

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
American Bridge Company ) ASBCA No. 57246  
 )  
Under Contract No. N40085-08-C-2121 )

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OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO) decision denying in its entirety the \$329,358.88 claim of American Bridge Company (ABC) on behalf of Case Foundation Company, its drilling subcontractor, for payment of the rock socket excavation price from the point of earth auger refusal to the bottom of the rock socket of 30 drilled shafts. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Each party has moved for summary judgment on the issue of entitlement, and has opposed and replied to the other's motion. ABC's request for oral argument on the motions is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The Naval Facilities Engineering Command (NAVFAC) awarded Contract No. N40085-08-C-2121 (the contract) to ABC on 28 March 2008 for the total bid price of \$14,996,752.00, for the Vehicular Bridge Replacement at the U.S. Naval Station, Newport, Rhode Island (R4, tab 5 at 237, 241; gov't proposed findings of fact (PFF) ¶ 7).

2. Contract specification section “00 41 00 (Bid Schedule),” items 0001 and 0002 included the following pertinent sub-items:

Item 0001b-Provision of 48" diameter drilled shafts as indicated on the drawings complete in place with steel shell and all reinforcing and concrete fill. Shafts shall be measured from the top of bedrock (elevation “A”) to the underside of the pier cap (elevation “C”) as indicated on drawing S-3.

Item 0001c-Provision of rock sockets complete in place with...all reinforcing and concrete fill. Rock sockets shall be measured from the top of bedrock (elevation “A”) to the bottom of the excavation (elevation “B”) as indicated on drawing S-3.

....

Item 0002b-Rock sockets required for the extensions of the pier caps.

(PFF ¶ 5; R4, tab 2 at 67, tab 5 at 243-45) The estimated quantities in linear feet (LF), unit prices and extended amounts for the foregoing sub-items were (PFF ¶ 7):

<u>Bid-Item</u>	<u>Est. Quantity</u>	<u>Unit Price</u>	<u>Amount</u>
0001b	1,857 LF	\$ 865.00	\$1,606,305.00
0001c	168 LF	\$2,414.00	405,552.00
0002b	72 LF	\$1,905.00	137,160.00

3. Contract drawing S-3 depicted a plan of a 900' bridge atop 10 transverse piers. Beneath each pier were 3 vertical drilled shafts. In the “DRILLED SHAFT DETAIL” alongside the shaft elevation from top to bottom were arrow notes stating: “BOTTON OF PIER CAP ELEV C,” “APPROX TOP OF BEDROCK ELEV A” and “BOTTOM OF DRILLED SHAFT ELEV B.” Between Elevations A and B was stated: “ROCK SOCKET VARIES.” Beside the drilled shaft elevations in the “TYPICAL BRIDGE CROSS SECTION” were arrow notes stating: “APPROXIMATE TOP OF GLACIAL TILL EL. VARIES,” “APPROX. WEATHERED BEDROCK, EL VARIES,” “APPROX. TOP OF BEDROCK, EL VARIES” and “BOTTOM OF DRILLED SHAFT, EL VARIES.” Drawing S-3, note 2, stated: “THE INDICATED ROCK SOCKET TIP [BOTTOM] ELEVATIONS AND LENGTHS ARE BASED ON CONDITIONS FROM AVAILABLE SUBSURFACE EXPLORATIONS. FINAL ROCK SOCKET TIP ELEVATIONS AND LENGTHS MAY BE ADJUSTED BY THE [CO] DURING CONSTRUCTION WHO WILL CONFIRM THE ACTUAL ROCK CONDITIONS

ENCOUNTERED....” Drawing S-3’s Drilled Shaft Table stated that elevations A and B were “ESTIMATED.” (PFF ¶ 8; ex. G-3)

4. Contract drawing S-21, “SOIL PROFILE,” showed 10 bridge pier stations, 12 core boring locations interspersed among the 10 piers and, starting from 0 elevation downward, layers of organic silt, fibrous peat, sand and silt, silty clay, glacial till and boulders, weathered rock and bedrock. Drawing S-21 stated “R INDICATES REFUSAL.” It showed no R at boreholes B-8, B-9, B-10 and B-17. It showed an R at the bedrock elevation on boreholes B-5, B-12, B-13, B-14, B-15, and B-18 and an R at an elevation above the bedrock elevation of boreholes B-5, B-13 and B-16. It showed an R at each of two different elevations above the bedrock elevation of boreholes B-11 and B-12 and at each of three different elevations above the bedrock elevation of borehole B-14. Contract drawings S-22 through S-26, the boring logs, set forth specific data and descriptions of the subsurface soil at designated depths. (Ex. G-3; PFF ¶ 8)

5. The contract’s “SPECIAL PROVISIONS,” Part 800, provided in pertinent part (R4, tab 2 at 158, 164-66; PFF ¶ 14):

1.1 General.

...The embedment length of the drilled shafts may be modified by the [CO] based on the conditions encountered.

....

1.5 General Methods and Equipment.

The Contractor’s methods and equipment shall have adequate capacity including power, torque and down thrust to excavate a hole of both the maximum diameter and to a depth of 25% beyond the depths shown on the plans.... The Contractor shall provide all equipment and tools as necessary to construct the shaft excavation to the size and depth required....

....

1.6 Drilled Shaft Excavation.

A. General

[1] The Contractor shall use excavation techniques that are technically adequate and cost effective to meet the

geologic conditions encountered at the site.... Drilled shafts shall be excavated to the dimensions and elevations shown or as directed....

....

[3] Drilled shaft excavation is excavation accomplished with conventional tools such as earth augers, casing twistlers, drilling buckets, and overreaming (belling) buckets attached to drilling equipment of the size, power, torque, and down thrust (crowd) approved for use by the [CO].

....

#### C. Rock Socket Excavation.

Rock socket excavation is excavation that requires rock-specific tools and/or procedures to accomplish hole advancement, such as rock augers and core barrels. All excavation, performed below the depth where rock socket excavation is authorized shall be considered so regardless of the density, strength, hardness, or changes in type or character of materials encountered.

6. Contract section 00700 incorporated by full text the FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984) clause, and incorporated by reference the FAR 52.214-29, ORDER OF PRECEDENCE – SEALED BIDDING (JAN 1986) clause which provided:

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications);
- (b) Representations and other instructions;
- (c) Contract clauses;
- (d) Other documents, exhibits, and attachments; and
- (e) The specifications.

and the FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) and DFARS 252.236-7001, CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000) clauses. (R4, tab 5 at 259, 265, 267-68; PFF ¶¶ 10, 11)

7. The “Drilled Shaft Inspector’s Manual,” submitted by ABC on 18 June 2008 and approved by the government on 31 July 2008, provided in pertinent part:

### **3.3 IDENTIFYING THE BEARING STRATUM**

The inspector should classify soil and rock samples from the spoil pile and watch for signs of the bearing stratum on the auger or bucket as it is being removed from the hole. On some projects, the specifications may require drilling to a certain design bid elevation and then testing at that level to see if it meets the design requirements....

Once the inspector has determined that the bearing stratum has been reached, he should measure the depth and check the elevation against the design assumption, closest boring log, and materials observed in other nearby shafts....

....

### **3.5 ENCOUNTERING OBSTRUCTIONS, DEFINING ROCK REMOVAL, AND TIME RECORDS**

....

If there is a bid item for rock removal, there should also be a definition in the specifications to provide guidance for the inspector. If there is no specific definition in the specifications, a normal standard in the industry is to classify any material as rock for payment purposes, which cannot be drilled with a conventional earth auger or underreaming tool (as configured to be effective in the area for excavation of dense soil) and requires the use of rock augers, core barrels, air tools, blasting and/or other methods of hand excavation....

(R4, tab 7 at 325, 335-37; PFF ¶ 17)

8. Case Foundation Company (Case), ABC’s drilling subcontractor, advised ABC on 4 February 2009 that it had reached “earth auger refusal” at an elevation much higher than the drawings contemplated and was drilling “rock sockets” to the design bottom elevations shown on the contract drawings. Case stated that it was “concerned for the potential overrun of rock quantities.” ABC advised NAVFAC on 5 February 2009 that Case had been forced to use rock drilling tools prior to reaching rock socket elevations. ABC stated that if this situation continued it could result in a significant overrun of bid

items 0001c and 0002b and a significant underrun of bid item 0001b. (PFF ¶ 22; R4, tab 8 at 364-65)

9. The government's review of its drilling logs showed that Case switched from an earth auger to a rock auger for drilling through dense layers of glacial till before reaching bedrock (PFF ¶ 24; ex. G-13; R4, tab 11 at 377).

10. ABC's 19 May 2009 letter to NAVFAC requested a \$329,358.88 equitable adjustment, "based on all 30 Drilled Shafts complete," and calculated as follows:

Drilled Shaft (Bid Item 0001b)

$$1593.74 \text{ lf (actual)} - 1857 \text{ lf (anticipated)} = -263.26 \text{ lf} \\ -263.26 \text{ lf} \times \$865.00/\text{lf} = (-\$227,719.90)$$

Rock Socket (Bid Item 0001c)

$$398.77 \text{ lf (actual)} - 168 \text{ lf (anticipated)} = 230.77 \text{ lf} \\ 230.77 \text{ lf} \times \$2,414.00/\text{lf} = \$557,078.78$$

$$\text{Net Contract Change} = (-\$227,719.90) + \$557,078.78 = \\ \$329,358.88$$

(PFF ¶ 29; R4, tab 12 at 378)

11. On 4 November 2009 ABC forwarded to NAVFAC Case's 28 October 2009 claim at "the value of the claim to [ABC]...as specified in [ABC's] letter...dated May 19, 2009," viz., \$329,358.88, for payment of rock socket excavation from the point of auger refusal to the bottom of the rock socket, based on its interpretation of contract special provisions § 1.6A, ¶ 3, § 1.6C and § 3.5, ¶ 2, of the Drilled Shaft Inspector's Manual and drawing S-3. ABC did not certify the claim. (PFF ¶¶ 31, 32; R4, tab 15 at 385-87, 394-95)

12. After NAVFAC notified ABC on 3 December 2009 of the missing prime contractor CDA certification of its 4 November 2009 claim (R4, tab 16 at 398-99), ABC certified its \$329,358.88 claim that same date (R4, tab 17 at 400). The CO's 8 March 2010 final decision denied that claim in its entirety (R4, tab 18 at 404-07). (PFF ¶¶ 33, 34)

13. According to appellant's proposed findings of fact, Case employed earth augers and rock removal tools (rock augers, core barrels and chisels) to excavate the drilled shafts (app. proposed findings of fact (APFF) ¶ 3). Case began excavating each shaft using an earth auger (APFF ¶ 4; Pita sworn statement, ¶ 4). When Case's earth

auger met refusal, the material encountered caused the excavation to wander off the centerline of the drilled shaft, the earth auger teeth or teeth pockets would break and/or the earth auger advanced very slowly. The quantity, composition and properties of the excavated material which existed when the earth auger met refusal indicated the excavation had encountered the glacial till layer or the weathered bedrock layer. (APFF ¶ 5; Pita sworn statement, ¶ 5) Case then continued excavating using rock removal tools (APFF ¶ 6).

14. The government disputes APFF ¶ 4, disagreeing that Case began excavating *each* shaft using an earth auger and asserting that in some instances Case did not use earth augers at all, and disputes APFF ¶ 5, disagreeing that the conditions described constituted “refusal” (gov’t reply at 2).

### DECISION

Respondent argues that the plain language in the bid schedule and in drawing S-3 defined the drilled shaft and rock socket measurements for payment purposes and made it clear that appellant’s interpretation that payment was based on the type of excavating tool used is unreasonable; the Order of Precedence clause requires any inconsistency to be resolved in favor of the bid schedule over the specifications; and any ambiguity between the bid schedule and specifications was patent, giving rise to the duty to inquire before bidding, which appellant failed to do (gov’t mot. at 19).

Appellant argues that the added rock socket length it excavated when it encountered earth auger refusal at an elevation higher than the specified bedrock elevation was a contract change entitling it to an equitable adjustment (app. mot. at 8-11) and when its use of earth auger tools became technically inadequate and not cost effective, it was contractually entitled to switch to rock removal tools and to be paid therefor at the rock socket unit price (app. reply at 3).

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In cross-motions for summary judgment, we must evaluate each motion on its merits and decide whether summary judgment is appropriate. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

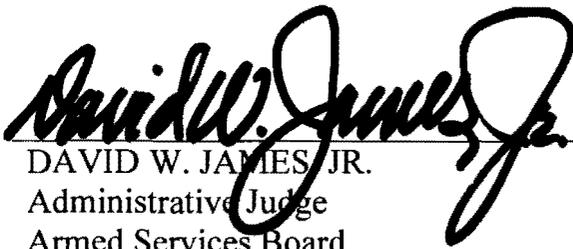
The contract provided for separate pay items for the drilled shafts (item 0001b) and rock sockets (item 0001c). The contract represented that drilled shaft excavation was “excavation accomplished with conventional tools such as earth augers” and rock socket excavation was “excavation that requires rock-specific tools.” The contract also stated that the contractor “shall use excavation techniques that are technically adequate and cost effective to meet the geologic conditions encountered at the site....” (SOF ¶ 5, 1.6) The

parties dispute whether Case, when excavating the drilled shafts, encountered “refusal” such that it was required to switch from conventional tools such as earth augers to rock-specific tools. Notwithstanding the parties’ contentions that the disputed facts in APFF ¶¶ 4-5 are *not material* to the motions (gov’t opp’n at 1; app. reply at 2), we conclude that there are genuinely disputed material facts (SOF ¶ 14). Therefore, we hold that summary judgment to either party is not appropriate.

CONCLUSION

We deny both parties’ motions for summary judgment.

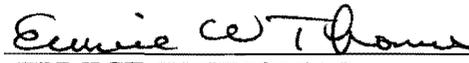
Dated: 9 November 2011

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

I concur

I concur

  
\_\_\_\_\_  
MARK N. STEPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

  
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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. 57246, Appeal of American Bridge Company, rendered in conformance with the Board’s Charter.

Dated:

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