ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
American Construction & Energy, Inc.	)	ASBCA Nos. 52031 and 52032
	)	
Under Contract No. F14614-96-C-0013	)	

APPEARANCE FOR THE APPELLANT: Mr. Thomas Whitehead
President

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Thomas S. Marcey, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals are taken from contracting officer's decisions denying claims for extended overhead (ASBCA No. 52031) and for a differing site condition (ASBCA No. 52032). The underlying contract is for repair and alteration work. The parties have waived a hearing pursuant to Board Rule 11. Only entitlement is before us. We deny the appeals.

FINDINGS OF FACT

The Contract - General

1. On 30 April 1996, the Air Force, through the 22d Contracting Squadron at McConnell AFB, Kansas (Government or respondent), awarded the above-captioned contract (contract) to American Construction & Energy, Inc. (appellant) for various repair and alteration tasks to a dormitory. Pertinent contract clauses included FAR 52.214-29 ORDER OF PRECEDENCE - SEALED BIDDING (JAN 1986), FAR 52.233-1 DISPUTES (OCT 1995), FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984), FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), FAR 52.242-14 SUSPENSION OF WORK (APR 1984), and FAR 52.243-4 CHANGES (AUG 1987). The contract also included FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984), which, in pertinent part, stated, "In case of difference between drawings and specifications, the specifications shall govern." (R4, tab 1)

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2. The contract required appellant to complete the work within 270 days after receipt of the Notice to Proceed. Work was added through bilateral Modification Nos.

P00001, which extended performance to 12 April 1997, and P00002, which extended performance to 29 May 1997. The modifications included compensation for extended overhead due to eight and five days of Government delay, respectively. Both modifications contained a release. (R4, tabs 1-3)

3. Appellant submitted two proposals dated 18 February 1997, one dated 28 February 1997, and one dated 10 March 1997, in which it proposed costs for requested repairs to various items and changes to light fixtures and receptacles. Both of the 18 February 1997 proposals contained a form titled "Reservation of Rights Clause" which, in essence, reserved appellant's right to claim impact costs. The other proposals did not contain that form. The total of the four proposals was $7,715.27, and each included overhead of 15 percent. Appellant did not request extended overhead or an extension of time. (R4, tabs 29-31)

4. On 7 April 1997 respondent issued a letter requesting a proposal for a change to the contract involving conversion of rooms on the first and second floors to double room suites (R4, tab 32). Appellant submitted a proposal dated 11 April 1997 in the total amount of $132,618.97. Appellant requested a 60-day extension. (R4, tab 33)

5. By unilateral Modification No. P00003, dated 15 May 1997, the Government suspended all work associated with the room-to-suite work from 14 May 1997 "for a period of ten days or until notification is issued to resume work in the areas affected" (R4, tab 4).

6. Appellant submitted a revised proposal dated 22 May 1997 in the total amount of $129,002.13 (R4, tab 46). Bilateral Modification No. P00004 amended the contract to provide for the work. It extended the performance period by 75 days to 12 August 1997 and increased the contract price by $136,717.40, which is the total of $129,002.13 for the room-to-suite conversion, and $7,715.27 for the repairs and changes. Modification No. P00004, which did not reserve any rights to appellant, contained the following release:

> In Consideration of the Modification agreed to herein, this serves to be a complete, equitable adjustment for the Contractor's proposal. The Contractor hereby releases the Government from any and all liability under this Contract for further adjustments attributable to such facts or circumstances giving rise to the proposal for adjustment for Modification P00004.

(R4, tab 5)

7. Unilateral Modification No. P00006 dated 12 August 1997 extended the performance period of the contract to 5 September 1997 for the express purpose of completing negotiations for unidentified changes. (R4, tab 7)

8. Bilateral Modification No. P00007 dated 23 September 1997 increased the contract price by $4,450.35. It noted that the extension of time for the additional work provided for therein was included in Modification No. P00006 and did not reserve any rights to appellant. It also contained the following release:

> In Consideration of this Modification agreed to herein as complete equitable adjustments for the Contractor's P00007, "Proposal for Adjustment", the Contractor hereby releases the Government from any and all Liability under this Contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "Proposal for Adjustment" for this P00007.

(Supp. R4, tab 76)

9. By letter dated 14 October 1998, appellant submitted a claim for "extended overhead per reservation of rights clause." The claim calculated 60 days @ $341.43, for a subtotal of $20,485.80 as "other direct costs," to which it added 15% for overhead and 10% for profit, for a total of $25,914.54. The claim contained no supporting documentation. (R4, tab 54)

10. By letter dated 18 December 1998, the Government issued a contracting officer's decision granting appellant $4,289.08 ($341.43 x 10 days x 15% overhead x 10% profit) for 10 days of extended overhead due to Government delay as a result of Modification No. P00003 (R4, tab 55). Appellant filed a timely appeal.

11. The parties executed bilateral Modification No. P00008 on 11 and 18 March 1999, which added funds to the contract for the ten days of extended overhead ($4,289.08) and "for a claim for shower base" ($19,255.32). The modification requested that appellant submit an invoice in the total amount of $23,544.40. (R4, tab 7) Appellant was subsequently paid $23,544.40 (R4, tab 60). These amounts are not at issue in ASBCA No. 52031.

12. By letter of 4 May 1999 appellant submitted to the Board a "Reservation of Rights" form which reserves impact costs. The letter alleges the reservation was included with Modification No. P00004. (*See* R4, tab 61) There is no other evidence that appellant submitted the "Reservation of Rights" form with Modification No. P00004.

13. Appellant's complaint describes its claim as one for job site overhead costs arising from time extensions under Modification Nos. P00004 and P00006.

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14. Specification § 15410 " PLUMBING PIPING" required the contractor to furnish and install hot and cold water piping; sanitary drainage and vent piping; and valves and specialties. Pipe and pipe fittings were to be type "L" hard copper with wrought copper, bronze, or cast brass fittings and solder joints. (Supp. R4, tab 69 at § 15410, ¶¶ 1.1 A., 2.1 A.)

15. Specification § 15450 "PLUMBING EQUIPMENT" required the contractor to furnish and install plumbing fixtures (supp. R4, tab 69 at § 15450, ¶ 1.1). The specification further required for the shower:

> C. P-3 SHOWER
>
> FIAT "PILOT #98M" 30"x 30" free standing shower, or Approved Equal. . . . Provide shower stall less standard trim and less drillings for roughing in. . . .
> 1. Fiat "Neptune shower door, or Approved Equal, . . .
> 2. SYMMONS #012585-D Corner HYDAPIPE, or Approved Equal, packaged unit for through ceiling supply piping complete with Safetymix pressure balancing shower valve with integral stops, super shower head, attached soap dish and mounting brackets.
> 3. Connect new shower drain to existing "P" trap.

(*Id.* at ¶ 2.3 C.)

16. Specification § 02070 " SELECTIVE DEMOLITION" provided for verification that utilities have been disconnected and capped and for the contractor to "survey existing conditions and correlate with requirements indicated to determine extent of selective demolition required." Specification § 04200 " UNIT MASONRY" established specific requirements for the concrete masonry to be installed. (*Id.* at § 02070, ¶¶ 3.1, 3.5A; § 04200, ¶ 2.2 and Part 3)

17. Drawing P-1 " PLUMBING DEMOLITION PLAN 1ST - 3RD FLOORS" included a diagram of each dormitory room on each floor. Every two rooms shared a toilet and shower, and each room contained a sink. Next to each toilet, shower and sink was a "1" symbol. A corresponding plan note stated "1. Remove fixture. HW and CW, vent and drain to be reused by new fixture." (R4, tab 2) Drawing P-2 " PLUMBING RENOVATION PLAN 1ST - 3RD FLOORS" required the contractor to install new showers, shower heads,

arms, control valves, new sinks, ball valves and toilets. The new showers, sinks, and toilets were each to be connected to "new rough ins." Further, P-2's Note 4 required that the contractor "[i]nsulate all existing domestic hot and cold water piping." Drawing P-3 "PLUMBING EQUIPMENT SCHEDULES/DETAILS" included a "PLUMBING FIXTURE SCHEDULE" establishing dimensions for the hot and cold water and waste pipes for the toilet, sinks and showers. The drawings did not show the location of the existing piping. (R4, tab 2)

