ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Phylway Construction, LLC	)	ASBCA Nos. 63705, 63723
	)	
Under Contract Nos. W912P8-20-C-0032 W912P8-19-C-0015	)	

APPEARANCES FOR THE APPELLANT:	S. Leo Arnold, Esq. Matthew W. Willis, Esq. Ashley & Arnold Dyersburg, TN
APPEARANCES FOR THE GOVERNMENT:	Michael P. Goodman, Esq. Engineer Chief Trial Attorney William G. Meiners, Esq. Engineer Trial Attorney U.S. Army Engineer District, New Orleans

OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

These appeals involve similar claims on two contracts arising out of work that appellant, Phylway Construction, LLC (Phylway), performed as a result of Hurricane Ida. The parties have elected to submit the appeals on the record pursuant to Board Rule 11. Only entitlement is before us. The Board denies the appeals.

FINDINGS OF FACT

ASBCA No. 63705 – The Woodpark Contract

1. The United States Army Corps of Engineers (USACE) awarded Contract No. W912P8-20-C-0032 to Phylway on July 10, 2020, in the amount of $51,702,210. The contract work included clearing, grubbing, and vegetation removal, excavation for a new drainage canal, and placement of uncompacted embankment and compacted embankment. (App. supp. R4, tab A-31, Joint Stipulations of Fact (JSF) ¶ 1; R4, tab 3 at 4)[1]

[1] All Rule 4 citations appearing under this portion of the decision (Woodpark Contract) relate to the Rule 4 materials the parties submitted under ASBCA No. 63705.

2. The contract contains two relevant clauses. The first is Federal Acquisition Regulation (FAR) 52.236-7, PERMITS AND RESPONSIBILITIES (NOV 1991). This clause provides in part:

> The Contractor shall [] be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(JSF ¶ 15; R4, tab 3 at 89)

3. The second is the Damage to Work clause, which provides in part:

> The responsibility for damage to any part of the permanent work shall be as set forth in the Contract Clause . . . PERMITS AND RESPONSIBILITIES (FAR 52.236-7). However, if in the judgment of the Contracting Officer (CO), any part of the permanent work performed by the Contractor is damaged by flood, earthquake, hurricane, or tornado which damage is not due to the failure of the Contractor to take reasonable precautions or to exercise sound engineering and construction practices in the conduct of the work, the Contractor shall make the repairs as ordered by the CO and full compensation for such repairs will be made . . . .

(JSF ¶ 16; R4, tab 3 at 148) (emphasis added)

4. On August 29, 2021, Hurricane Ida made landfall in southeastern Louisiana as a Category 4 hurricane. The Woodpark contract site flooded as a result of a storm surge and caused a variety of impacts to the site. (JSF ¶¶ 3-4)

5. USACE paid Phylway for some of the work necessitated by the hurricane. For example, in Modification No. P00009, USACE paid Phylway $2,496,500 to clean and re-excavate the new drainage canal to the original template and to remove siltation. (R4, tab 19 at 2)

6. The storm surge left a variety of debris on the site, including metal roofing, car tires, metal water tanks, plastic gas tanks, creosote timber, trees and other wood materials, marsh vegetation, and a layer of mud (App. supp. A-35, decl. of Michael Ard ¶ 7). While Phylway could not resume performance of the work until it removed the debris (JSF ¶ 4), it has not identified any specific damage caused by the debris.

7. USACE refused to pay for removal of debris deposited by the storm surge (JSF ¶ 8).

8. Phylway submitted a claim on March 1, 2023 (R4, tabs 10, 12 (certification)). As revised on April 12, 2023, Phylway sought $280,162.64, for "Hurricane Ida Cleanup, Etc." (R4, tab 14 at 9).

9. On June 9, 2023, CO Charles R. Zammit, Jr., denied the claim (R4, tab 2 at 8).

10. On August 31, 2023, Phylway submitted a timely appeal that the Board docketed as No. 63705.

11. As revised in its complaint, Phylway seeks $165,609.58, which it contends is compensable under the Damage to Work clause (compl. ¶ 12). Phylway seeks compensation for removal of the debris deposited on the compacted levee embankment and on the uncompacted material placed to fill in a drainage ditch (*id.* ¶¶ 9-12).

ASBCA No. 63723 – The Happy Jack Contract

12. USACE awarded Phylway Contract No. W912P8-19-C-0015 on February 13, 2019, in the amount of $48,654,095. The work included clearing and grubbing and new levee/ramp crossing embankments. (JSF ¶ 1) Like the Woodpark contract, the Happy Jack contract incorporated FAR 52.236-7, Permits and Responsibilities (Nov 1991) and the identical or nearly identical Damage to Work clause (JSF ¶¶ 11-12; R4, tab 4 at 19, 49).[2]

13. As a result of Hurricane Ida, the Happy Jack site flooded, and a storm surge left debris on the site such as creosote timber, trees, other wood materials, metal tanks and typical garbage and waste (JSF ¶ 3; aff. of James Heiser, ¶ 13).

14. Like on the Woodpark contract, USACE compensated Phylway for some of the impact caused by the hurricane. For example, in Modification No. A00014, USACE paid Phylway $28,768, for the loss of 899 cubic yards of embankment. The modification described the work as "repair damage to permanent work caused by Hurricane Ida." (R4, tab 16 at 2).

[2] All Rule 4 citations appearing under this portion of the decision (Happy Jack Contract) relate to the Rule 4 materials the parties submitted under ASBCA No. 63723.

15. Also like the Woodpark contract, USACE refused to pay for debris removal. On May 26, 2023, Phylway submitted a claim seeking $43,793.27 (R4, tab 3 at 1, 7). On July 17, 2023, CO Christopher M. Nuccio denied the claim (R4, tab 2).

16. On September 25, 2023, Phylway submitted a timely appeal that the Board docketed as No. 63723. Phylway seeks the costs of removing the debris on top of compacted fill (levee material) and from areas that it had cleared and grubbed but had not yet begun placing embankment. Phylway continues to seek $43,793.27, which it contends it is entitled to under the Damage to Work clause. (Compl. ¶¶ 8-11)

DECISION

These appeals turn on interpretation of the Damage to Work clause. USACE contends that deposition of debris on the site is not "damage," for purposes of that clause, if the appellant cannot identify specific damage or injury to that portion of the work. In other words, USACE contends that the mere presence of the debris is not damage. USACE also contends that removal of the debris is not "repair" as provided in the clause. It also contends that clearing and grubbing is not "permanent" work.

The long-established rule is that the contractor is responsible for damage suffered while work is in progress. For example, in 1931 the Court of Claims denied a claim for the cost of reconstructing a nearly completed building that had been damaged by a gas explosion that was not the fault of either the contractor or the government. The Court explained that:

> The rule is well settled that where a contractor undertakes to erect a building, and during the process of construction the building is injured or destroyed without fault of either party to the contract, the contractor is still bound by his undertaking to complete the building, and is liable in damages if he fails to do so.

Mittry v. United States, 73 Ct. Cl. 341, 358 (1931).

The Permits and Responsibilities clause shifts the risk for damage to the work to the government if the work is completed and accepted. Thus, the Board has held that the "general rule under the Permits and Responsibilities clause is that the contractor is responsible for the contract work until it is completed and accepted. If work in process is damaged, the contractor's responsibility is to restore it without compensation." *Joseph Becks & Assocs., Inc.*, ASBCA No. 31126, 88–1 BCA ¶ 20,428 at 103,326, *aff'd*, 864 F.2d 150, *1 (Fed. Cir. 1988) (table) (citing *Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 470 (Fed. Cir. 1988)). The Board has interpreted the clause to bar a claim that included the costs of debris cleanup after

unusually severe rainstorms. *N.J. Riebe Enters., Inc.*, ASBCA No.41691, 92-2 BCA ¶ 24,917 at 124,239.

Phylway relies on a decision in which the Board provided the appellant some relief on a contract that contained the Permits and Responsibilities clause but not the Damage to Work clause. In *Titan Pacific Construction Corp.*, ASBCA No. 24148 *et al.*, 87-1 BCA ¶ 19,626, the project site was struck by a severe wind and rainstorm, leaving trees and other debris on the site. On the day the storm ended, and the following day (February 13-14, 1979), the contractor performed emergency removal of debris from roads and construction sites to provide access for fire protection for buildings under construction. More than five weeks later (March 26-31, 1979), the contractor removed additional debris from earthwork and roadwork under construction. *Id.* at 99,338-40. The contractor sought payment for both periods of debris removal. The Board issued what could be characterized as a split decision. The Board granted the contractor compensation for the emergency debris removal in the first period, reasoning that the contract did not call for this work. *Id.* at 99,356. On the other hand, the Board denied compensation for debris removal for the later period of removal, which the Board concluded fell under the Permits and Responsibilities clause. *Id.*

At first blush, the Board's decision in *Titan* appears internally inconsistent because the Board ruled that the contractor was entitled to payment for removal of debris on February 13-14, 1979, but not debris removed from March 26-31, 1979. However, a close read of the decision provides a possible answer. In the latter period of time, the Board stated that the contractor removed the debris from earthwork and roadwork under construction, which clearly indicates that it was removed from the project site. *Id.* at 99,356. In the earlier period, the Board stated that the debris had been deposited on "roads, including those under construction," described the area of removal as "roads and construction sites" and then later stated that this was work "not called for under the contract." *Id.* at 99,338, 99,340 and 99,356. While not perfectly clear, we infer from this that the contractor had to remove debris from roads that were not part of the project site to provide access for fire protection to the project site.

In any event, Phylway's claims involve debris removal on the two project sites (findings 6, 13). Accordingly, they are comparable to the portion of the claim in *Titan* that the Board denied, namely the removal of debris from the earthwork and roadwork under construction. *Id.* at 99,356. This distinction renders Phylway's reliance upon the Board's decision in *Titan* unavailing.

The Damage to Work clause contains an exception to the rule that the contractor is responsible to repair damage to work not yet accepted to the extent the contractor can demonstrate that (1) the claim involves "permanent" work; (2) the work

was "damaged" by flood or hurricane and not due to the negligence of the contractor; and (3) the contractor performed "repairs" ordered by the CO (finding 3).

USACE relies upon the decision of the Court of Federal Claims in *Hardwick Bros. Co., II v. United States*, 36 Fed. Cl. 347 (1996), *aff'd*,168 F.3d 1322 (Fed. Cir. 1998) (table). *Hardwick* involved a contract for construction of a system of levees that contained both the Permits and Responsibilities and Damage to Work clauses. *Id.* at 353, 414. The contractor asserted a claim for damage to work caused by a river flood. The court observed that the claim did not involve destruction of the levee at issue but rather flooding that resulted in the deposit of debris on the embankment, as well as mud on reinforcing steel bars, both of which had to be removed by the contractor. The court rejected the contractor's claim, holding that neither the debris on the embankment, nor the mud on the steel bars, constituted damage under the Damage to Work clause. *Id.* at 414-15. In affirming the decision, the Federal Circuit cited with apparent approval the trial court's conclusion "that this exception [in the Damage to Work clause] to the general allocation of risk placed on the contractor must be construed narrowly. . . ." 168 F.3d 1322 at *5.

While *Hardwick* is not binding on the Board, we agree with the court's decision. The Board holds that the debris at issue here did not fall under the meaning of the word damage, as that word is commonly used, nor does the removal of the debris fall under the definition of repair.[3] In so ruling, we have consulted the online version of the Oxford English Dictionary and Webster's Third New International Dictionary (Unabridged). We find that the meaning of 'damage' in the context of the Damage to Work clause is captured by the following entry from the Oxford English Dictionary: "Injury, harm; esp. physical injury to a thing, such as impairs its value or usefulness." OXFORD ENGLISH DICTIONARY (2d ed.) (definition last modified September 2024),[4]. We find that the meaning of "repair" is contained in the following definition from the Oxford English Dictionary: "To restore (a damaged, worn, or faulty object or structure) to good or proper condition by replacing or fixing parts; to mend, fix." OXFORD ENGLISH DICTIONARY (2d ed.) (definition last modified December 2024).[5]

In these appeals, the debris was deposited on the embankments, on the fill in a drainage ditch, and in areas that had been cleared and grubbed (findings 11, 16). The Board concludes that debris that settled on, for example, the embankment, does not, by

[3] Neither party has cited a relevant definition of "damage" or "repair" in the contracts or the FAR.

[4] *See* https://www.oed.com/dictionary/damage_n?tab=meaning_and_use#7406157 (last accessed January 16, 2024).

[5] *See* https://www.oed.com/dictionary/repair_v2?tab=meaning_and_use#26104912 (last accessed January 16, 2024).

its mere presence, cause "physical injury" or harm to the embankment, even if the debris is preventing a resumption of the work. Moreover, removal of the debris is not an action directed at "a damaged, worn, or faulty object or structure," nor does it involve replacing or fixing parts, or require actions that could be characterized as mending.

Accordingly, the Board holds that the debris caused neither damage, nor required repair. Phylway's claim does not fall under the narrow exception contained in the Damage to Work clause. Based on our holding, we need not reach USACE's contention that clearing and grubbing is not permanent work.

CONCLUSION

The appeals are denied.

Dated: February 13, 2025

MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

DAVID B. STINSON
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. 63705, 63723, Appeals of Phylway Construction, LLC, rendered in conformance with the Board's Charter.

Dated: February 13, 2025

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals