

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 APPELLANT'S MOTION FOR RECONSIDERATION

Davis timely moved for reconsideration of our 12 August 2011 decision in the captioned appeal on 13 September 2011. *The Davis Group, Inc.*, ASBCA No. 57523, 11-2 BCA ¶ 34,824. Respondent replied to Davis' motion on 6 October 2011, appellant replied thereto on 21 October 2011 and respondent advised the Board that it did not intend to reply further. Familiarity with our decision is assumed.

Davis contends that some of the Board's findings were erroneous, not supported by the record, or clearly contrary to the preponderance of the evidence, as described below. According to Davis, such findings, as modified by certain alleged facts, require reversal of our holding that its delay in notifying the COE of a possible changed site condition of buried wood debris was the proximate cause of the later delay in government approval of Davis' Notice of Intent (NOI) to obtain a permit from the Georgia Environmental Protection Division (EPD). (App. mot. at 2, 9-10) We take up the findings in the order Davis addresses them.

Finding 17. Davis asserts that our statement, “The record does not indicate when Davis first sent the Whitaker report to the COE,” is in error on two grounds: (1) the contract required Whitaker’s “final geotechnical evaluation report to be submitted along with the first foundation design submittal” (R4, tab 4 at 37, 106 of 380); and (2) on 2 December 2009 Davis submitted such design (app. mot., attach. 1). Davis’ first ground is supported by the record. Task Order 2 (TO 2), SOW § 01 10 00, ¶ 5.2.2.2, stated: “The contractor’s licensed, geotechnical engineer shall prepare a final geotechnical evaluation report, to be submitted along with the first foundation design submitted, as described in [§] 01 33 16, *Design After Award*” (R4, tab 4 at 37 of 380).

In support of its second ground, Davis has submitted attachment 1 to the motion, Davis’ 30 November 2009 transmittal No. 013316-1, “30% Design Drawings & Specifications,” with a handwritten note “Received by Gov. - 12-02-2009.” We grant Davis’ unopposed request (app. resp. at 25) to admit attachment 1 in the record. Attachment 1, however, did not expressly identify a foundation design submittal or final geotechnical evaluation report. Thus Davis has failed to establish that it in fact submitted its final geotechnical evaluation report or its first foundation design to the COE on 2 December 2009.

Davis argues that on 6 January 2010 there was a discussion about organic sands and buried wood, from which Davis infers that the COE knew about buried wood on that date. It supports this argument with attachment 2 to its motion, a meeting memorandum. Davis further argues that, since the issue of its delayed notification of the buried wood “was not previously identified,” it did not include this document in the record (app. mot. at 2). Respondent objects to Davis’ attachment 2 because it was submitted after the appeal record was closed (gov’t reply at 1-2, 8-9). We overrule such objection. *See Madison Park Clothes, Inc.*, ASBCA No. 4234, 61-1 BCA ¶ 3054 at 15,809 (on reconsideration Board admitted evidence which the government did not realize that the Board would consider essential to decide entitlement; appellant was not prejudiced by such evidence).

Attachment 2 is a memorandum of a 6 January 2010 “35% Design Review Meeting” held at the COE’s offices (R4, tab 8) and written by AECOM’s Vice President Don Loper. It stated, *inter alia*: “5. It was note[d] that the site was dumping and has organic sands, and buried wood. More exploration of the site to determine the extent will be required.” Thus, attachment 2 shows that the COE knew about “buried wood” at the site on 6 January 2010 and that more exploration of the site was required. Respondent asserts that attachment 2 did not constitute notice of a differing site condition (DSC). At most, the note indicated that Davis believed that additional investigation was necessary. Even if it did constitute notice of a DSC, the 6 January 2010 meeting took place only 12 days before Davis explicitly notified the COE of potential differing site conditions, so the COE still was reasonably prompt in conducting its supplemental investigation on 28-29

January 2010. (Gov't reply at 1-2) We agree with respondent's assertions and discern no reason to modify our finding 17.

Finding 25. Davis argues that our statement that it "was responsible for delay in reporting to the COE the possible changed site conditions" is erroneous because wood debris under the parking lots had "nothing to do with the seasonal high water table" (SHWT) under its proposed detention basins; the COE's January 2010 investigation did not address or modify the Whitaker report determinations; and the COE "prejudicially misrepresented" that such investigation established a SHWT "in Basin #2 that was within 3.6" of the surface" (app. mot. at 3). Davis states that its 18 January 2010 differing site "notification caused the COE to investigate," the COE's January 2010 investigation "found no material difference between the subsurface conditions of the parking lot site...and those as determined by [Whitaker's] final geotechnical investigation" and disclosure of the subsurface conditions in 2009 would not have changed the parties' behavior (*id.* at 4).

Davis' argument fails because, but for its 18 January 2010 notice, the COE would not have made the 28-29 January 2010 geotechnical investigation which found a material difference: ground water within 3.6" of the surface at Boring B-3. There is a sufficient nexus between Davis' belated notice of wood debris and the COE's finding of ground water at Boring B-3 higher than Whitaker had reported. The COE's January 2010 investigation found ground water 3.6" under the surface elevation at Boring B-3, which was 45' from basin # 2. The COE did not represent that it found ground water within 3.6" of the floor of basin # 2.

Finding 15. Davis asserts that the AECOM "Site Layout" drawing was never submitted in Davis' proposal, but that such "error" is "largely harmless" and irrelevant (app. mot. at 5). The government made no response (gov't reply at 4). Finding 15 did not state that such drawing was in Davis' proposal; it was not erroneous.

Finding 20. Davis asserts that finding 20 failed to note that its 4 December 2009 drawings GC 101-111 were "the final (100%) design submission" and misidentified basin # 2 as "east" of the COF (app. mot. at 6). The government made no response (gov't reply at 5). Davis' 11 December 2009 submittal did not identify its 4 December 2009 drawings as "final (100%) design" (R4, tab 6). However, basin # 2 was not to the east of the COF. We modify finding 20, first sentence (11-2 BCA at 171,356), as follows: "Davis' 4 December 2009 drawings CG102 and CG103 changed the number of proposed infiltration basins to three: basin #1 to the north, and basins #2 and #3 to the south, of the COF."

Finding 21. Davis asserts that finding 21 failed to note that the government's design review comments were on Davis' 35% design submittal, as opposed to the design

submittal referenced in findings 19 and 20 (app. mot. at 6). The subject of the design review comments was “30% Drawings for the 3rd Sustainment Brigade” (R4, tab 7 at 1). Based on attachment 1 to the motion for reconsideration, those comments pertained to the drawings submitted on 30 November 2009, included in the record as ex. A-5, rather than the drawings referred to in findings 19 and 20. We clarify finding 21 to that extent.

Finding 26. We found, in connection with the COE’s investigation of whether there was subsurface wood debris at the site, that “[t]he COE modified its procedure at 7...borings to make a first groundwater observation followed by a second 1 to 20 hours later.” Davis agrees that the COE did make measurements of water levels in the borings, but argues that it “did not characterize either measurement as establishing a persisting level of ‘groundwater’ constituting ‘a seasonal high water table’” (app. mot. at 6). We did not imply that the COE had characterized either such measurement “as establishing a persisting level of ‘groundwater’ constituting ‘a seasonal high water table.’” The more important point, however, is that as a result of its measurements of water levels, “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” (finding 26; 11- 2 BCA at 171,357). Davis has not persuaded us that this finding is erroneous.

In reply to the motion, the government argued that a Department of Agriculture soil report for the area “provides that the upper limit of the [SHWT] ranged from zero to six inches below grade based on the soils present at the site” (gov’t reply at 5). In its response Davis analyzes various government sources and concludes that no one would rely on the soils report in question for engineering purposes. It asks that we take judicial notice of “the historic information that is readily available from government sources and the import of the information” (app. resp. at 20). The government’s reply, in effect, seeks to supplement finding 26 with additional evidence. Our concern in finding 26, however, was to explain the sequence of events resulting in the change from basins to vegetative swales. Accordingly, we do not modify finding 26 to take the soils report into account, and do not reach Davis’ analysis of the import of the information.

Finding 27. Davis argues that the COE erroneously represented findings to Davis on 5 February 2010 from its “recent borings,” but ACO Warren to whom its supplemental geotechnical investigation report was addressed had not seen that 1 March 2010 report, and it “is not clear” that such “recent borings” were done on 28-29 January 2010 (app. mot. at 8). Davis points to no evidence of “recent borings” by the COE at the COF site other than those of 28-29 January 2010. We conclude that Davis’ argument is untenable.

Finding 27, third sentence, began: “COE’s Jim Freeman recommended....” Mr. Freeman apparently was employed by the U.S. Department of Agriculture’s Natural Resources Conservation Service (*see, e.g.*, R4, tab 12). Therefore, we modify the third

sentence to begin: “Mr. Jim Freeman of the U.S. Department of Agriculture’s Natural Resources Conservation Service recommended....”

Findings 17 and 26. Davis argues that finding 17 (Whitaker’s report showed that groundwater conditions were uncertain) contradicts finding 26 (COE’s 2010 investigation gave it reason to suspect that groundwater could be encountered less than one foot below ground level) (app. mot. at 8-9). These findings concern two different reports. The minutes of the 4 February 2010 meeting (finding 27) show that the COE was indeed concerned about the groundwater results of its 2010 investigation. We do not perceive any inconsistency in findings 17 and 26.

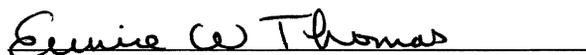
Findings 26 and 27. Davis argues that findings 26 and 27 “are obviously contradictory” because borings A-3 to A-6, which were to the south of the COF, as opposed to boring B-3, which was in the COF footprint, showed water levels below 1 foot. Again, Davis disagrees with the conclusions the COE drew from its January 2010 investigation. We do not perceive any contradiction in findings 26 and 27.

We deny the motion for reconsideration, except to the extent of our modifications of findings 20 and 27 and clarification of finding 21.

Dated: 1 December 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