ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Oman-Fischbach International, a Joint Venture	)	ASBCA No. 44195
	)	
Under Contract No. N62470-81-C-1177	)	

APPEARANCES FOR THE APPELLANT: William H. Gammon, Esq.
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APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Brad L. Johnson, Esq.
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OPINION BY ADMINISTRATIVE JUDGE COLDREN

This appeal arises from a contract whereby Oman-Fischbach International, a Joint Venture (appellant or OFI), agreed to construct a fuel tank facility for the Government, acting through the Atlantic Division, Naval Facilities Engineering Command, Norfolk, Virginia. Originally, appellant sought an equitable adjustment in the amount of $897,500 for increased costs. As explained below, that amount has been reduced to $531,907.18.

FINDINGS OF FACT

1. In September 1985, the Atlantic Division, Naval Facilities Engineering Command, Norfolk, Virginia, awarded a firm fixed-price contract No. N62470-81-C-1177 to appellant for the construction of fuel tank facilities at Lajes Field, Terceira Island, Azores (R4, tab 1).

2. Under the terms of an international law agreement, the Portugal Azores Technical Agreement of 1984, "Lajes Air Base and its supporting facilities shall be under the command of the Portuguese Armed Forces . . . ." (Supp. R4, tab 4 at 4[1]) Neither the Portuguese Armed Forces nor any other entity of the Portuguese government was a party to the subject contract (R4, tab 1).

3. The contract contained several standard clauses for fixed price contracts: FAR 52.212-12, SUSPENSION OF WORK (APR 1984); FAR 52.233-1, DISPUTES (APR 1984);

[1] The parties filed a joint supplemental Rule 4 file.

FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.243-4, CHANGES (APR 1984) (R4, tab 1). It also contained standard clause FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), which provides in part:

> (b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(R4, tab 1)

4. Several contract specifications are relevant to the dispute: § 01010, ¶ 5, which required the contractor and its employees to obey all base regulations, including traffic regulations; § 01011, ¶ 13.1, which established normal contractor work hours as 7:00 a.m. to 6:00 p.m., Monday through Saturday; § 01560, ¶ 2.3.1.1, which required OFI to haul rubbish and debris to the base disposal site, to comply with waste disposal site regulations, and estimated the haul distance as "no more than 10 miles"; § 02200, ¶ 3.5.3, which required disposal of waste materials in an area as directed by the contracting officer; and § 02200, ¶ 3.5.3.1, which stated as follows:

> Except for soil impregnated with lead, the Contracting Officer shall direct the Contractor to dispose of waste materials to one of the following sites indicated on drawing C-2:
>
> 1) North end of abandon [sic] runway 29
> 2) North west end of active runway 34
> 3) South of the south tank farm, in the lowland (marsh) area.
>
> Minimal grading and leveling shall be preformed [sic] at each site, as directed by the Contracting Officer.

(R4, tab 1; *see also* supp. R4, tab 51 at 2; *see also* tr. 2/111-12[2]) Neither Drawing C-2 nor any other contract drawing depicted these waste disposal locations (R4, tabs 1, 3; tr. 2/112).

[2] References to the hearing transcript are by volume and page number.

5. OFI sent a person (who became the project manager) to the Azores as part of a pre-bid site visit (tr. 1/29, 63-64). In addition to a briefing, prospective bidders were taken on a bus tour which included stops at the location of the tank farm, other remote locations, and on-base near the end of Runway 29 (tr. 1/66-73). All three of the waste disposal sites in the specifications were visible at some point in the tour (tr. 1/68, 2/21).

6. During the tour, Navy personnel discussed the requirements concerning security checks at the base gates and licenses for trucks to be operated on-base, the need to observe speed limits, and the requirement to keep on-base streets clear of waste materials (tr. 1/68-73, 2/22-23). Participants were also told that use of an on-base route to the Runway 34 site would require crossing an active runway, and that it would also need to be kept clear of debris (tr. 1/69, 71-72). Although OFI knew that the Government could direct useage of the Runway 34 site, OFI did not really believe that it would have to use that site, whether via an on-base or off-base route (tr. 1/71, 2/9, 2/12-13, 37, 53-54). During the pre-bid visit, there was mention of the prohibition against using a route through the military residential area (tr. 2/23). Other than the need to keep the on-base roads and active runway clear of debris and observe traffic regulations, and to not use the residential route, the record does not show any discussions as to the use of particular roads and streets, or routes to be used, mandatory or otherwise, to reach disposal sites.

7. The project manager testified that, in preparation of its bid, OFI planned to utilize first the waste disposal site south of the tank farm location, and then dispose of the remainder of the construction debris at the Runway 29 disposal site. According to his testimony, use of the Runway 29 site was planned to have been via on-base streets. (Tr. 1/79-80, 2/9) There is nothing in the appeal record in terms of documents, drawings, or notes which clearly and independently supports such intentions or plans. Appellant admits that OFI did not include the cost of hauling to the Runway 34 disposal site in its bid because it considered it unlikely that the contracting officer would direct it to use that site. Furthermore, appellant has not proved what the difference would have been between the cost of hauling to the Runway 34 disposal site via on-base streets and the active runway versus the route adjacent to the Base which it ultimately used. (*See* app. reply br. at 6)

8. From the beginning of work into August of 1987, appellant was able to use either the waste disposal site south of the tank farm location or other locations not delineated in the contract (but which were advantageous to appellant in both time and costs) (tr. 1/100-03, 108-10, 2/51-53, 129-30; supp. R4, tab 37). By the end of August 1987, although there were other disposal sites available, the project manager felt their use was not "feasible" (tr. 1/104, 111-12).

9. In late Spring 1986, the Portuguese converted an unsecured area to a secured one by locking the gate leading to the Runway 29 disposal area (supp. R4, tab 41). On 23 September 1987, appellant discovered the Portuguese locked gate which effectively prevented appellant from using the on-base route to get to the Runway 29 disposal site (supp. R4, tab 38; tr. 1/114-17, 135-36). By early November 1987, agreement was reached with the Portuguese so that the gate controlling access to the Runway 29 site would be open at least six hours per day, five days a week (supp. R4, tab 59). During those periods of appellant's operations that the gate was locked, the AROICC directed that appellant use the Runway 34 site via the Lajes route around the base and admitted that this was a change to the contract (tr. 1/122-24, 149-51; supp. R4, tabs 41, 53, 59). However, we find that this direction was not a compensable one because it post-dated the Portuguese locking of the gates. *See* Decision, *infra*.

10. On 14 November 1988, appellant submitted a "price proposal for an equitable adjustment" which was certified in accordance with the then applicable Department of Defense FAR Supplement (DFARS) 52.233-7000, CERTIFICATION OF REQUESTS FOR ADJUSTMENT OR RELIEF EXCEEDING $100,000 (FEB 1980). The subject of the letter was stated as "FAR 52.243-4, CHANGES." It sought a total adjustment of $897,500. (R4, tab 4)

11. By report dated 24 February 1989, the Defense Contract Audit Agency (DCAA) questioned $321,031 of the amount proposed by appellant. DCAA's audit questioned portions of almost every cost element of appellant's proposal. (R4, tab 5)

12. In another report dated 26 May 1989, DCAA questioned $109,307 of $155,951 claimed by one of appellant's subcontractors for delay. The entire amount had been included in appellant's change proposal. (R4, tab 6) DCAA's audits were supplemented by another report, dated 8 November 1989, which brought the total amount questioned to $431,185 (R4, tab 10).

13. On 8 June 1989, appellant wrote to Atlantic Division, Naval Facilities Engineering Command, Norfolk, Virginia, to provide additional supporting information for its proposal and to suggest a meeting. The letter also included an analysis which took exception to most of DCAA's earlier audit findings. (R4, tab 7)

14. Following a meeting between the parties in August 1989, the Government informed appellant, in a letter dated 21 September 1989, that the change proposal had not been considered a claim. The letter specifically noted that appellant's initial letter had not: 1) referred to the proposal as a claim or dispute; 2) asked for a contracting officer's final decision; or 3) referenced the contract's Disputes provision. The letter also questioned the authority of the person signing the certification. It concluded that appellant must submit a claim with proper certification in accordance with the Disputes

clause to get a decision by the contracting officer. (R4, tab 8) Appellant's counsel responded by letter dated 2 October 1989, and took issue with all of the Government's points (R4, tab 9).

