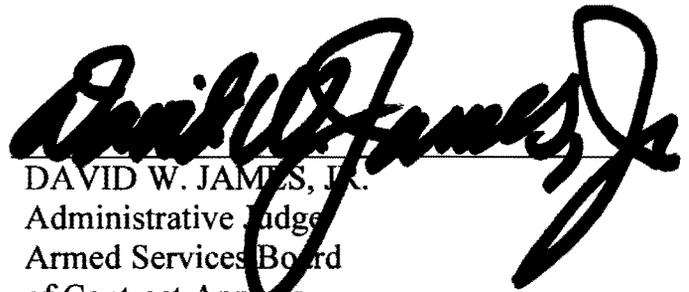
On 29 January 2010 the COE found Boring B-3, 45' from basin #2, indicated groundwater at 0.3' (about 3.6") below the surface grade. The COE had reasonable concern that groundwater could be encountered less than one foot below the existing surface grade at Davis' proposed basins. (Finding 26) On 4 February 2010 the parties discussed that groundwater concern. Davis knew it could have continued to use the dry detention basin design, although it might need to add fill to raise the basin floor elevations, but agreed with the COE's recommendation to change from dry detention basins to vegetative swales for storm water management. The swales would entail non-significant redesign costs and reduce Davis' construction costs. (Finding 27)

On 10 March 2010 the COE received and approved Davis' 2 March 2010 redesign and forwarded it to Department of Public Works, which approved and forwarded to GA EPD on 8 April 2010 (finding 28).

Therefore, Davis' delay in notifying COE of such wood debris for 78 days (from 1 November 2009 to 18 January 2010, findings 17, 25), most of which delay was unreasonable, rather than the CSS issue, was the proximate cause of the delay from January to April 2010 to investigate, resolve, resubmit, approve and forward to GA EPD Davis' storm water management design and accompanying NOI. We hold that Davis has not met its burden of proof that the site work was delayed for an unreasonable period because of government delayed approval of the NOI submittal.

We deny the appeal.

Dated: 12 August 2011


DAVID W. JAMES, JR.
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. 57523, Appeal of The Davis Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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