ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Steelhead Constructors, Inc.	)	ASBCA No. 55283
	)	
Under Contract No. W9127N-04-C-0019	)	

APPEARANCE FOR THE APPELLANT: Lewis J. Baker, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
James R. Herald, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Portland

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 22 September 2006 appellant timely moved for reconsideration of the Board's 22 August 2006 decision that granted the government's motion for summary judgment and denied the appeal. *Steelhead Constructors, Inc.*, ASBCA No. 55283, 06-2 BCA ¶ 33,388. Familiarity with our prior decision is assumed.

Appellant argues that our legal interpretation of the contract that it was required to provide imported sand for placement at the toe of the revetment, erred because it was inconsistent with the contract requirement to place excavated sand "along the toe" and because the government's direction to place imported sand first up "to elevation +14 ft. MLLW" and that "excavated sand be spread above the imported sand" necessarily caused the excavated sand to exceed the "final elevation" of +14 ft. MLLW (app. mot. at 2-3). Appellant argues that our decision as to superior knowledge erred because the contract quantities were estimated, not mandatory, and the quantities for excavated sand were the quantities to be excavated, not backfilled (*id*., at 5-7). Appellant attached the declaration of Mr. Kevin Ramstrom, its president, to its motion.

The government's 25 October 2006 response to the motion moves to strike that Ramstrom declaration and argues that appellant has simply restated its previous contentions briefed in April-May 2006, which contentions the Board considered and rejected (gov't resp. at 4-8). Appellant opposed the motion to strike.

In *AM General LLC,* ASBCA No. 53610, 06-2 BCA ¶ 33,387 at 165,524, we stated:

> In exercising our discretion on whether to receive new evidence on reconsideration, we consider, among other factors, (1) the kind of evidence being offered; (2) its availability at the time the record was closed and (3) whether the opposing party has been prejudiced by the delay in presenting such evidence.

Paragraphs 1-5 of Mr. Ramstrom's September 2006 declaration are identical to those in his April 2006 declaration. Paragraphs 6-8 of his September declaration state:

> 6. A survey of suitable excavated material was performed prior to backfill operations at the revetment. This survey confirmed that there was adequate suitable excavated material . . . to backfill the revetment from the toe to the finished beach elevation.
>
> 7. During the course of performance, the Government directed that imported sand be placed from the toe of the revetment on the seaward side to elevation +14 ft. MLLW. The top width was to be determined in the field based on the existing beach slope and elevation. The finished beach elevation was fixed at +14 ft. MLLW.
>
> 8. The Government also directed that suitable excavated material . . . be placed at elevations above +14 MLLW only.

Appellant concedes that the information in ¶ 6 is not new (app. opp'n to mot. to strike declaration at 2). It argues that the information in ¶¶ 7-8:

> was offered based on the Board's apparent misunderstanding regarding where the naturally occurring beach sand was placed. In paragraph 10 of the Board's findings, it reviewed the contract drawings in some detail and concluded on its own that imported and *naturally occurring beach sand* was [sic] to be placed to an upper elevation of 14 feet, with a width of 135 feet to 145 feet. Since the Board also found that 7,520 cy of imported sand was to be placed along the toe of the revetment in full, before the excavated sand was placed, it

> clearly did not understand that this requirement would necessarily result in the elevation of the beach being increased above the maximum elevation of +14 feet MLLW, in contravention of the contract requirements. . . .
>
> . . . .
>
> . . . [A] Declaration regarding the final elevation of the beach, as constructed, was not addressed in Steelhead's Opposition because the Government did not identify, as undisputed facts, the elevations where imported sand and naturally occurring beach sand were placed, thus triggering a need for Steelhead to admit or refute such allegations. The issue arises as a consequence of the Board's own findings regarding the meaning and content of the contract drawings.

(App. opp'n to motion to strike declaration at 2-3)

The Board's SOF 10[1] stated in relevant part, 06-2 BCA at 165,528:

> The fourth cross-section, "Sand Fill Section," depicted the revetment and "sandfill" from lower elevations of 8 feet sloping to 6 feet (194 feet from the revetment's shore side), to an upper elevation of 14 feet with a width of 135 feet to 145 feet. Its note 1 stated: "Existing beach slope and elevation will determine necessary top width to apply full sand Fill volume." Its note 3 stated: "Place imported sand first. Place excavated sand on top of imported sand."

Our decision did not stray beyond the facts and issues in appellant's claim, the pleadings and the motion for summary judgment. There is no dispute, and the Board understood, that excavated material was placed at elevations above +14 MLLW. Further, appellant has not identified any error in SOF 10.

Appellant's 5 January 2006 certified claim alleged:

> [Its 20 and 29 September 2004 letters to the COE stated that:] No drawings indicate that import sand goes in a designated area or zone. Typical cross-section 4 shows the total section of sand fill required. . . . [Its] note [3] states, "Place

[1] "SOF" refers to the Statement of Facts in our 22 August 2006 decision.

excavated sand on top of imported sand," indicating that import sand is to be covered by excavated sand.

. . . .

The sheet A-5, typical cross-section number 4, entitled "Sand Fill Section," delineates the lines and grades for the Sand Fill. The top of the sand fill is shown as elevation + 14 MLLW. . . . Sheet A-5, Note 3 [quoted above] indicates that both excavated sand and import sand are to be incorporated in the typical section for Sand Fill . . . .

. . . .

[Respondent's 14 October 2004 reply to appellant's foregoing statements was:]
2. We do not agree with the interpretations and conclusions expressed by your [letter]. . . .

3. . . . Based on your original ground survey data received on October 7, 2004, the Sand Fill section must be constructed to an approximate elevation of +14.5 MLLW . . . under . . . (CLIN) 0008A and 0008B.

4. The excavated beach sand . . . is to be used as backfill [and] simply dozed and spread out on top of or in front of the new Sand Fill section [under] CLINs 0003A and 0003B. . . .

[Appellant's 18 October 2004 reply to the COE stated:]
Utilizing both the imported and excavated sand in the sand fill section will raise the section finish grade from elevation 14 to approximately 19.

(R4, tab 4 at 5-8)

Appellant's complaint alleged, *inter alia*, that:

7. . . . Sand backfill was to commence at the toe of the revetment and proceed up to an elevation of 14 ft. MLLW [as] set forth on Contract Drawing, Sheet A-5.

. . . .

> 12. . . . Steelhead assumed that it would be permitted to utilize beach sand excavated from the Site as backfill . . . from the toe [of the completed revetment] . . . at an elevation of 14 feet.

Respondent's answer, while disclaiming knowledge of appellant's assumptions, denied the allegations of the complaint in relevant part (answer, ¶¶ 5, 9).

Appellant's opposition to the motion for summary judgment asserted that:

> Typical Cross Section 4 of Contract Drawing Sheet A-5 provides the top width for construction of the sand fill, along with the required slope and *elevation*. . . . With this information . . . Steelhead could determine the amount of imported sand fill, if any, that would be required depending upon the amount of suitable excavated material encountered. In the event that imported sand would be required, this same cross-section requires imported sand to be placed first, followed by excavated sand on top of the imported sand. [Emphasis added.]
>
> . . . .
>
> [T]he Contract contemplated two possible sources for constructing the sand fill: naturally occurring excavated sand and imported sand. . . . If necessary to be used, imported sand had to be placed first, followed by the naturally occurring sand up to the specified lines and grades on the drawings.

(App. opp'n at 9-10) Respondent replied:

> The excavated sand is *not* to be used to construct the sand fill, as Steelhead contends; rather, it is to be backfilled "along the toe *upon completion of the revetment*.["] This language clearly calls for placing the excavated sand upon completion of the sand fill element of the structure. . . .

(Gov't reply at 18; emphasis in the original)

From the foregoing excerpts from appellant's claim, the pleadings and the parties' arguments on summary judgment, it is quite clear that the parties had several opportunities since September 2004 to assert their views about the crucial issue of the meaning of typical cross-section 4's requirements with respect to the quality and quantity of materials to be placed from the toe of the revetment to elevation +14 ft. MLLW and higher. The August 2006 addition of drawing No. TM-347-1 to the record after the motion was briefed in April-May 2006 was not relevant to the foregoing crucial issue.

The kind of evidence in Mr. Ramstrom's September 2006 declaration is essentially repetitious of the evidence already considered and set forth in our Statement of Facts, and was plainly available to appellant in April-May 2006. Respondent would be prejudiced by the admission of such evidence to the extent it needed to respond to it. We grant the government's motion to strike the September 2006 Ramstrom declaration. Moreover, assuming, *arguendo*, that the declaration in issue were received in evidence, it would make no difference in the resolution of this motion for reconsideration, for the reasons discussed below on the merits of that motion.

Appellant contends that the Board's interpretation of the contract provisions was not correct because, like respondent, we "completely read out of the contract" the requirements to place suitable excavated material "along the toe," "adjacent to the completed revetment" and "at constructed toe of revetment," considering that the toe is the "structural element at the lowest seaward edge of the revetment" (SOF, ¶¶ 5, 6, 10(a); app. mot. at 2-3). Appellant also contends that the contract "did not afford the Government the option to increase the finished beach elevation above +14 ft. MLLW" and under the Board's interpretation "there would be no place to utilize the suitable excavated material without increasing the final elevation of the beach" (app. mot. at 2-3).

Appellant's arguments do not raise a genuine issue of material fact or establish that the Board's legal interpretation of the contract was erroneous. The arguments are based on its implicit premise that the terms "along" "adjacent to" and "at" meant that "excavated material" must physically touch the toe of the revetment, and its stated premise that "the finished beach elevation [was] +14 ft. MLLW" (app. mot. at 3). Both premises are invalid.

The terms "along" "adjacent" and "at" do not *necessarily* or *exclusively* mean that excavated sand must physically touch the revetment toe, as appellant's argument implies. As pertinent hereto, "along" means "1: over the length of (a surface) . . . 2: in the course of (as time or distance) . . . 3: in a line parallel with the length or direction of . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 60 (3d ed. 1986). "Adjacent" means "1a: not distant or far off . . . : nearby but not touching . . . b. relatively near and having nothing of the same kind intervening : having a common border ; ABUTTING, TOUCHING . . ." (*id*. at 26). "At" means "1 – used

. . . to indicate presence in, on, or near: as (1) presence or occurrence in a particular place . . . . 2a – used . . . to indicate that which is the goal of an action or that toward which an action or motion is directed . . .” (*id*. at 136). Thus, there is no unavoidable conflict between placing the imported sand fill first over the toe of the revetment and then placing the excavated sand over the imported sand fill “along,” “adjacent” or “at” the toe of the revetment.

The terms “finished beach elevation” and “final elevation of the beach” do not appear in the contract. The fourth typical cross-section did not designate “+14 ft MLLW” as the “finished beach elevation” or “final elevation of the beach.” That cross-section designated “+14 ft MLLW” as the upper elevation of the “sand fill,” a term different from “excavated sand,” and did not set forth the upper elevation of the excavated sand to be placed over the sand fill. (SOF, ¶¶ 5-8, 10)

Regarding withheld superior knowledge, appellant contends that the undisclosed ORPD Permit “mandated” 4,000 cubic yards of excavated sand and 3,120 cubic yards of imported sand, whereas contract CLINs 0003 and 0008 provided “estimated” quantities of 4,000 cubic yards of excavated sand and 3,120 cubic yards of imported sand, not “minimum” quantities as our decision inaccurately stated, 06-2 BCA at 165,530 (app. mot. at 5-7). The correct expression of the CLINs 0003 and 0008 quantities as “estimated” quantities does not change the result, because however those quantities were expressed, appellant unreasonably interpreted the CLIN 0008 sand fill requirement as surplusage if its survey confirmed that it could backfill suitable CLIN 0003 excavated material from the revetment toe to the + 14 ft. MLLW elevation (gov’t resp. to mot. for summary judgment at 14). 06-2 BCA at 165,530.

For the foregoing reasons, we reaffirm our decision on the motion for summary judgment and deny appellant’s motion for reconsideration.

Dated: 15 December 2006

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
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. 55283, Appeal of Steelhead Constructors, Inc., rendered in conformance with the Board's Charter.

Dated:

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