

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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JCI International, Inc.) ASBCA No. 54209
)
Under Contract No. N62467-02-M-2758)

APPEARANCE FOR THE APPELLANT: Mr. Julio E. Martinez
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
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Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
PURSUANT TO RULE 12.3

This appeal is from a final decision on a claim for damages for a differing site condition. There is no dispute as to the existence of a differing site condition. The parties differ over the extent of delay and the additional costs occasioned thereby. Appellant has elected to have this appeal processed under Board Rule 12.3, Accelerated Procedure.

FINDINGS OF FACT

1. JCI International, Inc. (JCI) is a general contractor with headquarters in Miami, Florida. On 3 August 2002, the Naval Facilities Engineering Command, ROICC Key West, Naval Air Station (government) issued a sole source Request for Quotations (RFQ) to JCI to partially demolish and repair housing unit 1058-B. (R4, tab 1) Drawings and specifications further detailed the work which included partially removing and rebuilding Unit B's carport roof, re-roofing the carport and patio roofs of Unit A, and re-roofing the storage rooms of Units A and B. The work also included plaster patching, carpentry, screen work and painting. (R4, tab 6 at 8 of 31)

2. On 30 August 2002, JCI submitted a proposal for a total price of \$91,609.05. Under that proposal, the actual work was to be performed by subcontractors and JCI proposed to furnish only a schedule purchased from a consultant (\$300) and eight weeks of supervision at \$1,100 per week (\$8,800). After the addition of taxes, insurance, and

fringe benefits, the amount of the proposal attributed to JCI was to be \$13,336.20. The amount attributed to subcontractor's work was \$61,806.56. The total of the quotation included prime contractor overhead on subcontractor costs (10.79%), prime contractor home office overhead on its own costs (10.79%) and profit (10%). (R4, tab 2)

3. On 5 September 2002, after having reviewed the 30 August 2002 proposal, Beverly Davis, the contracting officer (CO), sent an e-mail to JCI in which she made several comments about the proposal and why she thought it could be reduced. With regard to supervision, she stated:

Supervision is charged at 8 wks, \$8800. Do you intend to have a supervisor onsite for this project only, 40 hrs/wk for 8 full weeks?

She asked that JCI submit its best pricing for the project. (R4, tab 4)

4. On 5 September 2002, JCI responded to each of Davis' comments, submitted a revised proposal and with respect to supervision, stated:

Changed supervision to part time if not required will eliminate in its entirety. Please advise?

The total cost of the proposal was reduced to \$75,831.04 and the entry for supervision was reduced to \$4,400, based upon supervising the work for only 4 hours per day for 40 days. (R4, tabs 3, 5)

5. On 9 September 2002, the CO accepted the revised proposal and the parties entered into Contract No. N62467-02-M-2758, with delivery of the completed work due by 12 November 2002 (R4, tab 6; ex. G-3). On 19 September 2002, the CO acknowledged receipt of the payment bond and gave JCI notice to proceed on the purchase order (ex. G-4).

6. A pre-work meeting was held on 1 October 2002 that was attended by the contracting officer, four other base personnel for the government, and Mario Martinez, project manager for JCI. The minutes of that meeting reflect that they discussed items required for the contractor to perform, in part, as follows:

a. Schedule of Work/Construction Schedule/Project Progress Schedule: Schedule submittal pending.

b. Safety Plan/Environmental Protection Plan/Safety, Health and Emergency Response Plan: Approval pending.

c. Superintendence: You must give personal superintendence to the job site work or have a competent foreman, superintendent, or competent person satisfactory to the ROICC on the job at all times during work progress, with authority to act in your company's name.

(Ex. G-5 at 3)

7. Notwithstanding the discussion about having a superintendent on the job at all times, the bid as accepted provided only for four hours per day of superintending, even though workers might be there for eight hours per day (tr. 1/37). The superintendent assigned to the project by JCI was Pablo Gutierrez, who reported to Mario Martinez (tr. 1/39).

8. Gutierrez previously worked for JCI and had been let go. When JCI received this contract, Gutierrez was rehired. (Tr. 1/136) He was told that he would work part-time at the project in question and never discussed if he would get a full 40-hour week with JCI management. As it turned out he actually got a 40-hour workweek. (Tr. 1/143)

9. Gutierrez lived in Miami and would travel to Key West on Monday, returning to Miami on Friday. JCI maintained a house for its commuting employees in Key West. (Tr. 1/141-42)

10. JCI submitted a schedule on 30 September 2002 and the schedule was approved by the government on 8 October 2002 (ex. A-1). This was a baseline schedule with one critical path of all work activities. The schedule was structured so that when one activity was finished, the next activity would start. (Tr. 3/10)

11. Site work commenced on 15 October 2002 and continued without problems through 28 October 2002 (R4, tab 7, DR 1 to 10).¹ As of 18 October 2002, appellant's first invoice showed the contract work to be 73% complete (ex. A-1 at 4, no. 01). On 29 October 2002, work began on carport roofs and as demolition got underway, a differing site condition was encountered with respect to the existing roof (R4, tab 7, DR 11; tr. 1/65, 2/161-62). There is no issue as to the existence of a compensable

¹ DR refers to daily reports prepared by JCI and submitted to the government construction representative. We refer to unnumbered reports of 15 and 16 October as No. 1 and No. 2, respectively. Subsequent reports are essentially numbered consecutively beginning with No. 3. Where numbering is wrong later in the project, we refer to the DR by date.

differing site condition (tr. 1/21-22) but the parties now differ over the extent of the delay in resolving the unforeseen condition and the costs associated therewith.

12. The government construction manager, Paula Hooker, prepared a cost estimate on the same day the differing site condition was encountered in the amount of \$2,117.02, based on discussions with government and contractor personnel at the job site and the contracting officer issued a Request for Proposal (RFP) to appellant (ex. G-6; tr. 2/114).

13. Mario Martinez submitted an initial proposal for JCI for the corrective work on 30 October 2002 in the amount of \$7,037.35 (R4, tab 8). The proposal differed so much from the government estimate that the contracting officer asked ROICC personnel to further define the scope of work and prepare a second government estimate (tr. 2/115). The revised government estimate dated 8 November 2002 was \$2,944 (ex. G-6; tr. 2/116-17). On 12 November 2002, the CO issued a revised statement of work and asked for a revised proposal (ex. G-11).

14. On 12 November 2002, JCI submitted a second proposal in the amount of \$9,630.12 that included 13 days of extended field office overhead plus mark-ups (R4, tab 10). That same day, the contracting officer e-mailed JCI asking for clarification on several costs in the revised proposal (R4, tab 11).

15. Appellant responded on 13 November 2002 by e-mail with a third proposal in the amount of \$9,027.25 also seeking 13 days of extended field office overhead but reducing subcontractor costs (R4, tabs 12, 13).

16. Due to funding constraints, the contracting officer asked appellant to propose a roofing product within the amount of funds allocated to the contract (tr. 2/121). Appellant responded on 15 November 2002 by submitting a proposal for \$5,786.01 that deleted all contract roof work and provided a temporary fix to weatherize the carports (R4, tab 14; tr. 1/186).

17. Funds for the corrective work did not become available until an obligation authority was approved on 4 December 2002 (ex. G-7, item 4).

18. On 12 December 2002, the CO sent Modification No. P00001 to Julio Martinez, appellant's president, as a bilateral modification. Martinez told the CO he could not accept it. (Tr. 2/102-03) On 13 December 2002, the contracting officer issued Modification No. P00001, unilaterally, directing appellant to proceed with the additional work, increasing the contract amount by \$3,360.26 and extending the contract completion date by 47 days

excluding holidays, from 12 November 2002 to 1 January 2003.² The unilateral modification is not entirely clear on how the increased amount was calculated, however, it is clear that it included government estimates for subcontractor labor and materials, an amount for prime supervision for the time to perform the changed work (\$330) and proposal preparation costs (\$60). In calculating the time extension, the contracting officer assumed government responsibility for 44 days of delay, allowed 3 additional days for completion of the new work, and excluded the 3 holidays in that period. (R4, tab 20)

19. The CO's e-mail was sent at 5:51 PM on Friday, 13 December 2002, after the close of business (*id.*). The roofing subcontractor, which was based in Miami, was notified on Monday, 16 December 2002 and mobilized at the job site on Wednesday, 18 December 2002 (tr. 1/113).

20. After the differing site condition was encountered on 29 October 2002 through and including 19 November 2002, some work continued, including electrical, stucco, plaster, woodwork and concrete formwork (R4, tab 7, DR 12 to 25). This work was sporadic and out-of-sequence. Work was performed on whatever the contractor could get to and as much as could be completed, given the interrupted roofing work. (Tr. 1/78)

21. No work was performed from 20 November 2002 until the roofer re-mobilized on 18 December 2002 (R4, tab 6, DR 26, 27).

22. On 25 November 2002, JCI submitted an invoice for work completed through 20 November 2002, which showed the work to be 93% complete (ex. G-2 at no. 02).

23. Appellant had other work in the Key West area and while work was suspended for the contract at issue, work on another contract, Task Order No. 18 for re-roofing 4 buildings, was underway (ex. A-34; tr. 1/151-52, 2/176). Task Order No. 18 required JCI to provide a full-time supervisor and a full-time quality control person (tr. 2/177-78). Rene Rodriguez was JCI's Quality Control (QC) manager for Task Order No. 18 (tr. 1/151). On Tuesday 19 November 2002, Gutierrez was Acting QC manager on Task Order No. 18 (*id.*; ex. G-1 at no. 33). He was also Acting QC manager on that project on 20, 21, 22 and 27 November 2002 (tr. 1/152-53; ex. G-1 at nos. 34-36, 39). There was no work on that project on Thanksgiving, Thursday 28 November or the Friday after (29 November 2002) (tr. 1/154).

² Page 1 of Modification No. P00001 incorrectly states the extended due date as 2 January 2003, but page 3 of P00001 includes the correct date, 1 January 2003.

24. Gutierrez also was Acting QC manager for Task Order No. 18 on Monday, 2 December through Friday, 6 December 2002 (tr. 1/154; ex. G-1 at nos. 40-44). He was Acting QC on Task Order No. 18 again on 10 December, 11 December, and 13 December 2002 (ex. G-1 at nos. 46, 47, 49). Julio Martinez admitted that during the period the project was shut down while waiting for a government decision, Gutierrez was booked to Task Order No. 18 (tr. 2/36). On 16 December 2002, Gutierrez was in Miami because his wife had given birth to a son and he returned to work on 19 December 2002 at housing unit 1058-B, the contract at issue (tr. 1/156-57). We find as a fact that from 20 November through 13 December, JCI mitigated its damages by using Gutierrez on other projects and that no supervisory services were furnished on 16-18 December 2002.

25. The roofing subcontractor delivered materials to the job site on 18 December 2002 (R4, tab 7, DR 27) and on 19 December remobilized and completed all of the change work on that day, and on 20 December the contractor had returned to performing original contract work (tr. 1/158-59). On 2 January 2003, a worker was painting the wall connecting the two carports and, except for a screen that needed a minor repair, Gutierrez considered the work complete (tr. 1/162-63; R4, tab 7, DR dated 2 January 2003). When Unit 1058 work was complete, JCI assigned Gutierrez to Task Order No. 18 as superintendent (tr. 2/101).

26. On 23 December 2002, Mario Martinez requested a pre-final inspection (ex. A-47; tr. 1/207). On 9 January 2003, Melvin Herlehy, the government's construction representative, and Gutierrez conducted the pre-final inspection (tr. 1/164, 2/150, 194). According to Herlehy, the punch list consisted of four items: (1) the sod in front of the house needed tapering with sand; (2) the roof screen needed some attention; (3) carport ceiling in Unit A needed painting; and (4) damage to the black top asphalt driveway needed to be repaired (tr. 2/194-95; ex. G-16), items considered typical and minimal by Mario Martinez (tr. 1/99, 200).

27. The final inspection was conducted on 16 January 2003 (tr. 2/195). Neither party showed why the final inspection was conducted so long after the pre-final, and one party's representative speculated it was probably due to one of the parties' earlier unavailability (tr. 1/99-100, 2/218-19).

28. On 18 February 2003, JCI submitted a claim by e-mail to the contracting officer, summarized as follows:

Direct costs – Prime and subcontractor	\$11,779.00
Unabsorbed Overhead	9,411.00
Credit P0001	(3,360.00)
Total Claimed Costs	17,830.00

(R4, tab 29 at 2/30)

29. Of the direct costs, \$3,252.41 was attributable to subcontractor work, \$5,367.12 was attributable to prime contractor costs, plus prime mark-ups for overhead on subcontractor work (\$826.11), home office overhead (\$1,363.25), profit (\$861.95) and bond premium (\$108.54) (*id.* at 3/30). The prime contractor work was essentially additional costs for supervision (Gutierrez) and project management (Mario Martinez) (*id.* at 4/30).³ The unabsorbed overhead was computed using what JCI termed a Modified Eichleay Method for 44 days of delay (*id.* at 21/30).⁴

30. On 16 May 2003, the contracting officer issued a final decision accepting the total amount claimed for subcontractor work, which resulted in an additional award of \$1,106.00 after allowing for the allocable portion of the \$3,360 credit apparently. However, the contracting officer found no additional entitlement to field overhead or to unabsorbed home office overhead. (R4, tab 30)

31. The final decision was timely appealed to the Board on 2 June 2003 and was docketed on 6 June 2003.

32. JCI did not contemplate keeping Gutierrez on the payroll beyond the contract completion date, but because of the uncertainty of when the government would implement the change work to account for the differing site condition, they kept him on the payroll (tr. 2/45-46).

33. When the work on Unit 1058 was delayed, JCI was unable to obtain replacement work. Mario Martinez attributed this inability to obtain other work to circumstances on other projects, not the project in question. JCI's bonding capacity was locked-up because of pending claims involving a South Florida testing facility (Metro-Dade County) and another claim involving the Navy. (Tr. 1/110-11) Julio Martinez testified that even though there was minimal work remaining to be done, this job contributed to but was not solely responsible for, a limited bonding capacity (tr. 2/98-99).

³ In its brief, appellant contends its claim incorrectly reflected field overhead costs for the period 12 November 2002 through 2 January 2003 and should have encompassed the period 29 October through 13 December 2002, resulting in a revised field overhead claim of \$4026.31, excluding overhead and profit (app. br. at 8-9).

⁴ In its brief, appellant has recomputed the Eichleay computation by increasing the days of performance from 94 to 116 resulting in a revised Eichleay claim of \$7,720.68 (app. br. at 9).

34. Time for Gutierrez and Mario Martinez is charged by JCI as direct field expenses even though time for Mario Martinez was not included in the original estimate (tr. 2/46). JCI did not maintain a field office or employ a field clerk on the job (tr. 2/48), it was basically a construction manager with all of the actual work done by subcontractors (tr. 2/152).

35. When this job began, JCI started using a new system for recording Mario Martinez's time. On a weekly basis, he would report his time by job to the clerk in the home office prior to her preparing the payroll. (Tr. 1/118-19) When in the home office Mr. Martinez updates schedules, does invoicing, tracks submittals and daily reports, and assists with estimating. Whether required or not, he traveled to Key West once or twice per week. (Tr. 1/122)

36. Appellant's claim for costs associated with Gutierrez and Mario Martinez is for the period subsequent to the original contract completion date (12 November 2002) through actual completion on 2 January 2003. From 13 November through 19 November 2002, Gutierrez worked for 16 hours supervising work on Unit 1058. From 20 November through 13 December 2002, appellant mitigated its damages by assigning Gutierrez to other work. During that time, there were no subcontractors to supervise on the site of Unit 1058. Gutierrez did not work on 16, 17, or 18 December. (Tr. 1/157; ex. G-13; R4, tab 7) Gutierrez worked at Unit 1058 for 26 hours between 19 December 2002 and 2 January 2003 (ex. G-13). The final decision allowed costs for two four-hour days for supervision (R4, tab 30).

37. For Mario Martinez, appellant claims four hours each for 18 and 19 November for base contract work and then, for roofing change work, claims a total of 60 hours at 4 hours per day for every weekday between 12 December 2002 and 1 January 2003, including days on which no work was performed – 24, 25 December 2002 and 1 January 2003 (R4, tab 29 at 11/30). There is no credible evidence of what work was performed by Mario Martinez for any of these hours, and incredibly, most of the hours charged to the change work occurred after change work was completed (*id.*).

38. We find no entitlement to costs for Mario Martinez. We find appellant incurred costs due to the differing site condition for Gutierrez for 42 hours, which should be reduced by the 8 hours granted in the final decision, for a total of 34 hours.

39. We use the reasonable bid amount of \$4,400 for 40 days at 4 hours per day along with bid mark-ups to compute damages for Gutierrez's additional hours (\$110 per 4-hour day). Thirty-four hours equates to 8.5 4-hour days times \$110 per day equals \$935.00. Following the manner of mark-up in the bid included in the contract, we perform the following computation:

Direct Labor	\$935.00
Insurance, taxes, fringes (47.9%)	447.87
Subtotal	1,382.87
Home office overhead (10.79%)	149.21
Profit on subtotal (10%)	138.29
Bond Premium (.93%)	15.53
TOTAL	\$1,685.90

40. Appellant's claim for unabsorbed home office overhead is presented as a summary with no back-up data against which to ascertain the accuracy of the information. Julio Martinez testified generally that unallowable costs had been excluded from the overhead pool without stating what they were and how much they amounted to. (R4, tab 20 at 21/30; tr. 2/41-42) No additional proof was offered at trial. We find that appellant has failed to prove its costs for unabsorbed home office overhead.

DECISION

The parties dispute the number of days of delay as well as entitlement and quantum for extended field and unabsorbed home office overhead. The government contends that the contracting officer incorrectly calculated the number of days of delay when she unilaterally issued Modification No. P00001 and that she considered the time to be non-compensable. In lieu thereof, the government offered an expert witness who testified that based upon his calculation the actual delay was 38 days.

Unilateral Modification No. P00001 unequivocally granted a time extension of 47 days and excluding the three holidays amounted to a 44-day extension to 1 January 2003. In view of our resolution of the quantum overhead issues, we need not resolve the exact number of days of compensable government delay.

As our findings indicate, appellant is entitled to recover \$1,685.90 for Gutierrez and nothing for Mario Martinez. We deny the claim for unabsorbed home office overhead because, to the extent appellant may have been unable to take on more work, it was attributable to circumstances on other projects, not this project. This job contributed to, but was not solely responsible for, a limited bonding capacity. In any event, appellant has not proved the costs it claims for unabsorbed home office overhead. No proof was offered for any other cost category and we do not find entitlement to any.

The appeal is granted in part. Appellant is awarded \$1,685.90 together with interest from 18 February 2003 until paid.

Dated: 9 December 2003

RICHARD SHACKLEFORD
Administrative Judge
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. 54209, Appeal of JCI International, Inc., rendered in conformance with the Board's Charter.

Dated:

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