ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
HGM, Inc.	)	ASBCA No. 53150
	)	
Under Contract No. DAPC50-99-P-6069	)	

APPEARANCES FOR THE APPELLANT: David C. Schutter, Esq.
Christopher A. Dias, Esq.
Schutter, Dias, Smith & Wong
Honolulu, HI

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Anissa N. Parekh, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

HGM, Inc. (appellant) seeks full payment of its contract price to dispose of debris located at Wheeler Army Airfield (WAAF), Island of Oahu, Hawaii. The Department of the Army (Army or the Government) contends, *inter alia,* that appellant failed to comply with contract requirements and is not entitled to the full contract price. A hearing was held and briefs were filed. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. For reasons stated, we deny the appeal.

FINDINGS OF FACT

1. Contract No. DAPC50-99-P-6069 was awarded to appellant by the Directorate of Contracting, Ft. Shafter, Island of Oahu, HI on 13 July 1999 in the amount of $22,000 to dispose of approximately 4,000 cubic yards of debris located on WAAF, Island of Oahu, HI. The project was scheduled to be completed by 16 August 1999. (R4, tab 1)

2. The contract contained the following pertinent provisions. Item No. 0001 of the contract schedule provided as follows (R4, tab 1):

> FSC S205 SERVICES: FURNISH ALL LABOR, MATERIALS,
> FFP - TRANSPORTATION AND EQUIPMENT NECESSARY
> TO LOAD, HAUL AND DISPOSE OF APPROXIMATELY
> 4,000 CUBIC YARDS OF VARIOUS DEBRIS TO INCLUDE
> DIRT, METAL FENCING, ASPHALT AND CEMENT

> LOCATED OFF AIRDROME ROAD ON WHEELER ARMY AIRFIELD, ISLAND OF OAHU, HAWAII. DISPOSAL WILL CONSIST OF (BUT NOT LIMITED TO) LOADING, REMOVAL, HAULING AND DISPOSAL OF DEBRIS TO INCLUDE SOIL, BROKEN CONCRETE AND ASPHALT AND ANY OTHER ITEMS IN ACCORDANCE WITH REQUIREMENTS THAT MEET OR EXCEED ENVIRONMENTAL PROTECTION AGENCY (EPA), FEDERAL, STATE AND LOCAL LAWS. PURCHASE REQUEST NUMBER APZVPW-9166-9502

The Description/Specification/Work Statement provided in pertinent part as follows (*id.*):

> C.1 Scope of Work. The Contractor shall provide all labor, materials, transportation and equipment necessary to dispose of (but not limited to) loading, removal, hauling and disposal of debris to include soil, broken concrete and asphalt, fencing, and various other items in accordance with EPA, Federal, State and Local standards.
>
> C.1.1 Location. The debris is located in a vacant lot off Airdrome Road, Wheeler Army Airfield, Island of Oahu, Hawaii.
>
> . . . .
>
> C.5 SPECIFIC TASK REQUIREMENTS. The Contractor shall dispose of construction debris to include soil, broken concrete and asphalt and metal fencing material in accordance with EPA, Federal, State and local guidelines. The Contractor will submit all disposal documents (dump slips) to the COR of the contract within 7 working days after completion of the disposal.

3. Mr. Patrick Richardson, appellant's vice president, was involved in the planning, bidding and performance of the contract. Appellant planned to dispose of the debris off base. This was consistent with its performance of a similar contract with Ft. Shafter a few months earlier, wherein appellant was tasked to dispose of approximately 3,500 tons of soil and debris from Aliamanu Military Reservation (ex. G-20) and it disposed the material in nearby Pearl City (tr. 64-66). Under the subject contract appellant planned to provide screened soil to a local golf course, and the rest of the debris was to be hauled to a farmer in the general vicinity who charged $50 a truckload to dump the debris on his property (tr.

44-46). Appellant submitted its bid for the contract work in the lump-sum amount of $22,000.

4. After appellant submitted its bid it learned that the golf course needed to obtain a shoreline permit to dump soil on the golf course shoreline, which would take a number of months to acquire. This delay made the golf course impracticable as a disposal site for the soil to be removed under this contract. (Tr. 41-44) Appellant did not withdraw its bid. The Government awarded the contract to appellant on 13 July 1999.

5. After award appellant inquired as to whether the WAAF horse stables could use the subject soil and debris. The WAAF horse stables were located on the base (tr. 179). Appellant would be able to save money by dumping at the WAAF horse stables rather than on the farmer's property, or at some other off-base location.

6. Mr. Richardson went to the WAAF stables and spoke to Mr. Ed Gambio, an Army employee who was a member of the stables, and Mrs. Buchanan, the director of the stables, and asked if they would be interested in the soil and debris (tr. 33). Appellant offered to bury the construction debris amongst a thick layer of topsoil so that the area could be safely used by horses for exercise or training (tr. 58-59). Gambio and Buchanan expressed interest in appellant's proposal, but advised Mr. Richardson that he needed permission for this purpose.

7. Mr. Richardson contacted Ms. Tammie Phillips, the coordinator for the contract. Ms. Phillips was responsible for inspection and acceptance of services and for processing payment (R4, tab 1 at 6-7). She did not have the authority to modify the terms of the contract.

8. Mr. Richardson called Ms. Phillips to seek authorization to dispose of the soil and debris at the horse stables. Ms. Phillips told Mr. Richardson to "sit tight" and await further word (tr. 34). According to Mr. Richardson, the two spoke again several days later and Ms. Phillips stated that appellant could proceed to dispose of the material at the WAAF stables (*id.*). According to Ms. Phillips, she advised appellant that the base operations office had no objection, but that appellant would also need to get the contracting officer's approval (tr. 135-36).

9. Ms. Geralyn Ambrosio was the contracting officer. She was the Government person authorized to modify the contract (tr. 99). She testified and we find that neither Mr. Richardson nor Ms. Phillips sought her authorization to dump at the WAAF horse stables, or at any location on post. She also testified and we find that the intent of the contract was to dispose of all the debris off base. (Tr. 95-96) Subsequent contracts expressly stated this requirement (tr. 56-57). Ms. Ambrosio was located on nearby Fort Shafter. Ms. Phillips was located on WAAF. (Tr. 100)

10. Appellant commenced performance. It picked up the soil and debris at Airdrome Road, WAAF, and dumped it at the WAAF horse stable area, also known as the gulch. It took three to four days to perform the work. Appellant hauled the debris during daylight hours, and military police blocked traffic when necessary to allow the trucks the right of way. No one from Ms. Phillips' office came to the dump site to monitor appellant's progress. (Tr. 35) Nor does the record show that the contracting officer was aware of the horse stable dump at this time.

11. On 23 July 1999, Mr. Richardson telephoned Ms. Phillips and advised that appellant's removal obligation was near completion. Ms. Phillips met appellant at the pick-up site and noted that much debris remained. (Tr. 138) Mr. Richardson advised that roughly 4,000 cubic yards had been removed, per contract requirements (finding 2).

12. At the horse stables dump area there were rocks and metal in the topsoil placed by appellant. The area could not be used for the horses. (Tr. 184) Ms. Phillips sought an evaluation of the site from an environmental perspective.

13. Mr. Ian Beltram, an environmental engineer for the WAAF Department of Public Works (DPW), visited the site and took photographs. He observed a packed down soil area, and along the sides of this area near a ravine and stream he observed construction debris such as asphalt, concrete, piping and rebar (tr. 231). Mr. Beltram believed that appellant's dump at the horse stables was illegal based upon the rules of the Hawaii Department of Health, Solid Waste Management Control and also Army regulations. According to Beltram, the WAAF dump site was not a certified land disposal facility. He recommended the removal of all debris. (Tr. 237-41)

14. The Army did not remove the debris as recommended by Mr. Beltram. Nor did it initiate any charges against appellant for illegal dumping.

15. However the Government refused to pay appellant the full contract price for its work. Mr. Rod Oshiro, a DPW engineer took measurements of the debris remaining at the pick-up site and at the dump site. He used a measuring wheel to assess the length and width of the area, estimated the height and used a conservative compaction shrinkage factor. (Tr. 198-203) A measuring wheel is typically used by construction people to measure linear distances (tr. 198).

16. Using these figures, the Government estimated that appellant had removed roughly 1,875 cubic yards of dirt and debris. The Government proposed to pay appellant $10,312.50, reflecting roughly that portion of the 4,000 cubic yards that was actually removed (R4, tab 19). According to the contracting officer, this was a fair settlement for services rendered (tr. 110).

17. Appellant contended that it had complied with the contract and was entitled to the full contract price. According to appellant it used a Kumitsu loader with a bucket or scooper that handled 3-1/2 cubic yards per scoop, and it took 7 scoops to fill a truck, or roughly 25 cubic yards per truckload. Appellant provided invoices from a trucker known as "A's Trucking" to show that it moved 167 truckloads to the horse stable site.[1] According to appellant, 167 loads at 25 cubic yards per load totaled 4,175 cubic yards (tr. 30, 79-80; R4, tab 4), which met the contract requirement to remove approximately 4,000 cubic yards of debris (finding 2). By letter dated 12 August 1999 from appellant's counsel to the contracting officer, appellant demanded payment of the contract price in full (R4, tab 5).

18. The parties met at the dump site on 28 October 1999, but were unable to agree on the extent to which appellant had performed the contract work. The Government was willing to modify the contract, based upon its estimate of the debris removed (finding 16), because it believed it had underestimated the amount of debris that had been located at the original Airdrome Road location (tr. 101). Appellant was not interested in such a contract modification; it believed it had performed the contract in full and wanted to be paid the full contract price.

19. By letter to the Directorate of Contracting dated 11 February 2000, appellant reiterated its demand for the full contract price in the amount of $22,000 (R4, tab 27). By contracting officer's decision dated 6 November 2000, the contracting officer, *inter alia,* denied payment of the full contract price and reaffirmed the reasonableness of a partial payment in the amount of $10,312.50, which appellant had received in March 2000. She also stated that the contract would be closed. (R4, tab 33) This appeal followed. The Government has not sought the return of the payment made to appellant.

20. Mr. Richardson testified and we find that appellant did nothing to assure itself that its WAAF dump was consistent with federal, state and local law (tr. 57-58). Appellant provided no documentation to corroborate the capacity of its Kumitsu bucket scooper or of the trucks that hauled the debris. While Mr. Richardson was certain about the number of truckloads dumped at the horse stable site, he conceded that it was possible that there could have been errors in the number of scoops lifted per truck (tr. 81). Mr. Luie Burgess, who operated the loader and had worked with Mr. Richardson for about 30 years, testified similarly to Mr. Richardson but much of the relevant testimony was elicited by leading questions and was generally unpersuasive (tr. 84-85).

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[1] Appellant contends that these trucker invoices constituted disposal documents or dump slips in accordance with Section C.5 of the contract (finding 2). The Government disagrees, contending that the contract contemplated the submission of certified dump slips from a certified disposal facility. In view of our disposition of this appeal, we need not decide this issue.

DECISION

In order to be entitled to the full contract price, appellant must show that it complied with the terms and conditions of the contract. We agree with the Government that the threshold issue here is one of contract interpretation.

We are guided by the well-settled principle that contract language should generally be given its plain and ordinary meaning unless the parties attach some different or special meaning to the text. *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000) (and cases cited).

Clearly, this was a contract for the disposal of debris located on WAAF. Appellant was tasked to dispose and remove this debris under a number of contract provisions. Appellant was also required to submit disposal documents to the Government after completion of the disposal to verify its disposal efforts.

In its plain and ordinary sense, to "dispose" of an item in this context is to "transfer [it] into new hands or to the control of someone else"; or "to get rid of"; "throw away" or "discard" the item. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1986). Under this contract appellant did not dispose of this debris from WAAF. Appellant simply picked up the debris from one location at WAAF and dumped it at another location at WAAF. This was not consistent with the intent and purpose of this contract as stated by the contracting officer and as confirmed by the plain and ordinary meaning of its terms.

Appellant's performance was also inconsistent with its own interpretation of the work prior to submitting its bid. At that time, appellant planned to remove the debris from the base and dump it on the property of third parties. It was only when this arrangement fell through after bid submission that it investigated ways to get rid of the soil and construction debris on WAAF. Moreover, just a few short months before the subject contract, appellant had a similar contract with Ft. Shafter to dispose of debris. Appellant performed by removing the debris from the base. The weight of the evidence – and the clear terms of the contract – show that appellant was obligated to remove the debris off base.

Notwithstanding, appellant contends that the contract does not expressly state that "disposal shall be off-base." This is true but it is inconsequential. Such a contract provision would have only stated the obvious. Also, that the Army chose to spell out this requirement expressly in later contracts does not render this contract any less clear. *The Martin Lane Company Inc. v. United States,* 432 F.2d 1013, 1021 (Ct. Cl. 1970); *Boes Iron Works, Inc.*, ASBCA No. 46159, 94-3 BCA ¶ 27,230 at 135,697.

We conclude that the contract required appellant to dispose of the debris and to remove it from the base consistent with federal, state and local standards and guidelines.[2] Appellant failed to remove the debris from the base. Hence, it was not entitled to its contract price.

Appellant also contends that the Government authorized the disposal of the debris at the Wheeler horse stables. We believe that the contracting officer was the only person authorized to allow such a disposal, and the record fails to show such an authorization or ratification. Appellant also failed to show that the horse stable dump was made in accordance with federal, state and local law or that the contracting officer legally waived these requirements. We do not believe that the Army's partial payment of the contract price was tantamount to such a waiver.

However even assuming, *arguendo*, that authorized Government representatives appropriately and legally permitted disposal of the debris at the Wheeler horse stables, we would still deny appellant's claim. The contract required the removal and disposal of approximately 4,000 cubic yards of debris (finding 2). As between the parties' estimates of how much debris was actually removed, we believe the Government estimate was more credible. Appellant was paid a portion of the contract price based upon the Government's estimate. Appellant has not persuaded us that it is entitled to any further recovery.

The appeal is denied.

Dated: 10 February 2003

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

[2] Neither party has addressed the quantity of construction debris involved here, nor the specific procedures mandated by federal, state and local law to dispose of this particular quantity of debris, nor are the relevant regulations part of the record. Given our disposition of the appeal, we need not address these issues.

MARK N. STEMPLER
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. 53150, Appeal of HGM, Inc., rendered in conformance with the Board's Charter.

Dated:

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