



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 31, 2011

CBCA 975

IN-FINN-ITY GEOTECH SERVICE,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Richard M. Hughes, III, Kingston, PA, counsel for Appellant.

Tara D. Campbell, Office of the Solicitor, Department of the Interior, Pittsburgh, PA, counsel for Respondent.

Before Board Judges **GILMORE**, **DRUMMOND**, and **STEEL**.

DRUMMOND, Board Judge.

This appeal arises out of contract S07PC00005 (contract) between In-Finn-Itty Geotech Service (IGS) and the Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSM) for reclamation work in Pittston, Pennsylvania. IGS, alleging breach of contract and change, seeks \$98,523.47 for removing excess grout under the contract, plus attorney fees, interest, and costs. OSM disputes IGS's entitlement to claimed costs.

A hearing was held in Wilkes-Barre, Pennsylvania. The record includes the pleadings, appeal file, hearing transcript, and parties' post-hearing briefs. For the reasons stated below, IGS's claim is granted.

Background

On October 26, 2006, OSM issued a solicitation for reclamation work referred to as the Mill Street Subsidence Phase 2 Project (Mill Street Project). Appeal File, Exhibit 3 at 1, 7. The solicitation specifications sought a contractor to drill and grout fill voids (open areas) created by mine subsidence in Pittson, Pennsylvania. *Id.* at 1, 44, 45.

The solicitation specifications singled out for special attention the conditions at the project area. Appeal File, Exhibit 3 at 44. Section 1 of the statement of work described the site as located “below the collapsed base of the sewer line . . . located in the centerline of Mill Street . . .” *Id.* The sewer line was approximately four feet three inches in height and egg-shaped with a flat bottom. Transcript at 153. It was constructed of concrete and bricks and badly fractured and cracked. *Id.* at 26, 152. The specifications also warned about the subsurface conditions. The specifications stated that the “stability of the overburden and bedrock surrounding the project area is unknown and cannot be considered competent.” Appeal File, Exhibit 3 at 45. The voids beneath the sewer line ranged from seventeen feet to twenty-eight feet in depth. *Id.* at 44.

The specifications called for two distinct areas for drilling and grouting. The area beneath the sewer line was to be drilled and grouted first to provide a subbase for the sewer line. Appeal File, Exhibit 3 at 53, 57. Following the creation of a subbase, a separate contractor would install an inflatable sleeve or bladder inside the sewer line, and then IGS would pour additional grout into the boreholes to fill the area on the sides of the sewer line. *Id.* at 60.

The specifications required the successful contractor to drill “[a]pproximately twenty boreholes . . . in three subsurface void areas.” Appeal File, Exhibit 3 at 45. The specifications did not specify any particular locations for the boreholes. Rather, the specifications included a Drilling and Preparation of Boreholes clause which states that the “COR [contracting officer’s representative] will determine in the field [the] layout of the grout holes.” *Id.* at 53. The specifications also included a Grouting to Provide a Subbase clause which states that IGS will “monitor the elevations of the fill material (grout) during placement, so that the material does not interfere with (or migrate into) the sewer line that the City will replace.” *Id.* at 57. The specifications, however, did not mandate any particular method of monitoring the sewer line for grout migration. During performance, IGS planned to use various methods, including a camera underground, to monitor for grout migration. Transcript at 58-59.

On October 27, 2006, OSM conducted a pre-bid conference on the Mill Street Project. Among the attendees at the conference was Mr. William Finn¹, the owner of IGS². Appeal File, Exhibit 1 at 1. OSM was represented at the pre-bid conference by Mr. Bill Lever, the contracting officer (CO), and Mr. David Philbin, the COR³. *Id.* at 1-2, 5; Transcript at 10-12, 17. During the pre-bid conference, Mr. Philbin warned prospective contractors about the poor condition of the sewer line and reviewed the layout plan for the project which showed, the anticipated locations of the boreholes on either side of the sewer line. Appeal File, Exhibit 3 at 69; Transcript at 77, 152-54. OSM has offered no evidence that drilling boreholes in locations other than depicted by the layout plan was discussed during the conference. After reviewing the layout plan and the specifications, Mr. Finn testified that IGS anticipated drilling all boreholes around the sewer line. Transcript at 14-15, 17.

On November 7, 2006, OSM awarded to IGS the contract for the Mill Street Project. Appeal File, Exhibit 3. The contract included the solicitation specifications and layout plan. *Id.* The contract also incorporated by reference certain Federal Acquisition Regulation (FAR) clauses, including FAR clause 52.233-1, Disputes (Jul 2002) - Alternate I; FAR clause 52.233-4, Applicable Law For Breach of Contract Claim (Oct 2004); and FAR clause 52.243-5, Changes and Changed Conditions (Apr 1984). *Id.*

IGS arrived at the site on November 14, 2006. Appeal File, Exhibit 5. IGS's work was monitored by Mr. Philbin and OSM's inspection services contractor, Valenti Construction Company (VCC). *Id.*, Exhibit 3 at 10. Together Mr. Philbin and Steve Valenti, the primary inspector for VCC, directed the technical aspects of the Mill Street Project. *Id.*, Exhibits 3, 13; Transcript at 90-91, 165. Only Mr. Valenti was on site daily, and he prepared daily logs, diaries, and reports throughout the course of the project. Transcript at 132-33, 165; Appeal File, Exhibits 5-9.

¹ Mr. Finn testified that he has over fifty-eight years' experience in the subsurface investigation and drilling industry. Transcript at 11.

² IGS is a small, three-man company specializing in subsurface investigation and drilling started by Mr. Finn in 1994. Transcript at 10-12. Mr. Finn testified that IGS had performed over twenty-five surface investigation and drilling contracts for OSM before this contract. *Id.* at 11-12,15.

³ Mr. Philbin testified that he had worked on approximately fifty drilling and grouting projects.

Mr. Valenti's daily diaries document that IGS performed the initial drilling and grouting work between November 16 and November 28, 2006. Appeal File, Exhibit 5 at 7-8. The daily diaries for this period do not document any problems with IGS's performance. *Id.*

On December 12, 2006, the sewer contractor discovered approximately fourteen yards of grout in the sewer line near borehole 11M. Appeal File, Exhibit 12 at 1. IGS took the position that OSM was responsible for the costs to clean up the grout because it had ordered borehole 11M to be drilled through the sewer line. Appeal File, Exhibit 14. OSM acknowledges, the contract gave the COR discretion to select the locations for the boreholes. We find that under the specifications OSM had discretion to decide the locations for the boreholes during construction and selected the location for borehole 11M.

IGS also took the position that OSM breached the terms of the contract by directing the only methods that it would permit IGS to use for monitoring and was therefore responsible for the cleanup costs. Mr. Finn testified that OSM interfered with IGS's efforts to properly monitor the sewer. Transcript at 38-50. The contract gave IGS discretion to decide how to monitor the sewer. Appeal File, Exhibit 3 at 57. Mr. Philbin admitted during the hearing that he only authorized IGS to use an aluminum rod and weighted tape to monitor the sewer. Transcript at 184-85. Mr. Finn testified that both methods were ineffective and hampered IGS's ability to monitor the sewer line around borehole 11M during the grouting phase. *Id.* at 53, 71. In fact, Mr. Finn stated that during the grouting of borehole 11M the aluminum rod only revealed the grout level in the pipe used to add the grout and not the grout level in the sewer line itself. *Id.* at 71. He testified further that unlike the weighted tape and aluminum rod, the camera would have allowed IGS to see inside the sewer during the grout work and therefore the grout migration problem would have been discovered much earlier. *Id.* at 49-53.

Mr. Philbin was unable to give any reasonable explanation for his decision to prohibit IGS from using a camera to monitor the sewer line for grout migration. On cross-examination, he admitted that he made a mistake and that the use of a camera would have been reasonable under the circumstances of this case and effective in monitoring the sewer line. Transcript at 206, 211. We find that Mr. Philbin's decision to prohibit IGS from using a camera to monitor for grout migration was unreasonable and not justified under the terms of the contract.

On May 1, 2007, Mr. Valenti wrote to Mr. Lever to explain how the grout got into the sewer line. Mr. Valenti acknowledged that he and IGS had monitored the boreholes surrounding borehole 11M during the grout work and no grout was observed in the sewer line. He further acknowledged that neither "cameras nor employees were allowed down into

the sewer line” and concluded that “there was no way for us to know that the grout was flowing into the sewer line.” *Id.*

By letter dated June 4, 2007, Mr. Philbin wrote to Mr. Lever, stating that the location of borehole 11M contributed to grout migration problem and in his opinion “the cause and responsibility for the blockage is that both are shared.” Appeal File, Exhibit 13 at 1-2. At the hearing Mr. Philbin admitted that the opinions stated in the letter were “personal opinions” and not based “on the contractual obligations of the contract.” Transcript at 199.

On July 18, 2007, IGS wrote to Mr. Lever requesting \$98,523.47 for the cost of removing the grout from the sewer. Appeal File, Exhibit 14. The letter included an invoice for the grout removal. *Id.* There is no dispute concerning the dollar amount of the invoice.

On October 3, 2007, Mr. Lever issued a final decision on IGS’s claim for additional costs. Mr. Lever noted that the contract required IGS to monitor the grout and acknowledged that Mr. Philbin directed IGS to drill through the sewer line and prohibited the use of a camera to monitor the sewer. However, he concluded that “[o]ther methods were available to properly monitor the elevation of the fill material to ensure that the grout did not migrate into the sewer line during grouting without physically placing a worker in the sewer line.” Appeal File, Exhibit 16 at 1. He also noted that if “these methods (*i.e.* dropping a line or measuring rod into the grout pipe) were used, the chance of grouting the sewer line would have been minimal.” Mr. Lever finished the letter by advising IGS that its claim was denied. *Id.* There is no dispute concerning Mr. Philbin’s instruction to drill borehole 11M through the sewer line and his decision to prohibit IGS from using a camera to monitor the grout work.

During the hearing, Mr. Philbin testified that the grout migration problem was caused by IGS’s failure to monitor the sewer line during the grouting work and, therefore, IGS is responsible for the cost to remove the grout. Transcript at 182-83. The record includes no clear evidence that IGS failed to monitor the sewer line during the initial grouting work. Rather, the record shows just the opposite. Mr. Finn testified that IGS took measurements using an aluminum rod and Mr. Valenti took measurements using a weighted tape throughout the grouting work. *Id.* at 38-42, 95. Moreover, the daily diaries for this work do not record any failures by IGS to monitor the sewer during grouting work. Appeal File, Exhibit 5. We do not find Mr. Philbin’s testimony that the grout migration problem was caused by IGS’s failure to monitor the sewer line to be persuasive. We find Mr. Finn’s testimony on this issue to be more credible.

In its notice of appeal and complaint, IGS seeks \$98,523.47 for removing the excess grout. In addition, IGS seeks an unstated amount for interest, costs, and attorney fees.

Discussion

IGS alleges that OSM interfered with its performance and is liable for the cost of removing grout from the sewer line. OSM responds that IGS failed to properly monitor the grouting work and therefore is responsible for the sewer repairs.

It is well settled that:

[t]he covenant of good faith and fair dealing is an implied duty that each party to contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005). This Board recognizes that “[a]n implied covenant of good faith and fair dealing imposes an obligation on the part of each party to the contract to act reasonably.” *Butte Timberlands, LCC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730, at 166,994 (2007).

We are satisfied from the record before us that OSM interfered with IGS's efforts to effectively monitor for grout migration. Where the contract gives the contractor discretion to choose its method of performance, the Government's rejection of a reasonable method, including a change of method after performance begins, entitles the contractor to an equitable adjustment. *D.W. Sandau Dredging*, ENG BCA 5812, 96-1 BCA ¶ 28,064 (1995). The contract did not specify any particular method for monitoring the sewer and IGS had discretion to choose its method of monitoring the sewer line without interference from OSM. OSM was well aware of the poor condition of the sewer and has provided no reasonable explanation for its actions. In fact, Mr. Philbin conceded that, in hindsight, IGS should have been allowed to use a camera to monitor for grout migration. We find that use of a camera to monitor the sewer line was reasonable under the circumstances of this case. We further find that OSM interfered with IGS's performance by prohibiting IGS from using a camera to monitor the sewer for grout migration and therefore should be liable for the costs to remove the grout.

Attorney Fees and Costs

IGS also argues that it is entitled to attorney fees and costs. Claims for attorney fees and costs are considered under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006). Applications for attorney fees and costs are made after Board decisions are final, in accordance with Rule 30 (48 CFR 6101.30 (2009)).

Decision

IGS's claim is **GRANTED**. IGS is entitled to \$98,523.37. As prescribed by the Contract Disputes Act of 1978, 41 U.S.C. § 7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3825-26 (2011)), IGS is also entitled to interest on this award. Interest is due on \$98,523.37 from the date on which the contracting officer received IGS's claim until the date of payment.

JEROME M. DRUMMOND
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

CANDIDA S. STEEL
Board Judge