ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Luedtke Engineering Company	)	ASBCA Nos. 54226, 54227
	)	54228
	)	
Under Contract No. DACW49-01-C-0011	)	

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OPINION BY ADMINISTRATIVE JUDGE DELMAN

Appellant, Luedtke Engineering Company, has appealed a contracting officer's decision denying three claims for equitable adjustment. The parties agreed to waive oral hearing and to present their positions in writing under Board Rule 11. We decide entitlement only. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*

FINDINGS OF FACT

1. On 3 August 2001, the U.S. Army Corps of Engineers, Buffalo District (government) awarded Contract No. DACW49-01-C-0011 to appellant. The contract called for appellant to furnish all labor, materials and equipment to rehabilitate and support approximately 1,135 linear feet of an existing sheet pile wall that was built in the early 1900's, known as the Black Rock Upper West Approach Wall, Black Rock Locks, Buffalo, New York. (R4, tab 4)

2. Payment for the contract work was based upon the performance of individual line items of work identified in the bidding schedule. The bidding schedule identified estimated work quantities for each line item for which appellant provided unit prices, to include all costs, overhead and profit related to that item. There were line items specified

for the base contract work above ("base requirement"), and also for work subject to option exercise. The government awarded only the base contract work. (R4, tab 4 at 00010-4)

3. A notice to proceed was issued on 18 September 2001, and appellant mobilized to the project site. The contract called for project completion by 3 October 2002. (Aff. Zatkovic, 4/14/04 at ¶¶ 9, 10)

4. Appellant began setting the new sheet pile wall in February 2002. Appellant encountered unforeseen and difficult pile driving conditions. Certain sheets could not be driven to grade. Project work was delayed. (Jt. aff. Moore and DiPaola at ¶¶ 16, 19) The contract called for the new wall to roughly follow the alignment of the existing wall, but the coordinates provided for the new wall proved insufficient to allow for certain clearances that were necessary to construct the wall. (Aff. Zatkovic, 4/14/04 at ¶¶ 11, 12, 13, 16, 17)

5. The government issued Modification No. A00007 to address these issues. Modification No. A00007 required appellant to remove and reinstall certain piles and to reinstall certain sheets after completing excavation and backfill. It also revised the new wall alignment, requiring quantity increases of granular fill material and concrete wale under contract line item Nos. 20 and 22[1]. The modification increased the contract price by $122,935 and provided a 21-day time extension for delays in March 2002. The modification contained the following closing statement at Paragraph E:

> It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is increased as indicated above, which reflects all credits due the Government and all debits due the Contractor. It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

Appellant executed the modification on 3 April 2002. The government executed the modification on 5 April 2002. (R4, tab 7)

[1] After the IFB was issued, it appears that the line items in the bidding schedule were revised. We refer to the line items, as revised.

6. Notwithstanding the language of Paragraph E, appellant sought and the government agreed to pay appellant under Modification No. A00008 an additional $14,314.02 to compensate for appellant's equipment that was on standby in March 2002 as a result of the aforementioned delays. The parties also agreed to an additional time extension in the amount of 14 calendar days. The parties executed the modification on 30 May 2002. (Board corr. file)

7. At or around this time, the government also recognized that it had committed a design error in sizing the rebar for the concrete wale, and also determined that a portion of the concrete wale needed thickening. This work necessitated additional rebar and concrete. (Jt. aff. Moore and DiPaola, ¶¶ 40, 41) The government advised appellant of the proposed rebar changes before it installed any of the rebar (aff. Zatkovic, 4/14/04 at ¶ 47).

8. Modification No. A00009, executed by the parties in August 2002, was issued to address these matters. In brief, Modification No. A00009 added 39,158 pounds of steel bar reinforcement and 12 cubic yards of concrete, and added 160 cubic yards of concrete to thicken the construction of the concrete wale. The parties agreed to price the additional work for these additional quantities on a unit price basis under contract line item Nos. 21 and 22, for a total price increase of $78,242.20, and agreed to a project time extension in the amount of 14 calendar days for this additional work. (R4, tab 8)

9. Modification No. A00009 contained the following closing statement at Paragraph F:

> It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is increased as indicated above, which reflects revisions to estimated quantities. It is further understood and agreed that the Government and the Contractor retain all rights to request an equitable adjustment in the contract price as described in Contract Clause 11, FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY, beyond the original contract quantities.

(R4, tab 8 at 3) The reservation language above was proposed by appellant and accepted by the government.

10. Modification No. A00010, which revised the quantities for threaded rebar bolts and the concrete wale, was signed by the parties in October 2002. The modification contained the following closing statement at Paragraph F:

> It is understood and agreed that pursuant to the above the contract time is not affected, and the contract price is increased as indicated above, which reflects revisions to estimated quantities. It is further understood and agreed that the Government and the Contractor retain all rights to request an equitable adjustment in the contract price as described in Contract Clause 11, FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY, beyond the original contract quantities.

(R4, tab 9 at 2)

11. By letter to the government dated 12 June 2002, appellant requested direction on how to invoice for a temporary waler that had been installed on the job (R4, tab 10). A temporary waler was needed to perform the base contract work to anchor the new wall to the existing wall so the void between the walls could be filled with a granular stone to allow for the construction of a permanent concrete waler, and appellant knew this at the time of its bid (aff. Zatkovic, 4/14/04 at ¶¶ 8, 60). Appellant's temporary waler was made up of various steel angles, plates, couplings, nuts, and bolts (R4, tab 21, second page).

12. The specifications, § 05502, Metal Materials, Standard Articles and Shop Fabricated Items, at ¶ 1.3a, provided for the payment of wales at the applicable contract unit price per pound for item "Wales" in the bid schedule. The bid schedule, however, did not contain a unit price item per pound for wales or walers for the base contract work[2]. There was a line item for wales for the option work (No. 46) for which appellant provided a unit price per pound, but the government did not order the option work. (R4, tab 4)

13. Appellant's 12 June 2002 letter sought the government's assistance "to clear up this conflict in the contract." (R4, tab 10) However, appellant did not ask the contracting officer (CO) to clarify this conflict prior to bid.

14. Appellant's 12 June 2002 letter also sought to invoice its temporary waler under base contract line item No. 21– Deformed Steel Bars for Concrete Reinforcement. It did not explain or show how the temporary waler constituted deformed steel bars for concrete reinforcement under this line item. The government had processed payment for this item under line item No. 21 at one time, but then determined that payment under this

[2] It appears that the terms wale and waler are used interchangeably by the parties, and absent any evidence to the contrary we shall consider the terms interchangeable.

line item was in error and rectified it (jt. aff. Moore and DiPaola at ¶ 71). The government was of the view that payment for the temporary waler was an incidental cost related to the sheet piling system and was covered by the unit price for sheet piling in the contract schedule (R4, tab 11).

15. Insofar as pertinent the IFB, § 00100, provided as follows:

> 25. 252.236-7008 CONTRACT PRICES -- BIDDING SCHEDULES
>
> . . . .
>
> (b) The Contractor shall include in the prices for the items listed in the Bidding Schedule all costs for work in the specifications, whether or not specifically listed in the Bidding Schedule.

(R4, tab 4 at 13 of 16) Appellant did not provide any evidence showing how it accounted for the temporary waler costs for the base contract work in its bid.

16. On 17 December 2002, appellant submitted a claim to the government in the amount of $340,398.00, for a variation in estimated quantities of rebar, including the cost for the temporary waler (R4, tab 12). Appellant withdrew this claim on 11 March 2003 (R4, tab 18).

17. By three letters dated 11 March 2003, appellant submitted three claims to the CO. Appellant claimed $47,151.72 for additional costs to install knockout tubes caused by the new wall alignment under Modification No. A00007. The new alignment caused the new wall to be placed at a wider distance from the old wall than was shown in the bid documents. This wider distance from the old wall to the new wall caused appellant to perform extra work to install the knockout tubes. (Aff. Zatkovic, 4/14/04 at ¶¶ 36, 37) Under the original alignment, all of the required holes for these tubes were above normal water level. After realignment, 26 of the 50 tubes were affected by water elevations and were more difficult and more costly to install. (R4, tab 20, third page)

18. In the second claim letter, appellant sought $68,668.64 under the Variation in Estimated Quantity (VEQ) clause (*see* finding 22) for extra labor, material and equipment costs to install concrete reinforcement, steel bar, nuts and washers beyond 115% of the original estimated contract quantity for rebar based upon the design changes that resulted in Modification No. A00009 (R4, tab 19). This claim was filed in accordance with appellant's reservation of rights under Modification No. A00009. However appellant's claim did not show that the additional costs claimed were solely attributable to those

quantities in excess of 115% of bid estimated quantities, nor does appellant's record evidence make such a showing.

19. In the third claim letter, appellant sought recovery for portions of the temporary waler incorporated into the work in the amount of $105,737.43. Appellant sought to recover the cost of the temporary waler under contract line item No. 21, Deformed Steel Bars for Concrete Reinforcement. Appellant claimed that the government inadvertently omitted a unit price line item for the waler in the bidding schedule for the base contract work. (R4, tab 21)

20. By decision dated 2 June 2003, the CO denied appellant's three claims. The government contended that the costs related to the knockout tube installation claim were covered by the parties' agreement under Modification No. A00007 and the claim was barred by accord and satisfaction. As for the additional rebar claim, the CO contended that appellant did not show that any increased costs were solely attributable to variations in quantity above 115% of the bid estimated quantity, as prescribed by the VEQ clause. As for the third claim, the government was of the view that the cost of the temporary waler was part of the contract line items for sheet piling, in accordance with Section 02411, Metal Sheet Piling, ¶¶ 1.2.1.1 and 1.2.2.1, which state as follows:

> Payment for sheet piling quantities will be made at the applicable contract price per linear foot for furnished and installed sheet piling. Payment shall cover all cost of furnishing, handling, storing and installing piling including placing, driving, cutting holes, attaching cover plates (if applicable) *and other materials and work incident thereto*. [Emphasis added]

The government was of the view that the temporary waler constituted "other materials and work incident" to the sheet piling activity, and was paid as part of appellant's unit price for sheet piling. (R4, tab 1)

21. These appeals followed. The knockout tube installation claim was docketed as ASBCA No. 54226. The additional rebar claim was docketed as ASBCA No. 54227. The temporary waler claim was docketed as ASBCA No. 54228.

22. The VEQ clause in the contract provided as follows:

> 11. 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984)
>
> 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 that 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. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is justified.

(R4, tab 4 at 12-13 of 88)

DECISION

ASBCA No. 54226

As stated by the Court in *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993):

> Discharge of a claim by accord and satisfaction occurs when some performance different from what which was claimed as due is rendered and such substitute performance is accepted by the claimant as full satisfaction of his claim.

Accord and satisfaction is an affirmative defense. Insofar as pertinent here, the government has the burden to prove that the bilateral execution of Modification No. A00007 included and/or precluded consideration of appellant's knockout tube installation claim. We believe it has not met its burden.

The evidence shows that the government continued to consider, and granted a contractor claim arising out of the new wall alignment after execution of Modification No. A00007, specifically the equipment standby claim under Modification No. A00008 (finding 6). This belies the government's current position that Modification No. A00007 included or released all such claims. We believe that the parties' execution of Modification No. A00007 did not preclude consideration of appellant's knockout tube claim. *Community Heating, supra*.

The evidence shows that the new wall alignment provided by the government under Modification No. A00007 caused the new wall to be placed at a wider distance from the old wall than shown in the bid documents and as a result, additional costs were incurred to install certain knockout tubes (finding 17). Appellant is entitled to recover its provable, additional knockout tube installation costs that resulted from the new wall alignment. We sustain this appeal.

ASBCA No. 54227

Under this appeal, appellant seeks additional costs incurred due to the installation of increased quantities of concrete rebar under the VEQ clause. In order to establish entitlement to an equitable adjustment under the VEQ clause, a contractor must show that its increased costs were solely attributable to those quantities above 115 percent of the estimated quantity in the contract. *See Foley Co. v. United States*, 11 F.3d 1032 (Fed. Cir. 1993). Appellant has not made such a showing.

Appellant – apparently aware of the above limitation for equitable adjustment under the VEQ clause –argues that we should now treat its additional rebar claim from its inception as arising from government design changes under the Changes clause. The problem with this contention is that it is inconsistent with the contractor's understanding and actions during contract performance. Appellant agreed under Modification No. A00009 to process its claim for additional rebar quantities under the VEQ clause and not as an equitable adjustment under the Changes clause, and agreed to be compensated at the unit prices in the contract schedule for these additional quantities without having to substantiate specific increased costs, as would have been required in a claim under the Changes clause. Further appellant agreed under Modification No. A00009 — and in fact proposed the modification language therein — to reserve its right to file future claims for additional costs under the VEQ clause. (Findings 8, 9) Consistent with this understanding, appellant filed a VEQ claim with the CO in December 2002 – that it later withdrew -- and then filed another VEQ clause claim in March 2003 that is the subject matter of this appeal. (Findings 16, 18)

Appellant has failed to show entitlement to any additional recovery under the VEQ clause claim it filed. *Foley, supra.* It also has failed to show a basis for any additional recovery under Modification No. A00009. Hence, we must deny this appeal.

ASBCA No. 54228

Appellant knew, prebid, that the temporary waler was needed for the base contract work, that the specifications provided for reimbursement for the waler under a separate line item in the bid schedule, but there was no line item for walers in the bid schedule for the base contract work. This constituted a patent ambiguity or discrepancy in the contract documents for which appellant was obligated to seek clarification from the CO prior to bid. It did not do so, and must assume the risk of this failure. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153 (Fed. Cir. 2004); *Comtrol, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002).

Appellant also failed to comply with § 00100, ¶ 25(b) that required each bidder to include all work-related costs within its bid unit prices even if not specifically listed in the bidding schedule (finding 15). Appellant failed to show which, if any, line item for the base contract work it relied upon to cover its temporary waler costs in its bid.

For these reasons, appellant may not recover on this claim.

CONCLUSION

We sustain the appeal under ASBCA No. 54226, and we deny the appeals under ASBCA Nos. 54227 and 54228. We remand the claim under ASBCA No. 54226 to the parties to negotiate quantum.

Dated: 10 May 2005

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 54226, 54227, and 54228, Appeals of Luedtke Engineering Company, rendered in conformance with the Board's Charter.

Dated:

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