15. By letter dated 19 December 1989, appellant rejected an overall settlement offer. It did state that the subcontractor was willing to accept $12,260 for its delay claim. The amount was to be burdened by "overhead, profit and interest" for both the subcontractor and appellant. Appellant's letter further requested that the Government "issue a final decision to our claim." The letter contains no certification, nor does it incorporate by reference any other communication between the parties. (R4, tab 11)

16. In a 7 March 1990 letter, the contracting officer informed appellant that its "request for equitable adjustment" was being processed "under the Disputes Clause" as a request for a final decision. A decision was expected by 30 June 1990. (R4, tab 13)

17. Bilateral Modification No. P00052, dated 3 April 1990, increased the contract price $18,667 "in full and complete settlement" of the subcontractor's claim. It also stated that the amount was "inclusive of subcontractor markup, prime contractor markup, profits and interest." At the same time, the Government issued unilateral Modification No. P00053 for an increase in contract price of $215,271.20, which was to "compensate the contractor for Items 3, 4, 5, 7, 9, 10, 11, 12, and 13 of the Contractor's claim dated 14 November 1988 . . . ." The Government has paid these amounts to appellant. (R4, tab 14; tr. 1/24-25)

18. By letter dated 31 July 1990, the Government reverted to its earlier position, *i.e.*, asserting that neither the 14 November 1988 nor any subsequent correspondence was a claim. It suggested that if appellant wished to obtain a final decision, it submit "a claim stating a sum certain, with the proper certification in accordance with the Contracts Disputes Clause [sic]." (R4, tab 15)

19. On 10 August 1990, appellant filed a notice of appeal on the basis of a "deemed denial" of its 14 November 1988 proposal (R4, tab 16). Shortly thereafter, appellant filed a motion to confirm jurisdiction. On the basis of *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), we denied the motion, finding that appellant's submissions were not claims, and dismissed the appeal without prejudice. *Oman-Fischbach International (Joint Venture)*, ASBCA No. 41474, 91-2 BCA ¶ 24,018. We affirmed our decision on appellant's motion for reconsideration. *Oman-Fischbach International (Joint Venture)*, ASBCA No. 41474, 91-3 BCA ¶ 24,141.

20. On 1 July 1991, appellant filed a claim with the contracting officer, reasserting its request for an increase in the contract price. After deductions for settlement of the

subcontractor's claim, and other adjustments including adjustments for payment as a result of Modification No. P00053, appellant's claim was for $531,907.18. (R4, tab 17)

21. By final decision dated 25 November 1991, the Government denied appellant's claim but reaffirmed the amount of $215,271.20, awarded in Modification No. P00053 except for interest. The decision demanded return of $11,598.20, which represented interest included in the modification amount. (R4, tab 18) Appellant timely filed its notice of appeal. No evidence is present in the record that the contracting officer ever demanded the return of the $215,271.20 other than interest.

22. On 12 December 1995, appellant filed a motion asserting the validity of its earlier "claim." In it, appellant argued that, since *Dawco Construction* had been overruled by *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*), there was no basis for our dismissal of ASBCA No. 41474 and, in effect, it should be vacated. The motion further argued that under *Reflectone*, the 14 November 1988 proposal had indeed been a claim; therefore, interest should run from that date. (App. motion at 3-5) Appellant's introduction to the motion states, "This motion presupposes that OFI will be successful at least in part in its appeal." (*Id*.) The Government filed a letter response to the motion on 3 April 1996.

23. A two day hearing on the merits was held in Nashville, Tennessee.

DECISION

In its complaint and at hearing, appellant argues that entitlement has been conceded by the Government as to nine elements of its claim (comp. at 4; tr. 1/14-15). In its answer, at the hearing, and in its post-hearing brief, the Government has challenged appellant's entitlement to any increased costs (answer at 8-9; tr. 1/19-23, 25-26; *see also* Gov't post-hearing brief at 1; app. post-hearing brief at 38, 40-48). The Government bases its opposition to entitlement on an interference of work by third parties defense (answer at 9; tr. 1/19-20, 24-25).

