



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR PARTIAL SUMMARY RELIEF DENIED: June 23, 2015

CBCA 3966

DOT CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jackson Wyatt Moore, Jr., Tobias R. Coleman, and Peter J. Marino of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, Raleigh, NC, counsel for Appellant.

Mark R. Simpson, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **SHERIDAN**.

DRUMMOND, Board Judge.

This appeal arises out of a contract between DOT Construction, Inc. (DOT) and the Department of Agriculture's Forest Service (Forest Service) for, inter alia, outfall maintenance at a site in South Carolina. DOT seeks an equitable adjustment totaling \$111,062 based on a differing site condition claim. Specifically, DOT argues that its inability to drive certain steel pilings to the required design depth using the vibratory hammer specified in the contract constituted a differing site condition. This claim is referred to as DOT's early refusal differing site condition claim.

The parties have filed cross-motions for partial summary relief relating to the early refusal differing site condition claim. In support of its motion, DOT argues that a differing site condition should be assumed because DOT was unable to drive the piles to design depth with the hammer initially used. Conversely, the Forest Service argues that it is entitled to partial summary relief because DOT failed to provide proper notice of the alleged differing site condition and because DOT failed to establish that a differing site condition prevented it from driving the piles to the required depth.

In addition, DOT has requested that the Board strike the statement of uncontested facts included with the Forest Service's motion for summary relief in CBCA 3966. DOT alleges that the facts advanced by the Forest Service are "new theories that are inconsistent with the prior testimony of respondent's . . . witnesses." The Forest Service opposes DOT's request to strike.

It is well settled that in order to obtain summary relief, a party must show that there are no material factual disputes of the record and it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,890.

Our review of the record reveals a number of disputed material facts, including, but not limited to the following:

1. Whether the site conditions differed materially from those indicated by the contract documents;
2. Whether the Forest Service approved the hammer used by DOT and if such is relevant;
3. The cause of the difficulties in not reaching the depth required by the contract; and
4. The scope of the notice to the Forest Service that pile drilling was not reaching the required depth.

These disputed facts preclude resolution at this stage.

Decision

Neither party has proven that undisputed material facts entitle it to summary relief. Accordingly, the cross-motions for summary relief are **DENIED**.

DOT's motion to strike is **DENIED** as moot.

JEROME M. DRUMMOND
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

PATRICIA J. SHERIDAN
Board Judge