

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Maintenance Engineers) ASBCA No. 52527
)
Under Contract No. N62467-97-D-0929)

APPEARANCE FOR THE APPELLANT: Mr. Bradley G. Herman
Vice President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Naval Facilities Engineering
Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE ROME

Maintenance Engineers (ME) has appealed under the Contract Disputes Act, 41 U.S.C. § 606, from the contracting officer's (CO) final decision denying its \$9,244.91 claim for extra palm tree pruning costs under its ground maintenance contract with the Naval Facilities Engineering Command. The parties have waived a hearing and briefs and seek a decision on the submitted record pursuant to Board Rule 11. We decide entitlement only. For the reasons given below, we deny the appeal.

FINDINGS OF FACT

Background

1. Effective 7 January 1998, the Navy awarded Contract No. N62467-97-D-0929 to ME for grounds maintenance at the Coastal Systems Station (CSS), Panama City, Florida. The combined firm fixed-price and indefinite quantity contract, included a base year and four option periods. Among other work, the fixed-price portion of the contract called for scheduled and unscheduled pruning of palms and other trees. ME's price for all of the fixed-price work was \$330,311.00. ME's price for tree pruning was \$7,800.00. (R4, tab 1 at award page, B-2, M-2, tab 2 at Mod. 1 at 4)

2. Palm trees were scheduled to be pruned during the month of January. The Navy had intended to award the contract so that its base year would start, and the contractor would prune palms, in January 1998 but, due to an award delay (unexplained in the record), the

base year did not start until 1 February 1998. It ended on 31 January 1999. (R4, tab 1 at B-1, C-27, § C.23 a.; ex. G-1 at 2)

3. CSS contained approximately 375 palm trees, 275 of which were Sabal or like palms and about 100 were other varieties. (R4, tab 1 at C-27, § C.23.a; ex. G-2 at ¶ 4) The Sabal palm, the state tree of Florida, typically grows 20 to 40 feet tall and requires considerable annual trimming. The other palms at CSS were much smaller than the Sabals; they did not grow as fast; and they were much easier to maintain. (Ex. G-1 at 1)

4. The solicitation contained the FAR 52.237-1 SITE VISIT (APR 1984) clause:

Offerors are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

(R4, tab 1 at L-12) The solicitation noted that a site visit and pre-proposal conference would occur on 8 July 1997, at which time technical and administrative personnel would be on hand to discuss requirements and to answer questions (*id.*). The conference occurred when scheduled. Six companies were listed as having attended, but not ME, which is located in Jackson, Wyoming (R4, tab 1 at award page, amend. 0002 at 0002-3, 0002-6).

Contract Provisions Concerning Tree Pruning

5. Section C.3 of the contract defined “pruning” as:

selectively removing dead, dying, diseased, live interfering, objectionable and weak branches or growth to make a plant or tree grow or respond in a desired manner. Pruning differs from “shearing”. Pruning involves selection and judgment. “Shearing” means clipping all growth on a plant at a uniform distance and shape.

(R4, tab 1 at C-4)

6. Section C.23, “TREE PRUNING,” provided in part that:

Trees shall be pruned using as guidance Attachment J-C18 to selectively remove unwanted growth and encourage trees to grow or respond in a desired manner. All tree pruning shall be accomplished under the supervision of an individual furnished

by the Contractor, who is trained and qualified in proper tree pruning techniques. . . . Prior to starting work the Contractor shall propose a pruning plan for each tree for the approval of the [CO]. Work will not begin until the pruning plan is approved by the [CO]. Trees shall be pruned according to their natural growth habitat to evenly form and balance the tree, to promote proper health and growth, to respond to damage inflicted by natural or human causes

(R4, tab 1 at C-26, -27) Attachment J-C18 gave safety and procedural guidance for tree trimming, noting that “[t]he amount of trimming that may or should be done depends on the species of tree to be trimmed” (R4, tab 1 at J-C18-2), but it did not address palm tree pruning in particular.

7. Section C.23c.(1) provided, in part, that tree pruning was to consist of removing:

(a) Broken branches (hangers) or palm fronds caused by wind or other cause.

(b) Dead Branches or palm fronds.

(c) Obviously diseased, deformed or structurally weak branches or palm fronds that may cause a safety hazard or unsightly appearance.

. . . .

(g) Dead stubs remaining on the tree trunk or branches from natural removal in previous years.

(h) Short stubs or palm fronds (live or dead) remaining from improper previous pruning operations (old or recent).

(R4, tab 1 at C-27, C-28)

Pre-Performance Meeting and Evergreen’s Contract

8. Bradley Herman, ME’s “home corporate officer” who supervised ME’s maintenance contract, and other ME representatives attended a 29 January 1998 pre-performance meeting with the Navy. The last scheduled palm tree pruning had been in January 1997. Since ME’s performance period did not start until February 1998 and its scheduled palm pruning was not due until January 1999, it was discussed at the conference that the Navy would negotiate a separate contract for the missed pruning services. (R4, tab

3; ex. A-2 at ¶¶ 1, 2; ex. G-1 at 2) There is no evidence of record that Mr. Herman was on site at any time after the pre-performance conference, including during ME's palm pruning in January, 1999.

9. The Navy awarded a small purchase contract on 19 March 1998 to Evergreen Landscaping, Inc. (Evergreen), in the amount of \$6,650, to prune CSS' Sabal palms before the summer growing season. The other palms were not covered because the very mild winter had fostered little need for pruning them. (R4, tab 5; ex. G-1 at 2)

10. Pruning under Evergreen's contract consisted of removing broken or dead palm fronds, and obviously diseased, deformed or structurally weak palm fronds that might cause a safety hazard or unsightly appearance. Acceptance of the work was subject to the Navy's inspection and Evergreen would be required to correct any deficiencies due to improper tree pruning. (R4, tab 5, spec. 06-98-2938, ¶¶ 13, 15)

11. Evergreen pruned in March and April 1998, leaving the palms healthy and well-groomed (ex. G-1 at 2-3; ex. G-2 at ¶ 14). The Navy accepted Evergreen's work on 11 May 1998, with no deficiencies to be corrected. (R4, tab 5 at invoice)

12. At least some of ME's employees were at CSS when Evergreen worked (ex. G-1 at 4).

ME's Palm Pruning

13. Due to Evergreen's work, ME had to prune the Sabal palms after only eight to nine months' growth, rather than the year's growth contemplated at the time ME's contract had been solicited (ex. G-1 at 4; ex. G-2 at ¶ 12). The delayed pruning of the other palms did not increase ME's work because the trees required only minimal, quick and easy trimming, with no special equipment (ex. G-1 at 4).

14. ME began to prune palm trees on 7 January 1999. Contrary to its contract requirement, it did not submit a pruning plan before it began pruning. CSS's lead quality assurance evaluator (QAE) during the pruning work, Mr. Dennis B. Gunther, recorded in his 7 January inspection report that the pruning was unsatisfactory and did not comply with contract § C.23. (R4, tab 8) He found the appearance of the trees, after ME had pruned them, to be "very poor . . . rough, asymmetrical, and extremely thinned out" (ex. G-2, ¶ 6).

15. At a 7 January 1999 performance evaluation meeting, the QAE raised the perceived pruning deficiencies with William "Buddy" Mills, ME's project manager, who had performed the pruning. Mr. Mills blamed the trees' appearance upon the previous grounds maintenance contractor and stated that it was beyond the scope of ME's contract to correct that prior work. The Navy's Facility Support Contracts Manager (FSCM), Keller Brooks, recorded in his meeting minutes that the contractor's interpretation of the pruning

methods to be used on the palms differed from the Government's and that the contractor was directed to seek an interpretation and CO's decision on the matter. (R4, tab 7; ex. G-1 at 2-3; ex. G-2 at ¶ 7)

16. By letter to the CO dated 7 January 1999, referring to an alleged discussion between the Navy and Mr. Mills during the evaluation, Mr. Herman stated that it was detrimental to palm trees to remove the husk and that removal was not a contract requirement (R4, tab 9). The CO responded on 8 January 1999 that the Navy agreed that husks should not be removed, but that the discussion had not concerned husk removal. She said that, rather, the Navy sought the complete and proper pruning of palm trees in accordance with the contract, citing §§ C.23, C.23c.(1)(c), (g) and (h) (R4, tab 10).

17. In his inspection reports, the QAE continued to record unsatisfactory pruning by ME, through 13 January 1999, said not to comply with contract § C.23 (R4, tab 8).

18. On 15 January 1999, Mr. Herman wrote to the Navy that, in the 7 January meeting, the Navy had directed ME on the manner in which it wanted the palm trees pruned, and later had clarified its direction through a sample completed under the QAE's and the FSCM's supervision. He stated that this approach contradicted the Government's long established practices and he requested reconsideration of the "decision to change the Government's accepted palm tree plan." (R4, tab 11)

19. The CO replied on 19 January 1999, denying Mr. Herman's allegations and stating that the Government's position had not changed -- palm trees were to be pruned in accordance with the contract (R4, tab 12). Mr. Michael L. Pemberton, head of CSS's Maintenance Branch, and QAE Gunther, in their sworn declarations, also deny the allegations (ex. G-1 at 3; ex. G-2 at ¶ 11).

20. The QAE and Mr. Pemberton declare, based upon their personal observations, that ME's on-site personnel did not have palm tree pruning knowledge or skills. These unrebutted reports are supported by photographic evidence; and we accept them as fact. (Exs. G-1, G-2, including photo G)

21. ME did not complete its Sabal palm pruning requirement. Forty-five of the trees were left unpruned (ex. G-1 at 3; ex. G-2 at ¶ 9).

22. Despite its dissatisfaction with ME's pruning work, the Navy did not take any contract deductions for that work. However, it elected not to exercise its contract options. (Ex. G-1 at 3; ex. G-2 at ¶ 11)

ME's Claim

23. On 23 February 1999, Mr. Herman sought a \$4,592.00 equitable adjustment to ME's contract on the ground that, contrary to its representation at the pre-performance meeting, the Navy had not issued an interim contract for palm tree pruning prior to ME's work in January 1999, causing ME to perform the equivalent of two years' pruning in one year. Mr. Herman also alleged that the Government had changed its established pruning practice and had required ME to cut stubs, which were part of the trees' protective husks, flush with the trees' trunks. (R4, tab 14)

24. On 20 May 1999, Mr. Herman filed a claim with the CO, now in the amount of \$9,244.91, on the same grounds (R4, tab 15).

25. By final decision dated 22 September 1999, the CO denied the claim, stating that ME had been required to perform extensive rework due to "improper supervision of the work, lack of skilled personnel to perform the work, and lack of knowledge of contract requirements." (R4, tab 18 at 1) The nature and extent of the rework is not identified in the record. ME timely appealed to this Board.

DISCUSSION

Appellant claims that it was required to perform work beyond the scope of its contract, for which it is entitled to an equitable adjustment. Appellant has the burden of proving its claim by a preponderance of the evidence. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). In a case heard on entitlement only, appellant is required to establish the Government's liability and at least the fact of resultant injury. *Technocratica*, ASBCA Nos. 46567 *et al.*, 99-2 BCA ¶ 30,391 at 150,218.

In essence, appellant alleges that the Government constructively changed its contract. A constructive change can occur when a contractor performs work beyond that required under its contract, without a formal change order, and the work was informally directed by, or was the fault of, the Government. *Id.* at 150,227. To establish a constructive change, a contractor must prove that (1) a contract change occurred; (2) the changed work was not done voluntarily, but rather as a result of the Government's direction; and (3) the directed change increased the contractor's cost of performance. *See Combination Industries*, ASBCA No. 47789, 95-1 BCA ¶ 27,418.

In his claim to the CO, Mr. Herman alleged that the Navy had not issued a promised interim contract prior to ME's work in January 1999, thereby doubling ME's workload. He also claimed that the Navy had changed its established palm tree pruning practice and had required ME to perform the extra work of cutting husk stubs flush with tree trunks. The first part of ME's claim is manifestly incorrect. Evergreen performed its separate contract work during ME's contract performance period. At least some of ME's personnel were on

site when Evergreen worked (finding 12). Mr. Herman was the home corporate officer who supervised ME's maintenance contract. Although he attended the pre-performance conference, after the Navy had awarded the contract to ME, there is no evidence of record that he was on site during ME's palm pruning work in January 1999. (Finding 8) The fact that he apparently was unaware of Evergreen's work when he filed ME's claim suggests that he had little direct knowledge of on-site pruning activities.