18. The Invitation for Bids (IFB) for the contract notified bidders of a site visit on 26 March 1996 which appellant did not attend (R4, tab 1; supp. R4, tab 70). Appellant denied in its correspondence to the Government that a site visit would have shown the location of the piping (*see, e.g.*, supp. R4, tab 79). The record contains statements from attendees at the site visit. The project manager from The Waldinger Corporation stated in pertinent part:

> I remember on the site visit of BLDG. 319, Looking [sic] at one of the bathrooms on the northeast side of the BLDG. which had a portion of the wall removed, in order to see the water, waste, and vent piping. This was of particular interest to me as a plumber knowing that the new free standing showers were to be installed in that area, and allowed me to see what alterations to the [water supply pipes] should be expected and allowed for in our bid.
>
> It seems to me that I remember seeing that one of the [pipes] would need to be relocated to allow for the shower entrance as it was shown on the plans to be placed in the remodeled bathroom.

(Supp. R4, tab 80) The president of Snodgrass Construction Company, Inc. stated, *inter alia*:

> During the visit of the entire building, we observed one sink area where the cabinet had pulled away from the wall. There was also one shower stall with a shower head mounted inside where the plumbing inside the wall was exposed. That wall had to be removed in order to make room for the new shower stall.

(Supp. R4, tab 81)

19. By letter dated 6 November 1996, appellant requested direction on how to proceed, indicating that it discovered upon demolition of the existing shower wall that the existing hot and cold water lines to the shower ran in a continuous line from the first to the

third floor approximately 16" from the corner of the new shower units to be installed. Appellant's 6 November 1996 letter alleged that it would need to eliminate the existing supply lines in order to use the corner hide-a-pipe shower unit, and that "new supply lines from the pipe chase will have to be installed." (R4, tab 19)

20. The parties met to discuss the situation on 8 November 1996. It was the Government's position that Note 1 of drawing P-1 and Note 1 of drawing P-2 (finding 17), read together, allowed the contractor to use existing piping to the extent possible but also required new rough-in plumbing from that point forth. (Supp. R4, tab 71) After additional correspondence from appellant, the Government by letter dated 4 December 1996 informed appellant it was required by specification § 15410 to furnish and install hot and cold water piping, and to use the existing hot and cold water, vents and drains to the extent feasible. (Supp. R4, tab 75)

21. By letter dated 6 December 1996, appellant responded that because there were no provisions in the plans and specifications for new supply lines, that it anticipated that the supply lines were in the pipe chase and the shower units were supplied from the side of the shower wall. Appellant asserted that it could not connect the new rough-ins to the existing water supply lines because they would be exposed on finishing of the room, without explanation of why they would be exposed. The 6 December 1996 letter and another dated 28 February 1997 went unanswered, according to a third letter dated 17 March 1997 in which appellant again alleged delay and asserted that its interpretation that the pipes were in the shower wall was reasonable, and that any ambiguity should be construed against the Government. (R4, tabs 58, 60) By letter of 23 March 1997 appellant sought an equitable adjustment (R4, tab 61).

22. In a 21 May 1997 letter to the Government appellant argued that because the shower valve was a "corner valve" and was to have new rough-ins that tied into the existing hot and cold water piping, it determined that the shower valves in the shower wall were rough-ins off of the existing piping. Appellant further stated that a site visit would not have identified this site condition, and that the only way to determine that the plumbing was different was to open up the wall, or be provided with detailed drawings of the existing and new plumbing requirements. Appellant stated that "[t]o remove water lines that were approximately 16" into the middle of the bathrooms on all floors is not and never was a part of this contract . . . ." (Supp. R4, tab 79)

23. Appellant submitted its claim in the amount of $29,735.77 by letter dated 14 October 1998. The claim was for removal of the hot water and cold water piping at issue, repair of holes in the floor, removal and installation of concrete blocks and associated costs, including 20 days of "extended overhead" at $341.43 per day. As support, appellant included a rough sketch of the plumbing conditions allegedly encountered. (R4, tab 54) The claim was denied in an 18 December 1998 contracting officer's decision (R4, tab 67). A timely appeal was taken.

24. In its complaint appellant alleges " a subsurface condition that differed materially from those indicated in the contract." We thus construe the claim to be asserted under the Differing Site Conditions clause.

DECISION

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Except for the "Reservation of Rights" form allegedly submitted with Modification No. P00004, appellant has submitted neither evidence nor a brief. Appellant executed a release from any and all liability attributable to the facts or circumstances under which the proposal for adjustment arose. We construe the release as inclusive of job site overhead, which, in the absence of contrary evidence, we conclude was a foreseeable element of cost. *Drake-Merritt-Roe, a Joint Venture*, ASBCA No. 15119, 72-2 BCA ¶ 9732 at 45,485. There was no reservation of rights associated with Modification No. P00006 and a release for time and costs for that modification was included in Modification No. P00007. "It is well settled that a contractor who executes an unconditional release is barred from any additional compensation under the contract based upon events occurring prior to the execution of the release." *Northwest Marine, Inc.*, ASBCA No. 40505, 94-3 BCA ¶ 27,036 at 134,742 (citations omitted). Recovery of job site overhead is thus barred for Modification No. P00006.

Appellant's 4 May 1999 letter alleges its "Reservation of Rights" form was submitted when it executed Modification No. P00004. There are no contemporaneous references to the form or other evidence to support a finding that it was part of Modification No. P00004. The burden of proof is on respondent with respect to the affirmative defense represented by the release in this case. Respondent has met that burden inasmuch as appellant neither disputes that it agreed to the release nor argues that it is without effect. The burden now shifts to appellant to establish that it reserved certain rights. *Cf. Atherton Construction, Inc.*, ASBCA No. 48167, 98-1 BCA ¶ 29,649. We find it has not met that burden and the claim is barred by the releases in the modifications.

Finally, even if the claim were not barred by the releases, the only information in the record from which the basis of the claim, let alone proof of the claim, can be ascertained is in the claim and the complaint. We have held that claims and pleadings are not adequate to prove disputed facts. *Peterman, Windham and Yaughn, Inc.*, ASBCA No. 21147, 77-2 BCA ¶ 12,674. Except for its claim and complaint, appellant has failed utterly to provide proof of its claim. The appeal is denied.

Appellant's argument appears to be that it read the drawings and drawing notes to state that it would not have to install new piping, but simply new rough ins, for the shower valves. As we understand the claim, it was from those drawings and the requirement for a "corner valve" for the shower (ostensibly part of the HYDAPIPE shower unit provided for in specification § 15450) that appellant allegedly made the determination that the existing hot and cold water piping could be used and would be accessible without having to demolish the shower wall. Further, appellant states that a site visit would not have shown this condition.

Treating appellant's claim as a Type I differing site condition, appellant must, *inter alia*, prove that the contract documents represented a specific subsurface or latent condition; that it reasonably relied on the contract representation; that the condition actually encountered was materially different from that represented; and that the condition was not reasonably foreseeable. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987). As to foreseeability, we have found that appellant did not attend a site visit at which the plumbing inside the wall was exposed (finding 18). One of the other bidders in attendance at the site visit stated the exposure of the plumbing was adequate for him to see what alterations to the water supply pipes "should be expected and allowed for in our bid" (*id*.). We hold on the evidence presented that a site visit would have revealed the conditions appellant now claims were unforeseeable. Appellant cannot, therefore, recover. *G&P Construction Co., Inc.*, ASBCA No. 49524, 98-1 BCA ¶ 29,457.

To prevail on a Type II differing site condition claim, a contractor must prove, among other things, that it encountered something materially different from the "known" and "usual." *G&P Construction Co., Inc.*, 98-1 BCA at 146,227, *citing Charles T. Parker Constr. Co. v. United States*, 433 F.2d 771, 778 (Ct. Cl. 1970); *Potomac Co.*, ASBCA No. 25371, 81-1 BCA ¶ 14,950, at 73,992. An "unknown" condition within the meaning of the clause does not include one which can be observed through a reasonable site visit where, as here, such a visit is allowed. (*Id*.) The appeal is denied.

SUMMARY

ASBCA Nos. 52031 and 52032 are denied.

Dated: 27 November 2000

CARROLL C. DICUS, JR.
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
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 Nos. 52031 and 52032, Appeals of American Construction & Energy, Inc., rendered in conformance with the Board's Charter.

Dated:

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