The parties do not dispute that the ultimate cause of appellant's claimed increased costs was the locking of the gate which controlled access to the dump at the end of Runway 29 through the base (tr. 1/243). The parties agree that the locking was by Portuguese authorities, and neither party has argued that it was an act over which the Government, *i.e.*, the U.S. Government, had any control or authority (tr. 1/13-16, 20; *see also* app. post-hearing brief at 39, 46-48; Gov't post-hearing brief at 1, 25-27).

Thus, the question presented is whether, under a firm fixed-price contract, the Government is obligated to reimburse appellant for additional costs which were incurred as a result of a foreign government's act in the absence of any contractual basis by which

the Government assumed responsibility, explicitly or implicitly, for such increases. The answer, simply stated, is no.

Appellant points to no contractual provision under which the Government explicitly assumed the risk of increased costs resulting from any acts of the Portuguese. Rather, appellant would have us find an implied warranty of access to the Runway 29 dump through the base. Appellant would then have us find that the denial of access was a breach of that warranty and is a change to the contract for which the Government is liable. To find an implied warranty, appellant relies on two contract clauses. First, ¶ 3.5.3.1 which designated three waste disposal or dump sites, and provided the contracting officer with the authority to direct the contractor to use one of those sites. Second, ¶ 13.1 which "guaranteed," according to appellant, an eleven-hour work day, six days per week. (Tr. 1/8; *see also* app. post-hearing brief at 40)

Appellant concedes that no contractual document indicated or dictated any particular route to any of the dumps (tr. 1/9-10; app. post-hearing brief at 40-41). Rather, because the pre-bid bus tour did not utilize any route other than the base route, and Navy personnel mentioned security procedures at the gates, the requirement for on-base licenses, and the need to observe on-base speed limits, appellant asserts that, coupled with the eleven-hour work day, the reasonable conclusion is that it would have unrestricted access through the base (tr. 1/68-73, 2/12-13; app. post-hearing brief at 6-7). Appellant further asserts that this conclusion was reinforced by a discussion of potential problems in using the Runway 34 dump (tr. 1/68-73; app. post-hearing brief at 6-7). It is on this basis that appellant would find an implied warranty upon which we could find liability on the part of the Government.

It has long been settled that the Government, under a firm fixed-price contract, has no legal duty to protect a contractor against increased costs, whether for material or labor. *D. P. Flores Construction Co., Inc.*, ASBCA No. 22973, 79-1 BCA ¶ 13,679. There are, of course, exceptions. Only the one raised by appellant is relevant here; *i.e.*, where the Government explicitly or implicitly agreed to indemnify a contractor for the acts of a third party.

We are unable to find that the Government implicitly agreed to indemnify appellant because the contract language is contrary to such an interpretation. Appellant erroneously reads ¶ 3.5.3.1 as permitting it to choose the least costly of the three dump sites contractually specified for depositing the excavated materials. Thus, appellant argues that the contracting officer in designating another more costly dump site than the one appellant chose out of the three specified by the contract has changed the contract terms entitling appellant to an equitable adjustment (finding 4). In fact, ¶ 3.5.3.1 authorizes the contracting officer rather than appellant to choose any of the three specified dump sites (*id.*). Consequently, appellant bears the risk that the contracting

officer might designate the most costly dump site, should have included the costs to use the most costly dump site in its bid, and cannot recover for being ordered by the contracting officer to use any of these contractually specified sites.

Even if the contract read, as alleged by appellant, that appellant had the right to choose one of the three dump sites, there has been much greater and more substantial evidence of a Governmental warranty in those situations where contractors have been indemnified. In *D & L Construction Co. & Associates v. United States*, 402 F.2d 990, 999 (Ct. Cl. 1968), the Court found that the Government had extended a warranty which had been breached. The contract provided that "existing off-site improvements, such as existing streets," would be available to the contractor. *Id*. at 997. Further, the contracting officer had written to the contractor, on the date the contract was executed, assuring it that the Government would "provide suitable access and means of ingress and egress . . . ." *Id*. It is also notable that when the Government denied the access promised, the contractor was left with no suitable access. *Id*. at 999. From those contractual and written assurances, the Court found an implied promise that the Government "would stand the resulting increased cost." *Id*.

Similarly, in *Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 811 (Ct. Cl. 1948), the contract specifications required that a specific route be used by the contractor. 76 F. Supp. at 813. The Court found that was a representation that the roads would be available, and the contractor had based its bid upon that representation. *Id*. at 815. The Court concluded that representation was a "direct promise" that "if costs were increased as a result of the exercise of a sovereign power, [the Government] would pay the increase." *Id*.

In contrast, and more closely related to the present situation, in *Lenry, Inc. v. United States*, 297 F.2d 550 (Ct. Cl. 1962), the Court concluded that there was nothing in writing from which to conclude there was a warranty. After the commencement of performance, plaintiff's work was interrupted by a flood which destroyed parts of certain streets it had intended to use as access roads. 297 F.2d at 550. Plaintiff averred that "the contract documents . . . taken as a whole," established a warranty. *Id*. at 551. In other words, plaintiffs asked that the Court find that "the Government *guaranteed* in all events the continued existence and availability of certain city streets . . . ." *Id*. The Court concluded that had the Government wished "to make such a unique and all-encompassing guarantee," it would have been "so specified in clear and unmistakable language." *Id*. at 553. The Court also noted that the streets involved were neither within the jurisdiction of the Federal Government nor under its control. *Id*. In fact, the streets were under the jurisdiction of the municipal authorities, *i.e.*, another sovereign. *Id*. Finally, there was nothing in the record to show that the Government "knew, or should have known, of the particular method of operation originally selected by [the contractor], since it formed no part of this contract." *Id*.

We have examined the other cases relied upon by appellant. As in those discussed above, the Court or Board found something far more substantial than what appellant would have us use to find a warranty. *See, e.g., Henderson, Inc.*, DOT BCA Nos. 2423, 2500, 94-2 BCA ¶ 26,728 (contract provision stating that dredging was prohibited during certain portion of the year found to warrant inference that dredging be allowed during the remainder of year); *J.W. Bateson Co., Inc.*, GSBCA No. 4687, 80-2 BCA ¶ 14,608 (contract drawing depicted ramps leading to and a portion of the street closed by the non-party local government as being within the work limits and a contract provision stated that these ramps could not be impeded during construction; appellant specifically inquired as to availability of this street for access and was led to believe it would be available); *Dravo Corporation*, ENG BCA No. 3800, 79-1 BCA ¶ 13,575 (contract provision designated five work/storage areas; subsequent denial of use of one of the areas found to be a breach of warranty).

In effect, appellant would have us imply one implication from another implication. It would have us imply that the bus tour and discussions, coupled with its selected contract provisions (which concededly do not deal with road access and give the contracting officer rather than appellant the right to designate the dumping site), gave rise to an implied warranty of access to a particular route, and then from that we are to imply that the Government would be liable for any increased costs arising from denial of that access. We decline to do so. Unless the parties contract in unmistakable terms to shift the risk of increased costs due to acts by a third-party government, no liability on the part of the Government attaches from such acts. *See also Pyramid Construction & Engineering Corporation*, ASBCA No. 15735, 71-2 BCA ¶ 9114 (act by a government other than the one which is a party to the contract provides no right to an equitable adjustment under the contract).

Appellant correctly points out that the AROICC directed that it use the Runway 34 dump via the Lajes route around the base, that this direction specified a route when no routes were specified in the contract, and that the AROICC admitted that the direction constituted a contract change (finding 9). The AROICC's direction to use the only route available to the Runway 34 dump after the Portuguese had already closed any other possible route the prior year did not actually cause appellant's change in contract performance. We must, therefore, deny the contention.

CONCLUSION

Based upon the foregoing, appellant has failed to show that the Government had affirmatively assumed, by implicit or explicit warranty, the risk of increased costs due to a sovereign act of a government not a party to the contract. Having determined that

appellant is not entitled to an equitable adjustment, we need not address appellant's arguments with respect to ASBCA No. 41474 relating to interest. The appeal is denied.

Dated: 12 July 2000

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Acting 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. 44195, Appeal of Oman-Fischbach International, a Joint Venture, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals