

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Fru-Con Construction Corporation)
) ASBCA No. 53794
Under Contract No. DACW69-93-C-0022)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON APPELLANT’S MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of our decision on the merits following an entitlement hearing in the above-captioned case reported as *Fru-Con Construction Corporation*, ASBCA Nos. 53544, 53794, 05-1 BCA ¶ 32,936. The motion relates only to ASBCA No. 53794, which was an appeal from a government claim for “credits and savings” resulting from alleged relaxation of the contract work requirements. We concluded that the government was entitled to a contract “time credit of 84 days . . . together with such adjustment as may be appropriate” because it waived the 14-day commissioning requirement specified by paragraph 11 of Section 5C of the contract specifications. 05-1 BCA at 163,166.

Appellant asks us to issue a supplementary opinion clarifying that the adjustment associated with the 84 days is a reduction of the 10 June 2000 contract completion date and that the 84 days are not compensable. In its motion, appellant also asserted that the government’s credit should be reduced from 84 days to 56 days based upon as-built schedules for Gate Nos. 3 and 8 that were included as an exhibit to its expert’s report because completion of these gates was not immediately followed by installation of other gates (app. mot. at 3, n.2). Appellant expanded its arguments regarding the credit in its reply brief to include the contention that our award of 84 days is not supported by the

record, a new interpretation of the commissioning requirements specified by paragraph 11 of Section 5C, and the assertion that we should have relied upon the Fru-Con as-planned schedule, resulting in a credit of only 28 days.

The government's position is that the Board has already decided that the 84 days are compensable and that it is entitled to recover appellant's alleged savings of 84 days of overhead costs under the Changes clause.

We are not persuaded that appellant's various contentions with respect to the number of days of contract schedule credit we awarded to the government have merit for a number of reasons. First, appellant relies upon quotations from our decision that are incomplete in material respects and taken out of the context in which they were written. This is particularly true of its reference to our finding regarding the lack of any specific analysis relating only to the relaxation of the commissioning requirement.

Second, appellant ignores findings we made based upon credible evidence offered by the government. We awarded the government a contract schedule time credit based upon record evidence that the government relaxed contractually-required critical path work and that no commissioning work was performed by appellant. 05-1 BCA at 163,154. In this regard, relying upon the government's expert, we found that Gate Nos. 1 and 6 were completed during the winter months when commissioning would not have impacted the start of work on a subsequent gate. *Id.* at 163,156. Thus, we allowed a credit of 84 days, 14 days each for Gate Nos. 2, 3, 4, 5, 7 and 8. 05-1 BCA at 163,166.

As to Gate No. 3, we view appellant's contentions as going to the credibility and weight of the evidence. Our findings regarding the completion of Gate No. 3 were based upon the report prepared by the government's expert which provided clear evidence that testing of Gate No. 3 was completed on 19 May 1998, after which appellant was permitted to begin work on Gate No. 4 (ex. G-1 at III-19, -30, ex. G-5). The as-built now cited by appellant does not persuade us that our finding is incorrect, in part because it does not reflect any testing for Gate No. 3 (R4, tab C-2, append. 11).

As to Gate No. 8, we found that the government's expert adjusted the approved Fru-Con schedule to reflect the required commissioning period, which had not been included as a critical path activity, before he used it for his delay analysis. 05-1 BCA at 163,143-44. Relying upon appellant's as-built, we also found that Gate No. 8 was completed on 23 August 1998 (R4, tab C-2, append. 11). And, while there was no sequential gate to be installed, additional work continued to be performed, in particular the repair work required in order for Gate No. 1 to seal properly. 05-2 BCA at 163,147. Indeed, substantial completion of the project did not occur until 13 December 1999. 05-1 BCA at 163,153.

In this regard, appellant's present interpretation of the commissioning requirements contained in paragraph 11 of Section 5C of the contract specifications is unreasonable. The provision states that, "[a]fter acceptable trial operation and before preceeding [sic] with the next gate replacement, the new gate, complete with new chain and all related operating equipment rehabilitation, shall be placed in normal operating service for 14 days to allow for adjustments" and that any adjustments or defects disclosed during the 14-day commissioning period are to be corrected by appellant at no cost to the government (R4, tab D-1, § 5 at 5C-5, ¶ 11). When the contract is read as a whole, and in particular in conjunction with paragraph 9 of that same section, the only possible interpretation of the commissioning requirement is that the critical activity is the "completion" of the new gate, including its commissioning, and not the "replacement" of the old gate.

Finally, on the record presented here, appellant's contention that there is no critical path analysis to determine whether there was an impact to the critical path and the related contention that we improperly took judicial notice of critical path facts are not persuasive. The same is true of its argument that Fru-Con's as-planned schedule should be used to reduce the total credit to the government to 28 days. The contract required a 14-day commissioning period for each completed gate. This was critical path work and the requirement was waived. As the project was actually constructed, only Gate Nos. 1 and 6 were completed at such times that the commissioning period would not have impacted the prosecution of subsequent work.

In sum, we reaffirm our conclusion that the government is entitled to a contract schedule credit of 84 days because it waived the commissioning requirement. Under the Changes clause, the government is normally entitled to a contract price adjustment for such a relaxation of specification requirements. *See* EFARS 52.243-0004.

As adjusted by modifications, the project completion date was 10 June 2000; however, the project was actually completed early and accepted for beneficial occupancy on 13 December 1999. 05-1 BCA at 163,153. Beneficial occupancy occurs when contract work is substantially complete and the project is capable of being used for its intended purpose. *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1315-16 (Fed. Cir. 2000). Appellant asserts that the 84-day credit should be deducted from the contract completion date, 10 June 2000. The government's position is that the relaxation of the specifications permitted appellant to achieve beneficial occupancy 84 days earlier than it would have, which produced a cost savings it is entitled to recover.

Neither party has cited authority addressing the specific issue appellant asks us to clarify. Thus, consistent with our approach to the government's claim as being in the nature of a reverse-delay claim, we look to whether a contractor completing the contract work early may nevertheless be entitled to compensable delay caused by the government.

We have concluded that in appropriate circumstances such contractors are entitled to recover additional costs incurred. *See U.A. Anderson Company*, ASBCA No. 48087, 99-1 BCA ¶ 30,347, *aff'd on reconsid.* 99-2 BCA ¶ 30,565; *Oneida Construction, Inc./David Boland, Inc., Joint Venture*, ASBCA Nos. 44194, 94-3 BCA ¶ 27,237.

By analogy, it follows that the government's 84-day reduction to critical path contract work enabled appellant to achieve beneficial occupancy of the project 84 days earlier than it otherwise would have. And, we agree with the government that appellant experienced a cost savings because it did not have to perform these additional 84 days of work. Thus, as we concluded, the government is entitled to an appropriate adjustment. Inasmuch as quantum evidence was not presented, however, we express no view now as to how this compensable adjustment should be computed. We clarify our earlier decision to this extent and note that this same result would derive if we were to agree with appellant's various arguments that the number of days of credit due the government is less than 84.

CONCLUSION

Appellant's motion for reconsideration is granted to the extent that we clarify that the 84 days of credit to the contract schedule we awarded to the government are compensable. In all other respects, we deny the motion and reaffirm our original findings.

Dated: 28 September 2005

CAROL N. PARK-CONROY
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. 53794, Appeal of Fru-Con Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals