

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Wade Perrow Construction, Inc.) ASBCA Nos. 53021, 54018
)
Under Contract No. NAFEF3-98-C-0037)

APPEARANCE FOR THE APPELLANT: Mr. Daniel G. McKinney
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Ronald S. Marsh, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Seattle

OPINION BY ADMINISTRATIVE JUDGE TUNKS
PURSUANT TO RULE 11

These appeals arise from a dispute over the storm drainage provisions in a design/build contract for a golf clubhouse and maintenance facility. ASBCA No. 53021 is a claim for \$28,619.26 plus five-days for providing a catch basin and a drain line from an overflow parking lot to a pond on a golf course on the north side of the site. ASBCA No. 54018 is a claim for \$27,996.02 plus three-days for improving the drainage system on the south side of the site. The contract is not subject to the Contract Disputes Act. The appeals were submitted on the written record pursuant to Board Rule 11. Only entitlement is before us.

FINDINGS OF FACT

1. On 12 January 1998, the Government issued Request for Proposals (RFP) No. NAFEF3-98-R-0006 for a design/build contract for a golf clubhouse and maintenance facility at Selfridge ANG, Mt. Clemens, Michigan (R4, tab B-3). In addition to the storm drainage system which is the subject of these appeals, the work included the design and construction of a golf clubhouse, a cart storage building, a maintenance building and related structures, cart paths from the clubhouse to the #1 tee and other locations and "relocation, temporary construction and restoration necessary to produce a complete and useable facility" (¶ 1.2A, R4, tab B-3 at C-1/1, C-3/18).

2. The RFP contained an option for an overflow parking lot. The Government had 60 calendar days from the contractor's receipt of the Notice to Proceed (NTP) in which to exercise the option (R4, tab B-3 at H-22, ¶ H-30). The option provided as follows:

Option 2 - Overflow Parking

Provide all labor, materials and equipment to construct an overflow parking area adjacent to the new parking lot The overflow lot shall accommodate at least 40 cars

(R4, tab B-2 at B-4)

3. The RFP indicated that the site was generally flat with very little change in elevation and that there was an existing drainage ditch along South Perimeter Road (hereinafter “the perimeter ditch”) (R4, tab B-3 at C-1/5, C-1/6, tab D-12 at sheet SC3). The RFP did not identify any existing culverts across South Perimeter Road (app. supp. R4, tab A-8 at admission 1).

4. In designing the project, the contractor was required to meet the design criteria in the RFP. Conflicts between the design criteria and the contractor’s submittals were to be resolved in accordance with clause L-20, which provided, in part, as follows:

The criteria specified in this RFP are binding contract criteria and in cases of any conflict, subsequent to award, between RFP criteria and Contractor’s submittals, the RFP criteria shall govern unless there is a written agreement between the Contracting Officer and the Contractor waiving the specific requirement or accepting a specific condition pertaining to the offer.

(R4, tab B-3 at L/5)

5. The following design criteria are relevant to these claims:

2.1 Grading at Buildings and Structures:

A. The site shall be graded . . . to prevent ponding of storm water in either lawn or paved areas.

....

C. Drainage Patterns: Retain existing drainage patterns to the maximum extent practicable.

....

2.3 Existing Utilities:

A. Locate and identify existing underground . . . services and utilities within contract limit work areas.

....

3.1 [Utilities Service] General:

A. The Offeror shall be responsible to determine that all of the existing service utilities are of sufficient capacity to accommodate all of the design loads for this total facility. Should the Offeror determine that one or more of the existing service utilities are not adequate . . . then the Offeror shall submit with his . . . proposal, the requirements, design data and the price for increasing the capacity of each existing . . . utility system or for providing a new . . . system.

....

3.3 Storm Drainage System:

A. Design Criteria: . . . Design frequency shall be 10 years for gutters and downspouts and 25 years for all other drainage.

....

4.1 Coordination:

A. The existing golf course . . . will be renovated under a separate contract. The Contractor shall coordinate his work with the golf course renovation contractor to avoid impeding the progress of either project.

(R4, tab B-3 at C-4/1 through C-4/4)

6. Paragraph H-15(a) of the RFP required the contractor to make two design submittals. The first submittal was to be at the 50 percent design stage and the second submittal was to be at the 95 percent design stage. (R4, tab B-3 at H-12) If the submittal was not approved, paragraph H-15(j) required “the Contractor to make the necessary corrections or revisions and submit a completed corrected design . . .” (R4, tab B-3 at H-15).

ASBCA No. 53021 (Catch Basin)

7. In response to the RFP, Wade Perrow Construction, Inc. (WPC) submitted its proposal on 2 March 1998 (R4, tab B-1). The proposal included \$5,000 for the overflow parking lot option (R4, tab B-2 at B-4).

8. On 19 March 1998, the Government asked WPC to clarify its drainage plan since no catch basins were shown (compl., tab 1 at item 48). WPC replied that it planned to use “sheet flow to ditch” (compl., tab 2 at item 48).

9. WPC submitted its best and final offer (BAFO) on 8 April 1998. The BAFO stated that “[d]rainage is to be mostly sheet flow to the ditch.” (R4, tab B-4 at Site Narrative)

10. On 15 June 1998, the Government awarded Contract No. NAFEF3-98-C-0037 in the amount of \$3,239,000 to WPC (R4, tab B-1). The contract was not subject to the Contract Disputes Act (R4, tab B-3).

11. WPC acknowledged receipt of the NTP on 2 July 1998 (R4, tab A-2).

12. On 29 July 1998, WPC submitted its 50 percent design submittal. The grading plan in the submittal indicated that WPC intended to sheet flow water from the area of the overflow parking lot onto the golf course. (App. supp. R4, tab A-5)

13. On 6 August 1998, the Government rejected the revised drainage plan for the following reasons:

18 . . . Grading north of parking lot will result in ponding water by driving range and at #1 tee. This is not acceptable. Grades should be raised at cart path to drain water to south, or catch basins provided between cart path and parking lot.

19 . . . No drainage shown for clubhouse service court.

20 . . . Coordinate grading east of clubhouse with course contractor to prevent ponding on the course.

(R4, tabs A-8, A-9)

14. On 11 August 1998, the Government issued Modification No. P00001, exercising the option for an overflow parking lot. The modification did not include any separate provisions relating to storm drainage. (Modification No. P00001 dated 11 August 1998)

15. On 25 August 1998, WPC revised its grading plan to include a catch basin and a drain line from the overflow parking lot to a pond on the golf course (R4, tab D-14 at sheet C-3).

16. On 12 October 1998, WPC confirmed with the golf course contractor that “the proposed outlet for the stormline into Pond C . . . was appropriate and posed no conflicts with [the golf course contractor’s] work” (compl., tab 8).

17. On 9 November 1998, WPC submitted a claim for approximately \$35,000 for providing the catch basin and drain line and requested a contracting officer’s final decision (compl., tab 10).

18. On 13 January 1999, the contracting officer’s representative, Mr. Harry L. Salisbury, Jr., recommended that WPC’s catch basin claim be denied for the following reasons:

Due to the restricted grades we are working with . . . it is apparent that sheet flow[ing water from the overflow parking area] south to the drainage ditch is not feasible. Sheet flowing to the golf course, thereby causing undesirable ponding, is not a viable option either. . . . [T]he only viable method to remove the water from the overflow parking area is by piping it to some outlet system.

(R4, tab E-7)

19. On 25 March 1999, the Government’s architect-engineer, Bucher, Willis & Ratliff Corporation, provided the following comments:

At the 50% design review . . . WPC was directed to coordinate with the Golf Course Contractor, and [told] that the clubhouse project would not be allowed to just drain water onto the golf course site without making sure it would not pond and create water problems on the course. . . . WPC was advised that if they could not find a way to surface drain to the north without adversely affecting the golf course, they could change the ridge line to the north side of the cart path and surface drain everything to the south, or consider using a catchbasin and piping the storm water to the nearest golf course pond. This was noted in our 50% civil design review comments #18 and #19 on August 6, 1998.

(R4, tab E-8)

20. On 3 June 1999, WPC reduced its claim to \$32,544.28 (R4, tab A-12).

21. On 3 December 1999, WPC reduced its claim to \$28,619.26 and a five-day extension of the completion date (R4, tab A-13).

22. The contracting officer denied the claim on 4 August 2000 because providing the catch basin and drain line were required to meet the design criteria in the contract (R4, tab A).

DECISION

WPC argues that it is entitled to an equitable adjustment of \$28,619.26 and a five-day extension of the contract completion date for providing a catch basin and drain line from the overflow parking lot to a pond on the golf course. According to WPC, the work was beyond the scope of the contract. The Government argues that WPC was required to provide the catch basin and drain line in order to meet paragraphs 2.1A and 4.1A of the design criteria. Consequently, the Government concludes that the work was not a change to the contract.

In order to satisfy paragraphs 2.1A and 4.1A of the design criteria, WPC's drainage system had to prevent ponding and avoid interfering with the progress of WPC's contract or the golf course contractor's contract. The Government presented evidence that the proposed drainage plan in WPC's 50 percent design submittal would have caused unacceptable ponding by the driving range and at the #1 tee as well as on the golf course. The record does not contain any contemporaneous letters from WPC disputing the accuracy of the Government's evaluation and WPC did not offer any evidence with its Rule 11 brief showing that the Government's analysis was incorrect. We conclude that, in providing the catch basin and drain line, WPC did no more than what was required to meet the design criteria in the contract. Accordingly, WPC is not entitled to an equitable adjustment.

