ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ellis Environmental Group, LC	)	ASBCA No. 56227
	)	
Under Contract No. F01600-01-D-0022	)	

APPEARANCE FOR THE APPELLANT: Charles M. Laycock, Esq.
Newberry, FL

APPEARANCES FOR THE GOVERNMENT: Col Neil S. Whiteman, USAF
Chief Trial Attorney
Christopher S. Cole, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILSON
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Ellis Environmental Group, LC (appellant) moves for summary judgment in this appeal contending that there are no material facts in dispute regarding its entitlement to recover the costs relating to an alleged Type II differing site condition claim. The parties have filed briefs in support of their respective positions. For the reasons stated below, we deny appellant's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 24 September 2001, the Department of the Air Force (government) awarded Contract No. F01600-01-D-0022 to appellant (R4, vol. 1, tab 1 at 17). The multiple award indefinite delivery, indefinite quantity contract required appellant to provide "a broad range of real property maintenance, repair, and alteration, and major and minor construction projects at Maxwell Air Force Base and Gunter Annex, Alabama" (*id*. at 19).

2. Under the contract, the government would issue task orders to contractors requiring performance of "any and all functions called for in the contract per the statement of work specified in individual task orders" (*id*. at 21). The contract incorporated by reference FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) and the following clause in pertinent part:

FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984)

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract.
>
> (b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.
>
> (c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; *provided*, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(*Id*. at 53)

3. On 28 September 2005, the government issued delivery order 0003 to appellant for a total value of $2,364,186.00 to furnish all plant, labor, equipment and material necessary to complete the following: Phase 1a (an addition to Building 1402); Phases 1b and 1c (renovations to Building 1402); and Phase 1d (removal of vinyl tiles in Building 1402 at Maxwell Air Force Base) (R4, vol. 2, tab 1 at 1-3). Appellant entered into a subcontract with Dixie Acoustical Contractors, Inc. (Dixie or subcontractor) to accomplish Phases 1a and 1b (R4, vol. 2, tab 8).

4. Delivery order 0004 was issued on 20 September 2006 to perform Phase 2 renovations of Building 1402 in the amount of $4,346,633.00 (R4, vol. 1, tab 3 at 19; compl. and answer ¶ 4). This work was also subcontracted out to Dixie (R4, vol. 2, tab 8).

5. The General Electrical Notes for both Phases 1 and 2 contained the following language:

> 9. ROUGH-IN OF OUTLET BOXES FOR DEVICES, EQUIPMENT CONNECTIONS, ETC. SHALL BE IN ACCORDANCE TO THEIR SPECIFIC PURPOSE AND COORDINATED WITH THE LATEST ARCHITECTURAL FLOOR PLANS AND ELEVATIONS AND APPROVED MILL WORK DRAWINGS
>
> - FLUSH OUTLETS SHALL BE MTD FLUSH WITH THE FINAL FINISHED SURFACE TO ALLOW FOR COMPLETE SURFACE TREATMENTS, EXTENSIONS ETC.
>
> ….
>
> 20. ALL RACEWAYS, CONDUITS PATHWAYS, ETC., SHALL BE CONCEALED. TRENCH/CUT/PATCH/REPAIR EXISTING WALLS AS REQUIRED. COORDINATE WITH ARCHITECTURAL DRAWINGS FOR CHASES, FURR-OUTS, ETC., TO CONCEAL CONDUIT IN ALL FINISHED AREAS.

(R4, vol. 2, tabs 20, 21) Thus, the delivery order required the contractor to install electrical outlets so that the faceplate or outer covering lay flat or "flush" against the wall.

6. During Phase 1 construction, appellant submitted a "Request For Information" (RFI) #16 to the contracting officer regarding the thickness of the existing walls and whether there was enough room to install certain electrical/data outlets. RFI #16 reads as follows:

> REQUEST: Direction needs to be given as there is [sic] no provisions for new electrical devises [sic] in the existing areas, we have no way to install electrical outlets. The average room has 11 outlets and some have more…. Need direction weather [sic] to trench walls or fur [sic] out with new studs from existing block walls.

(R4, vol. 1, tab 4) The RFI did not indicate whether a change in contract price was anticipated resulting from the above-mentioned inquiry.

7. The government responded on 18 May 2006, informing appellant that the contract drawings and notes "contain all the information the Contractor needs to successfully complete his installation" (*id*. at 2).

8. On 23 June 2006, appellant issued a modification to its subcontract agreement with Dixie which provided additional funds in the amount of $117,347.00 to "furr existing walls with sheet metal studs and gypsum board" for Phase 1b and 1c renovations (R4, vol. 2, tab 9).

9. Renovations continued, as evidenced by daily reports contained in the record (R4, vol. 2, tab 22; compl. and answer ¶ 33). During Phase 2 construction, appellant issued RFI #10, dated 2 March 2007, to the government stating in pertinent part:

> Upon start of demo work we discovered existing devices were not supported according to code. During prior renovations the concrete block was broken out to allow sufficient depth for the devices. The devices were supported by the conduit, which does not meet current code. This condition could not have been expected to have been noted during pre-contract inspections…We suggest modification to contract calling for an additional layer of sheetrock on the walls where this condition exists.

(R4, vol. 2, tab 16) This RFI also notified the government that the above-mentioned condition may affect the contract price (*id*.).

10. The government responded to RFI #10 contending "the claim for an additional layer of drywall being an unforeseen condition is in error." The government added "Ellis Group was well aware of existing conditions having conditions consistent with Phase 1 construction." It was reasonable to conclude from the General Notes, the government maintained, that wall construction in accordance with the specifications required concealment of conduits and electrical boxes and would require extra materials and labor. (R4, vol. 1, tab 5 at 2) Thus, the government, while agreeing that appellant's approach to the problem was sound, denied responsibility for the potential Phase 2 cost increase.

11. On 26 March 2007, the parties held a meeting to discus, *inter alia*, RFI #10, whereby the government subsequently agreed that the condition was unforeseen and requested that appellant submit a cost estimate to correct the problem (R4, vol. 1, tab 6 at 2). Appellant submitted a cost estimate for the "lamination of the walls to allow for the installation of conduit" in the amount of $126,863.50 (R4, vol. 2, tab 17). The

government, under bilateral Modification 02 dated 26 June 2007, paid for the lamination of the Phase 2 walls (R4, vol. 2, tab 18).

12. In June of 2007, appellant submitted a cost estimate breakdown in the amount of $140,718.37 for the reconstruction of the Phase 1 walls after the government accepted the Phase 2 change order (R4, vol. 2, tab 14; compl. and answer ¶ 47). The government responded by e-mail dated 11 July 2007, indicating that appellant had not submitted an RFI for this work and that if the work was done, it was done so at appellant's expense. The government further stated that the request should have been submitted through the proper channels at the time of discovery of the changed condition and not months later after acceptance of the Phase 1 work. (R4, vol. 2, tab 19)

13. Appellant filed a certified claim with the contracting officer dated 10 August 2007 in the amount of $140,718.37 for costs associated with the lamination of walls in Phase 1 alleging: (1) that the lack of sufficient wall depth equated to a Type II differing site condition; (2) the government breached the superior knowledge doctrine by not disclosing that the walls were not of a sufficient depth; and (3) the government admitted that the narrow walls constituted a compensable change in the contract when it signed Modification 02 promising to pay for the lamination of the Phase 2 walls (R4, vol. 1, tab 7).

14. The contracting officer issued a final decision on 10 October 2007 denying the claim in its entirety (R4, vol. 1, tab 8).

15. By letter dated 24 October 2007, appellant filed a timely notice of appeal with the Board.

16. After the pleadings were filed, appellant moved for summary judgment in the amount of $140,718.37 contending, *inter alia*: that no material facts are in dispute; the elements of a Type II differing site condition were present; the claim was not waived by delay or lack of notice; and the government's approval of the change order for lamination of the Phase 2 walls constituted an admission that reconstruction of the Phase 1 walls was compensable because both actions were necessary to remedy the same changed condition (app. br. at 13-19). The government filed a response arguing that at least two issues of fact remain unresolved: (1) whether appellant provided adequate notice to the government of the alleged Type II differing site condition; and (2) whether appellant acted as a reasonable contractor in its site investigation. In addition, the government argued that appellant had failed to demonstrate that the alleged condition was unknown or unusual. (Gov't resp. at 1, 11-13). Appellant filed a reply asserting that the government admitted several things in its pleading, including: the government had adequate notice and did not object to the reconstruction of the Phase 1 walls through daily reports and RFI #16; appellant's reconstruction of the walls was reasonable;

appellant conducted a reasonable pre-bid inspection; and the purpose of lamination during Phase 2 was to flush-mount electrical face plates rather than to remedy a violation of the electrical code (app. reply br. at 3-11).

DECISION

Summary judgment is appropriate when there are no disputed material facts and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). The burden is on the movant to establish the absence of any issues of material fact. A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986). Factual inferences are to be drawn in favor of the party opposing summary judgment. *Lockheed Martin NESS-Akron*, ASBCA No. 54193, 04-2 BCA ¶ 32,728, citing *United States v. Diebold*, Inc., 369 U.S. 654,655 (1962); *Alvarez & Associates Construction Co., Inc*., ASBCA No. 49341, 96-2 BCA ¶ 28,476. Our task is not to evaluate or weigh competing evidence but only to determine whether a genuine disputed issue of material fact exists that is suitable for resolution at trial. *Alvarez, supra*.

In its motion, appellant has failed to meet its burden that no material facts are in dispute. At a minimum, a factual dispute remains regarding the reasoning behind why the government denied the Phase 1 costs, while allowing costs for similar work in Phase 2. Appellant contends that the government paid for the same work (adding depth to the walls in order to accommodate flush mounting of electrical boxes) to remedy the identical problem encountered during Phase 2 that it denied in Phase 1. The government alleges that the Phase 2 work was allowed to remedy electrical code violations and to keep the project from falling further behind schedule, while there was no mention of code violations during the Phase 1 wall renovations.

Most importantly, we are not persuaded that the pleadings resolve the basic issue regarding whether the conditions at the site during Phase 1 construction were of an unusual nature which differed materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract. Because this issue, among others, remains unresolved, summary judgment is not appropriate.

Accordingly, appellant's motion for summary judgment is denied.

Dated: 9 July 2008

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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. 56227, Appeal of Ellis Environmental Group, LC, rendered in conformance with the Board's Charter.

Dated:

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