In his declaration, Mr. Herman acknowledges that there was an interim pruning contract and he focuses instead upon the second aspect of ME's claim. Mr. Herman declares that, during a site inspection, ME had observed that the 375 palm trees at CSS had been properly pruned over several years according to generally accepted pruning practice, leaving 16- to 24-inch husks at the base of the trees, but that, during ME's contract performance, the Navy had directed it to remove the husks from every palm tree, on the ground that the husks had resulted from improper pruning (ex. A-2 at ¶¶ 8, 14). Mr. Herman does not state who made the site inspection on behalf of ME or whether it was pre-proposal or later. As we have noted, ME is not listed as having attended the pre-proposal conference (Finding 4).

Mr. Herman adds that there was nothing in the solicitation to advise a potential bidder that the Government allegedly considered that almost every palm tree at CSS had been pruned improperly. According to him, ME's contract contained no detailed palm tree pruning specifications, leading it to follow accepted practice and to leave the husks. Although there is no contemporaneous evidence in the record as to how ME arrived at its proposal price, Mr. Herman states that ME did not include husk removal in that price (ex. A-2 at ¶ 17). Mr. Herman's view of acceptable pruning practice is said to be based upon 10 years' personal experience in pruning Sabal palms and upon Betrock's Guide To Landscape Palms. However, the excerpt from Betrock's he submitted does not describe palm pruning practice (ex. A-1).

We accord little weight to Mr. Herman's declaration. Assertions or allegations standing alone, unsupported by specific probative evidence, such as corroborative project documentation and sworn testimony from personnel with direct involvement in project performance, are insufficient to prove a claim. *Technocratica, supra*, 99-2 BCA at 150,226; *Superior Abatement Services, Inc.*, ASBCA Nos. 47118 *et al.*, 94-3 BCA ¶ 27,278 at 135,897. Moreover, we draw some adverse inference from appellant's failure to submit evidence from Mr. Mills, or from anyone else who actually performed the pruning work and allegedly was subject to the Navy's directions. *Technocratia, supra*, 99-2 BCA at 150,226. In contrast, the Government has rebutted all of appellant's allegations with the sworn declarations of involved personnel.

There is no probative evidence of record that the Navy claimed that any trees had previously been pruned improperly, whether by Evergreen or by any contractor prior to ME. The Navy contends, and there is evidence, to the contrary. The head of CSS's Maintenance

Branch, Mr. Pemberton, declares that the Navy has applied the same pruning requirements and inspection standards year after year and has not had palm pruning problems except during ME's performance (ex. G-1 at 3). We have found that Evergreen left the Sabal palms in a well-groomed, healthy condition and that the Navy accepted its work with no deficiencies to be corrected (finding 11).

Further, whether or not cutting the stubs of palm trees flush with their trunks would have constituted husk removal and would have differed from established pruning practice, as appellant contends, the Navy's declarants deny that the Navy required such pruning, and they deny that the Navy directed ME on how to perform the contract work (ex. G-1 at 3; ex. G-2 at ¶ 13). Their declarations are supported by the contemporaneous documentation of record. For example, in responding to Mr. Herman's contentions concerning allegedly injurious husk removal, the CO agreed that palm husks were not to be removed; she denied that the Navy had discussed husk removal; and she did not direct any particular pruning method. Instead, she referred ME to the contract's specifications. (Findings 16, 18, 19)

In sum, not only has appellant failed to prove the alleged established palm pruning practice upon which it relies, but it has not proved that the Government directed any particular pruning method, or that any direction it might have issued was beyond the scope of the contract's requirements. Thus, it has not met its initial burden to prove that the Government changed its contract.

DECISION

The appeal is denied.

Dated: 13 June 2001

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 52527, Appeal of Maintenance Engineers, rendered in conformance with the Board's Charter.

Dated:

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