

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Mylene Will Company L.L.C.) ASBCA No. 58154
)
Under Contract No. FA4809-11-M-V031)

APPEARANCE FOR THE APPELLANT: Mr. Greg Sullivan
Member

APPEARANCES FOR THE GOVERNMENT: Col. Jennifer L Martin, USAF
Air Force Chief Trial Attorney
Skye Mathieson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) 8 May 2012 final decision which denied appellant's 25 January 2012, \$21,568.13 claim under the captioned contract alleging differing site conditions. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. After a two-day hearing, the parties submitted post-hearing and reply briefs. We decide entitlement only (tr. 1/8-9).

FINDINGS OF FACT

1. On and after 25 August 2011 Hurricane Irene damaged and uprooted trees at Seymour Johnson Air Force Base (SJAFOB), North Carolina (tr. 1/93, 255-56).

2. SJAFOB designated a 150 by 200-foot concrete slab near the base perimeter road and Slocum (or south) Gate entrance to SJAFOB as the drop site for trees, limbs, branches and brush debris (tr. 1/259; R4, tab 35 at 186¹). About 50-60 feet from, and surrounding, the slab was a 7-foot fence covered by opaque, brown sheets (tr. 1/264-65, 2/9, 225; R4, tab 35 at 186).

3. On 29 August 2011 SJAFOB personnel dragged smaller branches and tree limbs to the streets, and those with pickup trucks transported such debris to the drop site (tr. 1/259, 261, 268). On about 2 September 2011, heavy equipment workers of the SJAFOB Civil Engineering Squadron (CE) used chain saws to cut downed trees into pieces and used wheel loaders, dump trucks and back-hoes to transport the larger tree and brush materials to the drop site, including uprooted tree trunks with root balls (tr. 1/261-64).

¹ All Rule 4 page citations are to the Bates number.

4. On 22 September 2011 the SJAFB 4th Contracting Squadron (ACC 4) issued Solicitation No. FA4809-11-Q-6038 (the RFQ) to provide “Disposal Services for Tree and Brush Debris Due to Storm Damage” of 5,000 cubic yards on a firm fixed-price basis, to be performed from 29 September to 15 November 2011, with quotes due by 27 September 2011. The RFQ stated: “**SITE VISIT: All prospective offerors are encouraged to attend the site visit...scheduled for 26 September 2011 at 10:00 AM at [SJAFB].**” (R4, tab 4 at 53-54, 56-57; gov’t br. at 15 n.2, “FedBizOps.gov” website)

5. On 23 September 2011 Mylene Will Company L.L.C. (M&W) submitted a \$17,600 total price quotation under the RFQ, omitting a unit price. The record contains no pre-award work papers showing M&W’s debris disposal methods and assumptions, and costs it estimated to remove the debris from SJAFB. (R4, tab 4 at 56; tr. 1/144; see finding 9)

6. On or about 24 September 2011 CS Tree Services Inc.’s (CS) Christopher Bailey visited SJAFB and photographed the debris pile. His photos show tree trunks, stumps with root balls, limbs, branches, dirt piles and weed control fabric. (Ex. G-8 at 1-9; tr. 2/95-99)

7. M&W did not send a representative to the 26 September 2011 SJAFB site visit (R4, tab 5 at 59; tr. 1/39, 97, 275). During that site visit, the debris pile contained tree trunks, large stumps with root balls, weed block material, dirt and pieces of rock, as M&W’s Greg Sullivan acknowledged upon examining the CS photographs at the hearing (tr. 1/123, 126, 129, 276-78, 2/239-40; ex. G-8; R4, tab 35 at 186). The 26 September 2011 “MEMORANDUM FOR ALL PROSPECTIVE OFFERORS,” signed by ACC 4’s SrA Aaron Caraway and CO Jordan L. Siefkes, included, *inter alia*, the following questions and answers: “Can the material be ground on site prior to load and hauling off base? Yes.... Is the vegetative debris clean of other waste (paper, metal etc)? 99.9% Yes. There may be a little weed cover material or something to that effect. Very minimal.” (R4, tab 6)

8. On 26 September 2011 M&W sent SJAFB, at its request, a \$3.52 unit price calculated by dividing \$17,600 by 5,000 cubic yards (R4, tab 4 at 58; tr. 1/149-50).

9. On 27 September 2011 M&W received SJAFB’s 26 September 2011 site visit memo and Mr. Sullivan went to the SJAFB Slocum Gate, about 250-300 yards from the debris pile (tr. 1/40, 98). From that gate he viewed, but did not photograph, the debris pile, which he saw was composed of large logs, stumps, root balls with dirt, brush, limbs, leaves and weed barrier (tr. 1/42, 46, 100-09, 123-27, 129, 159). At that time he planned to grind and recycle the brush and wood chips, to dispose of the stumps and root balls at an off-base compost or landfill facility, and to sell marketable logs (tr. 1/82, 110-11, 132-35), but he did not so advise ACC 4. After his viewing, no more material was added

to the debris pile (tr. 1/108, 126-27). SrA Caraway asked Mr. Sullivan whether he wanted to change M&W's quote. Mr. Sullivan said that the site visit memo did not indicate a need to change its quote. (Tr. 1/42, 157-58)

10. On 28 September 2011 ACC 4 awarded Contract No. FA4809-11-M-V031 (the contract) to M&W. The contract's sole work item was contract line item number (CLIN) 0001, "Provide Disposal Services for Tree and Brush Debris Due to Storm Damage," 5,000 cubic yards (CY), unit price \$3.52 per CY, for a total amount of \$17,600.00. (R4, tab 1 at 1, 3)

11. The contract was a commercial items contract that incorporated by reference, *inter alia*, the Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) clause, whose paragraph (c) provided: "*Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties" (R4, tab 1 at 5). The contract did not include or incorporate by reference the FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) (DSC) clause (R4, tab 1).²

12. The contract's "STATEMENT OF WORK" provided:

1. **Scope:** The Contractor shall provide all personnel, equipment, tools, supervision and other items and services necessary to ensure accumulated tree and brush debris are [sic] removed from [SJAFB] and disposed of. Contractor shall transport and dispose of materials in accordance with all applicable state and federal laws and regulations.

....

8. **Disposal:** Disposal shall be in accordance with existing local, state, and federal regulations. The contractor shall be responsible for any permit or fees associated with the use of off-base disposal locations.

ACC 4's SrA Caraway was designated Contract Administrator. (R4, tab 1 at 34-35)

² M&W asserts that the contract does incorporate the FAR 52.236-2 clause. The contract's FAR 52.252-2, CLAUSES INCORPORATED BY REFERENCE (FEB 1998) clause (R4, tab 1 at 22), does not refer to FAR 52.236-2. FAR 36.502 prescribes the FAR 52.236-2 DSC clause only for contracts for "construction...dismantling, demolition, or removal of improvements," none of which was specified in ACC 4's tree and brush debris disposal services contract.

13. Due to M&W's delays in receipt of the contract documents and base security clearances, M&W requested, and the CO granted, no-cost extensions of the performance completion date first to 9 December 2011 and later to 22 December 2011 (R4, tabs 2, 3).

14. Mr. Sullivan and M&W's labor foreman, Raymond Vasquez, first went to the SJAFB work site on Thursday 8 December 2011 (tr. 1/135-36, 242, 2/182-83). On 9 December 2011 M&W brought a hand-fed chipper to the debris site. Mr. Vasquez testified that he knowingly fed into the chipper, intermixed with the brush, "little landscape rocks" and "little gravel stuff" that damaged the chipper, but he fed no "chunks of concrete" into the chipper. (Tr. 1/139, 226-27, 230, 244-45, 248; R4, tab 24 at 162)

15. On Sunday 11 December 2011 M&W alleged to ACC 4 that M&W had encountered "debris other than tree and brush...such as concrete, metal, rocks, dirt etc. that can not be disposed in the same manner as the tree and brush debris" and that it "experienced equipment failure due to this foreign debris" requiring down time repair and major parts replacement (R4, tab 13 at 76; tr. 1/138).

16. M&W's 13 December 2011 email to ACC 4 alleged: "[W]e are again encountering...a large quantity of dirt/soil, gravel, rock and roadway debris" which the Goldsboro Compost Facility would not accept (R4, tab 14 at 78; tr. 1/202, 206).

17. On 14 December 2011 ACC 4's Terry Wooley, MSgt John McComas, CO TSgt Jeremy Hebb and others visited the SJAFB debris site. Mr. Sullivan pointed out to them a white rock or chunk of concrete, two flat slabs, and an L-shaped, light-colored object described as a "ribbon curb" or a "white rock [that] looked like some curbing off of one of the landscape beds" – which are visible in M&W's photographs taken in mid-December 2011, but were not visible in Mr. Sullivan's 27 September 2011 viewing – as well as weed fabric and dirt. (R4, tabs 15, 33 at 179, tab 36 at 190; tr. 1/189-90, 193-94, 2/187)

18. M&W did not photograph or otherwise confirm Mr. Sullivan's statement that M&W "might have" encountered metal or plastic in the SJAFB debris pile (tr. 1/159-60, 188-91, 194-95; R4, tab 36 at 188). We find that M&W did not encounter such materials.

19. Mr. Vasquez later threw the weed fabric, rock, slabs and curbing off to the side in a "little foot pile, roughly." M&W did not photograph or measure that pile or show it to respondent. M&W later removed the weed fabric, rock, slabs and curbing in a dump truck commingled with tree and brush debris. (Tr. 1/181, 193-96, 206-10, 245-48)

20. In December 2011 M&W made 55 deliveries to Best Sand & Gravel, Inc. (Best) landfill, whose delivery tickets stated "Trees" (49 tickets), "Debris" (5 tickets) and no identified material (1 ticket), and 3 deliveries to Universal Wood Recycling

(Universal), whose invoice and scale tickets stated “old pulp/debris” and “AGED PULP/DEBRIS” (R4, tabs 23, 24 at 157-59, 161). Calvin Williams’ trucking company delivered M&W’s debris to Best and Universal. Universal took no concrete and rejected some of Williams’ loads due to “dirt.” Mr. Williams identified no separate load of rock, slabs and ribbon curb. (Tr. 1/217, 220-22) M&W adduced no evidence that it encountered in the SJAFB debris more than 5 CY (.1% of 5,000 CY) of weed fabric, rocks, slabs and ribbon curb or that it removed from SJAFB more than 5,000 CY of debris.

21. On 21 or 22 December 2011 M&W completed contract performance (tr. 1/87).

22. M&W’s 25 January 2012 claim sent to CO Hebb alleged a “DIFFERENCE IN SITE CONDITIONS...DIRT, STONE, ROCK, CEMENT, METAL, ROADWAY DEBRIS AND ITEMS THAT CAN NOT BE HANDLED IN THE SAME MANNER AS...TREE AND BRUSH DEBRIS” and sought \$21,568.13 for equipment failure and added hauling expenses, landfill fees and labor (R4, tab 22).

23. The 8 May 2012 final decision of CO Hebb denied M&W’s claim and notified M&W of its appeal rights (R4, tab 29). M&W appealed from CO Hebb’s decision on 21 May 2012.

DECISION

The commercial items contract in this appeal had no FAR 52.236-2, DIFFERING SITE CONDITIONS (DSC) clause (finding 11, n.2). Nonetheless, we have treated a claim of misrepresentation of site conditions as a breach of contract when the contract lacked a DSC clause. *See International Technology Corp.*, ASBCA No. 54136, 04-1 BCA ¶ 32,607 (*ITC*) at 161,372 (appellant framed its case in terms of breach of contract since the contract did not include a DSC clause), 06-2 BCA ¶ 33,348 at 165,365, *aff’d*, *International Technology Corp. v. Winter*, 523 F.3d 1341, 1348 (Fed. Cir. 2008), where the court stated:

A misstatement as to site conditions in a government contract can support a claim for breach of contract. *See Hollerbach v. United States*, 233 U.S. 165, 172...(1914). The same requirements apply whether the contractor asserts such a common law breach claim or a Type I claim under the [DSC] clause...which...was not included in ITC’s contract.... *See also P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 919 (Fed. Cir. 1984) (applying the same analysis to a common law breach claim and a Type I differing site condition claim).

Generally, a party alleging a breach of contract has the burden of proving the fundamental facts of liability, causation and resultant injury. *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). To recover for a Type I differing site condition, a contractor must prove, by preponderant evidence, that: (1) the conditions indicated in the contract differ materially from those actually encountered during performance; (2) the conditions actually encountered were reasonably unforeseeable based on all the information available to the contractor at the time of bidding; (3) the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and (4) the contractor was damaged as a result of the material deviation between the expected and the encountered conditions. *See Control, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002).

With respect to the government's representation of site conditions at the SJAFB debris pile, on 26 September 2011 the CO advised M&W of .1% weed cover in the debris pile (finding 7). On 27 September 2011 Mr. Sullivan viewed weed cover and root balls with dirt at that pile (finding 9). The contract specified removal and disposal of tree and brush debris (findings 10, 12). Since M&W knew of such weed cover and root balls with dirt, it did not reasonably rely on the contract's indication of only tree and brush debris. *See ITC*, 06-2 BCA ¶ 33,348 at 165,365 (party was not misled about soil conditions since it had personal knowledge of such conditions).

M&W claims, and the government does not dispute, that the SJAFB debris pile contained a white rock or concrete chunk, two flat slabs and an L-shaped ribbon curb visible on 14 December 2011 (finding 17), which M&W called "foreign debris" (finding 15). The contract did not specify such "foreign debris," which was not visible to offerors in the 26 September 2011 site visit (finding 7) or in Mr. Sullivan's 27 September 2011 site view (finding 9). M&W has shown that the contract-related documents indicated that the SJAFB debris contained tree, brush and weed cover, but not the "foreign debris," and that it reasonably relied on such indication, satisfying DSC elements (2) and (3).

It is immaterial that ACC 4 was ignorant of, and did not seek to deceive M&W about, the white rock or concrete chunk, two flat slabs and an L-shaped ribbon curb in the SJAFB debris pile. "We note...that a finding that the contractor was actively 'misled,' in the sense that the Government 'withheld' or 'concealed' information within its grasp, is not essential to proof of a changed condition.... Fault on the part of the Government is not a necessary element." *United Contractors v. United States*, 368 F.2d 585, 597 n.6 (Ct. Cl. 1966).

With respect to DSC elements (1) and (4), the materiality of the government's breach regarding the SJAFB debris pile "depends on the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." *Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992). A breach is material only if the injured party establishes a causal

connection between the breach and its injury. “In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected[.]” RESTATEMENT (SECOND) OF CONTRACTS, § 241 (1981).

With respect to injury, the issue is whether M&W’s removal of the white rock or concrete chunk, two flat slabs and an L-shaped ribbon curb injured M&W by depriving it of any reasonably expected benefit. M&W contends that the “dirty...foreign material” it encountered in the SJAFB debris “could not be used in any form of recycle method.” The Goldsboro Compost Facility and Universal refused to take non-recyclable debris at no cost. Therefore, M&W had to pay the price per load to dispose of dirty debris at Best Sand and Gravel. (App. br. at 2)

CS’ 24 September 2011 site photos of the SJAFB debris showed tree root balls and dirt piles (finding 6). These were visible to participants in the 26 September 2011 site visit (finding 7). That M&W chose not to participate in the 26 September 2011 site visit and to inspect the SJAFB debris close up does not absolve it of responsibility for what that site visit would have revealed. *See Azerind, Inc.*, ASBCA No. 34294 *et al.*, 87-3 BCA ¶ 20,122 at 101,887 (contractor made no pre-bid site inspection, but such inspection would have revealed the amount of visually observable rust on galvanized material and thus the amount of sandblasting required).

M&W planned to grind and recycle the brush, take the stumps and root balls to an off-base no-cost disposal facility, compost or landfill, but did not so advise ACC 4 (finding 9). The contract did not specify recycling of any SJAFB debris (findings 11-12). Hence M&W’s assertion that “dirty” foreign material was non-recyclable is immaterial.

After 14 December 2011, M&W’s Mr. Vasquez threw weed fabric, rock, slabs and curbing off to the side of the debris pile in a “little foot pile, roughly.” M&W did not photograph or measure that pile or show it to the Air Force, and later removed that pile of foreign debris in a dump truck commingled with tree and brush debris. (Finding 19) M&W adduced no proof that the foreign debris encountered during contract performance exceeded .1% of the 5,000 CY debris pile (5 CY), or that it removed more than 5,000 CY of debris from SJAFB (finding 20). M&W’s assertion that the foreign debris was so mixed into the debris pile that it could not be separated (app. br. at 2) is untrue, because Mr. Vasquez threw the foreign material into a separate pile (finding 19).

Moreover, the record contains no M&W work papers showing the costs it planned to incur in removing SJAFB debris (finding 5). In December 2011 Calvin Williams’ trucking company delivered M&W debris to Best Sand & Gravel and Universal Wood Recycling. M&W made 55 deliveries to Best Sand & Gravel, whose delivery tickets stated “Trees” (49 tickets), “Debris” (5 tickets) and no identified material (1 ticket). M&W made 3 deliveries to Universal Wood Recycling, whose invoice and scale tickets

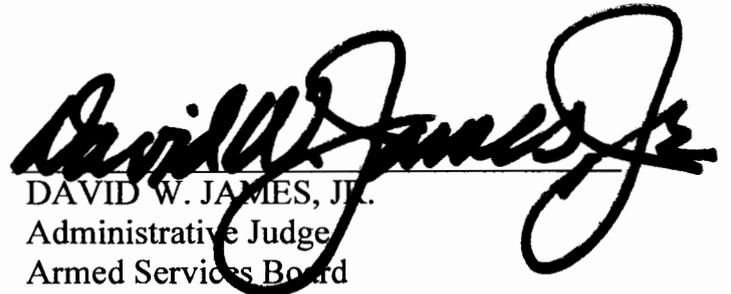
stated “old pulp/debris” and “AGED PULP/DEBRIS.” Mr. Calvin Williams identified no separate load of weed cover fabric, rock, slabs or ribbon curb. (Finding 20) With respect to that portion of M&W’s claim that sought the costs of repairing its failed chipper equipment, the damage to the chipper was knowingly self-inflicted (finding 14), and hence is not recoverable.

Based on the foregoing findings, we hold that M&W has not sustained its burden of proving that it was damaged as a result of the foreign material commingled in the debris it removed from SJAFB (DSC element 4). *See San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557, 1563-64 (Fed. Cir. 1997) (government breached by failing to provide operable dam spillgates, but the contractor failed to show that such breach was the “but for” cause of its injury; damages were not recoverable).

CONCLUSION

We deny the appeal.

Dated: 18 September 2013


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

I concur


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

I concur


MARK A. MELNICK
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. 58154, Appeal of Mylene Will Company L.L.C., rendered in conformance with the Board's Charter.

Dated:

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