ASBCA No. 54018 (Improve Drainage Along South Perimeter Road)

23. On 9 July 1998, WPC located a culvert along South Perimeter Road at the southwest corner of the site. As a result, WPC decided that "drainage should be sheet flow to swale on south side of parking lot and run to th[e] existing culvert." (Compl., tab 3)

24. WPC submitted its 50 percent revised submittal on or about 29 July 1998. Item 72 of the Government's comments provided as follows:

72 . . . Has the capacity of the drainage swale south of the parking lot been checked? It appears to be only 6 inches deep

and relatively flat. The capacity should be checked a [sic] well as velocities.

(R4, tab A-8)

25. In reply to item 72, WPC submitted its 25-year storm calculations on 29 September 1998. The calculations indicated that sheet flow into the existing culvert would not meet the 25-year rainfall requirement. (Compl., tabs 6, 23 at 2)

26. On 1 October 1998, WPC proposed installing a new 15-inch culvert to the existing system to meet the 25-year rainfall requirement (compl., tab 7).

27. On 3 November 1998, the Government replied to WPC's proposal as follows:

The RFP requires that the design be for a 25-year event
[Y]ou did not make us aware . . . that the use of sheet flow in lieu of a conventional . . . system would compromise our stated design criteria. We accepted your . . . proposal [in] the belief that [the 25-year] requirement . . . would still be met.
[I]nstallation of a new culvert under the South Perimeter Road . . . is an acceptable solution. However, we . . . believe that providing this culvert is your responsibility

(Compl., tab 9)

28. On 9 November 1998, WPC requested a contracting officer's final decision and submitted a claim for approximately \$45,000 to clean out the existing 12-inch culvert and install a new 15-inch culvert (compl., tab 10).

29. On 4 May 1999, WPC located a second silted-over 12-inch culvert near the clubhouse (compl., tab 22, COP #12 at 5).

30. On 3 June 1999, WPC requested a contracting officer's final decision on a claim for uncovering the two existing 12-inch culverts, cleaning them out and putting them into service. The amount of the claim was \$39,295.53. (Compl., tab 18)

31. On or about 15 June 1999, WPC proposed sheet flowing run-off water across South Perimeter Road into the two existing 12-inch culverts (compl., tab 19). The Government accepted the proposal (R4, tab A).

32. The contract was substantially complete by 19 August 1999 (compl., tab 22).

33. On 3 December 1999, WPC reduced its claim to \$27,996.02 and a three-day extension of the contract completion date (R4, tab A-13).

34. On 4 August 2000, the contracting officer denied the claim. Since WPC could meet the 25-year rainfall requirement by using the two existing culverts and the perimeter ditch, the contracting officer concluded WPC was not entitled to an equitable adjustment for improving the drainage system along South Perimeter Road. He also concluded that locating, excavating and cleaning the existing culverts was within the scope of the contract. (R4, tab A)

DECISION

WPC argues that it is entitled to an equitable adjustment of \$27,996.02 and a 3-day extension of the contract completion date for locating, excavating and cleaning-out two existing 12-inch culverts along South Perimeter Road. WPC alleges that the work was a change to the contract. The Government argues that the work was required to meet the 25-year rainfall requirement of paragraph 3.3 of the design criteria and that, as a result, WPC is not entitled to an equitable adjustment.

WPC does not dispute that the drainage system it proposed for the south side of the site failed to meet the 25-year rainfall requirement of the design criteria. WPC argues that it is entitled to an equitable adjustment for three reasons. First, WPC argues that it is entitled to the costs of locating and identifying the existing culverts because they were not identified in the RFP. However, paragraph 2.3A of the design criteria made WPC responsible for locating and identifying all existing underground services and utilities within the contract limits. Thus, WPC is not entitled to additional compensation for locating and identifying the existing culverts. WPC secondly argues that it is entitled to an adjustment under paragraph 3.1A for uncovering the existing culverts and cleaning them out. This argument fails because paragraph 3.1A provides for an adjustment only if the “existing service utilities” are not adequate to accommodate the design loads for the project. Although it considered adding a new 15-inch culvert to the existing system, WPC ultimately used the existing 12-inch culverts and the existing perimeter ditch to drain the south side of the site. This combination of existing drainage structures met the 25-year rainfall requirement. As a result, WPC is not entitled to an adjustment under paragraph 3.1A. Finally, WPC argues it is entitled to an equitable adjustment because uncovering and cleaning-out the culverts was beyond the scope of the contract. This argument cannot succeed because paragraph 1.2A of the RFP required WPC to provide the “relocation, temporary construction and restoration necessary to produce a complete and useable facility” (R4, tab B-3 at C-1/1). Accordingly, we conclude that restoring the existing culverts was part of the contract requirements.

CONCLUSION

The appeals are denied.

Dated: 29 January 2003

ELIZABETH A. TUNKS
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 Nos. 53021, 54018, Appeals of Wade Perrow Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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