ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Clauss Construction	)	ASBCA No. 51707
	)	
Under Contract No. DACA21-96-C-0153	)	

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OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) denial of the contractor's $1,862,196 claim under the captioned contract for extra work and loss of salvage profits because the Government did not permit the contractor to remove intact portions of 86 family housing units (FHUs) off-site from Fort Bragg, NC, for rehabilitation and sale to the public. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a three-day hearing at Fayetteville, NC, the parties submitted post-hearing briefs. The Board is to decide only entitlement (tr. 8).

FINDINGS OF FACT

1. On 27 September 1996, the ACOE awarded Clauss Construction (CC) contract No. DACA21-96-C-0153 (contract 153) for the demolition of 86 FHUs at Fort Bragg, NC, for the firm fixed price of $223,370 (comp. & ans., ¶ 6; R4, tab 5).

2. In contract 153, specification § 02050 DEMOLITION provided in pertinent part:

1.1 GENERAL REQUIREMENTS

The work includes demolition, salvage of identified items and materials, and removal of resulting rubbish and debris . . . . In the interest of conservation salvage shall be pursued to the maximum extent possible; salvaged items and materials shall be disposed of as specified.

1.2 SUBMITTALS

Government approval is required for submittals with a "GA" designation . . . . The following shall be submitted . . . .

Work Plan; Demo 86 Family Housing Units.

The procedures proposed for the accomplishment of the work. The procedures shall provide for . . . careful removal and disposition of materials specified to be demolished . . . .

. . . .

3.1 EXISTING STRUCTURES

Existing structures indicated shall be removed to subgrade.

. . . .

3.4 DISPOSITION OF MATERIALS

Title to material and equipment to be demolished, except Government salvage and historical items, is vested in the Contractor upon receipt of notice to proceed. The Government will not be responsible for the condition, loss or damage to such property after notice to proceed.

3.4.1 Salvageable Items and Material

Contractor shall salvage items and material to the maximum extent possible.

3.4.1.1 Material Salvaged for the Contractor

Material salvaged for the Contractor shall be stored as approved by the [CO] and shall be removed from Government

> property before completion of the contract. Material salvaged for the Contractor shall not be sold on the site.
>
> 3.4.1.2 Items Salvaged for the Government
>
> Salvaged items to remain the property of the Government shall be removed in a manner to prevent damage, and packed or crated to protect the items from damage while in storage or during shipment . . . . [The only items identified for salvage for the Government were the historical items in ¶ 3.4.1.3.]
>
> . . . .
>
> 3.4.2 Unsalvageable Material
>
> Concrete, masonry, and other noncombustible material, shall be disposed of in the disposal area located outside the limits of the base . . . .

We find that the ¶ 1.2 work plan submittal required no Government approval, and the FHUs above their foundations were composed of wood panels and ceilings, and roof tiles, *i.e.*, combustible materials (ex. G-48, §§ 02050, 02080, App. A at 1 of 13).

3. In contract 153, specification § 02080 ASBESTOS REMOVAL provided in pertinent part:

> 2.3 Title to Materials. All materials in and on the structures at the time of demolition shall be disposed of as asbestos waste. The contractor may have title to any non-asbestos-containing [materials] prior to demolition of the structure. If any materials are salvaged the asbestos-containing materials must not be damaged or rendered friable in the process.

Paragraphs 17.1.1 through 17.1.4 required the contractor, "[b]efore demolition commences," to remove and dispose of 1,935 square feet of exterior transite siding, 1,935 square feet of interior transite board, and 40 square feet of friable duct tape. (Ex. G-48)

4. In contract 153, specification § 02090 REMOVAL AND DISPOSAL OF LEAD-CONTAINING PAINT: (a) provided in pertinent part:

> PART I: GENERAL

> The intent of this project is to demolish interior and exterior components of Buildings in such a manner that the lead based painted building components may be removed and disposed of so as not to pose a hazard to the public, workmen and the environment.
>
> . . . .
>
> 1.3 Disposal of Building Materials Painted with Lead Based Paint
>
> . . . .
>
> b. Do not remove any lead based painted materials from the buildings. All (LBP) building materials are to be [demolished] with the building and disposed of with the building rubble and asbestos waste, as per North Carolina requirements. All demolished buildings will be composite sampled and tested by TCLP for lead. Demolition debris shall be disposed of according to its waste classification in an approved manner.

(b) identified LBP in 40 paint chips taken from 18 FHUs, with no representation that such sample was representative of all 86 FHUs; (c) stated that the "U.S. EPA" considered "lead containing material" as 0.5% by weight; and (d) did not identify any North Carolina LBP requirements (ex. G-48). "TCLP" meant "Toxicity Characteristic Leaching Procedure," with a regulatory level of "5.0 mg/L" for hazardous waste No. D008, lead, per 40 CFR § 261.24.

5. Contract 153 did not define "demolition" (ex. G-48; tr. 231).

6. In respondent's "Holland Barracks" contract, No. DACA21-95-C-0071, for building demolition and construction at Fort Bragg, specification § 02050 included provisions substantially identical to contract 153's ¶¶ 1.1, 3.1, 3.4, 3.4.1, 3.4.1.1, 3.4.1.2, and 3.4.2. That contract required Government approval of the contractor's demolition work plan submittal, and omitted specification §§ 02080 and 02090. (Exs. A-32 at 2, A-49; tr. 333-34, 419-20) Respondent allowed the removal of two buildings intact for relocation off base under Contract No. DACA21-95-C-0071 (ex. A-32 at 2; tr. 360-63).

7. CC's bid for contract 153 was based on CC's in-house estimate, not on subcontractor bids; was based on salvaging 20 to 25% of the material processed; and contemplated further investigation of removing FHU structures intact (tr. 154-55, 162, 189-91).

8. The ACOE gave CC notice to proceed on 10 January 1997, which CC acknowledged on 16 January 1997 (R4, tab 6). This gave CC 360 days thereafter to complete contract performance, *i.e.*, by 11 January 1998 (ex. G-48 at 00010-1).

9. On 14 January 1997, Olde Fayetteville Investments, Inc. (OFI), of Fayetteville, NC, submitted a bid to CC for $65,000 to relocate and to "market the units to the fullest extent possible" with a minimum of 45 FHUs or more as allowed by the Government (ex. G-2).

10. On 26 February 1997, CC entered into a written subcontract with OFI, also known as "Architectural Salvage, Inc." (ASI), for the demolition, removal, salvage and disposal of 86 FHUs in accordance with contract 153 for $65,000.00. The subcontract listed OFI/ASI's subcontractors as "Fayetteville Housemovers" and "Adams House Moving." (Ex. G-1 at 2, 10; tr. 229-30) OFI/ASI subcontracted with Fayetteville Housemovers and Adams to move portions of the 86 FHUs (tr. 248, 359, 363, 370-71).

11. On 21 January 1997, OFI/ASI subcontracted with World Marketing Associates, Inc. (WMA), of Spring Lake, NC, to advertise and market the foregoing 86 FHUs for sale (ex. A-39; tr. 34, 259-60, 278). WMA President, Linwood Berg, bought 20 FHUs himself and sold about 23 FHUs to others (tr. 35, 46, 266, 269, 271).

12. Included with CC's Transmittal No. 3 dated 27 February 1997, entitled "DEMOLITION & HOUSING RELOCATION PLAN," was a 23 February 1997 "Work Plan" prepared by OFI/ASI for "salvage and/or relocation," that included raising and moving the 86 FHUs fully intact to a proposed relocation site outside Fort Bragg, or, if not fully intact, hand-dismantled to allow maximum recovery of reusable materials (ex. G-7 at 5-6).

13. The CO disapproved CC's Transmittal No. 3 on 26 March 1997 (ex. G-7 at 1). Administrative Contracting Officer Chris M. Wenk's 26 March 1997 letter to CC stated:

> Your variation submittal . . . has been disapproved. The sale of these housing units will not be allowed with any contamination involving asbestos and lead to remain. The Department of the Army is not permitted to transfer to another party all liability for contamination caused by the . . . Army.
>
> The contract clearly calls for the demolition of the housing units and does not allow the homes to be sold to the public. Even though you mention that you have title to material and equipment to be demolished, except government salvage and historical items upon notice to proceed, the contract also states that you do not have title to the asbestos material prior to demolition.

