

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Donaldson Enterprises, Inc.) ASBCA No. 57927
)
Under Contract No. W912CN-10-D-0030)

APPEARANCE FOR THE APPELLANT: Carl H. Osaki, Esq.
Honolulu, HI

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Brian E. Bentley, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Donaldson Enterprises, Inc. (DEI) appeals a contracting officer's (CO's) decision deducting \$3,627.48¹ from a delivery order invoice under the captioned contract (hereinafter Contract 0030). The deduction was for the value of government property allegedly converted by a subcontractor for private use in the course of performance of the contract. We find that DEI was contractually responsible for the loss of the government property at issue, but the value of that property was no more than \$3,051.28, when it was converted to private use. We sustain the appeal to the extent of the difference, \$576.20, between the government deduction and our finding as to the value of the converted property. We deny the appeal in all other respects.

FINDINGS OF FACT

1. On 29 September 2010, DEI was awarded Contract 0030 to blast, excavate, crush, and transport rock from a government quarry at Schofield Barracks to designated government work sites on the island of Oahu, Hawaii. Contract 0030 was a requirements contract. The specified work was to be performed only as authorized by delivery orders issued under the Ordering clause. (R4, tab 2 at 1, 8-13, 27-28)

¹ The amount deducted in the CO's decision was \$3,627.20. However, when implemented by modification to a delivery order price, the deduction was \$3,627.48. For purposes of this decision we consider the difference *de minimis* and find that the amount deducted was the amount in the implementing modification.

2. Contract 0030 included, among other provisions, the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) clause. Paragraphs (d) and (j) of that clause stated in relevant part:

(d) *Disputes*. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference....

(j) *Risk of loss*. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

....

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(R4, tab 2 at 16, 19) The contract line item numbers (CLINs) and Delivery Information in the contract designated all CLINs as “FOB: Destination” (*id.* at 8-13, 15)

3. Delivery Order 0001 under Contract 0030 was issued effective 25 February 2011. It required DEI to blast, excavate, crush, and transport 952 tons of rock from the Schofield quarry to the Kahuku Training Area. The specified delivery date was 1-25 March 2011. (R4, tab 5 at 1, 3-4) Delivery Order 0001 was the only order authorizing work under Contract 0030 to be performed in March 2011.² DEI subcontracted the crushing and transporting work to MEI Corporation (MEI) (tr. 1/22).

4. On 9 March 2011, before DEI began performing Delivery Order 0001, MEI loaded 80.85 tons of crushed rock at the Schofield quarry and stockpiled it at a site where it was constructing a parking area for a private bus company in the city of Kapolei. MEI loading tickets 299 and 300, machine printed by the MEI loader at the quarry, show a

² Delivery Order 0002 was initially issued on 2 March 2011 for 2,640 tons of crushed rock for delivery in the period 1-25 March 2011 (R4, tab 9 at 1, 4-5). However, the delivery time in this order was subsequently amended to the period 12 April to 6 May 2011 (R4, tab 24 at 2-3).

total of 80.85 tons loaded on 9 March 2011 with a printed site destination of "Southrange." However, a handwritten note at the bottom of each ticket stated: "KAPOLEI-KAH." The author of that note and the date it was written are not in evidence. (R4, tab 42, ex. B; tr. 1/28-29, 37-42, 68-69)³

5. On 15 March 2011, a supervisor on another contract at Schofield Barracks (Mr. Toloke), saw an MEI-escorted truck removing crushed rock from the Schofield quarry and dumping it at the MEI Kapolei construction site. He also saw an MEI excavator leveling the dumped rock at that site. (Tr. 2/7-12, 36-37) Mr. Toloke reported what he saw to the CO of Contract 0030 (Mr. Umeda). On 21 March 2011, Mr. Umeda reported what Mr. Toloke had told him to the Schofield Barracks military police (R4, tab 26 at 43; tr. 2/45-47).

6. On 22 March 2011, DEI began performing Delivery Order 0001. The order was completed on 29 March 2011 with a total of 975.11 tons of crushed rock delivered from the Schofield quarry to the Kahuku Training Area. DEI's daily records of deliveries at Kahuku for Delivery Order 0001 contain 42 MEI loading tickets, machine printed by the MEI loader at the Schofield quarry. These tickets were numbered between 234 and 297. They show for each truck the total daily load, the date/time the last load on the truck was completed, and the site destination of the load ("Kahuku"). (R4, tabs 11-14, 16-17; tr. 1/38-39)

7. MEI alleges that loading tickets 299 and 300 for the 80.85 tons stockpiled at Kapolei were submitted to and paid by the government (tr. 1/40). Apart from the testimony of MEI's president, there is no evidence supporting this contention. Loading tickets 299 and 300 do not appear in any of DEI's daily reports of loading tickets received for Delivery Order 0001 from the start of performance of that order on 22 March 2011 through its completion on 29 March 2011 (*see* finding 6).

8. On 23 March 2011, a military police investigator (Mr. Murto) went to the MEI construction site at Kapolei. At hearing, Mr. Murto testified that on that day he saw no stockpiles of rocks at Kapolei. "There was nothing piled, no dirt, no rocks. I saw only flat parking lot at that time." (Tr. 2/65-66) When asked whether there was gravel spread across the parking lot, Mr. Murto testified that it didn't look like a gravel driveway, but "there was a large amount of rock within the dirt" (tr. 2/66).

9. When shown photographs purportedly taken on 23 and 24 March 2011 showing piles of rock and dirt on the Kapolei work site, Mr. Murto testified that he had not seen the piles of rock shown in the photographs and that he had "seen every foot of the property" (tr. 2/70). Mr. Murto further testified that the date/time stamps on digital

³ The Board has attached to Rule 4, tab 42, ex. B, a more legible copy of that exhibit showing MEI loading tickets 299 and 300 (*see* ex. A-10 for identification at 4-8).

photographs can be “adjusted” to show a date/time other than the date/time the photograph was actually taken. (Exs. A-23, -24, -25; tr. 2/71) The person who took the photographs did not testify at the hearing.

10. On 24 March 2011, Mr. Murto questioned MEI’s president (Mr. Ramanlal) about the use of Schofield rock at Kapolei. Mr. Ramanlal told Mr. Murto that “we used our Kapolei job site to stockpile materials to fill our order for Kahuku.” He denied that MEI was using the Schofield rock on the Kapolei site. (R4, tab 26 at 15; tr. 1/97-104) At hearing, Mr. Ramanlal testified that 9 March 2011 was the only occasion that MEI stockpiled Schofield rock at Kapolei (tr. 1/28).

11. MEI alleges that on 29 March 2011 it delivered 130 tons of crushed rock from Kapolei to the government at the Kahuku Training Area and that the 130 tons included the 80.85 tons of government crushed rock stockpiled at Kapolei on 9 March 2011. There is, however, no evidence for this alleged 29 March 2011 delivery other than invoices to MEI by a trucking company. The only witness for MEI at the hearing, MEI’s president, was not present on 29 March 2011 either at the alleged loading of the government crushed rock at Kapolei or at its alleged delivery at Kahuku. (Ex. A-21; tr. 1/69) Moreover, the only deliveries at Kahuku for Delivery Order 0001 on 29 March 2011 in the DEI daily record were those on MEI loading tickets 263, 264 and 265. Those loading tickets were machine generated by the MEI loader at the Schofield quarry, not at Kapolei, and showed a combined total weight of only 73.70 tons.

12. On this record, we conclude that the 80.85 tons of government crushed rock that MEI stockpiled at its Kapolei parking area construction site were not delivered to the Kahuku Training Area on 29 March 2011 as alleged by MEI.

13. On 4 August 2011, the president of MEI was “titled” as a subject of the MP investigation.⁴ On 6 August 2011, the MP investigation final report concluded that: “On [15 March 2011] between 30 and 80 tons of rocks were unlawfully transported from the Schofield Barracks KoloKole Quarry to [the] Campbell Industrial Park, Kapolei for use in constructing a parking lot. This was done at the directive of [the MEI president].” The report classified the incident as a larceny of government property. (R4, tab 26 at 1, 45)

14. On the basis of the MP investigation report, the CO for Contract 0030 on 27 September 2011 issued a final decision under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, asserting a government claim against DEI for the value of the government crushed rock that “had been improperly removed” from the Schofield quarry by DEI’s subcontractor MEI. The claimed value was \$3,627.20 for an estimated 80 tons at \$45.34 per ton. Although the final decision stated it was capturing the parties’

⁴ “Titling” is not an indictment (tr. 2/95-96). There is no evidence that a criminal prosecution has been initiated against MEI’s president.

mutual agreement and was entitled "Settlement of Claim," it concluded with notice to DEI of its right to appeal the decision to this Board or the Court of Federal Claims. (R4, tab 34; tr. 2/53)

15. In bilateral Modification (Mod.) 2 to Delivery Order 0002, effective 19 October 2011, DEI and the government agreed to a \$3,627.48 reduction in the delivery order price on the following basis:

a. This Modification is issued In Accordance With (IAW) FAR 52.212-4(d), Contract Terms and Conditions—Commercial Items (JUN 2010). As per the Contracting Officer[']s Final Decision dated 27 September 2011 and subsequent e-mail dated 06 October 2011, CLINs 0001, 0002 and 0004 are adjusted as follows:

....

Total Contractual adjustment = (\$3,627.48)

b. All other terms and conditions shall remain unchanged.

(R4, tab 39)

16. The \$45.34 per ton value of the crushed rock was determined by the CO asking people in the government what "paving aggregate" would cost (tr. 2/55). MEI argues that (i) the 80.85 tons of Schofield crushed rock was of lesser quality than "paving aggregate" as indicated by the total contract/delivery order price of \$30.14 per ton, and (ii) if any "misappropriation" occurred, it occurred before MEI crushed the 80.85 tons at the quarry when the value of the rock was less than the \$4.10 per ton component of the contract/delivery order price for blasting and excavating the rock from the quarry (app. br. at 51-53). We disagree. We have found above that the conversion of the 80.85 tons occurred after it was crushed and stockpiled ready for use at Kapolei (*see* finding 12). Moreover, the contract/delivery order price of \$30.14 per ton included only the costs of processing (i.e. blasting, excavating, crushing, and transporting) the rock in the quarry into crushed rock at the work site. It did not include any amount for the value of the unprocessed rock in the quarry. (R4, tab 4 at 2, tab 5 at 3-4) On this evidence we find in the nature of a jury verdict that the value of the 80.85 tons when converted to private use at Kapolei was \$37.74 per ton (the average of the contract/delivery order price of \$30.14 per ton and the CO's estimate of \$45.34 per ton), or a total value of \$3,051.28.⁵

⁵ $[(\$30.14 + \$45.34) \div 2] \times 80.85 = \$3,051.28.$

17. On 26 December 2011, MEI appealed the CO's 27 September 2011 final decision (R4, tab 42). On inquiry by the Board, DEI by letter dated 22 January 2012 stated that it "supports and joins in the appeal of MEI" (R4, tabs 43, 44).

DECISION


The government contends that this appeal is barred because bilateral Mod. 2 to Delivery Order 0002 settled the government claim. We disagree. Mod. 2 states that it "is issued In Accordance With" FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) clause, and "per the Contracting Officer[']s Final Decision dated 27 September 2011" (*see* finding 15). Paragraph (d) of the cited FAR clause expressly states that "[t]his contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613)," and expressly incorporates into the Delivery Order, the FAR 52.233-1, Disputes clause for resolving disputes (*see* finding 2). The CO's final decision also expressly provided in its concluding paragraph a notice to DEI of its right to appeal the decision to this Board or the Court of Federal Claims (*see* finding 14). If the parties had intended to negate the express representations of appeal rights in the references in Mod. 2, they should have done so by eliminating those references or by including a general release or other express language to that effect. They did not do so and the present appeal is not barred by accord and satisfaction.

On the merits of the appeal, we have found above that on or about 9 March 2011, 80.85 tons of crushed rock were taken by a DEI subcontractor from the Schofield quarry and stockpiled at the subcontractor's private construction site at Kapolei (finding 4). The subcontractor contends that the stockpile was intended as temporary storage for subsequent transfer to the government Kahuku Training Area. However, we have further found that the 80.85 tons of government rock stockpiled at Kapolei were not delivered to the government (finding 12).


We have made no finding as to whether this conversion of the government rock was intentional or inadvertent. In either case, the 80.85 tons of government rock never reached the destination specified in the only delivery order then in effect. That failure was a breach of contract by DEI. Moreover, the Schofield quarry rock was bailed to DEI for performance of the contract, and the contract expressly placed the risk of loss of the bailed rock on DEI up to the time it was redelivered to the government (findings 1, 2). A contractor is responsible contractually for the actions of its subcontractor. *D&H Construction Company*, ASBCA No. 37482, 89-3 BCA ¶ 22,070 at 111,005 (contractor responsible for subcontractor's fraudulent provision of counterfeit equipment). In these circumstances, DEI is liable to the government for loss of the rock at Kapolei without regard to fault. *See FMC Corporation*, ASBCA No. 23135, 80-2 BCA ¶ 14,634 at 72,204.

We have found above that the value of the 80.85 tons of Schofield crushed rock stockpiled at Kapolei was \$3,051.28 when it was converted for private use sometime between 9 and 23 March 2011 (finding 16). Accordingly, we sustain the appeal to the extent that DEI is entitled to recover the difference (\$576.20) between the amount deducted by the government in Mod. 2 for loss of the property and our finding of the value of that property at the time it was converted. We deny the appeal in all other respects.


Dated: 16 July 2013


MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur


ELIZABETH M. GRANT
Administrative Judge
Acting 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. 57927, Appeal of Donaldson Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals