

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
DD-M Crane & Rigging ) ASBCA No. 53881  
 )  
Under Contract No. DACW05-00-C-0009 )

APPEARANCE FOR THE APPELLANT: Ms. Denise Maurer  
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Carl E. Korman, Esq.  
District Counsel  
Kay A. Hutchison, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Sacramento

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS  
UNDER RULES 11 and 12.3

This timely appeal is from a contracting officer's denial of DD-M Crane & Rigging's (DD-M) claim for \$79,014.02, an amount which the Government, in Modification No. P00009, deducted from the amounts owed DD-M under its contract for levee reconstruction. The appeal is processed under Board Rules 11 and 12.3. Neither party submitted affidavits in support of its position. The issue of entitlement is before us.

SUMMARY FINDINGS OF FACT

1. On 15 December 1999 the U.S. Army Corps of Engineers (Government) awarded Contract No. DACW05-00-C-0009 to DD-M, a disadvantaged woman owned 8(a) business enterprise, for the total estimated price of \$1,333,249 (R4, tab 3).

2. The contract Scope of Work was:

The project consists of approximately 1.05 miles of levee reconstruction within Reclamation [sic] District 1500. Reconstruction of Sites 1 and 2 at waterside of Sutter Bypass levee are within this area. Work consists of slurry cut-off wall at each site.

(R4, tab 3 at 1)

3. The contract incorporated FAR 52.233-1 DISPUTES (DEC 1998) and FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984), the latter of which states in part:

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. . . .

(R4, tab 7a)

4. Also included was FAR 52.236-16 I QUANTITY SURVEYS (APR 1984) - ALTERNATE I (APR 1984) which states in part:

(a) Quantity surveys shall be conducted, and the data derived from these surveys shall be used in computing the quantities of work performed and the actual construction completed and in place.

(R4, tab 7b)

5. Four of the items on the contract (stripping, excavation, embankment and backfill, and slurry cutoff wall) were estimated amounts with unit prices (R4, tab 3 at 00010-5).

6. DD-M acknowledged receipt of Notice to Proceed on 17 December 1999 (R4, tab 4).

7. The excavation at the Site 2 slurry wall had to be deeper than intended because the necessary clay layer was not located where anticipated, and the trench walls ultimately collapsed. Thus the work was first suspended and later accelerated. (R4, tab 8g at 1)

8. Modification Nos. P00001, P00002, P00008 and P00009 are particularly relevant to this dispute.

9. The description of Modification No. P00001 states in part:

UNPRICED MODIFICATION - PART I OF II

The contractor shall provide all necessary equipment, materials and labor to deepen the Site 2 slurry wall from 45 feet to a depth of 65 feet deep between Stations 4 + 50 and 20 + 00. If necessary the Contractor shall continue excavation below 65 feet until impervious material is encountered. The maximum obligation of the Government for this modification (P0001 Part I of II) is \$300,000.00.

(R4, tab 5a)

10. The description of Modification No. P00002 states in part:

UNPRICED MODIFICATION - PART Ia OF II We have found it necessary to make changes in the Site 2 slurry wall excavation and backfill procedures. This modification lifts the Suspension of Work and the Contractor shall **proceed immediately** with the revised procedures which are listed on Page 2 of this modification. The maximum obligation of the Government for this modification is \$800,000.00 (\$300,000 Part I of II and \$500,000 Part Ia of II)[.]

(R4, tab 5b)

11. All contract work was completed by 8 February 2001 (R4, tab 2 at 2).

12. In preparation for negotiation of Modification No. P00008, DD-M submitted cost proposals entitled: (1) "Sutter Bypass Levee, Contract No. DACW05-00-0009 [sic], Modification No. P00002, Proposed Final Cost" and "Subject: Close out of P 00002 [sic] - Slurry Wall Depth Change" dated 30 May 2001; and (2) "Final Quantities - Sutter Bypass P00002" dated 6 July 2001 (R4, tabs 8e, 8f).

13. On 13 July 2001 the Government wrote DD-M and stated in part:

. . . [W]e met on 6 July 2001 to discuss the issues involved in the Site 2 slurry wall. We furnished you with our review of the cost data you had submitted earlier the previous month. You presented us with a revised proposal reflecting your request. This proposal contained several items of work DD-M had never before quantified but which you feel should be included in our overall settlement. We have reviewed your proposal and have contacted you by telephone on 10 July and 12 July 2001 to discuss our positions. *As a result of these discussions we have offered to settle the unpriced*

*modification for an equitable final adjustment of \$300,000.00.* Should you agree, we feel such a settlement will be fair and reasonable to both parties. [emphasis added]

Although we do not believe that delay in closing this contract is the sole cause of your difficulty in obtaining bonding; we are, however, diligently pursuing the resolution of this open modification.

(R4, tab 8h)

14. On 13 July 2001 DD-M faxed the Government, referencing “Subject: Project Close-out, Bilateral Proposal” and stated in part:

Even though the settlement offer from the Corps of Engineers is considerably less than the dollar amount that DD-M has requested, in the interest of time and wishing to put this project behind us, DD-M will accept the settlement offer of \$300,000.00.

....

DD-M is available to assist in the effort to close out this project.

(R4, tab 8i)

15. On 31 July 2001 the parties executed Modification No. P00008, which states:

The Contractor shall furnish all labor, materials and equipment to complete the work at Site 2 described in modifications P0001 [sic] (Part I of II) and P0002 [sic] (Part Ia of II). Total price for this change order: P0001 [sic], (\$300,000.00), P0002 [sic], (\$500,000.00) and P0008 [sic], (\$300,000.00) is \$1,100,000.00. TOTAL CONTRACT PRICE: Increase \$1,100,000.00.

Add Item No. 18, Settlement of Site 2 Acceleration Costs, 1 Job. Lump Sum--\$300,000.00.

CONTRACT COMPLETION DATE: Unchanged.

It is understood and agreed that acceptance of this modification by the Contractor constitutes an accord and satisfaction and represents payment in full (both time and money) for all costs and/or delay, if any, arising out of, or incidental to [sic], the work as herein revised.

(R4, tab 5c)

16. Since DD-M had already received \$800,000 of the amount granted by Modification No. P00008, DD-M was due the balance of \$300,000 under Modification No. P00008 (R4, tab 2 at 4 n.5).

17. On or about 22 August 2001 the Government sent a bilateral modification which provided for a deduction in contract price of \$79,014.02 to DD-M for signature (R4, tab 8k).

18. A Government Price Negotiation Memorandum dated 24 August 2001 refers to DD-M's Credit Proposal in excess of \$43,000 submitted 4 April 2001 and a 7 August 2001 telephone discussion between William L. Carp, DD-M's Project Manager, and Floyd E. Bolton, Jr., the Government's negotiator, during which the Government understood it was agreed that there should be a deduction in the contract price of \$79,014.02 due to variations in the estimated quantities (R4, tabs 8b, 8k at 3).

19. On 4 September 2001 DD-M both faxed and wrote the Government, returned the bilateral modification, and stated in part:

. . . DD-M expected a full net payment of \$300,000.00 based on the agreement reached with the Corps of Engineers on July 31, 2001.

. . . .

. . . If DD-M had been made aware of this potential deduction, we would not have agreed to the \$300,000.00. . .

(R4, tab 8l)

20. On 12 September 2001 the contracting officer issued unilateral Modification No. P00009, effective 5 September 2001, which reduced the contract price by \$79,014.02 due to variations between estimated and actual quantities (R4, tab 2 at 2, tab 5d). The Government deducted this amount from the \$300,000 payment due DD-M under Modification No. P00008 (ex. E to app. reply br.).

21. On 12 October 2001 DD-M filed a claim asserting that the deduction of \$79,014.02 was not in accordance with the agreement between the parties reached in connection with Modification No. P00008 (R4, tab 6).

22. On 26 April 2002 the contracting officer issued his decision denying DD-M's claim (R4, tab 2). This timely appeal followed on 23 July 2002 (R4, tab 1).

### DECISION

This appeal concerns the proper interpretation to be placed on Modification No. P00008. DD-M states that Modification No. P00008 for payment to DD-M of \$300,000 was settlement of all matters remaining in the contract, and by the accord and satisfaction provision, Modification No. P00008 precludes the \$79,014.02 deduction due to variations in estimated quantities which the Government subsequently made to this payment.

We disagree. The clear wording of Modification No. P00008 pertains only to the excavation at Site 2, specifically the excavation at the Site 2 slurry wall.

DD-M essentially requests reformation of Modification No. P00008 to provide that the modification was a final settlement of all aspects of the contract so as to prohibit any deductions by the Government from the payment of \$300,000 granted by Modification No. P00008 to DD-M. This request is seemingly premised on two somewhat inconsistent contentions: (1) the parties agreed to an equitable final settlement in Modifications No. P00008, but the Government then "renege" on its commitment; and (2) the Government was late in closing out the contract, prohibiting DD-M from obtaining bondable work which limited its profitability and thus DD-M's execution of Modification No. P00008 was obtained by duress (app. reply brief at 2).

We can appreciate that DD-M may have assumed that all matters other than those covered by Modification No. P00008 were resolved prior to beginning negotiation of Modification No. P00008. However, the parties' correspondence and particularly DD-M's submissions in anticipation of the negotiation of Modification No. P00008 do not reflect that either party was mistaken that Modification No. P00008 covered any matters other than those stated, and specifically not all deductions to which the Government might be entitled due to variations in estimated quantities. Further, on this record DD-M has not established duress or overreaching by the Government due to the fact the delay in payment was affecting DD-M's bonding capacity.

Regarding the \$79,014.02 deduction, under the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984), and FAR 52.236-16 I QUANTITY SURVEYS (APR 1984) – ALTERNATE I (APR 1984) clauses to the contract, either party was entitled to an adjustment in the contract price if the actual quantities differed from the estimates. This appeal concerns entitlement only and thus we do not address the amount of the deduction.

We have no record of a claim or an appeal by DD-M concerning the amount of the deduction. However, DD-M seemingly contends that the Government failed to properly calculate the variations in estimated quantities, in that the Government ignored whether there were variations as to some items of more than 15 percent, and has raised this point as an affirmative defense in this appeal (app. br. at 2). Thus we remand this question to the contracting officer to negotiate with DD-M the amount, if any, by which the deduction should properly be adjusted due to the variations in estimated quantities.

Accordingly, the appeal is sustained to the extent set forth in the prior paragraph and denied in all other respects. We remand the appeal to the contracting officer for the parties to negotiate the proper amount of the adjustment to the deduction, if any, due to the variations in estimated quantities.

Dated: 27 January 2003

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JEAN SCHEPERS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

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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. 53881, Appeal of DD-M Crane & Rigging, rendered in conformance with the Board's Charter.

Dated:

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