(Ex. G-9; tr. 472) CC had no prior knowledge of the ACOE's foregoing interpretation of contract 153 (tr. 155).

14. Between 26 March and 28 April 1997, Mr. Schappi Marsh, "Authorized Representative of the Contracting Officer," sent an undated letter to CC stating that "no work shall commence until your company presents a scope of work for the removal of the housing units. A contracting officer's decision will be rendered on this scope of work" (ex. G-20; tr. 432, 475).

15. CC submitted to the ACOE an "addendum" dated 28 April 1997 to its Transmittal No. 03A, dated 29 April 1997, stating that CC would remove asbestos material identified in the plans and specifications from the houses to be relocated, including roofing mastic, floor tile, transite siding, transite wall and ceiling board, and duct tape, and would remove all LBP materials identified in the plans and specifications from the FHUs' exterior trim, exterior door and hand rails. CC provided information from independent consultants concerning asbestos and LBP abatement requirements in residential structures:

> 40 CFR 260 thru 268 does not define intact residential units as a hazardous material. An intact residential unit is in fact an asset with significant value. The inference that the unit may be painted with lead based paint or contain asbestos containing materials does not in fact change the entire unit or its components into a hazardous material. Current real estate transactions reveal or disclose the presence of lead based paint or asbestos friable or non-friable. The intact housing unit is not a hazardous waste. The North Carolina Code 10G.0505 Requires asbestos material generated by demolition processes to be disposed of in a municipal solid waste landfill, however the[re] is no regulation current or proposed that would require the demolition of residences based solely on the presence of Lead Based Paint or asbestos containing building material.

(R4, tab 7) Respondent admitted that North Carolina did not require removal of intact lead material from residential structures being reused, relocated, dismantled or salvaged (ex. A-32 at 3).

16. Mr. Marsh's 8 May 1997 letter to CC disapproved CC's 29 April 1997 "Demolition Plan/Relocation Plan," Transmittal No. 03A, and stated:

> Complete removal of all asbestos and lead-based material on the exterior and interior of the house is required before any of the houses can be sold and moved off the post. Encapsulation is not allowed as an option. Furthermore, you will be required

> to hire an independent EPA certified lead inspector to identify all the lead-based paint in the houses and also to clear the houses. The current specifications require demolition. New specifications must be developed for the house selling situation. You must submit a revised lead and asbestos abatement plan covering the house selling situation.

(R4, tab 7; ex. G-10)

17. Under threat of default termination on 17 April 1997 (ex. A-27), CC sent to the ACOE Transmittal No. 03B, which the ACOE received on 12 May 1997, with a demolition plan that omitted relocation of any FHUs intact. The CO approved Transmittal No. 03B on 11 June 1997. (Ex. G-51; tr. 48, 172-73)

18. On 7 July 1997, CC submitted to the contracting officer a claim certification* and OFI/ASI's 20 June 1997 claim for "$1,862,195" (sic). OFI/ASI and its subcontractors claimed $1,551,300, and CC claimed $310,896, totaling $1,862,196. (R4, tab 3; ex. G-52) The ACOE's actions damaged CC (tr. 177).

19. The CO's 26 May 1998 final decision denied CC's 7 July 1997 claim in its entirety (R4, tab 1). On 24 August 1998 CC timely appealed therefrom to the ASBCA (R4, tab 2).

DECISION

Appellant has the burden of proving its constructive change claim against the Government. *See John T. Jones Const. Co.*, ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,974, *aff'd sub nom. John T. Jones Const. Co. v. Caldera*, 178 F.3d 1307 (Fed. Cir. 1998) (table). If a contract authorizes a specific method of performance, to forbid such method is a constructive change. *See Bruno New York Industries Corp. v. United States*, 342 F.2d 75, 79, 169 Ct. Cl. 999, 1007 (1965) (contract allowed use of non-tantalum capacitors if approved by the procuring agency; Government order requiring tantalum capacitor was a change); *Walashek Industrial & Marine, Inc.*, ASBCA No. 52166, 01-1 BCA ¶ 31,385 at 155,000-01 (contract allowed removal of existing paint with limited amount of primer; Government order to remove all surface coatings was a change).

Appellant argues that contract 153 did not forbid the relocation and sale of the 86 FHUs substantially intact, after removal of asbestos; contract 153 required abatement of LBP only for 18 FHUs, not 86 as respondent demanded; requiring abatement of LBP on 68

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* Clauss Construction's 7 July 1997 CDA claim certification was sent to the Board by respondent on 15 October 2001 at the Board's request. The record is reopened to admit this certification as exhibit G-52.

other FHUs was a differing site condition; and respondent's frustration of appellant's proposed method of performing contract 153 was a constructive change (app. br. at 6-8).

Respondent argues that at the time of contracting both parties understood by the "plain dictionary definition," that "demolition" meant to tear down or raze the 86 FHUs; such meaning of "demolition" was consistent with the specification requirement for salvage "to the maximum extent possible," by merely limiting the maximum extent; appellant established no trade practice or course of dealing between the parties allowing FHU relocation since appellant was not a party to the "Holland Barracks" contract; and appellant's interpretation of "demolition" and "salvage" are inconsistent with the specification § 02090, ¶ 1.3b, requirement, "Do not remove any lead based painted materials from the buildings" (Gov't br. at 19-34).

Contract 153 specified in the General Requirements that "[t]he work includes demolition, salvage of identified items and materials, and removal of resulting rubbish and debris." As between demolition and salvage, the contract specified that "salvage shall be pursued to the maximum extent possible." The contract stated that existing structures were to be "removed" to subgrade. Further, the contract reiterated under Salvageable Items and Material, that "Contractor shall salvage items and material to the maximum extent possible." Moreover, the contract defined "Unsalvageable Material" as "[c]oncrete, masonry, and other noncombustible material," not the FHUs. (Finding 2) In view of these provisions requiring and encouraging salvage, respondent's argument based on dictionary definitions of "demolition" that appellant was prohibited from salvaging the FHUs intact is unpersuasive.

Respondent argues further that CC's proposal to relocate the 86 FHUs intact violated specification § 02090, ¶ 1.3b, "Do not remove any lead based painted materials from the buildings" (finding 4). Respondent misinterprets ¶ 1.3b. CC did not propose to "remove any lead based painted materials" from any FHU, but rather to relocate FHUs intact without removing any LBP materials from their interior or exterior surfaces (finding 12). Respondent admitted that North Carolina did not require removal of intact lead material from residential structures being reused, relocated, dismantled or salvaged (finding 15).

We hold that the specification provisions in contract 153 are plain and unambiguous, and did not forbid CC from removing and relocating FHU structures intact or substantially intact. Thus, CC's demolition work plan, Submittal No. 3, was not a "variation" from the specifications that required the CO's approval. Furthermore, no Government approval was prescribed for CC's demolition work plan (finding 2). Therefore, respondent had no contractual right to impose conditions for approval of such work plan (findings 13-16).

Assuming *arguendo* that the contract terms with respect to CC's demolition and salvage duties were not clear and unambiguous, then such terms were latently ambiguous. It was not obvious that the specification § 02090, ¶ 1.3b, provision -

> All (LBP) building materials are to be [demolished] with the building and disposed of with the building rubble and asbestos waste, as per North Carolina requirements.

was reasonably intended to negate the contractor's title and right to salvage materials including LBP materials established in specification § 02050, ¶3.4, when such salvage did not violate North Carolina requirements. Respondent interpreted those provisions to prohibit relocating FHUs intact; appellant interpreted them to permit such relocation. Those terms must be construed against their drafter, the Government, by the rule of *contra proferentem.* As we found, appellant relied at time of bid upon an interpretation that removing the FHU structures intact was permissible (finding 7).

We conclude that respondent's refusal to allow CC to remove and relocate FHUs intact for later sale to the public, and to regard the salvageable wooden FHU structures as "unsalvageable" demolition debris to be disposed of in a landfill, constituted a constructive change. *See Bruno New York; Walashek, supra*. Accordingly, we do not decide the other grounds appellant advances for entitlement. We sustain the appeal on entitlement, and remand it to the parties to resolve quantum.

Dated: 7 December 2001

DAVID W. JAMES, 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 No. 51707, Appeal of Clauss Construction, rendered in conformance with the Board's Charter.

Dated:

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