UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 22, 2023

CBCA 7456

KLOEPFER INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Keane F. Kloepfer, Project Manager of Kloepfer Inc., Paul, ID, appearing for Appellant.

Rayann L. Speakman, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **SHERIDAN**, **SULLIVAN**, and **CHADWICK**.

CHADWICK, Board Judge.

Appellant, Kloepfer Inc. (Kloepfer), seeks additional compensation under a contract to construct a road for a subagency of respondent, Department of Transportation (DOT). DOT moves for summary judgment. We grant the motion and summarily deny the appeal.

Background

The Federal Highway Administration awarded the subject contract in May 2021 to Canyon Valley Concrete, Inc., which styled itself as "FKA" (formerly known as) Kloepfer. The contract required construction of four miles of road in Cassia County, Idaho, for a price

of approximately $3.6 million, consisting of fixed unit prices or lump sums for approximately forty pay items. The contractor's bid price in response to the solicitation had originally been effective only until April 11, 2021, but Kloepfer (apparently acting on behalf of the offeror and eventual contractor) had agreed in writing on April 2, without reservation, to extend the agency's acceptance period by sixty days, which was past the award date.[1]

The bulk of the claim concerns the roadway excavation pay item, which was priced at $15.30 per cubic yard, totaling $140,209.20 for 9164 cubic yards. Subsection 24.02 of the specifications defined roadway excavation as "includ[ing] all material encountered regardless of its nature or characteristics."[2] The specifications also set forth requirements for "rock blasting" as necessary for excavation.

DOT posted a geotechnical report with the solicitation for the contract. The awarded contract cited the report in a Physical Data clause but did not incorporate the report by reference. The report listed the soil results from fifteen holes bored near the project area. Most of the borings returned silt, sand, or clay, but three struck basalt, and the report stated that "the majority of the project is underlain by basalt." We take judicial notice that basalt is a hard, volcanic rock.[3] Kloepfer states without citing specific evidence that "[b]ecause the bores were taken hundreds of feet away from the roadway, one could not conclude for a fact that there [wa]s rock in the roadway." Kloepfer also emphasizes the following language of the geotechnical report:

> Often, variations occur between exposed topography and borings, the nature and extent of which do not become evident until additional exploration or construction is conducted. A reevaluation of the recommendations in this report should be made after performing on-site observations during construction to note the characteristics of any variations. The variations may result in additional earthwork, excavation, and construction costs, and it is suggested a contingency be provided for this purpose.

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[1] The contractor identified John F. Kloepfer as its point of contact prior to award. Keane F. Kloepfer signed post-award correspondence, the certified claim, and the notice of appeal. Both individuals consistently used Kloepfer Inc. letterhead. The contracting officer addressed the decision on the claim to the contractor, "FKA" Kloepfer.

[2] The contract incorporated by reference FP-14, Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects (2014).

[3] *See* https://volcanoes.usgs.gov/vsc/glossary/basalt.html (last visited Aug. 22, 2023).

In July and August 2021, after starting work, the contractor advised the agency that it had encountered basalt in the road path, which Kloepfer (again apparently writing for the contractor) characterized on August 10 as "Differing Site Conditions as per [48 CFR] 52.236-2(a)(2) [(Apr. 1984)]," a contract clause. In a series of letters, DOT denied that a differing site condition existed and maintained that the roadway excavation pay item covered all excavation costs regardless of method.

In December 2021, Kloepfer submitted a certified claim for $167,635.03, consisting of (1) $153,561.40 for "costs incurred to excavate and remove rock" from the roadway and (2) $14,073.63 "for extra costs due to material price increases from the time of bid 2-11-21 to the time of award 5-28-21 [which] Kloepfer had no control over and [which are] a result of economic inflation and delayed award." The contracting officer denied the claim in April 2022. Kloepfer timely appealed. The parties took discovery and fully briefed DOT's June 2023 motion for summary judgment on both components of the claim.

Discussion

As an initial matter, if we were awarding money, we would seek clarification as to whether the actual contractor has appeared in the case before us. DOT awarded the contract to a successor to Kloepfer, not to Kloepfer or to a predecessor of Kloepfer. We do not know why the named contractor abandoned its corporate identity during performance and reverted to the old name, and we ordinarily expect an "fka" contractor to proceed under its new name before the Board. *See, e.g.*, *Acuity Engineering & Technical Services, LLC v. Department of State*, CBCA 7565, et al. (May 19, 2023); *Intellibridge, LLC v. Department of Health & Human Services*, CBCA 7458 (Mar. 3, 2023). We find, however, based on the correspondence record, that Kloepfer and its management have apparent authority to act for the named contractor such that both companies are bound by our denial of relief. *E.g.*, *AMX Veterans Specialty Services, LLC v. Department of Veterans Affairs*, CBCA 5180, 16-1 BCA ¶ 36,454, at 177,668–69.

DOT bears the burden as movant to show that "it is entitled to judgment as a matter of law based on undisputed material facts." Board Rule 8(f) (48 CFR 6101.8(f) (2021)). As the party with no burden of proof on the merits, DOT need only "point out the absence of evidence creating a disputed issue of material fact. The burden then falls on the non-moving party to produce evidence showing that there is such a disputed factual issue in the case." *Simanski v. Secretary of Health & Human Services*, 671 F.3d 1368, 1379 (Fed. Cir. 2012); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Kloepfer, which is represented by a non-attorney, has not been precise in its claim or during the appeal as to which of the two types of differing site condition it alleges it encountered. *See, e.g.*, *Quality Forests, Inc. v. Department of Agriculture*, CBCA 123, 07-1

BCA ¶ 33,490, at 166,003–04 (addressing both types). DOT responds to the claim as a type I—as alleging a "subsurface or latent physical condition[] at the site which differ[ed] materially from those indicated in th[e] contract." 48 CFR 52.236-2(a)(1) (2020). DOT argues that Kloepfer lacks evidence to satisfy any of the elements of a type I differing site condition, *see Quality Forests,* 07-1 BCA at 166,003, but we may focus for clarity on the key requirement to prove that "the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding." *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002); *see Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987). Kloepfer cites no evidence on this point but admits that "[v]ariations in basalt can be very rapid and change rapidly in a matter of feet" and that the geotechnical report "mention[ed] . . . bedrock." Kloepfer argues that "one could not conclude for a fact" based on the borings "that there [wa]s rock in the roadway"—but that is not the issue or the test. By Kloepfer's own description, an informed bidder would have recognized that it might encounter rock in locations that the agency had not specifically identified.

Indeed, Kloepfer criticizes the agency's boring plan and asserts that the contractor "expected the [Government] to stand by" the sentence in the geotechnical report quoted above in which the engineer suggested adding a "contingency" for removing hard rock. The cited language of the report has the opposite importance of that which Kloepfer suggests, however. The report warned bidders of a risk for which the contract, as solicited, did *not* include the recommended "contingency." It was up to bidders to factor that risk into their prices (or to elect not to bid). *See Comtrol*, 294 F.3d at 1364 ("Nothing required Comtrol to bid on the contract."). As it was reasonably foreseeable based on the available information that the contractor might encounter basalt, Kloepfer cannot establish a type I differing site condition. *See, e.g.*, *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1378 (Fed. Cir. 2007) (sustaining a finding that the contractor should have foreseen "stiff clays" where pre-bid information "showed the [project] as being within an area in which there was the likelihood of encountering stiff clays"); *Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 17-1 BCA ¶ 36,599, at 178,299 (2016).

Similar reasoning precludes finding a type II differing site condition, i.e., "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract." 48 CFR 52.236-2(a)(2). Kloepfer does not allege—and, in fact, effectively denies—that basalt is unusual in the project area.

Kloepfer also seeks to increase the contract price based on the date of award. As DOT notes, Kloepfer cites no authority supporting such an adjustment. The contractor forfeited such relief when it extended its bid and accepted the contract. *See Meridian Global Consulting, LLC v. Department of Homeland Security*, CBCA 6906, 21-1 BCA ¶ 37,875, at

183,915 (finding that appellant waived or forfeited an objection to the start date); *see generally Whittaker Electronic Systems v. Dalton*, 124 F.3d 1443, 1446 (Fed. Cir. 1997). Kloepfer argues that "[t]he contractor should not . . . bear the cost of material price increases." To the contrary, "[i]n firm fixed-price contracts, risks fall on the contractor, and the contractor takes account of this through his prices." *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1170 (Ct. Cl. 1975). The contractor "assumed the risk of unexpected costs on the original scope of work." *RLS Construction Group LLC v. Department of Veterans Affairs*, CBCA 6349, et al., 20-1 BCA ¶ 37,566, at 182,404.

Decision

The appeal is **DENIED**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge